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Volume XXXVIII

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CM 258372 to CM 259672

(1944)

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

SPJGV
CM. 258372

8 JUL 1944

UNITED STATES)

92D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Fort Huachuca, Arizona, 26
April 1944. Dismissal and
total forfeitures.

Second Lieutenant BENJAMIN
HOLMES (O-1103696), Corps
of Engineers.)

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 1: In that 2nd Lieutenant Benjamin Holmes, 317th Engineer Combat Battalion, did, without proper leave, absent himself from his duty as duty officer in the Battalion Motor Park at Fort Huachuca, Arizona, from about 1200 25 December 1943 to about 2000 25 December 1943.

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

Specification 1: In that 2nd Lieutenant Benjamin Holmes, 317th Engineer Combat Battalion, did, at Fort Huachuca, Arizona on or about 25 December 1943 wrongfully commit an assault and battery upon 2nd Lieutenant William F. Jones, C.E., by seizing

(2)

him by the coat and ripping certain of the buttons therefrom at the same time saying to the said 2nd Lieutenant William F. Jones, "Let's go outside and settle this," or words to that effect.

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 and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced competent evidence to prove the following state of facts.

a. Charge I and the Specification.

By memorandum dated 26 November 1943, issued by Headquarters 317th Engineer Combat Battalion, Fort Huachuca, Arizona, there was published a duty roster for officers covering duty at the 317th Engineer Battalion Motor Park for three successive series of Fridays, Saturdays and Sundays, i.e. 19 November 1943 to 21 November 1943, inclusive, 26 November 1943 to 28 November 1943, inclusive, and 24 December 1943 to 26 December 1943, inclusive. The hours of the tours of duty were (a) 1700 Friday to 0800 Saturday, (b) 1700 Saturday to 1200 Sunday, and (c) 1200 Sunday to 0800 Monday. All officers detailed to duty by this memorandum were to be physically present at the Motor Park during the entire tour of their duty except for necessary absence for meals or in performance of duty (R. 6, 9; Pros. Ex. A). The accused was detailed to a tour of such duty commencing on Saturday, 25 December 1943 and had not been excused from it (R. 9, 19; Pros. Ex. A). According to the duty roster the hours of duty were from 1700 Saturday to 1200 Sunday. However, 25 December was a holiday and the battalion commander believed it was understood in the organization that on holidays the hours of duty would be the same as on Sundays irrespective of the day of the week on which the holiday fell. In such event accused's tour of duty on 25 December would have commenced at 1200 hours rather than 1700 hours (R. 8). The battalion commander had a general discussion about the duty roster with the officers concerned but did not give them any specific instructions other than to point out "that their duties were enumerated on the Roster" (R. 10). He could not remember whether or not accused was present at this general discussion. Furthermore, he did not tell accused specifically that duty hours on a

holiday would be the same as on Sunday regardless of the day of the week on which the holiday fell (R. 10, 11). The first time that a holiday fell on a Saturday covered by the duty roster was 25 December (R. 9). It was common knowledge, however, in the battalion that, although normally Saturday duty began at 1700 hours, on Christmas day it was to commence at 1200 hours (R. 19).

Private Curtiss Brown, on duty as driver at the dispatch office on 25 December, first saw the accused on his tour of duty that day about 1700 or 1730, when accused came to the dispatch office and told Brown not to let any vehicles out until they were checked. The accused then returned to the shop office, where the duty officer stayed, and told Private Brown he would be there if needed. Brown saw the accused two or three times that night and the next morning, as the accused made his rounds about every two hours (R. 15-16).

The officer of the day, Captain John A. Campbell, looked for accused at the Motor Park at 1600, 1800 and 2000 on 25 December 1943 and could not find him there (R. 19). Around 2200 or 2230 hours that same night accused was at the Mountain View Officers' Club, Fort Huachuca (R. 24, 64-65). Captain Campbell first saw accused that night about 2345 hours at Fry Gate when called there by the military police to identify him (R. 21-22).

The practice of trading tours of duty between officers was not authorized, though it had happened. Disciplinary action followed if such trading was discovered (R. 11).

b. Charge II and the Specification.

Around 2230 on Saturday, 25 December 1943, in the Mountain View Officers' Club, Fort Huachuca, the accused approached First Lieutenant William F. Jones, who had been a witness against him at a previous court-martial and said, "Let's go outside and let's settle this" (R. 24, 25). Lieutenant Jones had been advised shortly before that accused might be looking for him with hostile intentions (R. 24). He refused accused's suggestion and the latter thereupon grasped him by the blouse, ripping off buttons and tearing the blouse as he demanded that Lieutenant Jones step outside (R. 24). Lieutenant Jones remained seated and Second Lieutenant Francis L. Barrigher escorted the accused away. Lieutenant Jones then caused the provost marshal to be called (R. 25). In Lieutenant Jones' opinion, the accused was drunk (R. 27).

(4)

4. For the defense, Second Lieutenant Mack H. Eldridge testified that he relieved accused as duty officer at the Motor Park at the accused's request, from about 2200 to sometime between 2300 and 2400, to "spell him for about two hours". Witness stayed in the shop office during this time and had no calls for cars. He did not see the officer of the day nor the driver on duty. Accused was there when the witness came to relieve him and returned after 2300, walking in the door of the shop office alone. Witness knew of other occasions where officers on special duty spelled one another. He had no authority to do so other than accused's request (R. 29-32).

Accused's company commander, Captain Jesse R. Turner, Jr., a witness for defense, testified that he had not authorized accused to trade his tour of duty or any part thereof with any other officer, nor had any changes been made in the duty roster, Exhibit A, which detailed accused in the first instance. He further testified that although it was unauthorized some officers in the past had traded tours of duty with other officers and that disciplinary action as a result of this unauthorized practice had resulted in some instances (R. 38-39). To his knowledge there were no verbal or written instructions to cover special duty hours on holidays other than Sundays. He issued no instructions on the matter of tours of duty on holidays (R. 38-39).

Private Curtiss Brown, the only driver on duty with accused, was recalled as a defense witness, and said that he did not see anyone looking for the duty officer on the night in question, however, he was out on trips some of the time. He did not see Lieutenant Eldridge at any time while on duty (R. 40-41).

Lieutenant Barrigher and Second Lieutenant Frank Williams testified that they were with accused at the Officers' Club and saw him in an altercation with Lieutenant Jones which began when the latter needlessly bumped into accused on the stair balcony although he had plenty of room to pass. Accused asked Lieutenant Jones what was the matter with him and the latter thereupon gave accused a shove and told him to keep out of his way. Accused, who is about half a head taller and ten to fifteen pounds heavier than Lieutenant Jones, then grabbed him by the coat collar, but Lieutenants Barrigher and Williams separated them and took accused downstairs. According to Lieutenant Barrigher, accused might have gone back upstairs later. According to Lieutenant Williams, accused remained seated outside in sight of both himself and Barrigher until the provost marshal

came and took him away. Accused and Lieutenants Barrigher and Williams were each carrying a glass of whiskey around the club, but Lieutenant Williams, who does not drink, did not observe whether anyone took a drink (R. 42-60).

Accused, being informed of his rights, elected to remain silent (R. 62).

5. Colonel Raymond G. Sherman, coordinator of patrols on duty the night of 25 December 1943, called as the court's witness, testified that in answer to a call he went with the military police to the Officers' Club. He found everything orderly and was informed there had been no disturbance, but Lieutenant Jones complained that accused had assaulted him and had ripped all the buttons off his blouse. Lieutenant Jones had the buttons in his hand and his blouse was torn. The witness talked to accused who denied everything. He was not drunk, but had been drinking, and his manner was very overbearing. He took accused to Fry Gate and turned him over to Captain Campbell, the Engineers duty officer. This was not earlier than 2230 or 2300, possibly a little later. Witness understood that accused was under sentence of a general court-martial and that Lieutenant Jones had been a witness against him (R., 63-66).

6. The "understanding" said to prevail in the organization, as to the hours of special duty on holidays, is insufficiently established by the evidence as an authoritative amendment to the express terms of the order in evidence, Exhibit A, which fixed the accused's tour of duty on the particular day as beginning at 1700 hours on Saturday, 25 December 1943. It is therefore immaterial whether he was at the place of duty before 1700. However, the evidence does establish his absence from duty from 2200 hours to about 2330 hours or 2400 hours. A finding as to the duration of the absence is unnecessary (CM NATO 1087, 3 Bull. JAG 9). Accordingly the evidence sustains the finding of guilty of the Specification, Charge I. Likewise, the evidence clearly establishes that accused committed an assault and battery on Lieutenant Jones in violation of Article of War 96. The evidence sustains the finding of guilty of the Specification, Charge II.

First Lieutenant William F. Jones was permitted to testify that he was a witness against accused at a former trial resulting in his conviction (R. 25) and Colonel Raymond G. Sherman of the military police was permitted to testify that he understood the accused to be under general court-martial sentence (R. 65). No

(6)

evidence of previous convictions was introduced. These abuses passed without objection. However, the compelling evidence fully establishes the commission of the present offenses charged and the error did not substantially prejudice the rights of accused. Any improper effect it may have had in influencing the court's determination of the sentence imposed may be corrected by the confirming authority (3 Bull. JAG 186).

7. The accused is 24 years of age. He was commissioned a second lieutenant at Fort Belvoir, Virginia, 16 September 1942, on completion of a course at the Engineer School. In civil life he was a dance band musician. He had three years of college education.

The record of the trial of this accused by another general court-martial of the same command, now before another Board of Review in this office (CM 258544), shows that he was convicted on 2 December 1943 of violations of the 96th and 95th Articles of War for driving a Government vehicle in violation of standing orders and for making a false official statement that he had not done so. Although that case was tried four months and 24 days before the instant case, the sentence was not approved until 26 June 1944, four days after the action in the instant case and 57 days after the trial of the instant case. The character of his service generally is noted by the investigating officer as unsatisfactory.

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

Thomas M. Japp, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

(Filed without further action in view of the execution of the sentence to dismissal against the same officer in a different case, CM 258544, confirmed in G.C.M.O. 471, 1 Sep 1944)

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

5 JUL 1944

(7)

SPJGH
CM 258377

UNITED STATES)

SECOND AIR FORCE

v.)

Trial by G.C.M., convened at
Army Air Field, Dyersburg,
Tennessee, 22 May 1944. Dis-
missal and total forfeitures.

Second Lieutenant HARRY F.
CANTRELL (O-689450), Air
Corps.)

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR 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 Harry F. Cantrell, Heavy Bombardment Crew Pool, attached 223rd Army Air Forces Base Unit (Combat Crew Training School, Heavy), Section F, did, at Odessa, Texas, on or about 16 October 1943, wrongfully and unlawfully make and utter to Henderson Drug Company, Odessa, Texas, a certain check, in words and figures as follows, to wit:

87-36

HAMILTON NATIONAL BANK

Chattanooga, Tenn., Oct 16

1943 NO. _____

Pay to the
order of

Henderson Drug Co

\$15⁰⁰

Fifteen and 00/ - - - - - DOLLARS

Harry F Cantrell - 2nd Lt

O-689450

and by means thereof did obtain full value from said Henderson Drug Company, which check, upon being presented to the said bank

(8)

upon which it was drawn for payment, was not honored or paid by it because he, the said Second Lieutenant Harry F. Cantrell, did not have on deposit with said bank sufficient funds for payment thereof.

Specification 2: Similar to Specification 1, except that it alleges that the check was made and uttered to Pyote Army Air Base Exchange, Pyote, Texas, on 18 November 1943, in the amount of \$10, and was drawn on the First National Bank of Pecos, Texas.

Specification 3: Similar to Specification 1, except that it alleges that the check was made and uttered to Pyote Army Air Base Exchange, Pyote, Texas, on 24 November 1943, in the amount of \$20, and was drawn on the First National Bank of Pecos, Texas.

Specification 4: Similar to Specification 1, except that it alleges that the check was made and uttered to George Hendren, Halls, Tennessee, on 19 February 1944 in the amount of \$5.

Specification 5: Similar to Specification 1, except that it alleges that the check (dated 23 February 1944) was made and uttered to George Hendren, Halls, Tennessee, on 19 February 1944 in the amount of \$5.

Specification 6: Similar to Specification 1, except that it alleges that the check (dated 22 February 1944) was made and uttered to Army Air Field Exchange, Dyersburg, Tennessee, in the amount of \$27.50.

Specification 7: Similar to Specification 1, except that it alleges that the check was made and uttered to First Citizens National Bank, Air Base Branch, Dyersburg, Tennessee, on 6 March 1944 in the amount of \$25.

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

Specifications 1 and 2: (Findings of guilty disapproved by the reviewing authority).

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

Specification: In that Second Lieutenant Harry F. Cantrell, Heavy Bombardment Crew Pool, attached 223rd Army Air Forces Base Unit (Combat Crew Training School, Heavy), Section F, did, at Dyersburg, Tennessee, on or about 30 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to Milton J. Rosenbloom a certain check in words and figures as follows, to wit:

Chattanooga
Dyersburg Tenn., 3-30- 1944 NO.

HAMILTON
FIRST-CITIZENS NATIONAL BANK 87-104

Pay to Rosenbloom or order \$ 10 00

Ten - - - - - DOLLARS

For _____

M.T.U.
DAAB

Harry F Cantrell 2nd Lt.

0-689450

and by means thereof did fraudulently obtain from Milton J. Rosenbloom \$9.55, lawful money of the United States, and goods, wares and merchandise of the value of about \$0.45, he, the said Second Lieutenant Harry F. Cantrell then well knowing that he did not have and not intending that he should have sufficient funds in the Hamilton National Bank of Chattanooga, Tennessee, for the payment of said check.

He pleaded guilty to Specifications 1, 2 and 3, the Charge, and to the Charge, and not guilty to all other Specifications and Charges. He was found guilty of the Specification, Additional Charge II, except the words "with intent to defraud", "fraudulently" and "he, the said Second Lieutenant Harry F. Cantrell then well knowing that he did not have and not intending that he should have sufficient funds in the Hamilton National Bank of Chattanooga, Tennessee, for the payment of said check", substituting for the words last excepted the following words "which check, upon being presented to the said bank upon which it was drawn, for payment, was not honored or paid by it, because he, the said Second Lieutenant Harry F. Cantrell, did not have on deposit with said bank sufficient funds for the payment thereof"; not guilty of Additional Charge II but guilty of a violation of the 96th Article of War; and guilty of all other Specifications and Charges. He was sentenced to dismissal and total forfeitures. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Additional Charge I, and of Additional Charge I, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in pertinent part is summarized as follows:

a. Specification 1, the Charge: Mr. Jack Collins, part owner and manager of Henderson Drug Company, Odessa, Texas, testified by deposition (Ex. 1) that accused made and uttered a check (Ex. 2) dated 16 October 1943,

for \$15, payable to his company, and drawn on Hamilton National Bank, Chattanooga, Tennessee. Accused received full value for the check, part in merchandise and the rest in cash. The check, when presented to the bank, was returned unpaid and marked insufficient funds, and had not since been paid. Mr. Charles F. Hall, assistant cashier of the Hamilton National Bank, testified by deposition (Ex. 16) that the records of the bank showed that accused had maintained an account there but that he did not have on deposit as much as \$15 on 16 October 1943, nor thereafter until 5 January 1944. Accused had no arrangement with the bank whereby checks would be honored in the absence of sufficient funds to his credit (R. 13, 38).

b. Specifications 2 and 3, the Charge: Captain W.O. Hedley, exchange officer at Army Air Base, Pyote, Texas, who did not know accused, testified by deposition (Ex. 3) that accused made and uttered two checks to the exchange and received full value therefor. One of the checks (Ex. 4) is dated 18 November 1943 for \$10, and the other (Ex. 5) is dated 24 November 1943 for \$20. Both checks are payable to cash and drawn on the First National Bank, Pecos, Texas. Both checks were subsequently presented to the bank on which they were drawn, and were returned, marked "Not sufficient funds". They had not since been paid. Mr. Ray C. McPherson, assistant cashier of the First National Bank, Pecos, Texas, testified by deposition (Ex. 6) that accused had no funds on deposit with the bank on 18 November 1943 and had made no deposit since that date. Both checks (Exs. 4 and 5) were presented to the bank on 26 November 1943, and were not paid because accused had no money on deposit (R. 13-14).

c. Specifications 4 and 5, the Charge: On 19 February 1944 accused purchased some gasoline and oil from Mr. George A. Hendren, who operated a service station at Halls, Tennessee. Accused gave him a check (Ex. 7) in the amount of \$5, drawn on Hamilton National Bank, in payment, and received the balance in cash. On 23 February accused had another transaction at the service station and gave "one of the boys" a check (Ex. 8) for \$5. Mr. Hendren came in just as accused was leaving, noticed that the name of the bank on the local bank check form had not been changed, and called the attention of accused to it. Accused then changed the name of the drawee bank to Hamilton National Bank. Mr. Hendren turned both checks in to the gasoline distributor for the purchase of gasoline, and both subsequently came back unpaid. Mr. Hendren had to make them good. Accused had given Mr. Hendren other checks which were honored by the bank. Accused called on Mr. Hendren about 1 March to inquire about the two checks (Exs. 7 and 8), which had not come back at that time. When accused delivered the second check (Ex. 8) "Lt. Wetzel" was in the station, asked Mr. Hendren to notify him in the event any of the checks of accused came back and stated that he (Lieutenant Wetzel) would make them good. The day the checks came back, Lieutenant Wetzel "picked them up". Mr. Hendren testified that he did not think accused was trying to be dishonest, that accused came to the station and paid the checks sometime in March, and that he (Mr. Hendren) would cash checks again for accused (R. 14-18).

First Lieutenant Oswald C. Wetzel, Jr., "Tactical Officer for Section F", Army Air Field, Dyersburg, Tennessee, testified that he was present on 23 February when accused changed the name of the bank on a check for Mr. Hendren, and he told the latter to let him know if the check was "no good". This statement was made in line of duty as tactical officer, as they had been checking accused to see if he was passing any more bad checks. Accused was under the "jurisdiction" of Lieutenant Wetzel, whose duty it was to exercise supervision, "more or less disciplinary", over the officers under him. When the checks came back Lieutenant Wetzel took them to "Captain Slack", and they talked to accused about them. The bank records showed that on 19 February 1944 accused did not have on deposit sufficient funds to pay a check for \$5, and that the first date thereafter on which he had that much on deposit was 6 March 1944 (R. 19-22, 38; Ex. 16).

d. Specification 6, the Charge: Mr. James S. Moore, manager of the post exchange clothing store at Dyersburg Army Air Field, "Ok'd" a check (Ex. 9) which accused wrote. It is dated 22 February 1944, drawn on Hamilton National Bank, and in the amount of \$27.50. The check was given in payment for merchandise. The check came back from the bank and was put through for collection a second time at the request of accused. It was returned again by the bank. Accused subsequently paid the check on 21 March 1944. The bank records showed that on 22 February 1944 accused did not have as much as \$5 on deposit in the bank and that his account remained in that condition until 6 March 1944 (R. 22-27; 38; Ex. 16).

e. Specification 7, the Charge: Mr. Thomas E. Williams, manager of "the Banking Facility" at the Dyersburg Air Base, cashed a check (Ex. 10) for accused. The check, on a customer's draft form of First Citizens National Bank, Dyersburg, Tennessee, is dated 6 March 1944, in the amount of \$25, and drawn on Hamilton National Bank. The check "came back" in a week or ten days, marked insufficient funds. Accused came in about the second or third week in March and paid the check. The bank records of Hamilton National Bank showed that on 6 March accused had sufficient funds in his account to pay the check, but that on 7 March, he had only \$17.48 on deposit, and did not afterwards have a balance sufficient to pay the check. It takes two or three days for a check to reach the Hamilton National Bank through banking channels from "the Post Exchange" at Dyersburg Army Air Field (R. 27-29, 38; Ex. 16).

f. The Specification, Additional Charge II: Accused signed a check (Ex. 15) which he delivered to Mr. Milton J. Rosenbloom, a merchant of Dyersburg, for 45¢ or 55¢ in merchandise and the balance in cash. The check dated 30 March 1944 is for \$10 and drawn on Hamilton National Bank. It was deposited, went through "the regular course", and came back a week or two later. Accused put his serial number and "section number" on the check without Mr. Rosenbloom asking him to. Accused made the check good about 1 May. He did not have as much as \$10 in his bank account on 30 March, nor thereafter (R. 34-39; Ex. 16).

4. The accused elected to remain silent (R. 39).

5. The evidence shows that accused made and uttered six checks aggregating \$87.50, drawn on the Hamilton National Bank of Chattanooga, Tennessee, received full value therefor, and failed to maintain a sufficient balance in the bank to pay the checks upon presentation, as alleged (Specs. 1, 4-7, the Chg., and the Spec., Add. Chg. II). He also made and uttered two checks, aggregating \$30, drawn on the First National Bank of Pecos, Texas, received full value therefor, and failed to maintain a sufficient balance in that bank to pay them, as alleged (Specs. 2 and 3, the Chg.). The accused subsequently made restitution as to all of the checks, except three aggregating \$45. He pleaded guilty to the Specifications involving these three checks.

The conduct of accused clearly constituted a violation of the 96th Article of War. It was his responsibility to maintain a balance in his account sufficient to pay checks drawn by him.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service 9 December 1941 to 30 June 1942; aviation cadet from 30 June 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 26 August 1943.

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

Samuel M. Driver, Judge Advocate.

(On Leave) _____, Judge Advocate.

J. Lottinos, Judge Advocate.

1st Ind.

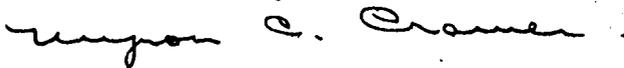
War Department, J.A.G.O., 14 JUL 1944 - To the Secretary of War.

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 Harry F. Cantrell (O-689450), 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 made and uttered eight checks aggregating \$117.50, over a period of several months, without maintaining a sufficient bank balance to pay them on presentation. He pleaded guilty as to three of the checks. It appears from an investigating officer's report transmitted to me by the Commanding General, Second Air Force, that accused, having been duly placed in arrest in quarters, subsequent to his trial in the present case breached his arrest. I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a petition for clemency by accused dated 25 May 1944 which is attached to the record.

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



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

4 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. ltr. for sig. S/W.
- Incl 3 - Petition for clemency
dated 25/5/44. Attached to record.
- Incl 4 - Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 467, 1 Sep 1944)



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

(15)

SPJGK
CM 258380

27 JUL 1944

UNITED STATES)

NEW YORK PORT OF EMBARKATION

v.)

Trial by G.C.M., convened
at Brooklyn, New York, 19
June 1944. Dismissal.

Captain JACK T. LIGHTSEY
(O-903172), Transportation
Corps.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Captain Jack T. Lightsey, T.C., Control and Planning Division, Headquarters, New York Port of Embarkation, Brooklyn, New York, did at New York City, New York, on or about 6 June 1944 wrongfully and unlawfully procure the admission to Pier 90, North River, a restricted military area, of one Shala W. Henry, a civilian, known by the said Captain Jack T. Lightsey to be a person not authorized to be admitted thereto, at a time when embarkation of troops and other secret military activities were in progress.

Specification 2: In that Captain Jack T. Lightsey, T.C., Control and Planning Division, Headquarters, New York Port of Embarkation, Brooklyn, New York, did at Pier 90, North River, New York City, New York, on or about 6 June 1944, with intent to deceive Colonel James E. Slack, G.S.C., Chief of Staff, Headquarters, New York Port of Embarkation, officially state to the said Colonel James E. Slack that one Shala W. Henry, a civilian then accompanying the said Captain Jack T. Lightsey, was an employee of the Boston Port of Embarkation, employed as Executive Assistant to the Demobilization Officer at that Port; that the said Shala W. Henry was in New York to attend a conference, to be held on 7 June 1944 at the New York Port of Embarkation, to consider problems of demobilization; that the said Shala W. Henry had received official military orders

10 Jan 1945
Authority of JAG
Shelton W. Thomas 10/25/44

to that effect; that such official orders had been received by and were then in the office of the said Captain Jack T. Lightsey at Headquarters, New York Port of Embarkation; and that he, the said Captain Jack T. Lightsey, wished to have the said Shala W. Henry observe the embarkation of troops then and there in progress at said Pier 90 in order to further an official demobilization study being made by the said Shala W. Henry, all of which statements were known by the said Captain Jack T. Lightsey to be untrue, in that the said Shala W. Henry was not an employee of the Boston Port of Embarkation; in that the said Shala W. Henry had not come to New York City to attend a demobilization conference; in that the said Shala W. Henry had not received official orders directing his performance of duty at the New York Port of Embarkation; in that the said Captain Jack T. Lightsey had not received and did not have such orders at his office at Headquarters, New York Port of Embarkation; and in that the said Captain Jack T. Lightsey desired the admission of the said Shala W. Henry to said Pier for no official purpose.

Specification 3: Nolle prosequi by direction of appointing authority.

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

Specification: In that Captain Jack T. Lightsey, T.C., Control and Planning Division, Headquarters, New York Port of Embarkation, Brooklyn, New York, did, at New York City, New York, at divers times from about 1 February 1944 to about 10 April 1944, wrongfully and unlawfully assume a grade superior to his own by wearing in public the insignia of a major.

He pleaded not guilty to and was found guilty of all Charges and Specifications, except Specification 3 of Charge I, which was withdrawn by direction of the appointing authority. 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. Summary of the evidence.

a. Charge I and Specifications.

On the evening of 6 June 1944, an embarkation of troops was in progress at Pier 90, New York Port of Embarkation. The ship upon which the troops were embarking was visible from the pier itself, and the embarkation appears to have occupied several hours (R. 27, 33, 39). Certain rigid rules existed for admission of personnel to the piers. Though they were not substantially

different when an actual embarkation was in progress, from the rules at other times, they were more scrupulously enforced (R. 19,24,25,29). In order to enter the pier at any time, military and civilian personnel were required to be wearing one of several different badges. If a badge was not presented, other orders or credentials were required, and had first to be approved by the Internal Security Office of the pier (R. 14,15,17, 18).

Accused was stationed at Headquarters, Control and Planning Division, New York Port of Embarkation (R. 47).

About 2200 on 6 June he approached the front gate or head of the pier in the company of a civilian, one Shala W. Henry. Accused told Corporal Charles B. Woehrle, 6th Guard Detachment, then on duty, that he wished to take Mr. Henry onto the pier. Accused wore a port badge, but Henry had no identification, so Corporal Woehrle referred them to Staff Sergeant John A. Blair, his superior (R. 13-16).

Sergeant Blair testified that he explained the regulations governing admission to the pier to accused, that the Internal Security Office had received no notification concerning Mr. Henry's visit, and that he could not enter without proper credentials. It appears, however, that credentials were not specifically asked for nor offered (R. 19-22,24,26). Accused told Blair that Mr. Henry should be allowed to enter because he was a visitor from the Boston Port of Embarkation on official business in the nature of a survey and that it was necessary for him to observe an embarkation (R. 22).

Blair sent Woehrle to find Captain John F. Barry, Transportation Corps, then on duty as Internal Security Officer. Before they arrived, however, Colonel James E. Slack, General Staff Corps, Chief of Staff at the Port, arrived in the company of several other officers (R. 22,23,38,39,45). Accused told Colonel Slack that Mr. Henry was Executive Assistant to the Demobilization Officer of the Boston Port of Embarkation, that Henry was in New York to attend a conference on the following day to consider problems of demobilization, and that he (accused) wanted Henry to see an embarkation of troops in order that he might become familiar with the activities of the port and with demobilization problems. Accused further stated that he had made arrangements through "Colonel Gray's office" for Mr. Henry to see the embarkation (R. 40).

In the meantime Captain Barry had joined the group. Accused told him much the same story, adding that while Mr. Henry did not have with him copies of his orders from the Boston Port of Embarkation, he (accused) had seen copies of the orders (R. 27,28,36,37). Captain Barry at first refused to admit Mr. Henry (although he did offer to admit accused), but after a conference between Colonel Slack and Captain Barry, Mr. Henry was permitted to register at the gate, received a pass, and entered the pier

with accused (R. 31,34,35,41). Captain Barry testified that he granted this permission upon Colonel Slack's recommendation that he do so (R. 36).

About 10 minutes later, however, Colonel Slack and Captain Barry reconsidered their action, and as a result, Colonel Slack went to look for accused. Finding him and Mr. Henry, they requested further and more definite identification of the latter. Accused then said that he had copies of Henry's orders from the Boston Port of Embarkation in his desk at the Port Headquarters. When Mr. Henry could produce no other satisfactory identification or authorization, Colonel Slack told Captain Barry to order accused and Henry from the pier. He also told accused to report to him at 0830 the following morning and to bring with him copies of Henry's orders from Boston (R. 31,32,42,43).

It was stipulated between the prosecution and accused and his counsel that if present in court Mr. Henry would have testified that he was accused's brother-in-law, that he was not and had not been employed in any way by the Boston Port of Embarkation, but was in New York solely upon personal business. He would further have testified that accused had full knowledge of these facts, but that together he and accused had had three drinks prior to arriving at the pier and that in his opinion accused was drunk at the time he was speaking to Colonel Slack (R. 48,49).

Colonel Slack testified that when accused reported to him the next morning he presented witness a letter of resignation from the Army. Accused volunteered the statements that his whole story of the night before had been false, in that Mr. Henry was not an employee of the Boston Port, and had no orders from that station (R. 43-45). Colonel Slack also stated that no conference on demobilization was scheduled, and that under the provisions of a port memorandum concerning the admission of visitors, a civilian having no official business at the pier could not have been admitted during the embarkation (R. 45,46; Pros. Ex. A).

Upon cross-examination Colonel Slack testified that accused had worked directly under him for about a month in the Control and Planning Division and that the quality of his work had been excellent.

b. Charge II and Specification.

Miss Belle Ricker, an employee of the Polyclinic Hospital in New York, testified that she had met accused in November of 1943, at which time he was wearing the insignia of a captain (R. 51,52,55). She had seen him frequently since that date, and especially between 1 February and 10 April 1944 (R. 51,56). During the month of January accused commenced to wear the insignia of a major, and upon his numerous appearances in public with her in New York, Providence and Cranston, Rhode Island, wore these insignia. He had given her a gold oak leaf prior to February (R. 51,53,54).

Accused's War Department A.G.O. Form 66-1 showed that his rank during the period between 1 February and 10 April 1944 was that of captain (R. 56-58). It also showed that his efficiency rating from 1 December 1943 to 5 February 1944 was "superior" (R. 59).

Evidence for defense.

c. Charge I and Specifications.

Accused's rights were explained to him by the law member and he was sworn and testified in his own behalf (R. 68,69). He stated that he lived at Hostess House, on Staten Island, and that he arrived there about 1700 on 6 June. At the invitation of Mr. Sterling E. Standford, the manager, he had "more than six and perhaps less than ten" drinks while waiting for an expected telephone call from Mr. Henry, his brother-in-law (R. 70). The call came about 1945. Accused had not seen his brother-in-law in three years. They arranged to meet at the bar of the Hotel New Yorker, and eventually did so. Here accused had several more drinks. Finally he decided to visit Pier 90 in order to see a "Colonel Fingarson", who he knew was departing from that pier. He did not know and was unable to explain why he had taken Mr. Henry with him. When he arrived at the pier he was drunk. He admitted that he regained some "equilibrium" when he was talking to Colonel Slack and Captain Barry at the pier, but he had become so far involved that he could no longer extricate himself (R. 71,74-76). He did not realize the seriousness of his acts. He admitted the falsity of his statements, and said that he had pleaded not guilty only because he had had no evil intent (R. 71). He attributed his actions to excessive drinking (R. 74).

Mr. Standford substantially corroborated accused's testimony concerning their drinking together. In an hour and a half or two hours they had "about seven or eight drinks" of "whiskey and Coca Cola". Witness "would say" that accused was sober when he left (R. 81-84).

d. Evidence in rebuttal.

Captain Barry testified that upon both occasions when he had talked to accused he had been within three feet of him, and that he could observe his appearance and general demeanor. Accused could walk unaided, his speech was normal, and though there was an odor of alcohol on his breath, witness was of the opinion that accused was not drunk (R. 85-88).

e. Charge II and Specification.

Accused stated that after returning from overseas, he was stationed in New York. He was unable to find a place for his family and was unhappy for this reason. He met Miss Rucker at a dance, and kept increasingly steady company with her, even spending Christmas at her home in Rhode Island. He saw that they were becoming involved, so "about the first of

February" he told her that he had been promoted to a majority. This was because Miss Rucker's mother believed that when an officer was promoted to major he was thereafter sent overseas. Accused told Miss Rucker he was going overseas, and thereafter did not see her any more (R. 71-73). He never wore the insignia of a major except in Miss Rucker's presence, and only for the purpose of breaking up their relationship (R. 75,77).

Accused also stated that he had been stationed in Southern Persia for eleven months prior to his coming to the New York Port, that his job there was to supervise the loading of freight cars and keep traffic moving, that he had worked long hours in very hot and oppressive weather, and that he had lost thirty pounds during the course of this duty (R.79). Since his return, and in the sixty days prior to 6 June he had taken to drinking excessively, for the first time in his life (R. 74). Major Richard H. Gans, Transportation Corps, was accused's immediate superior in the Control and Planning Division of the New York Port of Embarkation. He stated that accused had performed his duties in a superior manner, but witness had noticed that accused was restless and nervous, and that he had "almost a constant tremor in his hands" (R. 66,67).

Captain Fred W. Brewer, Medical Corps, Chief of the Neuropsychiatric Department of the Station Hospital, Fort Hamilton, New York, had examined accused between 15 November and 9 December 1943 and had found him to be suffering from "neurosis, anxiety type, mild" (R. 60). He again examined accused on 8 June 1944 and found him "mentally competent". The cause of the condition found on the first examination, witness thought, was an hereditary factor, aggravated by a foreign tour of duty, with arduous work, long hours, and lack of recreation (R. 60,61). Witness was of the opinion that accused was legally sane and could adhere to the right (R. 63, 64). His drinking was not responsible for any aggravation of his condition (R. 64).

4. The evidence clearly showed, and accused admitted, that he improperly procured the admission to a pier where an embarkation of troops was taking place of a civilian, that he made false statements to a superior officer in the course of procuring that admission, and that on repeated occasions he appeared in public wearing the insignia of a higher rank than his rightful one. He could assign only the reason that he had had too much to drink as the cause of his first two offenses, and an effort to break up an affair with his woman companion as the reason for his third offense. It goes without saying that neither of these excuses, even if true, constitutes defenses to the Charges and Specifications. Accused's own witness and Captain Barry testified that accused was sober. A deliberate false official statement, made with intent to deceive, is a violation of Article of War 95 (Sec. 453(20), Dig. Op. JAG, 1912-40). Colonel Winthrop cites as examples of conduct violative of Article of War 95 (then Article 61), an attempt to pass guards with a forged pass and under an assumed

name, and taking bribes to allow civilians to pass a picket line (Military Law and Precedents, 2d ed., p. 717, notes). While the present case does not involve a bribe, or the use of an assumed name, it does involve the passage of a civilian into a secret area on the false ground that he had orders permitting his admission. We believe it to be analogous to the above citations, and so hold. It has likewise been repeatedly held that appearing in public while wearing insignia of an assumed higher rank constitutes a violation of the 96th Article of War. No oral misrepresentation, and no expectation of pecuniary gain, are necessary (CM 233900, CM 243926).

5. War Department records show that accused is 34 years of age. He attended The Citadel for two years and George Washington University for one year, and the National University Law School for three years, but graduated from none of them. He was a Principal Claims Examiner in the General Accounting Office at the time of his appointment as a Second Lieutenant, Transportation Corps, on 22 April 1942. He was promoted to First Lieutenant on 4 July 1942. The files do not show the date of his promotion to Captain.

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

Wm. G. Jones, Judge Advocate.
Herbert J. Stapp, Judge Advocate.
Daniel Conner, Judge Advocate.

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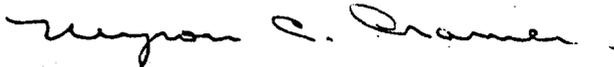
1st Ind.

War Department, J.A.G.O., **12 AUG 1944** - 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 Jack T. Lightsey (O-903172), 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 and the sentence and to warrant confirmation thereof. Accused's misconduct was of a serious nature from the viewpoint of military security. It is believed, however, that his misconduct was due to partial intoxication and a foolish desire to impress his brother-in-law with his importance rather than to an evil intent. I recommend that the sentence be confirmed, but in view of accused's previous good record, and of his long tour of foreign duty under trying circumstances, I recommend that the execution of the sentence be suspended during accused's good behavior.

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



Myron C. Cramer,
Major General,

The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

Incl.2-Draft of ltr. for
sig. Sec. of War.

Incl.3-Form of Ex. action.

(Sentence confirmed but execution suspended. .G.C.M.O. 488, 9 Sep 1944)

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

SPJGN
CM 258408

30 JUN 1944

UNITED STATES)

INFANTRY REPLACEMENT
TRAINING CENTER

v.)

Trial by G.C.M., convened at
Camp Blanding, Florida, 22
June 1944. Dismissal.

First Lieutenant NEIL H.
BEAN (O-1297657), Infantry.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Neil H. Bean, 1st Lieutenant, Company "A", 226th Infantry Training Battalion, 69th Infantry Training Regiment, Camp Blanding, Florida, did without proper leave absent himself from his organization at Camp Blanding, Florida, from about 0630, 7 June 1944, to about 0745, 12 June 1944.

The accused pleaded not guilty to and was found guilty of the Charge and Specification thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded

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the record of trial for action under Article of War 48.

3. The evidence for the prosecution, as established by the duly authenticated extract copies of the morning report of the company to which the accused was assigned, shows that the accused absented himself without leave from his organization at Camp Blanding, Florida, from 7 June 1944 to 12 June 1944. During the period of accused's alleged absence from his organization, a search was made of the company area as well as the officers' quarters and the accused was not seen. Furthermore, the accused, during the period of his alleged absence, failed to report to the officer to whom he had been assigned as an "understudy" (R. 4-5; Pros. Exs. A, B).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to remain silent and no evidence was presented by the defense.

5. The Specification alleges that the accused absented himself without proper leave from his organization from about 0630, 7 June 1944 to about 0745, 12 June 1944. The findings of guilty are sustained by the uncontradicted evidence which shows that the accused was absent without authority from his organization during the time alleged.

6. The records of the office of the Adjutant General show that the accused is approximately 36 years of age; that he served as an enlisted man from 25 January 1941 to 19 September 1941; that he served in the enlisted reserve corps from 19 September 1941 to 30 January 1942; that he was recalled to duty and rendered service as an enlisted man from 30 January 1942 until he was discharged to accept a commission as a second lieutenant on 22 October 1942.

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

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN
CM 258408

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

4 - JUL 1944

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 Neil H. Bean (O-1297657), 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 of dismissal be confirmed but suspended during good behavior.
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,
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. 408,
27 Jul 1944)



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

(27)

SPJGQ
CM 258412

14 JUL 1944

U N I T E D S T A T E S	)	ARMY AIR FORCES EASTERN
	)	TECHNICAL TRAINING COMMAND
v.)	
	)	Trial by G.C.M., convened at
Second Lieutenant FREDRIC	)	Scott Field, Illinois, 13
HUGH MERKER (O-749488),	)	June 1944. Dismissal and
Air Corps, Station No. 5,	)	confinement for one (1) year.
Alaskan Wing Command.)	

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

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

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

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

Specification: In that Second Lieutenant Fredric Hugh Merker, Air Corps, Station No. 5, Alaskan Wing, Air Transport Command, then 352nd Base Headquarters and Air Base Squadron, AAB, Great Falls, Montana, did, without proper authority absent himself from his command at Great Falls, Montana, from about 18 April 1944 to about 4 May 1944.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Second Lieutenant Fredric Hugh Merker, Air Corps, Station No. 5, Alaskan Wing, Air Transport Command, did, at St. Louis, Missouri, on or about 26 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel Jefferson, St. Louis, Missouri, a certain check in words and figures as follows, to wit:

4/26

1944

THE First National BANK

Great Falls, Montana

Pay to Hotel Jefferson or Order \$25.00

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

Alaskan Wing · /s/ Fredric H. Merker
1855 S. Fifth St. 2nd Lt AC O-749488
Cuyahoga Falls; Ohio

and by means thereof did fraudulently obtain from the said Hotel Jefferson, twenty five dollars (\$25.00) in United States Currency, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Great Falls, Montana, for the payment of said check.

Specifications 3-8, inclusive, are identical in form and substance with Specification 2 except for the dates, amounts, and names of payees which differ from it in the following, respectively:

	Date	Amount	Payee
Specification 3	4/28/44	(same)	(same)
Specification 4	4/28/44	(same)	(same)
Specification 5	4/17/44	(same)	Stevens Hotel
Specification 6	4/19/44	\$50.00	Stevens Hotel
Specification 7	4/ 9/44	\$50.00	F & R Lazarus & Co.
Specification 8	4/ 4/44	\$50.00	F & R Lazarus & Co.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Second Lieutenant Fredric Hugh Merker, Station No. 5, Alaskan Wing, Air Transport Command, being indebted to The Stevens Hotel, Chicago, Illinois, in the sum of ten dollars and five cents (\$10.05) for room and services, which amount became due and payable on or about 21 April 1944, did, at Chicago, Illinois, dishonorably fail and neglect to pay said debt.

He pleaded guilty to the Specification of Charge I, excepting the words (sic) "18", substituting therefor the "words '19", guilty to Charge I and not guilty to all other Charges and Specifications. He was

found guilty of the Specification of Charge I, with the exception and substitution pleaded, and guilty of all other Specifications and the Charges. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five (5) years. The reviewing authority disapproved the findings of Specification 1 of Charge II and of Specification 1 of Charge III, approved the sentence but remitted four years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution relating to those offenses which have not been disapproved by the reviewing authority, briefly summarized, is as follows:

The accused, a member of 352nd Base Headquarters and Air Base Squadron, Army Air Base, stationed at Great Falls, Montana, was granted a fifteen day leave of absence and, according to the morning report of his organization, left his station, under said leave, on 3 April 1944 (R. 11; Ex. A). At the expiration of the leave he failed to report for duty and was, on 18 April 1944, carried as absent without leave on the morning report of his organization (R. 11; Ex. B). This unauthorized absence continued until 4 May 1944 when the accused was apprehended by civil authorities in the Statler Hotel in St. Louis, Missouri (R. 12-17). On 5 May 1944 he was surrendered to military control at Jefferson Barracks, Missouri (R. 15, 17) and he was placed in confinement there on that date (Ex. E).

Special order No. 92, Headquarters, Station No. 5, Alaskan Wing, Air Transport Command, 29 April 1944, was admitted in evidence to show release of the accused from assignment to 352nd Base Headquarters and Air Base Squadron and assignment to said Station No. 5 of the Alaskan Wing, effective 30 April 1944 (R. 11; Ex. C). The morning report of 352nd Base Headquarters and Air Base Squadron for 30 April 1944 was admitted in evidence to prove that accused had been dropped from the rolls of said organization on that date and was transferred to Station No. 5, Alaskan Wing, pursuant to the order above mentioned (R. 12; Ex. D). Paragraph 10, Special order No. 133, Headquarters Scott Field, Illinois, 12 May 1944 whereby the accused was attached as a casual to 3505th Army Air Forces Base Unit as of 11 May 1944 (R. 19; Ex. F) and the morning report of the 3505th Army Air Force Base Unit for 12 May 1944, showing that accused joined the organization on that day (R. 19, Ex. G), were admitted in evidence. With the exception of oral testimony of two civil police officers who apprehended the accused in St. Louis, Missouri, (R. 12-18) the remainder of the evidence for the prosecution rested upon stipulations, exhibits and a statement of the accused.

Specifications 7 and 8, Charge II:

On the 4th and 9th of April 1944, the accused tendered to F & R Lazarus and Company, in Columbus, Ohio, two checks signed by him, each in the sum of \$50.00 and for which he received, in cash, the face

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amount of the checks. Each check was drawn upon the First National Bank of Great Falls, Montana, and when presented for collection payment on each was refused and the checks were returned to F & R Lazarus and Company unpaid (R. 28, 29; Ex. Z, AA, BB).

Specifications 5 and 6, Charge II:

On 17 April 1944 the accused registered as a guest at the Stevens Hotel, St. Louis, Missouri (Ex. V) and on that date tendered to the Stevens Hotel his check drawn upon the First National Bank of Great Falls, Montana in the amount of \$25.00 and requested that it be cashed for him. Likewise on 19 April 1944, the accused requested that they cash his check in the amount of \$50.00 drawn upon the same bank. The hotel gave the accused cash for the face amount of these checks and when the checks were presented to the drawee bank for collection payment was refused and they were returned to the Stevens Hotel unpaid (R. 26; Ex. T, U, V, W, X, Y).

Specifications 2, 3, 4; Charge II:

On 25 April 1944 the accused registered as a guest at the Hotel Jefferson, St. Louis, Missouri (Ex. K), and while there gave the hotel three of his checks in the amounts of \$25, \$25 and \$25 on 26, 29 and 29 April 1944, respectively, receiving cash therefor, in each instance, in the face amount of the check. Each check was drawn upon the First National Bank of Great Falls, Montana. They were deposited and when presented to the drawee bank for collection, payment was refused and the checks were returned to the Hotel Jefferson unpaid (R. 20, 22, 24, 25; Ex. J, K, L, M, O, P, Q, R, S).

Specification 2, Charge III:

The accused left the Hotel Jefferson in St. Louis, Missouri, on 1 May 1944 leaving unpaid a bill then due and payable in the amount of \$21.45, representing the total of room rent, valet services and tax. The accused left the hotel on this occasion without checking out or advising the hotel of his departure (R. 20; Ex. J).

In the early part of May 1944 Major Morgan F. Phipps, Air Corps, who had been making an investigation of matters involving the accused, had an interview with him. After being warned of his rights the accused voluntarily made a statement which he signed under oath in the presence of Major Phipps.

In said statement he admitted that he left his duty station at Great Falls, Montana, on 3 April 1944 for a 15 day leave for the purpose of going to Ohio to visit his mother and sisters and to attempt to raise the sum of \$1200 to pay off debts which he had contracted. He was unsuccessful in raising the money because of his inability to provide

security. He began drinking on 11 April and from then until he was apprehended on 4 May 1944 he was under the influence of liquor most of the time. He started back to Great Falls on 18 April 1944 but "laid around" Chicago for 3 or 4 days and then went to Burlington, Iowa for a couple of days, continuing to drink meanwhile. He went on to St. Louis, Missouri, arriving there on 25 April 1944 and registering at the Jefferson Hotel where he wrote checks which he "thought" amounted to \$82.00. On 1 May 1944 he moved to the Statler Hotel and on 4 May 1944 he was arrested by civil police and taken to the city jail. On 5 May 1944 he was surrendered to military control at Jefferson Barracks, Missouri. The reason he wrote the checks was because his supply of money had become exhausted though he knew he "had insufficient funds in the bank to cover". He was married when he was 19 and has a child two years old. His father is dead and it has been necessary for him to help support his mother. He wants to remain in the Army as a flier and be restored to duty as soon as possible but, at the time when he made the statement he was unable to make restitution for the bad checks he had written (R. 32; Ex. EE). This statement was reaffirmed by the accused, after proper warning, before First Lieutenant H. Walter Hanson, Jr., Air Corps, the investigating officer on 22 May 1944 (R. 37, Ex. FF).

Mr. W. H. Williams is Assistant Cashier of the First National Bank, Great Falls, Montana. By stipulation, it was agreed that he would testify as follows: The accused opened a checking account with the bank on 13 October 1943 and said account has been active ever since. As of the end of March 1944 the account showed a balance of \$1.35. On 1 April 1944 the accused made a deposit of \$121.90 making a balance to the credit of the accused of \$123.25. By 10 April 1944 checks and charges in the total amount of \$101.28 were debited against the accused leaving a balance of \$21.97. When, then, on 12 April 1944 the check in the amount of \$50 given on 4 April 1944 to F. R. Lazarus & Company by the accused (Ex. AA) was presented for payment, payment was refused for the reason that there were not sufficient funds on hand to pay the same. On 13 April 1944 a charge of \$.79 was debited against accused leaving a balance of \$21.18 on hand and on the same day payment of the check for \$50.00 given on 9 April 1944 to F. R. Lazarus & Company by the accused (Ex. BB) was likewise refused because of insufficient funds.

Debits for checks and charges between 13 and 21 April 1944 amounted to \$3.50 leaving a balance on hand on 14 April 1944 of \$17.68. On 22 April 1944 the check given by accused to the Stevens Hotel on 17 April 1944 in the amount of \$25.00 (Ex. T) was presented for collection and payment thereof was refused because of insufficient funds. Payment of the check for \$50.00 given to the Stevens Hotel by the accused on 19 April 1944 (Ex. U) was likewise refused for the same reason on 26 April 1944. Charges debited against the accused between 21 April 1944 and 1 May 1944 totalled \$11.85 leaving a balance on hand on 1 May 1944 of \$5.83.

On 2 May 1944 two checks of the accused were presented to the bank for payment, one dated 25 April 1944, payable to the Jefferson Hotel in the amount of \$7.12 (Ex. N) and the other dated 26 April 1944, payable to

the Jefferson Hotel in the amount of \$25.00 (Ex. O). . Both were returned unpaid. On 3 May 1944 the check given by the accused and payable to the Hotel Jefferson on 28 April 1944 in the amount of \$25.00 (Ex. P) was dishonored and returned unpaid for lack of sufficient funds. On 6 May 1944 debits against the accused in the total amount of \$1.00 reduced the balance to \$4.83. On 8 May 1944 the check given by the accused on 29 April 1944 payable to the Hotel Jefferson in the amount of \$25.00 (Ex. M) was returned unpaid because of insufficient funds.

Mr. Williams was familiar with the handwriting of the accused and his signature and after an examination and comparison of the signatures on all of the checks above mentioned with the authorized signature of the accused on file with the bank, he was of the opinion that each was the signature of the accused (R. 30; Ex. CC).

4. For the defense it was shown by stipulated testimony of Mr. W. H. Williams, Assistant Cashier of the First National Bank of Great Falls, Montana that the accused had, on three different occasions prior to March 1944 overdrawn his account in said bank and that the bank had honored said overdrafts. On the first occasion the accused overdrew his account in the sum of \$20.16 on 28 January 1944. On the two other occasions the overdrafts were for small sums, not in excess of \$2.00 each (R. 39; Def. Ex. 1).

The accused, having been informed of his rights elected to be sworn as a witness and testified, substantially, as follows:

He graduated from high school in 1939. After working during the summer he went to the University of Ohio for $1\frac{1}{4}$ years. In the winter of 1940 he was married and he left school in the following Spring. He worked in a bomb plant until March. On 20 July 1942 he enlisted in the Army where he became an Aviation Cadet. After receiving his commission as a second lieutenant he served in the Air Service Command and the Alaskan Wing (R. 41). In February of 1944 while in the Officer's Club at Great Falls, Montana, he became involved in a dice game with other officers. Besides losing \$250 in cash, he paid a gambling debt with a check for \$80.00 and still owed one of the officers \$400. This officer kept pressing him for payment and the accused did pay him \$100 in cash a week later and offered him a personal note for \$300 (R. 41, 42). Later this creditor threatened to take the matter up with the accused's commanding officer but instead arranged for a bank loan of \$300 to be made to the accused upon his signing a note therefor. The \$300 was paid to the officer and when the note fell due the accused was unable to pay it (R. 42, 43). Thereupon he requested a 15 day leave for the purpose of going home. He went on leave and started to return to Great Falls on 16 April 1944, knowing that he was due back at his station by midnight of 18 April. When he arrived in Chicago he became despondent because of being obliged to return and face his financial difficulties. He stayed in Chicago

three days then went to Burlington, Iowa in an attempt to obtain a loan from a friend of his father. He was unsuccessful and went on to St. Louis, Missouri. He admitted giving the checks in question in this case to the Hotel Stevens, The Hotel Jefferson and F. R. Lazarus and Company, but though he was not sure how much money he had in the bank when he issued the checks he intended, if the funds were insufficient, to have sufficient in the bank by the time the checks cleared. He also admitted neglecting to pay the Hotel Jefferson and Hotel Stevens bills for room rent and services he had obtained while staying at these hotels as a guest (R. 43, 44). He made arrangements later for his mother to pay these bills, but he did not know whether they have been paid. He did, however, send a money order to the Hotel Stevens in payment of the bill of \$10.05 (R. 41).

Upon cross-examination he admitted that he did not know how much money he had in the bank on 1 April 1944 but said he "would guess about \$40 or \$50. I don't know" and he made no effort to ascertain the status of his bank account before going on leave (R. 40). He likewise admitted signing the registration cards at the Hotel Jefferson and Hotel Stevens (R. 53, 55), and each of the checks described in the Specifications (R. 53-58). He further admitted that he left the Hotel Jefferson on 1 May 1944 without notifying anyone of his departure and knowing that he owed the hotel for room rent and other services (R. 55). He had issued checks in the total amount of \$79.74 prior to his departure on leave from Great Falls on 3 April 1944 but made no effort to learn the status of his account at that time and while he did make a deposit of \$120 in April he made none between the period 8 April - 4 May (R. 58).

When asked "Did you keep track of the amount of checks that you wrote from the time you started on your leave until you were picked up at the Hotel Statler here at St. Louis?", he replied: "I knew approximately what I had written." And to the question: "Lt. Merker, you knew then that you had written checks in excess of the amount that was available for such checks at the First National Bank, Great Falls, Montana" the accused answered: "I knew that, yes" (R. 59).

5. By his plea the accused admitted his guilt of the offense alleged in Charge I and its Specification. An extract copy of the morning report of his organization discloses that on 18 April 1944 the accused failed to return to duty at the expiration of a fifteen-day leave of absence which, by another extract copy of the morning report, was shown to have begun on 3 April 1944. The court by its findings, adopted the change expressed by the accused in his plea and, by exception and substitution, fixed the initial absence as of 19 April 1944. Two civil police officers testified that they apprehended the accused in the city of St. Louis, Missouri on 4 May 1944 and the evidence shows that the accused at that

time frankly admitted his unauthorized absence. By an extract copy of the morning report of the Casual Detachment, No. 1 Prison, 1737th S.C.U. Station Complement, Jefferson Barracks, Missouri, his surrender to military control on 5 May 1944 was duly established. Thus, every element of the absence without leave has been shown by competent evidence, irrespective of the plea.

With regard to the offenses of giving checks with intent to defraud, knowing that he did not have sufficient funds in the bank upon which the checks were drawn to insure their payment, the record portrays the accused as a financially embarrassed young man who, when confronted with the inevitable results of his improvident conduct, lacked the moral courage to overcome them. After he had squandered his money in gambling losses he obtained a leave of absence in order to attempt to raise the money required to settle his debts. Being unable to make any loans for lack of collateral he became despondent, took to drinking, and while overstaying his leave, wrote checks indiscriminately upon a bank account which he knew, or should have known was insufficient to pay them. In his testimony under oath, at the trial, he admitted making, and uttering each of the checks described in Specification 2 to 8, inclusive, of Charge II and that in each instance, he received the consideration alleged. The status of his account with the bank was established by stipulated testimony of an officer of the bank and conclusively shows that, although the account was current and the accused had made a substantial deposit on 1 April 1944, it had become depleted within a short time thereafter to such an extent that none of the checks which the accused is charged with fraudulently issuing could be paid when presented. The accused's statements as a witness demonstrate that he was aware of the fact that there were not sufficient funds in the drawee bank to pay any of the checks he issued while on leave after the payment of the checks which he had issued in Great Falls, Montana before going on leave and he made no effort whatever to investigate the status of his account with the bank while he had every opportunity and facility for doing so. Under these circumstances he is properly chargeable with knowledge as to the actual status and the intent to defraud may be inferred from his arbitrary and reckless issuance of the checks notwithstanding. The record is, therefore, deemed legally sufficient to support the findings as to Specifications 2 to 8, inclusive, of Charge II.

Since the charge of dishonorable failure and neglect to pay the debt owing to the Hotel Jefferson for room rent and services rendered is laid under the 95th Article of War it requires more than simple proof of neglect on the part of the accused to pay the debt promptly to support it. Where, however, the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud or deceit, it may properly be deemed to constitute the offense (par. 453 (14), Dig. Op. JAG 1912-1940). In this case the prosecution proved, and the accused admitted under oath, at the trial, that he was registered as a guest at the Jefferson Hotel, had availed himself of the accommodations and services of the hotel and then, surreptitiously left and engaged quarters at another hotel in the same city, well knowing that the debt was due and owing at the time. He had made no arrangements for the payment of the

bill, told no one of his intentions to leave, gave no address where he could be reached thereafter and thus evidenced his determination to evade the honest payment of his account. Fraud and deceit may reasonably be inferred from such actions and the accused's conduct, under these circumstances was of the dishonorable character contemplated by Article of War 95.

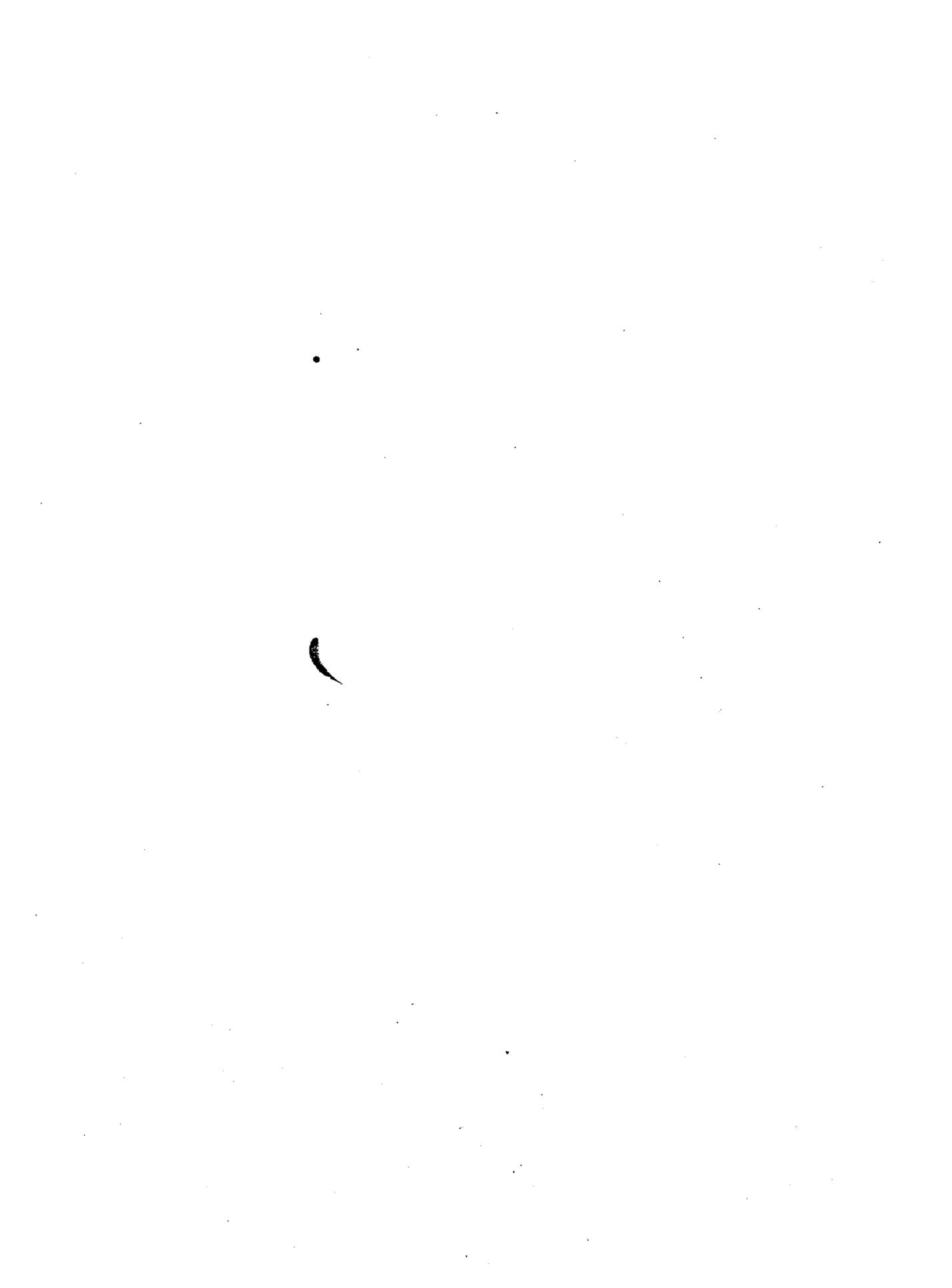
6. The records of the War Department disclose that the accused was born in Wilmington, Ohio and is twenty three years of age. He attended the public schools of Wilmington, Ohio, was graduated from high school in 1939 and thereafter attended Ohio State University for one year. Prior to his enlistment he was variously employed as a sales clerk, assistant cashier, elevator operator, filing clerk and foreman. He enlisted in the Army on 20 July 1942 and became an aviation cadet on 15 September 1942. Upon completion of the prescribed course of training he was commissioned a second lieutenant, Army of the United States on 22 June 1943 and assigned to the 398th Bomber Group at Ephrata, Washington. He is married and has one child.

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 and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 95. Such punishment as a court-martial may direct is authorized upon conviction of a violation of Article of War 61 and punishment at the discretion of the court is authorized upon conviction of a violation of Article of War 96.

_____, (on leave), Judge Advocate.

William H. Lambrell, Judge Advocate.

Herbert R. Fredericks, Judge Advocate.



(36)

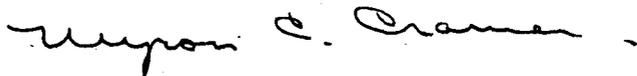
1st Ind.

War Department, J.A.G.O., **20 JUL 1944** - 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 Fredric Hugh Merker (O-749488), Air Corps, Station No. 5, Alaskan Wing Command.

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 of the sentence. I recommend that the sentence be confirmed and carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

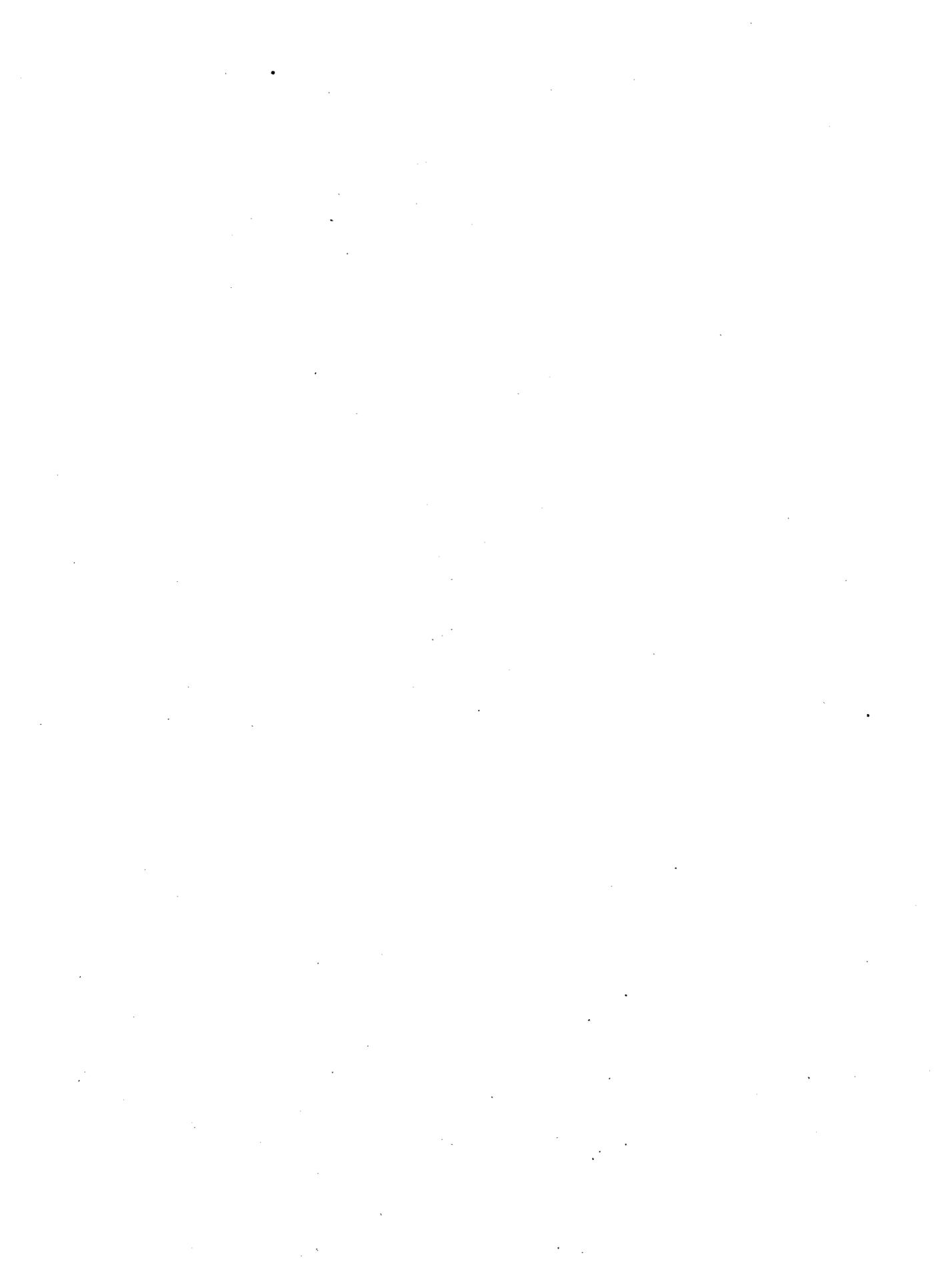
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the above recommendation, should such action meet with approval.



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

- 3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Dft. ltr. for
sig. S/W.
Incl. 3 - Form of action.
-

(Sentence as approved by reviewing authority confirmed.
-G.C.M.O. 475, 1 Sep 1944)



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

SPJGV
CM 258414

24 JUL 1944

UNITED STATES)
) v.)
))
Second Lieutenant ALFRED)
G. THOMPSON (O-756825),)
Air Corps.)

THIRD AIR FORCE

Trial by G.C.M., convened at
Morris Field, Charlotte,
North Carolina, 6 June 1944.
Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 96th Article of War.

Specification: In that Second Lieutenant Alfred G. Thompson, Headquarters 411th Bombardment Group (L), Florence Army Air Field, Florence, South Carolina, did, on or about 14 April 1944, near Florence Army Air Field, Florence, South Carolina, wrongfully violate Section II, Paragraph 16g (1) (d), Army Air Force regulation 60-16, dated 6 March 1944 by flying a type A20J military airplane at an altitude below 500 feet above the ground.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that Second Lieutenant Alfred G. Thompson, * * * did, on or about 14 April 1944, near Florence Army

Air Field, Florence, South Carolina, through neglect suffer a type A20J Airplane, military property of the United States, value of about \$142,042.00 to be damaged by flying said airplane into certain trees.

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

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

Section II, paragraph 16a (1) (d), Army Air Forces Regulation 60-16 was read to the court. This regulation provides:

"Minimum altitudes of flight. Except during take-off and landing, aircraft will not be operated below the following altitudes: 500 feet above the ground elsewhere than as specified above."

Private First Class Donald J. Gottschling, Section O, Florence RTU, Florence Army Air Field testified that on 14 April 1944 he was a crew chief, and as such had at about 0700 on 14 April made a pre-flight examination of the A-20-J plane flown by the accused later that morning. The pre-flight examination showed the plane to be in good condition. This plane was flown from 0800 to 1000 by a Lieutenant Robertson and this witness is not certain whether or not he saw the plane before it was flown off by accused at 1100. When the plane was landed by the accused this witness observed dents in it and made a thorough examination after it had been towed to the maintenance area. This examination revealed that the cowling of the left engine was dented, the ignition harness damaged, the right wing tip plexiglass was broken, with leaves and twigs stuck in the broken place, and there were pieces of dead wood lodged in the fins and baffles of the left engine. After this examination Second Lieutenant Howard L. Taylor, Engineering Officer, was called (R. 5-8).

On examination by the court Private Gottschling testified without objection that he had examined the form 1-A submitted after the first mission (flown by Lt. Robertson) and the entry on this form made by the first pilot was "O.K." (R. 8).

Lieutenant Taylor's testimony as to the damage to the plane was substantially the same as Private Gottschling's. Lieutenant Taylor said that the dents on the cowling and ring column were huge, and readily noticeable (R. 9-10).

Captain George B. Thabault, the investigating officer in this case, testified that after instructing accused as to his rights in connection with accused giving a statement the accused told him he wanted first to talk to some of his friends. The next day accused told Captain Thabault he had decided against making a statement. However, during the first interview, and after he had been warned of his testimonial rights, the accused told Captain Thabault

"You know how it is when out with an instructor sometimes he will peel off and the students will peel off after him and then we will re-join and possibly do that two or three times, and I possibly did the same thing - I just peeled off too low" (R. 10, 11).

It was stipulated that the value of the plane described in the Specifications was military property of the United States of a value of about \$142,042 (R. 12).

4. The defense offered no evidence and the accused after having his rights as a witness explained to him elected to remain silent (R. 12).

5. The reasonable inference of the circumstantial evidence in this case shows that accused flew a military airplane, property of the United States, below an altitude of 500 feet, in violation of Section II, paragraph 16a (1) (d), Army Air Forces Regulation 60-16, and thereby damaged the plane, in that the plane was in good condition when flown off by accused, and when landed the cowling of the left engine was dented, the ignition harness was damaged, and the right wing tip plexiglass was broken, with twigs stuck in the broken places and pieces of dead wood lodged in fins and baffles of the left engine.

6. War Department records show that accused is 22 years of age and a high school graduate. He entered military service 20 September 1941 and was appointed aviation cadet 1 December 1942. After completion of training at Yuma Army Air Field, Yuma, Arizona, he was appointed second lieutenant, Army of the United States, 1 October 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the

substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 83 or 96.

Thomas N. Jaffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Swettenham, Judge Advocate.

SPJGV

CM 258414

1st Ind.

War Department, J.A.G.O.,

11 OCT 1944

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 G. Thompson (O-756825), 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, to support the sentence and to warrant confirmation of the sentence.

3. Consideration has been given to a recommendation for clemency signed by the trial judge advocate, and also to the inclosed memorandum from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 7 October 1944, recommending that the sentence be commuted to a forfeiture of pay in the amount of \$60 per month for six months. I concur in the recommendation of General Giles.

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

4 Incls.

Incl.1-Record of trial.

Incl.2-Memo fr Deputy

Commander,AAF,7 Oct 44.

Incl.3-Dft ltr for sig S/W.

Incl.4-Form of action.

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

(Sentence confirmed but commuted to forfeiture of \$60 pay per month for six months. G.C.M.O. 586, 25 Oct 1944)

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

(43)

16 AUG 1944

SPJGH
CM 258423

UNITED STATES)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Major LOUIS R. LEFKOFF)
(O-296224), Coast Ar-)
tillery Corps.)

Trial by G.C.M., convened at
Camp Van Dorn, Mississippi, 15
June 1944. Dismissal, total
forfeitures and confinement
for one year and one day.
Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR 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 Major Louis R. Lefkoff, Coast Artillery Corps, while acting under color of his office as Police and Prison Officer, Camp Van Dorn, Mississippi, did, at Camp Van Dorn, Mississippi, on or about 27 April 1944, through his orders and instructions, wrongfully and unlawfully cause cruel, inhuman, and unusual punishment by flogging to be administered upon General Prisoners Earl A. Rankin, Julian S. Stevens, Edward D. Jeffers, Joseph R. Pinkos, Elmer Seigle, Paul M. Smith, Robert W. Rhoddy, David J. Toombs, and Robert H. Starks.

He pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year and one day. 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 the 48th Article of War.

3. Evidence for the prosecution:

On 27 April 1944 at about 11:00 a.m. the accused, who was the Police and Prison Officer of the Stockade at Camp Van Dorn, Mississippi, handed out

"billy clubs" to six or seven guards who were assembled in the "investigation room" (also known as the visiting barracks) just outside the stockade enclosure and told them to "work over" or "beat up" a prisoner who would be brought into the room. Accused then ordered General Prisoner Julian S. Stevens out of the stockade and escorted him to the room. The guards did not carry out the orders of accused, however, and did not strike Stevens with any of the clubs (R. 8-19).

Accused then telephoned Second Lieutenant James R. Barth, a military police officer of Headquarters Detachment and asked him to send "a couple of strong armed men" to the stockade. Lieutenant Barth "knew what it was" as he had previously conversed with accused about needing men "for this particular purpose". Lieutenant Barth with "S/Sgt. Knight" and another enlisted man went to the stockade where they found accused, standing outside the visiting barracks, armed with a .45 caliber pistol. He asked Lieutenant Barth to order Sergeant Knight and the other military policeman to go into the barracks and "work over" Stevens who was standing in the middle of the floor. Lieutenant Barth declined to do so and said "Major, if you want a man beat up you will have to give the order". Knight also told the accused that he would not "beat the man up without a direct order" and stated that if he had to carry out such an order he would need some more men. At the direction of Lieutenant Barth Sergeant Knight then went to his company and brought back three more men. After he had again been informed that the military policemen would not act without a direct order from him the accused said "All right, Knight, I order you to go in there and beat up those men", and asked "How are you going to beat them?". Knight answered "Across the fanny" and accused remarked "Can't we beat him across the mouth and face where it would be more good" but Knight refused to follow this suggestion. Sergeant Knight and the other four military policemen then walked into the room where Stevens was standing, took him by the arms, led him over to a corner of the room where they could not be seen from the outside, placed him "belly down" across a table about four feet square, held his arms and legs and Sergeant Knight proceeded to flog him with a rubber hose about eighteen inches long and three-fourths of an inch in diameter with three ".45 slugs in one end of it". Sergeant Knight had brought the hose from the stockade office. (In his deposition, Ex. F, Stevens stated that he was flogged with what appeared to be a Speedometer cable.) The blows were struck "as hard as possible". Stevens was wearing a pair of fatigue trousers but was bare from the waist up. After he had been struck about ten times he fainted. He was given fifteen to twenty lashes "all the way from the knees to the shoulders" and at the conclusion of the flogging his body was "all red welts". Before Stevens left the investigation room accused came to the doorway and said "Make him drop his pants so that I can see if that is enough". When Stevens' trousers were dropped accused remarked "I guess that will be enough" (R. 20-28, 34, 38, 40, 42, 65, 70, 75, 77-79, 82).

After the accused had escorted Stevens back to the stockade the other eight general prisoners named in the Specification of the Charge (some colored and the others white) were taken, one at a time from the stockade to the investigation room, were held face down over the table, and were flogged with the rubber hose by Sergeant Knight or one of the other military policemen. The accused, armed at first with a pistol and later on with a Thompson sub-machine gun also, would go to the stockade, call out the name of the prisoner and tell him that he "was next" and would then escort him, at the point of the pistol or machine gun to the investigation room and after he had been beaten would take him back to the stockade. The procedure was much the same as in the case of Stevens, except that the others with one exception were not struck above the waist but only on the buttocks and the backs of the legs and as the floggings progressed one or two of the "slugs" came out of the hose. Stevens apparently received the severest beating. The number of lashes administered to each prisoner was variously estimated to be from 15 to 28 but General Prisoner Elmer Seigle thought that he had been struck only about twelve times. One of the military policemen, who stated that his weight was 224 pounds, testified that where the hose struck the prisoners "it would be bloodshot or black and blue". Most of the witnesses testified that after Stevens had been flogged the accused stayed outside of the investigation room while the beatings were in progress. However, General Prisoner Robert H. Starks testified that after he had received about ten of a total of "twenty-four or twenty-eight" lashes, the accused came into the room and told the military police "to hit harder that they weren't hitting hard enough", and Earl A. Rankin testified that after receiving twelve lashes accused entered and said "Hit him twelve more. He is the leader of the gang". When General Prisoner Edward D. Jeffers was flogged the hose "seemed to wind around his stomach", he "let out an awful scream" and complained of his side. When he was returned to the stockade he collapsed in the yard and was taken away in an ambulance (R. 23, 34-38, 42, 46-51, 54-58, 61, 76, 79, 83-84).

On 27 April 1943 Jeffers and Robert W. Rhoddy were taken to the post dispensary where they were examined by Major Sage Harper, a medical corps officer. Jeffers was complaining of the region of his right lower abdomen where there were "some little welts". Both men had welts and slight discolorations across the buttocks and posterior thighs. Major Harper also examined at regular sick call on 28 April the other general prisoners named in the Specification. Each of them had a few bluish discolorations across the posterior thighs and buttocks. Major Harper was of the opinion that the beatings were "Not too severe and not too mild" (R. 83-84).

In the cross-examination of General Prisoners Paul W. Smith, David J. Toombs and Elmer Seigle, for the "purpose of impeachment" and after the trial judge advocate had stated that he had no objection, the defense introduced in evidence copies of general court-martial orders showing that

the witnesses had been convicted of the following offenses: Smith, being absent without leave on two occasions, escape from confinement and participating in the commission of a riot; Toombs, being absent without leave; and Seigle, leaving his post while on duty as a sentinel, suffering and aiding prisoners to escape, larceny of an Army rifle and being absent without leave (R. 53, 56, 63; Exs. C, D, E).

4. At the time of the arraignment defense counsel stated that accused did not have any special pleas or motions and pleas of not guilty were entered to the Charge and Specification. After the prosecution had rested, defense counsel made a short opening statement, the trial judge advocate asked whether the defense was making a plea of temporary insanity and defense counsel replied "The plea is temporary insanity at the time of the offense". The evidence then adduced by the defense may be summarized as follows: During the time accused was Police and Prison Officer, the nine general prisoners named in the Specification of the Charge were involved in a series of escapes from the stockade and were otherwise engaged in disorders. The clique in the stockade to which many if not all of them appear to have belonged held "kangaroo" courts-martial and imposed fines upon and administered beatings to other prisoners. In some instances the beatings were so severe that the victims were sent to the hospital. Several times at night during roll call "Pinkos, Stevens, Starks and Rankin" called accused "a Jew so and so" and they all threatened to kill him if they had a chance. The disciplinary facilities at the stockade were limited and wholly ineffective. The "black box" was poorly constructed so that the prisoners would break out of it and when unruly prisoners were put in the "bull pen", a portion of a barracks that was "cut off", they would tear up the floor and "break the door out". They had no respect for their guards and "One of their favorite expressions was that none of these 4-F guards would ever shoot any of them" (R. 87-101, 109).

On one occasion "Private Dickinson" who owed Stevens \$2.00 which he was unable to pay, was "court-martialed" and beaten so severely that it was necessary to hospitalize him. The other prisoners emptied Dickinson's "bag" onto the floor and divided his belongings among them. At another time Private John Williams, Jr., was sleeping in the "colored barracks" when "Jeffers, Toombs and Rhoddy" threw him out of bed and proceeded to "beat him up". They struck him with a coal shovel inflicting a wound four inches long in the lower part of his right arm. One of them said "Bring him down here, we have rope and we'll hang him". Williams' screams attracted the attention of guards who helped him to escape from his assailants (R. 95, 98, 109-110).

Captain Leon N. Goldenson, Medical Corps, testified that he was a neuro-psychiatrist, that he had examined accused on 27 May 1944 and found him to be under an emotional tension from anxiety. Captain Goldenson was of the opinion that it was possible for a man of the personality of accused

to be mentally irresponsible "at the time he ordered certain men to be punished". When asked on cross-examination to explain his complete findings, Captain Goldenson stated that accused had a simple adult maladjustment "which precludes the presence of a psychosis, or the presence of psychopathic personnel /personality". He expressed the opinion that accused could distinguish right from wrong. It was stipulated that if "Captain Howard, the Post Psychiatrist" were present his testimony would be substantially the same as that of Captain Goldenson (R. 107-108, 126).

Major Robert L. Kushner, Dental Corps, testified that he had known accused "very intimately" for the past thirteen or fourteen years, that accused was quiet, minded his own business, was well thought of and respected in Atlanta, Georgia, where he lived, and did not have a "pugnacious character" but quite the opposite. Major Kushner "would classify" the accused as a "very fine and intelligent gentleman" (R. 111-112).

Accused testified that he graduated from "Georgia Tech" as an electrical engineer, was commissioned 6 June 1932 and entered upon active duty on 5 November 1940. He did administrative work for about sixteen months, served with troops at Camp Edwards, Massachusetts, was promoted to major, was transferred to Camp Stewart, Georgia, where he was executive officer of an anti-aircraft battalion, was reclassified "for lack of force" and was transferred to Camp Van Dorn, and assigned as Police and Prison Officer on 2 February 1944. He had no previous experience in "handling prisoners". After Rankin and Stevens had been returned from escape and confined in the stockade accused asked for, but never received, permission to work some of the general prisoners outside of the stockade. They were incorrigible and talked the "rest of the gang" into not following any of the rules and regulations. Accused asked to have Stevens transferred out of the stockade but it was not done. "They" began intimidating other prisoners and conditions became so bad that two or three of the prisoners were "beat up" and were sent to the hospital. He asked to have Starks, Rankin, Pinkos, Stevens and Smith transferred as they were the "worst ones". Each one of them had escaped from three to five times and the stockade was not built to hold that type of prisoner. On 23, 24 and 25 April prisoners in the stockade were beaten by the other prisoners, in some instances with such severity that the victims had to be hospitalized. Stevens had been hiding and missing roll call and he and Starks had refused to obey direct orders given to them by the accused. Stevens threatened with a large butcher knife Sergeant Berkemeyer who had gone into the stockade at the direction of accused. The prison guards were furnished by the tactical units and had been given no "M.P." training. Accused had guards put packs on Stevens and Starks and ordered them to walk the track between the fences. They threw the packs down and accused had them handcuffed and detailed two guards to make them walk. After walking a short time the prisoners took off the handcuffs and the packs and sat down (R. 113-116).

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On 25 April Stevens, Rankin, Starks and some other prisoners came to the mess hall for breakfast, after breakfast was over, Accused told them that they could not go in and Stevens reached into a push cart, picked up a big piece of coal and threw it at accused. On 26 April accused went to the hospital to see four prisoners who had been "beaten up". He had "a great fear" after Stevens and Rankin came back because they told him that they would "get" him if he came into the stockade, that they would do as they pleased and would escape and kill his wife and baby. He was afraid that somebody would be killed in the stockade if he did not do something to prevent it "right away". He had no effective means of controlling the dangerous prisoners and was unable to have them transferred. On 26 and 27 April accused felt that the situation was desperate, he could not control "the place" and decided to "turn it over to the M.P.'s". When Stevens was walking over to the investigation room he moved close to one of "these inexperienced guards" who was armed with a "tommy gun" and accused reached over and "grabbed" it before Stevens could get it. Accused ordered the carbines put away and gave the guards clubs because he was afraid that Stevens would seize one of the guns and start a riot (R.116-118).

On cross-examination accused stated that "walking the track" consisted in having a prisoner walk back and forth between the stockade fences with a pack on his back. The longest time accused had a prisoner walk in this manner was "all day long". He did not know that this form of punishment was contrary to Army Regulations. He had also withheld mail from prisoners until he learned that it was "illegal" to do so. He had merely continued the same disciplinary measures that had been used by the police and prison officer who preceded him. He had not asked Lieutenant Barth to send him some men on the morning of 27 April and he did not know of anyone else who made such a request. He did not know why the "MPs" came to the stockade until "they got there". Before the "MPs" came accused had ordered Stevens out of the stockade, had threatened to shoot through the barracks if he did not come out, had issued clubs to four of the guards "for their own defense" and had told them to "work over" Stevens but stated that he did not know what the term "work over" meant. He did not give Sergeant Knight a direct order to "work over the prisoner" and did not see any prisoners flogged. He ordered out of the stockade one at a time the nine prisoners named in the Specification because an enlisted man of his "personnel" whose name he did not remember had given him a "list of prisoners to order out". He had ordered them out because the "MP's had come down and wanted them to come into the building one at a time". When he was asked whether he had heard any of the prisoners being flogged accused stated that he had "heard noises". He saw some marks on Stevens' back and knew that he had been flogged but made no attempt "directly" to stop the floggings. He did not order any prisoner to drop his trousers so that accused could see the marks on his body and did not tell Sergeant Knight to hit the prisoners across the mouth. He saw one prisoner taken away in an ambulance. He did not know what caused the military police to start beating the prisoners (R. 118-126).

5. The evidence shows conclusively and beyond any reasonable doubt that accused who was then Police and Prison Officer at Camp Van Dorn, Mississippi, had nine general prisoners taken one at a time from the stockade to the visiting barracks where under his directions and upon his direct orders they were held face down across a table and severely flogged by military policemen with a rubber hose weighted with 45 caliber pistol "slugs". Cruel and unusual punishment of persons subject to military law "including flogging" is expressly forbidden (A.W. 41, Manual for Courts-Martial, 1928, par. 102). The conduct of accused in ordering and causing floggings to be administered to military prisoners was to the prejudice of good order and military discipline and of such a nature as to bring discredit upon the military service. It clearly constituted a violation of the 96th Article of War (CM 118423, Dig. Ops. JAG 1912-40, sec. 454(10); Dig. Ops. JAG 1912-40, sec. 453(3)).

Accused in a half hearted fashion denied that he ordered the military police to administer the floggings but the evidence to the contrary is overwhelmingly and convincingly conclusive.

A belated special plea of temporary insanity was interposed in behalf of the accused but was wholly unsupported by the evidence adduced. In fact the testimony and stipulated testimony of the expert medical witnesses for the defense was to the effect that although accused was suffering from "simple adult maladjustment" he was sane and capable of distinguishing between right and wrong.

6. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows: appointed second lieutenant, Coast Artillery Corps Reserve, Army of the United States, 6 June 1932; active duty 14 August 1932 to 27 August 1932, 10 February 1935 to 9 August 1935, 14 September 1935 to 11 November 1935, 10 May 1936 to 30 September 1936, 21 August 1938 to 3 September 1938, 3 July 1939 to 16 July 1939 and from 5 November 1940; promoted to first lieutenant 25 June 1935; to captain 22 March 1940 and temporarily to major 30 November 1942, all in the Army of the United States.

7. Mr. Wolfe Lefkoff, brother of the accused, and Mrs. Hessie Lefkoff, wife of the accused, personally appeared before the Board of Review on 19 July 1944. Mr. Charles A. Noone of Chattanooga, Tennessee, has submitted a brief in behalf of the accused.

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

Samuel M. Diver, Judge Advocate.

Robert Glennon, Judge Advocate.

- 7 - J. J. Lott, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

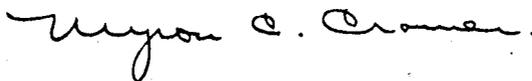
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Louis R. Lefkoff (O-296224), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. After the accused, who was the Police and Prison Officer at Camp Van Dorn, Mississippi, had handed out "billy clubs" to six or seven guards and told them to "work over" or "beat up" a military prisoner and the guards had declined to do so, the accused called in a specially selected detail of military policemen who, upon his orders and under his direct supervision, severely flogged the same prisoner and eight others with a rubber hose weighted with 45 caliber pistol bullets. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for one year and one day be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the following letters and telegrams received by or referred to this office requesting clemency in behalf of the accused: From Mrs. Harry Goldberg, Atlanta, Georgia, dated 7 July; from Mr. Stephen Lefkoff, brother of the accused, New York City, one dated 12 July and another dated 26 July; from Mr. James A. Byars, Lindale, Georgia, dated 22 July; from Dr. Alfred Lefkow, cousin of the accused, New York City, dated 1 August; from Mr. and Mrs. Wallace F. Martin, Sr., Flemington, Georgia, two letters each, dated 4 August; from Mrs. Perle Lefkoff Sicro, sister of the accused, Atlanta, Georgia, dated 5 August; from Miss Sarah Lefkoff, sister of the accused, Atlanta, Georgia, dated 5 August; from Mr. W. W. Rushton, Atlanta, Georgia, dated 9 August (all of the foregoing are directed to the President or to his secretary); from Honorable Robert Ramspeck, United States House of Representatives, dated 7 July; from Honorable Richard B. Russell, United States Senate, dated 13 July; from Colonel C. M. Boyer, Office of the Executive for Reserve Affairs, War Department, Washington, D. C., dated 21 July; from Rabbi Harry H. Epstein, Atlanta, Georgia, dated 21 July; from Honorable Ben T. Hulet, Commissioner of Labor, State of Georgia, Atlanta, Georgia, dated 21 July; Mrs. Louis R. Lefkoff, wife of the accused, Woodville, Mississippi, dated 22 July; from Mr. Stephen Lefkoff, brother of the accused, New York City, dated 22 July; from Mrs. Sol H. Kaplan, Woodville, Mississippi, dated 23 July; from Mr. William B. Hartsfield, Atlanta, Georgia, dated 24 July; from Honorable Sol Bloom, United States House of Representatives, dated 24 July with 6 inclosures; from Mr. Eugene J. Webb, Atlanta, Georgia, dated 24 July; from Mr. Elmer F. Stover, Atlanta, Georgia, dated 25 July; from Mr. M. C. Turman, Atlanta, Georgia, dated 25 July; from Mr. C. A. Jones, Atlanta, Georgia, dated 26 July; from Miss Sarah Lefkoff, sister

of the accused, Atlanta, Georgia, dated 26 July; from Mrs. Ethel Friedman, sister of the accused, Atlanta, Georgia, dated 26 July; from Mrs. Perle Lefkoff Sicro, sister of the accused, Atlanta, Georgia, dated 28 July 1944; from Mr. Julian V. Boehm, Cincinnati, Ohio, dated 28 July; from Mrs. Charles Lefkoff, mother of the accused, dated 29 July; from Mrs. Rebecca Lefkowitz, sister of the accused, New York City, dated 1 August; from Mr. Oby T. Brewer, Atlanta, Georgia, dated 2 August; from Honorable Walter F. George, United States Senate, dated 8 August, with 1 inclosure; from Mr. Edward M. Kahn, Atlanta, Georgia, dated 4 August; and from Mr. and Mrs. Wallace F. Martin, Sr., Flemington, Georgia, dated 8 August.

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 above recommendation, should it meet with approval.



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

(Sentence confirmed but forfeitures and confinement remitted.
G.C.M.O. 606, 4 Nov 1944)



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

(53)

SPJGK
CM 258543

7 JUL 1944

UNITED STATES)

92ND INFANTRY DIVISION)

v.)

) Trial by G.C.M., convened at Fort
) Huachuca, Arizona, 14 January 1944.
) Dishonorable discharge, total for-
) feitures, and confinement for ten
) years.

)
)
) Second Lieutenant BALLIE
) WALL, JR. (O-1289513),
) Infantry.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Second Lieutenant Ballie Wall, Junior, Company "E", 371st Infantry, did, at Fort Huachuca, Arizona, on or about 19 December 1943, forcibly and feloniously, against her will have carnal knowledge of Mrs. Rosalind V. Westray.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced "to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor" for life. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures, and confinement for ten years, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

The prosecution introduced only two witnesses, the prosecutrix and the physician who examined her after the commission of the alleged offense. The prosecuting witness was the wife of an enlisted man of the 92nd Division, and was apparently a civilian employee of the Post's Quartermaster laundry. She lived on the post in a women's barracks (R. 12,13).

She testified that her husband's company was rumored among some of the women who lived in her barracks and who themselves had husbands in it and who had gone out to visit, to be bivouacked in the vicinity of a road which led past their barracks and to the North Gate of the reservation (R. 7,13). Some time before 2200 on Sunday, 19 December 1943, she started out in the direction of the place where she thought she might find her husband (R. 7,11). She was walking along the road, still within sight of her barracks, at about 2150, when accused drove up in his car. Accused introduced himself, told her he was from New York, and asked her name (R. 7,12,13).

She told him where she was going. He said that he was going out that way and that he could help her find her husband. Observing his pleasant manner and that he was an officer, she had no hesitation in entering his car. They drove out through the North Gate of the post. Accused showed his pass, but she was not required to show hers. Somewhere near the first building or house beyond the gate accused stopped the car, off the road. He immediately "grabbed" her, tried to kiss her, and put his hand "up" her clothes (R. 7,8,13,14,17,18,19). She "protested", telling him that she "wasn't that type of person", and started to get out of the car (R. 8,14). Accused told her he would take her back, and she apparently reentered the car. He proceeded to back the car out, but instead of returning through the gate, drove further down the road. The car was going too fast for her to get out, but she kept asking accused please to take her home (R. 8).

He drove on down the road to an intersection, turned left into this road, and drove about 150 feet. There were no buildings, farmhouses or cars near this place. Accused and witness then "started fighting" in the front seat of the car. She got out and ran along the road, but accused got out, ran after her, and caught her after she had gone "about fifty feet or more". (R. 9,15) She observed that he had removed his shirt and trousers (apparently after he had got out of the car) and that he was dressed only in his pajama tops or a hospital jacket (R. 9,18,19). He took her back to the car, this time to the back seat. She wrestled, fought, and pleaded with him, telling him that he would not want his mother or sister so treated, and further that she (witness) was an expectant mother. Accused said that "he didn't give a damn about nothing, he was going to do what he wanted". She threatened to tell "Colonel Hardy" and General Almond, but accused said he said "he didn't give a G-dam about either one of them" (R. 9).

Accused threw her head back into a corner of the back seat, had one hand on her throat, and took one of her legs and threw it over the front seat. He then got between her legs and accomplished his purpose. Penetration took place. Witness fought, screamed and yelled, resisting as much as she could, but accused told her to scream all she wished, because no one would hear her out there (R. 9,10,15).

After the attack accused insisted on taking her back to camp, although she wished to walk. She returned with him because "there was no harm in

coming back then, after he had done what he proceeded to do". On the way back he told her that he was a professional gambler, and that he had plenty of money; that if she needed anything she could find him in the hospital, where he had gone because he did not want to serve in the field (R. 10).

They came back through the North Gate. She was not required to show her pass and did not attempt to inform the Military Police there of what had happened (R. 15-17). Accused let her out of the car on the road just before they reached her barracks. It was then about 0315 Monday. He did not offer her any money. She did not tell anyone in the barracks about what had happened. She was not able to get out of bed to report to anyone until Tuesday morning, when she went to see Colonel Hardy. She succeeded in reaching him on Tuesday afternoon, at which time she told her story to him and to "Colonel Hogan", and was later given a physical examination at the post hospital (R. 11,15,16). She stated that she had worked on the Friday and Saturday before the attack, but that she was not able to work for seven days after it, and at the time of the trial, she said, she had a sore spot on her throat, pain in her back, severe headaches, and bruises in various portions of her body (R. 11,16).

Major Harold W. Thatcher, Medical Corps, Chief of the Medical Service at the post hospital, gave her as complete a physical and vaginal examination as was possible on Tuesday, 21 December. The length of time which had elapsed since the attack was alleged to have occurred, and the fact that he did not have the clothing which she had worn at the time, rendered it impossible to make all the tests customary in such cases. Witness could not test for spermatozoa "or any evidence of actual intromitus" (R.20).

He observed that she was "markedly nervous, almost hysterical". He found a small bruise about one inch in diameter just above the left breast, and a small bruised area at about the middle aspect of the right arm, between 1/2 to 3/4 inch in diameter. At the upper left-hand portion of the vagina was a small red area approximately 1/2 inch in diameter. The mucous membrane had been rubbed off. There was a linear fissure on the mucosa in the rectum. Witness "would say" that the wounds had been received "within a period of three or four days" (R. 20,21). While Major Thatcher did not mention any injuries to the victim's neck, a written report of the examination showed that there was "tenderness on palpation of anterior portion of (her) neck" (Pros. Ex. A).

Evidence for defense.

Accused's rights as a witness were explained to him by the law member, and he elected to be sworn and testify (R. 21,22).

At the time of the alleged offense he was a patient at the station hospital. He had been there since 9 November, suffering from a congenital

fusion of the fifth lumbar transverse process (R. 22,34). On 19 December Lieutenant George A. Bethel, Jr., 365th Infantry, and Mrs. Bethel came to the hospital and requested that he drive them to Bisbee, Arizona, in his car. After obtaining a pass good until 2130, the three left the post (R. 23,35; Def. Ex. A). They drove to Bisbee, and later crossed the border at Naco. In Mexico accused bought ear rings, a silver bracelet, and bottles of cognac, rum, and Scotch. They returned to the United States about 2245 and arrived back at the post at approximately 2400. Accused dropped off Lieutenant and Mrs. Bethel at their quarters on the post, then drove over several of its streets. It was "long after midnight" when, while driving down the street near the prosecuting witness' barracks, he saw her (R. 23-25, 32).

He stopped his car, rolled the window down, said, "Hello", and asked if he could be of any assistance to her. He had never seen her before (R. 25,30,32,33). She said that he could and got into the car. As he started to drive off, he asked where he could take her. She replied that she was not going any place in particular, but that she had come out because she was lonesome and unable to sleep (R. 26). He told her his name and that he was a patient in the hospital (R. 33). They continued to drive around the post, and stopped at some undesignated spot on the post, where she picked up the bottle of Scotch and asked if she could have a drink. Upon being told that she could, she tried to open it, but was unable to do so, whereupon he opened it for her with the case of his switchboard keys. Both took a drink, then drove for another 15 minutes. She suggested that they drive somewhere off the post, but did not indicate any particular destination (R. 26,27).

Accused drove to the North Gate, the nearest exit. He stopped just before reaching it and had another drink. Accused was not required to show his pass when they went through, but she showed hers. After they passed through the gate she put her hand in his trousers and fondled his private parts (R. 27,31,33). Until then he had no intention of engaging in intercourse (R. 34). He drove to a road intersection, where he turned right, passed a farm house, and parked at the side of the road some 75 yards beyond it (R. 27). Here she "became rather endearing", questioned him about other women in his life, and finally "snuggled over into the seat and practically threw herself" on him. They engaged in an act of intercourse in the front seat, but finding it neither sufficiently roomy nor comfortable, she suggested that they get into the back seat. Accused reached over and opened the door to the back seat. She climbed out and got into the back. He climbed over the seat (R. 28). She "offered no resistance whatever" to his advances, and actually encouraged him. He used no violence (R. 28,31,32).

Afterwards they both got out of the car to relieve themselves. They were not parked there very long, and returned to the post through the same gate whence they had come out. Accused was not required to show his pass

to the Military Police, but she again showed hers, "automatically" (R. 28, 29). He returned her to a spot on the road near her barracks at about 0200 or 0215. An hour and a half or two hours had elapsed since he picked her up. He denied telling her that he was a professional gambler, and denied showing her a roll of money (R. 29,33). They sat in the parked car for a few minutes, until accused said that he must get back, and bade her good night. She then asked, "What about my time?", and when he asked her what she meant she referred to the time she had spent with him. She wanted \$5 (R. 29,30,32). He had no money, so made an appointment to see her at "Mar Kim's" between 2100 and 2130 the next evening, promising to give it to her then. She agreed to this. He did not, however, keep the engagement, and had not seen her since then (R. 30,33).

Accused admitted that he had overstayed his pass, and was unable to account for the bruises suffered by the prosecuting witness (R. 30,31).

Accused's story of his activities during the day and evening was substantially corroborated by Lieutenant and Mrs. Bethel, the latter a teacher at the Post School. They had requested him to drive them to Bisbee that morning, and after he secured his pass they left the post about 1500. They visited Bisbee, ate dinner, and crossed the border at Naco. Lieutenant Bethel testified that accused spent most of his money on his purchases in Mexico. They reentered the United States about 2300, due to the curfew law, and began their drive back to Fort Huachuca, a distance of about 40 miles. Lieutenant Bethel saw accused take only one drink. They made two stops en route, one to fix a flat tire, and one to purchase papers and groceries. They arrived at their quarters on the post "pretty close to midnight" (R. 36-41,42-45).

Lieutenant Bethel admitted that he had recently been found guilty by a general court-martial of making a false official statement (and apparently also of an absence without leave), but implied that the sentence imposed had been commuted to a reprimand and that he had been restored to duty (R. 37,38).

Second Lieutenant William P. Gray, Company F, 370th Infantry, testified for the defense that on 5 January he had been at "Mar Kim's" getting something to eat, and that while there he had struck up a chance acquaintanceship and engaged in conversation with the prosecuting witness and another girl who was with her (R. 46,47). After some casual conversation, witness and the prosecuting witness made a date to go to a show the next evening but he later recalled having heard her name mentioned by accused in connection with the charges here involved, and did not keep the engagement (R. 48,49).

It was stipulated that the prosecuting witness had not worked at her job at the Quartermaster laundry for the two days prior to the commission

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of the offense, and that she did not work thereafter until at least 29 December 1943 (R. 50; Def. Ex. 2).

4. Little recapitulation is necessary. The prosecuting witness and accused each tells a different story, agreeing only that there was an act of intercourse between them. She claims that he picked her up at approximately 2200, drove her off the post, attempted to have intercourse with her, promised and then refused to take her home, and finally accomplished his purpose by force, and despite her utmost efforts to prevent him. She claims that he took her home approximately 5 hours after they first met, that she suffered considerable physical violence, but that she did not notify anyone of the attack until 36 hours later because she wished to tell "Colonel Hardy".

Accused claims that he picked her up after midnight, that she invited and encouraged his advances, that he at no time used force, that he brought her to her quarters within two hours after they first met, and that she then asked him for five dollars in payment of her services. This he promised to pay, but did not, after which she preferred charges against him.

A fellow officer and his wife corroborated accused's version of his activities prior to the offense by their testimony that he was with them until two hours after the time at which the prosecutrix stated positively that he picked her up. Inferentially accused's story is further substantiated with respect to his inability to pay the requested \$5 by Lieutenant Bethel's testimony that accused had spent all his money in Mexico.

6. The Board of Review is compelled to conclude that the record of trial does not support the court's findings of guilty. The crime of rape is a despicable one, and, as has been said, it is "an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent". There is substantial doubt that force was used, and that the act here complained of was not actually encouraged and invited by the alleged victim, in the hope of monetary reward.

Consideration of just a few discrepancies and obscure portions of the testimony of the prosecuting witness will suffice to show the doubts which arise. In the first place, she claimed that she spent five unwilling hours with accused, and that most of that time she was resisting his advances. If the attack took place shortly after they left the post, there was little reason for accused to have kept her out until 0315. If he overcame her only after violent and prolonged resistance on her part, the bruises which even she claimed to have suffered were nowhere nearly proportionate to those which must reasonably have been expected to be incurred in a struggle of that duration. Her alleged injuries are hardly indicative of violent resistance.

Secondly, her presence on the road outside of her dormitory, even at the time and for the purpose alleged by her, is not convincing. This witness gave every indication in her testimony from the stand of being a woman

of above average intelligence. It suggests a complete naivete on her part to think that she could start out at 10 o'clock at night on a military reservation, in a vague attempt to find and visit her husband whom she knew only to be bivouacked somewhere in the direction she professed to be going. The Board believes that she was not that naive.

Thirdly, there is an irreconcilable conflict in her story of accused's pursuit of her when she got out of the car and started to run from him, with acknowledged physical facts. She testified that he caught her and took her back, and that he was then clad only in a pajama top or hospital jacket, having presumably removed his shirt and trousers while in or immediately after getting out of the car to chase her. Yet, she testified, he caught her after only running 50-odd feet. It is unreasonable to believe that accused could have undressed in that short space of time. Even allowing for some error in her calculation of distance, it is difficult to see how he could have seen and pursued her had she gotten any further away, for it was admittedly uninhabited country, and late at night.

Then, too, accepting as true her story that she reluctantly accompanied him back to the post in his car, because she saw no harm in doing so after he had perpetrated the act, there is the fact that she passed the Military Police on duty at the gate and yet said nothing. She made no report until the second day. It is hardly the act of a woman who has been so outraged. While fear, shock, and modesty may account for the delay in the protests which are to be expected in a case of this nature, the delay here, when taken with other facts, lends little credence to her story.

It is true that the physician who examined her testified to the presence of minor injuries often associated with violent assaults. It is not beyond probability, however, that they could have been incurred in intercourse consented to by her, with accused or even someone else. Another lieutenant testified to her apparent willingness to date him on short acquaintance. The prosecution made no effort to produce the clothing worn by her at the time of the assault, and did not explain this failure to produce. There, if anywhere, was evidence of a struggle.

Finally, there is the undisputed evidence that the prosecuting witness did not go back to work until at least three days after she said she did. It is likewise an inconsistency, which, though small in itself, looms larger when considered together with other shaky testimony. On the basis of the prosecution's evidence, the record is legally insufficient to support the findings of guilty.

6. War Department records show that accused is 29 years of age. He attended high schools for four years, in Wilmington, North Carolina, and Brooklyn, New York, but did not graduate. He was inducted into the Army in March 1941, attended the Infantry School, Fort Benning, Georgia, and

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upon graduation therefrom on 4 August 1942 was commissioned a second lieutenant, Infantry, Army of the United States, on 5 August 1942. In recommending him for attendance at Officers' Candidate School, his commanding officer said that accused character was "excellent" and that he had demonstrated outstanding qualities of leadership.

7. For the foregoing reasons 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.

Irving G. Eisen, Judge Advocate.

Hermann Mayer, Judge Advocate.

Samuel S. Conner, Judge Advocate.

1st Ind.

War Department, J.A. G.O., **18 JUL 1944** - To the Commanding General,
92nd Infantry Division, Fort Huachuca, Arizona.

1. In the case of Second Lieutenant Ballie Wall, Jr. (O-1289513), Infantry, I concur in the foregoing opinion of the Board of Review holding that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50 $\frac{1}{2}$, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 258543).



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

1 Incl.
Record of trial.



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

SPJGN
GM 258544

11 JUL 1944

UNITED STATES)

92ND INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Fort Huachuca, Arizona, 2 and
3 December 1943. Dismissal.

Second Lieutenant BENJAMIN
HOLMES (O-1103696), 317th
Engineer Combat Battalion.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

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

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

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

Specification 1: In that 2nd Lieutenant Benjamin Holmes, C.E. did at Tonto National Forest, Arizona, on or about 26 September 1943 with intent to deceive Major William W. Little, his commanding officer, officially state to the said Major Little, that he did not drive a $\frac{1}{4}$ ton 4x4 truck on the night of 25 September 1943, which statement was known by the said 2nd Lieutenant Holmes to be untrue.

Specification 2: (Finding of Not Guilty).

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

Specification 1: In that 2nd Lieutenant Benjamin Holmes, C.E. having received a lawful order from Lieutenant Colonel Duncan Hallock, his superior officer, that officers would not drive government vehicles did at Phoenix, Arizona, on or about 25 September 1943, fail to obey the same.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 2 of Charge I and Specifications 2 and 3 of Charge II but guilty of Specification 1 of Charge I and Charge I and Specification 1 of Charge II and Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 25 September 1943, which was Saturday, the 317th Engineers Combat Battalion, to which the accused was assigned as a second lieutenant, was bivouacked in Tonto National Forest on the Salt River in Arizona. Two companies were granted permission to go in convoy that night to Phoenix, about thirty-five miles away, "for recreational purposes". Company "B", of which the accused was a member, was not scheduled to visit Phoenix until the following evening. Its personnel, both commissioned and enlisted, were accordingly restricted to the bivouac area. Its officers, as well as those of all the other companies in the Battalion, had been expressly forbidden by a standing order to drive Army vehicles (R. 6-8, 12, 14, 20-21, 24).

To prevent any unauthorized persons from proceeding to Phoenix, a barricade was ordered erected at a cattle guard on the main highway, and three men were stationed there to report the number of all cars and trucks which "had gone through". The only other route to town "entailed a rather rough road through mountains and was much longer". The barricade, when completed, consisted of a "Men Working" sign, "or something to that effect about twelve feet wide, twelve feet long, of 2x4, similar to a sawhorse except much longer" (R. 8-9, 17-18, 32).

At about 8:00 p.m., after the convoy had departed, Major William W. Little, the Acting Battalion Commander, passed by the barricade on his way to Phoenix. He informed the guards that his vehicle "would be the last to go through" except for one from the Message Center at about 11:00 p.m. Having delivered this admonition, he continued his journey into town to await the formation of the return convoy (R. 9, 32).

In the meantime the accused, Second Lieutenant Arthur L. Davis, and Technician Fifth Grade Kermit R. Richardson had set out for Phoenix in a jeep. Richardson, one of the regularly assigned drivers for Company "B", had been ordered by the accused to make the trip. No reason for going into town was offered. They reached the barricade about 9:00 p.m. Although it was in "a very conspicuous place in a defile where it would be difficult to miss", Richardson apparently did not see it, and, since "it wasn't long enough to block the road", he sped by it. The guards attempted to wave him down, but to no avail. They were of the impression that the jeep contained three or four occupants but were unable to identify any of them (R. 24-26, 29-30, 32-34, 37).

Upon arriving in Phoenix about 9:00 p.m., Richardson drove to the Recreation Hall. After being told to wait for the accused until 11:00 p.m., he went inside. Between 11:30 p.m. and midnight the accused drove the vehicle to within a few feet of Second Lieutenant William T. Jones and Chaplain George E. Bowser and asked Jones whether he "had a command car". The accused "was alone" at the time and "right behind the wheel". He had failed to call for Richardson at the appointed hour, and the latter had accordingly left for the bivouac area at 11:05 p.m. with the convoy (R. 21-23, 26-29, 70, 71, 76-79).

The accused and Second Lieutenant Davis followed in the jeep some time later. They "skirted the end of the barricade" and ran over "the front tent rope that supported the tent that the guards slept in". The tracks left by the jeep were seen by Major Little "the next day" after he had instituted an investigation (R. 18-20, 37-38).

On the morning of that day, which was 26 September 1944, he requested all of the Company Commanders "to make a check on their motor vehicles and determine which ones had been out the night before * * *". At his suggestion, Captain Elmer P. Rohrbacher, the Commander of Company "B" interrogated Corporal Richardson and the accused. The corporal at first denied that he had driven the jeep, but the accused freely admitted that he had gone to Phoenix in the vehicle and stated that "he thought he wouldn't get to go tomorrow so he just decided that he would go tonight". Later Corporal Richardson revealed that he had been the driver during the journey to Phoenix. Upon receiving the report of Captain Rohrbacher, concerning the episode of the previous night, Major Little, "in order to tie up any loose ends" personally questioned the accused and specifically asked him "if he had driven the vehicle at any time during that evening". The accused replied "that he had not". He fixed the hour of his return to the bivouac area as "somewhere in the neighborhood of 11:30 or 12:30 that night" (R. 10, 12, 15-16, 35-37, 40-41).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. His testimony and that of the other witnesses for the defense clearly corroborated the prosecution's evidence concerning his trip to Phoenix in contravention of standing orders. The only disputed factual issue was whether he personally had driven the jeep at any time during the night of 25-26 September 1943 (R. 62).

After entering Phoenix, Corporal Richardson had brought the vehicle to a stop in front of the USO Club at about 8:30 p.m. Both he and Lieutenant Davis "got out". The accused informed the Corporal that, "I will be back here approximately 11:00 o'clock. If I am not here you go ahead and catch the convoy". With this assurance the Corporal entered the Club. Lieutenant Davis, after arranging to meet the accused later at the Elk's Club, went to visit a friend for about "fifteen or so minutes". After the departure of his companions, the accused approached Private Curtis Brown, a licensed driver who was standing in front of the USO Club, and requested him to chauffeur the jeep. Brown "obeyed his orders and taken him across town" to the Elk's Club. On the way at about 9:00 p.m. while Brown was at the wheel, the accused saw Lieutenant Jones and had the vehicle "pulled aside" to carry on a conversation with him (R. 53-56, 58-59, 61, 63-65).

Private Brown waited for the accused and Lieutenant Davis outside the Elk's Club. When they joined him about 11:00 p.m., he proceeded to drive back to the bivouac area along the "main highway". They travelled at a "normal speed" of about twenty-five miles per hour. When Brown reached the barricade, he stopped momentarily and then "drove around it". No one made any effort to halt them. They arrived at the bivouac area between 12:30 or 1:30 a.m. All of the driving was done by Brown, none by the accused or Lieutenant Davis. From the moment he seated himself behind the wheel to the time of his return to the bivouac area Brown never left the jeep. There was "no chance" for anyone else to drive (R. 54-59, 61-63).

5. Specification 1 of Charge I alleges that the accused did "on or about 26 September 1943 with intent to deceive Major William W. Little, his commanding officer, officially state to the said Major Little, that he did not drive a $\frac{1}{2}$ ton 4x4 truck on the night of 25 September 1943, which statement was known by the said [accused] to be untrue". Specification 1 of Charge II alleges that the accused "having received a lawful order from Lieutenant Colonel Duncan Hallock, his superior officer, that officers would not drive government vehicles did at Phoenix, Arizona, on or about 25 September 1943, fail to obey the same".

While the defense adduced some testimony to the effect that the accused did not himself drive the jeep on the night of 25-26 September 1943, the evidence to which the court gave credibility was to the contrary. The court had the witnesses before it and, in the exercise of its prerogatives, chose to disbelieve Private Curtis Brown. His account of the events of the evening contained a noteworthy discrepancy as to time. It was his contention that he and the accused saw Lieutenant Jones at about 9:00 p.m. Both Lieutenant Jones and Chaplain Bowser, however, placed the meeting at a much later hour. What is even more significant, Lieutenant Jones was positive that the accused was the only occupant of the jeep. Although not equally certain, Chaplain Bowser's recollection was to the same effect. In the light of this testimony the court was fully justified in concluding that, while Brown may have performed the duties of a chauffeur during the evening, he was not continuously at the steering wheel during the period between his meeting with the accused in front of the USO Club and their return to the bivouac area. At least during his conversation with Lieutenant Jones, the accused operated the jeep personally. In so doing he clearly contravened the standing orders of his organization forbidding the driving of government vehicles by officers for private purposes. His disobedience was a violation of Article of War 96. It follows that his statement to Major Little that he had not driven the jeep was false. Since it was made to a superior officer acting in an official capacity, it constituted conduct unbecoming an officer and a gentleman within the meaning of Article of War 95 (par. 151, M.C.M., 1928).

6. The accused is about 24 years of age. The records of the War Department show that the accused had enlisted service from 27 February 1942 to 15 September 1942; that he was commissioned a second lieutenant on 16 September 1942; and that he has been on active duty as an officer since the last date.

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

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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SPJGN
CM 258544

1st Ind.

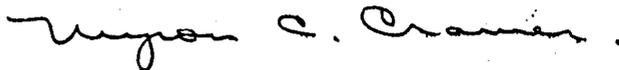
War Department, J.A.G.O., **18 JUL 1944** - To the Secretary of War.

1. Herewith transmitted for the action of the President are the records of trial and the opinions of the Boards of Review in two cases involving Second Lieutenant Benjamin Holmes (O-1103696), 317th Engineer Combat 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 and ordered executed.

3. Subsequent to the offenses involved in the present case the accused was tried by a general court-martial and found guilty of absenting himself without leave from his duty as duty officer at Fort Huachuca, Arizona, in violation of Article of War 61; and of committing an assault and battery upon a fellow officer, in violation of Article of War 96. The accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The record of trial in the second case (CM 258372) has been examined by the Board of Review and I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence. If the sentence in the present case is confirmed, the action of the President in the other case will be unnecessary. In order, however, that the full record of the accused's misconduct may be before the President, both records of trial and both opinions by the Boards of Review are transmitted herewith.

4. Inclosed herewith are a draft of a letter for your signature transmitting the records in both cases 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,
Major General,
The Judge Advocate General.

4 Incls.

- Incl 1 - Record of trial
- Incl 2 - Record of trial
- Incl 3 - Dft. of ltr. for
sig. Sec. of War
- Incl 4 - Form of Executive
action.

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

SPJGQ
CM 258549

12 JUL 1944

U N I T E D S T A T E S	)	92ND INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Huachuca, Arizona, 9
Second Lieutenant STERLING	)	June 1944. Dismissal.
EASLEY (O-1318291), Infantry.)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Sterling Easley, 365th Infantry, did, at Fort Huachuca, Arizona, on or about 31 March 1944, with intent to deceive, officially state in writing to the Finance Officer, Ninety-Second Infantry Division that he had not previously signed a pay voucher or any portion thereof, which statement was known by said Second Lieutenant Sterling Easley to be untrue in that two vouchers covering the same period named by the accused in his written statement were in the said Finance Officer's, Ninety-Second Infantry Division, possession at the time.

He pleaded not guilty to, but was found guilty of, both the Specification and the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

On or about 28 April 1944 two pay and allowance account vouchers (WD Form 336-Revised) signed by accused were submitted to Lieutenant Colonel Thomas S. Gasiorowski, disbursing officer for the

92nd Infantry Division (R. 7). One of these vouchers was for the period of 1 to 29 February 1944 (R. 7, Ex. A), and the other was for the period of 1 to 31 March 1944 (R. 7, Ex. B). Colonel Gasiorowski returned both vouchers to the Personnel Officer "because I knew the officer (accused) was AWOL during the periods", and no days of absence without leave were shown on either of the vouchers (R. 7, Ex. A, B). "They (the vouchers) were returned to the Personnel Officer, to have the officer concerned, Lt. Easley, enter on his pay voucher the time lost for AWOL" (R. 9). These same two vouchers, unchanged and without any correction having been made on either of them (R. 9), were returned to Colonel Gasiorowski's office on or about 4 May 1944 (R. 8, 9). On or about the same date, still another pay and allowance account voucher signed by accused, covering the period of 1 February 1944 to 31 March 1944, also reached Colonel Gasiorowski's office (R. 8, Ex. C). There was attached to this latter voucher a certificate signed by accused, in substance as follows (R. 8, Ex. C):

"I have not previously signed a pay voucher covering the period stated in this voucher or any portion thereof.

"If such voucher was presented to another disbursing officer it was withdrawn personally by me and has been destroyed, or I received or requested a partial payment in the amount of \$ none."

A similar certificate had likewise been attached to the voucher originally submitted for February (Ex. A).

When this third voucher, covering both February and March, arrived in his office, together with the other two vouchers for February and March, Colonel Gasiorowski returned all three of them to the Personnel Officer because, as he stated, "I knew they weren't correct" (R. 9). He did not at any time personally discuss the vouchers with accused (R. 10), nor did he know whether, when they were originally returned to the Personnel Officer for correction, the Personnel Officer turned the first two vouchers in question over to accused before returning them to the finance office (R. 9). The pay and allowance accounts of officers were ordinarily handled by Sergeant Harris and only came to the attention of Colonel Gasiorowski when something unusual came up (R. 9, 10).

4. Evidence for the Defense:

Sergeant Alvin Harris, Headquarters 92nd Division, Finance Section, was the first witness called by the defense (R. 10). The handling of accused's pay card was a part of his (Harris') duties (R. 10, 11). On 28 April 1944 accused was in the Finance Office inquiring about his pay vouchers, upon which he had not received pay (R. 10). Harris told accused at the time that his vouchers had been returned for corrections; that the Finance Office had received an order stating that he had been AWOL, and that it would have to be shown on his voucher before he could be paid (R. 11). He explained to accused that it would be necessary for him to make the correction before his voucher would be a "bona fide voucher" (R. 11). Accused inquired of Sergeant Harris about his vouchers upon two or three occasions, and upon one of these occasions was accompanied by another officer (R. 11). The Finance Office sent the two vouchers which

accused originally presented for the months of February and March (Exs. A, B) to the 370th Infantry (accused's organization at the time of their original presentation) for correction when they were originally returned for that purpose (R. 11). Sergeant Harris did not know whether accused had knowledge that these vouchers had been thereafter returned to the Finance Office without correction (R. 11).

Second Lieutenant Reuben Johnson and accused went to the Finance Office together on or about 28 April 1944 to inquire about their pay (R. 13). They had submitted their vouchers at about the same time, around 31 March 1944 (R. 14), but neither had been paid. They were both informed by a Sergeant at the Finance Office that their pay vouchers had been withdrawn (R. 13, 14, 15) or "taken up" (R. 14) by Lieutenant Sullivan, Personnel Officer of the 370th Infantry (R. 13). Lieutenant Sullivan, according to the Sergeant, "was going to look up something about some dates on them". "He (the Sergeant) said Lieutenant Sullivan wasn't sure about some dates he wanted to put on them - dates of AWOL" (R. 15). Lieutenant Johnson did not thereafter see Lieutenant Sullivan (R. 15) nor was his pay voucher ever returned to or destroyed by him (R. 13, 14). He prepared and signed a new pay and allowance account voucher (R. 13) and had not had any trouble with his pay vouchers since that time (R. 14).

Having had his rights explained to him the accused elected to be sworn as a witness in his own behalf. His present organization is Company M, 365th Infantry (R. 16). He was transferred from the 370th Infantry to the 365th Infantry on 28 April 1944 (R. 17). He has not been paid for the months of February and March 1944, nor in fact since the month of January 1944 (R. 17). While still on duty with the 370th Infantry, accused submitted separate vouchers for the months of February and March, submitting both at the same time (date of submission not shown) (R. 17). In the latter part of April he went to the Finance Office to check up. He was there informed by Sergeant Harris that his pay vouchers had been withdrawn for correction by Lieutenant Sullivan of the 370th Infantry (R. 17). He attempted to call Lieutenant Sullivan but was unable to reach him by telephone (R. 17). Having been informed that his vouchers had been withdrawn by Lieutenant Sullivan, accused did not know where they were after he was transferred to the 365th Infantry (R. 17, 18). He had no reason to believe that they were in the Finance Office (R. 18). After being transferred to the 365th Infantry on 28 April, accused waited until around 7 May, at which time he went to the Personnel Office, where a clerk prepared one pay voucher covering both February and March (R. 18). Accused, personally, took it to the Finance Office (R. 18). He did not type anyone of the three vouchers (R. 18).

On cross-examination accused admitted that he knew the contents of the certificate attached to the last voucher prepared for him and hereinabove set out (Ex. C) at the time he signed it (R. 18). He did not, at any time, after the submission of the first two pay vouchers

(Exs. A, B), know they were being held by the Finance Office (R. 19). He made no further effort to get the first two vouchers (Exs. A, B), after being informed by Sergeant Harris that they had been returned to the 370th Infantry, than his unsuccessful effort to call Lieutenant Sullivan (R. 19). He did not see the first two vouchers and therefore did not destroy them before signing the third voucher and certificate (R. 19).

During examination by the court, accused admitted that he was "fully aware" that unless he personally destroyed his original two vouchers his third voucher was a double claim for the same pay (R. 19). He added, however, "but I would like to say this; on maneuvers I submitted pay vouchers for the same month, and after they had gone to the Finance Office they came back without that statement on them, because it wasn't put on there and I wasn't paid when that voucher was destroyed because that statement was on there" (R. 9). In response to the following question: "You are claiming pay for the full period of two months; did anything transpire in those two months that wouldn't entitle you to full pay?" Accused replied: "Nothing has been proven that wouldn't entitle me to full pay" (R. 20). He had been informed at the Finance Office that his pay vouchers had been withdrawn by Lieutenant Sullivan for certain corrections but he nevertheless submitted the third pay voucher (Ex. C) for the same amount of money as had been claimed in the original two vouchers which had been rejected (R. 20). He "wasn't informed of the corrections by Lieutenant Sullivan, because I haven't seen him since he withdrew my pay voucher" (R. 20). The 365th Infantry and the 370th Infantry were both at Fort Huachuca, within a few blocks of each other (R. 20, 21). While he had gone to the 370th Infantry area since being transferred to the 365th Infantry, accused did not have time to go there during duty hours, and had never gone to Headquarters of the 370th Infantry for the purpose of ascertaining why his pay vouchers had not been paid (R. 21). He was not informed at the Finance Office as to the exact reason Lieutenant Sullivan had withdrawn his pay vouchers (R. 21). A captain (name unknown) told him that he did not know the reason, but that he could talk to the colonel (R. 21). He did not talk to the colonel and did not inquire whether the colonel was present or not (R. 22). He wanted to see the colonel but made no effort to ascertain whether or not he was present because he "didn't have that much time on hand" (R. 22). The manner of presenting pay vouchers, that is, whether they were carried to the Finance Office by the person in whose favor they were drawn or sent through his Regimental Personnel Section, varied at different posts (R. 22). When he had been in the 93rd Division he had personally carried his vouchers to the Division Finance Office (R. 22).

5. The Specification of the Charge is clumsily drawn but was not attacked at the trial. It does not appear from the record that accused was in doubt as to the offense with which he was charged, or that he was in any manner misled or that any of his substantial rights were injuriously affected by the inartificial pleading. The Specification is therefore held to be sufficient to support the finding of guilty predicated upon it (A.W. 37).

The evidence is without substantial conflict. At some unfixed date prior to 28 April 1944 accused signed and presented, or caused to be presented, to the Finance Officer of the 92nd Infantry Division for allowance and payment, two pay and allowance accounts, one for the entire month of February and the other for the entire month of March, 1944. He thereafter, sometime around the 4th to the 7th of May 1944, signed and personally presented to the Finance Office of the 92nd Infantry Division, for allowance and payment by the same Finance Officer, still another pay and allowance account covering the period of 1 February to 31 March 1944, inclusive. In connection with, and as a part of this last mentioned voucher, he signed, attached, and presented a certificate, containing among other provisions the following: "I have not previously signed a pay voucher covering the period stated in this voucher or any portion thereof". This portion of the certificate was, of course, false and was known by accused to be false. Accused was not, and does not claim to have been, ignorant of the fact, nor does he claim to have forgotten, that he had already signed two vouchers which, together, covered the identical period of time covered by this third voucher. Only a few days before signing and presenting this third voucher he had gone to the Finance Office and inquired about the two other vouchers. Furthermore, accused admitted from the witness stand that he was cognizant of the contents of the certificate in question at the time he signed it.

The only defensive theory suggested by the evidence is that the offense alleged was not committed because accused had been advised at the Finance Office, before signing and presenting the third voucher and the certificate now under discussion, that the first two vouchers presented by him had been withdrawn by, or returned to, the Personnel Officer of the 370th Infantry for correction. This circumstance does not alter the fact that the above quoted portion of the certificate in question was false; and was known by accused to be false at the time he signed the certificate. If it raises any defensive issue, it can only be the question of whether or not the accused made the false statement "with intent to deceive" the Finance Officer. The only logical conclusion is that he did so intend. He knew that the certificate was required as a prerequisite to allowance and payment of his voucher, and must be held accountable for knowing that the Finance Officer would, and for intending that he should, rely upon it in the event he did allow and pay the claim. Since he knowingly made the false statement with the intent that the Finance Officer should rely upon it as being the truth, it seems necessarily to follow that he did intend to practice deceit. The ultimate end to be gained by this deceit is of no moment. In other words, it is immaterial whether accused intended or hoped ultimately to collect twice for the same period of time, or whether he hoped to collect in full for February and March without suffering any deductions, or whether he merely wanted to expedite collections of money claimed to be due him without the necessity of pursuing the original two vouchers, further, or whether he was actuated by some other undisclosed motive. He did intend that, in reliance upon the certificate, the Finance Officer should allow and pay the voucher to which it was attached. Nor does it make any difference that the Finance Officer discovered the falsity of the certificate before acting upon it.

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

(75)

SPJGV
CM 258550

12 JUL 1944

UNITED STATES)

SECOND AIR FORCE

v.)

Second Lieutenant HAROLD
B. SHROYER (O-579221),
Air Corps.)

Trial by G.C.M., convened at
Topeka Army Air Field, Topeka,
Kansas, 31 May 1944. Dismissal,
total forfeitures and confine-
ment for one (1) year.

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Harold B. Shroyer, Air Corps, 272nd Army Air Force Base Unit (Staging Base), Section A-1, was, at Kansas City, Missouri, on or about 2 May 1944, in a public place, to wit, the State Hotel, drunk and disorderly while in uniform.

Specification 2: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Harold B. Shroyer, * * *, did, at Topeka Army Air Field, Topeka, Kansas, on or about 8 May 1944, feloniously take, steal, and carry away about \$350.00, lawful money of the United States, the property of Second Lieutenant John A. Sica, Air Corps, 272nd Army Air Force Base Unit (Staging Base), Section A-1.

Specification 2: In that Second Lieutenant Harold B. Shroyer, * * *, did, at Topeka Army Air Field, Topeka, Kansas, on or about 10 May 1944, feloniously take, steal, and carry away about \$30.00, lawful money of the United States, the property of First Lieutenant Ellis H. Moke, Air Corps, 272nd Army Air Force Base Unit (Staging Base), Section A-1.

The accused pleaded not guilty to all Charges and Specifications and was found guilty of Specification 1, Charge I, not guilty of Specification 2, Charge I; not guilty of Charge I but guilty of a violation of the 96th Article of War, and guilty of Charge II and its two Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In support of Specification 1 of Charge I the prosecution introduced evidence demonstrating that about 1 a.m. on the morning of 2 May 1944, accused, wearing his uniform and insignia of grade, emerged from the bar of the State Hotel, Kansas City, Missouri, entered the hotel lobby, proceeded through it a short distance and then commenced to vomit in the presence of a substantial number of hotel guests (R. 7, 12). Luther A. Key, the hotel night clerk, hastened to assist accused to the men's room located in the basement and as they descended the steps accused commenced to vomit again. Apparently accused then refused to proceed further to the basement. He informed the clerk that his room was on the tenth floor and the clerk then sought the assistance of a bellhop to escort accused to his room after requesting accused to remain on the stairway. When the bellhop arrived, accused could not be located. Shortly thereafter the night clerk discovered accused on the mezzanine floor, mounting a flight of four steps which led to a room used for storing hotel supplies (R. 7, 10, 13). While the clerk sought an elevator operator to conduct accused to the room he claimed to be occupying, accused wandered off again, entering an elevator which was not in operation. Finally, accused was taken by elevator to the upper reaches of the hotel but apparently he got off at the ninth floor rather than the tenth (R. 8).

About a half hour later a guest at the hotel informed the night clerk that someone was lying in the hall on the ninth floor of the hotel (R. 10). The clerk investigated and found accused stretched

prone on the floor at the west end of the hall in a small alcove which served as an entrance way to several rooms (R. 8, 23). The clerk attempted to arouse accused by shaking him and striking him in the face with light, stinging blows but his efforts were unavailing (R. 8). He then telephoned the military police and when Captain Wayne F. Kennedy, provost marshal of Kansas City, and a sergeant arrived some ten minutes later, the clerk escorted them to the ninth floor where accused in full uniform was still recumbent upon the floor of the alcove with hands folded across his body and his hat resting on his chest (R. 8, 11, 22, 23). Captain Kennedy shook accused and raised him to his feet and apparently accused then partly recovered consciousness (R. 8, 23). Accused stated he was registered in room 1004 and when asked for his AGO card drew from his pocket a hotel room key belonging to Muehlebach Hotel in Kansas City (R. 11, 12). Accused had the odor of alcohol about him and, in the opinion of Captain Kennedy, he was very drunk (R. 8, 23). He was assisted to the elevator, staggering as he walked, was taken to the lobby and then escorted from the hotel (R. 12, 23). Accused was not registered at State Hotel but had apparently engaged a room the previous day at the Muehlebach Hotel (R. 11, 14, 15).

In support of Specifications 1 and 2 of Charge II the prosecution introduced evidence to show that about 4 p.m., 7 May 1944, accused, Second Lieutenant John A. Sica and an orderly were present in Lieutenant Sica's room in the officers' barracks at Topeka Army Air Field. Preparing to take a shower, Lieutenant Sica removed his trousers in which he had his billfold and hung them in a clothes press. In his billfold he had \$350 in cash, his AGO card, driver's license, car registration and some gasoline ration coupons. When Lieutenant Sica left to shower, accused and the orderly were in the room but apparently departed before he returned. Upon his return, Lieutenant Sica removed his trousers from the clothes press, noticed that the pocket in which he kept his billfold was unbuttoned and discovered that the billfold was missing. He telephoned accused and the officer of the day and thereafter the orderly was searched as were his quarters but the billfold and its contents were not found (R. 30, 51). Although accused and Lieutenant Sica had been wont to borrow money one from the other in the past, the latter had not given accused permission to take his wallet or its contents on this day (R. 34, 36). The following day accused denied he had taken the billfold when questioned by Lieutenant Sica (R. 35).

On 10 May 1944, First Lieutenant Ellis H. Moke was given \$50 in cash by a Captain McVay and Captain Otto H. Schmiemann,

assistant provost marshal, and on the following day was given an additional \$350 in cash by Captain Schmiemann and Captain Prescott H. Manning, Base Intelligence Officer. These funds had been obtained from the Officers' Mess, the three captains had made a list of the serial numbers appearing on the bills and had dusted them with anthracene powder, a substance visible on the bills or other objects only under ultra violet rays. These bills were placed in Lieutenant Moke's wallet (R. 38, 39, 44, 50, 51; Pros. Ex. E). About 2:30 p.m. on 11 May Lieutenant Moke left his wallet containing the \$400 in a pocket of a shirt hanging in his room in the officers' barracks and thereafter departed with accused and Lieutenant Sica, driving accused to his office while the other two officers proceeded to the gymnasium for exercise (R. 39). Prior to leaving his quarters, Lieutenant Moke had phoned Captain Manning to inform him of his departure. Captain Manning and Captain Schmiemann had then proceeded to the Officers' Mess, had observed accused and the other two officers leave the barracks and thereafter entered the barracks and occupied a room directly across from Lieutenant Moke's quarters. About 4:30 p.m. that day they heard someone enter the barracks, mount the stairs and enter Lieutenant Moke's room. The rattle of clothes hangers was heard and then the visitor departed. Captain Schmiemann followed the visitor down the hall, looked from a window and observed accused leaving the barracks and making his way to the Officers' Club. Captain Manning entered Lieutenant Moke's room, removed the wallet from the shirt and, upon examination by Captain Schmiemann and him, found \$30 to be missing therefrom (R. 44, 45, 51, 52). Although Lieutenant Moke and accused had been accustomed to borrow money one from the other from time to time, the former had not given accused permission to take anything from his wallet on this day or at any other time. Lieutenant Moke then owed accused \$50 but the previous day he had offered to pay it to him. However, accused said it was unnecessary as he was about to cash a check to obtain funds (R. 41-43).

After the foregoing episode, Captain Manning and Captain Schmiemann proceeded to the Officers' Club and requested accused to accompany them to Captain Manning's office. There he was asked to empty his pockets and an examination of his wallet revealed three money order receipts, each for \$100 dated 8 May 1944, and two bills, one for \$10 and the other for \$20, which bore, respectively, the serial numbers J24937431A and J14657962A. They were two of the bills which Captain Manning had placed in Lieutenant Moke's wallet after first noting their serial numbers (R. 45, 49, 52, 53; Pros. Exs. E, F, G). Accused was then questioned without first being warned of his rights. At first he denied taking the \$30 from Lieutenant Moke's wallet but thereafter admitted he had done so. He

denied, however, that he had taken the money stolen from Lieutenant Sica on 7 May. After accused admitted taking the \$30 he was warned that anything he might say could be used against him (R. 45, 46, 52). On this same day, but whether before or after the foregoing events is not apparent on the record, accused asked Lieutenant Sica to come to his quarters where he told Lieutenant Sica that he had taken his billfold containing \$350 on 7 May. The lieutenant thought he had \$360 in his wallet at the time but accused insisted the amount was \$350, saying, "I ought to know, I took it" (R. 31, 32). Accused further stated he had thrown the wallet in the roadway near the nurses' quarters hoping someone would discover it and return it to the owner. Accused gave Lieutenant Sica a check for \$250, returned five or six gasoline ration coupons and proceeded to discuss an arrangement to pay back the balance that had been taken (R. 31-33).

The following day, 12 May, Captain Manning and Captain Schmiemann again questioned accused but he still denied he had taken Lieutenant Sica's billfold and money, although he had already admitted it to his victim. On 13 May, Captain Manning questioned him again telling him that a number of people on the base believed he was the culprit and that if he told the truth more would be thought of him than if he continued to lie. Accused then confessed saying, "* * *, Captain Manning, I haven't been fooling you for one minute. You knew that I took Lieutenant Sica's money" (R. 46). Accused then stated he took the billfold, and threw it on the gravel road near the base hospital after first removing the money. He stated he planned to repay Lieutenant Sica partly by check and partly by assigning to him \$50 owed accused by Lieutenant Moke (R. 46). Accused further stated that a portion of the money taken from Lieutenant Sica had been used to purchase the three money orders totaling \$300 which he had sent to his father and mother (R. 47).

4. The accused elected to remain silent after his rights had been fully explained to him, and no evidence was introduced by the defense.

5. At the close of the prosecution's case, the defense addressed several motions to the court. The only one warranting consideration is the motion that Specifications 1 and 2 of Charge II be dismissed on the grounds that material evidence had been obtained illegally and accused had been ordered to hand over evidence which would tend to incriminate him. To raise the issue properly the defense should have moved that

certain evidence be stricken from the record as inadmissible. However, the substance of the motion will be considered as if it were in proper form. The motion raises three questions. First, whether the accused was subjected to an unreasonable search of his person in violation of the Fourth Amendment to the Constitution, second, whether he was compelled to be a witness against himself and to incriminate himself in violation of Article of War 24 and the Fifth Amendment, and third, whether the defense of entrapment bars prosecution of accused under Specification 2 of Charge II.

The first question can be disposed of on the facts. Accused's person was not searched by Captain Manning and Captain Schmiemann. He was merely requested to empty his pockets of his effects and he did so voluntarily. When an individual consents to a search no question of unreasonable search under the Fourth Amendment arises (Cantrell v. United States, 15 Fed. (2d) 953, cer. den. (1927) 273 U.S. 768; USCA, Const. Amend. 4 sec. 124). The prohibition against self incrimination and compelling an individual to give evidence against himself is a prohibition against the use of physical or moral compulsion to extort communications from a suspect. It does not prohibit the use of compulsion to obtain an exhibition of the suspect's body or an examination of his clothing which indeed may be removed by force (MCM, 1928, par. 122b). Similarly, in the opinion of the Board of Review, it does not prohibit an examination of the contents of the pockets of his clothing. Finally, the defense of entrapment is inapplicable. A trap was set merely to catch accused in the perpetration of a crime conceived and executed by him. "The mere setting of a trap to detect the perpetration of a crime is not a defense if the crime is conceived by the accused and not suggested by the police agent. Guilty intent to commit a crime being formed, any person may furnish opportunity, or even lend assistance to the criminal, for the purpose of detection and punishment" (1 Bull. JAG 360). Accordingly, the motion of the defense was properly denied.

Accused's drunken conduct in the State Hotel on 2 May 1944 was conduct of a nature to bring discredit upon the military service in violation of Article of War 96. The evidence sustains the finding of guilty of Specification 1, Charge I. The prosecution's evidence and the accused's two voluntary confessions, one to Lieutenant Sica and one to Captain Manning, fully sustain the finding of guilty of Specification 1, Charge II. The prosecution's evidence showing accused's visit to Lieutenant Moke's quarters in the absence of its occupant and his unauthorized possession immediately thereafter of

two of the marked bills which had been placed in Lieutenant Moke's wallet conclusively sustains the finding of guilty of Specification 2, Charge II.

6. Accused is about 23 years of age and a high school graduate. He enlisted in the service on 29 January 1941 and was commissioned a second lieutenant on 16 April 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violations of Articles of War 93 and 96.

(On leave)

, Judge Advocate.

Robert B. Harwood

, Judge Advocate.

Robert C. Trevittan

, Judge Advocate.

SPJGV
CM 258550

1st Ind.

War Department, J.A.G.O.,

20 JUL 1944

- To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harold B. Shroyer (O-579221), 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, legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was found guilty of being drunk and disorderly while in uniform in a public place in violation of Article of War 96, and of the theft of \$350 and the theft of \$30 on separate occasions from two different officers in violation of Article of War 93. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



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

- 3 Incls.
Incl.1-Record of trial.
Incl.2-Dft ltr for sig S/W.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 478, 1 Sep 1944)

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

(83)

SPJGH
CM 258712

2 AUG 1944

UNITED STATES)

v.)

Second Lieutenant ANDREW L.)
FARRIS (O-1171997), Field)
Artillery.)

92ND INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Huachuca, Arizona, 28
April and 16 June 1944. Dis-
missal, total forfeitures and
confinement for five (5)
years.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Andrew L. Farris, Battery "B" 599th Field Artillery Battalion, having received a lawful command from Captain Jack D. Hays, Battery Commander, Battery "B" 599th Field Artillery Battalion, to report to the Battery Area at 0600 4 December 1943, the said Captain Hays being in the execution of his office, did, at Fort Huachuca, Arizona, on or about 4 December 1943, fail to obey the same.

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

Specification: In that 2d Lieutenant Andrew L. Farris, Field Artillery, then 599th Field Artillery Battalion, on detached service with Director Headquarters, Fourth Army, Louisiana Maneuver Area, Leesville, Louisiana, did without proper leave, absent himself from his station and duties near Leesville, Louisiana, from about 0700 April 3, 1944, to about 1200 April 6th 1944.

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

Specification 1: (Finding of not guilty).

Specification 2: In that 2d Lieutenant Andrew L. Farris, Field Artillery, then 599th Field Artillery Battalion on detached service with Director Headquarters, Fourth Army, Louisiana Maneuver Area, Leesville, Louisiana, did, at Lake Charles, Louisiana, on or about April 3rd, 1944, knowingly and without proper authority, use and drive a one half ton Command Car, U.S.A. Registration No. 207037, property of the United States furnished for the military service thereof.

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 1, Additional Charge II, guilty of Specification 2, Additional Charge II, except the words "U.S.A. Registration No. 207037", and guilty of all other Specifications and of all Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in pertinent part is summarized as follows:

a. Specification, the Charge: Captain Jack D. H. Hays, 599th Field Artillery Battalion, Fort Huachuca, Arizona, testified that on 3 December 1943, he thought in the afternoon, accused entered the day room of the battery. As Captain Hays recalled it, accused had returned to the battery from the hospital. He told accused there was nothing further for the afternoon, but that he was to report to the battery the next morning, when they were to leave for "D" series exercises. They were scheduled to leave at about 7:00 or 7:30 a.m. and, as Captain Hays recalled it, he told accused to report at six o'clock. The next morning accused was not present at six o'clock, nor was he present at 6:45 or 7:00 a.m. when the battery went to the motor park. Captain Hays did not see accused again until later in the day when they reached the maneuver area. First Lieutenant Elvy F. Whitlock saw accused in the orderly room at about 7:15 a.m. when Lieutenant Whitlock was making a "last minute check" of the barracks. Accused was looking for his bed roll. On cross-examination and examination by the court, Captain Hays stated that accused had been in the hospital, that accused told him on 3 December that he would have to return to the hospital after they were in the field, and that accused returned to the hospital in about two days. Captain Hays did not know what the sick book showed as to the status of accused, but it was his "impression" that accused had reported back for duty (R. 12-17).

b. Specification, Additional Charge I, and Specification 2, Additional Charge II: Captain John L. West testified by deposition (Ex. A) that from 10 March to 6 April 1944 he was Chief Fire Marking Umpire, Director Headquarters, Fourth Army, Leesville, Louisiana. Accused was a fire marker

under him, and had been issued a one-half ton command-reconnaissance car and other equipment. About the middle of March a memorandum was sent to artillery battalion commanders directing that during "breaks" all fire marking umpires should return to their units. Captain West testified that any officer not returning to his unit "during the breaks between phases was A.W.O.L. unless he had a pass from Director Headquarters showing either a request for car or radio repair". He held a fire markers' meeting, at which accused was present, and advised them of these requirements. About the end of March, Captain West held another meeting, at which accused was present, and told the markers how to "process" their vehicles at the end of the maneuver period ending at 7:00 a.m. on 3 April. He testified that accused was absent without leave from 7:00 a.m. on 3 April through 5 April 1944. At about 10:00 a.m. on 5 April Captain West called the organization of accused and was advised that accused had not returned. Officers were permitted to use Government vehicles in the discharge of their duties, but were instructed not to use them for their personal affairs or while not on duty (R. 17).

First Lieutenant Arthur D. Hathaway testified by deposition (Ex. B) that from 10 March to 6 April 1944 he was Assistant Artillery Officer, Fourth Army Director Headquarters, that accused was an artillery umpire attached to his section, and that a memorandum issued to the umpires stated that leaves during rest periods would be issued only by the Artillery Officer, Director Headquarters. Lieutenant Hathaway stated that, prior to the end of maneuvers at 7:00 a.m. on 3 April, accused received a copy of written instructions that all umpires would return immediately to Director Headquarters at the close of maneuvers and remain there until given clearance for property issued them. Lieutenant Hathaway remained at headquarters until 10:00 a.m. on 6 April without "ever making contact" with accused, and stated that accused was absent without leave from 7:00 a.m. on 3 April. All umpires reported in and turned in their equipment on the day maneuvers ended except accused and one other. From 3 to 6 April, Lieutenant Hathaway "contacted" the unit of accused daily, and checked several times daily with the "Director Hq-Provost Martial" for information as to the whereabouts of accused (R. 17).

Captain Clement R. Steele, Assistant Division Ordnance Officer, 92nd Division, was in charge of processing vehicles during and at the conclusion of the maneuvers. A one-half ton truck that was on memorandum receipt signed by accused was turned over to Captain Steele on 6 April by military police (R. 19-20; Ex. D).

4. The defense introduced evidence as to the Charge only, as follows:

Captain L. C. Wormley, Medical Corps, performed an operation on accused at the station hospital, Fort Huachuca, about September 1943 or later. The testes of accused had drawn up from the scrotum as a result of a hernia operation at another station, and Captain Wormley operated to correct that

condition. After the first stage of the operation accused was permitted to walk around and left the hospital. He returned to the hospital on 3 December 1943 for the second phase of the operation, but as no beds were available in the officers' ward he was told to come back the following Monday. At this time accused was not able to perform full duty, as he had "an attachment of his scrotum to his thigh, where the testes was transplanted into the thigh". He did not have full use of his legs, but could walk with one leg stiff. It was stipulated that "Lt" R. O. Weathers would testify that accused was given a choice of "quarters or field" and that he elected to go in the field because he could secure adequate mess facilities and "other attentions" (R. 26, 35-38).

Accused testified that he reported at Fort Huachuca from a convalescent leave on 3 December 1943. His left testicle had been transplanted to his left leg, and he was to have another operation performed. When he went to the hospital, Captain Wormley did not have a bed available, so gave him a note to the battalion surgeon stating that if accused went to the field with his organization he was to report back to the hospital on 6 December. Accused took the note to the battalion surgeon, Lieutenant Weathers, who advised him that he was not able to perform duty, and could either remain in quarters or go to the field with the organization until his return to the hospital. Since the entire division was moving out, accused chose to go with his organization, as otherwise he would have to buy food "some other place". Accused explained the situation to Captain Hays on the evening of 3 December, and the latter said "O.K." and "There is nothing else for you to do around here, so if you have any personal business to attend to, do so". Captain Hays stated that the organization would leave the next morning between seven and seven-thirty and, when accused said he would report then, replied "O.K.". He received no other instructions to report. Accused reported between 7:00 and 7:15 a.m. on 4 December, found that his bed-roll had not been "taken down", and went to the orderly room to look for it. Accused went to the field with his battery, and next saw Captain Hays at about 2:00 p.m. on 4 December (R. 27-33).

Lieutenant Colonel Thilo M. Baumgartner, 599th Field Artillery, recommended that accused be punished under the 104th Article of War for failing to report at the properly appointed time on 4 December (R.22-24).

5. Captain Hays, recalled as a witness for the court, identified the sick book of Battery B, 599th Field Artillery Battalion, and found no entry as to accused from 2 to 7 December. It was stipulated that accused was on duty as of 3 December (R.33-34).

6. a. Specification, the Charge: About September 1943 accused underwent an operation at the station hospital, Fort Huachuca, and one of his testicles was attached to his thigh until a second phase of the operation could be performed. He was given a convalescent leave and upon his return on 3 December reported at the hospital for the operation to be completed.

As no beds were available he was sent to his organization, which was going to the field the next morning at seven or seven-thirty. Accused was given his choice of remaining in quarters or going with his organization until 6 December when he was to report back to the hospital. He elected to go with the organization.

When accused reported to Captain Jack D. Hays, his battery commander, on 3 December and explained the situation, he was told, according to accused, that it would be satisfactory for him to report the next morning by the time the battery was to leave, between seven and seven-thirty. As Captain Hays recalled it, he told accused to report at 6:00 a.m., but he was not positive in his recollection. Accused reported between 7:00 and 7:15 a.m. on 4 December and went to the field with the battery.

It appears to the Board that the evidence does not sustain the finding of guilty of this Specification beyond reasonable doubt. Accused was not in physical condition to perform full duty, but was going with his battery at his own choice during the period when he was waiting to return to the hospital. Under the circumstances, no reason is observed why accused would have been required to report at 6:00 a.m. along with the officers who were in good physical condition and performing regular duty. Accused testified positively that he was to report between seven and seven-thirty, whereas Captain Hays, testifying more than six months after the event, only "recalled" that he told accused to report at 6:00 a.m. The staff judge advocate reached the same conclusion as the Board does, as shown in his review.

b. Specification 2, Additional Charge II: Between 10 March and 6 April 1944 accused was a fire marker or artillery umpire, under Fourth Army Director Headquarters. A one-half ton command-reconnaissance car was issued to him for his official use. Such vehicles were not to be used for personal affairs or when not on duty. Accused and other umpires were instructed to return all property issued to them, at the end of the maneuver period, 7:00 a.m. on 3 April. Accused did not return the car at that time nor afterward. The assistant division ordnance officer received the vehicle from military police on 6 April.

The Specification of which accused was found guilty alleges that accused did "knowingly and without proper authority, use and drive" the car at Lake Charles, Louisiana, on or about 3 April. There is no competent evidence in the record that accused used and drove the car as alleged. The mere fact that he did not turn it in at the required time does not sustain an inference that he was using the car for his own ends. Excluding from consideration hearsay evidence bearing on this Specification, which has not been summarized in the opinion, the Board concludes that the record is not legally sufficient to sustain the finding of guilty.

c. Specification, Additional Charge I: Between 10 March and 6 April 1944, accused was a fire marker or artillery umpire in the Louisiana maneuver area, under Fourth Army Director Headquarters. Accused and other umpires were advised that during "breaks" between phases they would return to their units. The current maneuver period ended at 7:00 a.m. on 3 April. The umpires, including accused, were instructed that at the end of the period they would immediately return to Director Headquarters and remain there until given clearance for property issued to them. All leaves during rest periods were issued only by the Artillery Officer, Director Headquarters. The assistant artillery officer, who remained at Director Headquarters until 10:00 a.m. on 6 April was unable to find accused, and accused did not report and turn in the vehicle issued to him at the end of the maneuver period. Both the assistant artillery officer and the Chief Fire Marking Umpire testified that accused was absent without leave from 7:00 a.m. on 3 April.

Although it was not shown that accused had not returned to his own organization except by hearsay evidence, it clearly appears that accused was required to report to Director Headquarters at 7:00 a.m. on 3 April and remain there until he had received clearance for property entrusted to him. Under such circumstances it is immaterial whether or not he returned to his organization, as he had no right to go there until he had cleared Director Headquarters for the rest period. All leaves during the rest period were required to be obtained at that headquarters.

Absence without leave may be inferred from circumstances. Direct proof, though desirable, is not in all cases requisite (CM 126112, Dig. Op. JAG, 1912-40, sec. 419(2)). In the opinion of the Board, the uncontradicted evidence for the prosecution shows beyond reasonable doubt that accused was absent without leave as alleged.

7. a. When the court reconvened on 16 June 1944, after a first session on 28 April, a new trial judge advocate, appointed in the interim, was present as were two members of the court who were not present on 28 April (R. 6). The record does not show that the proceedings at the first session were read to them, nor otherwise made known to them. However, at the session on 28 April the only proceedings were the organization of the court, a part of the arraignment, and the granting of a continuance. No evidence was heard. In the opinion of the Board there was no prejudice to the rights of accused.

b. On 16 June the defense requested an additional continuance on the grounds that they had not had sufficient time to prepare for trial and that two important witnesses for the defense could not be located (R. 6-8). The Additional Charges are dated 11 May 1944, and were served on accused on 14 June. The court did not grant a continuance, but adjourned for two hours and twenty-five minutes in order to give counsel a further opportunity to study the depositions and prepare for trial. One of the absent witnesses later appeared at the trial and testified, and the

testimony of the other was covered by a stipulation. When the court reconvened after the adjournment the defense stated that there were no special pleas nor motions. The Board is of the opinion that the original request for a continuance was waived, and that there was no justifiable reason for further delay under the circumstances.

8. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 6 January 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 22 October 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 insufficient to support the findings of guilty of the Specification, the Charge, of the Charge, of Specification 2, Additional Charge II, and of Additional Charge II; legally sufficient to support the findings of guilty of the Specification, Additional Charge I and of Additional Charge I; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Samuel M. Driver, Judge Advocate.

Robert Plummer, Judge Advocate.

J. H. H. H., Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

15 AUG 1944

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 Andrew L. Farris (O-1171997), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Charge and the Specification thereunder, and of Additional Charge II, and Specification 2 thereunder; legally sufficient to support the findings of guilty of the Specification, Additional Charge I, and of Additional Charge I; and legally sufficient to support the sentence and to warrant confirmation thereof. The accused was absent without leave for about three days (Spec., Add. Chg. I). He was found not guilty of Specification 1, Additional Charge II. The Staff Judge Advocate quotes the Commanding General, 92nd Division Artillery, as stating that accused had been punished three times under the 104th Article of War within eight months prior to 23 January 1944, and that accused was a highly disturbing factor in his organization and the source of constant trouble therein. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for five years be confirmed, that the forfeitures and confinement adjudged be remitted, and that the sentence as thus modified be carried into execution.

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

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

3 Incls.

Incl. 1-Rec. of trial.

Incl. 2-Drft. ltr. for sig.

S/W.

Incl. 3-Form of Action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 494, 12 Sep 1944)

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

(83)

SPJGH
CM 258712

2 AUG 1944

UNITED STATES	)	92ND INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Huachuca, Arizona, 28
Second Lieutenant ANDREW L.	)	April and 16 June 1944. Dis-
FARRIS (O-1171997), Field	)	missal, total forfeitures and
Artillery.	)	confinement for five (5)
	)	years.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Andrew L. Farris, Battery "B" 599th Field Artillery Battalion, having received a lawful command from Captain Jack D. Hays, Battery Commander, Battery "B" 599th Field Artillery Battalion, to report to the Battery Area at 0600 4 December 1943, the said Captain Hays being in the execution of his office, did, at Fort Huachuca, Arizona, on or about 4 December 1943, fail to obey the same.

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

Specification: In that 2d Lieutenant Andrew L. Farris, Field Artillery, then 599th Field Artillery Battalion, on detached service with Director Headquarters, Fourth Army, Louisiana Maneuver Area, Leesville, Louisiana, did without proper leave, absent himself from his station and duties near Leesville, Louisiana, from about 0700 April 3, 1944, to about 1200 April 6th 1944.

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

Specification 1: (Finding of not guilty).

Specification 2: In that 2d Lieutenant Andrew L. Farris, Field Artillery, then 599th Field Artillery Battalion on detached service with Director Headquarters, Fourth Army, Louisiana Maneuver Area, Leesville, Louisiana, did, at Lake Charles, Louisiana, on or about April 3rd, 1944, knowingly and without proper authority, use and drive a one half ton Command Car, U.S.A. Registration No. 207037, property of the United States furnished for the military service thereof.

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 1, Additional Charge II, guilty of Specification 2, Additional Charge II, except the words "U.S.A. Registration No. 207037", and guilty of all other Specifications and of all Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in pertinent part is summarized as follows:

a. Specification, the Charge: Captain Jack D. H. Hays, 599th Field Artillery Battalion, Fort Huachuca, Arizona, testified that on 3 December 1943, he thought in the afternoon, accused entered the day room of the battery. As Captain Hays recalled it, accused had returned to the battery from the hospital. He told accused there was nothing further for the afternoon, but that he was to report to the battery the next morning, when they were to leave for "D" series exercises. They were scheduled to leave at about 7:00 or 7:30 a.m. and, as Captain Hays recalled it, he told accused to report at six o'clock. The next morning accused was not present at six o'clock, nor was he present at 6:45 or 7:00 a.m. when the battery went to the motor park. Captain Hays did not see accused again until later in the day when they reached the maneuver area. First Lieutenant Elvy F. Whitlock saw accused in the orderly room at about 7:15 a.m. when Lieutenant Whitlock was making a "last minute check" of the barracks. Accused was looking for his bed roll. On cross-examination and examination by the court, Captain Hays stated that accused had been in the hospital, that accused told him on 3 December that he would have to return to the hospital after they were in the field, and that accused returned to the hospital in about two days. Captain Hays did not know what the sick book showed as to the status of accused, but it was his "impression" that accused had reported back for duty (R. 12-17).

b. Specification, Additional Charge I, and Specification 2, Additional Charge II: Captain John L. West testified by deposition (Ex. A) that from 10 March to 6 April 1944 he was Chief Fire Marking Umpire, Director Headquarters, Fourth Army, Leesville, Louisiana. Accused was a fire marker

4. Evidence for the Defense:

Having been first advised of his rights, accused elected to be sworn as a witness in his own behalf and testified substantially as follows: On the morning in question he returned to the serving line to secure a second cup of milk to replace some which he had spilled or wasted from his cup. When he first reached for the additional milk the person who was serving struck his hand down, and upon his second effort to get it, called the mess officer (R. 26). When the mess officer was called, accused returned to his table and sat down. The mess officer (Lieutenant Miller) then approached the table and asked accused for his name and dog tags. Accused told him that he had no dog tags. Thereupon Lieutenant Miller placed his foot upon the seat where accused was sitting and looked as if he tried to put it on him (R. 26). He again asked accused for his name but accused refused to divulge it. When Lieutenant Miller persisted, accused walked out because he "did not want to be bothered", but he did not curse the Lieutenant (R. 26). As he walked out of the mess hall the Lieutenant (Miller) grabbed him by the arm and he "snatched loose". When he "snatched loose", the Lieutenant told him, "I have your name and organization, and I will prefer charges against you". Accused "figured" that if he "was going back to the stockade" he "might as well go for something", so he struck Lieutenant Miller (R. 27). Lieutenant Miller called Lieutenant Stoddard, who came up in a threatening manner and appeared to be going to strike or grab hold of accused. Accused did not give Lieutenant Stoddard a chance to hit him, but himself swung at Lieutenant Stoddard (R. 27). He did not hit Lieutenant Stoddard but intended to hit him (R. 27, 28). When he swung at Lieutenant Stoddard the latter raised his foot and kicked him in his left side (R. 27). At this time accused saw Lieutenant Miller standing near by and struck him on the head with his helmet, whereupon a sergeant caught and held accused (R. 27).

Accused is 19 years of age and reached the seventh grade in school. He never worked much before being inducted into the Army, but had "worked around hotels" some (R. 27).

5. All of the elements of the offenses alleged in both Specifications of the Charge are fully established by competent and legal evidence of record. The evidence proves beyond reasonable doubt that accused struck both Lieutenant Miller and Lieutenant Stoddard, the former several times, as, and at the time and in the manner, alleged in the respective Specifications. While testifying at the trial accused admitted that he struck Lieutenant Miller several times, both with his fist and with his helmet liner, and further admitted that he struck at Lieutenant Stoddard with the present intention of actually hitting him. The testimony of Lieutenants Stoddard and Miller, and of Corporal Cavello and Sergeant Thomas leaves no room to doubt that accused effected his intent and purpose and did actually strike Lieutenant Stoddard in the face with his fist. Both Lieutenant Miller and Lieutenant Stoddard were commissioned officers in the Army of the United States, and were in the execution of their respective offices at the time

they were assaulted by accused, a private. Both were endeavoring to maintain order and military discipline, as was their duty to do under the circumstances. The controversy had its inception inside the mess hall while Lieutenant Miller was discharging the duties immediately and specifically incumbent upon him as mess officer. The remarks which accused there addressed to Lieutenant Miller and his conduct in refusing to give his name and organization and in walking away from Lieutenant Miller merely because he "did not want to be bothered" were disrespectful, insubordinate, insulting, and insolent in the extreme, and called for disciplinary measures. Lieutenant Miller would have been derelict in the proper discharge of his duties had he failed to make an effort to detain and identify accused. Likewise, Lieutenant Stoddard would have failed in the proper discharge of his duties had he not gone to the aid of Lieutenant Miller under the circumstances.

The evidence does not raise any defensive issue. On the contrary, it shows that the attack which was made by accused upon these two officers was unprovoked, and was made wantonly, willfully, and maliciously. Accused admitted as much, in effect, by his testimony that he "figured" that if he "was going back to the stockade" he "might as well go for something". The record of trial shows an utter disregard and disdain on the part of accused for military authority and a most flagrant violation of Article of War 64.

The Board of Review is of the opinion, therefore, that the evidence is legally sufficient to support the conviction of the offenses alleged.

6. The charge sheet shows that the accused is 19 years of age and that he was inducted into the service on 17 July 1943, with no prior service.

7. The court was legally constituted and had jurisdiction over the accused 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 the sentence and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon a conviction of a violation of Article of War 64.

(on leave) _____, Judge Advocate.

William A. Samuels Judge Advocate.

Herbert Bredwell, Judge Advocate.

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

4 AUG 1944

(95)

SPJGH
CM 258726

UNITED STATES)

XXIII CORPS

v.)

Trial by G.C.M., convened at
Camp Hood, Texas, 8 June 1944.

Private JOHN T. BARKSDALE)
(34759570), Company A,)
669th Tank Destroyer)
Battalion.)

Dishonorable discharge and con-
finement for thirty-five (35)
years. Penitentiary.

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR 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 Charges and Specifications:

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

Specification 1: In that Private John T. Barksdale, Company "A", 669th Tank Destroyer Battalion, did, at North Camp Hood, Texas, on or about 16 April 1944 behave himself with disrespect toward Second Lieutenant Truman R. Blanton, his superior officer, by saying to him "at ease my god damned ass", or words to that effect.

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

Specification: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, on or about 16 April 1944, offer violence against Second Lieutenant Truman R. Blanton, his superior officer, who was then in the execution of his office, in that he, the said Private John T. Barksdale did draw back a rock at the said Second Lieutenant Truman R. Blanton and say to him 'I'll kill you too, you son-of-a-bitch'.

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

Specification 1: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, on or about 16 April 1944, threaten to assault Staff Sergeant Melvin Gray, a non-commissioned officer with a rock, while said

Staff Sergeant Melvin Gray was in the execution of his office.

Specification 2: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, on or about 16 April 1944, use the following threatening and insulting language toward Staff Sergeant Melvin Gray, a non commissioned officer who was then in the execution of his office "you god damned mother fucker, don't you come up on me or I'll bust your head open for you", or words to that effect.

Specification 3: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, on or about 16 April 1944 assault Staff Sergeant Melvin Gray, a non commissioned officer with a dangerous weapon, to-wit: a rock, while the said Staff Sergeant Melvin Gray was in the execution of his office.

Specification 4: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, on or about 16 April 1944, use the following threatening and insulting language toward Staff Sergeant Melvin Gray, a non commissioned officer who was then in the execution of his office "I'll kill you you god damned mother fucker" or words to that effect.

CHARGE IV: Violation of the 93 Article of War.

Specification 1: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, on or about 16 April 1944, with intent to do him bodily harm commit an assault upon Private Manuel D. Turner, by willfully and feloniously striking the said Private Manuel D. Turner on the legs and the left hand with a dangerous weapon, to-wit: several rocks.

Specification 2: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at Gatesville, Texas, on or about 16 April 1944 in the night time feloniously and burglariously break and enter the dwelling house of Private Claude D. Brown with intent to commit a felony therein, viz rape.

Specification 3: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at Gatesville, Texas, on or about 16 April 1944, with intent to commit a felony, viz, rape, commit an assault upon Mrs. Claude D. Brown.

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

Specification 1: In that Private John T. Barksdale, Company "A" 669th Tank Destroyer Battalion did, at North Camp Hood, Texas, without proper leave, absent himself from his organization and station from about 1900 hours 15 April 1944 to about 0430 hours 16 April 1944.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for thirty-five (35) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution:

a. Specification 2, Charge IV (burglary), Specification 3, Charge IV (assault with intent to commit rape) and Charge V (absence without leave): Captain Harry Bradshaw, Company A, 669th Tank Destroyer Battalion, North Camp Hood, Texas, the commanding officer of accused, testified that on the weekend of 15-16 April 1944 the accused had not been issued a pass and was not authorized to leave the post (R. 7-8).

On the evening of 15 April 1944, Private Claude D. Brown and his wife retired for the night to the room they occupied in a dwelling house in Gatesville, Texas. All of the windows in the room were closed and covered on the outside by screens. At about 4:15 o'clock the following morning, it was still dark outside, Mrs. Brown awakened her husband and pointed at accused who was standing on the foot of the bed. The window next to the bed which was closed the night before had been opened. Private Brown asked accused what he wanted and accused replied "Lay down or I will kill you both". The accused, after looking under the pillows on the bed, remarked "Good, no gun" and said "I don't want no money, all I want is to have sexual intercourse with your wife". Accused then went to the side of the bed occupied by Mrs. Brown, raised her nightgown up beneath her breasts and started to "rip" off a sanitary belt she was wearing at the time. He had his right leg against her left leg and as he raised up to unbutton his pants Private Brown struck out with his fist, knocking accused over against the wall. Mrs. Brown "jumped" out of bed and in the fight that followed between accused and her husband she was struck a blow in the ribs by accused. Mrs. Brown turned on the lights and accused was "either knocked out or dived out" of the window. The accused climbed back through the window carrying a hoe handle and the fighting was resumed. After a few blows were struck he "dove" out of the window (R. 37; 39-48).

On 17 April 1944 the accused after having first been advised of his rights made a statement (Ex. B) to his commanding officer, which was reduced to writing and signed by accused. He stated that he went to Gatesville, Texas, at about 7:00 p.m. on Saturday night, 15 April 1944 and "got drunk". He left the post without a pass and knowing that he was restricted. He drank heavily during the evening and at about 3:00 o'clock the next morning started out for the bus station to return to camp but could not find his way. He stepped over a fence, went to the back porch of a home where he sat down and removed his shoes, "shook" the screen door but found it locked, stood on the end of a saw horse, raised a screen and window and stepped through the window into a room and on to a bed. He saw a white woman in the bed and "wanted to lay down with the woman and have intercourse". He stated that he had been carrying three rocks in his pocket all night and when the man in the bed asked what he wanted, he threatened to kill both of them if they moved, adding that "I want to have intercourse with your wife". He then "crawled" into bed with his head "toward her head". He was "laying down" on one of her legs and as he raised himself to unbutton his pants the man struck him, knocking him out of the bed. The lights were turned on and in the fight that followed accused stated that he fell out of the window. He returned to the room with a stick and the fight continued until he recovered his cap from the bed. He then left by the same window and returned to camp (R. 48-52).

b. The evidence as to the remaining Charges and Specifications may be summarized as follows: On 16 April 1944 at about noon Staff Sergeant Melvin A. Gray heard a commotion inside the barracks where accused lived, entered and found accused fighting with a staff sergeant. The fighters were separated and two sergeants took accused outside of the building. Breaking away from them accused ran over to a pile of rocks and as Sergeant Gray started toward him accused said "Don't you come on me, you God damn mother fucker, I'll bust your head open". He held two rocks in his hand while addressing these remarks to Sergeant Gray. The accused was overpowered by the two sergeants and brought before Second Lieutenant Truman R. Blanton in the company supply room. The sergeants were having trouble holding accused and Lieutenant Blanton gave accused the order "At ease". Accused replied "At ease my God damn ass". Lieutenant Blanton then ordered the sergeants to take accused to the guardhouse. Accused broke away and ran out of the door into the street where he picked up rocks and threw them at the supply room. When Sergeant Gray came outside the accused ran after him and threw rocks at him saying, "You God damn mother fucker, I'll kill you". He chased Sergeant Gray into the supply room and threw rocks at him there (R. 8-13, 15-24, 30-31, 34).

Private Manual D. Turner saw accused standing in front of the orderly room with two rocks in his hand and asked him why he did not stop as he was only making trouble for himself. Accused turned on him, asked if he

wanted "some of it too" and started throwing rocks at Turner, hitting him on the right knee and left hand causing injuries that required medical attention. The rocks accused threw at Private Turner were "about the size of a baseball" (R. 13-14, 24-30).

Lieutenant Blanton, accompanied by a guard, went into the street where accused was holding back a crowd and walked toward accused. The accused looked in their direction, drew back the hand in which he held a rock and said "I'll kill you, too, you son of a bitch". The officer of the day arrived and took accused into custody (R. 31-36).

Witnesses observed that accused was not acting in a normal manner. He was "angry" and "took on the appearance of a madman" (R. 24, 29, 33).

In a statement (Ex. A) made to his commanding officer on 17 April 1944, after being advised of his rights, the accused said that on the day before one of the soldiers in the barracks made a remark to him as he was dressing and he said "I don't appreciate any of you son of a bitches fucking with me and that goes for all of you mother fuckers". This resulted in a fight and he was taken before Lieutenant Blanton. When Lieutenant Blanton told him "at ease" he replied "goddamn it at ease". Sergeant Gray then pulled a plaster from his chest and accused threatened to "get" him. Accused broke away from the soldiers who were holding him, ran out into the street, picked up some rocks, and seeing Sergeant Gray coming from the supply room threw a rock at him. He later opened the supply room door and threw rocks at Sergeant Gray, chasing him from the supply room to the day room. When he saw Lieutenant Blanton and the guard coming toward him he told them to "come get me if you want me. If you do goddamn it I'll break one of your necks". Accused further stated that he dropped the rocks when the Officer of the Day drew his gun and two guards took him into custody (R. 48-52).

4. For the defense: Second Lieutenant James A. Powers testified that he talked to accused at about 2:00 p.m. on 16 April 1944 and was of the opinion that accused had been drinking but did not believe he was intoxicated. Accused was not alert and his attitude was very unruly and antagonistic (R. 56-58).

The accused made an unsworn statement to the effect that before he entered the Army he had been living with a woman for three or four months but was not married to her, that she became pregnant and that the baby was supposed to be born in May. He was "worried and tore up" and decided to drink some liquor, but drank too much of it and hardly knew where he was or what he was doing. He further stated that he was not accustomed to drinking liquor and that nothing would have happened had he realized what he was doing. He realized he "messed up" and was sorry (R. 53-56).

5. a. Charge V: It is shown by the evidence that accused without proper leave absented himself from his organization from about 7:00 p.m. 15 April to about 4:30 a.m. 16 April 1944.

b. Specifications 2 and 3, Charge IV: The evidence shows that at about 4:15 a.m. on 16 April 1944 the accused entered a private dwelling in Gatesville, Texas by raising a window screen and the window. He stepped through the window into the bedroom where Private Claude D. Brown and his wife were sleeping. When they awakened accused threatened to kill them if they moved and stated to Private Brown that he wanted to have sexual intercourse with Mrs. Brown. He went to her side of the bed, placed his right leg against her left leg, raised her nightgown up and attempted to remove a sanitary belt she was wearing. When accused raised himself up to unbutton his trousers Private Brown knocked him from the bed and a fight followed in which accused struck Mrs. Brown in the ribs.

The evidence establishes that accused broke and entered the dwelling in the night time with the intention of committing rape and that in attempting to carry out his design accused assaulted Mrs. Claude D. Brown with like intention.

c. Charge III: The evidence further shows that at about noon on the same day, 16 April 1944, Staff Sergeant Melvin Gray, a noncommissioned officer, acting in the execution of his office stopped a fight in the barracks between accused and a sergeant. The accused, after being removed from the barracks, picked up some rocks and threatened to assault Sergeant Gray (Spec. 1) and used threatening and insulting language toward him by saying "Don't you come on me, you God damn mother fucker, I'll bust your head open" (Spec. 2). A short time later accused threw rocks at Sergeant Gray (Spec. 3), committing an assault and while throwing the rocks accused used threatening and insulting language by saying, "You God damn mother fucker, I'll kill you" (Spec. 4). The acts of accused in each instance were in violation of Article of War 65.

Charge I: Sergeant Gray and two other noncommissioned officers took accused to the company supply room where Lieutenant Truman R. Blanton was at work. Accused was struggling to free himself and Lieutenant Blanton ordered him to be at ease, to which accused replied "At ease my God damn ass". The language used by accused and directed at his superior officer was clearly disrespectful and in violation of Article of War 63.

Specification 1, Charge IV: The evidence further shows that after Lieutenant Blanton ordered accused to be taken to the guardhouse, the accused broke away, ran into the street, and started throwing rocks at the supply room. Private Manual D. Turner told accused he was only making trouble for himself by throwing the rocks and accused asked if Turner wanted "some of it too". He then assaulted Private Turner by throwing rocks at him.

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NAVY DEPARTMENT

(101)

The rocks, about the size of a baseball, hit Private Turner on the hand and knee causing injuries that required medical attention. In the opinion of the Board of Review the evidence supports the finding of guilty of this Specification.

Charge II: While accused was keeping others at a distance with his rocks, Lieutenant Blanton and a soldier from the guardhouse approached him from the other side of the street. The accused, looking in their direction, drew back his hand in which he held a rock and said "I'll kill you, too, you son of a bitch". The accused stated that when he saw Lieutenant Blanton and the guard approaching him he told them to "come and get me if you want me. If you do God damn it I'll break one of your necks". It is clear that the offer of violence was directed at both Lieutenant Blanton and the guard. A violation of Article of War 64 is established.

6. Charge III consists of four Specifications arising out of two separate transactions. It would have been preferable to allege Specifications 1 and 2 as one offense and Specifications 3 and 4 as another offense (MCM 1928, par. 27). The Board of Review is of the opinion, however, that accused was not prejudiced as the sentence is sustained by the findings of guilty of the other Charges and Specifications.

7. The accused is 19 years of age. The Charge Sheet shows that he was inducted on 21 September 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Penitentiary confinement is authorized by the 42nd Article of War for the offense of assault with intent to commit a felony, viz., rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year, by section 22-501 of the District of Columbia Code.

Samuel M. Davis, Judge Advocate.

Robert J. Cannon, Judge Advocate.

J. J. Tottus, Judge Advocate.

02278



WAR DEPARTMENT
Army Service Forces
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
Washington, D.C.

(103)

SPJGK
CM 258734

31 JUL 1944

UNITED STATES)

92D INFANTRY DIVISION

v.)

) Trial by G.C.M., convened at
) Fort Huachuca, Arizona, 29
) May 1944. Dishonorable dis-
) charge and confinement for
) five (5) years.

)
)
) Second Lieutenant EDWARD T.
) GILLIAM, JR. (O-1293938),
)
) 365th Infantry.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 64th Article of War.

Specification 1: In that Second Lieutenant Edward T. Gilliam, Junior, 365th Infantry, having received a lawful command from Captain Joseph S. Matachinskas, his superior officer, to report for duty daily at 0700 and at 1245, did, at Fort Huachuca, Arizona, on or about 8 May 1944, willfully disobey the same.

Specification 2: In that Second Lieutenant Edward T. Gilliam, Junior, 365th Infantry, having received a lawful command from Captain Joseph S. Matachinskas, his superior officer, to be present with the Company at 0600, 11 May 1944 for duty as an observer, did, at Fort Huachuca, Arizona, on or about 11 May 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence was introduced of one previous conviction by general court-martial for behaving himself with disrespect toward his superior officer in violation of Article of War 63. 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 might direct for five (5) years". The reviewing authority approved only so much of the findings of guilty of the Charge and its Specifications as involves findings that the accused failed to obey the orders of his superior officer in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Specification 1. On 2 May 1944, the accused was attached, unassigned, to Company M, 365th Infantry, 92d Infantry Division, Fort Huachuca, Arizona. At reveille on 5 May, Captain Joseph S. Matachinskas, the company commander, "issued a direct order" to the accused, the gist of which was that the accused was to report daily for duty at 7 o'clock in the morning and at 12:45 in the afternoon. Captain Matachinskas stated that accused did not report for duty at 7 o'clock a.m. or at 12:45 p.m. or at any other time on 8 May 1944 (R. 7-11,13-15-17,23). One witness, First Sergeant Benjamin S. Williams, Company M, 365th Infantry, testified that accused was present with the company at reveille (6 a.m.) 8 May 1944, but that he did not recall that the accused was with the company at any other time during that day (R. 19-20).

Specification 2 alleges willful disobedience by accused of an order of his superior officer to be present with the company at 6 a.m. 11 May 1944 for duty as an observer. Captain Matachinskas testified that by the order of the regimental commander the accused was placed in arrest in quarters on 9 May 1944. The record does not disclose the reason for this action but presumably the arrest was based upon accused's alleged misconduct on 8 May which is the subject of Specification 1. Late in the evening of 10 May 1944 Captain Matachinskas entered accused's quarters to instruct "Lieutenant Caster", roommate of accused, with respect to certain administrative duties. The accused was lying on his bunk. Although there is nothing in the record to disclose that the order of the accused's arrest had been rescinded or modified, Captain Matachinskas ordered accused to be present with the company the next morning (11 May) at 6 o'clock for Tank Artillery Problem Number One. According to the testimony of Captain Matachinskas this order was not obeyed (R. 8-9).

First Sergeant Williams, a witness for the prosecution, stated that he did not remember seeing accused with the organization when it "moved out at 0600" 11 May, but that he did recall seeing him in the field later in the afternoon of that day (R. 20-21).

4. For the defense.

Staff Sergeant Oviet Williams, Company M, 365th Infantry, testified that he saw accused in the supply room around 7 o'clock on the morning of 11 May. Accused requested a bed roll on memorandum receipt stating that it was needed for an overnight problem. At this time the company had left the area and had gone to the field (R. 24-26).

The accused, after being fully advised of his rights, declined to testify or make an unsworn statement.

Captain Matachinskas, recalled by the prosecution stated that

he saw accused's bed roll in the field; that it was beside his bed roll, but that he observed that the bed roll of accused was not used that night (R. 28).

5. The evidence is clear and convincing that accused was given a lawful order by his superior officer to report to his organization at a fixed time and place, that accused understood the order and that he failed to obey it, thus supporting the findings of guilty of Specification 1 in violation of Article of War 96 as approved by the reviewing authority. With respect to Specification 2, failing to obey the order to report for duty as observer on 11 May 1944, the evidence shows that because of his misconduct on 8 May the accused, by order of the regimental commander was placed in arrest in quarters on 9 May. The terms and limits of the restraint imposed by the order of arrest do not appear in the record of trial. Insofar as the record discloses, the order of arrest by the regimental commander had never been rescinded or modified. In the absence of affirmative evidence that the terms of arrest imposed by the regimental commander authorized the performance of the duties by accused required of him under Captain Matachinskas' order, we are compelled to hold that Captain Matachinskas' order was in direct conflict with the order of the regimental commander and therefore illegal. It follows that accused's failure to obey it constitutes no offense.

The court sentenced accused "to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five (5) years". Inasmuch as accused is a commissioned officer such a sentence is inappropriate, being that which is applicable to an enlisted man. The Board of Review is of the opinion, however, that the sentence is not illegal and that no substantial right of accused has been prejudiced thereby (CM 218520, Coone, B.R. 12, p. 77; CM 243683, Bowen and CM 249921, Maurer).

6. War Department records show that accused is 25 years of age and a high school graduate. He attended Florida Agricultural and Mechanical College for 1-1/2 years but did not graduate. Upon the completion of the prescribed course of training at The Infantry School, Fort Benning, Georgia, he was commissioned a second lieutenant, Infantry, Army of the United States, 18 September 1942. On 3 January 1944 he was found guilty by a general court-martial of behaving himself with disrespect toward his superior officer in violation of Article of War 63 and was sentenced to dismissal, total forfeitures, and confinement at hard labor for 6 months. The reviewing authority approved only so much of the sentence as involved a forfeiture of \$75 per month of his pay for 6 months.

7. The court was legally constituted and had jurisdiction of the person and the offenses. 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 Specification 1, as modified and approved by the reviewing authority, in violation of Article of War 96, legally insufficient to support the finding of guilty of Specification 2, and legally sufficient to support 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 96.

Wm. C. Egan, Judge Advocate.
Wm. C. Egan, Judge Advocate.
Samuel Connerford, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 AUG 1944 - 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 T. Gilliam, Jr. (O-1293938), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of the Charge as approved by the reviewing authority, but legally sufficient to support the finding of guilty of Specification 1 as modified and approved by the reviewing authority, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. I also concur in the opinion of the Board of Review that that part of the sentence which imposes "dishonorable discharge" rather than dismissal, while inappropriate in the case of a commissioned officer, is merely an inaptly expressed but not an illegal sentence. This is accused's second conviction by a general court-martial within six months. On 17 January 1944 he was convicted of behaving with disrespect towards his superior officer in violation of Article of War 63. Accused's repeated misconduct demonstrates that he is unfit to remain an officer. It is believed, however, that dismissal alone would be adequate punishment. I therefore recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and as thus modified that the sentence be carried into execution.

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



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

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

(Finding of guilty of Specification 2 of Charge disapproved.
Only so much of sentence confirmed as provides for dismissal.
G.C.M.O. 508, 22 Sep 1944)



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

(109)

SPJGQ
CM 258754

25 JUL 1944

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

FOURTH AIR FORCE

v.)

Trial by G.C.M., convened at
Tonopah Army Air Field, Tono-
pah, Nevada, 31 May 1944.

Second Lieutenant RAY W.
GRAY (O-816464), Air Corps.)

Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt. Ray W. Gray, 802nd Bombardment Squadron (H), 470th Bombardment Group (H), did, at Las Vegas, Nevada, on or about 18 February 1944, wrongfully force his attentions upon Mrs. Barbara Ann Ryder, the wife of another man, to the scandal and disgrace of the military service.

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

Specification 3: (Finding of guilty disapproved by the reviewing authority.)

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

Specification 5: (Nolle Prosequi).

Specification 6: (Nolle Prosequi).

Specification 7: (Nolle Prosequi).

Specification 8: (Finding of guilty disapproved by the reviewing authority.)

Specification 9: (Nolle Prosequi).

He pleaded not guilty to the Charge and all Specifications. By direction of the appointing authority the prosecution entered a nolle prosequi as to Specifications 5, 6, 7, and 9. Accused was found guilty of the remaining Specifications, viz., Specifications 1, 2, 3, 4 and 8, and the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specifications 2, 3, 4 and 8, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of Specification 1 of the Charge may be summarized as follows:

Mrs. Barbara Ann Ryder, the woman upon whom accused is alleged to have forced his unwelcome attentions is nineteen years of age and the wife of Staff Sergeant Michael F. Ryder, Tonopah Army Air Base, Tonopah, Nevada. She married him at Ogden, Utah, on 1 January 1944. She first met accused on 17 February 1944 while they were travelling on the same bus from Tonopah to Las Vegas, Nevada. They sat beside each other on the bus and engaged in casual conversation during the progress of the trip. There "was some conversation about a Vickie Gilmore" who had told Mrs. Ryder that she knew a Lieutenant Gray. Accused stated that "he had taken her out a couple of times".

Mrs. Ryder's destination was Salt Lake City, Utah, while accused was going to San Bernardino, California. They arrived in Las Vegas at 8:15 o'clock p.m., 17 February 1944, where both changed buses. Mrs. Ryder was not scheduled to leave Las Vegas until 1:15 o'clock a.m. of 18 February 1944. Accused proposed that they see the town together and go dancing, to which proposal Mrs. Ryder assented. She could not check her two suitcases at the bus station so accused suggested getting a hotel room in which to leave the luggage while they went out. Mrs. Ryder agreed. Upon being informed at the Overland Hotel, where accused inquired about a double room, that only a single room was available, accused said "never mind". They then checked Mrs. Ryder's suitcases at a "storage place" to which they had been directed. Then they went to the Sal Sagev Hotel, where, after holding a conversation with the hotel clerk which Mrs. Ryder did not hear; accused secured room No. 233. They went to this room together. It was a large room containing a double and a single bed. Mrs. Ryder hung her coat in the clothes closet, put her cosmetic case on the bureau, and requested accused, who said he was going out for a few minutes, to fetch her black suitcase so that she might change clothes. Accused returned with the suitcase within about ten minutes and left again. Mrs. Ryder bathed, changed clothes, and went down to the hotel lobby, where she was joined by accused at about 9:30 o'clock. They visited various places and dined and danced. Accused was served

three or four drinks of bourbon and water. During the course of the evening accused suggested that Mrs. Ryder wait over and take a bus at 4:48 a.m., 18 February 1944, instead of the one scheduled to leave at 1:15 a.m., but she did not agree to do so.

Mrs. Ryder and accused returned to Room No. 233 in the Sal Sagev Hotel at about 12:15 o'clock a.m., 18 February. She removed her shoes, preparatory to putting on shoes of a different style, but before she had put on these other shoes, went to the bureau to comb her hair. Accused advanced to a position immediately behind her, told her she had lovely hair, took the comb, and, without objection on her part, combed her hair. He then put his arms around her, kissed her twice on the neck, and then swung her around and kissed her on the lips. Mrs. Ryder did not object to this kiss but when accused tried to repeat it, she broke away from him and went into the bath room.

Accused had removed his blouse when he first entered the room. While Mrs. Ryder was in the bathroom he removed his shirt, trousers, and shoes, and was standing near the bathroom door when she opened it. He reached toward Mrs. Ryder, whereupon she said, "what's this", to which he replied, "don't get excited". He then pulled her to the large bed, she the while begging him to let her go. She was scared and struggled with accused, but "he said he wanted" her "and that's all there was to it". Accused was "fully on top" of Mrs. Ryder on the bed, pinning her arms above her head with his left arm and hand. She screamed and kept struggling, but with his right hand accused succeeded in pulling her dress up over her hips and her panties down around her knees, tearing the panties. He had his male organ exposed and tried to penetrate her female organ but did not succeed in doing so. Having succeeded in freeing her hands, Mrs. Ryder scratched and pushed accused and continued to holler. Accused said, "If you do that again you'll be sorry". Mrs. Ryder screamed again and accused hit her in the face with his fist. She then pushed accused off the bed by placing her knee in his stomach. He struck the floor lamp and it fell on top of him. Mrs. Ryder ran to the door and pounded on it, still calling for help. She then ran into the bathroom with the thought of locking herself in, but accused entered the bathroom behind her and crowded her against the bath tub and began choking her. At this juncture, she heard someone say, "what's going on here?" When this was said, accused quit choking her and she discovered that the hotel clerk was standing in the room. She was hysterical and told accused he would be sorry he ever laid a hand on her. Accused laughed at her. After the clerk had bathed her face she went down stairs with him and on to the Ladies Room, where she changed her panties. She showed the torn ones she removed to a woman who had brought her suitcase to her. She then wanted to call her husband but the hotel clerk dissuaded her from this after she told him that accused had not had intercourse with her. Accused was requested to leave the hotel, and after he had done so at about 3:00 a.m., 18 February, Mrs. Ryder returned to the room and remained there until about three o'clock in the afternoon.

It was stipulated that if Robert D. Garrett were present in court he would testify under oath substantially as follows (R. 10): He is night clerk at the Sal Sagev Hotel, Las Vegas, Nevada. At about one o'clock a.m. on 18 February 1944, while at the hotel desk, he heard screams of a woman coming from the second floor of the hotel. At about the same time a Mrs. Jenkins called him about the disturbance. He went to the second floor without knowing from which room the screams had come. When in front of Room No. 233 he heard a woman crying, and knocked on the door. The door was partly opened by accused, who had on his pants, fully buttoned, but did not have on a shirt or undershirt. Garrett observed that accused's chest was red and scratched. He asked accused what was going on, to which accused replied, "nothing". Mrs. Ryder, who was standing in the center of the room when he entered, ran to Garrett, caught him by the arm, and asked him not to leave her. She was crying and was quite hysterical. She was fully dressed but her hair and dress were "slightly mussed up". At his suggestion she went into the bath room to bathe her face and while she was out of the room Garrett said to accused, "what did you do, make a bad guess?" Accused nodded his head in the affirmative. Mrs. Ryder accompanied Garrett down stairs. He did not see any bruises on her, nor did she mention that accused had struck her, but she did say that he had bumped her head against the door. She said that accused had tried to do "that" to her and that she had resisted him. After talking with a Mrs. Dorion and Mrs. Jenkins in the hotel lobby Mrs. Ryder approached the desk and asked Garrett how accused had registered. She appeared surprised when he showed her the registration card, which read, "R. W. Gray and wife".

It was also stipulated that if Mrs. Bessie K. Dorion were present in court she would testify to substantially the following: She lives in Room No. 201 of the Sal Sagev Hotel. At about 1:15 a.m. on 18 February 1944 she was awakened by someone screaming and knocking on a nearby door and she heard a woman saying, "let me out of here". Later, she saw the panties which Mrs. Ryder removed and they were torn down one of the side seams. Mrs. Ryder did not mention that accused had struck her.

Accused's confession, voluntarily made to the investigating officer, was introduced in evidence (R. 9, Ex. 3). In it, accused deposed substantially as follows: He and Mrs. Ryder only engaged in casual intermittent conversation on the bus between Tonopah and Las Vegas. He slept through most of the trip. Mrs. Ryder remarked that from what Vickie Gilmore had told her she thought he was a "wolf", but that the right woman could tame him. Before arriving in Las Vegas accused asked Mrs. Ryder to have dinner with him. She accepted his invitation and when they reached Las Vegas at about 8:45 p.m. they checked her bags through to Salt Lake City and then had dinner. He also took two drinks, bourbon and water. After dining he asked Mrs. Ryder if she would like to go dancing, to which she replied that she would. It was then about 10:00 o'clock and his bus was scheduled to leave at 10:45 p.m., so they went to the Overland Hotel to check bus schedules and see if there were later buses they could catch. They discovered that he could catch a bus at 6:30 and she could catch one at 4:45 the following morning, 18 February.

Mrs. Ryder decided to wait over and catch the 4:45 bus instead of the 1:15 bus. He then expressed his intention of getting a room and asked for a single room at the Overland Hotel. No single rooms were available so he asked for a double room. The clerk informed him that he could not rent him a double room because of OPA regulations. Accused and Mrs. Ryder thereupon departed for the Sal Sagev Hotel and before entering it he told her that they would have to register as man and wife in order to get a double room. Mrs. Ryder started to say something but stopped, which accused construed as an indication of her willingness for him to register in that manner. She was standing at his elbow when he signed "R. W. Gray and wife" on the register, and he at that time requested the clerk to call them at 4:00 o'clock the following morning so that Mrs. Ryder could catch the 4:45 bus. They went to Room No. 233 together and while Mrs. Ryder was bathing he brought her luggage to the room. They thereafter dined and danced until about 12:30 o'clock. Mrs. Ryder asked accused if he would write to her and gave him her home address. On their way back to the hotel accused suggested that they again check and see if there were not still later buses they could catch and avoid having to get up so early. Mrs. Ryder agreed to this and they discovered that she could catch a bus at 8:30 and he one at 10:45 the following morning. When they reached the Sal Sagev he went to the desk and had the time for their call changed from 4:00 o'clock to 7:00 o'clock and they then went to their room.

On entering the room Mrs. Ryder removed her coat, put her arms around accused, kissed him, and told him how much she liked him and what a wonderful time she had had during the evening. She then got her comb and accused sat beside her and combed her hair. He suggested that it was time to go to bed and they both stood up, embraced, and kissed again. Accused then remarked that it was too bad that one of the beds was going to waste. Mrs. Ryder stated that she was going to use one of the beds herself. Accused told her that was ridiculous, and, having concluded that she was a "little thrill seeker", decided to teach her a lesson.

He had already removed his blouse and he now removed his shirt and shoes. While they were standing near the double bed he fell across it and pulled Mrs. Ryder down beside him. He started to make love to her and made clear his intent to have "relations with her", but she said she could not have relations with him as she had just finished menstruating. While lying on the bed accused had his hand under Mrs. Ryder's dress, inside her panties, and was feeling around her female organ. He had her panties pulled down about six inches but did not recall having torn them. He was lying on her part of the time, as he "wanted to teach her a lesson". He still had his pants on and they were fully buttoned. He did not have his pants open at any time, nor did he have his male organ exposed at any time while wrestling with Mrs. Ryder on the bed. His first thought was to have intercourse with her but when she refused he decided to teach her a lesson and make her believe that he was going to force her to have intercourse with him. Mrs. Ryder scratched him on the hand and shoulder during the tussle but he did not strike her and did not recall having told her he would hit her if she scratched him again. Mrs. Ryder kept telling accused to stop and also kept trying

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to push him off her. She finally succeeded in pushing him away from her and she jumped up, ran to the door, opened it, and started to go out. Accused told her not to leave the room as she had on no shoes and her clothes and hair were mussed. He put his hand on the door, whereupon Mrs. Ryder started to scream. Accused tried to reason with her, but she seemed quite excited and hysterical. The hotel clerk knocked on the door and was admitted into the room by accused. Mrs. Ryder accompanied the clerk when he left.

4. Evidence for the Defense:

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 23). He reiterated without material deviation substantially the same version of his relations with Mrs. Ryder as that contained in his voluntary pre-trial statement made to the investigating officer, and which has been related above (R. 26-30, 31-33). He had construed Mrs. Ryder's failure to protest against registering at the hotel as husband and wife, her decision to wait over and catch a later bus than she originally intended, and her acquiescence in his changing the hour they were to be called, from four to seven o'clock, as indications of her willingness and intention to spend the night with him. Mrs. Ryder had been quite affectionate while they were dancing together and also when they first returned to the hotel room. There was no resistance or protest from her until he progressed to the point where he had her dress up and her panties down, and had made it clear that it was his purpose to have intercourse with her (R. 29, 30). Accused then concluded that she was "trying to kid" him along and decided to scare her by making her believe he was going to have intercourse with her whether she wanted to or not. He said he guessed he scared her too well. Mrs. Ryder did not scream while she was on the bed, nor until she reached the door and accused would not permit her to leave the room (R. 29, 30).

It was stipulated that if Mrs. Charles Jenkins were present in court she would testify under oath that she was awakened by a woman's screams in the Sal Sagev Hotel at about 1:15 a.m. on 18 February 1944 and finally went to the lobby of the hotel. She talked to Mrs. Ryder in the writing room of the hotel and asked her if she knew accused had registered them as husband and wife, to which Mrs. Ryder replied: "Sure I knew that, but I didn't see anything wrong with that. I thought I could trust a soldier far more than a civilian".

Two sworn statements made by Mrs. Ryder before the trial, one of which was made before Lieutenant V. C. Kelso, Provost Marshal Office, Fort Douglas, Utah, on 20 February 1944 and the other of which was made before Lieutenant H. A. Carrico on 8 March 1944, were introduced in evidence (R. 34, Exs. G, H), as were also the answers of Mrs. Ryder to cross-interrogatories propounded to her in her deposition (R. 34, Def. Ex. F). Mrs. Ryder had made quite a number of representations in her sworn statements which were at variance with her deposition testimony.

Chief among these inconsistencies were the representations that she had not kissed accused (Def. Ex. H), that accused had dragged her into the bath room (Def. Ex. H), that he had raped her (Def. Ex. G); and that accused had his trousers on before she left the room with the clerk (Def. Ex. H); whereas, in the statement which she made to Lieutenant Carrico on 8 March (Def. Ex. H) Mrs. Ryder admitted she had misstated the facts in her statement of 20 February to Lieutenant Kelso when she claimed that accused had raped her and in response to the cross-interrogatories in her deposition, she admitted that her representations in the statements that she and accused had not embraced and kissed were false. She explained this by saying that she had been afraid that if she admitted kissing accused no one would believe the remainder of her story. She maintained, however, that accused was still in his shorts when she left the room with the clerk.

5. Excepting one of Mrs. Ryder's contentions, namely, that accused struck and choked her, which accused denies, there is little or no conflict in the material evidence of record offered by either side. This officer "picked up" the nineteen year old wife of an enlisted man in a public vehicle, took advantage of a delay in the travel schedule to register her as his wife at a hotel where he deliberately secured one room for both of them, and, with the obvious purpose of setting the stage for what he proposed to occur later, paved the way by dining and dancing with her thus putting her under obligation to him. The execution of his perfectly obvious plan of seduction was brutal. Both in his voluntary statement to the investigating officer before the trial and in his testimony at the trial, accused admitted that he imposed himself upon Mrs. Ryder by use of force in a lewd and indecent manner, against her will, and despite her protests and resistance. He further admitted that he sought to convince Mrs. Ryder that it was his purpose and intention to have sexual intercourse with her by force and without regard to whether she consented. The sincerity of her objections, is attested by the resistance she offered, by her screams for help and by the hysterical state of mind to which she was reduced. Accused is clearly guilty of conduct unbecoming an officer and gentleman, in violation of Article of War 95.

6. Accused stands convicted of a violation of Article of War 95, alone, for which the only punishment provided and authorized by law is dismissal, nothing more and nothing less. The record of trial is therefore not legally sufficient to support that portion of the sentence which adjudges forfeitures against accused.

7. War Department records disclose that this officer is 28 years of age and is married. He is a high school graduate and has attended college for two years. He was a salesman in a Men's Furnishings Store before entering the service. He entered the Air Corps as a private on 4 March 1942, became an aviation cadet on 20 September 1942, and was commissioned a temporary second lieutenant, Army of the United States, on 3 November 1943. He entered upon active duty the same day at Moody Field, Georgia.

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8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings, as approved by the reviewing authority, but is legally sufficient to support only so much of the sentence as provides for dismissal from the service, and is legally sufficient to warrant confirmation of the sentence of dismissal. Dismissal is mandatory upon conviction of Article of War 95.

William A. Pounds, Judge Advocate.

William H. Gambrell, Judge Advocate.

(sick in hospital), Judge Advocate.

1st Ind.

War Department, J.A.G.C., 16 AUG 1944 - 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 Ray W. Gray (0816464), Air Corps.

2. I concur in the opinion of the Board of Review that while the record of trial is legally sufficient to support the findings, as approved by the reviewing authority, it is legally sufficient to support, and to warrant confirmation of, only so much of the sentence as adjudges dismissal from the service. I recommend that only so much of the sentence as adjudges dismissal from the service be confirmed and carried into execution.

3. This officer has become involved in further difficulties since the instant case was tried. Subsequent to receiving the record of trial, I have received advice, through the Commanding General of the Fourth Air Force, that a report of investigation, prepared under the direction of the Commanding Officer of Tonopah Army Air Field, Tonopah, Nevada (accused's station), shows (a) that Lieutenant Gray was drunk and disorderly in a public place in Tonopah, Nevada, on the night of 21 July 1944, and (b) that he made false certificates as to his flying time for the months of April and May 1944, which resulted in an overpayment to him of \$150. No action is being taken on these additional matters pending disposition of the instant case.

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 above recommendation, 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. sig. of S/W
- 3 - Form of action

(Only so much of sentence as provides for dismissal approved. As thus approved sentence confirmed. G.C.M.O. 523, 26 Sep 1944)

1st Ind.

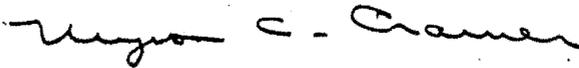
War Department, J.A.G.O., 16 AUG 1944 - To the Secretary of War.

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2. I concur in the opinion of the Board of Review that while the record of trial is legally sufficient to support the findings, as approved by the reviewing authority, it is legally sufficient to support, and to warrant confirmation of, only so much of the sentence as adjudges dismissal from the service. I recommend that only so much of the sentence as adjudges dismissal from the service be confirmed and carried into execution.

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

3 Incls.

- 1 - Record of trial
- 2 - Dft. ltr. sig. of S/W
- 3 - Form of action

(Only so much of sentence as provides for dismissal approved. As thus approved sentence confirmed. G.C.M.O. 523, 26 Sep 1944)



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

22 AUG 1944 (119)

SPJGH
CM 258821

UNITED STATES)

17TH AIRBORNE DIVISION)

v.)

Privates CHESTER A. SANTOIEEMMA)
(32934588), Headquarters)
Battery, 17th Airborne Division)
Artillery, ANDREW NICOLOPOULAS)
(31379291), and GEORGE E.)
TROLLOPE (39212419), both of)
Company H, 513th Parachute In-)
fantry, and STEPHEN M. VEROBEL)
(13031962), Service Company,)
513th Parachute Infantry.)

Trial by G.C.M., convened at)
Camp Forrest, Tennessee, 19 and)
20 May 1944. As to Santoiemma)
and Nicolopoulos: Dishonorable)
discharge and confinement for)
twenty-five (25) years. As to)
Trollope: Dishonorable dis-)
charge and confinement for)
forty (40) years. As to)
Verobel: Dishonorable dis-)
charge (suspended) and confine-)
ment for fifteen (15) years.)
As to Santoiemma, Nicolopoulos)
and Trollope: Penitentiary.)
As to Verobel: Rehabilitation)
Center.)

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE I: Violation of the 66th Article of War.

Specification 1: In that Private Chester A. Santoiemma, Headquarters Battery, 17th Airborne Division Artillery, Private Andrew Nicolopoulos, Company H, 513th Parachute Infantry, Private Stephen M. Verobel, Service Company, 513th Parachute Infantry, and Private George E. Trollope, Company H, 513th Parachute Infantry, acting jointly, and in pursuance of a common intent, did, at the Post Stockade, Camp Forrest, Tennessee, on or about 3 May 1944, attempt to create, begin, excite and cause a mutiny in and among members of the 17th Airborne Division, prisoners in said Stockade, by urging, advising, exhorting and persuading said members concertedly to refuse to obey the lawful orders of Second Lieutenant John J. Cullen, Corps of Military Police, their commanding and superior officer, to fall out, to assemble in ranks, and to go through an infiltration course, and by threatening to inflict bodily harm and other punishment on the members

thereof if they should obey the said orders, with the intent to usurp, subvert and override, for the time being, lawful military authority.

Specification 2: In that Private Chester A. Santoiemma, Headquarters Battery, 17th Airborne Division Artillery, Private Andrew Nicolopoulos, Company H, 513th Parachute Infantry, Private Stephen M. Verobel, Service Company, 513th Parachute Infantry, and Private George E. Trollope, Company H, 513th Parachute Infantry, acting jointly; and in pursuance of a common intent, did, at the Post Stockade, Camp Forrest, Tennessee, on or about 3 May, 1944, voluntarily join in a mutiny which had been begun in and among members of the 17th Airborne Division, prisoners in the said Post Stockade, against the lawful military authority of Second Lieutenant John J. Cullen, Corps of Military Police, their commanding and superior officer, and did, with intent to usurp, subvert and override, for the time being, lawful military authority, in concert with sundry other members of the 17th Airborne Division, prisoners in said Stockade, assembled on the ground and in the barracks in said Stockade, refuse to fall out, to assemble in ranks, and to go through an infiltration course.

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

Specification: In that Private Chester A. Santoiemma, Headquarters Battery, 17th Airborne Division Artillery, Private Andrew Nicolopoulos, Company H, 513th Parachute Infantry, Private Stephen M. Verobel, Service Company, 513th Parachute Infantry, and Private George E. Trollope, Company H, 513th Parachute Infantry, acting jointly, and in pursuance of a common intent, did, at the Post Stockade, Camp Forrest, Tennessee, on or about 3 May, 1944, wrongfully, unlawfully and feloniously, and to the prejudice of good order and military discipline, conduct themselves mutinously, by urging, advising, exhorting and persuading members of the 17th Airborne Division, prisoners in said Stockade, not to perform their military duty, to wit, the duty of falling out when ordered, the duty of falling in ranks when ordered, and the duty of going through an infiltration course when ordered, and by saying, "We are not falling out tonight", "We are not going through the infiltration course", "Anybody who goes out is chicken shit", "Anybody who goes out will get the hell beat out of them", "Don't fall out or you will get it", "Anybody who goes out will find their bunks torn down", "Nobody is going to perform duty under a rifle" and "We are not going through the infiltration course unless they give us releases" (meaning thereby that neither they nor any other of said members were going to do duty or training under armed guard), or

words to such effects, they and each of them then being informed and having reason to believe that they and other members of the 17th Airborne Division, prisoners in said Stockade, would be lawfully ordered, and required by lawful military authority, to fall out, to fall in in ranks and to go through an infiltration course.

Each accused pleaded not guilty to and was found guilty of all Charges and Specifications with the exception that accused Verobel was found not guilty of Specification 1, Charge I. Evidence of previous convictions by special courts-martial of accused was introduced as follows: Accused Santoierma of sleeping on guard, in violation of Article of War 96, and of petty theft, being absent without leave, and breach of arrest in violation of Articles of War 93, 61 and 69; accused Nicolopoulos, Trollope and Verobel each one conviction of being absent without leave, in violation of Article of War 61. Accused were sentenced to dishonorable discharge, total forfeitures and confinement at hard labor as follows: Santoierma and Nicolopoulos each for life and Verobel and Trollope each for forty years. The reviewing authority approved the sentences, but as to Verobel, reduced the period of confinement to 15 years, suspended the dishonorable discharge and designated the Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, as the place of confinement, and as to each of the accused, Santoierma and Nicolopoulos, reduced the period of confinement to 25 years. The United States Penitentiary, Atlanta, Georgia, was designated as the place of confinement for all of the accused other than Verobel and the record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution:

On 3 May 1944 about 100 enlisted men of the 17th Airborne Division, including all of the accused, were prisoners in the Post Stockade at Camp Forrest, Tennessee. At about 8 p.m. on that day Second Lieutenant John J. Cullen, Corps of Military Police, acting under the orders of the Provost Marshal of the division, went to the stockade to have the prisoners run the infiltration course. At the direction of Lieutenant Cullen, Sergeant John P. Maras went to the entrance of the stockade and blew his whistle. The blowing of the whistle was the customary and well known signal for the prisoners to come out of the barracks into the enclosure. When the whistle sounded only seventeen men of the 17th Airborne Division came out. None of the accused was among them. Sergeant Maras took their names and the ones who had not already run the infiltration course were sent out to run it. A number of the men who did not come out shouted "We will not fall out", "We have to do duty in the day time, why should we fall out at night", and similar remarks (R. 20-28, 46-50, 73).

Sergeant Frank Pack, Military Police Detachment, Fourth Service Command, at the request of Lieutenant Cullen, entered the stockade and went through four of the barracks. He asked the prisoners what was wrong and some of them asked why they were not released if they were required to run the infiltration course. Sergeant Pack "time and again" heard one or another of them remark that, "Anyone that falls out is chicken shit". He urged the men to fall out but they did not do so. He saw all of the accused in the barracks (R. 62-65).

Lieutenant Cullen then went into the stockade enclosure and told the men to come out as he had something to say to them. Some of them stated "We are not going to fall out" but others said "Let's hear him" and "quite a crowd" gathered around him. Some of them said that they would not "soldier under a gun" and Lieutenant Cullen told them that it was a Division order. He heard three or four prisoners remark "this is mutiny" and told them "You bet your life that is what it is - - -". He then ordered the prisoners to fall in on his left in a column of twos to run the infiltration course. Not one of the prisoners obeyed the order. From the back of the crowd "clustered" around him Lieutenant Cullen heard numerous remarks to the effect that the prisoners did not intend to run the infiltration course that night. He asked "Do you refuse to fall in?" and some one replied "You are damned right we do. We aren't going to run the infiltration course. Let's go back to sleep". Lieutenant Cullen then left the stockade (R.29-32, 37).

a. Accused Chester A. Santoiemma, Andrew Nicolopoulos and George E. Trollope:

These three accused had worked together and were "buddies or friends". On the evening of 3 May before the whistle had blown for the prisoners to turn out, accused Santoiemma "and some more boys" came through the barracks in the stockade where Private Stanley Webster was lying in his bed. Santoiemma was "making threats about whoever fell out". He remarked "We are going to run the infiltration course tonight" but "We are not going out under the course under the gun. When they release us we will run it". He also stated that anyone who "went out there" was nothing but "low down chicken shit". Private Webster was "fairly certain" that Nicolopoulos was with Santoiemma and was making similar remarks (R. 81-83, 107, 129).

Private Allen C. Runyan also saw accused Santoiemma come into a barracks in the stockade before the whistle had blown, and heard him tell the prisoners that they were not falling out and that if they did so they "would be chicken shit". Another man was with Santoiemma but Private Runyan could not remember whether it was one of the other accused (R. 103-104).

Private John H. Froehlich was in the stockade at 8 p.m. on 3 May and before the whistle sounded there were "a few fellows" running around

saying that the prisoners had to go out on the infiltration course. Private Froehlich saw accused Santoiemma, Nicolopoulos and Trollope standing behind the latrine near his barracks. He could not remember whether it was before or after he heard the whistle. They were "hollering" to the other prisoners "Don't fall out" (R. 113-115, 117).

At some time during the evening Santoiemma came to the door of the barracks in which Private Glenn Edward Nygard was quartered and said "No one falls out" and "any one that falls out is chicken shit". Accused Trollope made the latter remark also, and told Sergeant Pack that the prisoners did not "want to fall out, having guns over them". After the whistle blew Private Eugene F. Dudley, who was in the latrine, heard somebody say "nobody falls out". It sounded like accused Santoiemma with whose voice Dudley was familiar (R. 165-167, 172-174).

Private Jacob M. Jordan, who was quartered in the same barracks with accused Santoiemma, Nicolopoulos and Trollope, left the building when he heard a blast of the whistle but did not go "clear up to the fence" as usual "Because the boys said not to go" and he was afraid of getting a beating. Santoiemma told him not to "fall out" and Nicolopoulos said "You boys fall out, you get a beating". Accused Trollope did not address any remarks directly to Private Jordan but the latter heard him say to "a whole bunch" of other prisoners "If you fall out you are chicken shit" (R. 186-190, 194, 196-201).

b. Accused Stephen M. Verobel:

After Sergeant Maras had blown the whistle for the prisoners to turn out and was standing by the stockade gate, accused Verobel came up and asked whether he had "a release for them". Sergeant Maras replied that he did not have a release and that "it was for the purpose of running the night infiltration course". Accused Verobel said "Good night", turned around and went back (R. 50-51).

After the whistle had sounded accused Verobel came to the door of Private Nygard's barracks and said that "the 17th Division trucks" were there. He also stated that none of the others were falling out and anybody "in there" who did was "chicken shit". Accused Verobel also said that anyone who fell out would be "bull holed" (R. 164-165).

4. The evidence for the defense: Private Clifton E. Plunkett was a prisoner in the stockade on 3 May 1944 and acted as "stockade orderly". When the whistle blew he went up to "the sergeant", asked what was wanted, and was told that it was for "the 17th" to fall out. He shouted for "the 17th" to fall out and practically all of the men of that division proceeded to do so. Plunkett remembered seeing accused Santoiemma and Nicolopoulos who were among the first to fall out. After the prisoners fell out they talked for a while, then "the Lieutenant" came in and talked to them and the prisoners all went back into the barracks and began to get ready to go to bed. Private Plunkett did not see any activity on the part of any of the accused and did not hear

saying that the prisoners had to go out on the infiltration course. Private Froehlich saw accused Santoiemma, Nicolopoulos and Trollope standing behind the latrine near his barracks. He could not remember whether it was before or after he heard the whistle. They were "hollering" to the other prisoners "Don't fall out" (R. 113-115, 117).

At some time during the evening Santoiemma came to the door of the barracks in which Private Glenn Edward Nygard was quartered and said "No one falls out" and "any one that falls out is chicken shit". Accused Trollope made the latter remark also, and told Sergeant Pack that the prisoners did not "want to fall out, having guns over them". After the whistle blew Private Eugene F. Dudley, who was in the latrine, heard somebody say "nobody falls out". It sounded like accused Santoiemma with whose voice Dudley was familiar (R. 165-167, 172-174).

Private Jacob M. Jordan, who was quartered in the same barracks with accused Santoiemma, Nicolopoulos and Trollope, left the building when he heard a blast of the whistle but did not go "clear up to the fence" as usual "Because the boys said not to go" and he was afraid of getting a beating. Santoiemma told him not to "fall out" and Nicolopoulos said "You boys fall out, you get a beating". Accused Trollope did not address any remarks directly to Private Jordan but the latter heard him say to "a whole bunch" of other prisoners "If you fall out you are chicken shit" (R. 186-190, 194, 196-201).

b. Accused Stephen M. Verobel:

After Sergeant Maras had blown the whistle for the prisoners to turn out and was standing by the stockade gate, accused Verobel came up and asked whether he had "a release for them". Sergeant Maras replied that he did not have a release and that "it was for the purpose of running the night infiltration course". Accused Verobel said "Good night", turned around and went back (R. 50-51).

After the whistle had sounded accused Verobel came to the door of Private Nygard's barracks and said that "the 17th Division trucks" were there. He also stated that none of the others were falling out and anybody "in there" who did was "chicken shit". Accused Verobel also said that anyone who fell out would be "bull holed" (R. 164-165).

4. The evidence for the defense: Private Clifton E. Plunkett was a prisoner in the stockade on 3 May 1944 and acted as "stockade orderly". When the whistle blew he went up to "the sergeant", asked what was wanted, and was told that it was for "the 17th" to fall out. He shouted for "the 17th" to fall out and practically all of the men of that division proceeded to do so. Plunkett remembered seeing accused Santoiemma and Nicolopoulos who were among the first to fall out. After the prisoners fell out they talked for a while, then "the Lieutenant" came in and talked to them and the prisoners all went back into the barracks and began to get ready to go to bed. Private Plunkett did not see any activity on the part of any of the accused and did not hear

them urge or advise any other men not to fall out or make any inflammatory or threatening remarks (R. 204-211).

Private William Timms had been sitting on his bed in the stockade barracks talking with accused Santoiemma for about half an hour before the whistle blew. Timms did not hear Santoiemma say anything, either before or after the whistle blew, about "the 17th" running the infiltration course. The other three accused did not come into Timms' barracks at any time. When the whistle sounded Timms went out and "they said it was to run the infiltration course". "The Lieutenant" said for the ones who were "going to run it" to fall in on his left and "the rest to fall back". Timms fell back because he had already run the course. Private Melton Brown said to him, "Timms, I will beat the hell out of you if you run that course" but no other person threatened him. He did not hear any of the accused advise or threaten anyone with reference to the running of the course (R. 226-233).

Private Ferdinando C. Bovio was quartered in the same barracks with accused Santoiemma, Nicolopoulos and Trollope on 3 May. He had gone to the latrine and had just come out when the whistle blew. When he entered his barracks the men were coming out and there was considerable confusion. The three accused with whom he was quartered were in the building at that time. He went out to "the gate" and "they said it was for infiltration course". None of the accused were causing any excitement among the prisoners or doing anything to promote insubordination (R. 244-247).

Private William H. Creed testified that he and accused Verobel lived in the same barracks. Both of them had been in the barracks from the time they returned from "chow" until the whistle blew and had engaged in conversation but nothing was said about what the 17th Airborne Division men would be required to do. Verobel did not make any statements about going through the infiltration course and made no attempt to influence or deter any other prisoner. When the whistle was sounded "somebody saw somebody getting out a bunch of guards", "somebody" said it was for the infiltration course, "somebody" said "I am not going out", then "another" said "I am not going either", and "it all started up, everybody said they were not going out". There were no ring leaders and from "chow" until the whistle blew no group of men came into the barracks making any announcements or threats. Creed did not run the infiltration course. He stayed in because he had made a nine mile hike that day and was tired and the majority of the prisoners refused to go out. He was not influenced, persuaded or coerced by anyone. He went out to hear "the Lieutenant" who said that anybody who wanted to run the infiltration course could go out and run it and that those who wanted to do so could "step over to the left hand side". Some sergeant had come through the barracks once and said something about running the infiltration course and then had come in again and said "Just forget about it, go back to bed" (R. 254-263).

On examination by the court Private Creed testified that "the Lieutenant" in his talk to the prisoners in the stockade had said "Anybody who wants to run the infiltration course step to my left hand side" but had not said that all the men who did not want to run it could "go back". Private Creed admitted that he knew that he was required to run the course on the night of 3 May and that he had no choice in the matter (R. 264-265).

Nine other witnesses, who had been prisoners in the stockade on 3 May 1944 testified for the defense. They stated, in effect, that no man or group of men had come through the barracks before the whistle blew, urging, counseling or demanding that the prisoners refrain from turning out or from running the infiltration course. None of the witnesses who did not run the course was influenced, persuaded or coerced by any of the accused with reference to such action and none of them heard any of the accused make any threatening or persuasive statements or otherwise attempt to influence others to refuse to turn out when ordered to do so. Several of the witnesses testified that when Lieutenant Cullen came into the stockade and talked to the prisoners he stated that the men might either fall in to run the infiltration course or go back to their barracks, whichever they wished to do. However, two of the witnesses recalled hearing Lieutenant Cullen say that if the prisoners did not run the course it would be mutiny (R. 266-273, 277-293, 313-318, 330-349).

All of the accused elected to remain silent (R. 350).

5. On rebuttal Lieutenant Cullen testified that when he ordered Sergeant Maras to sound the whistle for the prisoners to fall out, Maras blew three blasts, about seventeen prisoners (including none of the accused) came out to the gate, Maras took their names, and blew the whistle again. Each time he blew the whistle he "hollered" distinctly "men of the 17th Division" or "All 17th Division outside". None of the four accused came outside. Lieutenant Cullen had the Provost Sergeant (Pack) go into the stockade to see what was the matter and when the latter came back and reported that the men were not falling out Lieutenant Cullen had Sergeant Maras blow the whistle again. As none of the prisoners did come out, Lieutenant Cullen entered the stockade. Neither he nor anyone else in authority told the prisoners that they could choose between falling out and not falling out. As he was going into the stockade someone shouted "This is mutiny" and Lieutenant Cullen told the prisoners when they gathered around him that it was mutiny and that they "did not realize the consequences". He gave them a direct, unequivocal and unqualified order to fall in on his left in column of twos to run the infiltration course (R.350-356).

6. a. Specification 2, Charge I: The evidence shows that at about 8 p.m. on 3 May 1944, Second Lieutenant John J. Cullen, acting under orders from the Provost Marshal of the 17th Airborne Division, went to the stockade to take out the prisoners who were members of that division (about one hundred, including all of the accused) to run the infiltration course.

Lieutenant Cullen had a sergeant blow a whistle which was the signal for the men to turn out of their barracks. Although the whistle was blown several times and the sergeant called loudly for the men of the 17th Airborne Division to come out, only 17 complied and came out to the stockade fence. Lieutenant Cullen then sent the provost sergeant through the barracks to induce the prisoners to come out but to no avail. There was considerable noise and confusion in the stockade and many of the prisoners were shouting that they would not run the infiltration course. Lieutenant Cullen then went into the stockade enclosure, and the prisoners gathered around him. After he had talked to them he ordered them to fall in on his left in a column of twos to run the infiltration course. None of them obeyed the order. Several prisoners remarked "This is mutiny" and Lieutenant Cullen told them "You bet your life that is what it is". He asked them whether they refused to obey his order and a prisoner in the crowd shouted "You are damned right we do - - -". None of the accused turned out to run the infiltration course.

Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. The concert of insubordination contemplated in mutiny need not be preconceived, nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders or to do duty with an insubordinate intent (MCM, 1928, par. 136a; CM 249636, Williams, 3 Bull. JAG 234). It is clear that when a large number of 17th Airborne Division prisoners concertedly and in defiance of superior military authority disobeyed the orders to turn out and run the infiltration course a mutiny existed in the post stockade. All of the accused failed to obey the orders and their conduct and the remarks which each of them was heard to make, show that they were acting voluntarily and in concert with the other mutineers. The evidence sustains the finding of guilty of joining in a mutiny as alleged in the Specification under consideration.

b. Specification 1, Charge I: It appears from the evidence that before the whistle was blown on the evening of 3 May, accused Santoiemma came into one of the barracks, urged the prisoners not to run the infiltration course "under the gun" and remarked that anyone who turned out was nothing but "low down chicken shit". One witness was "fairly certain" that accused Nicolopoulos was with Santoiemma and made similar remarks. Either before or shortly after the whistle sounded accused Santoiemma, Nicolopoulos, and Trollope were together behind a latrine in the stockade shouting to the other prisoners "Don't fall out". At some time during the evening Santoiemma and Trollope went to the door of a barracks, urged the prisoners not to fall out and stated that "Anyone that falls out is chicken shit". After the whistle had been blown accused Trollope made a similar remark to a group of prisoners, Santoiemma told a prisoner not to fall out and Nicolopoulos said to the same prisoner "You boys fall out, you get a beating". Under the circumstances the statements made by the accused Santoiemma, Nicolopoulos and Trollope were such as tended to excite and cause a mutiny and the Board

of Review is of the opinion that the evidence sustains the finding of guilty of the three accused named of attempting to create a mutiny.

c. Specification, Charge II: The evidence shows that on the night of 3 May, accused Verobel went up to the sergeant who had just blown the whistle and asked whether he had "a release for them". When the sergeant gave a negative reply Verobel said "Good night", turned around and walked away. The same accused also came to the door of one of the barracks and stated that none of the others were falling out and that anybody "in there" who did was "chicken shit". He also remarked that anyone who fell out would be "bull holed". The acts and declarations of Verobel and the statements made by the other three accused as related in paragraph 6b above, under the circumstances clearly constituted mutinous conduct in violation of the 96th Article of War.

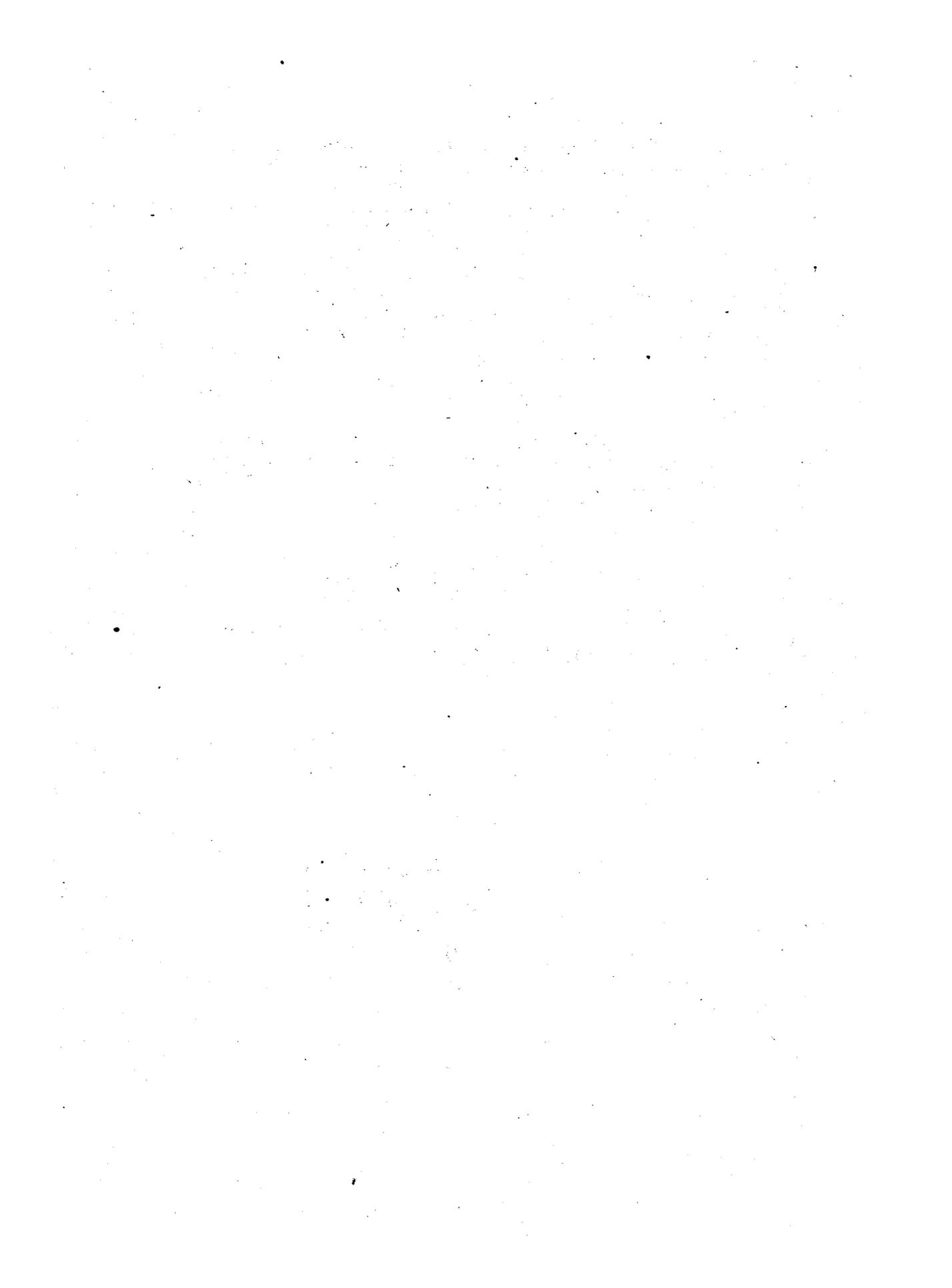
7. The ages of accused are as follows: Santoiemma, 19 years; Nicolopoulos, 29 years; Trollope, 19 years; and Verobel, 24 years. The charge sheet shows that Santoiemma was inducted on 7 April 1943, Nicolopoulos was inducted on 13 July 1943, Trollope was inducted on 2 August 1943, and Verobel enlisted on 15 March 1941.

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 sentences; confinement in a penitentiary is authorized by the 42nd Article of War for the offense of mutiny.

Samuel M. Diver, Judge Advocate.

Robert G. Cannon, Judge Advocate.

J. J. Pottichos, Judge Advocate.



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

(129)

SPJGQ
CM 258829

12 Jul 1944

UNITED STATES)

92ND INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Fort Huachuca, Arizona, 19
June 1944. Dismissal, total
forfeitures and confinement
for five (5) years.

Second Lieutenant STERLING
EASLEY (O-1318291), In-
fantry.)

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL and FREDERICK, 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 61st Article of War.

Specification: In that Second Lieutenant Sterling Easley, Three Hundred Seventieth Infantry, did, without proper leave, absent himself from his duties at Company I, 370th Infantry, in the vicinity of Kurthwood, Louisiana, and Fort Huachuca, Arizona, from about 8 March 1944 to about 28 April 1944.

He pleaded not guilty to, but was found guilty of, both the Charge and Specification, with the exception that, by use of exceptions and substitutions, "20 April 1944" was substituted in lieu of "28 April 1944" in the Specification. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five (5) years. 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, as adduced by duly authenticated extract copies of the morning reports of Company I, 370th Infantry (R. 7, Ex. 1) and by the testimony of First Lieutenant Saunders B. Moon, commanding officer of Company I, 370th Infantry, and by stipulation, may be summarized as follows:

Having been transferred to the 92nd Infantry Division from the 93rd Infantry Division, accused was assigned to Company I, 370th Infantry, by special order dated 8 March 1944 (R. 7, Ex. 1). However, he reported for duty to Company I, which at the time was on maneuvers near Kurthwood, Louisiana (R. 9), on 7 March 1944 (R. 7). On 8 March 1944, accused asked and received permission from his commanding officer, Lieutenant Moon, to go to the rear echelon, which was some four miles distant (R. 8). At the time of granting this permission, Lieutenant Moon told accused that he would have to hurry to the rear echelon and back because the company was moving out very shortly (R. 8). In order to expedite accused's return Lieutenant Moon even furnished him with transportation for use in making the trip (R. 8). Accused dismissed his transportation and sent it back, but did not himself return (R. 8). Lieutenant Moon did not see him from the time he left for the rear echelon until the time of this trial (R. 8). Accused was not present for duty with his organization at any time between 8 March 1944 and 20 April 1944 (R. 9). He had no authority to be absent from his organization at any time on or after the 8th of March except to make the trip hereinabove mentioned (R. 9). Accused was picked up on the morning report of the company as from duty to AWOL on 8 March 1944 (Ex. 1). It was stipulated that he returned to duty on 20 April 1944 (R. 8). He was transferred from the 370th Infantry to the 365th Infantry on 28 April 1944 (R. 8, Ex. 1).

4. The accused, having had his rights explained to him, elected to remain silent and offered no evidence.

5. The evidence introduced by the prosecution is legally sufficient to support the finding of guilty of absence without leave from 8 March 1944 to 20 April 1944, a period of one month and twelve days. There is no evidence raising a defensive issue, and none to be considered in mitigation or extenuation of the offense.

6. War Department records disclose that this officer is 23 years of age and is married. He is a high school graduate and attended Kansas Wesleyan University, Salina, Kansas, for one year. He was employed as a laborer by a Railroad Company prior to being inducted into the service on 9 August 1941. He attended The Infantry School, Fort Benning, Georgia, was commissioned a temporary second lieutenant, Army of the United States, 27 April 1943, and entered on active duty the same day. On 9 June 1944 accused was, by general court-martial, found guilty of the offense of making a false official statement in violation of Article of War 95 and was sentenced to be dismissed the service. The sentence has not yet been acted upon by the President.

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

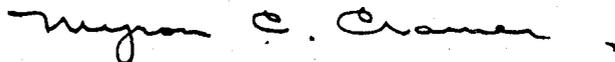
War Department, J.A.G.O. 8 AUG 1944 - To the Secretary of War.

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 Sterling Easley (O-1318291), 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 of the sentence. However, upon the facts disclosed by the record of trial, I feel that the sentence is unnecessarily severe. I, therefore, recommend that the sentence be confirmed but that three years of the confinement and the forfeitures adjudged be remitted and that the sentence as thus modified be carried into execution.

3. The sentence in the instant case (CM 258829) was adjudged on 19 June 1944. Accused had been previously tried (9 June 1944) by general court-martial and found guilty of making a false official statement with intent to deceive a finance officer, in violation of Article of War 95, and was sentenced to be dismissed the service. The record of trial in that case (CM 258549) has been examined by the Board of Review and the Board has rendered its opinion that the record is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in that opinion. Action by the President upon both records of trial appears to be unnecessary. Therefore, in the event the sentence in the instant case is confirmed and carried into execution, I shall, unless otherwise directed, cause the record of the other trial (CM 258549) to be filed in my office without further action. A copy of the opinion of the Board of Review in the other case is attached hereto for your information.

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



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

4 Incls.

- 1 - Record of trial.
- 2 - Dft. ltr. sig.
of S/W
- 3 - Form of action.
- 4 - Cpy of Op. of B/R
in case of 2nd Lt. Sterling
Easley (CM 258549)

(Sentence confirmed but confinement and forfeitures remitted.
G.C.M.O. 519, 26 Sep 1944)

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

SPJGN
 CM 258334

28 JUL 1944

UNITED STATES)

SECOND AIR FORCE)

v.)

Private First Class ANDREW
 M. HOZA (7022576), Head-
 quarters, 9th Bombardment
 Group (H).)

Trial by G.C.M., convened at
 Army Air Field, Dalhart, Texas,
 1, 2, 4 and 5 May 1944. Dis-
 honorable discharge and con-
 finement for forty-five (45)
 years. Penitentiary.)

 REVIEW by the BOARD OF REVIEW
 LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

CHARGE I: Violation of the 92nd Article of War.
 (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Andrew M. Hoza, Private First Class, Headquarters, 9th Bombardment Group (H), did, at or near Dalhart, Texas or or about 30 March 1944 with intent to commit a felony, viz, sodomy, commit an assault upon Mildred Peeples by willfully and feloniously striking the said Mildred Peeples upon and about the head, body and face with a shoe or other hard object, and with his fist.

Specification 2: In that Andrew M. Hoza, Private First Class, Headquarters, 9th Bombardment Group (H), did, at or near Dalhart, Texas on or about 30 March 1944 with intent to commit a felony, viz, rape, commit an assault upon Mildred Peeples by willfully and feloniously striking the said Mildred Peeples upon and about the head, body and face with a shoe or other hard object, and with his fist.

Specification 3: In that Andrew M. Hoza, Private First Class, Headquarters, 9th Bombardment Group (H), did, at or near Dalhart, Texas on or about 30 March 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the persons of the said Mildred Peeples a wrist watch, value about \$150.00, the property of the said Mildred Peeples; and about \$4.00 lawful money of the United States, the property of A.P. Edwards and Herbert L. Peeples, Dalhart, Texas.

Specification 4: In that Andrew M. Hoza, Private First Class, Headquarters, 9th Bombardment Group (H), did, at or near Dalhart, Texas on or about 30 March 1944 commit the crime of sodomy by feloniously and against the order of nature having sexual connection with Mildred Peeples, a human being, by then and there with his penis penetrating the mouth of Mildred Peeples.

The accused pleaded not guilty to all of the Charges and Specifications and was found not guilty of Charge I and its Specification but guilty of Charge II and all of the Specifications 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, at such place as the reviewing authority might direct, for forty-five years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that the accused was a Private First Class assigned to the 9th Heavy Bombardment Group and stationed at the East Base, Army Air Field, Dalhart, Texas. During the evening of 29 March 1944 he for several hours after 7 p.m. indulged in some drinking with friends. At about 11:25 p.m. he was observed standing near the bus which was due to leave for the East Base at 11:30 p.m.

The driver, Mildred Lorraine Peeples, was a woman some 38 years of age and weighing between 116 to 120 pounds. She was the wife of Mr. Herbert Peeples who was one of the two owners of the bus line. Mrs. Peeples "had a regular * * * run" because of the shortage of help (R. 8, 12, 27, 33, 107-108, 118; Pros. Ex. 21).

By 11:30 p.m. between twelve to fifteen passengers boarded the bus. The accused was one of them. He walked to the rear of the bus, sat down, and fell asleep. Five minutes after the scheduled time Mrs. Peeples commenced the trip to the Base. She followed the usual route and in due course arrived at the entrance gate to the East Base. Driving "on up several blocks to the P X", she there discharged her passengers. After retrieving a hat dropped near the center of the bus, she resumed her seat at the wheel, switched off the lights, and drove back to the entrance gate. As she approached the guard, she illuminated the interior of the bus for his inspection. He did not enter the vehicle, and, since from the outside he saw no passengers, he waved to her indicating that she was to continue on her way (R. 12, 14-16, 109, 111-112; Pros. Ex. 2).

The accused was still on the bus. Apparently, without awaking from his slumber, he had slumped to the floor between some of the rear seats. His position was such as to place him outside the line of vision of both the guard and Mrs. Peeples. Only a small portion of the return trip to Dalhart had been completed when the accused was aroused from his slumber and learned that "the bus was heading out of camp". He stood up, and walked forward (R. 15; 113; Pros. Ex. 2).

Mrs. Peeples had no premonition of his approach. Suddenly "some bright light appeared before" her. To quote her,

"I thought the bus had exploded. My head began to feel funny. I put my hand up to my head to see what was wrong * * * I received a terrible blow on my head * * * I just kind of glanced up and saw a soldier's [low cut oxford] shoe. It was * * * raised up above my head. I turned my head around to see [someone in an enlisted man's] uniform standing behind me".

A handkerchief was tied around his eyes and an overseas cap was pulled down over his forehead. Despite her pleas for mercy, he continued to beat her with the shoe in his hand until she lost control of the bus and it "swerved off of the road" and came to a stop (R. 16-17, 40-41; Pros. Ex. 2).

He ordered her to "get up". When she protested that she was unable to rise, he belabored her, choked her, and pulled out some of her hair, leaving a bald spot on her head. "Somehow or other" she managed to struggle loose momentarily. He seized her again, jerked her out of the seat, and kicked her out of the bus. At that moment the lights of an approaching car were seen in the distance. The accused immediately ordered Mrs. Peeples "back on the Bus" and into the driver's seat. She made no effort to "flag" the oncoming car, because she was "bewildered" and "flabbergasted" and because he threatened to "break her * * * neck". In compliance with his order to "get going", she started the bus. She proceeded down the road to the junction with the main highway. Dalhart lay to the left. He ordered her to turn right. She "knew" that if she disobeyed "he would kill" her. About one hundred yards from the junction he had her turn left toward a railroad track paralleling the highway. After driving "just a short ways" and before reaching the track, she was directed to stop the bus and "to get up out of the seat". She "just could not". He again hit her about the face, pulled her hair, and choked her. Seizing her by the coat collar and by the hair, he pulled her out of her seat. In an attempt to "appease" him and in the hope that it might be robbery she offered him the change in her right pocket. He accepted the money, but it purchased neither pity nor mercy for her (R. 17-19, 29, 36-37, 42-44; Pros. Ex. 2).

Forcing her to the floor of the aisle, he unfastened her slacks, and when she proved reluctant "to push them down", he "jerked" them from her body. Her "underpants" were removed by him at the same time. He commanded her to spread her legs apart, but since in the narrow aisle "there was not enough room to do that", he made her finger his penis. She noticed then that he was not circumcized. Moving up on her body, he forced his organ into her mouth so that she choked and gagged and "worked it back and forth" until he ejaculated. When he was done, he assisted her to her feet and permitted her to dress. As soon as she had drawn her slacks on he thrust her into the driver's seat, and, placing her hands behind her back, he held them in one of his. She had some "larger change" in her left pocket and offered it to him. After fingering her private parts and squeezing her left breast, he "got the money out". The sum thus obtained by him when added to the amount taken from her right pocket aggregated between \$5 to \$8 (R. 19, 36).

The second bribe was no more effective than the first. His immediate reaction was to attempt to bind her hands behind her back with a handkerchief which she had used to wipe blood from her face. After she had twice untied the knots, he led her to the rear and threw her down on one of the seats. Upon renewing his attempt to bind her, he noticed her wristwatch. His efforts were diverted to its removal, but he was pre-

vented from accomplishing his purpose by the safety clasp. Since the watch was a Christmas gift from her husband and was worth \$150, she "hated" to surrender it. Accordingly, after volunteering to unfasten it, she slipped it into her "right hand pocket". This course proved futile, for he soon again "started pounding and pulling at her hair". She gave up the watch (R. 20, 120).

Upon receiving it, he proceeded to tie her hands securely behind her back. Ripping off her slacks and underpants, he marched her toward and across the railroad tracks and into a field. He placed one of his legs behind her and "just knocked [her] down" so that she fell flat on her back. He directed her to spread her legs apart. Realizing that "he meant business", she spread them "just a little ways". He told her to "spread them further, or I will break your * * * neck". She obeyed, and he lowered himself on her body and "put his penis up to [her] organs". In her opinion there was actual penetration but, to quote her own words,

"I would not say it was a deep entry, because I pulled my body; it was rigid. He could not".

He finally concluded that, "that is not so good" and asked her to "blow it". The meaning of this phrase was unknown to her, but she "soon found out". He inserted his penis into her mouth and "ejaculated the second time" (R. 20-21; Pros. Ex. 2).

When he was done, he ordered her to "get up off of the ground". She was so "petrified", "scared", and "nervous" that she could not. He pulled her to her feet, but she could not walk. Everything started "going around". The night was cold, and she was "shivering and shaking all over". He buttoned her coat, and placing his arm around her body, assisted her back to the bus. Once they were inside she seated herself behind the driver's wheel. He untied her hands and instructed her to "drive back" without turning on the lights. When she remonstrated that she could not see without the lights because one eye was swollen and bleeding, he replied that he would direct her. He insisted that she go "faster", "faster". At the end of the road along which they were driving was a sign containing the warning, "end of construction". As they approached it, he told her to "keep going straight ahead". To the right and forming a ninety degree angle with the road on which they were traveling was the caliche road leading to the entrance gate of the East Base. Seeing the lights of an automobile coming from that direction, and convinced that if she went straight ahead beyond the sign the accused "would surely kill" her, she turned to her right toward the gate house. To attract the attention of the driver of the oncoming automobile she blinked her lights and honked her horn (R. 21-23, 55).

Enraged, the accused beat her again. As earlier in the evening, she lost control of the bus and swerved off the road. Somehow she succeeded in getting by him and in reaching the outside. While going down the steps of the bus, she screamed for help. To silence her the accused put his right hand over her mouth. She bit his middle finger. He said: "Don't bite me hard". Concluding that she was not hurting him, she "tried to bite him harder" (R. 23).

When both were outside of the bus, he struck her a terrific blow across the bridge of her nose causing her again to see "this terrible bright light". He followed up with a blow on the back of her head, two kicks in her stomach, and two in her back. The wind was knocked out of her. At this point he fell over her. She managed to get to her feet and ran toward the gate house. The accused entered the bus and set it in motion toward her. She thought, "My God, he is going to run over me". Just then a car approached from the rear. Mrs. Peeples "screamed frantically" until it stopped (R. 23, 55-56).

The driver was Captain James J. Buscher of the Air Corps. Mrs. Peeples exclaimed, "For God's sake, catch that bus. A soldier is in it". He followed the bus, but by the time he reached it the accused had brought it to a stop and had fled. Mrs. Peeples complained to the Captain that she had been raped, and that her watch had been stolen. She talked and cried all the way to the gate house. Most of the time she was incoherent. When she arrived at the gate house her husband, who had been looking for her, was on the telephone. She briefly described her harrowing experience and said, "Hurry, I need you so bad" (R. 23-25, 56, 58, 119; Pros. Ex. 2).

A few minutes later she was taken by Captain Buscher in his car to the dispensary. At about 1:15 a.m. she was examined by Captain Don A. Young of the Medical Corps. She was then suffering from shock, as evidenced by "incoherent speech; nervousness, trembling; coldness of the hands". Despite her condition, her first request was for "some mouth wash, or at least a glass of water". She complained that she had been raped and forced to commit sodomy and reiterated several times that she had bitten her assailant on a finger. A physical examination disclosed "First * * * multiple contusions, or bruises, about the entire head, face, left hand, - both knees; and second, - she had approximately one inch lacerations or cuts, one on top of the head, one over the left eyebrow, and one under the left eye. She had additional abrasions on the inside of the mouth; left side, and about the neck and knees, both knees". One eye was swollen shut. The laceration on her head was a puncture which could have been inflicted with the heel of a shoe (R. 59-62, 78, 128, 139 (Pros. Exs. 3, 4)).

In the hope of finding some clue, the interior of the bus was

promptly searched. There blood smears on the seats and walls, a ladies belt, some small coins, a pair of ladies drawers, and a bloody handkerchief were discovered. Acting upon the information available Captain (then First Lieutenant) Raymond K. Ramsey of the Air Corps called the Officers of the Day at the main and west base and asked them "to watch out for an enlisted man who had blood smears on his clothes and a cut on his finger" (R. 79-80, 135).

In the meantime the accused had climbed over the camp fence and had returned to his barracks. At about 1:10 a.m. he went to the latrine to urinate. "There was blood on [his] hands so [he] washed them". He wrapped the wristwatch in some toilet tissue, which he had used as a towel, and threw the package thus formed into one of the toilet bowls. A poker game was in progress in the latrine. The participants had observed the accused enter (R. 88, 113-116; Pros. Ex. 2).

Around 4:30 a.m. an inspection of the hands of all enlisted men was held. The accused was among those examined, but probably because of the poor lighting in the barracks, the clue sought for was not found. In the morning two more inspections were called, the first, at 8:00 a.m., was to be held at the hangar and the other, an hour later, at the barracks. Noticing that he had blood on his clothes, the accused placed them in his barracks bag and donned an entirely different uniform. This was worn by him to the initial inspection. When he returned, he removed his blood-stained uniform from the bag and placed it under the mattress of the bed. This concealment achieved its purpose at the barracks inspection at 9:00 a.m. (R. 67, 80-81; Pros. Ex. 2).

When the inspecting officers had departed, the accused transferred the stained articles of clothing back into the bag and carried it to the latrine. Master Sergeant Roscoe Botman happened to follow him and observed him placing several items of what appeared to be underclothing into the stove. As a matter of fact, the accused also deposited a blouse and some trousers. A fire had been started before his arrival, and it soon reduced the articles of clothing to ashes. Technical Sergeant Thomas P. Harrall who came to the latrine some time later could still "smell clothes burning". The interior of the stove was examined and the ashes sifted shortly after 1:30 p.m. Captain Ramsey, Captain Harold H. Evans, Captain Artuhr Butterworth, Jr., First Lieutenant George E. Albritton, and Sergeant Harrall, who made the search, found some charred cloth;

"two belt hooks made of brass, which came off the back of the blouse at the waist line; * * * [some] small buttons of brass, which were also identified as being off the blouse; two large buttons which also

came off the blouse; one small horn button belonging to the center section; and an AAFTAC pin insignia, such as is worn by enlisted men on their caps (R. 65-73, 82, 85-87, 89, 106; Pros. Ex. 2).

After these various items had been gathered, the accused's shoes were "picked up". He had two pairs, one being low cut oxfords, and the other high cut "Garrison" type. The oxfords were "well cleaned". To Lieutenant Fay V. Johnson, Jr., the Provost Marshal at the East Base, the "high shoes seemed to be the ones he wore that night". This conclusion was corroborated by Sergeant Ralph H. Gerin who recollected that the accused did not wear oxfords on the night of the assaults (R. 76, 90, 96).

During the first inspection Major Brothers at about 8:30 a.m. had found two lacerations on the accused's right middle finger. Major Brothers had called the matter to the attention of Captain Evans. No immediate action had been taken. At the hearing Major Brothers was "not in a position to say" that the lacerations were caused by a human bite. Captain Young who made an examination on the evening after the attacks was, however, of the opinion that they "could have been caused by a bite" within "forty-eight to seventy-two hours, at the most". He also examined the accused's penis and found that it had never been circumcized and that it contained no unusual marks (R. 62-64, 88, 104, 122).

Acting in pursuance to the orders of Major Brothers, Sergeant Gerin on 2 April 1944 made a thorough search of the filing cabinet in the office in which he and the accused were employed. In one of the drawers was a white handkerchief "tied in a knot" containing "something that clinked". The sound was caused by a number of coins aggregating \$5. The drawer in which they had been discovered was the repository for blank forms and was opened only infrequently (R. 93, 97, 100).

In the presence of Colonel Charles A. Mahoney, the Provost Marshal of the Second Air Force, Captain Junious Sneed, the Provost Marshal of the Army Air Field, Dalhart, Texas, Lieutenant Colonel Tilton, the Commanding Officer of the East Field, a Mr. Kelley, an FBI agent, and First Lieutenant Max O. Siegal, the Courts and Boards Officer and a Judge Advocate, the accused, on 2 April 1944, after being fully warned of his rights under Article of War 24, signed a statement consisting of six and one-half pages. He had no counsel present at the time. The statement was not a confession but it did contain a number of admissions. The most important of these were that he had been on the bus at 11:30 p.m.

on 29 March 1944, that he struck Mrs. Peeples with his fist several times, that he "helped her take her slacks off", that he attempted to have sexual intercourse with her, and that he "put" her wristwatch in his pocket (R. 44-53; Pros. Ex. 2).

4. The accused, after he had been fully apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. Several other witnesses were called by the defense. Private First Class Henry Przybek, Corporal Snartland, Sergeant Charles F. Bretchel, and Sergeant Glenn Skaggs, all testified that they had indulged in some heavy drinking with the accused on the night of 29 March 1944 and that in their opinion he was drunk when he parted from them. Bretchel was himself intoxicated and assumed that if the accused was imbibing continuously, he would be in a like condition. Przybek's conclusion was apparently based upon the amount of liquor consumed. Snartland was not "sure" that the accused was intoxicated. After separating from his drinking companions, the accused went to the bus station. When seen there by Sergeant Simon Berrger, he was "staggering along" and was "intoxicated" (R. 150-174).

His own testimony began with an account of his family background and his sexual experience. He had been born in a small mining community in Pennsylvania. Both his parents were immigrants from Czechoslovakia. When he attained the age of 13 or 14, his mother became deranged and was confined for a time in state institutions for the insane. At the age of 16, upon completing the eighth grade, his schooling ended. After working on his parent's farm, he moved to New York where he obtained employment as a dish washer, bus boy, and waiter (R. 175-178).

He had had his first sexual relations at the age of 14. During the ensuing two years he had intercourse "about nine or ten times" and also practiced masturbation. From the age of 18 to the date of his induction he had normal sexual relations about two or three times a month. After he entered the Army, "it was quite frequent". On 13 October 1943 he married. Thereafter he had twice had intercourse with women other than his wife. At no time in his life had he ever committed sodomy (R. 179-181).

During the evening of 29 March 1943 he had consumed large quantities of whiskey and had become intoxicated. He left his drinking companions at the Club Cafe because he "had to vomit". After relieving himself "around the corner" he proceeded to the bus station. Soon he "had to vomit again". Upon entering the bus he seated himself in the rear. Within two or three minutes he was asleep. When he awoke he was lying on the floor of the bus. He has described what ensued as follows:

"I stood up and the Bus was going around and I was holding to the seats on the side * * * When I walked towards the front of the Bus, the driver said something to me. I don't know what was said now. Out of a clear blue sky, I just hit the driver of the Bus, - for what reason, I don't know. I don't know how many times. I hit her * * * I just swung * * *; wherever it landed."

All of his blows had been delivered with his right fist. The shoes he wore that night were of the Garrison type. No club or weapon of any kind was used by him in assaulting Mrs. Peeples. He was not motivated by a desire for money, for he had about \$1.70 in his pocket and some change in the filing cabinet in the office in which he was employed, and he was due to receive his monthly pay the next day. He had "just more or less kept the cabinet as a hiding place for his money every night" (R. 182-188, 191-199, 204-212, 222).

The laceration on his finger was probably a scratch received while wrestling with a Sergeant Latson. This was the explanation preferred by him to Major Brothers and Captain Evans on the morning of the inspection. A bruise on the accused's right knee was the result of his having "bumped" into his bunk (R. 193-194).

He had first been interrogated on 30 March 1944. The following day, after having Article of War 24 read to him, he signed a statement which was untrue. He was again questioned on 1 April 1944 from 2:00 p.m. to 8:00 or 9:00 p.m. During the period Captain Buscher remarked to Lieutenant Ramsey that "they can't try him for a court-martial on circumstantial evidence". Lieutenant Ramsey replied: "Well, you know what kind of chance he will have if they try it at Dalhart; he will probably, he won't even get to the Court house; the people have a Court of their own". Later Captain Buscher said, "why don't you come clean * * * I understand they will probably drop the rape charge and the sodomy charges. Since Mrs. Peeples being a respectable lady at the time, they would not want anything serious to get out about it" (R. 195-198, 216-220).

On 2 April 1944 the accused was again interrogated. He was brought to the Provost Marshal's office at about 5:30 p.m. after having eaten only two mouthfuls of his dinner. His account of the treatment he was accorded was as follows:

"Well, the Colonel and the FBI man, they questioned me the most * * * Lieutenant Siegel was writing it down * * * The Colonel would ask me a question. I would say

I did not know or was not sure or could not answer. He says: 'You know damn well you do; you are just lying about it'. So, I said: 'No sir'. I would fly off the handle and would say: 'Yes' * * * /The/ civilian asked me questions and kept tapping me on the knee."

The accused was told that he could not "get a lawyer until after the questioning is over with". Everything in the statement obtained from him that day was false, except the admission that he had struck Mrs. Peeples (R. 200-201, 220).

He had been drinking regularly since he first moved to New York City and his consumption of liquor had become "pretty heavy" after he had been stationed at Baltimore. When drunk he was incapable of sexual intercourse, because he "could not get an erection" (R. 203, 207).

The last witness for the defense was Captain N. J. Eggeling of the Medical Corps, a neuropsychiatrist. He examined the accused as to the events of 29 March 1944 on two occasions. On the first the accused was in a normal condition; on the second he was under the influence of sodium amytal. In both instances he failed to recollect anything that occurred after he struck Mrs. Peeples and his stories, although told several days apart, were identical in all other respects. Captain Eggeling, relying upon experience, was convinced that this consistency was "conclusive" evidence of the truth. He was also of the opinion that over-indulgence in alcohol will in the case of many individuals render the consumer unconscious and will result in a loss of memory. He believed the accused to be sane at the time of trial and that the type of insanity with which the accused's mother was afflicted was not hereditary (R. 226-232).

5. On rebuttal the prosecution introduced evidence affirmatively showing the voluntary nature of the statement dated 2 April 1944. Each and every one of the charges of coercion and inducement made by the accused was specifically denied by the testimony of Lieutenant Siegal and Captain Sneed (R. 233-246).

6. Specification 1 of Charge II alleges that the accused did

"on or about 30 March 1944 with intent to commit a felony, viz, sodomy, commit an assault upon Mildred Peeples by willfully and feloniously striking the said Mildred Peeples upon and about the head, body and face with a shoe or other hard object, and with his fist."

Specification 2 alleges that the accused did on the same day and in like manner commit an assault with intent to commit rape upon Mildred Peeples. Specification 4 alleges that the accused did "on or about 30 March 1944 commit the crime of sodomy by feloniously and against the order of nature having sexual connection with Mildred Peeples, a human being, by then and there with his penis penetrating the mouth of Mildred Peeples". These various acts were set forth as violations of Article of War 93.

The record depicts a series of wanton and brutal assaults by the accused upon Mrs. Peeples, the prosecutrix. No provocation of any kind or nature was offered by her. Incited by drink and lust, he struck her a cowardly blow from behind which dazed her and deprived her momentarily of the power to resist effectively. His intent was soon made manifest. Only the narrowness of the aisle prevented him from raping her in her helpless condition. When he realized that he could not separate her legs sufficiently in the cramped space available, he gave full proof of his contemptible and degraded nature by thrusting his penis into her mouth and forcibly and against her will completing a sodomistic sexual act.

Later, after the drive to the vicinity of the railroad tracks, the same nefarious pattern of conduct was repeated. Once again he attempted to penetrate her vagina with his sexual organ, but his purpose was at least in part defeated by the rigidity of her body. Frustrated in his design to commit rape, he compelled her to submit to a second act of sodomy per os.

II Bull. JAG, May 1943, p. 188, sec. 451 (2), states that:

"In seeking the motive of human conduct, the court need not be limited to the direct evidence; inferences and deductions from human conduct may properly be considered where they flow naturally from the facts proved."

In the instant case there is no need to rely upon inferences, for the intent motivating the accused's assaults is expressly revealed by the conduct which followed. Twice he tried to accomplish normal intercourse with her, and failing that he twice coerced her into yielding her body to him for sodomistic purposes. The assaults accordingly were clearly made with intent to commit rape and to commit sodomy. Whether the accused used a shoe, as Mrs. Peeples contended, or his fist, as he insisted, is immaterial.

Proof of intent is not a necessary element of the crime of sodomy. The act alone establishes the offense. The accused twice within an hour inserted his sexual organ into Mrs. Peeples' mouth and twice ejaculated therein. This despicable conduct was against the order of nature and constituted sodomy per os.

In paragraph 126 of the Manual for Courts-Martial, 1928, the "general rule of law" is stated "that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense". This principle does not aid the accused. The testimony of his drinking companions concerning his condition was largely surmise based upon the quantity of liquor consumed rather than upon his demeanor and speech. On the other hand, Mrs. Peeples was of the opinion that "he just had enough liquor to make him rather 'cocky' and just 'brave'" (R. 38). The court in the exercise of its judicial function chose to believe her, and its determination cannot be said to have been erroneous. The findings made by Captain Eggeling with the aid of sodium amytal cannot be given any legal weight. The law, as yet, does not admit evidence obtained by the use of lie detecting drugs or paraphenalia: Wharton, Criminal Evidence, Section 1429, citing State v. Hudson (Mo) 289 S.W. 920.

7. Specification 3 of Charge II alleges that the accused did "on or about 30 March 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person of the said Mildred Peeples a wrist watch, value about \$150, the property of the said Mildred Peeples; and about \$4 lawful money of the United States, the property of A. P. Edwards and Herbert L. Peeples, Dalhart, Texas". This offense was also laid under Article of War 93.

Robbery has been described as "the taking with intent to steal, of the personal property of another, from his person, or in his presence, against his will, by violence or intimidation" (M.C.M., 1928, par. 149f). All of the elements inherent in this definition have been proved beyond a reasonable doubt in this case. One need only glance at the photographs of Mrs. Peeples attached to the record as exhibits to appreciate the violence employed by the accused. After her encounter with him, her face was a mass of abrasions and lacerations and her head was disfigured by a severe scalp wound. Both the money and the wristwatch were taken from her person, and his disposition of them clearly shows an intent to deprive her permanently of their possession and ownership. The value of the wristwatch has been stipulated to, and the amount of cash stolen by him has been shown to be somewhat in excess of \$4, the sum alleged in the

Specification. Since as already noted in paragraph 6 the evidence shows that the accused was not so drunk as to preclude his formulating a specific intent, the defense of drunkenness is of no avail.

8. The attack made by the defense upon the voluntary character of the accused's statement of 2 April 1944 is not supported by the record. The evidence adduced by the prosecution refutes all intimations of coercion or improper inducement. But, even if the statement were excluded, more than ample evidence would remain to support the findings of the court.

9. The record shows that the accused is 25 years of age, and that he enlisted on 19 January 1940 for a period of three years which was subsequently extended to the duration of the war plus six months.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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

(147)

SPJGV
CM 258845

9 AUG 1944

UNITED STATES)

v.)

Private SYLVESTER DAVIS
(38235181), Section F,
2534th Army Air Forces
Base Unit.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND
Trial by G.C.M., convened at
San Angelo Army Air Field,
San Angelo, Texas, 9 June 1944.
To be hanged by the neck until
dead.)

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Sylvester Davis, Section F, 2534th Army Air Forces Base Unit, did, at San Angelo, Texas, on or about 27 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Peggy Lou Arnold, a human being by striking her with his fists and by kicking and stamping her on the head and body with his feet.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of one previous conviction was introduced. 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 48.

3. Competent evidence offered by the prosecution shows that about 9 p.m. on 27 May 1944, Mary Whitley, a sixteen year old colored

girl who had been keeping company with accused for about four months, was conversing with a soldier in front of Walker's Barbecue Pit, an eating establishment situated in the so-called Sharp End section of San Angelo, Texas, a colored business district. Accused approached and interrupted the couple, informing the soldier that Mary was his "woman" and that he objected to her talking to the soldier. The latter thereupon challenged accused to fight but he declined the offer (R. 40, 44-46). Thereafter accused proceeded to accompany Mary to her home located on 11th Street just off Chadbourne Street, interrupting their journey for a brief interval when they stopped at a gin on Farr Street to indulge in sexual relations (R. 46, 47, 50, 51). After leaving Walker's Barbecue Pit accused told Mary he was going to cut her throat and also that of the soldier with whom she had been talking but apparently she treated his remark lightly. Later during their walk accused asked Mary if she still wished to marry him and she replied in the negative (R. 53).

As they proceeded north on Chadbourne Street on the west side of the roadway, they came upon a white girl waiting for a bus on the corner of 9th and Chadbourne Streets and accused, passing within five feet of her, turned to smile at her (R. 54-56). This white girl was Peggy Lou Arnold, 20 years of age. She lived with her mother and one of her sisters and had just been visiting a married sister living in the vicinity having left shortly after 10 p.m. to obtain bus transportation to her home. She was clothed in a red sailor dress and tan jacket (R. 98, 130, 135-141, 162, 163). After passing Miss Arnold accused asked Mary if she disbelieved that he would knock her down and she replied affirmatively (R. 56). They continued walking north on Chadbourne Street and as they approached 10th Street accused left Mary abruptly, stating he was going to return to camp (R. 57). During the walk from Sharp End, both before and after the interlude at the gin, accused had been arguing with Mary and by his behavior indicated he was angry with her (R. 93-95). Accused had the odor of liquor about him and he acted as if he were "high" although he did no drinking during the walk which he negotiated without any assistance from Mary (R. 83, 94, 96, 97). Apparently, after passing Miss Arnold, Mary told accused she was going to return to Sharp End later that night which further incensed accused (R. 97).

After accused left Mary near 10th Street he retraced his steps, proceeding south on Chadbourne Street. Mary followed him for a few paces and then slipped between two buildings bordering the sidewalk from where she observed accused walk to Miss Arnold who was still standing at the bus stop and talk to her for a minute or

so (R. 57, 59, 60, 61). The bus stop was located on the northwest corner of 9th and Chadbourne Streets. On the southeast corner of this intersection there was an ice station of the West Texas Utilities Company, operated by Mr. A. B. Crawford (R. 15, 33). The intersection was illuminated by an overhead street light suspended in the middle of the intersection. The front of the ice station was illuminated by four 100 watt lights (R. 27). It was about 10:30 p.m. when accused accosted Miss Arnold at the bus stop. Mr. Crawford was in the engine room of his station preparing to close business for the night and his wife was awaiting him as she sat crocheting on the platform in front of the station (R. 19, 104). Suddenly Miss Arnold was heard to scream. Mrs. Crawford looked across the road, saw her lying on her back in the gutter near the bus stop and saw the accused step from the curb, raise his foot and bring it crashing into Miss Arnold's face (R. 104-106, 108). Mrs. Crawford screamed to her husband to call the police and, as he peered from a window in his ice station, he saw accused stamping Miss Arnold in the face as she lay helpless in the gutter across the street (R. 18-20, 31, 104, 107).

After Mrs. Crawford screamed accused looked up and then bending down he grasped Miss Arnold either by an arm or a leg, and began to drag her around the corner onto 9th Street. He dragged her west on 9th Street a distance of some 80 or 90 feet from the intersection and began to kick her and stamp upon her face (R. 21, 57, 61, 67, 89, 106, 107). Mrs. Crawford screamed again and ran to Chadbourne Street through the driveway of the ice station. Accused ceased his vicious assault on Miss Arnold, took two or three steps toward Mrs. Crawford, halted, wheeled about and began to run west on 9th Street "kind of scraping his feet on the ground" as he ran as if he were attempting to clean something from his shoes (R. 107). When Mary Whitley saw accused stamp Miss Arnold in the face and then drag her around the corner down 9th Street, she rushed down to a vacant lot on the northwest corner of the intersection, saw accused kick Miss Arnold some seven times as she lay alongside the roadway on 9th Street, and shouted to him to leave her alone (R. 57, 64, 65, 99; Ex. 6). Thereafter she saw accused deal Miss Arnold another blow with his foot and then run in a westerly direction on 9th Street away from the ice station (R. 65). Mary Whitley hurried to Miss Arnold, saw her lying on her back with her face covered with blood and then ran to the ice station to have an ambulance summoned (R. 28, 57, 73).

In the meanwhile Mr. Crawford had dialed the telephone several times to call the police but the line was busy. Mrs.

Crawford entered the ice station immediately after accused had left the scene and he told her to continue to dial for the police. Thereupon he picked up an iron rod and started across Chadbourne Street to 9th Street and saw accused running west on 9th Street (R. 21, 108). Mrs. Crawford soon made connection with the police station and then called for an ambulance. Within a few minutes three members of the military police, Staff Sergeant Holder and Sergeants Houchins and Loter, arrived at the scene (R. 26, 108, 109, 115, 164). They found Miss Arnold lying on the north side of 9th Street about 30 yards from the Chadbourne Street intersection. She was unconscious, stretched prone on her back with her feet pointed toward Chadbourne Street. Her dress was raised midway between her knees and thighs, her face was bloody and she gasped for breath as she lay in the road (R. 110, 115-119, 163, 164). Shortly thereafter Mr. G. C. Cannon, a funeral director for Johnson's Funeral Home in San Angelo, arrived and noticed that Miss Arnold was lying in a muddy portion of the roadway with mud plastered in her hair and splattered on her face (R. 127, 128). Staff Sergeant Holder remained at the scene while Sergeants Houchins and Loter drove west on 9th Street in the direction accused had gone (R. 109, 116). They drove out 9th Street to Randolph Street and as they turned south on Randolph Street Sergeant Loter observed two individuals in the opposite direction near the intersection of 10th and Randolph Streets. They turned and proceeding north on Randolph Street they came upon accused walking across 10th Street, about four blocks from the scene of the crime, and promptly placed him under arrest (R. 116, 117, 164, 165). Only about twelve minutes had elapsed from the time the military police left the police station until accused was apprehended (R. 118). Accused was not drunk when apprehended. He gave his name and intelligent answers to questions asked him, did not stagger and did not appear to be disheveled or excited (R. 122, 123, 133, 166).

Accused was taken to the police station at the City Hall where it was observed that his shoes and socks were splattered with blood as were the lower six or eight inches of his trouser legs (R. 119, 120, 131, 132). Within ten minutes thereafter he was taken to the guardhouse at the air field and when examined there he was found to be without socks, his shoes were not as muddy as when he first appeared at the police station, and the lower eight inches of his trouser legs were wet, the bloodstains formerly observed being invisible (R. 121, 122, 165). There was a wash basin in that part of the City Hall where accused had been confined for the few minutes prior to his transfer to the air field (R. 125).

In the meanwhile Miss Arnold had been promptly removed in the ambulance to Shannon Hospital where she was administered to by Dr. L. M. Wiig (R. 128). Her face was bloody and, along with her hair and clothing, was covered with mud. She was unconscious and breathing heavily. There was a deep irregular laceration extending over the right eye and across the bridge of the nose. Her eyelids, forehead and face were swollen considerably. She had a deep laceration on her upper lip, a smaller one on the lower lip and a deep laceration on the underside of her chin. Her upper jaw was freely movable in all directions due to fracture of the facial bones and her nose likewise moveable due to fracture of its bridge. Blood dripped from her facial lacerations (R. 152, 153). X-rays taken the following morning revealed more completely the extent of her injuries. She was suffering from a multiple fracture of the facial bones, the nasal bone had been torn free, both maxillary bones had been torn free and were fractured, the fracture of one extending into the cranial vault, and the outer table of the frontal bone in the frontal sinus area was also fractured (R. 153, 154). She expired at 3:20 p.m. on 1 June 1944, the cause of her death being compound fractures of the skull and facial bones, cerebral contusions and a cerebral nasal fistula all resulting from violent blows struck by some sort of a blunt instrument (R. 155, 156).

Lieutenant Ernest A. Connolly, Police Prison Officer at San Angelo Army Air Field, who participated in the investigation of this crime found a few strands of hair on the shoes accused was wearing when apprehended. He obtained several strands of Miss Arnold's hair at Shannon Hospital and took both specimens to the State Department of Public Safety. There they were subject to microscopic examination by George W. Lacey, a chemist for the department, and he testified it was his opinion that the two samples came from the same person (R. 142-144, 146). He also subjected portions of the legs of the trousers accused was wearing that night to a chemical analysis and determined that the bloodstains on them were human blood (R. 144, 147, 148).

On 29 May 1944, prior to the death of Miss Arnold, accused was taken to the office of Major Owen D. Barker, the investigating officer appointed in the case. Major Barker explained to accused that he was not to be influenced by the fact that he was present before an officer and that he could make a statement or not as he wished. He was informed that any statement he might make could be used against him in the event of trial. No promises were made to

accused to induce a confession. Thereafter accused made a voluntary statement, the essential portions being as follows (R. 149, 150; Ex. 18). Accused went to the town of San Angelo on the evening of 27 May 1944 accompanied by another soldier, "Lewis" Alfred, and during the evening he consumed a quart and a pint of wine interspersed with "quite a few bottles of beer". Thereafter he met Mary Whitley in front of Walker's Barbecue Pit where she was talking to another soldier. Accused had been dating Mary for the past two or three months. She had previously asked accused about marrying her but he had given evasive answers. He commenced walking toward Mary's home with her, she having agreed to conduct him to a bus stop or bus station. During the journey they engaged in sexual intercourse. Thereafter they passed a bus stop where a white girl was standing. About four steps past the bus stop accused told Mary he was not going to marry her and then left her. He was mad because she had taken him out of his way and not to a bus station to obtain transportation to camp. He returned to the bus stop and inquired of the white girl the way to camp and she stated she knew nothing about his camp. Then he struck her. "I don't know why I hit her. It was just meanness is all I can say". She fell to the ground and "I guess I stamped her, too". "I stamped her once or twice". Accused did not move the girl after she fell nor did he put his hands "near her any place". He heard a woman scream and shout "quit that" whereupon he left the scene of the assault. Accused had smoked a peculiar cigarette earlier in the evening. Years before he had smoked hemp and reefer cigarettes and knew that this one was not a "real cigarette". When accused was in the police station he washed his shoes and trousers to remove the mud upon them and left his socks on a window sill when he was taken from there to San Angelo Field (Ex. 18).

After Miss Arnold's death, new charges were prepared charging accused with murder and Major Barker, again appointed to investigate, visited accused at the hospital where he was confined because of an intestinal disorder. Accused was instructed that he was now charged with murder, that he was privileged to remain silent, that if he wished to make a statement it must be voluntary and that any such statement could be used as evidence upon trial of the charge. Thereafter accused voluntarily made a statement, the essential portions of which are as follows (R. 159, 160; Ex. 19). As Mary Whitley and he were walking to her home on 27 May 1944, Mary asked accused for money and he stated he had none. Mary then suggested she could obtain money if accused would

help her and, as they passed Miss Arnold standing on the corner, Mary suggested that accused strike her to give Mary an opportunity to steal her money. They continued a little further before accused returned and accosted Miss Arnold asking her if he was proceeding correctly to the Concho bus station and she replied that she did not know. Thereupon accused struck her, kicked her once and promptly left the scene when Mary reported someone was approaching. He denied dragging her or touching her thereafter. While at the police station he washed mud from his trousers and shoes, removed his shoes and socks believing he would be there for the night and left his socks someplace around the bed. He also denied taking Miss Arnold's purse (Ex. 19).

4. The defense introduced evidence to show that about 5:15 p.m. on 27 May 1944 accused and Private Louis Alfred arrived in San Angelo and, in company with Sergeant Preston Green, purchased a quart and a pint of wine (R. 168, 170, 177). They consumed the pint of wine and, purchasing a few small bottles of beer, began to drink the quart of wine along with the beer in a little shop in Sharp End. They eventually adjourned to another establishment known as Gay Paree and continued drinking. Sergeant Green left the group about 8:30 p.m. and around 9:15 p.m. Private Alfred separated from accused in front of the Gay Paree (R. 168, 169, 171-173, 177, 178). All told accused had consumed about three bottles of beer and a share of the quart and pint of wine in which all three had indulged. When Private Alfred left him, accused was somewhat intoxicated but was not drunk. He did not stagger and he understood everything Private Alfred said to him (R. 169, 170, 173-176).

After having been properly warned of his rights accused elected to take the stand and testify under oath. He asserted that the first statement he had given (Ex. 18) was true but that the second one (Ex. 19) was not (R. 180). He had fabricated the second story because he was fearful he would be charged with rape (R. 182, 196). He remembered walking behind the gin with Mary and also passing Miss Arnold as she was standing on the corner (R. 184). He was arguing with Mary during the walk, protesting that he would not marry her because he was displeased at her conduct with other men. He left her after proceeding a few steps past Miss Arnold because he had been drinking and wished to avoid trouble with Mary (R. 185, 189, 195). Thereafter he approached Miss Arnold, asked her what bus he should take to return to camp and what time it was. After she replied she did not know he struck her with his fist, knocking her into the street. He then dragged her down 9th Street

a distance of some eight feet and kicked her (R. 186, 187, 198-201). His only excuse for his acts was that he had been drinking more than he should have (R. 188, 204).

5. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought exists when the act causing death is coupled with an intent to cause death or grievous bodily harm to a person or knowledge that the act will probably cause the death of or grievous bodily harm to the person assaulted (MCM, 1928, par. 148a). The existence of malice aforethought is conclusively established by the evidence. There is no question of the sanity of accused. He was observed by a Board of Officers, appointed to examine into his mental condition, over the period of time from 31 May 1944 to 8 June 1944. The Board found accused to have a mental age of between six and seven years and to be sane at the time of the examination and sane at the time of commission of the crime, being capable at both times of realizing right from wrong and of adhering to the right. He was also found to be capable of assisting his counsel in the conduct of his defense.

Voluntary drunkenness is no excuse for crime but it may be considered in determining whether accused possessed mental capacity to entertain the requisite specific intent (MCM, 1928, par. 126a). It is apparent on the record, even from accused's own testimony, that, although he had been indulging in alcoholic beverages, he was unquestionably sufficiently sober to know what he was doing when he committed his wanton, brutal and vicious assault upon Miss Arnold. The evidence abundantly sustains the findings of guilty of the Charge and Specification.

6. The accused is about 25 years of age. He was inducted into the military service on 31 August 1942.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, legally sufficient to support the sentence and to warrant confirmation of the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

Thomas W. Daff, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGV
CM 258845

1st Ind.

War Department, J.A.G.O., 19 AUG 1944 - 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 Sylvester Davis (38235181), Section F, 2534th Army Air Forces Base Unit.
2. On 2 August 1944 all of the original members of the court-martial which tried accused reassembled in revision proceedings to determine whether the vote of the court on the findings of guilty was unanimous. In such proceedings the court declared and affirmed that the vote was unanimous and amended the record to show that at the previous session all members present at the time the vote was taken concurred in the findings of guilty of the Specification of the Charge and the Charge alleging murder. Thus the vote on the findings of guilty is in conformity with the recent federal court decision in the case of Hancock v. Stout. There is no reason why the President may not now confirm the sentence or take such other action as he may think proper.
3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, legally sufficient to support the sentence and to warrant confirmation of the sentence. Accused brutally murdered one Peggy Lou Arnold, a girl 20 years of age, by knocking her to the ground with a blow of his fist and then viciously stamping upon and kicking her about the face and head. I find no extenuating or mitigating circumstances to warrant clemency and accordingly recommend that the sentence be confirmed and carried into execution.
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 it meet with approval.

Myron C. Cramer

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

- 3 Incls.
Incl. 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of action.

(Sentence confirmed. G.C.M.O. 645, 8 Dec 1944)



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

SPJGV
CM 258871

15 JUL 1944

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

) MILITARY DISTRICT OF WASHINGTON

v.

Private EARL L. WISSE
(33875185), Company B,
5th Engineer Training
Battalion, Army Service
Forces Training Center.

) Trial by G.C.M., convened at
Fort Belvoir, Virginia, 14
June 1944. Dishonorable dis-
charge and confinement for
life. Penitentiary.

REVIEW by the BOARD OF REVIEW

TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

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

Specification: In that Private Earl L. Wisse, Company B, Fifth Engineer Training Battalion, Army Service Forces Training Center, Fort Belvoir, Virginia, did, at Washington, District of Columbia, on or about 8 May 1944 at about 12:30 A.M., forcibly and feloniously against her will, have carnal knowledge of Lola May Sellman, 2429 Christian Street, Baltimore, Maryland.

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

Specification 1: In that Private Earl L. Wisse, * * *, did, at Washington, District of Columbia, on or about

8 May 1944, at about 12:30 A.M., by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Lola May Sellman, 2429 Christian Street, Baltimore, Maryland, one hundred and fifty dollars (\$150.00) lawful currency of the United States, consisting of one (1) one hundred-dollar (\$100.00) bill, two (2) twenty-dollar (\$20.00) bills, and one (1) ten-dollar bill, the property of the said Lola May Sellman, value about one hundred and fifty dollars (\$150.00):

Specification 2: In that Private Earl L. Wisse, * * *, did, at Washington, D. C., on or about 8 May 1944, with intent to commit a felony, viz, sodomy, commit an assault upon Lola May Sellman by willfully and feloniously forcing the said Lola May Sellman to have carnal connection, per os, with him, the said Earl L. Wisse.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged 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, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

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

While in Baltimore, Maryland, on 7 May 1944, the accused went several times to the store of the National Peanut Corporation. On one of these visits he asked Miss Lola May Sellman to go out with him that night. She did not give him an answer but when she got off work at about 9 o'clock that night accused was waiting for her (R. 8). Accused said he had to be back at his station at Fort Belvoir, Virginia, at 11 o'clock and after walking around Baltimore for about an hour Miss Sellman agreed to accompany him as far as Washington, D. C., she to return immediately. Arriving in Washington by bus accused told Miss Sellman they would get something to eat and then go somewhere to talk. They boarded a streetcar, but the car was stopped by an accident and they got off. They walked up an alley adjacent to a parking lot near

Jackson Place in the City of Washington. Here they halted and accused asked her to accompany him on a trip to New York, but she replied she already had a soldier friend in Seattle, Washington, and that she had enough money to go out there to see him and to return (R. 20). Accused pulled Miss Sellman's coat, which was thrown around her shoulders, from her and put it on the ground. At this time he also snatched her purse from her, and she was worried and "started getting nervous" (R. 27, 28). He then forced her to the ground. She struggled and succeeded in getting off the ground, but he pulled her down again. This second time he pulled her panties down to her feet, got her dress up, and managed to penetrate her vagina with his penis. She does not know whether he had an ejaculation. She was fighting accused during this time, and he stopped and said "if he couldn't do it that way he would do it the other way" (R. 10). Accused then placed his head between her legs and attempted to force his tongue in her vagina and his penis in her mouth, though he did not succeed in either effort (R. 11, 25). The struggle in the alley continued for about an hour and when Miss Sellman succeeded in getting off the ground the fourth time accused noticed her forehead was bleeding, and she discovered her legs were bloody and she was bleeding from the vagina. Accused left to find a ladies' room for her to clean up in, saying if she were not there when he came back he would look for her in the bus terminal (R. 21). After accused left, Miss Sellman cleaned up as best she could and walked about a block where she met a man in a blue uniform, whom she thought was a policeman, and reported the matter to him. This man was a building guard. He called the police, who arrived in about fifteen minutes (R. 12). Just before accused left in search of a room where Miss Sellman could clean up he snatched her purse from her, looked in it, then handed it back to her. When she got to a light and looked in her pocketbook, a wallet containing \$250 which she had in the purse was missing (R. 11, 21).

After the police arrived Miss Sellman accompanied them to the scene of the attack. There the wallet was found, but the money had been taken out. Miss Sellman was then carried to the Gallinger Hospital.

Dr. Daniel C. Caruthers testified that when he examined Miss Sellman about 0300 on the morning of 8 May 1944 she appeared to be dirty and grimy, except for her face which was fairly clean. She had scratches on her forehead, on the backs of both hands and on her elbows, and abrasions about her back. She had dry blood around the vagina, and he found her hymen freshly ruptured and discolored. His

examination showed Miss Sellman to have been a virgin prior to the penetration causing the injuries (R. 40-43).

Photographs taken on 8 May 1944 showing the condition of Miss Sellman's elbows and back, and of the abrasions on the backs of accused's hands were properly received in evidence (R. 36, 37, 38; Exs. 6, 7, 8).

Two statements dictated and signed by the accused after he had been fully warned as to his testimonial rights were received in evidence as Exhibits 9 and 10 (R. 45, 49). In these statements the accused admitted that after considerable struggle, and against Miss Sellman's will he made a penetration of her, but did not complete the intercourse. He also admitted that he took the money from the wallet in her purse without her consent. After leaving Miss Sellman he returned to Fort Belvoir, arriving there about 3:30 a.m. He remained on the post until he was taken into custody by the military police, the arrest being made at the post hospital where accused was being treated for gonorrhoea.

In a statement made to Major Raymond W. DeLancey, the investigating officer in this case, after full warning as to his rights on the premises, the accused stated he had taken \$246 from a wallet belonging to Miss Sellman, the wallet at the time being on the ground (R. 50).

4. For the defense.

After full explanation of his rights as a witness the accused elected to testify under oath. The pertinent portions of his testimony are that Miss Sellman voluntarily accompanied him up the alley near Jackson Place, and that the act of sexual intercourse was voluntary on her part, though she might have put up a little struggle. After the intercourse was started she saw he had no rubber on and told him to quit which he did (R. 59). Accused denied that he attempted any acts of sodomy with Miss Sellman (R. 56).

Accused admitted he took Miss Sellman's money without her permission (R. 57) and on cross-examination admitted he had been convicted for nonsupport for which he was sentenced to a penitentiary for more than a year, and that he also had been convicted of larceny.

5. The evidence shows that after making the acquaintance of Miss Lola May Sellman in Baltimore, Maryland, the accused had her accompany him to Washington, D. C. There he persuaded her to go up an alley with him near Jackson Place, where he forcibly had sexual intercourse with her and attempted an act of sodomy with her. During this time he also forcibly took Miss Sellman's purse from her possession and stole \$250 from a wallet carried in the purse.

6. The charge sheet shows that the accused is 25 years of age. He was inducted into the Army on 25 January 1944.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and legally sufficient to support the sentence. A sentence of either death or life imprisonment is mandatory upon conviction of rape in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year by Section 22-2807 of the District of Columbia Code.

(On leave), Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Smith, Judge Advocate.

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

(163)

8 SEP 1944

SPJGH
CM 258874

UNITED STATES)

ANTILLES DEPARTMENT

v.)

) Trial by G.C.M., convened at
) APO 853, 9-10 June 1944. Dis-
) honorable discharge and con-
) finement for life. Peniten-
) tiary.

) Private OSVALDO PIETRI
) (10405867), Company H,
) 295th Infantry.)

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR 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 Charges and Specifications:

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

Specification: In that Private Osvaldo Pietri, Company "H", 295th Infantry, did, at Guanica, P. R., on or about 2 April 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Victor Padilla, a human being by shooting him with a pistol.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Osvaldo Pietri, Company "H", 295th Infantry, did, at the road from Guanica to Yauco on or about 2 April 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Catalino Martinez a revolver the property of Catalino Martinez.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge II, and guilty of all other Specifications and 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. Evidence of a previous conviction by summary court-martial of absence without leave for two days in violation of the 61st Article of War was introduced. 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution may be summarized as follows: On the evening of 2 April 1944 the accused accompanied by another soldier and a civilian entered the "Blue Sky" bar in Guanica, Puerto Rico. The manager of the bar observed that accused carried a pistol underneath his shirt, similar to weapons carried by the military police. The magazine had been removed from the gun. The accused was well behaved in the bar, drank some beer but was not intoxicated and left at about 7:30 or 8:00 p.m. (R.26-29).

At about nine o'clock that evening Carlos Hernandez Santana and Victor Padilla were on the beach of Guanica Harbor and saw two girls, one of them known to Santana as "Dorca", walk by followed by two men, Manuel Blasini and "Maximino". Shortly thereafter a shot was fired in the direction of the "monument" and Santana and Padilla walked there to find out what had happened (R. 29-30). As they approached a "shack or house" near the monument, the accused, armed with a pistol, was "squatted" beside the building. He ordered them to put up their hands and directed them to walk ahead of him, "Toward the mountain". As they were walking along a trail leading away from the beach, Padilla asked accused not to take them "that way" and turning back toward accused said "don't take us under these conditions". The accused was about ten or twelve feet behind them and as Padilla was speaking accused fired the gun. Victor Padilla "fell and moved and said, 'Oh my God' and died" (R.30-32). Accused ordered Santana to keep on walking toward the mountain or he would shoot him and stated that he killed Padilla because "he had played the fool". The accused showed Santana some bullets and stated "these are for you". He made Santana remove his shirt and trousers but later returned the clothes and directed him to turn around and walk back toward the town. When they returned to a place near the scene of the shooting accused removed his necktie and bound Santana's hands in front of him. On four occasions on the way back accused forced Santana to hide from passing automobiles, threatening to kill him if he did not obey. On arriving in Guanica accused took Santana past the bar to see if people were "talking". The bar was closed and as they walked along the road accused forced Santana to hide with him to avoid being seen by the lights of a passing car (R. 32-35). Jose Benito Acosta, Justice of the Peace in Guanica saw the two men running and left his car to follow them into a field. He caught up with Santana who had stopped running but could not catch accused who went over a fence and disappeared (R. 13-15, 35). Santana stated that he had never seen accused prior to that night (R. 29).

While Lieutenant (j.g.) David Gelber, United States Coast Guard, was making his "check up" of the Guanica dock at about 9:30 that evening he heard a shot fired from along the water's edge and saw two girls running from that direction. He went to investigate and found "this body" lifeless, on the road. The deceased's shirt was torn and footprints around the body indicated to Lieutenant Gelber that a "scuffle" had taken place. He also found footprints leading away from the body toward the hills (R. 7-9). The

deceased was bleeding from a wound on the upper left side of his chest (R. 8, 10, 12). Jose Benito Acosta, arriving at the scene, identified the deceased as Victor Padilla and sent the body to the hospital for an autopsy (R. 9-10). Judge Acosta testified that about an hour had elapsed from the time the body was discovered until he came upon Santana and accused in the field (R. 13-14). He estimated the place where the body was found to be about 50 yards from the beach and about 300 yards from the edge of town (R. 16-17).

The autopsy disclosed that the direct cause of death was "a profused hemorrhage of the aortic and right pulmonary vein and artery" resulting from the bullet wound. The bullet entered on the left side of the chest in the "third intercostal space", followed a downward course to the right "lesioning the aorta", the big artery coming from the heart, perforated the middle and lower lobe of the right lung producing a profused hemorrhage, and perforated the posterior part of the right side of the chest, fracturing the ninth rib posterior at its point of exit (R. 17-20). The doctor who performed the autopsy, was of the opinion that the deceased must have been in a "stooping" or "sitting" position when the shot was fired as the bullet followed a downward course showing that it had been fired from a higher position than the point where it entered the body (R. 23).

At about midnight on 2 April, Catalino Martinez, a watchman for the South Puerto Rico Sugar Company, was riding a bicycle on the road from Guanica toward Yauco and came upon accused walking in the same direction. As he came alongside of accused the latter drew a pistol and "grabbed" the handle bars of the bicycle. Martinez asked accused "are you crazy?" and accused replied that he was not but was going to kill Martinez like he "killed that one back there". Accused "touched" Martinez around the waist and found a revolver which he took, ordering Martinez to turn back toward Guanica or he would kill him. The gun (Ex. A) was a .38 caliber Harrington and Richards, serial number 191476 (R. 39-42).

On the afternoon of 3 April 1944 Private Victor F. Hernandez met accused at APO 853. During the course of their conversation accused offered to sell Hernandez a .38 caliber revolver which bore serial number 191476, and which he said was a gift from his uncle. The accused also removed a .45 caliber pistol from his shirt and said he was in trouble, that he had killed somebody in a fight at Guanica. Hernandez took the revolver to keep for accused and turned it over to Lieutenant Isaac Vergne (R. 44-48).

It was stipulated between the prosecution, defense counsel and accused that if Captain George J. Weinstein, Chief of the Neuro-Psychiatric Section, 298th Station Hospital, were present he would testify that accused was under observation from 1 June to 6 June 1944, that the examination of accused revealed that he was sane, and at the time of the alleged offense was able to distinguish right from wrong and adhere to the right (R. 6).

4. For the defense: A sketch (Def. Ex. B) was received in evidence showing Guanica harbor and the general vicinity where the body of Victor Padilla was found (R. 65).

The accused testified that he had been a resident of Yauco all of his life (R. 74) and that he had never been convicted of a crime nor disciplined for violation of Army Regulations during his two years in the service (R. 66).

Accused testified that he left his station, Camp O'Reilly, on Friday, 31 March 1944, taking with him a service pistol that he had borrowed two days before for guard duty. He carried it over the week-end for no particular reason but to have it with him when he returned to camp (R. 83-86). He went to the "Blue Sky" Bar at about 6:30 p.m. on 2 April with his brother and another soldier (R. 66, 80-81) for the purpose of recovering a ring that a girl named Dorca Centeno had obtained from him the previous Friday evening. She refused to return the ring at first but at about 9:30 p.m. told accused she was going home to get it for him (R. 83, 86-87). Accused waited for about ten minutes and was informed that she had gone to the beach in the opposite direction from her home (R. 88-89). Accused stated that he went to look for her and on leaving the bar placed the magazine in his pistol but did not have a cartridge in the chamber of the weapon (R. 89, 94-95).

The accused further stated that he walked along the beach and met Carlos Santana and Victor Padilla who asked where he was going. He had never seen either of the men before and replied that he was looking for some friends. As accused walked away they called him back and said they would show him where to find "the girls" (R. 66-67). They led accused into the woods for a distance and informed him he would have to pay money for locating the girls. While they were discussing the payment Santana "grabbed" him from behind and Padilla "jumped" him from the front, throwing him on the ground. They started searching his pockets and accused, afraid of injury to himself, took out his pistol, pulled back the slide, and breaking away from his assailants fired a shot into the air. According to accused this was the first shot fired from the pistol that evening (R. 68, 72-74, 95).

Accused further testified that he directed Santana and Padilla to walk ahead of him to the police station to report the assault and as they were walking along Padilla turned and "grappled" with him. Santana joined in and as the three of them had their hands on the gun, fighting for possession, it "went off" and Padilla fell (R. 68, 75-76). Accused ordered Santana to continue the trip to the police station and had him remove his clothes to be certain he was not carrying a weapon (R. 69). Santana "wanted to run" so accused tied his hands as he was afraid if Santana escaped he would not be able to prove he had been attacked. On arriving in Guanica accused saw a number of people running toward him and being afraid they might attack and

possibly kill him he left Santana and walked down another street (R. 70, 72-73). Accused denied that he threatened to kill Santana (R. 77).

With reference to Specification 2, Charge II, accused testified that on leaving Guanica he had walked some distance when Martinez, riding a bicycle, approached and threatened to kill him with a revolver he held in his hand. Martinez told accused to hand over his pistol and accused him of killing a man in Guanica. Accused stated that he "grabbed" the revolver as he was afraid and in the fight that followed he obtained possession of the weapon. He ordered Martinez to get on his bicycle and to "keep moving" (R. 70). Accused then continued on his way to Camp O'Reilly, arriving there at about 4:00 p.m. and gave the revolver to Private Victor Hernandez for safekeeping (R. 90-93).

Mr. Luis Gerard Mayer, Episcopal Minister, and Mr. Luis A. Ramirez, municipal judge of Yauco, testified that they had known accused for approximately seven years, that he was trustworthy, of good moral character and enjoyed a very good reputation (R. 48-51). Mr. Carlos Rivera Cordero, principal of schools in Yauca, stated that he had been acquainted with accused since he was a child, that accused lived with his parents in the country, was a very good boy, associated with good people among whom he bore a good reputation (R. 51-52). Mr. Aracelio Vidal, elementary school teacher, had known accused since he had been in the second grade. Accused graduated from grade school in 1941, two or three months before he entered the Army. While in school accused was cooperative, helpful and always upheld the good name of the school (R. 52-53).

5. The evidence shows that on 2 April 1944 the accused, armed with a .45 automatic pistol, held up Carlos Santana and Victor Padilla on the beach of Guanica Harbor, Puerto Rico, and forced them to walk ahead of him into the adjoining woods. When Victor Padilla turned back toward accused, protesting at being taken into the woods "under these conditions", the accused shot and killed him.

The evidence further shows that following the shooting the accused held up Catalino Martinez on the road from Guanica to Yauca and took from him a .38 caliber revolver. Accused threatened to kill Martinez like he "killed that one back there".

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 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. 148).

The accused contended that Padilla and Santana attacked him, threw him to the ground and attempted to rob him, that he raised himself up from the ground and drawing his gun fired a shot into the air. He stated that he then made the two men raise their hands and walk ahead of him, intending to turn them over to the police for attacking him, that Padilla and Santana grabbed the gun and in the ensuing struggle the shot was fired that killed Padilla. Accused further contended that when he was returning to Camp O'Reilly to report the shooting Catalino Martinez attempted to arrest him for killing Padilla, that he was afraid of the revolver Martinez held in his hand, and after a struggle took the weapon away from him.

The court disregarded the version of the murder and robbery as told by accused, and correctly so. Although there was but one witness to the commission of each crime, their testimony, when considered with the flight of accused, his admission that he had killed a man and other facts established by the evidence, is sufficient to show the guilt of accused.

In the opinion of the Board of Review, the evidence shows that the homicide was committed by accused with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation as alleged in the Specification, Charge I, and that accused robbed Catalino Martinez of a .38 caliber revolver as alleged in Specification 2, Charge II.

6. The accused is now 20 years of age. The charge sheet shows that he was inducted at Fort Buchanan, Puerto Rico, 24 July 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. A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Samuel M. Dwyer, Judge Advocate.

Robert O'Connor, Judge Advocate.

J. P. Lottichos, Judge Advocate.

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

(169)

25 AUG 1944

SPJGH
CM 258883

UNITED STATES)

ARMY AIR FORCES TACTICAL CENTER)

v.)

) Trial by G.C.M., convened at
) Army Air Forces Tactical
) Center, Orange County,
) Florida, 12, 18, 19 and 20
) May 1944. To be hanged by
) the neck until dead.

) Private CHARLIE B. WILLIAMS
) (35105754), 904th Army Air
) Forces Base Unit (Avn), Army
) Air Forces Tactical Center,
) Orlando, Florida.)

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Charlie B. Williams, 904th Army Air Forces Base Unit (Aviation), did, at South Camp, Army Air Forces Tactical Center, Orange County, Florida, on or about 3 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Technical Sergeant Howard J. Robertson, 904th Army Air Forces Base Unit (Aviation), a human being, by shooting him with a rifle.

Specification 2: In that Private Charlie B. Williams, 904th Army Air Forces Base Unit (Aviation), did, at South Camp, Army Air Forces Tactical Center, Orange County, Florida, on or about 3 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private William (NMI) Robinson, 904th Army Air Forces Base Unit (Aviation), a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and the Specifications. Evidence of one previous conviction by summary court-martial of absence without leave for three days was introduced. 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 48.

3. Evidence for the prosecution: The accused was a member of the 904th Base Unit (Aviation), a colored organization with white officers, stationed at South Camp, Army Air Forces Tactical Center, Orlando, Florida (R. 35-37). During the evening of 2 May 1944, he came into the Union Bus Station in Orlando and asked for a ticket to Augusta, Georgia. The ticket agent, Mr. Isaac S. Goodwin, was about to sell him the ticket when he noticed the baggage man and also a city policeman shaking their heads in a negative fashion. According to Mr. Goodwin there was the "smell" of intoxicating liquor on the breath of accused and he was quite talkative and restless but otherwise there was nothing unusual about him and in his opinion accused was not intoxicated. Mr. Goodwin delayed furnishing the ticket and in a few minutes the policeman came back with a white military policeman who took charge of accused (R. 80-86, 92-93). The military policeman, Corporal Henry A. Ratajczak, asked accused his destination, inspected his pass, and, smelling liquor on his breath, told him that any soldier who had been drinking was not allowed on a bus going any distance and that he should get a cab back to camp and continue his trip in the morning. It was then about 9:30 p.m. He released accused but finding him walking down the street a little later Corporal Ratajczak took accused back to the bus station and phoned for the colored military police to come after him. Accused walked with a slight stagger but in Corporal Ratajczak's opinion he was sober (R. 99-104, 172).

Private First Class Walter Pratt and Corporal Errol C. Jordan, colored military policemen, took accused from the bus station to the colored military police headquarters about 9:45 p.m. According to Jordan, Corporal Ratajczak told them that accused was "too drunk to ride a bus". Jordan testified that on the way to headquarters accused and Pratt engaged in an argument and accused said that if he was locked up that night he would kill Pratt after he got out (R. 112-116, 142-146). Accused was quite talkative at the military police station and asked if he could have a "man to man" talk with Second Lieutenant Robert L. Bell, white officer in charge of the colored military police. They stepped outside and accused asked Bell why the military police were always mistreating people and said that he (accused) was a "pug" and a gangster and nobody could "pick" on him. Accused held up his fists in front of him and said "Lieutenant Bell, if you take that bar and gun off I can even lick you". Accused said he was Jewish and asked if Bell was. He also said the colored man was abused and mistreated and that the soldiers at South Camp hated "Captain Munn" (his commanding officer), a "Mississippi cracker" who hated negroes. Accused was "in a hot temper" and very talkative but after talking to him for 15 or 20 minutes Bell finally quieted him and he agreed to go back to camp. Bell testified that accused had the odor of liquor on his breath but he did not stagger and his speech was coherent, logical and relevant. Bell was of the opinion that accused was not drunk (R. 129-137). Accused was taken by Pratt and Jordan to South Camp where he was placed in the "holdover". On the way to camp he complained about being mistreated, called Pratt a "snagger tooth son-of-a-bitch" and

threatened to kill him. He resisted being locked up and it was necessary to use "force" on him. When he was finally lodged in the "holdover" he shouted "I will kill one of you son-of-a-bitches". Pratt testified that accused "had enough whiskey in him to raise some hell" but was not drunk. Jordan was of the opinion that accused was neither drunk nor sober (R. 117-121, 147-149).

The "holdover" was located in Building T-405, a one-story structure about 20 feet by 40 feet in size, housing the interior guard at South Camp. The building was divided into two rooms of equal size, one of which was used as a prisoner's room and the other as a guard room, the rooms being connected by a barred door (R. 64-65, 190). A drawing (Ex. 10A) of the floor plan of the building was received in evidence (R. 66-67, 78). A map (Ex. 9) of South Camp showing the location of various buildings including T-405 was also received in evidence (R. 72-75).

Second Lieutenant Irwin W. Rainer, officer of the day at the air base on 2 May 1944, inspected the interior guardhouse at South Camp at about 11:30 p.m. He heard a loud disturbance within the prisoners' room, profane language and "banging" on the walls. Lieutenant Rainer flashed his light through an aperture in the door into the prisoners' room and accused said, "Get that goddamned light out of my eyes" and continued his profanity. Lieutenant Rainer took out his pistol and remarked "This is a nice gun", "I would hate to have to use it". Accused became silent but when Lieutenant Rainer returned the gun to his holster, accused remarked, "Bring that gun over here and I will show you what to do with it", and resumed the disturbance (R. 150-156). About midnight, two guards, one armed with side arms and the other with a 30 caliber Springfield rifle 1903 model (Ex. 10), took accused, at his request, and another prisoner, to the latrine. The accused laid down on the floor there and "started yelling" that he was sick and needed a doctor. One of the guards helped him up and supported him part of the way back to the guardhouse. Accused was "lifeless like" but he did not stagger "much" and walked the remainder of the way to the prisoners' room mumbling to himself. It was then about 12:10 a.m. 3 May (R. 161-164, 177-187, 194, 210-211, 238, 402). After accused had been re-confined the guard armed with the rifle stood it against the wall of the guard room and left (R. 184-185).

Accused began to shout that he was sick and that he wanted the officer of the day. He requested that Technical Sergeant Howard J. Robertson do something for him and when told he could do nothing accused called Robertson a "T.B. son-of-a-bitch" and "all sorts and kinds of names"; he said Robertson should not be in the Army and he did not understand why they kept him. Private First Class Landle Broadnax, a guard, told accused to keep quiet and promised to get him some aspirin tablets (R. 195-197). When Broadnax returned with the aspirin accused refused to

take them. Accused continued to curse Robertson, called him a "mother-fucker" and said if he got out he would kill Robertson (R. 235-236). He also picked up a chair and beat the wall (R. 276). Broadnax said he was going to send accused to the stockade, and after bringing accused from the prisoners' room to the guard room and ordering him to be seated, he (Broadnax) went to the phone, called the stockade at "Signal Hill" and asked that they send down transportation for a prisoner. At this time, in addition to Broadnax, there were in the room Technical Sergeant Robertson, Private William Robinson, Sergeant Edward R. Young and Private Robert H. Weaver, all members of the same organization as accused (R. 36-37, 199-200, 236). None of the men were armed (R. 215, 244-245). Accused said, "You are calling Signal Hill" and made a "break" for the rifle standing against the wall. Picking up the rifle he pointed it at Private Broadnax and said "Up!Up!". Robinson who was sitting on top of a desk jumped up and accused fired at him. Robinson fell to the floor. Accused said, "I'm going to kill all you mother-fuckers like that". Sergeant Robertson had dropped to the floor after accused fired at Private Robinson and now accused looked down at him and said, "You T.B. son-of-a-bitch, I been wanting to kill you". Sergeant Robertson commenced to raise his head and accused pulled the trigger but as he had not ejected the fired cartridge the gun merely snapped. Accused then worked the bolt and fired at Sergeant Robertson. He stood there a minute, remarked, "Oh, those mens is dead", "I am going out now", and walked out of the room carrying the rifle with him (R. 201-203, 206-209, 213, 222-226, 237-243, 283-285, 292-294). In the opinion of Sergeant Young, Private Weaver and Private Broadnax, accused was sober at the time of the shooting (R. 251, 269, 272). After accused left the guardhouse he stood outside, rifle in hand, for a short time and then walked away. To a soldier who inquired what was the trouble, accused "mumbled" out something about "Had it in for the Sergeant" (R. 300-302, 314-315).

Several officers and enlisted men went to the guardhouse immediately after the shooting. Sergeant Robertson was dead, the back of his head "shot out". Private Robinson was still alive and was taken to the hospital (R. 38-39, 48, 326, 332). An empty .30 calibre shell (Ex. 11) was found on the floor (R. 334-336); a bullet (Ex. 12) was embedded in a wall board (Ex. 6) having passed through the guard roster board (Ex. 8) (R. 68-71, 343-344, 351-352); and later part of the steel jacket of a .30 calibre bullet was found under the building having passed through a board (Ex. 7) in the floor which was beneath the body of Sergeant Robertson. (R. 69-70, 75, 377-378) Pictures (Exs. 13-20) were taken that night of the interior of the guard room (R. 353-359). Private Robinson died about 2:15 that morning, 3 May (R. 45). An autopsy performed on his body disclosed that death was caused by a bullet which went through his arm, entered the chest wall, passed through the diaphragm, the stomach, liver and came out below the right nipple. A piece of the steel jacket of a bullet (Ex. 3) was found in the left pleural cavity and a lead fragment (Ex.4)

in the 10th thoracic vertebra. An autopsy performed on the body of Sergeant Robertson disclosed that the cause of death was a bullet wound in the right hand side of the head shattering the skull and lacerating the brain. Reports of the autopsies performed on Sergeant Robertson and Private Robinson were received in evidence as Exhibit 1 and Exhibit 2, respectively (R. 53-61).

Immediately after the shooting guards were posted around the camp to prevent the escape of the accused (R. 379). About 5:30 on the morning of 3 May the accused was found in the bunk of Sergeant William A. Douglas in Building T-459 which was next door to T-463, where accused lived. Sergeant Douglas, a good friend of accused, told him that he was wanted by the military police and escorted him to Captain Charles T. Munn's office. On the way accused asked "how bad was things" (R. 391-396, 400). When accused was brought before Captain Munn he asked accused "where is the rifle?" Accused said he had thrown it under a barracks, volunteered to lead them to the place but although a search was made the rifle was not found (R. 381-382). The rifle was found at about 7:45 a.m. at the side of Building T-473, located near the guardhouse (R. 360-361). There was one empty shell (Ex. 21) in the chamber and "one full one" (Ex. 22) in the magazine (R. 367-368, 402). Accused, after being advised of his rights under the 24th Article of War, was questioned during the morning by the provost marshal. Accused stated that he was not drunk at the time he was picked up at the bus station although he had a few drinks; he had a three day pass, and was trying to buy a bus ticket at the time; he was first picked up by a white military policeman and then colored military policemen took him to military police headquarters on "West Church Street"; he talked to Lieutenant Bell outside the headquarters but denied telling him that he was a pugilist and a gangster; he was brought back to South Camp and placed in the cell in the back of the guardhouse; he was sick and wanted to get out to see a doctor; he was taken to the latrine and then returned to his cell. When asked why he made so much noise he replied, "Those guards", "Those Sergeants are always snitching on me", "Yes, they are tattling on me, getting me into trouble". Accused further stated that he remembered coming out of the cell but did not remember what happened then. He denied killing Sergeant Robertson and Private Robinson. He said, "I guess I had a gun" but did not know where he got it. Accused said he then walked out of the guardhouse, threw the gun under a barracks and went to bed in a bed not his own. On further questioning accused said there was a "rumpus" in the guardhouse and it was possible he had a gun because "I had to defend myself". He did not know whether he was attacked. When asked flatly if he killed "them" he replied, "Captain, I am a young negro and I want to live". When pressed further he asserted, "No, no, I didn't kill them", "I was drunk. I don't remember" (R. 384-385, 403-409).

4. Evidence for the defense:

Sergeant Luther E. Perkins, 904th Base Unit (Avn) testified that he had been on military police duty in Orlando for about 10 months and it was his "guess" that during that time accused had been picked up for drunkenness on

an average of about once a week. He had arrested accused personally on one occasion upon a complaint that accused had been choking another soldier (R. 420-423).

Sergeant Albert Clark, 904th Base Unit (Avn) testified that at about 11:45 a.m. on 2 May he saw and heard accused playing a phonograph record in the "USO Club" and that accused continued to play the same record over and over again continuously for 4 or 5 hours. On a previous occasion Sergeant Clark "picked" accused up for "AWOL" and was bringing him back to camp when accused jumped out of the car. The car was traveling 25 miles per hour at the time (R. 423-431).

Sergeant Herbert R. Hartman, Private Klein E. Porter, Private First Class Hillard Wright, Jr., Private John Mathews and Private Clarence Terrel, all members of the same organization as accused testified concerning an incident which happened "about four months ago". Accused came into his barracks one evening, he had been drinking, and said he wanted to die. He took a bottle with a skull and crossbones on the label, from his trunk, drank the contents, smashed the bottle, and then doubled up on the floor. A doctor was called and after looking at the label said accused would be all right. The next day accused said he did not remember anything that had happened (R. 432-434, 441, 443-444, 449-451, 463-465). Sergeant Hartman was of the opinion that when accused was drinking he "wasn't himself at all; he was out of his head" (R. 435). Private Wright had heard accused on several other occasions say that he wanted to kill himself. His opinion was that the mind of accused "goes and comes". He also thought that accused was a very heavy drinker, drank anything he could get his hands on (R. 452-456). Private Terrel thought that a man who would try to kill himself had "something wrong with his mind" (R. 465-466).

Private Joshua Owens, 1539th Quartermaster, a friend of accused for the past two years, testified that about six months previously accused was in a downtown store drunk and proceeded to throw his money out in the street. Accused had no recollection of the incident the next day. A month before, accused, drunk, gave away his money to two girls. On several occasions accused complained he was being mistreated and said he would just as soon "end it all" (R. 468-475).

Mr. Roy Baisden, operator of a beer garden, testified that about 1 March 1944, accused and another soldier named Pryor, after scuffling in a friendly fashion inside his place of business, went outside and that accused got Pryor down and choked him until he was "purring at the mouth" and "bloody foam was coming out of his mouth". Accused was pulled away, artificial respiration applied and Pryor revived. Accused said to him "Pryor, get up, wake up, you know I wouldn't hurt you" and commenced to cry. On another occasion accused greeted a civilian at the bar and then "hailed off" and struck him on the lip

with his fist. Accused was a "nice boy" when sober but when he had "a drink or two" he did not act normal. One night accused pulled off his clothes and threw his shirt "on the porch". The next morning he was found behind some bushes across the road and when awakened asked, "Where am I?" (R. 475-488).

Mrs. Mary F. H. London, hostess at the "Colored USO Club" in Orlando, testified she had known accused for about two years, her husband, now overseas, and accused having been friends. She recalled that "about last February" accused, who had been drinking, gave her a dollar to get his uniform from the laundry. She got the suit for him but in a few minutes he came back wearing the uniform, asking for his money and insisting he had not received the uniform. Another time accused, again under the influence of liquor, was in the hands of the military police and he appealed to Mrs. London for protection. When she told him the military police would not harm him he accused her of "going against" him and cursed her. The day after each of these episodes he came to Mrs. London and told her he did not remember anything that had happened but had been told by other soldiers what he had done and thereupon apologized. When drinking accused often talked about committing suicide; he had the idea that he was being persecuted and was afraid that the military police would beat him (R. 488-500).

Corporal William J. McElroy, classification clerk of the organization of accused, testified that the "biggest" number of the men in the organization had classification scores running from 60 to 80. It was stipulated that the classification score of accused was 56 (R. 500-505).

Private Hinton Battles, 904th Air Base Unit (Avn) testified that accused drank to excess and when drinking was not of normal mind. He recalled seeing accused in Orlando one time with his money in his hand and another soldier said that accused had just given his money away to a girl and he had made her return it. The next day Private Battles talked to accused and he remembered nothing about the incident. Accused told Private Battles that he had smoked marihuana cigarettes "when he was living in Cleveland" (R.505-511).

It was stipulated that accused had been in Orlando for 24 hours prior to his being returned to camp and that he had a 3 day pass at that time (R. 656).

Accused, having been advised of his rights, elected to remain silent (R. 513-516).

5. Rebuttal evidence: Captain Robert A. Wise, Chief of the Psychiatric Section, Army Air Forces Regional Station Hospital at Orlando, testified that he examined accused on 8, 13 and 15 May 1944. The examinations consisted of conversations with the patient lasting three to five hours in all, together with consideration of the physical, clinical and laboratory findings. Captain Wise was of the opinion that accused had defective moral and ethical judgment and was a constitutional psychopath, but at the time of the offense

was able to differentiate between right and wrong, mentally able to adhere to the right, and was legally responsible for his actions (R. 519-521, 529-532, 534-535, 599). Captain Wise further testified that by the "Bellevue-Wechsler Test" accused had a mental age of "8 years and some months", and by the Army standard test, 10 years, which classified him as of border-line intelligence (R. 543-544). The term "border line mental defective" does not in general have any relation to the term insanity and the term "Constitutional psychopathic state" does not imply insanity (R. 586). Captain Wise was of the opinion that some of the acts of accused related by the witnesses for the defense were rational and others irrational (R. 553-568). However, these various incidents did not alter his opinion that accused was sane (R. 587-593).

On 4 and 8 May 1944 accused was brought before a "sanity board" composed of Lieutenant Colonel Harold F. Robertson, Captain Allen P. Gurganious and Captain Ralph E. Schmidt, all members of the Medical Corps. Accused was given a mental examination by the board, in consultation with Captain Wise, and a complete physical examination, and found to be essentially normal. The board's opinion contained in reports dated 4 and 17 May (Exs. 23, 24) was that accused was sane at the time of examination and at the time of the commission of the offenses; that at these times he was "capable of realizing right from wrong and of the normal control of his actions"; and that he was capable of communicating intelligently with his counsel and of doing the things necessary for the proper presentation of his case. The diagnosis and findings of the board were confirmed at the trial by each of the members (R. 600-606, 608, 616-618, 621-622, 635-636). Colonel Robertson, president of the board, and Captain Gurganious testified that in their opinion at the time of the offense accused had the mental capacity to judge between right and wrong and was capable of adhering to the right (R. 622-623, 629-634). Colonel Robertson believed that the various incidents related by defense witnesses were indicative of an "abnormal reaction" on the part of accused, but it did not alter his opinion that accused was sane (R. 610-611, 619-620).

6. a. The evidence establishes that shortly after 12:10 a.m. on 3 May 1944, the accused, who was under custody in the guard room at South Camp, Army Air Forces Tactical Center, Orlando, Florida, suddenly seized a rifle which was standing against the wall and fired a shot at Private William Robinson and another at Sergeant Howard J. Robertson, wounding the former so that he died within two hours and killing the latter instantly. The evidence concerning events leading up to the dual killing shows that about 9:30 p.m. on 2 May, when accused, holding a three-day pass, attempted to purchase a ticket at the bus depot for an out-of-town destination, a military policeman, observing that accused had been drinking, ordered him back to camp. When accused failed to obey the order he was taken to military police headquarters and thence to camp where he was lodged in the "holdover" in the guardhouse. He created a disturbance there, pounded the walls, threatened to kill Sergeant Robertson of the guard, and it was decided to remove him to the post stockade. Shortly after midnight he was brought out of the "holdover" into the guard room to await

transportation and it was at this time that the homicides were committed. The shootings were done in cold blood and without any semblance of provocation. Accused fired first at Private Robinson who had jumped up when accused seized the gun. Robinson fell to the floor mortally wounded. Accused now looked at Sergeant Robertson and said "You T.B. son-of-a-bitch, I have been wanting to kill you". He pulled the trigger but as the cartridge did not fire the first time, he worked the bolt and pulled the trigger again. The gun fired, the force of the shell tearing part of Robertson's head away. Shortly after accused remarked that he "had it in for the Sergeant". Although the evidence shows that accused, in the language of a witness, "had enough whiskey in him to raise some hell" there is no question that the character or degree of his drinking was not such as to deprive him of the mental capacity to entertain the specific intent requisite in the offense charged or to excuse him from the consequences of his acts (par. 126a, MCM, 1928, p. 135-6). Every one of the many witnesses who observed accused from the time he was in the bus depot to the time of the shooting, when asked to express an opinion as to his sobriety, testified that accused was sober (excepting only one witness who thought accused was neither drunk nor sober). The officer in charge of the military police to whom accused talked for some 20 minutes around 10 p.m. testified that the speech of accused was coherent, logical and relevant. Very convincing is the fact that when accused was questioned the morning following the shooting concerning events of the night he had a clear recollection of everything that happened up to the very moment the shots were fired and also remembered that he had disposed of the rifle afterward by throwing it under a barracks. In the opinion of the Board of Review all of the elements of the crime of murder, defined by the Manual for Courts-Martial (par. 148a) as "the unlawful killing of a human being with malice aforethought", are proven beyond reasonable doubt. It is not contended that there was any legal justification or excuse and in their absence the homicides were unlawful. There was malice aforethought which in the words of the Manual (par. 148a):

"* * * may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, * * *; knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person, * * * 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 oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, * * * provided the offender has notice that the person killed is such officer or other person so employed".

b. The evidence offered by the defense related almost entirely to his past behavior which it was argued was indicative of insanity. Several

witnesses testified that accused drank to excess and that at such times his conduct was abnormal. It was shown that at such times accused had threatened suicide and had made at least one apparent attempt at suicide, he had thrown his money out in the street or given it away, he had struck an acquaintance without cause and choked into insensibility a friend with whom he was "playing", and he had a friend secure his uniform from the laundry and returned in a few minutes wearing it while insisting he had never received it. The day before the killing accused sat in the "USO" and played the same record continuously for four or five hours.

By way of rebuttal three members of a medical board, and a psychiatrist, who had examined the accused, testified that he was sane at the time of the offenses and the trial, capable of differentiating between right and wrong and of adhering to the right. The psychiatrist further testified that accused was a constitutional psychopath and a border-line mental defective but that neither of these terms implied insanity. The psychiatrist and the president of the medical board were of the opinion that although some of the acts of accused related by witnesses for the defense were irrational or abnormal nevertheless he was sane.

The court balloted separately upon the issue of insanity and specifically found that accused was sane at the time of the offenses and the trial, capable of realizing right from wrong, able to adhere to the right, and capable of communicating intelligently with his counsel and doing all things necessary for the proper presentation of his case. In the opinion of the Board these findings are fully sustained and justified by the evidence.

7. The Charge Sheet shows that the accused is 26 years of age and that he was inducted 3 July 1941.

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. The death penalty is authorized upon conviction of murder in violation of the 92nd Article of War.

Samuel M. Dixon, Judge Advocate

F. H. Brown, Judge Advocate

J. J. Lott, Judge Advocate

1st Ind.

War Department, J.A.G.O.,

1 SEP 1944

- 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 Charlie B. Williams (35105754), 904th Army Air Forces Base Unit (Avn), Army Air Forces Tactical Center, Orlando, Florida.

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, while in custody in a guardhouse, suddenly seized a rifle which had been carelessly left standing against the wall, and in cold blood fired two shots at, and killed, two unarmed members of the guard. Although his detention in the guardhouse resulted from his failure to obey a military policeman who ordered him to return to camp because he had been drinking, the evidence shows that accused was sufficiently sober to be aware of what he was doing and to be responsible for his actions. Subsequent to the killings and prior to trial accused was examined by a psychiatrist and also by a board of medical officers and found to be sane at all material times, capable of distinguishing between right and wrong and of adhering to the right.

Among the papers attached to the record of trial is a telegram from the police department at Louisville, Kentucky, stating that accused is a known petty thief and vagrant and that he was arrested in 1934 for house-breaking and grand larceny; in February 1935 for malicious cutting; in October 1935 for shooting and wounding; in 1936 for possession of marihuana; in 1937 for carrying a deadly concealed weapon; in 1938 for malicious cutting; and in 1941 for grand larceny. I recommend that the sentence to be hanged by the neck until dead 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 above recommendation, should it meet with approval.

3 Incls.

Incl.1-Rec. of trial.

Incl.2-Drft. ltr. for sig. S/W.

Incl.3-Form of Action.

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

(Sentence confirmed. G.C.M.O. 644, 7 Dec 1944)



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

(181)

SPJGK
CM 258900

4 AUG 1944

UNITED STATES)

FOURTH ARMY

v.)

) Trial by G.C.M., convened at
) Camp Bowie, Texas, 16 June
) 1944. Dishonorable discharge
) and confinement for life.
) Penitentiary.

) Private CLYDE RAKESTRAW
) (14048176), 664th Ordnance
) Ammunition Company.)

REVIEW by the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Clyde Rakestraw, 664th Ordnance Ammunition Company, did, at Camp Bowie, Texas, on or about 8 June 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Tom C. Curtis, 664th Ordnance Ammunition Company, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life.

3. Summary of the evidence.

The 664th and 657th Ordnance Ammunition Companies occupied adjoining areas at Camp Bowie, Texas (Pros. Ex. 1). On 2 June 1944 accused was transferred from the 657th to the 664th Company (R. 53). At about 1820 on 8 June 1944 accused had an altercation in the mess hall of the 664th Company with Private Tom C. Curtis, one of the cooks. Acting in accordance with the general company policy, Curtis refused to allow accused to go into the kitchen when the latter sought to do so after supper to get a drink of water. When accused persisted in his efforts, Curtis, who

had in his right hand a knife, which he held down by his side and did not raise at all, pushed accused backward with his left hand. Two enlisted men, Sergeant Claude Kelley and Private John T. Williams, intervened and the former led accused to the door (R. 5-13,15). According to Sergeant Kelley, as he did so, accused "kind of smiled" and said "no one could do that to him" (R. 11). According to Private Williams, accused remarked, "he didn't like anybody to shove him around" (R. 6). Just after leaving the mess hall, accused was heard to call out to a member of his former organization, the 657th, that "a cook hit him and he was going to get him" (R. 15,16,17). At about 1900 accused was seen by several enlisted men in the 664th Company area. He was carrying a rifle and was going toward the latrine, located in the northwestern corner of the area (Pros. Ex. 1, R. 19,20,22,23,25,29,34, 43,44,45). Both wooden doors and the right screen door of the latrine were open (R. 23,31,45,51). Curtis, after having indulged in horseplay near the latrine with a member of the company, Private Goynes (R. 21,23, 27,28), had gone into the latrine to get a loan of twenty cents from Private Johnson, who was taking a shower in a part of the same building (R. 36,40). Curtis was seated and could be seen easily from the outside (R. 31,33,36). When accused got within a few feet of the latrine, he stopped, brought the rifle to his right hip, with the stock about three feet and the muzzle about four feet from the ground, and fired into the latrine without taking any special aim (R. 22,23,28,30,31,35,40,44,46). The bullet struck Curtis, who was just rising from his seat, and caused a large gaping wound in the region under his left armpit, which resulted in his death at the station hospital the same day at about 2205 (R. 24,32, 33,36,37,41,48,54,60-67). There was also found what appeared to be a small gunshot wound, which passed through the soft tissue of deceased's left index finger (R. 61,66,67). No one had left the latrine just prior to the shooting (R. 26,35,38,40). Immediately following the firing of the one round, accused threw the rifle against the latrine, turned around and proceeded at a trot towards the orderly room in the southern part of the company area (R. 26,27,31,32,41,42,44; Pros. Ex. 1). At about 1910 Second Lieutenant Frank C. Krump, who had just completed a class in the day room, located slightly northwest of the orderly room (Pros. Ex. 1), heard someone shouting, "I shot him, I shot him", and going outside saw accused with First Lieutenant Philip L. Cable, the company commander (R.47). Lieutenant Cable was walking away from the day room at the conclusion of the class when accused cried out to him, "I shot a man", adding, in answer to a question by Lieutenant Cable, that he did not know his name. He was then asked by Lieutenant Cable, "What did you do that for?", and replied, "Well, he hit me". Accused thereupon handed two rounds of ammunition to the Lieutenant (R. 53,54). The rifle, a 1903 .30 caliber Springfield No. 4037845, which was missing from the supply room of the 657th Company, was found near the latrine, with the spent cartridge case still in it. The spent bullet lodged in a wall of the latrine, about six feet from the ground (R. 49,50,56; Pros. Ex. 2).

It is approximately three hundred yards from the mess hall of the 664th Company to the supply room of the 657th Company. The latter room

was open between 1800 and 1930 on 8 June to permit members of the company to take out their rifles for cleaning (Pros. Ex. 2).

For the defense.

After an explanation of his rights, accused elected to take the stand and make a sworn statement. Accused was "terribly nervous and excited" after his altercation with deceased, who had struck him with his "balled up" fist, and who had picked up a knife. Anticipating further trouble, he went over to the supply room of the 657th Company, where he picked up the rifle and three rounds of ammunition. On his way over, accused spoke to only one person, a member of the 657th, inquiring of this soldier whether he had a round of ammunition. He took the rifle and ammunition to defend himself when Curtis came out of the mess hall. He loaded the rifle and went back to his hut steps with the intention of shooting Curtis in the leg "if he came around with that knife". Accused likewise testified that he "had the intention of shooting Curtis in the leg as he came out of the mess hall". Accused moved from the steps to a cooler place, changed his mind about shooting Curtis and was going to take the rifle back. Before doing so he had to go to the latrine and took his rifle with him merely to use in pushing the door open. He had not seen Curtis playing around with Private Goynes, and did not know that Curtis was in the latrine. As accused got about four and a half feet from the latrine door, "something came out like a flash" and jumped on him. Accused became excited and "the trigger went off". The "flash" looked "like a man or something * * * it was a soldier, dressed in khaki". He didn't know whether the "flash" looked like Curtis. Realizing that he had shot somebody, he threw the rifle down and proceeded to tell Lieutenant Cable (R. 72-81).

Accused had been in the Army a few days over three years, and had seen actual combat service overseas against the Japanese as a member of the 76th Coast Artillery Antiaircraft Battalion (R. 75,80,81).

4. The record of trial fully supports the court's finding of guilty. Immediately after the argument with deceased, accused proceeded to procure a rifle and ammunition from the supply room of his former organization, admittedly for the purpose of shooting deceased in the leg. About forty minutes after this incident accused fired the rifle into the latrine in which deceased, plainly visible to persons on the outside, was sitting. A short time prior to the fatal shooting deceased had gone into the latrine after having indulged in horseplay with another member of the company in the area around the latrine. While there is no absolute proof that accused saw deceased at that time, it is reasonable to conclude that accused was aware of deceased's presence in the latrine, particularly as accused was within four feet of the open door when he fired. Accused's sole defense was that, having decided not to shot deceased, he carried the rifle to the latrine only for use in pushing open the door, and that it was unaccountably fired when a "flash" "in the form of a man" dashed from the latrine. No

weight can be given to this contention. The record conclusively shows that both wooden doors and one screen door remained constantly open and that no one left the latrine just prior to the shooting.

5. All of the elements of murder are clearly established. 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 nor an actual intent to take his life or even to take anyone's life. Malice aforethought may exist when the act is unpremeditated. It may mean the existence of one of the following states of mind: an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; knowledge that the act will probably cause the death of, or grievous bodily harm to, any person; or intent to commit any felony (M.C.M., 1928, par. 148a).

It is the opinion of the Board, based on the testimony, that accused knowingly fired at deceased as a result of the ill-feeling engendered by the earlier altercation. Even had accused's intention been merely to shoot deceased in the leg, such intention would not have changed the nature of the resulting crime. There is nothing in the record to suggest the propriety of a finding of guilty of the lesser offense of manslaughter, nor to justify a plea of self-defense.

At the conclusion of the case for the prosecution, defense moved for a finding of not guilty. This was properly denied.

6. The charge sheet shows that accused was 21 years and 9 months old at the time of the commission of the crime. There was no prior service. He enlisted on 5 June 1941. According to the testimony he participated in active combat overseas as a gunner with an antiaircraft battalion. Consideration has been given to a letter to the Commanding General of the Fourth Army from accused's mother, and to two petitions, addressed to that officer, from citizens of Gainesville, Georgia, where accused resided, attesting to his previous good character and requesting clemency.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of either death or life imprisonment 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 section 273-275, Criminal Code of the United States (18 U.S.C., 452,454):

W. G. Go, Judge Advocate.
William M. Mays, Judge Advocate.
Samuel Cornfield, Judge Advocate.

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

(185)

SPJGV
CM 258905

27 JUL 1944

UNITED STATES)

v.)

First Lieutenant BILLY G.
LUCAS (O-1584540), Trans-
portation Corps.)

HAMPTON ROADS PORT OF EMBARKATION

Trial by G.C.M., convened at
Newport News, Virginia, 23
June 1944. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Billy G. Lucas, Transportation Corps, Headquarters, Hampton Roads Port of Embarkation, Newport News, Virginia, did at Hampton Roads Port of Embarkation during the period from on or about 29 September 1943 to on or about 6 October 1943, feloniously take, steal, and carry away United States currency, value about Seven Hundred Dollars (\$700.00), the property of Sergeant Talmadge Middleton.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, although believing it inadequate, and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to prove that sometime during the latter part of September or the early part of October 1943, Fred E. Millhorn, a first cousin of accused, drove accused to Camp Patrick Henry, a staging area, so that he might visit a friend confined in the hospital (R. 4, 17). The accused discovered his friend had been discharged from the hospital and, leaving Millhorn for some 20 or 30 minutes, accused eventually returned to the automobile about 8:30 p.m. accompanied by Sergeant Talmadge Middleton. Accused and Sergeant Middleton were not blood relatives but accused's brother had at one time been married to the sergeant's mother, now Mrs. Goins (R. 4, 8, 16, 17). Millhorn was acquainted with Mrs. Goins having known her for some 15 years (R. 16). The three men visited in the auto for about a half an hour and for some 20 minutes of the time the dome light of the car was lighted (R. 9). During the visit Sergeant Middleton gave accused a large white envelope that appeared to be about 3½" x 9" in size and bore the imprint of a censor's stamp on the right hand side of its face. The envelope was addressed to the sergeant's wife, Mrs. Talmadge Middleton, Dryden, Virginia. Millhorn did not notice whether or not it was sealed (R. 4, 8, 10). Sergeant Middleton informed accused that the envelope contained \$700 and requested accused to mail it for him (R. 4, 7, 10). Accused took the envelope and placed it in his pocket (R. 11). Shortly thereafter accused and Millhorn left the sergeant and returned to Newport News.

During the return trip they stopped at a barbecue stand along the roadside for sandwiches and refreshments. They occupied a booth at the stand and, after they had placed their orders, accused drew the envelope from his coat pocket (R. 5, 11, 12). Accused remarked that he wished to see if all the money was in the envelope and proceeded to tear off one end of it and extract the money. After counting the money accused believed it to be \$10 short. Counting it the second time, he placed the bills in stacks of \$100 each on the table and found it totaled \$700. Accused then placed the money back in the envelope and returned it to his pocket (R. 5, 12, 13, 14). Millhorn did not believe accused was violating any instructions given by Sergeant Middleton when he opened the envelope and counted the money. Soon thereafter they resumed their trip to Newport News and somewhere near a Western Union telegraph office on Huntington Avenue, Newport News, accused separated from Millhorn. It was then approximately 9:30 p.m. (R. 15).

On 6 October 1943, Sergeant Middleton's organization, Depot Repair Squadron, 60th Air Depot Group, embarked at Hampton Roads, Virginia, for parts unknown (Pros. Exs. 4, 5).

The records of General Auto Sales, an establishment dealing in automobiles in Newport News, showed that on or about 4 October 1943 this company received \$700 from the accused as a down payment on an auto sold to him for \$945. Under federal regulations a down payment equal to one third of the selling price of the auto was required which in this case would have been \$315. If the payment had been made by check the deposit slips of the company would have reflected it. However, there was nothing on the company's deposit slips to indicate that in October a check for \$700 had been deposited to the company's account (R. 41, 42). Accused maintained a checking account with Citizens Marine Jefferson Bank, Newport News, Virginia, but during the months of September and October his balance never exceeded \$58.65 and his total withdrawals for those two months were \$99.07 (R. 50; Pros. Ex. 6).

On 18 November 1943, Edgar A. Lee, a Post Office Inspector located at Newport News, received a telephone call from Lieutenant Colonel George V. Klimes, Post Inspector General at Newport News, and was requested to investigate to determine what had happened to a particular letter previously mailed by accused. Lee checked the dead letter section and also that section where all improperly or insufficiently addressed letters are held, commonly called the "nixie" section, but was unable to locate it. Lee was of the opinion that a letter placed in the letter box in front of the Newport News Post Office should reach Dryden, Virginia, within three days in the ordinary course of events (R. 35, 36). Raymond B. Robinson, also a postal inspector, made an investigation concerning this letter at the post office in Dryden, Virginia, and as a result of his investigation found no reason to believe the letter ever reached that post office. He was of the opinion that in the ordinary course of the mails it would take two days for a letter to reach Dryden from Newport News (R. 37, 38).

On 15 November 1943, accused was interviewed by Lieutenant Colonel George V. Klimes, Post Inspector General at Newport News, and shorthand notes of the conversation were taken by Technician Fourth Grade Betty J. Magnuson. No threats or other inducements were used upon accused. Sergeant Magnuson did not remember of her own knowledge whether accused was warned of his rights under Article of War 24 but did know that certain matter on the transcription of the conversation to the effect accused had been so warned was true when the transcription was made (R. 18-20). During this interview accused stated that he visited Sergeant Middleton one evening at Camp Patrick Henry and was given a bulky envelope, censored, stamped, sealed and addressed to the sergeant's wife which accused was asked to mail. Sergeant Middleton informed

accused it contained \$700 which had been won in a dice game. Accused returned to his office in Newport News about 9 p.m. and, although he had not been asked to do anything but post the letter as it was, he decided to send it the next day as a money order and accordingly placed the envelope in his desk for the night. The following day he concluded he would be violating postal laws if he tampered with the letter so he posted it in a mailbox located in front of the Newport News Post Office on 25th Street. About five or six days later accused received a letter from Mrs. Goins, Sergeant Middleton's mother, stating that although the sergeant had written that the money had been sent his wife it had not in fact been received. She asked accused to attempt to locate the letter and stated that she was going to request the War Department to investigate. Accused stated that he replied that the Army postal system had no concern with the letter since he had mailed it himself from an outside letter box. Accused further stated that on 13 November 1943 he received a letter from his sister, Mrs. J. P. Martin in which she wrote that Dorrell Middleton, the wife of Sergeant Middleton, had nothing to do with the letters Mrs. Goins had written about this incident and had "quit worrying over the money matter for she said yourself (Lt. Lucas) and Talmadge (Sgt. Middleton) standing was worth more than all the money. You know, Billy, (Lt. Lucas) we don't think the whole thing will amount to much for if the Government should investigate certain people's character, I guess they would feel small" (R. 21-28).

Accused also informed Colonel Klimes that Dryden, Virginia, had a population of about 500 people and he believed somebody other than an addressee could call for and receive mail at the post office situated there. Accused also stated that Mrs. Goins had been confined at one time in the state penitentiary after conviction for trafficking in narcotics and bootlegging; that she and her husband were then running a bootlegging establishment; that Mrs. Goins was probably prompted to write letters about this matter because of personal jealousy inasmuch as she had two sons who had served in the Army almost as long as accused and were still enlisted men; and that apparently Mrs. Goins harbored animosity toward the accused because he had told her that she and Sergeant Middleton's wife would be unable to visit the sergeant at Camp Patrick Henry (R. 24, 25, 27).

On 22 May 1944, Captain Arthur T. Singer, Assistant Port Inspector General, had a conversation with accused about this matter

after first asking accused if he understood his rights under Article of War 24 to which accused replied affirmatively stating that it would be unnecessary to read the Article to him (R. 31). Accused then was shown a letter which he admitted having written on 11 October 1943 to Mrs. Goins (R. 31; Ex. A-1). In it accused had written that the envelope containing the \$700 had been "turned over BY ME to the mailing section, where an M.P. was on duty at the time" (Ex. A-1).

On cross-examination by the defense Captain Singer testified that sometime during the middle of November Mrs. Talmadge Middleton stated she had not received the envelope and the money. He also testified that, when he pointed out to accused that his statement in this letter concerning mailing of the envelope differed from what he previously had told Colonel Klimes, accused sought to explain it by saying "There are several things in the letter Ex. A-1 that were stated by me that weren't true due to the fact that I know she would make a mess out of this. I was merely trying to clear myself a bit and not get into trouble. I thought by making those statements she would not go into the thing" (R. 34).

4. The defense introduced Mrs. Talmadge Middleton as a witness and she testified as follows. Sometime during March 1944 she received an envelope containing a letter from her husband and approximately \$700 in cash (R. 54-55). It was a large, white, War Department envelope bearing the imprint of a censor's stamp on the back, it showed no signs of having been tampered with, it was addressed in Sergeant Middleton's handwriting, and the letter contained within stated her husband had won the money rolling dice (R. 60, 63, 64). She wrote her husband that she had received it but told no one else (R. 56).

On cross-examination she admitted accused was her blood uncle. She denied that on the Friday immediately preceding the trial she had told Mrs. Goins she had not received the money although she had conversation with her then and they discussed the accused. She never did tell Mrs. Goins she had received the money. She did not tell accused of its receipt until they met at the bus station in Newport News when she arrived the Saturday prior to this trial although she had previously telephoned him because she heard "an investigation was going on" and at that time had been asked by him to come to Newport News as she probably would be called as a witness (R. 56, 57, 61, 62, 65). Although she had a checking account at Lee Bank and Trust Company she did not deposit the \$700 in it but secreted

it in one of the side pockets of a brown traveling bag that she had in her bedroom (R. 58, 60). She testified she loaned \$300 of it to her sister, Johnnie Martin, loaned another \$300 to an unidentified friend and spent \$100 for a chest of drawers, a rug and some household linen (R. 59). On the Monday previous to trial when asked how much of the \$700 she had spent, she had replied "Practically all of it" (R. 59, 60). She further testified that although she was on friendly terms with her mother-in-law, Mrs. Goins, the latter's efforts to trace the money were not agreeable to her inasmuch as she preferred to handle the matter alone and desired no aid or assistance (R. 62).

Johnnie Martin, a sister of Mrs. Talmadge Middleton, testified that she worked at Langley Field, Virginia, as a mechanic, earning \$38 a week (R. 67). Some two months prior to this trial she received a loan of \$300 from Mrs. Middleton. The latter came to Newport News and the loan was made at the home of the accused (R. 66, 67). She refused to reveal why she needed the money claiming that her answer would tend to incriminate her (R. 68).

At the request of the court Mrs. Middleton was recalled to the stand and testified that she came to Newport News in the first part of May 1944 "with a friend to bring her baby to Portsmouth and to see my sister to give her the money" (R. 70, 71). She loaned her sister \$300 without being informed why her sister needed the money. The loan was made at accused's house in Sussex-Hampton, Virginia, and although she saw accused at the time, the three of them being present when the loan was made, she did not tell him she had received the \$700 (R. 71).

5. In rebuttal of the evidence presented by the defense the prosecution introduced Jewel Lucas, the daughter of Mrs. Goins, as a witness. She testified accused was her blood uncle and that she had known him all her life (R. 71). She had been visiting her sister-in-law, Mrs. Talmadge Middleton, during the three weeks just prior to this trial of accused and had heard Mrs. Middleton say that all she knew about the situation was that accused was supposed to have sent the money for her husband and she had not received it (R. 72).

The defense then recalled Mrs. Middleton to the stand and she denied that, on the previous Friday in the presence of Mrs. Goins and Jewel Lucas, she had stated she had not received the money. The

prosecution then recalled Jewel Lucas and she testified that on the previous Friday Mrs. Goins had stated in the presence of Mrs. Middleton and herself that she was convinced of one thing and that was that Mrs. Middleton had not received the money to which Mrs. Middleton replied, "No, but I rather think Fred got it than Billy" (R. 74).

6. Vigorous objections were made by the defense to the testimony of Sergeant Magnuson and Captain Singer concerning statements made by the accused during the investigation of this matter by the Port Inspector General. Both of these statements were properly admissible in evidence as admissions against interest made by the accused inasmuch as they contained conflicting assertions as to where and how the letter had been mailed by accused which, in turn, tended to connect accused with the offense charged (MCM, 1928, par. 114b). They were admissible in evidence without any showing by the prosecution that they were voluntarily made (MCM, 1928, par. 114b).

Miss Jewel Lucas, called as a prosecution witness, testified to a statement made by Mrs. Middleton sometime during the three weeks prior to trial to the effect that she had not received the money. The defense objected to the testimony of the witness on the grounds that the accused was not present during the conversation and that the trial judge advocate had not stated the purpose of the testimony. The law member overruled the objection. If the testimony of Miss Lucas were offered for the truth of the matter asserted in it, the objection of defense was proper inasmuch as it was hearsay. If it were offered only for the purpose of impeaching Mrs. Middleton the law member should have ruled that it was admitted only for that purpose to advise defense so that any proper objection might be made to its admission. Indeed, the defense could have objected to its admission for the latter purpose on the grounds that proper foundation for the question had not been laid. To impeach a witness on the grounds of prior inconsistent statements made by him the witness must be asked on cross-examination if he made the inconsistent statement and his attention must be directed to the "time and place of such statement and the person to whom it was made" to afford him an opportunity to explain it (MCM, 1928, par. 124b). Here on prior cross-examination Mrs. Middleton was only asked about a prior statement made to Mrs. Goins on the Friday immediately previous to the trial (R. 57). Miss Lucas, however, testified about a statement made sometime during the three weeks immediately prior to trial. The prosecution had not laid proper foundation for Miss Lucas'

testimony by previous cross-examination of Mrs. Middleton as to a prior statement made sometime during the three weeks prior to trial. Accordingly, the objection of the defense should have been sustained.

The foregoing error did not substantially prejudice the rights of accused, however, inasmuch as proper foundation was laid and subsequently proper evidence introduced to impeach Mrs. Middleton on the basis of a prior inconsistent statement. On cross-examination and on examination by defense in surrebuttal Mrs. Middleton denied she had informed Mrs. Goins on the Friday immediately prior to trial that she had not received the money. Miss Lucas testified to the contrary that on that day Mrs. Middleton did tell Mrs. Goins in her presence that she had not received the money but rather thought "Fred got it than Billy" (R. 74). The effect of this testimony upon the credibility of Mrs. Middleton as a witness was for the court to determine.

At the close of the prosecution's case in chief, defense moved for findings of not guilty on the grounds that (a) there was no proof that the \$700 was missing and (b) even if it were missing the evidence could only support a conviction for embezzlement and not for larceny. The motion was denied by the court. Such a motion is to be denied if "there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of an offense charged" (MCM, 1928, par. 71d).

The only evidence produced during the prosecution's case in chief to demonstrate that the money was missing was the testimony of Captain Singer, Assistant Port Inspector General, who testified on cross-examination by defense counsel that sometime during the middle of November 1943, Mrs. Talmadge Middleton had stated that she had not received the envelope and the money (R. 34). Although this testimony was hearsay it was elicited by the defense and, accordingly, was entitled to consideration by the court. Other evidence offered during presentation of the prosecution's case in chief shows that a stamped, sealed, addressed envelope containing the money was given to accused to mail the latter part of September or early part of October 1943. In the ordinary course of the mails it should have been received by Mrs. Middleton within two or three days of posting. After accused had left Sergeant Middleton he tore open the envelope, counted the money and found it totaled exactly \$700. Within a few days thereafter accused made a down payment of \$700 on an automobile and, from the

evidence as to the automobile dealer's bank deposit slips and the withdrawals made from a checking account of accused in a local bank, the court was justified in inferring that the payment was made in cash. Subsequently, the accused made contradictory statements on the simple matter of how he had mailed the envelope. On 15 November 1943, accused stated that he posted the envelope in a mailbox located in front of the Newport News Post Office on 25th Street and that he wrote Mrs. Goins he had mailed it "personally in an outside Post office box". However, on 22 May 1944, accused admitted authorship of a letter to Mrs. Goins written on 11 October 1943 in which he stated that the envelope was "turned over BY ME to the mailing section, where an M.P. was on duty at the time". To justify the contradiction accused stated there were several things in his letter of 11 October 1943 which were untrue "due to the fact that I accused know she would make a mess out of this. I was merely trying to clear myself a bit and not get into trouble. I thought by making those statements she would not go into the thing". An investigation by postal authorities revealed that the envelope was not in the dead letter section or the "nixie" section of the Newport News Post Office and that nothing was uncovered to indicate that it had ever reached the Post Office in Dryden, Virginia.

It is to be observed that the trial of this case occurred some nine months after the envelope had been given to accused to mail. If the \$700 had been received by Mrs. Middleton sometime after the middle of November 1943 that would not necessarily be inconsistent with the original theft of it. Subsequent restoration of stolen property does not purge one of the original offense. Considering all of the evidence presented before the prosecution rested its case in chief, The Board of Review is of the opinion that the motion for findings of not guilty was not sustainable upon the first ground advanced by the defense.

The motion was likewise not sustainable upon the second ground advanced by the defense. Under the facts as proved the accused was properly charged with larceny and not embezzlement. A bailee, although obtaining possession lawfully, commits the offense of larceny if thereafter without authority he breaks the package entrusted to him, abstracts its contents and converts them to his own use (Dig. Op. JAG, 1912-40, sec. 451 (38)).

The troublesome aspect of this case is occasioned by the testimony of Mrs. Talmadge Middleton, a niece of the accused. She testified for the defense that sometime during March 1944 she received

an envelope addressed in her husband's handwriting, containing the \$700 and a letter from her husband. It is apparent that the court did not believe her testimony. The credibility and trustworthiness of this witness was seriously impaired by the testimony given by another niece of accused, Miss Jewel Lucas, who testified, in contradiction of Mrs. Middleton's testimony, that on the Friday prior to the inception of this trial she heard Mrs. Middleton inform Mrs. Goins that she had not received the money but rather believed that "Fred got it than Billy". Although Mrs. Goins had supplied most of the impetus for the investigation of the matter and was deeply interested in it, Mrs. Middleton testified she did not tell her at any time that she had finally received the money even though she was on friendly terms with her mother-in-law and had a conversation with her about the accused on the Friday immediately prior to the trial of this case. The record does not indicate that Mrs. Middleton is so ill equipped mentally that she was unable to appreciate the effect that receipt of this money would have upon the situation and upon Mrs. Goins' attitude in the matter. It is unbelievable that Mrs. Middleton would not have conveyed this information promptly to Mrs. Goins.

Mrs. Middleton also testified that she called the accused sometime shortly before trial because she heard "an investigation was going on" and, although she was asked by him to come to Newport News inasmuch as she probably would be called as a witness, she did not tell him she had received the money until later when she arrived at the bus station in Newport News the Saturday prior to trial. If such a telephone conversation were had ordinary human instincts would have impelled her then to tell accused of the receipt of the money. If she had not told accused then that she had received the money, why should he ask her to appear as a witness? What testimony material to his case could she give?

This witness further testified that she did not deposit the \$700 in her bank account but hid it in a brown traveling bag until she spent \$100 for household furnishings, loaned \$300 to a sister, Johnnie Martin, and loaned \$300 to an unidentified friend. When questioned on the Monday immediately prior to this trial she did not mention these loans but when asked how much of the \$700 she had spent she replied "Practically all of it". Although her sister testified she had received a loan of \$300 she refused to state for what purpose the money was needed on the grounds her answer might incriminate her. Mrs. Middleton also testified that she traveled to Newport News from her home in

Dryden, Virginia, "with a friend to bring her baby to Portsmouth and to see my sister to give her the money". She further testified that the loan was actually made at accused's house and although accused was present she did not tell him that she had received the \$700. It is unbelievable that she would not have told him of the receipt of the money at that time rather than permit accused to remain ignorant of such a vital fact.

It is as apparent to the Board of Review, as it was to the court, that Mrs. Middleton's testimony as to the receipt of the money was pure fabrication to assist her uncle to extricate himself from his unwholesome dilemma. Ordinary common sense would go begging if credence were accorded her testimony.

It should not pass unobserved that Mrs. Goins was present and testified at the trial. However, under a ruling of the law member her testimony was stricken from the record on the grounds that she was a convicted perjurer and had not been pardoned (R.71). Without passing on the correctness of this ruling, it tended to benefit the accused rather than injure his substantial rights.

From all of the circumstantial evidence produced, especially when considered in the light of accused's contradictory statement on the simple matter of where and how he mailed the envelope and of Mrs. Middleton's unbelievable testimony, it is the opinion of the Board of Review that the findings of guilty of the Charge and Specification are sustained.

7. Accused is 25 years of age. He enlisted in the Army on 24 April 1937 and served as an enlisted man until he was commissioned a second lieutenant on 11 December 1942 after graduation from the Quartermaster School, Camp Lee, Virginia. He was promoted to first lieutenant on 17 August 1943.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Thomas N. Tapp, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

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SPJGV
CM 258905

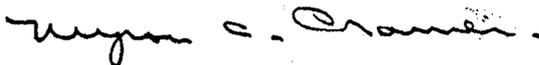
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War Department, J.A.G.O., 17 AUG 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Billy G. Lucas (O-1584540), 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, to support the sentence and to warrant confirmation of the sentence. The accused was found guilty of the theft of \$700 from a noncommissioned officer in violation of Article of War 93. He was sentenced to be dismissed the service. I recommend that the sentence, although grossly inadequate, be confirmed and carried into execution.

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



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

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft of ltr for sig S/W.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 526, 26 Sep 1944)

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

(197)

. 29 AUG 1944

SPJGH
CM 259005

UNITED STATES)
) FIELD ARTILLERY REPLACEMENT TRAINING CENTER
) FORT SILL, OKLAHOMA
) v.)
) Trial by G.C.M., convened at
Second Lieutenant MERVIN)
O. POTEET (O-1179173),) Fort Sill, Oklahoma, 16-17
Field Artillery.) June 1944. Dismissal.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR 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 2nd Lt. Mervin O. Poteet, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did without proper leave absent himself from his station at AAF Contract Pilot School, Pittsburg, Kansas, from about 16 March 1944 to about 22 April 1944.

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

Specification 1: In that 2nd Lt. Mervin O. Poteet, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did at Camp Croft, South Carolina, on or about 15 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Camp Croft Exchange certain checks in words and figures as follows, to-wit:

Assumption, Ill.
~~Spartanburg, S.C.~~ Jan. 15 1944
Assumption
THE ~~COMMERCIAL~~ NATIONAL BANK 5
of Spartanburg 67-699
Pay to the order of _____ Cash \$25 ⁰⁰/₁₀₀
Twenty five & ^{no}/₁₀₀ _____ DOLLARS
Mervin O. Poteet
and also O-1179173

Assumption, Ill. Jan. 15
~~Spartanburg, S.C. 1/17/44~~ 1944

Assumption
THE ~~COMMERCIAL~~ NATIONAL BANK
~~of Spartanburg~~ 5
67-699

Pay to the order of Cash \$25 ⁰⁰/₁₀₀
Twenty five & ^{no}/₁₀₀ -----DOLLARS

Mervin O. Poteet
O-1179173

and by means thereof did fraudulently obtain from the said Camp Croft Exchange the sum of fifty dollars (\$50.00), lawful money of the United States, he, the said Lieutenant Poteet, then well knowing that he did not have and not intending that he should have sufficient funds in the Assumption National Bank of Assumption, Illinois, for payment of said checks.

Specification 2: In that 2nd Lt. Mervin O. Poteet, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did at Spartanburg, South Carolina, on or about 17 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to The Citizens and Southern National Bank a certain check in words and figures as follows, to-wit:

67-682
THE CITIZENS AND SOUTHERN NATIONAL BANK
of South Carolina

Spartanburg, S. C. Jan. 17 1944 \$50/00

Pay to the order of

THE CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA

Fifty and no/100 -----DOLLARS

Value received and charge the same to the account of

TO First Assumption National)
Bank)
Assumption, Ill.)

Mervin O. Poteet
O-1179173

Form 263

and by means thereof did fraudulently obtain from the said Citizens and Southern National Bank the sum of fifty dollars (\$50.00), lawful money of the United States, he, the said Lieutenant Poteet, then well knowing that he did not have

and not intending that he should have sufficient funds in the First Assumption National Bank of Assumption, Illinois, for the payment of said check.

- Specification 3: Similar to Specification 2, but alleging check drawn on the First National Bank, Assumption, Illinois, dated 31 January 1944 for \$10, made at Mulberry, Kansas, payable to the order of cash, and uttered to Mrs. Ethel Ward.
- Specification 4: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 14 March 1944 for \$20, made at Pittsburg, Kansas, payable to and uttered to C. H. Washington.
- Specification 5: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 20 March 1944 for \$15, made at Frontenac, Kansas, payable to and uttered to Judea Nizzia.
- Specification 6: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 21 March 1944 for \$20, made at Pittsburg, Kansas, to order of cash and uttered to D. Alumbaugh.
- Specification 7: Similar to Specification 2, but alleging check, drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 21 March 1944 for \$20, made at Frontenac, Kansas, to the order of cash and uttered to Dom Nizzia.
- Specification 8: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 22 March 1944 for \$20, made at Frontenac, Kansas, payable to and uttered to Dom Nizzia.
- Specification 9: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 27 March 1944 for \$10, made at Kansas City, Kansas, payable to the "Y.M.C.A., K.C., Kas." and uttered to the Young Men's Christian Association.
- Specification 10: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 29 March 1944 for \$25, made at Kansas City, Missouri, to the order of cash and uttered to the Plaza Bank of Commerce.
- Specification 11: Similar to Specification 1, but alleging the two checks were drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 31 March 1944 for \$10 each, made at Kansas City, Missouri, to the order of cash and uttered to Helen Helms, "The Blue Room".

Specification 12: Similar to Specification 2, but alleging check drawn on the National Bank of Pittsburg, Pittsburg, Kansas, dated 15 March 1944 for \$15, made at Pittsburg, Kansas, payable to and uttered to Hotel Besse.

Specification 13: Similar to Specification 1, but alleging two checks dated 14 January 1944 for \$10 each, made at Camp Croft, South Carolina, to the order of cash and uttered to the "Officers' Mess".

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

Specification: In that 2nd Lt. Mervin O. Poteet, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, having been first lawfully married to one Margaret Mary Poteet on or about 13 April 1939 at Waukegan, Illinois, did, while said marriage was valid and subsisting and while said Margaret Mary Poteet was alive and yet his wife, unlawfully and feloniously contract a second marriage to one Gladys Mae Kirkham, on or about 1 April 1944 at Kansas City, Kansas.

He pleaded guilty to the Specification, Charge I and Charge I, and not guilty to the remaining Charges and Specifications. He was found guilty of all Charges and Specifications and 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 (5) years. The reviewing authority approved only so much of the sentence as provides that accused be dismissed the service and forwarded the record of trial "pursuant to Article of War 46". (The record will be treated as having been forwarded for action under the 48th Article of War.)

3. Evidence for the prosecution:

CHARGE I: A copy (Ex. 1) of the morning report of Second Army Air Forces Liaison Training Detachment, Pittsburg, Kansas, shows accused, from duty, attached from the Field Artillery School, Fort Sill, Oklahoma, to absent without leave 16 March 1944 (R. 12). An extract copy (Ex. 2) of a morning report of the Air Training Student Officers Pool, Field Artillery School, Fort Sill, Oklahoma, shows accused from absent without leave to apprehended by military police, Kansas City, Missouri, and placed in confinement 22 April 1944 (R. 12-13).

CHARGE II: It was stipulated by the prosecution, defense counsel and accused that prosecution exhibits 3 to 18 are true photostatic copies of the original checks described in Specifications 1 to 13, Charge II; that the original checks were made and uttered by accused on the dates appearing thereon; that the checks were returned by the drawee banks, marked "insufficient funds" or "no account" (R. 13-25).

a. Specification 13: On 14 January 1944 an employee of the Officers' Mess, Camp Croft, South Carolina, cashed two checks for accused upon his presenting his identification card. Photostats (Exs. 17 and 18) of the checks, dated 14 January 1944, in the sum of \$10 each, payable to "Cash", and drawn on the Assumption National Bank, Assumption, Illinois, were received in evidence. Both checks bore the indorsements "Officers' Mess, Camp Headquarters, Camp Croft, S.C." (R. 25-26).

b. Specification 1: On 15 January 1944, the accused, upon presenting his "personal identification" cashed two checks at the Camp Croft Exchange. Photostats (Exs. 3 and 4) of the checks, dated 15 January 1944, in the sum of \$25 each, payable to "Cash", and drawn on the Assumption National Bank, Assumption, Illinois, were received in evidence. (R. 13-16)

c. Specification 2: On 17 January 1944 the accused "was passing through Spartanburg" and requested Leon L. Patterson, cashier of the Citizens and Southern National Bank of South Carolina, Spartanburg, South Carolina, to cash his personal check. Upon "proper identification" of accused the check was cashed. A photostat (Ex. 5) of the check dated 17 January 1944, in the sum of \$50, payable to The Citizens and Southern National Bank of South Carolina, and drawn on the First Assumption National Bank, Assumption, Illinois, was received in evidence (R. 16-17).

d. Specification 3: Ethel Ward of Mulberry, Kansas, "received" a check from accused which was returned marked "no account" and which she made good. A photostat (Ex. 6) of the check, dated 31 January 1944, in the sum of \$10, payable to "Cash" and drawn on the First National Bank, Assumption, Illinois, was received in evidence (R. 17-18).

e. Specification 4: On 14 March 1944, Carl H. Spendlove, store manager for C. H. Washington, tobacco dealer, Pittsburg, Kansas, cashed a check for accused for \$20. Accused identified himself by his "A.G.O." card. A photostat (Ex. 7) of the check dated 14 March 1944, payable to C. H. Washington, drawn on the National Bank of Pittsburg, Pittsburg, Kansas, was received in evidence (R. 18-19).

f. Specification 12: On 15 March 1944 a check was "given" by accused to Hotel Besse, Pittsburg, Kansas. A photostat (Ex. 16) of the check dated 15 March 1944, payable to the Hotel Besse, in the sum of \$15, drawn on the National Bank of Pittsburg, Pittsburg, Kansas, was received in evidence. (R. 24-25)

g. Specifications 5, 7 and 8: Judia and Dominic Nizzia, Frontenac, Kansas, cashed three checks for accused giving him "the full amount of money". Photostats of the checks, all drawn on the National Bank of Pittsburg, Pittsburg, Kansas, were received in evidence as follows: check dated 20 March 1944 for \$15 payable to Judia Nizzia (Ex. 8); check dated 21 March 1944 for \$20 payable to "cash" (Ex. 9); and check dated 22 March 1944 for \$20 payable to Dom Nizzia (Ex. 10) (R. 19-20).

h. Specification 6: D. Alumbaugh, Pittsburg, Kansas, cashed a \$20 check for accused in payment of "food, refreshments and balance in cash". A photostat (Ex. 11) of the check dated 21 March 1944, drawn on the National Bank of Pittsburg, Pittsburg, Kansas, payable to "Cash", was received in evidence (R. 20-21).

i. Specification 9: The Young Men's Christian Association, Kansas City, Kansas, cashed a check for accused in the sum of \$10 which was returned "because of insufficient funds". A photostat (Ex. 12) of the check dated 27 March 1944, drawn on the National Bank of Pittsburg, Pittsburg, Kansas, payable to the "Y.M.C.A., K.C., Kas." was received in evidence (R. 21-22).

j. Specification 10: On 29 March the accused presented his check to the Plaza Bank of Commerce, Kansas City, Missouri to be cashed. The bank paid the check upon accused producing "sufficient identification". A photostat (Ex. 13) of the check dated 29 March 1944, in the sum of \$25, drawn on the National Bank of Pittsburg, Pittsburg, Kansas, payable to "Cash" was received in evidence (R. 22-23).

k. Specification 11: Helen L. Helms, Kansas City, Missouri, cashed two checks for accused drawn on the National Bank of Pittsburg, Pittsburg, Kansas. Photostats (Exs. 14 and 15) of the checks dated 31 March 1944, for \$10 each, payable to "Cash" were received in evidence (R. 23-24).

It was stipulated that if A. H. Corzine, president of the First National Bank of Assumption, Assumption, Illinois, were present in court he would testify that accused opened a small account in the Assumption Bank on 3 June 1942, closed it on 16 November 1942 and had no account with the bank since that time (R. 26-27). It was further stipulated that if Edgar C. Webber, vice president and cashier of the National Bank of Pittsburg, Pittsburg, Kansas, were present in court he would testify that accused opened an account on 29 February 1944 with a deposit of \$400, and that by 3 March 1944 he had withdrawn \$410, leaving an overdraft of \$10 as shown by the statement (Ex. 19) of his account. Accused did not receive a copy of the statement (R. 27-28).

On 10 May 1944, the accused, after being advised of his rights, gave a sworn statement (Ex. 23) in which he identified his signature on most of the checks described in Specifications 1 to 12. He stated that he remembered cashing only the \$50 check (Ex. 5) on 17 January 1944 in Spartanburg, South Carolina, the \$20 check (Ex. 7) on 14 March in Pittsburg, Kansas, and the \$25 check (Ex. 13) on 29 March in Kansas City, Kansas. The accused further stated that his account in the First National Bank of Assumption had been closed about November 1942, but he had never received a statement that it was "completely closed out". At the time he wrote the checks on the National Bank of Pittsburg, he did not know whether he had

sufficient funds in his account to pay them as he had never received a statement from the bank. Accused believed that he must have cashed the checks whenever he "got real drunk" (R. 33-34).

CHARGE III: Mrs. Margaret Mary Poteet testified that she married the accused on 13 April 1939 at Waukegan, Illinois, as shown by the certificate of marriage (Ex. 20), that the marriage had never been dissolved, and that Judith Ann Poteet, four years of age, and Kathleen Olga Poteet, five months old, were issue of their marriage (R. 29-32).

A certified copy of a marriage license and certificate of marriage (Ex. 22) shows the marriage of accused to Gladys Mae Kirkham on 1 April 1944 at Kansas City, Kansas (R. 33). Gladys Mae Kirkham Poteet testified by deposition (Ex. 21) that she met accused on 20 March 1944 at "College Inn", Kansas City, Missouri. They were married in Kansas City, Kansas, on 1 April 1944, and lived together as man and wife for about two weeks. She further stated that from the time she met accused until she last saw him, accused was frequently intoxicated in the evenings, but did not drink during the day, and that accused was "quiet and sober" on the day of their marriage. In a previous statement (attached to Ex. 21), which she testified was true, she stated that accused was in an intoxicated condition from the time she first met him, that he would "sleep off one drunk only to go right on another", taking aspirins "by the bottles full" with his drinks, and that she never saw him "fully sober" until after he had been held by the military police for two or three days. He appeared, however, to be sober on the day they were married (R. 32-33).

In his sworn statement (Ex. 23) made on 10 May 1944 accused stated that he attended Liaison Pilot School at Pittsburg, Kansas from 19 January to 11 March 1944. He was to leave for Fort Sill, Oklahoma, 14 March but was "pretty drunk" and stayed in Pittsburg that night at the house of a girl acquaintance. He remained there for about a week and was "always in a half stupor or half drunk mood", taking aspirin tablets with his drinks. About 25 or 26 March he left for Fort Sill and while waiting in Kansas City, Missouri to change trains he started drinking again. About two days later he met Gladys Mae Kirkham in a tavern in Kansas City and stayed at her house that night. The next night they "got drunk" and continued drinking until 4:00 or 5:00 o'clock the following morning. In one of his "drunken moments" accused asked her to marry him. She made all arrangements for the wedding and they were married by a judge in Kansas City. Accused stated that he was "half doped" on aspirins and beer at the time and did not care what happened. He intended to return to Fort Sill the next day but "got too drunk". Several days passed and when he realized "what a foolish thing" he had done he prepared to leave for Fort Sill. He told Gladys Kirkham he was going to New York. Instead of leaving, however, he got drunk again and stayed at the

home of a civilian. The following day, while still drinking, he telephoned Gladys Kirkham telling her he was in New York. She traced the telephone call and asked the military police to help locate accused and as a result he was taken into custody. Accused further stated that he was in love with his wife and children and did not care for "Gladys" the girl he had "bigamously married" (R. 33-34).

4. For the defense: The accused testified that he completed twelve years of school in Assumption, Illinois. Before entering the Army he had been an inspector at Illinois Malleable Foundry, Decatur, Illinois (R. 46-47). He had been in the Army seven years, first enlisting at Fort Sheridan, Illinois. He served in artillery organizations at various posts in the United States before going to Iceland with Task Force No. 4 in September 1941. He returned in November 1942 to attend officer candidate school. After receiving his commission on 18 March 1943, accused was transferred frequently and in January 1944 he was stationed at Fort Jackson, South Carolina, where he became very "disgusted" because he had no assigned duties and found himself working under officers he had instructed at "OBC". From Fort Jackson he was sent to Liaison Pilot School at Pittsburg, Kansas, arriving there 19 January (R. 35-37).

With reference to the checks drawn on the Assumption Bank (Specs. 1, 2, 3 and 13, Chg. II) accused stated that he opened the account in June 1942 while he was in Iceland by making an allotment of \$100 a month to the bank. The allotment was in effect for three or four months and was stopped about 5 November 1942 on his return to the United States (R. 48-49). He wrote checks over a period of about twelve days in November 1942 (R. 53). He never received a statement from the bank and did not know the account had been closed on 16 November 1942 (R. 49-50). He did not write any more checks on the Assumption Bank until January 1944, but was always under the impression that he had approximately \$80 balance in the account (R. 50, 53). The First National Bank was the only bank in Assumption, Illinois (R. 47). He "faintly" recalled cashing the two checks (Exs. 3 and 4) for \$25 each at the Camp Croft Post Exchange, but did not remember cashing the two \$10 checks (Exs. 17 and 18) at the Camp Croft Officers' Mess. He had stopped over at Camp Croft on his way to Liaison Pilot School and was "fairly well intoxicated" at the time. He remembered cashing the \$50 check (Ex. 5) at the Citizens and Southern National Bank in Spartanburg. He stated that he had never been in Mulberry, Kansas and could not account for his \$10 check (Ex. 6) being cashed there (R. 37-40, 54-55, 57-58). However, his signature was on the check (R. 40). Accused further testified that his wife could draw on his account in the Assumption bank while he was in Iceland (R. 66).

As to the checks drawn on the National Bank of Pittsburg (Specs. 4-12) accused testified that he opened the account with a deposit of \$400

about 1 March 1944 and never made any additional deposits (R. 41, 59-60). He acknowledged that the bank statement (Ex. 19) showed that between 29 February and 2 March 1944 he had issued checks in a total amount of \$410 leaving the account \$10 overdrawn (R. 63-64). He never received a statement from the bank, however, and believed that he had sufficient funds in the account to meet the checks he issued between 14 March and 31 March 1944 (R. 64-65). Accused recalled cashing the \$20 check (Ex. 7) on 14 March 1944, but could not "definitely" remember cashing any of the remaining checks (Exs. 8 to 16) drawn on the National Bank of Pittsburg, because he was drinking during that period (R. 41-43). The accused further testified that he never intended to defraud any of the people who cashed his checks and had a Government check for \$360 on deposit in the prison office to pay all of the outstanding checks (R. 46).

As to Charge III the accused testified substantially the same as he related in his sworn statement (Ex. 23) of 10 May 1944. He added, however, that before he left the Liaison Pilot School at Pittsburg, Kansas, he was given a ten-day delay en route before departing to Fort Sill (R. 42). He had known Gladys Mae Kirkham about three or four days before he married her, and had been under the influence of liquor for so long that at the time of the marriage ceremony he did not realize he was already married. He remembered the marriage "very faintly", "some judge" performed the ceremony. His mind was not "working properly" but he would not say that he was "dead drunk" or in a "drunken stupor". After the marriage and until he left her he was never fully in possession of his senses (R. 68-70).

Mrs. Margaret Mary Poteet, the wife of accused, testified that she visited accused at Pittsburg, Kansas, early in February 1944 and observed that he was upset, "seemed nervous" and had been drinking "heavily". She visited him again during the latter part of February and first part of March, and his condition was about the same, but she "thought" he had been drinking more (R. 75). According to Mrs. Poteet the accused appeared "stable" when drinking but on becoming sober he did not "seem" to remember what happened while he was under the influence of liquor (R. 76). The accused always had provided for the family but the last few months while she was living with her family had been "slightly different" (R. 79). Before they left "Carolina" accused turned his pay check over to her each month. On the two occasions when she visited accused in February and March 1944 at Pittsburg, Kansas, he gave her over \$300 (R. 75-76). Mrs. Poteet further stated that she drew some money on the bank account of accused in the First National Bank of Assumption, Illinois, while accused was in Iceland but she did not remember the amounts (R. 75-76).

5. a. Charge I: It is shown by the evidence and admitted by the plea of guilty that the accused, without proper leave, absented himself from his station at Army Air Forces Contract Pilot School, Pittsburg, Kansas, from about 16 March to 22 April 1944.

b. Charge II: The evidence shows that between 14 January and 31 March 1944 the accused made and uttered sixteen checks in the aggregate amount of \$295. Six of the checks were drawn on the First National Bank of Assumption, Assumption, Illinois, and issued to the payees in amounts as follows: Two checks for \$10 each on 14 January 1944 issued at Camp Croft, South Carolina, payable to "Cash" (Spec. 13); two checks for \$25 each on 15 January 1944 issued at Camp Croft, South Carolina, payable to "Cash" (Spec. 1); \$50 on 17 January 1944 issued at Spartanburg, South Carolina, payable to The Citizens and Southern National Bank of South Carolina (Spec. 2); and \$10 on 31 January 1944 issued at Mulberry, Kansas, payable to "Cash" (Spec. 3). Ten of the checks were drawn on the National Bank of Pittsburg, Pittsburg, Kansas, in amounts as follows: \$20 on 14 March 1944, issued at Pittsburg, Kansas payable to C. H. Washington (Spec. 4); \$15 on 15 March issued at Pittsburg, Kansas payable to Hotel Besse (Spec. 12); \$15 on 20 March issued at Frontenac, Kansas payable to Judea Nizzia (Spec. 5); \$20 on 21 March issued at Pittsburg, Kansas payable to "Cash" (Spec. 6); \$20 on 21 March issued at Frontenac, Kansas payable to "Cash" (Spec. 7); \$20 on 22 March issued at Frontenac, Kansas payable to Don Nizzia (Spec. 8); \$10 on 27 March issued at Kansas City, Kansas payable to "Y.M.C.A." (Spec. 9); \$25 on 29 March issued at Kansas City, Missouri payable to "Cash" (Spec. 10); and two checks for \$10 each on 31 March issued at Kansas City, Missouri payable to "Cash" (Spec. 11).

The first six checks (Specs. 1, 2, 3 and 13) were returned by the First National Bank of Assumption, Illinois, marked no account. The account of accused with the Assumption Bank was closed in November 1942 and no further checks were written by him on this account until he issued the six checks in January 1944 for \$130. Accused testified that he remembered cashing three of these checks in a total amount of \$100, and was always under the impression that he had a balance of approximately \$80 in the account. The ten checks drawn on the National Bank of Pittsburg, Pittsburg, Kansas (Specs. 4, to 12) were returned by the drawee bank because of insufficient funds. Accused opened this account on 29 February 1944 with a deposit of \$400 and by 3 March 1944 had overdrawn his account \$10, leaving no funds to his credit when he issued the ten checks between 14 March and 31 March 1944 in a total amount of \$165. Accused testified that he recalled cashing one of the checks for \$20 but because of his intoxicated condition could not "definitely" remember cashing the rest of the checks. Accused also testified that he believed he had sufficient funds in the First National Bank of Assumption and the National Bank of Pittsburg to pay the checks he issued because he had never received a statement from either bank notifying him of the condition of his account.

An accused is properly chargeable with knowledge of the status of his bank account, where, as here, the status of the account results from the acts of accused, such as drawing checks (CM 236070, Wanner, 22 B.R. 279). The Board of Review is convinced from the evidence that accused was not so

intoxicated at the times the checks were issued as to be unable to know what he was doing and that he was not rendered incapable of realizing the consequences of his act. Drunkenness is a defense only where it negatives specific intent, and the burden of proof is upon accused to show that his state of drunkenness was such as to prevent his forming the design to defraud (CM 118861; Dig. Op. JAG 1912-40, sec. 451 (28)). The evidence sustains the findings of guilty of the fraudulent issuance of checks as alleged in Specifications 1 to 13, Charge II.

c. Charge III: It is shown by the evidence and the admissions of accused in his testimony that accused and Margaret Mary Poteet were legally married on 13 April 1939, and that, while the marriage status still existed, he contracted a bigamous marriage with Gladys Mae Kirkham on 1 April 1944, as alleged in the Specification of Charge III. Although it is undisputed that accused was drinking heavily during the period in which the bigamous marriage was contracted the Board does not believe that he was intoxicated to such extent as to deprive him of responsibility for his acts.

6. The records of the War Department show that this officer is 32 years and 2 months of age. He is a native of Illinois and resided there until he entered the Army, 29 June 1937. He has a high school education and was employed in civilian life as a carpenter and an "inspector". He has been married twice and has two children by his present wife. During his service in the Army as an enlisted man from 1937 to 1943 he was promoted successively from corporal to sergeant to technical sergeant. He attended Officer Candidate School at Fort Sill, Oklahoma, and upon completion of the course was appointed a temporary second lieutenant, Army of the United States, 18 March 1943, entering upon active duty on that date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Drwee, Judge Advocate.

Robert K. Blum, Judge Advocate.

J. J. Lottichos, Judge Advocate.

1st Ind.

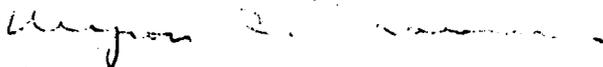
War Department, J.A.G.O., 1 SEP 1944

- 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 Mervin O. Poteet (O-1179173), 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 was found guilty of absence without leave from his station from 16 March 1944 to 22 April 1944, in violation of Article of War 61; of making and uttering, with intent to defraud, between 14 January 1944 and 31 March 1944, sixteen checks totaling \$295, knowing that he did not have, and not intending that he should have, sufficient funds in the banks on which drawn for payment, in violation of Article of War 95; and of bigamy, in violation of Article of War 96. I recommend that the sentence as approved by the reviewing authority, although inadequate, 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 above recommendation, should it meet with approval.


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

3 Incls.

Incl.1-Rec. of trial.

Incl.2-Draft. ltr. for sig.

S/W.

Incl.3-Form of Action.

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 547, 7 Oct 1944)

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

(209)

SPJGK
CM 259006

4 AUG 1944

U N I T E D S T A T E S	)	ARMY AIR FORCES
	)	EASTERN FLYING TRAINING COMMAND
v.)	
	)	Trial by G.C.M., convened at
Captain LLEWELLYN WERNER	)	Maxwell Field, Alabama, 15
(O-338358), Infantry.	)	June 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFILLD, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Llewellyn (NMI) Werner, then Commanding Officer of the 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pa. did, at 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, on or about 26 January 1944, before Harmar D. Denny, Jr., Lt. Col., A.C., Assistant to the Inspector General, AAFETC, make under oath a statement in substance as follows: that he had paid out of his own pocket the expenses of a trip to Pittsburgh, Pennsylvania, with 1st Lieutenant Paul (NMI) Wilkinson, on or about 3 November 1943, which statement he then and there knew was not true.

Specification 2: In that Captain Llewellyn (NMI) Werner, then Commanding Officer of the 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, did, at 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, on or about 26 January 1944, with intent to deceive Lt. Col. Harmar D. Denny, Jr., AC, Assistant to the Inspector General, AAFETC, officially state to the said Lt. Colonel Denny that no "Slush Fund" existed at the 329th College Training Detachment, which statement was known by the said Captain Llewellyn (NMI)

Werner, to be untrue in that a "Slush Fund" was then in existence and had been in existence at the said 329th College Training Detachment, State Teachers College, Slippery Rock, Pennsylvania.

Specification 3: In that Captain Llewellyn (NMI) Werner, then Commanding Officer of the 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, did, at 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, on or about 1 December 1943, wrongfully request three (3) officers, then assigned to the 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, and inferior in rank to the said Captain Llewellyn (NMI) Werner, to sign a statement that no unauthorized fund was in existence at the said 329th College Training Detachment (Aircrew), State Teachers College, Slippery Rock, Pennsylvania, when the said Captain Llewellyn (NMI) Werner well knew that an unauthorized fund was then and there in existence at the said 329th College Training Detachment (Aircrew).

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

3. Summary of the evidence.

Accused was the Commanding Officer of the 239th Army Air Forces Cadet Training Detachment, which was situated at the State Teachers College, Slippery Rock, Pennsylvania (R. 7,13,17,21; Pros. Ex. 1). He assumed this command in May of 1943 (R. 16). A "slush fund" had been established by one of accused's predecessors in office and was continued by accused (R.17). Originally it had been established by \$5 donations by officers and enlisted men of the organization, and was further maintained by contributions to it from laundries and other establishments which did business with the detachment (R. 10,17; Pros. Ex. 1). It was used for the benefit of the detachment, in buying extra supplies and equipment and in providing recreation and entertainment (R. 8,9,18; Pros. Ex. 1).

a. Specification 1.

On 20 October 1943, accused received official orders to proceed to Pittsburgh, Pennsylvania, on 3 November for temporary duty in order to attend a conference of Army and college officials in connection with cadet training problems (Pros. Exs. 1,2). He told First Lieutenant Paul Wilkinson, Air Corps, his Adjutant and Personnel and Classifications Officer to accompany him to Pittsburgh, saying that attendance at the conference would

be beneficial to Lieutenant Wilkinson in the performance of his assigned duties. He informed Lieutenant Wilkinson that he would be reimbursed for his expenses upon return to Slippery Rock. Travel to and from the conference was performed by government vehicle and upon their return Lieutenant Wilkinson received \$6 or \$7, his total expenditures, from Lieutenant Charles P. Cliff, who was the custodian of the "slush fund" (R. 12,13; Pros. Ex. 1).

On 26 January 1944, an investigation was conducted at Slippery Rock by Lieutenant Colonel Harmar D. Denny, Jr., Air Corps, Assistant to the Inspector General. Among other questions asked of accused by Colonel Denny was one concerning payment of the money to Lieutenant Wilkinson after the Pittsburgh trip. Accused, under oath, told Colonel Denny that he had paid this money "out of his own pocket" (R. 20-22).

b. Specification 2.

The evidence offered by the prosecution to show the existence of the "slush fund" has already been set forth in discussing Specification 1, supra.

Colonel Denny testified that at the same investigation previously referred to he asked accused whether the latter had signed an affidavit to the effect that there was no "slush fund" at the detachment, and other questions, not material here, concerning uses to which the fund had been put. Accused said that he had signed such an affidavit, that there was no "slush fund", and that he had previously "expended" such a fund which when he took command he found to have been maintained by his predecessors (R. 22,23).

c. Specification 3.

On 1 December 1943, accused called a meeting of the officers in his detachment. Present were accused, Lieutenant Wilkinson, Lieutenant Clift, Captain Fred E. Spragens, Medical Corps, and Lieutenant Edward G. Petrillo, Air Corps, the Plans and Training Officer. An investigation of the existence of the "slush fund" was then being conducted by "Captain Sill" of the Inspector General's Department and the meeting was called to discuss it. Accused suggested to those present that the best way to forestall any further difficulties and to avoid a "bad name for the detachment" would be for each officer to execute an affidavit to the effect that no such fund existed. He did not attempt to force any of the officers to do so, but appears to have asked them if they would. Several expressed their willingness to "stand by" accused, but Lieutenant Petrillo refused to do so, and after an argument between him and accused the meeting broke up without anyone's executing or agreeing to execute such a statement (R. 13,15,18,19; Pros. Exs. 1,3).

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The statements made by accused to Colonel Denny concerning the existence of a "slush fund" and accused's previous affidavit concerning it, were made to the colonel in the morning of 26 January. At the beginning of the investigation Colonel Denny called accused's attention "to the rules concerning perjury", and afterwards told him "that any testimony given could be used against him" (R. 21, 22). In the afternoon, however, while they were walking back together from their lunch to the room in which the investigation was taking place, accused told Colonel Denny that he was worried over the possibility that the situation would cause trouble for him in the form of charges against him. Whereupon, Colonel Denny told accused,

"Well, Captain Werner, I don't think the story is the whole truth, and if you continue as you have the only thing given me is to call headquarters and recommend that you be relieved of your command, because frankly, I do not think that you are telling the truth." (R. 23).

Accused thereupon "broke down", admitted that the fund did exist, and that he had directed the payment from it of Lieutenant Wilkinson's expenses, and other details concerning it. Accused took full responsibility for its existence since he had assumed command and found that there was such a fund (R. 23-25).

It clearly appears that the fund was not large, that it had been used generally for the benefit of the detachment as a whole, and that accused obtained no personal benefit from it (R. 8,9,11,13,15,18; Pros. Ex. 1). Lieutenant Wilkinson testified that accused was well thought of by the officers of his command, that his "decisions and command functions were made as one who had good experience and training", and that he was highly regarded among his associates, in the college in which the detachment was located, and in the community of Slippery Rock (Pros. Ex. 1). He further stated, however, that accused's "military speech, bearing, and manner was (sic) considered by both the enlisted men and officers of his command to be below that of any officer, much less that of a commanding officer".

Evidence for defense.

Accused's rights were explained to him. He elected to remain silent and called no witnesses (R. 27).

4. There is strong intimation in Colonel Denny's testimony, that the confession obtained by him from accused on the afternoon of 26 January, was not entirely voluntary upon accused's part. It is true that accused had been at least partially apprised of his rights to speak or remain silent, but in view of the fact that he was being questioned by an officer considerably his senior in rank, and in view of the words used, - "if you continue as you have * * * (I shall be compelled to) * * * recommend that you be relieved of your command" - there are inherent the

indications of both a threat and a suggestion that benefit might accrue to accused if he changed his story. It was an unsatisfactory, if not dangerous method, of eliciting the statements which followed.

Assuming, but not deciding, however, that the confession was involuntary, the Board of Review is of the opinion that there is ample evidence in the record apart from accused's statements to Colonel Denny to support the findings of guilty. The testimony of the other witnesses as to the existence of the fund is clear and uncontradicted. The fact that accused procured the payment of Lieutenant Wilkinson's expenses from it, the facts concerning his suggestion to officers under his command that they execute false affidavits concerning it, and the fact that accused told Colonel Denny in the morning investigation that there was no such fund and that he had previously executed an affidavit to that effect, are all established by competent evidence. Colonel Denny's testimony as to the statements made by accused during the morning investigation could not be affected by the events of the afternoon.

While the false official statements alleged in Specifications 1 and 3 occurred at the same time, it is clear that both statements were made, that both were untrue, and that they constitute offenses in violation of Article of War 96. Causing an enlisted man to make a false statement has been held to constitute a violation of Article of War 95 (CM 237521). The analogy is sufficient to support a conviction of violation of Article of War 96, in that accused attempted to persuade military subordinates to execute false statements.

5. War Department records show that accused is 30 years of age and a graduate of Morgan Park, Illinois, Military Academy. He was appointed a second lieutenant, Infantry, Reserve, on 27 December 1935, which appointment he accepted on 3 January 1936. He was promoted to first lieutenant, Infantry, Reserve, effective 23 February 1939, and accepted on 25 February, and was promoted to captain, Infantry, Army of the United States, on 29 March 1942. He has been on active duty at various times since his original appointment, and continuously since 20 November 1940. He successfully completed the Officers' Course, The Adjutant General's School, Washington, D.C., 14 April to 10 May 1941.

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

Wm. H. Zou, Judge Advocate.
Herman M. Mays, Judge Advocate.
Samuel S. S. S., Judge Advocate.

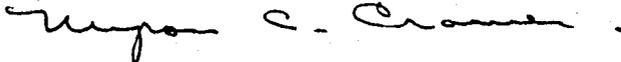
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War Department, J.A.G.O., 11 AUG 1944 - To the Secretary of War.

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 Llewellyn Werner (O-338358), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Accused was found guilty of making two false official statements to a superior officer in the course of an investigation, and of requesting three subordinate officers to execute false affidavits. These are serious offenses, but the evidence shows that he was not primarily responsible for the situation which brought about the investigations, and that he had received no personal benefit from the fund which was the subject of them. The reviewing authority, in approving the sentence, recommended that in the event of its confirmation, its execution be suspended. In view of all these circumstances, and particularly the recommendation of the reviewing authority, I recommend that the sentence be confirmed but that the execution thereof be suspended during accused's good behavior.

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



Myron C. Cramer,
Major General,

The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

Incl.2-Drft. of ltr. for sig.

Sec. of War.

Incl.3-Form of Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 503, 13 Sep 1944)

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

SPJGN
CM 259010

17 JUL 1944

UNITED STATES)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Trial by G.C.M., convened at
Fort Sam Houston, Texas, 9 June
1944. Dishonorable discharge
and confinement for life.
Penitentiary.

Private ALFREDO V. RIVERA
(38254923), Headquarters
Company, 3rd Battalion,
381st Infantry.)

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92d Article of War.

Specification: In that Private Alfredo V. Rivera, Headquarters Company, 3d Battalion, 381st Infantry, did, at San Antonio, Texas, on or about 9 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Carolina Rivera, a human being by shooting her with a gun.

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

Specification: In that Private Alfredo V. Rivera, Headquarters Company, 3d Battalion, 381st In-

fantry, did, without proper leave, absent himself from his station at Camp San Luis Obispo, California, from about 2 May 1944 to about 11 May 1944.

The accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of all Charges and Specifications. Evidence of one previous conviction for absence without leave for 25 days, in violation of Article of War 61, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that the accused left California on 15 April 1944, arrived in San Antonio, Texas, on 19 April 1944 and immediately went to see his wife, Carolina Rivera, the deceased, and their two children who lived with accused's mother-in-law, Mrs. Santiago Guarjardo, in a house located at 2903 Wyoming Street, San Antonio, Texas. During the following days the accused repeatedly quarreled with the deceased about her going out with other men and not having money from the allotments which he had made to her. On 29 April 1944 the accused through a civilian purchased a 38 caliber pistol from the Crescent Loan Company. On 6 May 1944, the accused and deceased had an argument about the accused going to "the store" during which he "got her by the hair and neck and * * * said he had to kill her before he left". On the morning of 8 May 1944 the accused left the house, stating that he was leaving forever but returned in the afternoon, quarreled with his wife and did not remove his clothes that night. At about 2 p.m. on the following afternoon, at Mrs. Guarjardo's house, the accused again quarreled with the deceased and asked her to leave some washing which she was doing and come into a room with him. The deceased told him that he could "tell it to her there". Accused then grabbed deceased by the hair, pulled her behind the curtains of a room and asked why she did not want him there. Deceased replied that it was not because she did not "want him here, but it is because the M.P.s will come here to pick him up and then she will lose the allowance for her babies". Following these statements a shot was heard by Mrs. Guarjardo who went into the room and saw her daughter fall after taking two steps. She asked accused what he had done and he told her to "shut up" or else he would "kill her too". Accused then put the gun to his chest but did not

"fire the trigger". He threw the gun on the bed and went out of the house after telling her he "wanted the law to pick him up out in the street". The deceased appeared to be dead when she fell (R. 8-13, 34-40; Pros. Ex. 8).

A short time later the accused, while in front of the house, told two policemen and two civilians that he had "just killed his wife" because he "loved her too much", and that "she wouldn't go back with him so he just made up his mind to kill her if she didn't go back with him" (R. 20, 21, 30, 42, 45).

The policemen entered the death room at about 3:10 p.m., found the deceased lying on the floor with a bullet wound through the middle of her chest, and discovered the accused's gun on the bed. One shot had been fired from the gun. The deceased had a weak pulse which ceased beating a few seconds after the arrival of the police (R. 22, 23, 27, 28, 45).

An embalmer who examined the deceased's body at 7 p.m. on that day testified that death resulted from the bullet wound (R. 48).

Accused submitted a voluntary statement in writing to the police on that evening which was introduced in evidence without objection. In this statement the accused stated that during his visit with his wife and children in San Antonio he had purchased a 38 caliber "breakback" pistol from a "hock shop" and had taken it to his mother-in-law's house. He admitted having had arguments with deceased which were caused by his having heard that she was going out with men and by her lack of respect for his mother. On 9 May 1944, as he prepared to leave on his return to camp, the deceased, after some delay, came into the room where he was. In straightening the sheets on the bed she saw his pistol which she already knew the accused had purchased. He put the pistol in his pocket. When she walked over to the dresser he then "started loving her" and asked when she was moving to California to live with him. She said that she would come the next month and made several excuses. The statement then continues:

"* * * and then I dont know what made me say it but, While I was still loving her and kissing her I told her, That if I could not have her then I did not want any one else to have her and I drew the pistol from my pocket and turned her head and I raised the pistol which was several inches from her Breast and fired. Right after I fired the

pistol she screamed and her mother came running into the room, and when she did I told her that I was going to kill myself also and I put the pistol against my chest and snapped it several times, I looked down to see what was the matter with the pistol that it would not fire. The cylinder was revolving but the gun would not go off, I then held the pistol in my hand and looked at it and put it up to my chest again and tried to make it shoot but it would not go off so I pitched it over on the bed and started out of the room, My Mother In Law asked me where I was going, I told her that I was not going to run off that I was only going to call the law and tell them that I had just killed my wife.

"* * * it all did happen in the City of San Antonio, County of Bexar and in the State of Texas on the day of May 9, 1944 A.D. at about 3:15 P.M." (R. 49; Pros. Ex. 8).

The accused also admitted in his statement that he "had been A.W.O.L. since May 2, 1944" (Pros. Ex. 8).

4. The evidence for the defense shows that the accused had illicit sexual relationships with Santiago Guarjardo and later with deceased, her daughter, while still married to his first wife. A child was born to accused and deceased out of wedlock, and a second child was born after their marriage on 29 September 1942. After the alleged offense was committed the accused instructed a civilian to "call the laws" (R. 53, 54, 59, 60, 75-78).

Captain Barnett Rosenblum, Medical Corps, a neuropsychiatrist, testified that he had submitted a statement on 20 May 1944 after examining accused to the effect that at the time of the alleged offense "from information available" the accused was able to adhere to the right and in his opinion could distinguish right from wrong. Witness stated, however, that he did not know from personal observation what accused's mental condition was on 9 May 1944 (R. 67-74).

The accused, whose "rights as a witness" had been explained to him, testified as to his first marriage, illicit sexual relationship with deceased's mother and then deceased, and subsequent marriage to deceased after the birth to them of an illegitimate child. He left Camp

White, Oregon, on 15 April 1944 on a sixteen-day furlough and arrived in San Antonio, Texas, on 19 April 1944, where he visited his wife. Several days later he heard that his wife had been seen driving with two men. They had an argument about this. The accused admitted being jealous of his wife, and that he had bought a pistol on 29 April 1944 but stated it was to be used on maneuvers. He denied arguing with and threatening to kill the deceased on both the 6th and 8th of May. On 9 May 1944, at about 12:30 p.m., he called the deceased who was washing "to come inside" because he was preparing to return to his organization. After some delay she came to him. He asked her to be true to him when he left. The accused then testified:

"I was hugging her and kissing her again. I don't know what happened. Something come over me and I grabbed the gun and shot her" (R. 74-82, 85-88).

On cross-examination he testified that he obtained the gun from his suitcase and not from his pocket, and that he had loaded the gun about two days before the shooting occurred. He also admitted killing his wife at the time and place alleged and being absent without leave from 2 May 1944 to 9 May 1944 (R. 90-92). On redirect examination he testified, as to the homicide, that "something happened to his mind, like that, and before he knew he pulled the gun on her and killed her right there" and that he did not know at the time what he was doing or that it was wrong (R. 92, 93).

5. The Specification of Charge I alleges that the accused,

"did, at San Antonio, Texas, on or about 9 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Carolina Rivera, a human being by shooting her with a gun."

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 the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (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.

When the evidence is examined in the light of the above principles, it is apparent that the accused is guilty as charged. The uncontradicted testimony clearly shows that the accused shot and killed the deceased at the time and place alleged. It is equally clearly established that this homicide was unlawful in that it was done without justification or excuse. The claim of not knowing at the time what he was doing as presented in the testimony of the accused is not corroborated in any respect. There is nothing in the record to indicate that the court acted arbitrarily in rejecting the accused's unsupported assertion. To the contrary, the evidence establishes that a few days before the homicide the accused purchased the gun with which he killed the deceased. His jealousy was inflamed by his having heard that the deceased had been going out with men. That the homicide was not the result of a sudden uncontrollable impulse is also indicated by the testimony showing that both prior to and after the deceased's death, the accused stated that he intended to kill her before he left. The evidence, therefore, shows beyond a reasonable doubt that the accused committed the alleged offense and supports the findings of guilty of the court as to Charge I and its Specification.

6. The Specification of Charge II alleges that the accused

"did, without proper leave, absent himself from his station at Camp San Luis Obispo, California, from about 2 May 1944 to about 11 May 1944."

The accused's plea of guilty, corroborated by his admissions to the police and by his testimony, constitutes a sufficient basis for the findings by the court of guilty of Charge II and its Specification (CM 236359, Bulletin, JAG, Vol. II, No. 7, sec. 416 (3)). The accused

was not prejudiced by failure of the court to explain to him the meaning and effect of his plea of guilty to this offense.

7. The accused is about 32 years of age. He was inducted at Fort Sam Houston, Texas, on 19 October 1942. His record shows no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charges and Specifications and the sentence, and to warrant confirmation thereof. A sentence either of death or imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel F. Golden, Judge Advocate.

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

SPJGN
CM 259026

24 JUL 1944

UNITED STATES)

92ND INFANTRY DIVISION

v.)

) Trial by G.C.M., convened at
) Fort Huachuca, Arizona, 21 June
) 1944. Dismissal, total forfeit-
) ures and confinement for five (5)
) years.

Second Lieutenant THEODORE
COLEMAN (O-1824140), 370th
Infantry.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Theodore (NMI) Coleman, Three Hundred Seventieth Infantry, did, without proper leave absent himself from his station in Vic Simpson, Louisiana from about 21 February 1944 to about 26 February 1944.

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

Specification: In that Second Lieutenant Theodore (NMI) Coleman, Three Hundred Seventieth Infantry, having received a lawful command from First Lieutenant Shires, his superior officer, to move his tent to the vicinity of the company mess and to remain there supervising its operation until it was brought up to the required standards of sanitation, did in Vic Simpson, Louisiana, willfully disobey the same.

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

Specification: (Finding of not guilty).

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

Specification: In that Second Lieutenant Theodore Coleman, Three Hundred Seventieth Infantry, did without proper leave absent himself from his organization and station from about 12 March 1944 to about 15 March 1944.

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

Specification 1: In that Second Lieutenant Theodore Coleman, Three Hundred Seventieth Infantry, did at in the vicinity of Kurthwood, Louisiana, on or about 12 March 1944, with intent to deceive Captain Joseph W. Henry, officially state to the said Captain Henry, "Yes he knows I am going on pass" or words to that effect, which statement indicated that his Company Commander knew he was going on pass, which statement was known by the said Second Lieutenant Coleman to be false in that his Company Commander had no knowledge that the said Lieutenant Coleman was going on pass.

Specification 2: In that Second Lieutenant Theodore Coleman, Three Hundred Seventieth Infantry, did in the vicinity of Kurthwood, Louisiana, on or about 12 March 1944, with intent to deceive First Lieutenant Hugh D. Shires, Three Hundred Seventieth Infantry, officially state to the said Lieutenant Shires, "I had no intention of going on pass", or words to that effect, which statement was known by the said Lieutenant Coleman to be false in that the said Lieutenant Coleman was detained by Captain Joseph W. Henry, Three Hundred Seventieth Infantry, just as he was about to enter a truck which was departing the area carrying a pass detail.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except the Specification of Charge III and Charge III, of which he was found not guilty. He was

sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. The evidence for the prosecution shows that on or about 20 or 21 February 1944, in the vicinity of Simpson, Louisiana, Captain Hugh D. Shires, 370th Infantry, then a lieutenant and accused's company commander, ordered the accused "to move his tent to the vicinity of the mess tent and remain there and supervise the mess, until it was brought up to Division standard". The accused moved his tent to the mess area but "didn't remain there". Captain Shires personally went to the area "and looked for accused, to see in what manner he was supervising the mess, and he couldn't be found". Accused was absent without leave from 20 February 1944 to 26 February 1944 (R. 10, 11, 14, 16; Pros. Exs. A, B).

On or about 12 March 1944, in the vicinity of Kurthwood, Louisiana, the accused, in response to the inquiry of Captain Joseph W. Henry, Regimental S-1, 370th Infantry, informed him that he was on pass and that his, the accused's, company commander knew he was going on pass "the next day". Captain Henry ascertained by phone that accused's company commander had not given him "a V.O.C.O., or his permission to go in town that afternoon". A short time later, Captain Henry "detained accused just about 10 to 15 feet from the truck" which was to carry the "pass detail" to town. Accused "was in the midst of a group of men and perhaps one or two officers who were moving toward the truck, and the others had got on the truck". Later that day, the accused stated to Captain Shires that he had not told Captain Henry that Captain Shires had given him permission to go "on pass" and further that "he had no intention of going on pass" (R. 11, 12, 14, 15, 17-19).

The accused absented himself without leave from 12 March 1944 to 15 March 1944 (Pros. Exs. C, D).

4. The accused, whose "rights" the defense stated "had been explained to him", testified that in the vicinity of Simpson he had been ordered by his company commander to "move his tent into the vicinity of the mess * * * until it was brought up to satisfactory". He remained in the mess area that day and the next, but not on the day after that (R. 23, 26).

The accused further testified that he was on umpire duty at the time when charged with absence without leave in February. He was absent from his organization for four days, did not recall the exact dates, did

not know he was considered AWOL, and did not have a pass. A certain number of the umpires had gone to town (R. 25, 27, 28).

On a Monday morning the accused had overslept and failed to report for duty. He was charged with AWOL despite the fact that he was in the area (R. 23).

In connection with the alleged offenses of having made false official statements, the accused testified that he went to regimental headquarters after receiving an order requiring mess officers to report there. He found that the order was erroneous. When he left regimental headquarters he went up to the truck on which men who had passes were leaving and talked with a sergeant. Captain Henry asked him if he were going on pass, to which the accused replied in the negative. About two hours later the accused's company commander asked the accused if he had told Captain Henry that "[he, the accused] could go on pass". The accused replied, "No, I didn't tell Captain Henry I was going on pass, because I had no intention of going on pass" (R. 23, 24).

5. The Specifications under the first unnumbered Charge and Additional Charge I, allege respectively absences without leave "from about 21 February 1944 to about 26 February 1944" and "from about 12 March 1944 to about 15 March 1944". The first unauthorized absence is alleged to have occurred "in Vic Simpson, Louisiana", and the second unauthorized absence "from his organization and station" without alleging its location.

The initial unauthorized absences are established by extract copies of the morning report of his organization which respectively show a change in accused's status from duty to AWOL on 20 February 1944 at "Slagle, La." and on 12 March 1944 at "Kurtwood, La." The termination of each of the unauthorized absences, as alleged, is shown by similar documentary proof. The extract copies of the morning report are authenticated by the organization commander on the prescribed form. The date of authentication in each instance, however, precedes the date of the entry which the certificate authenticates. A copy of a morning report of a company is admissible

"by a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original. Thus 'A true (extract) copy: (Sgd.) John Smith, Capt. 10th Inf. Comd'g. Co. A, 10th Inf.,' would be sufficient, prima facie, to authenticate a paper as a copy of an original company record of Company A, Tenth Infantry" (M.C.M., 1928, par. 116a).

In the case under consideration, if the authenticating certificate had been left undated there would be no question as to the admissibility of these copies of the morning report. Because of the impossibility to certify a fact of this nature not in esse, the date of authentication in each instance is a patent typographical error. Such patent typographical irregularity, in the absence of objection based thereon, does not render such documents inadmissible in evidence or detract from the probity of the matters certified. The certification itself is deemed to be of more importance than the patently erroneous date of the certificate.

The place of the first unauthorized absence was at Slagle, Louisiana, rather than "in Vic Simpson, Louisiana", as alleged. This variance is immaterial (CM 186501; Dig. Op. JAG, 1912-1940, sec. 416 (10)). The failure of the Specification as to the second unauthorized absence to allege the place where the accused's organization was located at the time of the unauthorized absence, although unnecessarily vague, is not material (CM 12281; Dig. Op. JAG, 1912-1940, Sec. 428 (12)).

The evidence for the prosecution shows beyond a reasonable doubt that the accused committed the two offenses of being absent without leave for the alleged periods and amply supports the findings of the court as to the Specifications under the first unnumbered Charge and Additional Charge I and as to such Charges.

6. The Specification under Charge II alleges that the accused,

"having received a lawful command from First Lieutenant Shires, his superior officer to move his tent to the vicinity of the company mess and to remain there supervising its operation until it was brought up to the required standards of sanitation, did in Vic Simpson, Louisiana, willfully disobey the same."

The proof required for conviction of the offense of willful disobedience is 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" (M.C.M., 1928, par. 134b).

The willful disobedience which must be shown must amount to

"an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A.W. 96" (M.C.M., 1928, par. 134b).

Tested by the foregoing, it is clear that the accused is guilty of willful disobedience of the order as alleged. The evidence shows that the accused, on or about 20 February 1944, was ordered by his superior officer to move his tent to the vicinity of the company mess and "to remain there supervising its operation until it [the mess] was brought up to the required standards of sanitation". The accused moved his tent to the required location, as ordered, "but he didn't remain there". The accused's company commander "personally went to the area and looked for him, to see in what manner he was supervising the mess, and he couldn't be found". Another inspection was made by the company commander. The accused was absent without leave for several days. On the other hand, the accused testified that he was there "that day * * * the next day [but] was not there the day following". The court, however, rejected the uncorroborated assertion of the accused and, in so doing, acted clearly within its province. By failing to remain in the vicinity of "the mess" and to supervise its operation, duties which had been explicitly and directly ordered by competent authority, the accused showed an "intentional defiance of authority", condemned by Article of War 64. Since the evidence shows that the accused did not remain in the vicinity of the mess, the conclusion inevitably follows that the mess was not "brought up to the required standards of sanitation" under the accused's supervision.

The failure of the Specification to allege the date of the offense did not prejudice the substantial rights of the accused. The test of the legal sufficiency of a Specification is "whether the accused has sufficient notice of the offense with which he is charged" (CM 120017; Dig. Op. JAG, 1912-1940, sec. 428 (10)). The testimony of the accused clearly indicates that he was fully apprised by the Specification of the alleged offense. Furthermore, the defense raised no objection at any time to the omission of the date of the offense in the Specification.

The evidence shows beyond a reasonable doubt that the accused committed the alleged offense and that the court was justified in finding the accused guilty of Charge II and its Specification.

7. Specification 1 of Additional Charge II alleges that the accused

"did at in the vicinity of Kurthwood, Louisiana, on or about 12 March 1944, with intent to deceive Captain Joseph W. Henry, officially state to the said Captain Henry, 'Yes he knows I am going on pass', or words to that effect, which statement indicated that his Company Commander knew he was going on pass, which statement was known by the said Second Lieutenant Coleman to be false in that his Company Commander had no knowledge that the said Lieutenant Coleman was going on pass."

The evidence shows that at the time and place alleged the accused, in response to an inquiry of Captain Henry at Regimental Headquarters told him that he, the accused, "was on pass". Captain Henry then asked accused if the latter's "company commander knew he was going on pass" to which the accused replied "Yes, the next day". Captain Henry phoned the accused's company commander and inquired if he had given the accused "a V.O.C.O., or his permission to go into town that afternoon" and was informed that no such authority had been given. The accused's company commander testified that he had not given the accused authority to go "on pass". Upon receiving this information, Captain Henry "detained" the accused in the vicinity of the point of assembly for the "pass detail" and while the accused was walking in the general direction of a truck assigned to carry those leaving the camp with pass privileges.

In stating to Captain Henry that he was "on pass" and that his, the accused's, company commander, knew he was "going on pass" either that day or the next day, which statements the accused knew were false, the accused endeavored to deceive Captain Henry so that he, the accused, might be able to leave camp without further inquiry concerning his authority to do so. This is made apparent by Captain Henry's finding the accused, not long after the statements were made, walking toward the truck into which many of the "pass detail" had already entered. Although the accused categorically denied that he had told Captain Henry that he was going on pass, the court chose to believe the testimony of the prosecution's witnesses. The evidence supports beyond a reasonable doubt the findings of guilty of Additional Charge II and Specification 1 thereunder.

8. Specification 2 of Additional Charge II alleges that the accused

"did in the vicinity of Kurthwood, Louisiana, on or about 12 March 1944, with intent to deceive First Lieutenant Hugh D. Shires, 370th Infantry, officially state to the said Lieutenant Shires, 'I had no intention of going on pass,' or words to that effect, which statement was known by the

said Lieutenant Coleman to be false in that the said Lieutenant Coleman was detained by Captain Joseph W. Henry, 370th Infantry, just as he was about to enter a truck which was departing the area carrying a pass detail.

The evidence shows that at the time and place alleged the accused made the alleged statement, and that it was false. The accused was detained in the vicinity of and while walking in the general direction of the truck at the point of assembly for the detail. These facts, coupled with the false statements of the accused made to Captain Henry to conceal his true status, form a sufficient basis for the court's inference that the accused was about to enter the truck "which was departing the area carrying a pass detail". The court's findings of guilty of Additional Charge II and Specification 2 thereunder are amply supported by the evidence.

9. The accused is about 25 years of age. War Department records show that he has had enlisted service from 21 May 1940 to 5 November 1942; and that he was commissioned a second lieutenant on 4 March 1943, after graduating from Officer Candidate School at Camp Hood, Texas.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Any sentence may be imposed upon conviction of willful disobedience in time of war, in violation of Article of War 64.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SrJGN
CM 259026

1st Ind.

War Department, J.A.G.O., 14 AUG 1944 - 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 Theodore Coleman (O-1324140), 370th 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 that the forfeitures and confinement 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 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 forfeitures and confinement remitted.
G.C.M.O. 493, 12 Sep 1944)

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

SPJGN
CM 259068

16 AUG 1944

UNITED STATES)

93RD INFANTRY DIVISION

v. .)

Trial by G.C.M., convened at
APO #709, 8 May 1944. Death
by hanging.

Private ROBERT A. PEARSON)
(35201718), Company E,)
368th Infantry.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, 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 Robert A. Pearson, private Company "E" 368th Infantry did, at APO #717 Unit #2 in the Second Battalion Area, on or about April 4, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Frederick D. Johnson Private, Company "E", 368th Infantry, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification thereunder. He was sentenced to be hanged by the neck until dead.

The reviewing authority approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life, and forwarded the record of trial to the Commanding General, United States Army Forces in the South Pacific Area, for action under Article of War 48. The sentence was thereafter confirmed by the Commanding General, United States Army Forces in the South Pacific Area, subject to a review of the record as provided in Article of War 50 $\frac{1}{2}$. Since the authority of the Commanding General, United States Army Forces in the South Pacific Area to act as a confirming authority was terminated as of 31 July 1944, prior to his final action upon the sentence, the record of trial has been forwarded to The Judge Advocate General, and has been reviewed in this office for action by the President under Articles of War 48 and 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 4 April 1944, the accused and the deceased, Private Frederick D. Johnson, occupied the same tent which they shared with two other soldiers, Private Walter McKinney and a Sergeant Moore. Their tent was located about 30 or 40 yards from the edge of a jungle where the accused and the deceased had an improvised still for the making of an alcoholic beverage referred to as "raisen jack". Between 7:30 and 8:00 o'clock on the evening of 4 April 1944, Private Henry Goodman observed a fire at the "raisen jack" still and went out to investigate it. There he found the accused and the deceased who "seemed to be arguing". In the argument the accused said to the deceased, "* * * you know what it was all about, you were the cause of it, and if it hadn't been for you it wouldn't have happened". The deceased replied by saying, "* * * why don't you let it drop" (R. 7-8).

The three soldiers then returned to the tent occupied by the accused and the deceased. Upon entering their tent the accused loaded a rifle which he was carrying, hung it on the pole of the tent, and went to his cot. The deceased and Private Goodman sat down on the deceased's cot and engaged in a conversation about the accused's sister. About this time the accused told the deceased and Private Goodman that they were "* * * trying to cross him on some raisen jack". The accused then arose, got his rifle from the tent pole, aimed it at the deceased and said, "* * * I'll kill anybody who tries to cross me and tries to be smart". While talking the accused was holding his gun about three feet from the deceased. To the accused's remark the deceased replied, "I thought that was all over, just let it drop". The accused thereupon told the deceased to get up and make some coffee. The deceased responded by preparing a pot of coffee over an open fire just outside the tent. He then returned to his former position on his

cot. Private Goodman, who was sitting by the deceased, described the events which next occurred, as follows:

"Johnson and I continued to talk, and [the accused] thought Johnson and I was talking about him, and he said I'll shoot you, I hear you talking. Johnson said go ahead, let's forget it. [The accused] had his gun again, and said to Johnson if you say another word I'll blow your brains out. So Johnson said, well Pearson, I haven't got but one time to die, and at that time [the accused] shot" (R. 9).

Private McKinney, a second witness who was in the tent at the time of the fatal shooting, describes it as follows:

"He [the accused] came on back around before Johnson's face, and said I'm going to kill me somebody tonight and you especially, and at that time the rifle went off, and I started out of the tent, and [the accused] told me to come back and sit down, and then told me to call the doctor, and then he told me to go and get him" (R. 14).

The shot fired by the accused entered the deceased's head and he fell backward across his cot. The accused ordered Private Goodman to sit still. Then he ordered Private McKinney to sit down between Private Goodman and the deceased and to call a doctor. Private McKinney yelled for a doctor several times. The accused then told Private McKinney to go get a doctor after which he left the tent with his rifle. Outside the tent he said "Damn, I didn't do it" (R. 7, 8-11, 11-14).

Private Goodman testified that the accused had been drinking "raisin jack" on the day in question but that "he didn't act like he had too much but like a man that had been drinking" (R. 10).

Lieutenant Colonel Merle L. Joyce, testified that he saw the accused on the night of 4 April 1944 at about 9:15 or 9:20 o'clock and observed his manner of walking and talking. In the opinion of the witness the accused was sober, although he had detected the odor of alcohol on the accused's breath. During the course of the evening the accused had stated that he "never meant to harm anyone" (R. 16-17).

Captain Reden R. Williams, a medical officer, testified that

he examined the deceased on the night of 4 April 1944 and observed that he was suffering from a gunshot wound in his right frontal region. He testified further that he examined the deceased the following day and that he was dead as the result of the gunshot wound in his head (R. 17-18).

4. The accused, after his rights as a witness had been explained to him testified that on 4 April 1944 he began drinking "raisin jack" about 11:30 in the morning. He described the source of his liquor and the events leading to the shooting of the deceased as follows:

"It was raisin jack. Goodman had a sixty gallon barrel of raisin jack put up out there. It was all ours, Goodman, myself, and Johnson. I go about eleven thirty and gets one of these buckets and carries it back to my tent and got one of my shirts and strained it. I was sitting there drinking it and about four fifteen I got up and went to get some water for the kitchen, and at the same time Goodman asked me for some white gas, and I said I'll get you five gallons. I goes to the kitchen and fills a five gallon can up and then it was about show time and then I goes back to my tent and lays across my bed for about five or ten minutes. I goes out to the still to see how its coming along. Johnson has a jug about half full and about four or five coke bottles full, and he says go ahead and taste it and see how you like it, and then we drank it. I left him there and came on back to my tent and then later on Goodman said the still broke and I said nothing we can do about it. Goodman then brings a jug of it full, in my tent. I said to Johnson lets drink some coffee, and by that time he gets up and then Johnson got up and started to making coffee. My rifle was laying across my bed and then I picks up my rifle and pulled the trigger without my knowing it was loaded. I then told McKinney to go and get a doctor and then I went out and got a jeep" (R. 18-19).

On cross-examination he testified that he did not "definitely remember" the shooting and that he had pulled the trigger of his gun because he "figured the thing wasn't loaded". He also testified that he did not remember the fire at the "raisin jack" still (R. 19).

5. The accused is charged with murder and the Specification alleges

that he

"* * * did, at APO #717 Unit #2 * * *, on or about April 4, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Frederick D. Johnson Private, Company "E", 368th Infantry, a human being by shooting him with a rifle".

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "a homicide done in the proper performance of a legal duty * * *". Furthermore an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it * * *" (par. 148a, M.C.M., 1928). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the term may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

"* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homi-

cide. It is manifest, therefore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

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

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

The words "deliberately" and "with premeditation" which are employed in the Specification, are not defined in the Manual for Courts-martial and form no part of the orthodox definition of common law murder. They are words which are frequently used in statutes describing first

degree murder and are so employed in Section 452, Title 18, United States Code (Miller on Criminal Law, pp. 273-274). Since Article of War 92 designates murder by its common law name alone, only the elements of the crime of murder as known at common law are required to be established in the present case. Although the words in question are mere surplusages, in the present Specification they are fully sustained by the proof. They have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Criminal Law, vol. 1, sec. 420). In the case of Bostic v. United States (94F (2) 636, C.C.A.D.C. 1937), it was said that:

"This court has stated the applicable rule in Aldridge v. United States, 60 App. D.C. 45, 47 F. 2d 407, 408, as follows: 'Deliberation and premeditation may be instantaneous. Their existence is to be determined from the facts and circumstances in each case. It is a question, under a proper charge by the court, for the jury to determine.'

"The authorities agree that no particular length of time is necessary for deliberation. * * * It is not the lapse of time itself which constitutes deliberation, but the reflection and consideration, which takes place in the mind of the accused, concerning a design or purpose to kill. * * * Lapse of time is important because of the opportunity which it affords for deliberation. * * * The human mind sometimes works so quickly as to make exact measurement of its action impossible, even with the facilities of a psychological laboratory. The jury must determine from the circumstances preceding and surrounding the killing whether reflection and consideration amounting to deliberation actually occurred. * * * If so, even though it may have been of exceedingly brief duration, that is sufficient. It is the fact of deliberation which is important, rather than the length of time during which it continued" (Citations of Authorities omitted; Certiorari denied, 58 S. Ct. 523, 303 U.S. 635, 82 L. Ed. 1095).

When the evidence is examined in the light of the above concepts, it becomes apparent that the accused is guilty as charged. The testimony clearly shows that the accused shot and killed the deceased at the place and time alleged. It is equally clearly established that this homicide was unlawful in that it was done without justification or excuse. The

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claim of an accidental shooting as presented in the testimony of the accused is sharply contradicted by the description of the two eye witnesses to the crime. The evidence shows first that the accused became angry with the deceased as a result of a fire which occurred at their improvised "raisin jack" still. Next, the evidence shows that the accused upon returning to his tent loaded his rifle. Thereafter he made accusatory threats against the deceased and aimed his loaded rifle at him. Finally, the accused renewed his threat with a warning to the deceased that "if you say another word I'll blow your brains out". When the deceased replied "Well Pearson, I haven't got but one time to die", the accused deliberately shot him. The act of the accused in thus deliberately shooting the deceased clearly appears to be the culmination of malicious resentment. This evidence shows beyond a reasonable doubt that the accused killed the deceased with malice aforethought, willfully, unlawfully, feloniously, deliberately, and with a premeditated intent. Every element of the crime alleged is established.

6. The charge sheet shows that the accused is 28 years of age and that he was inducted into the Army of the United States on 19 February 1941 and that he has had no prior military service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon a conviction of murder in violation of Article of War 92.

Abner E. Lipscomb Judge Advocate.

Seamus S. Sykes Judge Advocate.

Isabel F. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

12 SEP 1944

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 Robert A. Pearson (35201718), Company E, 368th 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 and ordered executed.

3. Consideration has been given to a letter from Capehart & Miller, Attorneys, submitting a request for clemency, signed by approximately 69 persons; to four letters from Mrs. Fannie Pearson Dickerson, mother of the accused addressed respectively to the President, to "Mr. McClay", Assistant Secretary of War, to the "General Commander in Chief, San Francisco Calif", and to Major Francis M. Scott, defense counsel for the accused; and to a letter addressed to Major Francis M. Scott, defense counsel, from the United Mine Workers of America, supported by a petition signed by numerous persons.

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,
Major General
The Judge Advocate General.

9 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of action.
- Incl 4 - Ltr. from Capehart & Miller.
- Incls 5, 6, 7, 8 - 4 Ltrs. from Mrs. Dickerson, mother of accused.
- Incl 9 - Ltr. from United Mine Workers of America with attached petition.

(Sentence confirmed. G.C.M.O. 618, 13 Nov 1944)

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

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SPJGQ
CM 259123

22 JUL 1944

U N I T E D S T A T E S)	FOURTH AIR FORCE
)	
v.)	Trial by G.C.M., convened at
	)	Headquarters, Los Angeles
Second Lieutenant ORVILLE	)	Fighter Wing, Los Angeles,
H. BATHE (O-763035), Provi-	)	California, 9 June 1944.
sional Squadron T, 441st	)	Dismissal.
Army Air Forces Base Unit.)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Orville H. Bathe, Provisional Squadron T, 441st AAF Base Unit, (formerly of 446th Fighter Squadron (TE), 360th Fighter Group), did, at or near Walnut Park, California, on or about 29 March 1944, violate paragraph 1, Army Air Force Regulation Number 60-16, dated 9 September 1942, by willfully and wrongfully operating an army airplane in a reckless and careless manner.

Specification 2: In that Second Lieutenant Orville H. Bathe, Provisional Squadron T, 441st AAF Base Unit, (formerly of 446th Fighter Squadron (TE), 360th Fighter Group), did, at or near Walnut Park, California, on or about 29 March 1944, violate paragraph 16, Army Air Force Regulation Number 60-16, dated 9 September 1942, by willfully and wrongfully operating an army airplane at an altitude of less than (500) five hundred feet.

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He pleaded guilty to, and was found guilty of, the Specifications and the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

On 29 March 1944 Captain William M. Waldman, operations officer at Van Nuys Air Field, Van Nuys, California, scheduled a solo, engineering flight for the accused who was a member of his base unit. The flight was such as is customarily ordered for an Air Corps trainee who has had "around 65 hours of training" who, if he is found capable of handling a plane, is then permitted to "take the plane up alone". The area assigned for the flight was that portion of the environment of the town of Van Nuys which comprised the local training area of the base unit and included Walnut Park, a suburb just on the outskirts of the section in the vicinity of the flying field. A P-38 airplane, No. 199, was allocated to the accused for the occasion and during the afternoon of 29 March 1944 he took off on the mission and returned after approximately one hour and fifteen minutes in the air (R. 7-10, 26-28).

At about 6 o'clock on that afternoon, Mr. William J. Ortger, an employee of the Firestone Tire and Rubber Company, was returning to his home on Beck Avenue, Bell, California, and in doing so traversed Long Beach Boulevard in the vicinity of Walnut Park. When about ten or twelve blocks away from Florence Avenue, at about fifteen or twenty minutes after six o'clock he saw a P-38 plane going toward the West. His interest was aroused by the low altitude at which the plane was flying and he kept watching it. As it crossed Long Beach Boulevard the plane was not very much above the telephone poles and wires. He estimated the altitude of the plane to be about 200 feet from the ground and he was close enough to the plane then to plainly see the number "199" on the nose of the ship. The area over which the plane was flying is an old residential section, thickly built up, with very few vacant lots. After the plane had crossed Long Beach Boulevard Mr. Ortger saw it dip down over a house, circle toward the East, going North, and then disappear. Estimating the height of telephone poles to be seventy or eighty feet, he concluded that the plane was not over 200 feet above the ground and inasmuch as citizens had been requested to report cases of low flying he stopped at a drug store and made a telephone report of the incident (R. 11, 14-17).

Mrs. Mildred V. Baker and Mrs. Nettie P. Koeck, both housewives residing on Live Oak Street in Walnut Park, California, testified that on 29 March 1944 at about 6:15 or 6:30 p.m., they observed a P-38

plane flying in the vicinity of their homes. Each identified the plane as a P-38 because of its twin tail and the plane was close enough for each to recognize the number "199" appearing thereon. Mrs. Baker said the plane was flying "very low", at an altitude of "250 feet or under". The course of the ship was from West to East, then it circled to the West and flew toward the East a second time. As it made the turn it "sort of rolled", turning "over and then clear over and around". There was a power line in the vicinity and Mrs. Baker became frightened and made a telephone report of the affair (R. 17-20). Mrs. Koeck was likewise alarmed at the performance. As she put it "it seemed to me he was using the high-power lines for a runway". The plane did not appear to her to be more than 25 feet above the wires, so close that she feared it would hit the wires. She estimated the altitude of the plane to have been about 200 feet from the ground. The plane continued to fly about in the area for about twenty or twenty-five minutes during which time Mrs. Koeck's husband made a telephone call reporting the incident (R. 21-24).

An aerial photograph showing the Walnut Park area and Army Air Force Regulations 60-16, 6 March 1944, were received in evidence (R. 12; Pros. Ex. 1; R-32, Pros. Ex. 2).

4. For the defense Captain Stanley Long, 441st Army Air Forces Base Unit, Van Nuys, California, testified that he has known the accused for approximately five months. He has flown with him on three flights and, in his opinion the accused's "air work was very good and his air discipline was very good". His flying ability "has been a little bit above the average". His character rating is excellent (R. 25, 26).

Captain Waldman, a prosecution witness who was also called as a witness for the defense, testified that he has known the accused for three and a half or four months. In his opinion, the accused has always been a good pilot. All of the reports which he had received from the accused's flight leader indicated that he "has been an exceptional pilot all the way through". This was "one of the reasons why he was allowed to take an airplane up by himself". "He has been an all around good officer * * *" (R. 26, 27).

The accused elected to be sworn as a witness and testified as follows:

"Well, gentlemen, I took off late in the afternoon (29 March 1944), around five thirty or six o'clock and I flew over towards Walnut Park and I did what I pleaded guilty to - of flying low over this area. I was in full control of the plane at all times. I made about three or four passes, the lowest of which could have been below 200 feet, but not below 150 feet. I thought they were about 200 feet, and the roll that the witnesses were talking about, I would like to demonstrate

for you, if you would let me, please. (Accused takes P-38 model in hand). I made my pass over this area and as I finished my pass I pulled up in a climbing roll and kept going up and - I don't remember - I think it was my next to last (last) pass and I came back and made another pass and went back towards the field. (demonstrating with model) * * * I realize what I am guilty of, sir, gentlemen -- and all that I ask is that I be allowed to stay in 38's, and I would like about a week to get about ten or fifteen hours and catch up with my outfit in England, if I could * * * The only excuse - really no excuse -- just that I forgot myself and thought I was a hot pilot, I guess, just before I thought my outfit was going overseas, and I don't know what it was. I realize the consequences now".

He stated that his mother was dependent upon him for support although he has a married brother who is an enlisted man in the Navy and who "helps her, once in a while, I believe" (R. 30, 31).

5. The legal and competent evidence thus adduced by the prosecution, together with accused's pleas of guilty and his admissions, under oath, at the trial, establish his guilt of the offenses charged. It is unnecessary to comment upon either the propriety or significance of any of the testimony. The witnesses for the prosecution definitely testified to conduct of the accused which proved his guilt beyond reasonable doubt irrespective of his pleas and the evidence offered by the defense was solely in extenuation and mitigation thereof.

6. Records of the War Department disclose that the accused was born in Compton, California, and is 22½ years of age. He was graduated from high school and was then employed from February 1940 to March 1943 by Western Electric as a telephone repairman. He enlisted as an aviation cadet on 9 March 1943 and after pursuing the prescribed course of training was commissioned a second lieutenant in the Army of the United States on 7 January 1944.

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

William A. Founds Judge Advocate.

William H. Lambell Judge Advocate.

Herbert B. Friedman Judge Advocate.

1st Ind.

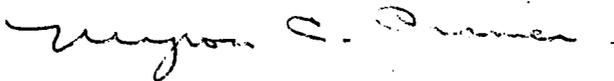
War Department, J.A.G.O., 11 OCT 1944 - To the Secretary of War.

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 Orville H. Bathe (O-763035), Provisional Squadron T, 441st Army Air Forces Base Unit.

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 of the sentence. I recommend that the sentence be confirmed but commuted to forfeiture of pay in the amount of \$75 per month for twelve months, and that the sentence as thus commuted be carried into execution.

3. Consideration has been given to the attached memorandum from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 7 October 1944. He recommends that the sentence of dismissal be commuted to forfeiture of pay in the amount of \$75 per month for twelve months. I concur in that recommendation.

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 above recommendation, should such action meet with approval.



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

4 Incls.

- 1 - Record of trial
- 2 - Dft. ltr. sig. of S/W
- 3 - Form of action
- 4 - Memo. fr. Lt. Gen.
Barney M. Giles, 7 Oct. 44

(Sentence confirmed but commuted to forfeiture of pay in amount of \$75 per month for twelve months. G.C.M.O. 585, 25 Oct 1944)

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

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SPJGK
CM 259158

17 JUL 1944

UNITED STATES)

THIRD AIR FORCE)

v.)

Private HERMAN L. GRICE)
(37100708), Headquarters)
and Headquarters Squadron,)
358th Service Group (Special),)
Army Air Field, Great Bend,)
Kansas.)

Trial by G.C.M., convened at
Barksdale Field, Louisiana,
19 June 1944. Dishonorable
discharge and confinement
for three (3) years. Dis-
ciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 93rd Article of War.

Specification: In that Private Herman L. Grice, Headquarters and Headquarters Squadron, 358th Service Group (Special), Army Air Field, Great Bend, Kansas, on temporary duty at Army Air Forces Guard School, First Military Police Training Center (Aviation), Barksdale Field, Louisiana, did, while a passenger on the Barksdale Field bus, enroute between Bossier City, Louisiana and Barksdale Field, Louisiana, on or about 26 April 1944, with intent to do him bodily harm, commit an assault upon First Sergeant Paul E. Schoonover, by cutting him on the chest, with a dangerous instrument to wit, a knife.

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

Specification: In that Private Herman L. Grice, * * * did, while a passenger on the Barksdale Field Bus, enroute between Bossier City, Louisiana and Barksdale Field, Louisiana, on or about 26 April 1944, behave himself with disrespect toward Second Lieutenant Elbert D. Litsey, his superior officer, by saying to him, "I'll beat the hell out of you, you son-of-a-bitch", or words to that effect.

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

Specification: In that Private Herman L. Grice, * * *, having received a lawful command from 2d Lieutenant Elbert D. Litsey, his superior officer, to "sit down and shut up", did, while a passenger on the Barksdale Field Bus, enroute from Bossier City, Louisiana, to Barksdale Field, Louisiana, on or about 26 April 1944, fail to obey the same.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of two previous convictions was introduced, both for absence without leave in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three 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 50 $\frac{1}{2}$.

3. The facts are undisputed as the witnesses for the prosecution agree in their recital of what occurred. The defense offered no witnesses, and accused, after an explanation of his rights, elected to remain silent.

Accused was a private in Headquarters and Headquarters Squadron, 358th Service Group (Special), Army Air Field, Great Bend, Kansas, on temporary duty at Army Air Forces Guard School, First Military Police Training Center (Aviation), Barksdale Field, Louisiana. At about 2030 on 26 April 1944, civilian police put accused on a Barksdale Field bus in Bossier City, Louisiana, with the remark, "Here is one of your men". Accused was "not in control of himself" and was cursing and using obscene language (R. 6). Lieutenant Litsey, Air Corps, who was seated across from accused, first requested and then ordered accused to "sit down and shut up". Accused not only did not comply with the order but directed profane and obscene remarks to the lieutenant, stating "I'll beat the hell out of you, you son-of-a-bitch". (R. 7,8,9,10, Ex. A.) At the time that the order was given, Lieutenant Litsey believed that accused was in such a drunken condition as not to comprehend fully what he was telling accused and was too drunk to behave in a normal manner or realize fully what he (accused) was doing (Ex. A). Before reaching Barksdale Field, accused pulled the cord to get off the bus. Upon instructions from Lieutenant Litsey the driver continued, whereupon accused threatened to wreck the bus unless he did stop (R. 7,9,10,11). As accused made a movement to jerk the wheel from the driver, First Sergeant Schoonover, 770th Chemical Company, grabbed him by the right arm, while another soldier grabbed him by the left. At that stage another occupant warned that accused had a knife, whereupon the soldier who had grabbed accused by the left arm let go and accused whirled around, cutting Sergeant Schoonover in the chest with a pocket-knife. Accused then threatened to knife the driver, who thereupon stopped the bus at Lieutenant

Litsey's suggestion and let accused off (R. 7,9,10,11). All of this apparently occurred in a very brief period of time for around 2030 the sergeant of the guard at Barksdale Field, in response to a call from the West Gate, first went to that point and then "up the road" where he found accused, who did not know what he was doing, lying on the ground "in a passed out condition" due to being drunk (R. 11,12).

4. There is no testimony whatever to indicate that accused knew what he was doing or that he recognized Lieutenant Litsey as an officer or that he heard or understood the orders given to him by the lieutenant. On the other hand the positive testimony clearly shows that at the time of the incident out of which all three charges grew accused was so drunk as not to be in possession of his mental faculties. Drunkenness is not a defense for crime committed while in that condition, but may be considered as affecting mental capacity to entertain a specific intent, where such an intent is a necessary element (M.C.M. 1928, par. 126a).

In the discussion of the 63rd Article of War at page 147, Manual for Courts-Martial, 1928, the principle is enunciated that "Where the accused did not know that the person against whom the act, etc., were directed was his superior officer, such lack of knowledge is a defense". Similarly, in the discussion of the offense of willfully disobeying a superior officer under the 64th Article of War the rule is laid down that the accused must know that the order is from a superior officer (MCM, 1928, p. 149).

It is the opinion of the board that the record affirmatively shows that accused was incapable of harboring any specific intent to do Sergeant Schoonover bodily harm, or of knowing that Lieutenant Litsey was his superior officer, or of understanding that an order had been given to him, and that the record is devoid of any testimony from which a contrary inference may be drawn.

"Convictions by courts-martial may rest on inferences but may not be based on conjecture" and "if any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference" (CM 223336, Wills, JAG Bull., Aug. 1942, p. 159).

The Board of Review is constrained to conclude that the findings of guilty of Charges II and III, and the Specification under each, are not warranted, and that the testimony is sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves an assault with a dangerous weapon in violation of Article of War 96. The maximum authorized confinement for this offense is ten years (CM 230478, Maynor, B.R. 17, p. 375).

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II,

and its specification and Charge III and its Specification; legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the time and place alleged, assault the named soldier with a dangerous weapon, to wit, a knife, in violation of Article of War 96, and legally sufficient to support the sentence.

Wm. E. Gou, Judge Advocate.
Norman Hayes, Judge Advocate.
Samuel Linnford, Judge Advocate.

1st Ind.

1 AUG 1944

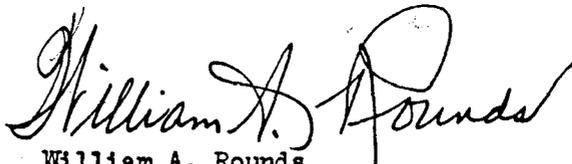
War Department, J.A.G.O.,
Third Air Force, Tampa, Florida.

- To the Commanding General,

1. In the case of Private Herman L. Grice (37100708), Headquarters and Headquarters Squadron, 358th Service Group (Special), Army Air Field, Great Bend, Kansas, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification and Charge III and its Specification; legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the time and place alleged, assault the named soldier with a dangerous weapon, to wit, a knife, in violation of Article of War 96, and legally sufficient to support the sentence, which holding is hereby approved. Upon disapproval of the findings of guilty of Charges II and III and their Specifications and upon approval of only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the time and place alleged, assault the named soldier with a dangerous weapon, to wit, a knife, in violation of Article of War 96, 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 259158).



William A. Rounds,
Colonel, J.A.G.D.,

Acting Assistant Judge Advocate General,
In Charge of Military Justice Matters.

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

(255)

SPJGQ
CM 259160

- 4 AUG 1944

UNITED STATES)

ANTIAIRCRAFT ARTILLERY
TRAINING CENTER

v.)

Private CHARLES F. CANNON)
(35694546), Headquarters)
and Headquarters Battery,)
832nd Antiaircraft Artillery)
Automatic Weapons Battalion.)

Trial by G.C.M., convened at
Camp Haan, California, 29 June
1944. Dishonorable discharge
and confinement for life.
Penitentiary.

REVIEW by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Charles F. Cannon, Headquarters and Headquarters Battery, 832nd Antiaircraft Artillery Automatic Weapons Battalion, then a person under sentence adjudged by court-martial, did, at Camp Haan, California, on or about 19 March 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Los Angeles, California, on or about 6 June 1944.

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

Specification: In that Private Charles F. Cannon, Headquarters and Headquarters Battery, 832nd Antiaircraft Artillery Automatic Weapons Battalion, then a person under sentence adjudged by court-martial, having been duly placed in confinement in the Camp Haan Stockade, Camp Haan, California, on or about 13 February 1944, did, at Camp Haan, California, escape from said confinement before he was set at liberty by proper authority.

(256)

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

Specification 1: In that Private Charles F. Cannon, Headquarters and Headquarters Battery, 832nd Antiaircraft Artillery Automatic Weapons Battalion, did, at or near the city of Bakersfield, county of Kern, state of California, on or about 20 March 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person and presence of Mrs. Margaret Bailey, one (1) 1941 De Sota sedan automobile, the property of Kay Bailey, of a value of more than fifty dollars (\$50.00).

Specification 2: In that Private Charles F. Cannon, Headquarters and Headquarters Battery, 832nd Antiaircraft Artillery Automatic Weapons Battalion, did, at or near the city of Bakersfield, county of Kern, state of California, on or about 20 March 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person and presence of Mrs. Margaret Bailey, the sum of three hundred forty-three dollars (\$343.00), lawful money of the United States, then in the lawful possession of Mrs. Margaret Bailey.

Specification 3: In that Private Charles F. Cannon, Headquarters and Headquarters Battery, 832nd Antiaircraft Artillery Automatic Weapons Battalion, did, at Los Angeles, California, on or about 25 May 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

George R. Daylon 16-17 Fourth and Spring Branch 16-17
Paint Cont.
4179 Du. Wayne

BANK OF AMERICA
NATIONAL Trust and ASSOCIATION
Savings

Los Angeles, Calif., May 25 1944

Pay to the
order of Arthur E. Crane \$ 37.21
Thirty Seven dol. Twenty one cents Dollars

Loan on pay George R. Daylon Paint
Cont.

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

Specification 4-13 incl: Each of these Specifications is identical in form and substance with Specification 3, except in the number, date, amount payable and the branch bank upon which the check is drawn, which are, respectively, as follows:

<u>Specification</u>	<u>Number</u>	<u>Date</u>	<u>Amount</u>	<u>Branch Bank</u>
4	same	blank	\$32.27	Ninth and Main
5	same	5/15/44	32.27	Santee-Textile Branch
6	same	5/10/44	32.27	Santee-Textile Branch
7	same	7/17/44	32.27	Los Angeles Main Office
8	172	5/5/44	32.27	Los Angeles Main Office
9	same	5/22/44	32.27	Ninth and Main Branch
10	same	5/11/44	27.21	Ninth and Main Branch
11	173	5/28/44	47.84	Los Angeles Main Office
12	same	5/21/44	same	Los Angeles Main Office
13	same	5/21/44	47.81	Ninth and Main Branch

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

Specification: (Finding of not guilty.)

He pleaded guilty to the Specification of Charge I, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty; not guilty to the Charge but guilty of a violation of Article of War 61; guilty to the Specification of Charge II and to Charge II; and guilty to Specifications 3 to 13, inclusive, of Charge III and to Charge III.* He pleaded not guilty to Specifications 1 and 2 of Charge III and to the Specification of Charge IV and to Charge IV. He was found not guilty of the Specification of Charge IV and of Charge IV and guilty of all other Specifications and Charges. Evidence of three previous convictions was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution, briefly summarized, is as follows:

The accused was, for some time prior to, and on 19 March 1944, in the military service of the United States, as a private in Headquarters and Headquarters Battery, 832nd Antiaircraft Artillery Automatic Weapons Battalion, stationed at Camp Haan, California (R. 11).

On 22 February 1944, by special court martial order No. 37, Headquarters, Antiaircraft Artillery Training Center, Camp Hann, California, he was sentenced, in addition to forfeitures, to be confined at hard labor in the Camp Haan stockade for a period of six months (R. 11; Pros. Ex. 1).

(258)

On 19 March 1944 the accused, together with three other prisoners, List, Sheridan and Besherse, having previously planned to do so (R. 58), escaped from the Stockade at Camp Haan by disarming and overpowering their guard (R. 12-15; Pros. Exs. 2 and 3).

At approximately 7:30 or 8:00 p.m. on 20 March 1944 the accused, with his three companions, was in the city of Bakersfield, California (R. 34, 36, 39). At that time Mrs. Margaret Bailey, wife of a grocery store operator in Shafter, California (R. 34), who had taken neighbors from Shafter to the Mercy Hospital in Bakersfield, was waiting in her automobile which was parked on the street by the hospital (R. 35). She had been sleeping (R. 44) but suddenly she heard the car door open and four soldiers got into the car. One grabbed her around the neck and another pushed her over. She was told that they were in trouble and that she had to get them out of it (R. 36, 49) and that if she "would keep quiet" she "would get out of it alive". She heard the clicking of a gun or "a noise that sounded like a gun" from somewhere on the back seat. "Jimmy" (whom she later identified as List) was driving and "Whitey" (later identified as Besherse) continued to hold her around the neck while the accused and the other soldier sat in the rear seat. It was just beginning to get dark and "Whitey" kept holding Mrs. Bailey's head down so she could not see out of the car. Eventually they left town and proceeded along a dirt road and a short time thereafter List told the rest "he had business with her (Mrs. Bailey) in the back seat". He stopped the car and the accused and Sheridan moved to the front seat with Besherse while List took Mrs. Bailey into the rear (R. 37-51). Thereupon, after the car had again started, List raped Mrs. Bailey while the others looked on, laughing (R. 39). When he had accomplished the act he said "O.K. Whitey" whereupon Besherse changed places with List and also raped Mrs. Bailey while the others again turned around and laughed. The accused did nothing to prevent the rapes (R. 40). At the time Mrs. Bailey had with her, in her purse, \$360 in 20-dollar bills, \$25 in silver and between \$7 and \$8 in smaller change. While List was driving and Besherse had Mrs. Bailey on the back seat List opened the purse and took some bills out of it. Then, when it was suggested that they were running out of gasoline, List told Mrs. Bailey she "had better have some gasoline stamps" and took the purse again and started looking for them. Mrs. Bailey was afraid they were going to kill her and consequently she was concerned only with getting safely away. They had said that if she did what they told her to do, they would not kill her and she "would get out alive". After List had looked through the purse Besherse took it and searched it. At this point Mrs. Bailey reached for the car door thinking she might be able to jump out but Besherse grabbed her arm, felt her watch and took it from her arm (R. 41-51). Then, after getting back on the main highway again and once more leaving it to go onto a dirt road, Besherse said "Let's kill this dame and get it over with" and finally stated "Here's the dame's getting-off place" at which Mrs. Bailey thought he was "fixing to kill" her. Besherse opened the door and told her to get out, which she did (R. 42, 43). She went behind the car followed by List who, when he saw her crouched there, asked "What the God damn hell (she) was doing." He made her stand up,

and then he ran, jumped into the car and "took off" (R. 44). She had never been on that road before, to her knowledge, and she started running to look for a house. She did come to the home of Mr. Walter Fir and his family, who were already in bed, but they arose and let her in. After reporting to them what had happened they called the police. Mrs. Bailey then tried to call her husband but, failing in that, got in touch with her brother, and later Mr. Fir came and took her home. When she arrived home in an hysterical condition (R. 54) she reported to her husband what had happened to her and the McFarland police were, in turn, notified (R. 44-46).

After Mrs. Bailey had been put out of the car by the soldiers she found that nothing was left in her purse (R. 47). The automobile which she had been driving, with her husband's consent, was a 4-door 1941 model DeSoto sedan which had a value on 19 March 1944 of more than \$50.00 and was the property of Mr. William K. Bailey (R. 47, 54, 68). The money taken from Mrs. Bailey belonged to herself and her husband jointly (R. 48, 56). The Baileys did not see their automobile again until about 10 days later when they were told by the Chief of Police of Bakersfield that it had been found and they later obtained possession of it from the Vallejo police (R. 47, 55). Mrs. Bailey testified throughout that she feared for her life during the whole time the soldiers were in her car (R. 40, 41, 43, 44).

On 5 June 1944 Detective Sergeant Joseph A. Cunningham and Detective Sergeant Delos A. McCoolle, both members of the Los Angeles police department, saw the accused in a cafe in Los Angeles dressed in civilian clothes and accompanied by a girl. The accused gave the assumed name of "Crane" when accosted by the detectives. When asked for his identification papers the accused stated they were in the possession of his wife who had just left to go to a furniture store. No such person was found at the store indicated by the accused nor had she been seen. The accused then took the detectives to the hotel where he had registered under the assumed name of "John Gorman" and, upon search of his room, they discovered an Army discharge certificate in the name of another soldier. This, together with a letter addressed to a "Mrs. Cannon", accused said he found in the room. There were articles of civilian clothing in the room and when asked whether he was in the Army the accused stated he had been but had received a medical discharge because of stomach ulcers and a punctured ear drum. He had \$50.00 in his possession which he stated belonged to his wife. He then said that his wife was pregnant and was living in the "Evangeline Home" under the name of Pat Burke. Upon inquiry at the Evangeline Home it was discovered that Miss Burke was not in but her room mate, Miss Nichols, talked with Detective Cunningham. Meanwhile the accused, who had remained outside in the car, disappeared but called Miss Nichols on the telephone while Detective Cunningham was still with her. Through this conversation the detectives planned to apprehend the accused during the evening but did not see him again until the next morning when he was taken into custody while in a telephone booth at the St. Paul hotel. The accused was taken

to police headquarters where he admitted that his name was "Cannon". The records of the police department contained information that the accused was wanted by the Bakersfield police as a military prisoner escaped from Camp Haan and that he was likewise wanted by the Hollywood Police Bureau for passing bad checks. The accused then admitted that he had escaped with three other prisoners from Camp Haan on 19 March 1944. Military authorities were notified and on 7 June 1944 the accused was surrendered to military control (R. 17-32).

On 8 June 1944, First Lieutenant Glen W. Ellard and First Lieutenant Horace W. Russell, 832nd Antiaircraft Automatic Weapons Battalion, who had been detailed to question the accused regarding court-martial charges against him, visited the accused in the Riverside County jail. After he had been properly warned of his rights under Article of War 24 the accused admitted that he and three other prisoners in the Camp Haan stockade had talked about and planned making an escape for about three weeks or a month. He confessed that, in March 1944, the four of them had escaped from confinement in the Camp Haan stockade by overpowering their guard and taking his rifle away from him. They thereupon took a government vehicle and drove to Corona or Arlington where they abandoned the government truck and took an Oldsmobile car belonging to a civilian. They proceeded to Bakersfield where List and Beshorse went in search of another car. Having found a woman by the name of Mrs. Bailey in possession of a car, they took the car and the woman and, picking up the accused and his companion some distance away where they were guarding groceries, they drove out of town. The accused and Sheridan were told to get into the front seat shortly thereafter while either List or Beshorse (the witness Ellard not being certain of the accused's statement on this point) first took the woman on the back seat and raped her following which the other did likewise. When asked why he did not make some effort to prevent these acts the accused stated that either List or Beshorse, whichever one was in the back seat with Mrs. Bailey first, had an M-31 rifle in his possession and the accused feared he might be killed if he interfered. Later, either List or Beshorse took \$100 from Mrs. Bailey and divided it among the four soldiers. Of this amount the accused said he received approximately \$20 or \$25. They then drove on toward Sacramento and when in that vicinity, the other three men put the accused out of the car after "robbing" him not only of that portion of Mrs. Bailey's money which he had received, but part of \$18 of his own money which he had when he escaped from the stockade. The accused stated "that he was afraid of Beshorse and List the entire time from the time he left here (Camp Haan) until they finally, to use his word 'robbed' him. He was afraid of those two men, he stated positively". He did not, however, state why he had not left them sooner than he did. The accused, after leaving the others, went into Los Angeles and lived there, first in one place and then in another, but never more than a week in any place. He did no work while there but obtained funds by cashing worthless checks. He saw the name "Arthur E. Crane" among some papers he found and adopted and used it in

drawing the checks. When shown a series of checks he identified each and freely admitted he had forged them and received money for them. After wearing army uniforms for about three weeks he changed to civilian clothes. When asked about his intention of returning to Camp Haan he said "he intended to, but just did not get around to it" (R. 56-67).

Written stipulations (Pros. Ex. 4-14) were admitted in evidence. Each of these was to the effect that the accused had falsely made, in its entirety, and with intent to defraud, the particular check referred to in the respective stipulation and had received cash, goods, wares and merchandise in each case in exchange therefor. The checks were admitted in evidence as Pros. Exs. 4A - 14A.

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified in substance as follows:

On the evening of 20 March 1944, the accused, accompanied by three other soldiers by the name of List, Sheridan and Besherse, was in Bakersfield, California. They had an Oldsmobile automobile which had given them trouble and they tried to fix it without success while waiting outside of town, by the river, until nightfall. They consequently determined to get rid of it and drove into town, parking "around the corner from the hospital about half a block" (R. 78, 81, 83). List and Sheridan then went on a hunt for another car and came back to inform the others they had found a DeSoto automobile with a woman in it, asleep. Though the accused and Besherse disapproved taking the car Sheridan and List nevertheless left, taking the rifle with them, got into the car and drove off (R. 78, 79, 82, 83). The accused and Besherse waited about 15 minutes and then followed the others on Highway 99. About 8 or 10 miles outside of town, List and Sheridan, who had pulled over to the side of the road, stopped the accused and Besherse and told them to take the things out of the Oldsmobile and place them in the DeSoto. This was done and the accused got into the back seat with Mrs. Bailey; but, before they started again, he changed to the front seat because List wanted to get in the back with her (R. 79, 83, 84). To the question, "Then where did you go?" the accused answered, "I went straight on up 99" although he later testified "they drove along slowly". List thereupon got into the back seat with Mrs. Bailey taking the rifle with him. Accused then stated he was "pretty sure" Sheridan was driving and although he "tried to talk List out of it" and the accused also talked "to him about it" List nevertheless raped Mrs. Bailey (R. 79, 84) and he was followed by "Whitey" (Besherse) who "went back later" (R. 84). The accused believed that List had taken money from Mrs. Bailey before he got into the DeSoto car (R. 79), because, as the accused got into the car "List told Whitey she had some money and he handed it back to Whitey to count and Whitey started counting it, and he said he did not know how much was there. He thought it would be about a hundred dollars before he looked at it and that is what List said. Whitey counted it and said 'Yes, you're right'" (R. 79, 84).

According to the accused "they took her (Mrs. Bailey) off by a camp up there and took her by a side way and dumped her out" (R. 84) after which they proceeded to Sacramento and from there to Vallejo, where \$20.00, part of the money taken from Mrs. Bailey, was given to the accused. Later an argument ensued and after his companions took \$18.00 of his own money, as well as the money of Mrs. Bailey which they had given him, he left them and went on alone to Los Angeles (R. 80, 85).

During all of these episodes the accused feared to leave his companions because "they threatened to kill anybody who left" (R. 80). He claimed that the others "were hot" about the fact that, in Bakersfield, the accused "didn't do anything but sit around and sleep all day" (R. 83), and later, in Sacramento, the accused heard List and Sheridan arguing about the stolen money and whether to give the accused "any or not because (he) wouldn't do anything" (R. 85). However, he admitted that no force whatever was used to get him to transfer from the Oldsmobile to the DeSoto automobile nor had any force been used to induce the accused to go to Bakersfield with the others (R. 87).

The accused arrived in Los Angeles on about 22 or 23 April 1944 and was there until he was apprehended on 7 June 1944 (R. 81). During all that time he made no effort to obtain employment and did no work of any kind. He stayed in "five or six" of the larger hotels, registering under assumed names. He "figured on returning to his station but didn't know when" and although he saw military police in Los Angeles every day while he was there he never thought of surrendering (R. 86). He also admitted that his statement to the police officers to the effect that he was married was false (R. 87).

5. It is abundantly evident from testimony adduced at the trial in addition to the extra judicial admissions and confessions of the accused, as well as his own testimony under oath, that he is guilty of the offenses charged in the Specification and Charge II and Specifications 3-13 of Charge III and of Charge III. To these offenses he pleaded guilty and he was, accordingly, and properly, found guilty of each.

The only matters requiring discussion are his guilt of the desertion alleged in the Specification and Charge I and of the robberies of which he stands accused in Specifications 1 and 2 of Charge III.

He pleaded guilty, by exceptions and substitutions, to absence without leave from his proper station at Camp Haan, California, from 19 March 1944 to 6 June 1944 and thus admitted that element of the offense of desertion. Inasmuch as the evidence shows that, when he was a prisoner in the stockade at Camp Haan under sentence of confinement at hard labor for six months, he participated in a violent escape therefrom by overpowering and disarming the guard, this, of itself would justify a reasonable inference that he had no intent to return thereafter to his duty station. But the evidence, as will be shown hereinafter, clearly shows that he likewise participated in two robberies

after his escape. He admitted, and other evidence shows, that subsequently, he lived in the city of Los Angeles using several aliases, wore civilian clothing, and supported himself by forging numerous checks and obtaining money by fraudulently uttering them. Though he had every opportunity to surrender himself to military control between 23 March 1944, when he arrived in Los Angeles, and 6 June 1944, when he was apprehended, he made no attempt to do so. When apprehended he gave a fictitious name, falsely stated that he was married and had a pregnant wife, and then eluded the authorities until again apprehended next day. In the light of all these facts and circumstances, the conclusion that he never intended to return is inescapable and he was properly found guilty of the desertion alleged.

That he is also guilty of the robberies is equally clear. For a long time prior to the joint escape from confinement the four confederates had unquestionably conspired to accomplish this end. While the theft of automobiles in connection therewith is not such an incidental and probably consequence of the planned escape so as to make each conspirator responsible therefor when such theft was not a part of the conspiracy, the subsequent acts of the four men, in confederation, made the taking of automobiles, by force, a natural and probable consequence of what they jointly planned to do. In his statement to an investigating officer, the accused admitted the joint stealing of a government car by the four prisoners immediately after their escape. This car was abandoned for another car stolen in Corona or Arlington, California, in the continued process of escaping. This automobile was likewise abandoned in Bakersfield, California and it was at this point when all of the conspirators became aware of the plan to take the DeSoto automobile, then in the possession of Mrs. Bailey, by force if necessary. The accused's testimony on this matter is as follows:

"They (List and Sheridan) went up and looked around there quite a bit and came back and said there was a car up there with a woman in it, asleep, and Sheridan was afraid to fool with it on account of that woman in there, and List was running things, and he said 'We will get it anyway' * * * List and Sheridan went back up to the car and took the gun with them, took the rifle and they pulled out * * *

Clearly the determination to "get it anyway" and the taking of the rifle implied the use of force and violence, if required, and was a statement of purpose made in the presence of all the conspirators and to which no dissent was made by any. If, therefore, the accused, according to his testimony, later voluntarily joined List and Sheridan in the stolen car and proceeded with them while Mrs. Bailey was a helpless prisoner in her own car, he was a principal in the robbery of the car. But Mrs. Bailey was positive in her description of the forceful manner in which her car was taken from her. She said that four men entered the car while it was parked by the Mercy Hospital in Bakersfield and she was asleep at the wheel. She was violently shoved over on the front seat and then overpowered by Beshorse while List drove the car away, the

two others occupying the back seat. During the ensuing time threats were made against her life and, while rendered powerless to resist through fear, she was twice raped and then robbed of all the money she had in her purse. If, as she testified, the accused was one of the four who thus took her car and her money, he is guilty of aiding and abetting in the commission of both offenses though he did nothing overt in accomplishing either result. He was an active confederate throughout, from the time of the escape until, as he says, his erst-while companions "robbed" him of his share of the money of which they had robbed Mrs. Bailey, and, under all of the evidence, the court was wholly justified in refusing to believe his protestations of innocent participation in the two robberies through fear of the associates which he had chosen, voluntarily joined and whom he unquestionably aided in the forcible theft of both the automobile and the money.

That the automobile and money were taken against the will of Mrs. Bailey is clearly evident from a consideration of all the facts and surrounding circumstances. Her testimony in the matter was given with frankness and candor and discloses an extraordinarily harrowing experience at the hands of four men whose conduct throughout brands them as desperados. When they entered her car, one of them carrying a rifle, while she was waiting alone, in the nighttime, outside of a hospital to which she had generously brought a neighbor and friend about to be confined in child-birth, they threatened her life, if she resisted. Similar threats were made later as they absconded with her and the car. She testified that she was afraid they would kill her if she did not let them do as they wanted. Under all the circumstances it is evident that her mind and her will were paralyzed by fear and physical resistance on her part would not only have been futile but foolhardy as well.

"In order to constitute robbery, the taking of the property in question must be against the will of the owner or other person in possession. The requisite unwillingness may be evidenced not only by actual resistance, but by the fact that resistance would have been offered had it not been prevented by actual, overpowering force or violence, or by threat sufficient to frighten the victim into compliance. For example, a victim acting under compulsion through fear or possibly through physical pain, although ultimately placing his property in the hands of the robber without raising a protesting voice or hand, is not acting of his volition, but at the will of the robber; in other words, it is the act of the victim but not his deed - his submission, but not his will * * * " (46 Am. Jur. 150).

Applying these principles to the clear and convincing evidence in this case, it is certain that Mrs. Bailey did not consent to the acts of the accused and his confederates and was robbed of her property against her will. Although the accused is not charged with rape upon Mrs. Bailey nor complicity in the rapes committed upon her by List and

and Besherse, there was no violation of any of his substantial rights by permitting testimony regarding the acts of rape to be introduced without objection on the part of the defense. The accused had told of the rapes in his extra judicial statement and he reiterated the circumstances in his own testimony at the trial. This evidence was competent and material because it had a bearing upon the state of mind which the series of events produced in Mrs. Bailey and further tended to prove that her failure to make active, physical resistance against her captors was due to a lack of will which had been suspended through fear.

6. The charge sheet discloses that the accused is 21 years of age, was inducted at Louisville, Kentucky on 19 January 1943, and has had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of robbery and forgery, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, Section 2901 and Title 22, Section 1401, respectively, of the Code of the District of Columbia. A sentence of life imprisonment is authorized upon conviction of desertion in time of war.

William H. Sambrell, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

John R. Anderson, Judge Advocate.

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

SPJGV
CM 259188

17 JUL 1944

U N I T E D S T A T E S	)	ARMY AIR FORCES
	)	CENTRAL FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at
	)	Pampa, Texas, 28 June 1944.
First Lieutenant JOY D.	)	Dismissal and total forfeitures.
BEAMER (O-564772), Air)	
Corps.)	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 61st Article of War.

Specification: In that First Lieutenant Joy D. Beamer, Air Corps, did, without proper leave, absent himself from his station at Pampa Army Air Field, Pampa, Texas, from about 1 June 1944 to about 7 June 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service 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 prosecution introduced without objection an extract copy of Special Orders No. 108, Headquarters Pampa Army Air Field,

dated 30 April 1944, assigning accused to 2531st AAF Base Unit (Pilot Sch, Adv-2E) Pampa Army Air Field, Pampa, Texas, effective 1 May 1944 (R. 7; Ex. 3). An extract copy of the morning report of the above unit showing the accused absent without leave as of 1 June 1944 was also received in evidence without objection (R. 10; Ex. 4). It was stipulated that accused was returned to military control by military police at Denver, Colorado, on 7 June 1944 (R. 11; Ex. 6).

4. The defense introduced no evidence, and the accused after having his rights as a witness explained to him elected to remain silent (R. 11).

5. The evidence conclusively shows that the accused absented himself without leave from his station at Pampa Army Air Field, Pampa, Texas, from 1 June 1944 until he was returned to military control by military police at Denver, Colorado, on 7 June 1944.

6. War Department records show that accused is 26 years of age and a high school graduate. He enlisted in the Army in December 1939, and after attending the Army Air Forces Officer Candidate School, Miami Beach Schools, Army Air Forces Technical Training Command, Miami Beach, Florida, was appointed second lieutenant, Army of the United States, 28 October 1942. He was promoted to first lieutenant 14 April 1943.

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

(On leave), Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Truettan, Judge Advocate.

SPJGV
CM 259188

1st Ind.

War Department, J.A.G.O., 1 AUG 1944 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 Joy D. Beamer (O-564772), 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, legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.
3. Consideration has been given to the inclosed letter from Senator Samuel D. Jackson in which he requests clemency.
4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



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

- 4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr fr Sen
Samuel D Jackson.
Incl.3-Dft ltr for sig S/W.
Incl.4-Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 454,
26 Aug 1944)

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

SPJGV
CM 259194

2 AUG 1944

UNITED STATES)

III CORPS

v.)

Technician Fourth Grade)
HARVEY E. MILBOURNE)
(33722649), 3460th Quarter-)
master Truck Company.)

Trial by G.C.M., convened at
Fort Ord, California, 22 June
1944. Dishonorable discharge
and confinement for life.
Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 Technician Fourth Grade Harvey E. Milbourne, 3460th Quartermaster Truck Company, did, at New Monterey, California, on or about 26 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Nathan B. Earl, Battery E, 54th Coast Artillery, a human being, by cutting him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the

sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

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

The testimony of all witnesses including the accused as to the facts occurring prior to and leading up to the fight between accused and Nathan Earl, the deceased, is substantially the same. After quitting work as janitresses at the Dental Clinic at Fort Ord on the afternoon of 18 May 1944, Lillie Mae Earl, wife of the deceased, and Elizabeth Foster, who together with her husband rented a room in the Earl home, joined the accused and First Sergeant Amos Snowden on the Fort Ord reservation. The quartet then met Clifford Moore, one of the post barbers, in the vicinity of the barber shop and they all drove to Moore's home in Pacific Grove, California. A stop was made en route to permit accused and Snowden to purchase a four-fifths quart of vodka. They arrived at Moore's house around 8:30 or 9 p.m. and all but Moore departed about 9:30 p.m. after consumption of the vodka. Although Elizabeth Foster testified that she then proceeded home unescorted (R. 50), Snowden, Lillie Mae Earl and the accused testified that they and Elizabeth Foster walked in couples to within a block of the Earl-Foster menage in Monterey, California, where Elizabeth left the group to continue on to her home followed soon by Lillie Mae.

Accused and Snowden remained at the corner where they had separated from the women (R. 70, 71, 112). Accused suggested leaving, but Snowden objected inasmuch as the Foster woman had told him she might return. According to Snowden Lillie Mae Earl came back to the corner and told accused, "Come on, Sgt Milbourne" (R. 71). She apparently returned to the house alone, as accused later asked Snowden to go on to the house with him. As they reached the next corner they heard a woman screaming, and accused said, "He must be beating her". They proceeded a little further and accused said, "I guess we better see if we can stop there. Something is happening". Snowden was reluctant to participate in any proposed rescue and persuaded accused momentarily to go on toward town. They had gone only a short distance when Elizabeth Foster emerged from the house and called, "Sergeant, come in and try to do something because he is going to kill her" (R. 71). Accused then proceeded into the Earl

house, Snowden following and cautioning him against the wisdom of such an act, telling accused "it was a family affair" and that "Anything might happen. He [Earl] might have a shotgun and he might shoot" (R. 82).

When Lillie Mae Earl entered the house after leaving accused she found her husband lying on a bed. When she admitted to him that she had been drinking he got up, slapped her, and locked the door to the room with a hook. When she bolted for the door he hit her on the side of the head, and she remembered nothing thereafter until she regained her senses in the Salinas Hospital and discovered that she had been cut on the right arm and in the side three times. She was hospitalized 13 days for these injuries (R. 25, 30, 98).

When Elizabeth Foster arrived home she went to her room and a short while later she heard Lillie Mae enter the house, proceed to the bathroom where the deceased was and ask him why he had not met her at the Music Box. Shortly after that she heard a "lick". Lillie Mae ran from the room, apparently stumbled and then deceased caught her and took her back into their bedroom. She heard another "lick" and Lillie Mae screamed "Stop cutting me". Elizabeth ran from the house screaming "Police", then returned and tried to phone the police but Lillie Mae's screams kept her from understanding the operator, so she hung up and resumed her shouts for help (R. 51, 52). When she ran from the house she saw two soldiers but said nothing to them (R. 61). After hanging up the receiver she ran to her room and, leaving her door partly ajar, she peered into a room on which the deceased's room also bordered. She saw the accused come to the door of deceased where he "smashed on the knob real hard" (R. 53), and finally the door flew open as the screw holding the hook lock came loose. She could hear Earl walking about in his room but could not see him. Accused held the door to Earl's room in such manner that Earl came out "kind of sideways" with both hands down. When his face was just past the door accused cut him, and blood streamed down Earl's face. She did not see a knife in Earl's hand (R. 53), nor could she see a knife in accused's hand "because he was using it so fast I couldn't see it" (R. 55). Earl staggered and fell on his face into the room into which witness was peeping through her cracked door and accused "jumped straddled him and stabbed him three more times" after he fell (R. 56). Earl was not resisting at this time, and after being stabbed on the floor "just kind of raised his head up just the least bit and walled his eyes and let his head fall back down" (R. 56). Before Earl fell into the room the accused had cut him on the face,

in the neck severing the jugular vein, twice in the back, and once on his side (R. 64). After stabbing Earl while he was lying on the floor the accused jumped up and fled (R. 56).

The other witness to the affray, Sergeant Snowden, testified that as he followed accused into the house he saw him pull "a couple of yanks" at the door to the bedroom in which were the deceased and Lillie Mae Earl (R. 71). The door came open and deceased came to the edge of the door. "They stood there just over a split second, and it seemed as if they were fitting to grab each other, sir, and when they did that, in just another second Earl was down" (R. 73). Snowden saw blood on the floor, and left the house. He did not see a knife in either man's hand (R. 73).

Two police officers of the city of Monterey arrived at the Earl home about 10:15 p.m. They found Lillie Mae Earl very hysterical, and it was necessary for four people to hold her. The body of Nathan Earl was lying full length on the floor with knife wounds all over the back, one in the neck and on one arm. A stream of blood eighteen inches wide, one half inch deep, and six and a half or seven feet in length ran from the body over the floor. A pocket knife with an open two and one half inch blade was found under deceased's body near the chest (R. 41-45).

A knife identified by Elizabeth as being one she had seen accused carrying during the afternoon was received in evidence as Exhibit D (R. 58). It was described by agreement between counsel as having a blade approximately seven inches long and an inch and a quarter wide, with a four inch handle, and it was stipulated that this knife was made from a jeep spring (R. 58, 59).

An autopsy performed on deceased's body 27 May 1944 disclosed three wounds in the thigh, one in the thumb, one in the cheek, one above the left clavicle, one in the abdomen and six or seven in the back. Most of the wounds were deep, the deepest perhaps ten inches. The wounds in the thigh were four inches deep, penetrating to the bone. Two of the back wounds entered the pleural cavity, each cutting a rib. The primary cause of death was the wound entering above the left clavicle which severed the aorta and resulted in immediate exsanguinating hemorrhages (R. 91-94).

4. For the defense.

After having his rights as a witness explained accused

elected to testify under oath. His testimony as to the events preceding the affray in deceased's home does not differ materially from that of the witnesses for the prosecution. His version of his actual combat with the deceased is that as he and Sergeant Snowden were passing the Earl home Elizabeth Foster came running out of the house very much disturbed and asked him to come into the house and stop a fight between Lillie Mae and her husband. He went into the house and heard screams emanating from a bedroom on his left. The door to this bedroom was locked and he forced it open. When he opened the door Earl was facing him with a knife in his raised hand. There was no time to say anything (R. 115) and the encounter occurred immediately. He went into the house to help because Elizabeth Foster had asked him, and not with the intention of killing Earl, and when he met Earl his intentions were to save himself (R. 115).

The accused's coat which he wore during the encounter was received in evidence as Exhibit 3 (R. 117). This coat had a cut one inch long through the outer cloth and shoulder padding on the left shoulder, but not completely through the uniform (R. 118). This cut was not in the coat before the fight.

On cross-examination accused testified he had known the Earls since last September and they were very good friends. He would go to their home about twice a week to see whichever one of them happened to be home. When Earl was not there he would not stay late (R. 140). He had never had any trouble with Earl and had never been told by him to stay away from the house (R. 119, 120).

He had been carrying the combat knife received in evidence as Exhibit D all evening (afternoon), wrapped in a piece of cloth and stuck in his belt (R. 122). He did not take this knife out of his belt until after he entered the house and encountered Earl (R. 126, 128, 131, 139). He had taken the knife with him that day for the purpose of buying a sheath for it, but had not gone to any place or store where he could obtain a sheath (R. 127). He had drunk at Moore's along with the crowd, but was not drunk and knew what he was doing (R. 131, 132).

Accused said he wore a garrison cap on the night of the difficulty, and pulled the chin strap down before he entered the house, but does not remember telling Lieutenant Wardle at the provost marshal's office on that night and after the fight, that he pulled the knife from his belt before he entered the house (R. 133). He could not say whether he did or did not stab Earl after he was down (R. 137).

5. Rebuttal evidence.

Elizabeth Foster testified she had seen accused at the Earl home at times when Earl was not there and that he would stay there from about eight at night until around five in the morning (R. 140, 141). For the defense Private First Class Jack Noakes said he had been at the Earl home with accused and they always left together around ten or eleven o'clock (R. 143).

First Lieutenant Clarence J. Wardle, criminal investigating officer, Provost Marshal's Office, Fort Ord, California, testified that he saw accused in the provost marshal's office, Fort Ord, California, on the night of 26 May 1944. After fully warning accused as to his testimonial rights accused gave one statement which he partially completed, then decided to change his statement and give another one. The pertinent part of this latter statement is that accused told Lieutenant Wardle that when Elizabeth Foster rushed out of the Earl house and told accused that Lillie Mae Earl had been cut and that her husband was killing her the accused, before going into the house, first lowered the chin strap on his cap, and pulled out the knife he had in his belt (R. 146, 147). He said he lowered the chin strap because he did not want to lose his cap in the fight (R. 149).

On cross-examination Lieutenant Wardle said that in the second of three statements given by accused he had stated that:

"When I entered the bedroom, Earl turned around and came at me with a knife in his hand. I also had a knife in my hand. It was a large hunting knife. I tried to get the knife out of Earl's hand, but he was slippery and I couldn't get it" (R. 148).

The accused being called in surrebuttal to Lieutenant Wardle's testimony stated that he remembered telling Lieutenant Wardle that he had pulled down his chin strap before entering the house, but does not remember telling him that he pulled the knife out before entering the house, and did not mean to say that he did (R. 149, 150).

6. Recapitulating briefly, the evidence shows that accused, Lillie Mae Earl, wife of the deceased Nathan Earl, Elizabeth Foster and Sergeant Amos Snowden had accompanied Clifford Moore to his home on the night of 26 May 1944 where the group consumed a bottle of vodka. Accused drank with the crowd, but according to his own testimony,

knew what he was doing and was not drunk. After about 30 minutes accused, Lillie Mae Earl, Elizabeth Foster, and Snowden left the Moore house to go toward the Earl house. They halted about a block from the Earl house and Elizabeth Foster proceeded on to the house, being followed a few minutes later by Lillie Mae Earl. Accused and Snowden waited on the corner as Elizabeth Foster had said she would return. Nathan Earl, husband of Lillie Mae, was unexpectedly at home. He became angered over his wife's alcoholic condition and slapped her and cut her several times. Elizabeth Foster hearing Lillie Mae's calls for help ran screaming and hysterical from the house, and according to accused and Snowden asked accused to go to the aid of Lillie Mae. Accused lowered the chin strap to his cap so he would not lose it in a fight, took a combat knife with a seven inch blade from his belt, and went into the house over the protests of Snowden who reluctantly followed him. In the house accused went to the locked door of the room in which were Nathan and Lillie Mae Earl and forcibly opened the door, breaking the lock by his batterings on the door. Earl emerged from the room with a pocket knife in his hand and was immediately attacked by the accused. Accused cut Earl in the face and on the neck and Earl fell to the floor bleeding profusely and in a helpless condition. Accused then jumped straddle of Earl and stabbed him three more times in the back while he was helpless on the floor. Accused then jumped up and fled the house. Accused inflicted deep and severe wounds on Earl's cheek, neck, back, side and thighs, from which Earl died almost immediately from loss of blood.

The only theories on which the accused could justify his killing of Earl are either self defense, or the prevention of the commission of a violent felony, i.e. the killing or serious injury of Lillie Mae Earl by the deceased. Self defense is untenable for the reason that flight was completely open to accused, an intruder in the Earl home. Nor can accused avail himself of the theory that he acted to prevent the commission of a violent assault upon Lillie Mae Earl. At the time of the killing the deceased had left the room where Lillie Mae Earl was, and it cannot reasonably be said that she was any longer in immediate danger.

The Board of Review is of the further opinion that all of the elements necessary to constitute murder were shown by the evidence to be present in the accused's vicious and violent attack upon deceased.

7. The charge sheet shows that accused is 25 years of age.

(278)

He was inducted into the Army 24 April 1943 and has served continuously since that date.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, 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 punishable civilly by penitentiary confinement under Section 275, Criminal Code of the United States (18 U.S.C. 454).

Thomas M. Japp, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevelan, Judge Advocate.

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

7 AUG 1944

(279)

SPJGH
CM 259220

UNITED STATES)

v.)

Second Lieutenant EDWARD
EBERSOLE (O-758435), Air
Corps.)

THIRD AIR FORCE

Trial by G.C.M., convened at
Morris Field, Charlotte,
North Carolina, 17 June 1944.
Dismissal.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR 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 96th Article of War.

Specification: In that Second Lieutenant Edward Ebersole, Section S, Morris Field Replacement Training Unit LB, Air Corps, did, at or near Hamer, South Carolina, on or about 1 May 1944, wrongfully violate paragraph 16 a (1) (d), Section II, AAF Regulation No. 60-16, dated 6 March 1944, by flying a military airplane at an altitude below five hundred (500) feet above the ground.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that Second Lieutenant Edward Ebersole, Section S, Morris Field Replacement Training Unit LB, Air Corps, did, at or near Hamer, South Carolina, on or about 1 May 1944, through neglect, suffer an A20G airplane, military property of the United States, value of about one hundred and twenty-six thousand, three hundred and twenty-three dollars (\$126,323.00) to be damaged by striking a tree.

Accused 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. Evidence for the prosecution: Accused left Morris Field, North Carolina, "around 11 o'clock" on 1 May 1944, on "Mission Number 10, III Bomber Command, Memorandum 50-1", a low-level navigation mission, lasting about two hours. He flew an A-20 G plane, valued at \$126,323. There were two courses for the mission and accused could elect the course he wished to fly. Captain Fred E. Nelson, acting operations officer, testified that he briefed accused for the flight, told him that 500 feet was the minimum flying altitude, and not to go below it. Captain Nelson was of the opinion that if a pilot were lost, in an emergency he could fly low over a town or airport in order to get its name but he could not fly low merely to orient himself to complete a mission (R. 5-10, 25).

About 11 o'clock in the morning of 1 May Leonard Horn and Aron Hinson were plowing in a tobacco field, approximately 250 yards by 500 yards in size, and located about two miles airline from Hamer, South Carolina. Two planes, one about 100 yards behind the other, came over the woods at one side of the field traveling rapidly at an altitude of about "twice the height of the trees". One plane passed directly over the field but the other dived down to about 20 feet above the ground, "mighty close" to where the men were plowing. The plane was unable to regain sufficient altitude before reaching the trees on the other side of the field and its right wing struck a 75 foot pine tree about 10 feet from the top. It then pulled to the right behind the pines and passed out of sight. Later in the day Horn and Hinson saw the plane again in a field three or four miles away where it had crashed. The plane was "torn up pretty bad" and there was a hole in the wing where it had struck the pine (R. 10-20).

Lacey Hamilton, colored, was plowing in a field near Hamer when the plane of accused crashed in it. He testified he was watching a plane flying over his head about 50 feet above the ground when he heard an "awful noise", looked back "and a plane was standing right there behind me". He was scared, "cut a dust" and did not come back until "I got reconciled". The accused asked Hamilton to help get him out so he procured an axe and helped release accused. Major Douglas W. Spawn went to the scene of the crash and saw the plane. He found a large hole in the right wing caused by it striking a tree. Part of the limb, leaves and "scrappings" were still in the wing; the "prop" at that side had a piece of wood driven into it; the fuselage was buckled, the "props" bent and the side scraped. It was damaged beyond repair. Major Spawn talked to accused who admitted he was the pilot of the crashed plane (R. 21-25).

4. Evidence for the defense: Accused testified that he would be 25 years old "in August". He entered the military service as an enlisted man in 1940, attended flying school from 1942 to 1943, and was commissioned 3 November 1943. He was sent to Macon Field for B-25 transition training, was stationed in Arizona and at Columbia, South Carolina, where he was assigned to a pilot's pool. Since arriving at Morris Field his training consisted mostly of instrument flying in a B-25. This was his first cross-country flight in an A-20 (R. 25-26).

On 1 May he reported for duty and found that he was scheduled on the "mission board" for mission 12, a three ship formation. However, in receiving his clearance he noticed it was mission 10, which he had not planned for, and so he borrowed somebody's map and took off. The map had obsolete courses on it and after passing Monroe on course he became lost. Somewhere beyond Monroe he looked back and saw another plane flying the same course, "surmised" the other plane was piloted by "Lt. Bailey", who he knew had the same mission. Accused made no attempt to communicate with the other plane by radio or to attract its attention. Accused was supposed to fly to Blenheim, the turning point on his mission, and when he became lost he went down below 500 feet and circled a town he thought was Blenheim. He was looking at his map as he circled the town and heard a loud noise "going through" his right wing, caused he "imagined" by hitting a tree. He pulled up sharply, the plane started to pull into a spin but he held it up long enough to make a crash landing. The plane was vibrating so much that accused could not tell whether it hit anything else in addition to the tree. He found that he had crashed about two miles from Hamer. Accused testified that he was familiar with Army regulations prohibiting low flying but had been taught that if lost it was permissible to "go down" and orient oneself (R. 26-30).

On cross-examination and examination by the court accused testified that he had about 95 hours flying time at Macon Field and about 30 hours in A-20s at Morris Field. He identified a certificate (Ex. 1) which he had signed on 12 April 1944 certifying that he had been told that any willful violation of flying regulations, particularly low flying, would result in trial by general court-martial with probable dismissal from the service. Accused admitted he was a good friend of Lieutenant Bailey but denied that he had any plans to meet him at Monroe or that he knew where Bailey's plane was at the time of the accident. Accused stated that he thought he was at a safe altitude of about 150 feet at the time he was looking at the map. He admitted, however, that he must have gone at least 60 feet from the ground. He denied "buzzing" the field or seeing the men plowing in it. He became lost somewhere between Monroe and Blenheim, which were 20 to 40 miles apart. He admitted that if he had climbed to 2,000 feet he probably could have seen Monroe, a town with which he was familiar (R. 30-34).

5. a. The evidence shows that about 1100 on 1 May 1944 two planes, traveling at a high rate of speed and about 100 yards apart, came over the woods adjoining a tobacco field near Hamer, South Carolina. According to the testimony of two men plowing in the field, the planes were traveling at an altitude "about twice the height of the trees". One plane passed directly across the tobacco field but the other plane, an A-20 G (valued at \$126,323), which was being piloted by accused on a low-level navigation mission from Morris Field, North Carolina, dived down to about 20 feet from the ground and "mighty close" to the men plowing. Accused was unable to

clear completely the trees at the other end of the field and his right wing struck a 75 foot pine tree about 10 feet from the top putting a large hole in the wing. The plane continued on for three or four miles and then crashed in another field, irreparably wrecked. Prior to taking off on this mission accused had been specifically instructed by the acting operations officer at Morris Field that the minimum flight altitude was 500 feet. Accused testified that he was lost at the time and had come down below 500 feet to circle a town in order to orient himself. He denied seeing any men in the tobacco field or "buzzing" it. He further testified that at the time the plane struck the tree he was examining his map and that the last time he checked his altitude before the impact he was traveling at a height of 150 feet. He admitted that prior to the accident Lieutenant Bailey, a close friend of his from Morris Field, was piloting a plane on the same course in his vicinity but denied knowing where Lieutenant Bailey was at the time of the accident. Accused was admittedly familiar with regulations governing low flying.

b. It is established that at the time and place alleged (Spec. 1, Chg. I) the accused piloted a plane at an altitude below 100 feet. Accused admitted this but contended that he was lost at the time and was flying low in an attempt to orient himself. The fact that accused was flying at tree level height, that he was over the countryside, and the other surrounding circumstances are wholly at variance with this contention and impugn the veracity of his testimony in this respect. His testimony that he was examining his maps at the time of the accident is likewise without corroboration as well as manifestly implausible on its face. In the opinion of the Board the circumstances rather plainly indicate that accused had been joined by his friend, Lieutenant Bailey, and that the two pilots were engaged in dangerous and unlawful flying just above the trees, from which low level the accused dived even lower in order to "buzz" the men working in the field. His operation of the plane at such an altitude was a violation of paragraph 16a(1)(d), Section II, Army Air Force Regulations No. 60-16, 6 March 1944, which provides a minimum flight altitude of 500 feet above the ground except in certain specified instances not pertinent here. Moreover, the evidence clearly establishes neglect on the part of accused in the operation of the plane resulting in it being irreparably damaged (Spec., Chg. II).

6. The accused is 24 years of age. Records of the Office of The Adjutant General show his service as follows: Enlisted service from 15 October 1940; aviation cadet from 10 November 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 3 November 1943.

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

sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 83 or of Article of War 96.

Samuel M. Dwyer, Judge Advocate.

Robert W. Cannon, Judge Advocate.

J. L. Lott, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., 17 AUG 1944

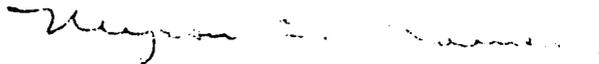
- To the Secretary of War.

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 Ebersole (O-758435), 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 in violation of Army Air Forces Regulations, piloted an Army airplane at an altitude below 500 feet (Spec. 1) and negligently struck a tree damaging the plane irreparably (Spec. 2).

In a memorandum to me, dated 3 August 1944, the Commanding General, Army Air Forces, recommends that the sentence be confirmed and ordered executed. I recommend that the sentence to dismissal be confirmed and carried into execution.

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



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

- 4 Incls.
- Incl.1-Rec. of trial.
- Incl.2-Draft ltr. for sig.
S/W.
- Incl.3-Form of Action.
- Incl.4-Memo. fr. CG, AAF,
3 Aug. 44.

(Sentence confirmed. G.C.M.O. 520, 26 Sep 1944)

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

SPJGK
CM 259222

(285)

10 AUG 1944

UNITED STATES)

INFANTRY REPLACEMENT TRAINING CENTER

v.)

Camp Blanding, Florida.

Second Lieutenant CLARENCE
V. McKITTRICK (O-1316771),
Infantry.)

Trial by G.C.M., convened at
Camp Blanding, Florida, 4 July
1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Clarence V. McKittrick, Company "E", 190th Infantry Training Battalion, Camp Blanding, Florida, did, without proper leave, absent himself from his organization at Camp Blanding, Florida, from about 1415, 16 June, 1944, to about 0830, 19 June, 1944.

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

Specification: In that Second Lieutenant Clarence V. McKittrick, * * *, having received a lawful command from Captain Charles H. Pillsbury, his superior officer, to wit: "Go to the Company area and wait for me there", or words to that effect, did at Camp Blanding, Florida, on or about 16 June, 1944, willfully disobey same.

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

Specification: In that Second Lieutenant Clarence V. McKittrick, * * *, was, at Camp Blanding, Florida, on or about 19 June 1944, in a public place, to wit, the 60th Infantry Training Regiment Officers' Club, drunk while in uniform.

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

Specification 1: In that Second Lieutenant Clarence V. McKittrick, * * *, did, at Camp Blanding, Florida, on or about 13 June, 1944, with intent to deceive Captain Charles H. Pillsbury, officially state to the said Captain Pillsbury, to wit: "I am going to the Dental Clinic for treatment", or words to that effect, when in fact at that time he had no intention of going to the said Dental Clinic.

Specification 2: In that Second Lieutenant Clarence V. McKittrick, * * *, did, at Camp Blanding, Florida, on or about 15 June, 1944, with intent to deceive Captain Charles H. Pillsbury, officially state to the said Captain Pillsbury that he had acknowledged receipt of a letter sent him by Lieutenant Colonel James A. Cheatham, which statement was known by the said Second Lieutenant Clarence V. McKittrick to be untrue.

Specification 3: In that Second Lieutenant Clarence V. McKittrick, * * *, did, at Camp Blanding, Florida, on or about 19 June, 1944, while in the 60th Infantry Training Regiment Officers' Club, wilfully and wrongfully expose in an indecent manner to public view his body below the hips.

Specification 4: In that Second Lieutenant Clarence V. McKittrick, * * *, having received a lawful order from First Lieutenant Louis Tallen to remain in his hutment until ordered to leave, the said First Lieutenant Tallen being in the execution of his office, did at Camp Blanding, Florida, on or about 19 June, 1944, fail to obey same.

Specification 5: In that Second Lieutenant Clarence V. McKittrick, * * *, having received a written command from Lieutenant Colonel James A. Cheatham, his superior officer, to wit: "Acknowledge receipt of communication and return to this Headquarters by 1130 this date", did, at Camp Blanding, Florida, on or about 1131, 15 June, 1944, fail to obey same.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction for absence without leave in violation of Article of War 61 and for appearing drunk in uniform in a public place, in violation of Article of War 96. 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. Summary of evidence.

To prevent needless repetition and to permit presentation of the facts at issue in the order in which they occurred, the testimony will be considered in four chronological groups into which the charges fall.

a. Charge IV, Specification 1, - false official statement relative to dental treatment.

Accused, a second lieutenant, was a platoon leader in Company E, 190th Infantry Training Battalion, at Camp Blanding, Florida. On the morning of 13 June 1944 he complained to his company commander, Captain Charles H. Pillsbury, that he had had a "bad" toothache the preceding night and requested and was granted permission to go to the Dental Clinic. Accused had not reported back to the company by 1100. After a search, Captain Pillsbury found him in the Officers' Club, seated at a table with a half-full beer bottle and a partly filled glass of beer in front of him. Later during the day accused stated to Captain Pillsbury that he had started to the clinic, but had changed his mind because he preferred to see a civilian dentist (R. 5,7,9). Accused repeated this explanation in his unsworn statement (R. 15).

b. Charge IV, Specifications 4 and 2, - failure to acknowledge receipt of letter, as required, and false statement in connection therewith.

On 15 June 1944 at about 1000 Captain Pillsbury delivered to accused a communication from Lieutenant Colonel James A. Cheatham, commanding officer of the 190th Infantry Battalion. By the specific terms of this communication, accused was required to acknowledge its receipt and to return it to battalion headquarters by 1130 of that date. Accused having failed to appear at the company for duty at 1300, Captain Pillsbury went in search of accused and found him asleep in Chaplain Fagan's hut. He inquired of accused whether he had acknowledged receipt of the communication and was advised that he had. The communication was later found in accused's desk in the orderly room and was delivered to battalion headquarters at 1320 (R. 8,9, Ex. B). In his unsworn statement accused offered no explanation of this incident.

c. Charge II and its Specification, - disobedience of orders given by Captain Pillsbury.

Charge I and its Specification, - absence from organization.

On the afternoon of 16 June 1944 a conference, participated in by Lieutenant Colonel Cheatham, Captain Pillsbury, Lieutenant Tallen, Adjutant of the 60th Regiment, and accused, was held in the day room. Accused was told that "he could resign from the service or if he did not he would be reclassified". Accused asked Lieutenant Colonel Cheatham whether he could "go home" after the meeting and was advised by the colonel that "it was all right with him if it was all right with his company commander". Captain Pillsbury, without indicating his consent, told accused to go back to the company and wait for him there. When Captain Pillsbury returned to the orderly room at 1415, accused was not there nor did he appear later that day or the following day. There is no direct testimony as to accused's

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action on the third day, Sunday, 18 June, but the extract from the morning report of 19 June 1944, offered in evidence as Exhibit A, shows that accused was recorded as absent without leave from about 1415, 16 June to 0830 19 June (R. 6,7,9,10,14, Ex. A). Indicating accused's absence on Sunday is the remark in his unsworn statement - "* * * I came in very early in the morning (Monday) on the bus * * *" (R. 15).

Accused offered the following explanation in his unsworn statement:

"Well, all I have to say is that after the meeting I had with Colonel Cheatham, Captain Pillsbury, and Lieutenant Tallen I was under the erroneous impression that I was all washed up with Company 'E' and I was just hanging around until they fixed up the papers for me. I was in the area all of the time that I was marked AWOL. * * * " (R. 15).

d. Charge III and its Specification, - drunk in uniform in Officers' Club.

Charge IV, Specification 3, - indecent exposure in Officers' Club.

Charge IV, Specification 4, - failure to obey order of Lieutenant Tallen.

At about 0830 on 19 June 1944 Private Mentz reported to Lieutenant Tallen that accused was sitting in the Officers' Club with his pants off. Lieutenant Tallen immediately proceeded to the club and found accused asleep in a chair, with his "trousers and underdrawers off" and his penis exposed. The only persons present were Private Mentz and another private who were cleaning up the club. Lieutenant Tallen helped accused to dress and ordered him to go to his hut and remain there until "I or the Battalion Commander or his Company Commander gave him authority to leave". Later that day Lieutenant Tallen saw accused "in the parking lot to the right of Regimental Headquarters", took him back to his hut, ordered him to remain there, and five minutes later saw accused walking toward the Officers' Club, at which time he again took him back to his hut and ordered him to remain there "until I told him to leave". The Officers' Club is for the use of the members of the 60th Regiment, is open all day, special functions are held at the club to which officers are permitted to bring their families and friends, outsiders very frequently come to the club at the invitation of officers, and civilian employees of the post frequently drop in for soft drinks (R. 11,12,13).

Without referring to Lieutenant Tallen's orders, accused, in his unsworn statement, offered the following explanation:

"* * * As far as the indecent exposure part goes I came in very early in the morning on the bus and I guess I was in pretty bad shape. Apparently I intended to go to bed and I went in there and there was nobody in there so I fell asleep. * * *"(R.15).

4. Additional summary is unnecessary as no witnesses were offered by the defense. The sufficiency of the evidence, however, will be considered seriatim.

a. Charge I and its Specification, - absence from organization.

The absence from the organization without authority is established by the testimony of Captain Pillsbury, Private Dale S. Hiles, understudy to the clerk of Company "E", and the certified extract from the morning report of Company E. The absence on Sunday is verified by accused's remark in his unsworn statement that he had gotten in early on Monday morning by bus.

b. Charge II and its Specification, - willful disobedience of Captain Pillsbury's orders.

The record is insufficient to justify the findings of guilty. The statement made by Captain Pillsbury was in the nature of a suggestion that if the accused desired to obtain permission from him to go home accused should go back to the company and wait until he arrived. Such a statement is not an order within the purview of Article of War 64.

c. Charge III and its Specification, - drunk in uniform in Officers' Club.

Accused was unquestionably drunk in the 60th Regiment Officers' Club at about 0830 on 19 June. Such a club is a public place in the broad sense of that term. There were present only the two enlisted men who were cleaning up the club, and accused was necessarily not conducting himself in a loud and boisterous manner, since he was asleep. It does not appear affirmatively that accused, who was at least partly undressed, was in uniform, and there are no facts from which it may be inferred that he was in uniform. Neither of the two enlisted men was called as a witness. Under all the circumstances of the case, the Board of Review is of the opinion that accused's drunkenness was not of the serious nature that makes him amenable to Article of War 95, but, rather, to Article of War 96. While it does not substantially affect the findings, the Board of Review is further of the opinion that there is no proof that accused was in uniform (CM 234815, Fann, 21 E.R., 171).

d. Charge IV, Specification 1, - false statement to Captain Pillsbury in connection with visit to Dental Clinic.

The Specification charges accused with having made the false statement to Captain Pillsbury that he was "'going to the Dental Clinic'* * * or words to that effect". Captain Pillsbury's testimony is that accused advised him that he had been suffering from a "bad" toothache and requested permission to go to the clinic. The specification adequately apprised accused of the

offense charged, and the request for permission to go to the Dental Clinic after the remarks about his severe toothache necessarily implied a representation that he was going there. Accused's action in not going to the clinic, his failure to advise Captain Pillsbury of his alleged change in plans or to return to the company for duty, and his visit to the Officers' Club, where he was found after 1100 by Captain Pillsbury with beer in front of him on a table, justify the conclusion that when accused sought the permission he did not intend to go to the clinic and his request was made with intent to deceive.

e. Charge IV, Specification 2, - false statement with regard to letter from Battalion Commander.

The testimony clearly establishes that when Captain Pillsbury, as company commander, at 1320 asked accused whether he had acknowledged receipt of the letter from Lieutenant Colonel Cheatham, which he, Captain Pillsbury, had delivered to accused that day and which contained specific instructions that its receipt should be acknowledged before 1130, he falsely replied in the affirmative, whereas the communication was actually still in accused's desk in the orderly room.

f. Charge IV, Specification 3, - indecent exposure.

The wrongful indecent exposure is fully established but there is lacking any proof of that deliberateness that is implied in the term "wilfully". That this element was absent is borne out by accused's drunkenness, which was made the basis for a separate charge.

g. Charge IV, Specification 4, - failure to obey orders of Lieutenant Tallen.

Lieutenant Tallen's orders to accused were equivalent to an attempt to place accused in arrest in quarters. While the Lieutenant was the Adjutant of the 60th Regiment, he was not accused's commanding officer and there is nothing in the record to indicate that he had any authority from the commanding officer to act for him. The situation as described does not constitute a "quarrel, affray or disorder" within the purview of Article of War 68. Consequently, Lieutenant Tallen was without authority to place accused in arrest, and accused's failure to comply with this attempted order is not an offense (MCM, 1928, par. 20, CM 226282, Loring, 15 B.R. 61).

h. Charge IV, Specification 5, - failure to acknowledge receipt of letter from Battalion Commander.

Accused's failure to comply with the specific instructions contained in the official letter to him from Lieutenant Colonel Cheatham, Battalion Commander, before 1130 15 June 1944 is fully established.

5. According to War Department records, accused is 39 years of age. He graduated from high school and attended college for one year. He entered the Army on 3 March 1942 as an enlisted man, and was commissioned a second lieutenant on 8 April 1943 after the completion of a course at The Infantry School, Fort Benning, Georgia. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to sustain the findings of guilty of Charge II and its Specification; legally insufficient to sustain the findings of guilty of Specification 4, Charge IV; legally sufficient to support only so much of the findings of guilty of Charge III and its Specification as involves a finding of guilty, except the words "while in uniform", in violation of Article of War 96, legally sufficient to sustain the findings of guilty of Specification 3, Charge IV, except the words "wilfully and"; legally sufficient to sustain the findings of guilty of Charge I and its Specification, of Specifications 1, 2 and 5 of Charge IV and of Charge IV; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized for violation of Articles of War 61 and 96.

Lucy E. Zee, Judge Advocate.

Norman Meyer, Judge Advocate.

Samuel Comanfield, Judge Advocate.

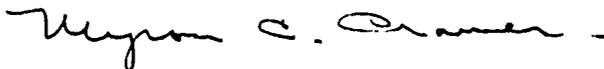
War Department, J.A.G.O., 23 AUG 1944

- 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 Clarence V. McKittrick (O-1316771), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to sustain the findings of guilty of Charge II and its Specification; legally insufficient to sustain the findings of guilty of Specification 4, Charge IV; legally sufficient to support only so much of the findings of guilty of Charge III and its Specification as involves a finding of guilty, except the words "while in uniform", in violation of Article of War 96, legally sufficient to sustain the findings of guilty of Specification 3, Charge IV, except the words "wilfully and"; legally sufficient to sustain the findings of guilty of Charge I and its Specification, of Specifications 1, 2, and 5 of Charge IV and of Charge IV; and legally sufficient to support the sentence and to warrant confirmation thereof. This was accused's second conviction by a general court-martial within five months. On 1 March 1944 he was found guilty by a general court-martial of absenting himself without leave for three days in January 1944, in violation of Article of War 61, and of appearing drunk in uniform in a public place in St. Augustine, Florida, in violation of Article of War 96. In that case he was sentenced to be restricted to his post for six months and to forfeit \$50 of his pay per month for a like period. The reviewing authority approved only so much of the sentence as provided for restriction for three months and for forfeiture of \$50 of his pay per month for six months. Since receipt of the record of trial in the case now under consideration this office has been officially advised that further charges of absence without leave have been filed against accused. It is apparent that accused is lacking in a proper appreciation of the duties and responsibilities of a commissioned officer, and 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,
Major General,

The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

Incl.2-Draft of ltr. for sig.

Sec. of War.

Incl.3-Form of Ex. Action.

- 8 -

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 527, 26 Sep 1944)

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

SPJGN
CM 259234

27 JUL 1944

UNITED STATES)

ARMY AIR FORCES WESTERN
FLYING TRAINING COMMAND

v.)

Trial by G.C.M., convened at
Las Vegas Army Air Field, Las
Vegas, Nevada, 1-2 June 1944.
Dismissal.

First Lieutenant ROBERT F.
HOLLADAY (O-900960), Air
Corps.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lieutenant Robert F. Holladay did, at Las Vegas, Nevada, on or about 2 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Nevada-Biltmore Hotel, a certain check in words and figures and providing as follows, to-wit:

"3/2 1944
Citizens & Southern National Bank
Macon Georgia

Pay to the order of Cash
Thirty & No/100 Dollars
0900960

\$30⁰⁰
~~XX~~

Phone-1160
214 So 4th

Robert F. Holladay
1st Lt A.C."

and by means thereof did fraudulently obtain from the Nevada-Biltmore Hotel the sum of Thirty Dollars (\$30.00) he, the said Robert F. Holladay, then well knowing that he did not have and not intending that he should have any account in the Citizens & Southern National Bank of Macon, Georgia for the payment of said check.

Specification 2: Similar to Specification 1, but alleging check drawn on same bank, dated 2 March 1944 at same place, payable to the order of and made and uttered to same hotel, thereby fraudulently obtaining \$50.

Specification 3: Similar to Specification 1, but alleging check drawn on same bank, dated 2 March 1944 at same place, payable to the order of and made and uttered to same hotel, thereby fraudulently obtaining \$27.

Specification 4: Similar to Specification 1, but alleging check drawn on same bank, dated 2 March 1944 at same place, payable to the order of cash and made and uttered to same hotel, thereby fraudulently obtaining \$25.

Specification 5: Similar to Specification 1, but alleging check drawn on same bank, dated 4 March 1944 at same place, payable to the order of cash and made and uttered to same hotel, thereby fraudulently obtaining \$15.

Specification 6: Similar to Specification 1, but alleging check drawn on same bank, dated 4 March 1944 at same place, payable to the order of and made and uttered to same hotel, thereby fraudulently obtaining \$15.

Specification 7: Similar to Specification 1, but alleging check drawn on same bank, dated 4 March 1944 at same place, payable to the order of and made and uttered to same hotel, thereby fraudulently obtaining \$20.

Specification 8: Similar to Specification 1, but alleging check drawn on same bank, dated 9 March 1944 at same place payable to the order of cash, and made and uttered to same hotel, thereby fraudulently obtaining \$15.

Specification 9: Similar to Specification 1, but alleging check drawn on same bank, dated 10 March 1944 at same place, payable to the order of and made and uttered to same hotel, thereby fraudulently obtaining \$10.

He pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the nights of 2, 4, 9, and 10 March 1944 the accused, accompanied by his wife, spent the evenings gambling in the casino operated by the Nevada-Biltmore Hotel at Las Vegas, Nevada. He was drinking on each occasion but not offensively so. On the first evening he drew four checks aggregating the sum of \$132 and cashed them with representatives of the hotel, on the second occasion three checks totalling \$50 and on the last two occasions one check each for \$15 and \$10 respectively. All of the checks were drawn on the Citizens & Southern National Bank of Macon, Georgia. He received money for the checks, and although there was some conversation between him, his wife and the hotel representatives which possibly could have been construed as expressing a desire that the checks should be held and not presented for payment, no agreement not to present the checks was made. Thereafter the checks were presented for payment in due course and were all dishonored. They were returned to the hotel whose representatives notified the accused about their return. The accused, thereafter, on several occasions agreed to redeem the checks and convinced the hotel management that he would do so and that he had no intention to defraud because the hotel representatives in effect so testified. Shortly before the trial the accused paid the hotel the full sum of \$207 which was the total of the nine checks but in the meantime an officer, investigating another matter at the hotel, had learned of the accused's dereliction and had secured possession of the checks, which became the basis for the preference of the instant charges (R. 13-27, 27-38; Pros. Ex. I-IX).

The checks were identified and introduced into evidence. According to the stipulated testimony of an officer of the drawee bank the accused's account with such bank had been "closed" since 18 December 1942. Since the latter date the accused had made no deposits in the account and, there being no funds therein, the checks had not been paid when presented (Pros. Exs. I-XI).

4. The evidence for the defense shows that the accused and the hotel representatives discussed the dishonored checks on several occasions

after their return from the bank and that the accused had agreed to redeem them which he ultimately did before the trial. It was also shown that the accused, after receiving the cash for the checks, lost the money in the hotel's casino by gambling (R. 39-41, 42-44, 44-45).

The accused, after explanation of his rights as a witness, testified that he had had about 12 to 14 years of service, that, from his conversations with the hotel representatives when he cashed the checks and his knowledge that the hotel customarily "held" checks cashed at the casino, he assumed the hotel would hold his checks without presenting them for payment although there was no express agreement by the hotel's representatives to do so, that he became disturbed when he learned the checks had been presented for payment and immediately notified the hotel that he would redeem them, that his duties had prevented an earlier redemption but that full payment had been made, that he considered the account in the Citizens & Southern National Bank as an "active account" since the bank held his papers, was executor of his will and, according to his recollection had about \$6.00 on deposit in his account, that he knew the account did not contain sufficient funds to pay the checks, that he had made no deposits therein but anticipated doing so at undisclosed dates, and that such account was no longer the depository of his wife's allotment checks. He disavowed any intention to defraud and attributed his difficulty to over-indulgence in intoxicants on the several evenings and the hope of recouping his losses by further gambling (R. 45-61).

5. The Specifications 1 through 9 allege that the accused at named times and places "with intent to defraud, wrongfully and unlawfully" made and uttered to the Nevada-Biltmore Hotel nine described checks aggregating the sum of \$207 upon a designated bank and "by means thereof did fraudulently obtain" from the hotel the sum of \$207 when he knew he did not have and without intending that he should have any account with the drawee bank for the payment thereof. "Giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be" is definite of an offense in violation of Article of War 95 (MCM, 1928, par. 151). Such offense is not precluded because the funds thereby acquired are used for gambling as the issuance of the check under such circumstances is discreditable and ungentlemanly regardless of the purpose for which it was given or the use made of the funds so secured. (CM 202601 /1935/ Dig. Op. JAG 1912-40, Sec. 453 (24)).

The evidence for the prosecution conclusively shows that the described checks were made and uttered by the accused who received the cash therefor and that at such time the account upon which they were drawn had been "closed" for more than a year. The checks were cashed without any agreement that they would be "held" by the hotel and not presented for payment which fact was admitted by the accused although he testified to con-

versations from which the persons cashing the checks possibly could have inferred that the accused intended for the checks to be "held". Such possible inference does not approach the necessary express agreement required to exculpate the accused's guilt. The accused also admitted that he knew his account with the drawee bank was insufficient to pay the checks and that he had made no deposits therein although he anticipated doing so at undisclosed future dates. The testimony of the hotel's representatives concerning the accused's intentions was rejected by the court, acting within its appropriate province. Securing cash by the utterance of the checks against a long closed bank account without an agreement not to present them for payment provides an adequate basis from which the court properly inferred the accused's fraudulent intent. The dissipation of the funds received for the checks by gambling and the ultimate redemption of the checks do not obliterate the offenses. The evidence, therefore, establishes beyond a reasonable doubt his guilt as alleged and fully supports the court's findings of guilty of the Charge and all its Specifications.

6. The accused is about 39 years of age. The War Department records show that he has had prior enlisted service in the Marine Corps from about August 1925 to December 1929 and that he was appointed a first lieutenant on 10 March 1942, since which date he has had active duty as an officer.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Charles S. Ayres, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(298)

SPJ:IN
CM 259234

1st Ind.

War Department, J.A.G.O., 14 AUG 1944 - 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 Robert F. Holladay (O-900960), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence 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 such action meet with 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. 498, 13 Sep 1944)

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

(299)

SPJGQ
CM 259246

21 AUG 1944

UNITED STATES)

TANK DESTROYER CENTER

v.)

Trial by G.C.M., convened at
Camp Hood, Texas, 21-22 June
1944. Dismissal and confine-
ment for two (2) years.

Second Lieutenant JERRY
KIEVERSTEIN (O-1826155),
Tank Destroyer Officers
Replacement Pool.)

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 94th Article of War.

Specification: In that Second Lieutenant JERRY KIEVERSTEIN, attached unassigned Tank Destroyer Officers Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, at North Camp Hood, Texas, on or about 20 April 1944, feloniously take, steal and carry away one (1) automobile tire of the value of about Twenty-one Dollars and Forty-five Cents (\$21.45), property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant JERRY KIEVERSTEIN, attached unassigned Tank Destroyer Officers Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, at Gatesville, Texas, on or about 20 April 1944, feloniously take, steal and carry away one (1) automobile tire, value about \$8.10, one (1) automobile tire inner tube, value about \$1.80, and one (1) automobile wheel, value about \$7.50, total value about Seventeen dollars and forty cents (\$17.40), the property of Second Lieutenant HUGH MC KINLEY.

(300)

Before accused pleaded to the general issue his private defense counsel made a motion for continuance which was denied. Accused pleaded not guilty to, but was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced at the trial. Accused was sentenced to be dismissed the service and to be confined at hard labor for a period of two (2) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3: Evidence for the prosecution:

It was stipulated that accused was in the military service on 20 April 1944 (date offenses are alleged to have been committed), as well as at the time of trial (R. 23).

He was the owner of a green Chevrolet automobile, 1937 model, Tudor, License No. Y06263, at all times pertinent to the issues here involved (R. 27, 28, 84, 92, Ex. C). It was stipulated that prior to 20 April 1944 accused had made two applications to the Office of Price Administration for a certificate to purchase tires, in the second of which, filed on 19 April 1944 in lieu of the first application, he certified that two of his tires were blown out and beyond repair and that two of them were being recapped (R. 25, 27, 92, Exs. A and B). It was further stipulated that on 20 April 1944 accused was in need of two tires (R. 27).

The spare, or fifth, wheel, tire, and tube which constituted part of the equipment of Government vehicle No. 113776, and which were furnished and intended for the military service (R. 86), were discovered to be missing on the morning of 21 April 1944 (R. 52, 55, 83). A wheel, tire and tube belonging to Second Lieutenant Hugh McKinley were stolen from Chamlee's Garage in Gatesville, Texas, between the hours of six and ten o'clock on the night of 20 April 1944 (R. 24, 32, 33, 42). The two stolen tires were found on accused's automobile at about 8:40 o'clock a.m. on the morning of 21 April 1944, the government tire on the left rear wheel and McKinley's tire on the right rear wheel thereof (R. 84, 85). The tire so found on the left rear wheel of accused's automobile was a Goodyear tire, size 600 x 16, 6 ply, No. 561Y x 137D, which showed "block marks" and had some small spots of OD paint on it (R. 57, 84, 85, Ex. G). It was stipulated that this tire is property of the United States and is the tire found to be missing from Staff Car No. 113776 (R. 23, 54). The tire discovered on the right rear wheel of accused's automobile was a Firestone tire, size 600 x 16, 4 ply, No. AG 170786 (R. 84, Ex. H). Lieutenant McKinley identified this tire as his (R. 24, 59), the serial number and make were the same as of the tire stolen from him (R. 24, 60, Ex. E), and defense counsel agreed in open court that it was Lieutenant McKinley's tire (R. 85). A disc wheel, identified by McKinley

as his, and an inner tube bearing a diamond patch were also introduced in evidence (R. 60, Exs. F, H).

Staff Car No. 118776 was based at the Headquarters Motor Pool, North Camp Hood, Texas, where it was designated as Car No. 3 and was kept in No. 3 stall (lines painted on the ground, R. 70). Corporal Gene L. Stotts was the only driver assigned to this car (R. 51). He made an "after-operations" check of his vehicle just before going off duty at approximately 5:30 p.m. on 20 April 1944 and the fifth, or spare, wheel and tire were in place in the trunk on the rear end of the car (R. 51, 52, 53, 57). He left his vehicle parked in its stall in the motor pool (R. 55). When he returned to duty the following morning, 21 April 1944, Corporal Stotts found his vehicle in the same place he had left it the preceding evening (R. 53), but upon making his "before-operations" check at about 7:00 a.m. he discovered that the fifth, or spare, wheel, tire and tube were missing (R. 52, 55). The car had been neither taken from the motor pool nor used between 5:30 p.m. of 20 April 1944 and the following morning (R. 69, 72). Neither the dispatcher, Corporal Elizabeth Clarke (R. 69), nor Corporal Stotts (R. 54), nor the soldier on night duty at the motor pool, Pfc. Francis Roberts (R. 73), nor the motor officer, Major Donald H. Krans (R. 86), gave anyone permission to take either the wheel, tire, or tube in question from Staff Car No. 118776.

Accused was seen in the Headquarters Motor Pool, North Camp Hood, where Staff Car No. 118776 (Car No. 3) was parked, at about 6:30 o'clock p.m. on 20 April 1944 by Private Thomas C. Hanley (R. 62, 63), Corporal Elizabeth Clarke (R. 67) and Pfc. Francis Roberts (R. 72). Private Hanley saw accused walking back and forth apparently looking for bumper numbers on the sedans in the motor pool (R. 63). Accused did not look inside the trunks of any of the cars, nor did he take anything away from the motor pool with him when he left on that occasion (R. 65, 66, 70). Hanley took accused's car number when the latter left the motor pool (R. 64).

The trunk to Staff Car No. 118776 had no lock on it and could be opened by anyone (R. 53). The spare tire was mounted on the wheel and stood between two blocks in the trunk. It was held in place by a bolt through the wheel and a nut (R. 55, 56). This nut could be removed with an ordinary wrench or a pair of pliers, no special equipment being required (R. 53). Private Roberts could not have seen anyone removing a tire from the trunk of the car from where he was in the dispatcher's office during the night (R. 73).

Lieutenant McKinley left his automobile at Chamlee's Garage in Gatesville, Texas, at approximately six o'clock p.m. (R. 24, 60) on 20 April 1944 to have a punctured tire repaired (R. 24, 58). He left the car inside the garage, in the East drive, some 15 or 20 feet inside the door (R. 58). He returned for his car and tire at about 10:00 p.m. (R. 24, 58, 60). The car was there but the spare wheel, tire, and tube were not (R. 24, 58).

Wesley Ward Cooper, who worked at Chamlee's Garage between the hours of 7:00 p.m. of 20 April and 7:00 a.m. of 21 April 1944, helped fix Lieutenant McKinley's tire and stood it against the rear bumper of McKinley's car at about 8:30 p.m. (R. 31). Within a few minutes after he had done this, a lieutenant, whom he did not know and whom he did not undertake to identify as accused, backed his automobile, a 1937 or 1938 model Chevrolet which looked like the car identified at the trial as belonging to accused (R. 33), into the garage and against Lieutenant McKinley's tire (R. 32). Cooper hollered "Ho" at the driver, whereupon the latter stopped and requested him to check his oil (R. 32). When Cooper started checking the oil, the Lieutenant who was driving got out of the automobile, on the opposite side from where Cooper was standing, and began to check the air in his tires (R. 32, 38). Cooper checked the oil and reported that no oil was needed, whereupon he was told to check it again (R. 32). Cooper did so, and again made the same report (R. 32). The Lieutenant then approached to where Cooper was and requested him to check the oil still another time (R. 32). Cooper did so and showed the Lieutenant that the oil registered full on the measuring stick. Thereupon, the Lieutenant directed Cooper to get him two light fuses. Cooper went inside the office, some 20 feet distant (R. 35), to get the light fuses, the Lieutenant remaining outside (R. 32, 37). When Cooper had found the fuses under the counter, the Lieutenant walked in and bought and paid for the full box of fuses instead of just two (R. 32). While Cooper was putting the money in the cash register the Lieutenant got into his automobile and drove off in an easterly direction toward Camp Hood (R. 32, 35, 36). The car was just passing from his view as Cooper came out of the office and he immediately missed Lieutenant McKinley's wheel and tire (R. 32, 35). The elapsed time between the time the Lieutenant backed his car into the garage against the tire and the time he left was from five to eight minutes (R. 33).

Another employee of the garage, Tommy Coskey, was working on a car for some enlisted men in the west drive of the garage at the same time Cooper was waiting on the Lieutenant (R. 34). There were from two to four of the enlisted men (R. 34, 40) standing within four to six steps of where Lieutenant McKinley's tire was situated (R. 39). Cooper expressed the belief that all of the enlisted men who were present when he began waiting on the Lieutenant were still present after the Lieutenant had left, but of this he could not be sure (R. 40, 41). Immediately upon discovering that Lieutenant McKinley's tire was missing, he made known his discovery to those present and searched for the tire, but failed to find it (R. 42).

Lieutenant Arthur T. Weston encountered accused in the town of Gatesville, Texas, at about 6:45 o'clock p.m. on 20 April 1944 and remained with him until about 8:45 o'clock of the same night (R. 26). Master Sergeant Myron L. Easley saw accused back his car into the east side of Chamlee's Garage sometime between 8:30 and 9:30 o'clock on the night of 20 April 1944 (R. 44). Sergeant Easley moved his own car to enable accused to get past him (R. 44). A box of fuses, identified by Cooper as the kind he sold the Lieutenant on the night of 20 April 1944 (R. 33, Ex. D) was found in the glove compartment of accused's automobile on the morning of 21 April 1944 (R. 85). It was stipulated that accused

purchased a box of Buss Glass Tube Fuses, SFE 30 AMP, in a yellow box, at Chamlee's Garage on the evening of 20 April 1944 (R. 25).

At around 9:00 o'clock p.m. on 20 April 1944 accused approached Private James A. Dintleman, and Pfc. Roy G. Kersten in the 140th TDTB motor pool, North Camp Hood, Texas, and asked them to change a tire for him (R. 74, 79). They replaced the tire on the right rear wheel of accused's car with another one and accused left (R. 75, 80). However, about an hour later he returned and asked Private Dintleman to change another tire. Dintleman accomodated him again, this time replacing the tire on the left rear wheel of accused's car with a different one, after which accused left again (R. 75, 80). It was stipulated that if Ewell Swift, tire inspector for the ration board, were called as a witness, he would testify that the reasonable cash market value of the Firestone tire was about \$11.50; of the Goodyear tire \$17.50; of the tubes \$1.50 each; and of the wheel owned by Lieutenant McKinley \$7.50 (R. 24).

4. Evidence for the defense:

After having his rights explained to him, accused elected to be sworn as a witness in his own behalf, and testified substantially as follows:

He purchased his car on 4 April 1944 and needed tires from the time he purchased it (R. 92). Between 4 April and 21 April he visited probably 15 or 20 places that either sold or repaired tires, including motor pools and repair shops in camp, in an effort to solve his tire problems (R. 92). He also made application to the ration board for a certificate to purchase tires (R. 92).

Immediately after classes ended at 5:20 o'clock p.m. on 20 April 1944 he walked into the Headquarters Motor Pool, where prosecution witnesses testified to having seen him, to see if the motor pool shop was open (R. 93). In doing so he passed within about 10 yards of the dispatcher's office. Upon discovering that the shop was closed he left immediately (R. 93). He did not, so far as he recalled, pass any parked staff cars in the motor pool, nor did he inspect or pay any particular attention to any of the Army cars that may have been there (R. 94, 107). His car was parked at the time in the school motor pool across the street from the Headquarters motor pool dispatcher's office (R. 94). He got in it and drove to his barracks, changed clothes, and then dined at the Officers Club, finishing his meal at about 6:00 or 6:15 p.m. (R. 95). From the Officers Club, he drove to Gatesville, Texas, arriving there at about 6:30 p.m., parked his car about one and one-half blocks west (R. 111) of Chamlee's Garage, and walked around town (R. 96). He talked to Red Chamlee, brother of the owner of Chamlee's Garage (R. 96) and then encountered Lieutenant Weston and remained with him until about 8:30 o'clock (R. 96-97).

Accused had previously checked his oil and thought it needed servicing, so he drove to Chamlee's Garage, where, due to the position in which he had got his car in avoiding a collision with another car, he backed into the east drive of the garage (R. 97). He did not recall backing against anything (R. 97), nor did he remember Cooper's hollering "ho" at him (R. 111). He did not get out of his car until after Cooper had once checked the oil and had informed him that none was needed (R. 98, 111). He did not check his tires while at the garage (R. 107) but did request Cooper to check the oil a second time, which he did, accused getting out of the car and checking with him on this second occasion (R. 98). Upon being convinced, after this second check, that his car contained sufficient oil, accused asked Cooper for two light fuses and went immediately along with him when Cooper went inside the glassed-in office after them (R. 98). He helped Cooper look for the fuses and purchased the full box (R. 99). After Cooper had placed the purchase price for the fuses in the cash register, accused went immediately to his car and drove back and parked at the same place he had been parked at before he went to the garage (R. 99-100). He saw several enlisted men and pedestrians in and around Chamlee's garage while he was there (R. 99) but did not see or pay any attention to any tire, or wheel, nor did he bother anything while he was there (R. 107).

While accused was standing on the street near his car, and within about five minutes after he had reparked it at the point one and one-half blocks west of Chamlee's garage, which would make it within about eight minutes from the time accused left the garage (R. 114), an enlisted man whom he had never seen before and does not know, who was not wearing a shoulder patch (R. 100, 114), and whose name accused did not ask (R. 116), tapped him on the shoulder and stated that he had heard that accused was having tire trouble and wanted to purchase some tires (R. 100). Accused acknowledged this to be true, whereupon the enlisted man stated that he had a couple of tires he would sell, and accused told him he wanted to see them (R. 100).

At this point in the negotiations Lieutenant Alexander approached accused and asked him to go to Waco with him. Accused told him he could not go because he was on a deal with the enlisted man for some tires, whereupon Lieutenant Alexander departed (R. 100-101). It was then between 9:00 and 9:30 o'clock (R. 100).

When Lieutenant Alexander had departed, accused asked the enlisted man where the tires were, to which the enlisted man replied, "if you will follow me I will take you to them" (R. 101). Accused went along to a point about two blocks west and one block north of Chamlee's Garage, where the enlisted man disappeared behind a fence and returned with two tires, both mounted on wheels (R. 101-102). Accused had not been back to the spot since the night of 20 April 1944 but offered to take the court to it (R. 102). When accused asked the enlisted man where he got the tires the latter "acted a little fidgety" and told him that if he did not want the tires he (enlisted man) could sell them to some one else (R. 103). After examining the tires accused concluded to buy them,

returned for his car, drove to where the enlisted man and tires were, paid the enlisted man \$50 for the tires and wheels, placed them in the rear seat of his car, and started back to camp (R. 103). About a mile before reaching camp accused stopped at a gasoline pump and endeavored to get the attendant (not called as a witness) to put the tires on his car for him, failing which, he proceeded on to his barracks (R. 103).

Accused reached his barracks at about 9:45 o'clock p.m., 20 April 1944, and carried the tires into the latrine and examined them under a light (R. 103). Then, since he had two very bad tires on the rear of his car and was anxious to get at least one good one on it, accused drove to the motor pool of an organization with which he had previously served and where he had previously had small jobs done on his car (not the same as the Headquarters Motor Pool from which the government tire was stolen), and there Private Dintelman changed one tire for him (R. 104). As he was driving back to his barracks accused noticed that his car was still bumping from a boot in the other tire, so he returned to the same motor pool and Private Dintelman also changed this tire for him (R. 104-105).

Accused noticed for the first time while examining the tires in the latrine that one of them was mounted on an OD rim. While Private Dintelman was changing the second tire, accused "noticed quite a few things about it that resembled a government tire", but he was not sure. However, it worried him, so he threw the OD wheel into a field and placed Lieutenant McKinley's wheel in the trunk of his (accused's) car (R. 105). He thereafter parked his car in front of his barracks, where it remained until it was found the following morning by those investigating the thefts of the tires, and went to bed (R. 105, 106). His barracks, where he parked the car, was only one block from the Headquarters Motor Pool from which the government tire was stolen (R. 106).

Second Lieutenant Clarence E. Alexander testified that he saw accused in the town of Gatesville, Texas, at about 9:00 or 9:30 o'clock on the night of 20 April 1944 and suggested that they go to Waco (R. 128). Accused was with a soldier at the time (R. 128) and replied that he could not go to Waco because he had a deal on with the soldier to buy some tires (R. 129).

Cross-examination of Lieutenant Weston developed that on 19 April 1944 accused had told him that a man at Chamlee's Garage was "lining up" a tire for accused, and accused pointed out the man (R. 28). Cross-examination of Corporal Stotts developed that he left staff car No. 118776 parked in the motor pool the evening of 20 April within about forty feet of the dispatcher's office and with its rear end exposed to unobstructed view from that office (R. 55, 56), and further, that the OD paint marks on the tire were just small brush marks about the size of a "thumb hold" (R. 54).

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5. The Board of Review has considered the motion for continuance made by defense counsel, as well as the evidence offered in support thereof, and has found the motion to be without merit. The motion was properly denied and no good purpose would be served by setting out the evidence in this opinion or by further discussion.

The competent evidence of record shows conclusively that a wheel, tire, and tube belonging to the United States and intended for the military service thereof was stolen from a government vehicle parked in the Headquarters Motor Pool, Camp Hood, Texas, sometime between 5:30 p.m. of 20 April 1944 and seven or eight o'clock of the following morning, and also that a wheel, tire, and tube belonging to Second Lieutenant Hugh McKinley were stolen from him between six and ten o'clock on the night of 20 April 1944. All of these stolen articles except the government wheel were found in accused's possession early in the morning of 21 April 1944, and are shown to have been in his possession between nine and ten o'clock of the preceding night (20 April). He admitted from the witness stand that he had possessed the government wheel on the night of 20 April and had thrown it away.

Proof alone that accused was in possession of this recently stolen property, if not satisfactorily explained, is sufficient to raise a presumption that he stole it. Par. 112a, M.C.M. 1928. Not only did accused fail, in the opinion of the Board of Review, to satisfactorily explain his possession of the property, but there is an abundance of other circumstances tending to connect him with the thefts.

The evidence satisfactorily shows that Lieutenant McKinley's wheel, tire, and tube were stolen from Chamlee's Garage between 8:30 and 9:00 o'clock on the night of 20 April and that accused had the tire placed on the right rear wheel of his car within less than an hour thereafter. Furthermore, the testimony of Cooper, the garage employee, that this wheel, tire, and tube were in Chamlee's Garage when accused backed his car in there on the night of 20 April and were gone when he drove away some five to eight minutes later is unimpeached. Accused had either backed his car against the wheel and tire or in close proximity to them, and had occupied the attention of Cooper in such a way as to afford an opportunity to place the wheel and tire in his automobile without detection. While the evidence shows that some enlisted men were present in the garage at the same time as accused, there is no evidence tending to connect anyone of them with the theft of the McKinley tire and wheel.

Early in the evening of 20 April 1944, accused was seen in the motor pool from which the government tire was stolen, in close proximity to the vehicle from which it was taken. He was apparently studying the vehicles which were parked there and no doubt noticed that staff car No. 118776 had no lock on its trunk. He lived in close proximity to the

motor pool and could easily have gained access to it between the time he had Lieutenant McKinley's tire placed on the right wheel and the time he returned approximately an hour later and had the government tire placed on the left rear wheel of his car.

Accused was badly in need of tires, was present at the garage immediately before McKinley's tire was missed, and was seen at the motor pool under suspicious circumstances, only a short time before the government tire must have been stolen from there. His story of having been accosted, within 8 to 15 minutes after the evidence shows the McKinley wheel and tire to have been stolen, on the streets of the city of Gatesville, by an enlisted man whom he had never seen before and whose name he did not ask, but who nevertheless possessed the knowledge that accused was in need of tires, and of having purchased the wheels and tires from this enlisted man, who produced the two tires, stolen from such widely separated points, from behind a fence at a point about three blocks distant from Chamlee's Garage and about equally distant from where he approached accused, is not at all convincing. Nor is it rendered any more probable or convincing, nor is the innocence of accused demonstrated, as his counsel has urged, by a consideration of the boldness and lack of judgment which is necessarily attributed to accused by a finding that he is guilty of having perpetrated the thefts in question.

The facts and circumstances proved by the legally competent evidence of record are consistent with each other and with the hypothesis of accused's guilt, and, when considered as a whole, are sufficient to exclude every other reasonable hypothesis except that of his guilt, and to convince the mind beyond a reasonable doubt that the accused and no one else stole the wheels, tires, and tubes as alleged in the Specifications.

6. Careful consideration has been given by the Board of Review to oral argument made before it and to the brief filed on behalf of accused by his individual counsel, Honorable Dexter W. Scurlock, of Fort Worth, Texas.

7. War Department records disclose that this officer is 21 years of age and is single. He is a high school graduate and attended New York State College of Forestry, Syracuse University, for one year. He represents that he reads and speaks Spanish well and French fairly well. He was employed by the United States Forest Service as a student Forester from May through August of 1942. He underwent basic R.O.T.C. training at Syracuse University and was inducted into the service on 15 February 1943. Having successfully completed the course prescribed for officer candidates at the Tank Destroyer School, Camp Hood, Texas, he was appointed and commissioned a temporary second lieutenant, Army of the United States, on 3 September 1943, and reported for active duty the same date.

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 and sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of either Article of War 93 or Article of War 94.

William H. Lambell, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 29 AUG 1944 - 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 Jerry Kieverstein (O-1826155), Tank Destroyer Officers Replacement Pool.

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 of the sentence. However, in view of the youth of accused and all of the circumstances of the case, it is my belief that the period of confinement imposed by the sentence is unduly severe. I recommend, therefore, that the sentence be confirmed but that the period of confinement be reduced to one year and that, as thus modified, the sentence be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Oral argument was made before the Board of Review by Dexter W. Scurlock, Esquire, of Fort Worth, Texas, individual counsel for accused. He also filed a brief and supplementary brief, and an affidavit made by Mr. A. H. McCoy of Gatesville, Texas. Both the briefs and the affidavit have been carefully considered and are forwarded with the record of trial.

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

Myron C. Cramer

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

5 Incls.

- 1 - Record of trial
- 2 - Dft. ltr. for sig. S/W
- 3 - Form of action
- 4 - Briefs submitted by
Dexter W. Scurlock, Esq.
- 5 - Affidavit by Mr. A.H. McCoy

(Sentence confirmed but confinement reduced to one year.
G.C.M.O. 616, 11 Nov 1944)



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

SPJGV
GM 259286

3 AUG 1944

UNITED STATES)

13TH ARMORED DIVISION

v.)

Trial by G.C.M., convened at
Camp Bowie, Texas, 16 June
1944. Dismissal.

First Lieutenant FESTUS W.
CALVERT (O-1541812),
Medical Administrative
Corps.)

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 96th Article of War.

Specification: In that First Lieutenant Festus W. Calvert, MAC, 83d Medical Battalion Armored, did, at Camp Bowie, Texas, on or about 3 May 1944, conspire with Second Lieutenant John Salmond, Junior, MAC, 83d Medical Battalion Armored, and Private Woodrow E. Strader, 1853d Service Command Unit, to commit an offense against the United States, to wit: larceny of automobile tires, property of the United States; and did, at Camp Bowie, Texas, on or about 4 May 1944, in pursuance of said conspiracy, feloniously take, steal, and carry away two automobile tires, to wit: one Armstrong 6-ply 600x16, serial number 113622DC, and one Ford 6-ply 600x16, serial number V752405, property of the United States.

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

Specification: In that First Lieutenant Festus W. Calvert,

* * *, did, in conjunction with Private Woodrow E. Strader, 1853d Service Command Unit, at Camp Bowie, Texas, on or about 4 May 1944, feloniously take, steal, and carry away two automobile tires, to wit: one Armstrong 6-ply 600xl6, serial number 113622DC, and one Ford 6-ply 600xl6, serial number V752405, of a total value of about \$25.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that First Lieutenant Festus W. Calvert, * * *, did, at Camp Bowie, Texas, prior to 1 April 1944, conspire with Second Lieutenant John Salmond, Junior, MAC, 83d Medical Battalion Armored, and Private Woodrow E. Strader, 1853d Service Command Unit, to wrongfully and unlawfully obtain an automobile tire for use on an automobile owned by Second Lieutenant John Salmond, Junior, and thereafter, on or about 1 April 1944, in pursuance of said conspiracy, did wrongfully and unlawfully obtain a Goodrich Silvertown Golden Ply 600xl6 automobile tire, serial number 2376673565, in violation of the regulations of Office of Price Administration.

Specification 2: In that First Lieutenant Festus W. Calvert, * * *, did, at Camp Bowie, Texas, on or about 3 May 1944, conspire with Second Lieutenant John Salmond, Junior, MAC, 83d Medical Battalion Armored, and Private Woodrow E. Strader, 1853d Service Command Unit, to wrongfully and unlawfully obtain two automobile tires for use on an automobile owned by Second Lieutenant John Salmond, Junior, and thereafter, at Camp Bowie, Texas, on or about 3 May 1944, in pursuance of said conspiracy, did wrongfully and unlawfully obtain two automobile tires, to wit: one Armstrong 6-ply 600xl6, serial number 113622DC, and one Ford 6-ply 600xl6, serial number V752405, in violation of the regulations of Office of Price Administration.

The accused pleaded not guilty to all Charges and Specifications and was found guilty of the Specification of Charge I, except the words "Second Lieutenant John Salmond, Junior, MAC, 83d Medical Battalion Armored, and", and of Charge I; guilty of the Specification of Charge II,

except the amount "\$25.00" substituting therefor the amount "\$16.85", and of Charge II; guilty of Specifications 1 and 2 of the Additional Charge, except the words "Second Lieutenant John Salmond, Junior, MAC, 83d Medical Battalion Armored, and", and of the Additional Charge. 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 two years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The Specification of Charge I alleges accused conspired with certain other individuals to steal two automobile tires, the property of the United States; the Specification of Charge II alleges the theft of these two tires by the accused; and Specification 2 of the Additional Charge alleges that accused conspired with certain other individuals wrongfully and unlawfully to obtain these two tires in violation of the Regulations of the Office of Price Administration. Specification 1 of the Additional Charge alleges accused conspired with certain other individuals wrongfully and unlawfully to obtain a third automobile tire in violation of the Regulations of the Office of Price Administration. It is important in the analysis of this case that the evidence be considered in its chronological order. Accordingly, the prosecution's evidence presented in support of Specification 1 of the Additional Charge will be first summarized.

In support of Specification 1 of the Additional Charge the prosecution presented evidence to prove that for some time prior to his confinement on 4 May 1944, Private Woodrow E. Strader had been a mechanic at the administration motor pool, his regular duty hours being from 7 p.m. to 3 a.m. (R. 22, 23). Sometime, apparently during March 1944, Strader had mentioned to Miss Juanita Avery, the manager of Post Exchange No. 1 and a friend of accused, that he could obtain "all the tires and tubes that you want, pretty cheap" (R. 21). Strader indicated to her that he was purchasing tires through an individual in Brownwood, Texas (R. 38). Apparently Miss Avery communicated this information to the accused and one evening during the early part of April accused met Strader at the Post Exchange and inquired about obtaining a tire (R. 13-16, 23, 24). Strader told accused he would investigate and advise him within a few days, having in mind an individual in Brownwood, Texas, "that had some he was supposed to sell" (R. 24). About 9 p.m. one evening thereafter Second Lieutenant

John Salmond, Jr., who owned an auto that accused was permitted to use freely, and accused, who did not own an auto, called upon Strader at the motor pool (R. 15, 16). After a brief conversation the two lieutenants proceeded to the Post Exchange and stated to Miss Avery that Strader had informed them he was expecting some youth to deliver a tire that evening and had suggested that accused and his companion return about 9:30 p.m. Accused, Lieutenant Salmond and Miss Avery drove to the motor pool at the suggested time but were again informed the tire had not arrived (R. 17).

About 10:30 p.m. that evening accused telephoned Strader and was requested to come to the motor pool. Accused, Lieutenant Salmond and Miss Avery again set forth to see Strader, apparently in Lieutenant Salmond's auto, and on the way experienced a blowout (R. 17). This occurred near the headquarters of an organization of colored troops and accused continued on to the motor pool in a truck driven by a colored soldier. He returned in about a quarter of an hour with Strader and a Goodrich tire. Lieutenant Salmond asked Strader if it was a Government tire and was informed by Strader that it had been obtained out of town. The tire was then placed upon the right rear wheel of the auto. No payment was made at that time for the tire although Miss Avery believed it was eventually paid for (R. 18, 19). She did know that during the last part of April accused met Strader in the Post Exchange and paid him \$8 for one tire, Miss Avery loaning accused \$3 of this amount (R. 15). However, she was of the opinion that this money was to pay for a later tire purchased by accused (R. 19-20). At some unstated time Miss Avery heard accused inquire of Strader where he was obtaining tires and Strader replied that it was from an out of town source. When accused asked if they were Government issued tires she heard Strader say they were not. Strader also told accused he was charging him only what the tires actually cost to obtain them (R. 20).

Strader denied that he had the foregoing transaction with accused although during the first part of April accused did come to the motor pool to borrow a jack to fix a flat tire and Strader loaned him one after first receiving the approval of his superior officer, Second Lieutenant Lloyd W. Sleeper, assistant chief of the administrative motor pool (R. 32, 49, 50). It was shortly after this that Lieutenant Sleeper received a report that a tire was missing from the motor pool. He made a report to the camp provost marshal, investigated the matter himself and thereafter kept Strader under surveillance (R. 50).

Sometime after the foregoing events, First Lieutenant John J. Richmond, Jr., of the Military Police Platoon, 13th Armored Division, at the suggestion of a Major Yon, examined a black 1939 or 1940

Oldsmobile coupe owned by Lieutenant Salmond (R. 44, 70). He was trying to locate a tire which was missing from the motor pool. It was an Armstrong tire which had three circular treads on each side and a sort of zigzag tread in the center. He found no tire matching this description on Lieutenant Salmond's auto (R. 46).

After having been duly warned of his rights, accused made a voluntary statement to Lieutenant Colonel Lloyd G. Buchler, the investigating officer in this case (R. 40-43). With respect to this particular Specification accused stated that he owned no automobile but used Lieutenant Salmond's whenever he wished. In April 1944 he told a feminine acquaintance that he was trying to acquire a tire for this vehicle and she suggested he contact Strader. Accused did so and told Strader he would buy anything except Government issued tires. Strader told him he would have a tire for him the following night. He stated that while driving to see Strader that night one of the tires on the auto blew out; that he thereafter received a ride to the motor pool in a "peep" driven by a colored soldier; that he arrived at the motor pool about 9 p.m., met Strader and drove alongside a fence on the south side of the motor pool where Strader picked up a tire; that they returned to the stranded automobile and Strader put the newly acquired tire upon the right rear wheel. Lieutenant Salmond paid for the tire while accused "paid for the work". Accused became suspicious of Strader's actions that night and had the tire inspected to see if it was a Government tire. Major Yon and a member of the military police examined the tire and stated it was not Government property. Accused believed Strader's statements that he was obtaining tires from another person. Accused stated that it was common knowledge in his battalion that he had black market tires and he freely admitted purchasing such tires (Pros. Ex. A).

In support of the Specification of Charge I, the Specification of Charge II and Specification 2 of the Additional Charge, the prosecution presented evidence demonstrating that one evening in April 1944 accused visited Strader at the administration motor pool to determine if he could obtain some tires that had not been "checked" (R. 25). Strader testified he did not know what accused meant by tires not "checked" but the law member ruled this testimony inadmissible, stating it was for the court to construe this expression (R. 36). Accused did not indicate from what source he expected tires to be obtained or indicate whether or not he was referring to tires from the motor pool (R. 25). A few days later accused and Strader had another conversation at the motor pool. Strader told accused he hadn't "anything lined up definitely" and accused then

inquired if Strader could "get him a couple from there" to which Strader replied he did not know. Strader understood the accused to be referring to "either those tires there at the motor pool or civilian tires, either one" (R. 26).

On the night of 3 May 1944, accused telephoned Strader and was told by the latter to come to the motor pool (R. 26). Sometime after this telephone conversation which occurred about 9 p.m., Strader visited motor pool Shop No. 2 which was unlocked, examined two tires lying on the floor inside the shop's doorway to determine their size, carried the tires to the fence encircling the motor pool which was elevated some twelve inches from the ground, and pushed them under it (R. 28, 29). Strader did not know whether or not these tires were Government property since several times in the past tires not owned by the Government had been brought to the shop for repair (R. 37). Around 1:30 a.m. the next morning accused arrived at the motor pool and inquired of Strader if he had been able to obtain a tire. When informed Strader had been successful in so doing accused told him he would be parked near the main gate of the motor pool and would meet Strader there when he completed his tour of duty (R. 26, 27).

Lieutenant Sleeper, the assistant chief of the motor pool, saw accused there on the night of 3 May and telephoned the military police for additional sentries to be posted about the motor pool (R. 50, 51). As a result Corporal John J. Beck and a Private Bergson were placed on guard about 2:26 a.m. near a gasoline station just outside the fence surrounding the motor pool (R. 57, 58). Within a few minutes they saw Strader walking near a shop building and the dispatcher's office within the motor pool enclosure, heard a noise which sounded as if a tire had struck the ground after being thrown over a fence, and then saw Strader leave the motor pool and enter an automobile parked across the street. This auto was then driven through the gasoline station and was stopped at a point alongside the fence which seemed to correspond to the location from which previously had emanated the noise heard by the two guards. They saw Strader leave the auto and then return to it with two tires which were placed inside (R. 59). Accused and Strader examined the tires casually to determine their condition before putting them in the auto (R. 29, 30). The auto was then driven for about fifteen or twenty feet until Corporal Beck challenged it (R. 31, 59).

Lieutenant Sleeper arrived at the scene shortly thereafter and accompanied accused to the Prison Office. When asked if he

wished to make a statement accused replied "What can I say". He then inquired if the tires were Government issued and when informed they were he stated "I was afraid of that. I knew they were black market tires, but I didn't know they were GI" (R. 52). Strader had not told accused that the tires were stolen, Government property and accused had not asked if they were Government property (R. 26, 33, 35). There was no agreement as to when accused was to pay for the tires and Strader never did receive anything for them from accused (R. 32, 33).

The two tires were properly identified and admitted in evidence (R. 52, 60, 67-69; Pros. Exs. B, C). One was a Ford 6-ply 600 x 16 tire, serial number V752405, and the other was an Armstrong 6-ply 600 x 16 tire, serial number 113622DC with the word "military" stamped upon it (R. 9; Pros. Exs. B, C). Both tires had the expression "Rei" written on them in yellow crayon. This expression was customarily written on all used, reissued Government tires in the administration motor pool (R. 54-55). The Ford tire was slightly damaged and under existing OPA price regulations the ceiling price for it was \$7.40 (R. 9, 10). The Armstrong tire had a ceiling price of \$9.45 (R. 8). When Government tires became unusable for military purposes at this post they were offered for sale to the highest public bidder by the post chief of salvage. At least one tire dealer in Brownwood, Texas, had purchased tires so offered which bore the word "military" stamped upon them (R. 9-11).

Accused made a voluntary statement to the investigating officer about this transaction. In essential particulars his statement was that sometime during the last week of April 1944 he telephoned Strader to see if he could obtain another tire. Strader replied that he would see his friend and let accused know. Accused met Strader in the Post Exchange a few days later and was informed that a tire would be available for him the next day. Accused then paid Strader \$8, borrowing \$3 from Miss Avery to make up the amount. Strader agreed to deliver the tire the next day but apparently failed to do so. On 3 May 1944 accused phoned Strader and the latter stated he would have a tire by 2:30 a.m. the next morning and told accused to come to the motor pool to obtain it. Accused arrived there about 1:30 a.m., parked the auto he was driving and dozed until Strader awakened him about 2:30 a.m. Following Strader's directions accused then drove through the gas station and alongside the motor pool fence. The situation looked "phony" to accused and his suspicions were aroused. Strader picked up two tires lying near the fence and placed them in

the auto. Although this area was somewhat lighted accused could not see the tires clearly. They then started to drive away but were promptly stopped by military police. While sitting in the auto surrounded by military police, accused asked Strader if they were Government issued tires and Strader replied that his "buddy" had told him they were not (Pros. Ex. A).

Accused denied he knew these tires were Government property. He stated that when he first met Strader, knowing that he worked in the motor pool, he informed him he would "buy anything except GI tires" and Strader informed him they would not be Government tires. The first tire Strader delivered to accused had been examined and found not to be a Government tire. Accused did not believe Strader was obtaining the tires himself because, whenever they discussed the matter of tires, Strader would always refer to "his buddy or friend". Accused believed it was common knowledge in the battalion that he had obtained black market tires. He did not know Strader was going to have two tires for him this night since he had only negotiated, and previously paid \$8, for a single tire. Accused stated "I'm guilty of dealing in black market tires but I'm not in on a deal like this" (Pros. Ex. A).

4. The defense offered no evidence in denial of the Specifications and the Charges.

5. The Specification of Charge I alleges that accused conspired to steal two Government owned tires and the Specification of Charge II alleges the theft of two such tires by accused. One of the essential elements of both of these offenses is the existence in the mind of the accused of the intent to take Government tires and convert them to his own use. From all of the evidence can it be said that the existence of this intent has been proven beyond a reasonable doubt? The evidence must be weighed and the credibility of witnesses adjudged to determine this crucial question (Dig. Op. JAG, 1912-40, sec. 408 (1)).

Undisputed evidence clearly demonstrates that accused acquired these two tires on the early morning of 4 May 1944, delivery being made at the administration motor pool under circumstances that appear highly suspicious. However, it must be remembered that the acquisition of even a "black market" tire is not a transaction to be negotiated at high noon in the public mart. It is also apparent that accused had previously negotiated the purchase of a tire from Strader, intending and believing that he was purchasing on the so-called black market in

violation of OPA ration regulations. There was no proof that this previously acquired tire was Government property. Indeed, the prosecution's evidence was to the contrary. The two tires accused is charged with conspiring to steal and with stealing were obtained through the same individual but a few weeks later. The fact that the first tire obtained by accused was a black market acquisition lends credence to his statement that he intended only to acquire another tire in a like manner. In addition, Miss Juanita Avery, a witness for the prosecution, furnished credible testimony in support of accused's contention. Although she was a friend of accused it is not apparent from the record that this relationship colored her testimony. It was she who introduced accused to Strader after the latter had confided to her that he could obtain tires at a low price from a friend in Brownwood, Texas, who was dealing in them. When Strader was questioned by accused about tires, Miss Avery heard him reiterate that he was obtaining them from an out-of-town source and deny they were Government tires.

Strader testified for the prosecution that he was requested by the accused to obtain some tires for him and eventually did so by stealing two of them from the motor pool. Strader had not told accused that the tires were stolen, Government property. Strader also testified that, during one of accused's visits to the motor pool, accused asked him if he could not obtain some tires that had not been "checked" and during another such visit if he could not "get him a couple from there". The law member struck from the record Strader's testimony that he did not know what accused meant by the word "checked" but permitted Strader to testify that accused's last remark about obtaining tires "from there" was interpreted by him to refer either to "those tires there at the motor pool or civilian tires, either one".

The word "checked" is subject to numerous interpretations and has many connotations that might be ascribed to it. It is a common expression used to refer to the existence of small cracks, breaks or "checks" as they are called that occur in the side of a tire after use and exposure. It is not a word which, without further explanation or interpretation, can reasonably be construed to have been used by accused to refer to the acquisition of Government property. Both the court and the Board of Review are unjustified in ascribing such sinister connotation to this meager term per se. Further explanation of its meaning to accused and his alleged coconspirator should have been introduced in evidence. Strader's understanding

of its meaning was most relevant and the law member was in error in ruling his testimony on that score inadmissible. Inasmuch as his explanation appears in the record it will be considered by this Board and the law member's error is therefore without prejudice to accused's substantial rights. Indeed the Board's reaction is similar to Strader's; we do not know what accused meant by this term. Our ignorance is scarcely justification for ascribing to it an evil and sinister connotation.

Assuming that accused did ask Strader if he could not "get him a couple from there", is it clear that accused was intending to conspire with Strader to thief Government tires from the motor pool? Is it not equally reasonable to presume that accused might have been inquiring whether he could purchase through Strader some serviceable secondhand Government tires before they were offered for sale to the general public through the post chief of salvage? Indeed, Strader himself did not understand that accused was suggesting only the theft of Government tires.

In his statement to the investigating officer, accused, frankly admitted that he had been seeking to acquire "black market" tires and that the fact was well known throughout his battalion. His statement lacks guile or deception and is not unconvincing. Accused had scarcely placed the tires in his auto when he was surrounded by military police. When questioned by military authorities shortly thereafter he inquired if the tires were Government property and, when informed they were, stated "I was afraid of that. I knew they were black market tires, but I didn't know they were GI". His statement rings true. Accused was undoubtedly suspicious at the maneuvering involved in obtaining the tires alongside the motor pool fence and his suspicions were confirmed by the immediate and rapid progression of events thereafter. However, a conviction of conspiring to steal and of stealing these tires cannot be supported by proof merely that at the time accused acquired them he had a suspicion, as distinguished from knowledge, that the tires were stolen Government property. The characterization of accused's conduct found in the recommendation for clemency signed by both the president and law member of the court and appended to the record is not inconsistent with our observations. In their opinions accused "did not initially contemplate obtaining government tires but did fail to use proper judgment when he should have suspected that government tires might be involved."

In the opinion of the Board of Review the evidence does not establish beyond a reasonable doubt that accused conspired with

Strader to steal, and did intend to steal, Government tires. Accordingly, the findings of guilty of Charge I and its Specification, and Charge II and its Specification are not sustained by the evidence.

The Specifications of the Additional Charge allege generally that the conduct complained of was "in violation of the regulations of Office of Price Administration". No proof was offered of the regulations themselves. However, it is the opinion of the Board of Review that it was permissible for the court to notice judicially these regulations. A court-martial may take judicial notice of the "general laws of the United States" (MCM, 1928, par. 125). It can scarcely be doubted at this late date that the administrative promulgations of the Office of Price Administration have the force and effect of general law. However, our conclusion does not rest solely upon this premise. The rules of evidence generally recognized in the district courts of the United States are to be applied by courts-martial (MCM, 1928, par. 111). It has been decided that federal courts are to notice judicially such rules and regulations as may be promulgated by the Interstate Commerce Commission in implementation of the Boiler Inspection Act (Lilly v. Grand Trunk Western RR Co., (Jan. 1943), 63 Sup. Ct. 347, 317 U.S. 481), and also such rules and regulations as may be prescribed by the Interior Department with respect to contests before the land office (Caha v. United States (Mar. 1894), 152 U.S. 211, 14 Sup. Ct. 513). In the case last cited it is stated as a general rule that:

"Wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice." (Caha v. United States, 14 S.C. 513, 517).

It is apparent from these authorities that the regulations of the Office of Price Administration would receive judicial notice in the district courts and, accordingly, similar notice may be taken of them in trials by courts-martial.

An examination of the OPA tire rationing order, Ration Order No. 1A, demonstrates in brief that no persons shall, without

tender and acceptance between the parties of a valid ration certificate permitting the transaction, "make or offer to make, accept or offer to accept, or solicit a transfer of any tire or new tire" (CCH, War Law Service, Rationing, par. 52, 210); that a "tire" is "any pneumatic rubber tire capable of being used or repaired for use" (CCH, supra, par. 52, 203 (34)); that a "transfer" means "any change in right, title, interest, possession or control, including, but not limited to sale, purchase, lease, loan, trade, exchange, gift, delivery, shipment and hypothecation" (CCH, supra, par. 52, 203 (35)). A violation of this public administrative law is, in the opinion of the Board of Review, conduct of a nature to bring discredit upon the military service and, therefore, an offense under Article of War 96.

The accused's admission that he was guilty of dealing in black market tires, coupled with the prosecution's evidence, clearly demonstrates that no ration certificate existed to authorize accused's purchase of the first tire and that, accordingly, the finding of guilty of Specification 1 of the Additional Charge is sustained. It is likewise clear that no ration certificate had been issued to authorize the accused's subsequent acquisition of the two tires covered by Specification 2 of the Additional Charge. That these tires may have been stolen property thus preventing the passage of title does not remove the transaction from the scope of the ration regulation. As shown above, this regulation covers even the transfer of possession of a used tire although no change of title be involved (CCH, supra, par. 52, 203 (34), (35)). The evidence sustains the findings of guilty of Specification 2 of the Additional Charge.

6. The accused is about 27 years of age. He was inducted into the military service on 10 September 1941 and on 17 October 1942 was commissioned a second lieutenant, Medical Administrative Corps. On 21 June 1943 he was promoted to first lieutenant.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification and Charge II and its Specification, legally sufficient to support the findings of guilty of the Additional Charge and Specifications 1 and 2 thereunder, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas M. Jaffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Hewitt, Judge Advocate.

SPJGV
CM 259286

1st Ind.

War Department, J.A.G.O., 21 AUG 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Festus W. Calvert (O-1541812), Medical Administrative Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification and Charge II and its Specification, but legally sufficient to support the findings of guilty of the Additional Charge and Specifications 1 and 2 thereunder, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but in view of the nature of accused's offenses and his otherwise spotless military record I further recommend that it be commuted to a reprimand and forfeiture of \$50 per month for two months, and that the sentence as thus commuted be carried into execution.
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.



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

- 3 Incls.
Incl.1-Record of trial.
Incl.2-Dft of ltr for sig S/W.
Incl.3-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed but commuted to reprimand and forfeiture of \$50 pay per month for two months. G.C.M.O. 505, 22 Sep 1944)



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

SPJGV
CM 259357

20 JUL 1944

UNITED STATES)

SECOND AIR FORCE

v.)

) Trial by G.C.M., convened at
) Mountain Home, Idaho, 23 June
) 1944. Dismissal and total
) forfeitures.

) Second Lieutenant JOHN J.
) McBRIDE, JR. (O-807016),
) Air Corps.)

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 61st Article of War.

Specification: In that Second Lieutenant John J. McBride, Jr., Air Corps, 213th Army Air Forces Base Unit, Section A, did, without proper leave, absent himself from his post and duties at Mountain Home Army Air Field, Mountain Home, Idaho, from on or about 13 April 1944 to on or about 22 May 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service, 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 total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced into evidence without objection an extract copy of the morning report of accused's organization, the 213th Base Unit (OTU (H)), Mountain Home Army Air Field, showing him absent without leave as of 13 April 1944, and an extract copy of the morning report of the Post Guardhouse, Fort Jay, New York, showing accused's confinement at that station on 22 May 1944 (R. 6; Exs. 1, 2).

Captain Richard F. Eiler testified that he has been Flight Control Officer at Mountain Home Army Air Field for approximately two and a half months and accused was assigned to work under him. About a week after witness assumed his duties as Flight Control Officer flying operations were discontinued temporarily and he told accused and his other officers to report to him and to the Director of Flying daily until flying was resumed. The accused reported as directed for about a week, then ceased reporting about 12 April 1944 and has not reported since (R. 6, 7).

4. For the defense:

After having his rights as a witness explained, to him accused elected to testify under oath. After giving a rather detailed personal history of his life since he was a small boy, emphasizing his early and continued interest in aviation, accused said that after receiving his wings about a year ago he was sent to a B-24 transition school and there had some trouble with altitude, but did not tell the Flight Surgeon because he thought he might be grounded. He made a request to be put in a semi-altitude group, but instead was sent to Mountain Home as an instructor pilot. In the early part of December 1943 he was given high altitude tests in a low pressure chamber and as a result was hospitalized. Later in December he was given a leave and he went to his home where he was married. Also while on this leave he contracted "flu". He thought his base had been notified of his illness, but it had not, and upon his return he was court-martialed. He wanted to get his crew back, but instead he was put before a Flying Evaluation Board and permanently grounded. In the examinations they could find nothing wrong with him so they sent him to see a psychiatrist and later they told him he was to be subjected to reclassification proceedings. He was given an opportunity to submit his resignation, and did so. In the early part of April 1944 he received letters telling him his mother's health had become worse and that she had to have an operation. His father had not been working regularly and could not afford to pay for the operation. Accused knew if he could get home there were "ways he could get the money". He did not think he could get an emergency leave because of his record, so he went home without any authority. His mother went to a hospital on 15 May 1944 and when he knew the operation was successful he turned himself into proper authorities. The hospital and medical bills were around \$295 (R. 8).

SPJGW

CM 259357

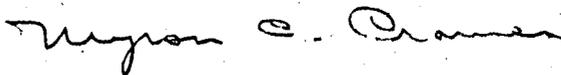
1st Ind.

War Department, J.A.G.O., 5 AUG 1944 - 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 J. McBride, Jr. (O-807016), 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, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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



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

3 Incls.

Incl.1-Record of trial.

Incl.2-Dft ltr for sig S/W.

Incl.3-Form of action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 474, 1 Sep 1944)

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

(329)

SPJGK
CM 259420

21 JUL 1944

UNITED STATES)

97th Infantry Division

v.)

Trial by G.C.M., convened at Fort
Leonard Wood, Missouri, 4 July
1944. Dismissal.

First Lieutenant JOHN
JOSEPH CARROLL (O-411006),
Infantry.)

OPINION of the BOARD OF REVIEW

LYON, MOYSE and SONENFIELD, 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 95th Article of War.

Specification 1: In that 1st Lt John Joseph Carroll, 2nd Battalion, 387th Infantry, did, at Fort Leonard Wood, Mo. on or about 16 June 1944, with intent to deceive Second Army Ordnance Inspection Team B, wrongfully direct Sergeant Zeb V. Costner Jr. Company "H", 387th Infantry, to falsify the identification of four United States one-quarter ton trucks (4x4) assigned to Company "H", 387th Infantry, by painting over the identification numbers and letters appearing upon the bumpers of said trucks and by removing the hoods and serial numbers of said trucks.

Specification 2: In that 1st Lt. John Joseph Carroll, 2nd Battalion, 387th Infantry, did, at Fort Leonard Wood, Mo., on or about 16 June 1944, with intent to deceive Second Army Ordnance Inspection Team B, wrongfully direct and cause Corporal Thomas G. Jernigan, Headquarters Company, 2nd Battalion, 387th Infantry, to paint over the identification numbers and letters appearing upon the bumper of a United States one-quarter ton truck (4x4) assigned to Company "H", 387th Infantry, so as to erase the identity of said truck.

He pleaded guilty to the Specifications and not guilty to a violation of Article of War 95 but guilty of a violation of Article of War 96. He was found guilty as charged. No evidence of previous convictions was introduced. He was sentenced to be

dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The undisputed evidence clearly shows that the accused was the Motor Officer of the Second Battalion, 387th Infantry, 97th Infantry Division, Fort Leonard Wood, Missouri. The motor vehicles of that battalion were to be inspected by Second Army Inspection Team B on 16 June 1944. The vehicles to be inspected included the vehicles of the lettered companies and five vehicles from Headquarters Company, Second Battalion. In the order of inspection the vehicles of the lettered companies were to be inspected prior to those of the Headquarters Company. There were four vehicles in the Headquarters Company which the accused was afraid would not pass the inspection. On 15 June 1944 accused accordingly instructed Sergeant Zeb V. Costner, Jr., the transportation sergeant of Company H, to observe the vehicles of Company H receiving the fewest "gigs" in the inspection and when they were returned to the motor pool to start painting out their bumpers and changing the hoods and send them back to the inspection line (R. 5,6). On the following day, accused ordered another soldier to remove the hoods from four Second Battalion Headquarters Company jeeps. In accordance with the orders of accused, this soldier removed the bolts as directed and placed them underneath the steering wheels of the particular vehicles. On the same day orders were given to certain enlisted men of Company H to take four jeeps from the H Company line to the Headquarters Company line. At that time the Company H vehicles had been inspected. Headquarters Company vehicles had not been inspected but were being placed in readiness for the inspection (R. 11-16). Accused ordered Corporal Thomas G. Jernigan, Second Battalion motor sergeant, to paint over the letter "H" on the bumpers of a Company H jeep which was at that time on Headquarters Company inspection line. The bumper had been newly repainted within the week prior to this incident and there was no occasion for repainting. While Corporal Jernigan was painting the bumper of this vehicle, in accordance with the directions of the accused, Captain Edwin P. Kanady, commanding officer of Headquarters Company, Second Battalion, appeared on the scene and asked what he was doing. Corporal Jernigan replied that he was painting the bumper as ordered by the accused. Captain Kanady then called the accused and requested an explanation. Thereupon accused stated, in effect, that several H Company vehicles would have to be substituted for Headquarters Company vehicles because vehicles of the Headquarters Company would not pass inspection (R. 7-10; Pros. Ex. 1).

Defense.

The defense offered in evidence an extract copy of War Department, A.G.O. Form No. 66-1, which shows the manner of the performance of accused's duties from March 1941 to June 1944 with ratings varying from "Satisfactory" to "Excellent". It also appears upon the form that accused had successfully

completed several courses of instruction in motor maintenance. The accused testified in his own behalf. From his testimony it appears that he enlisted in the 131st Infantry, 33rd Division National Guard, 20 August 1928, and continued to serve with that organization until he was discharged in the grade of first sergeant on 4 March 1941 in order to accept a commission as second lieutenant. He was then assigned to Company G of the 131st Infantry, and served as a platoon leader and company motor officer. He stated that he had successfully completed motor courses at the Fort Wayne Quartermaster Supply Depot, the Officers' Motor Maintenance Corps at Fort Benning, Georgia, and at the Normoyle Motor Base, San Antonio, Texas. Accused stated that he applied for parachute training and was at one time assigned to the 506th Parachute Infantry, Fort Benning, Georgia, but that he failed to qualify for this branch of the service, and was returned to the 33rd Division which was later inactivated. Accused stated that throughout his military service he had never been in any kind of difficulty with the military or civilian authorities and that he had never been punished under Article of War 104.

4. It is clear from the undisputed evidence in this case that the accused deliberately and carefully evolved a plan or scheme, the purpose of which was to deceive his military superiors in the course of an official inspection of motor vehicles over which accused exercised supervisory control. It is likewise clearly established that accused, in furtherance of this plan to deceive, ordered enlisted personnel under his control to execute the mechanics of his plan. But for the timely intervention of Captain Kanady the scheme would in all probability have been successful and thus have defeated the very purpose of the inspection. For an officer to concoct and order enlisted men under his control to carry out such a premeditated scheme and deception is obviously a violation of Article of War 95. (CM 237521)

5. War Department records show that accused is 32 years old. He was graduated from St. Patrick's Academy, Chicago, Illinois, in 1928. In August of that year he enlisted in Company L, 131st Infantry, 33rd National Guard Division. He had continuous service in that organization until he was discharged in the grade of first sergeant 4 March 1941 to accept appointment as a second lieutenant, Infantry, Army of the United States. On 24 March 1942 he was promoted to first lieutenant, Army of the United States, to date and rank from 1 February 1942. Upon his request he was assigned to the 506th Parachute Infantry, Camp Toombs, Toccoa, Georgia, 27 July 1942. During his commissioned service accused successfully completed several service schools instructing in motor maintenance.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the

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opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Henry G. Rose

Judge Advocate.

Norman Magee

Judge Advocate.

Samuel Sorenson

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 AUG 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant John Joseph Carroll (O-411006), Infantry.

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

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



Myron C. Cramer,
Major General,

The Judge Advocate General.

3 Incls.

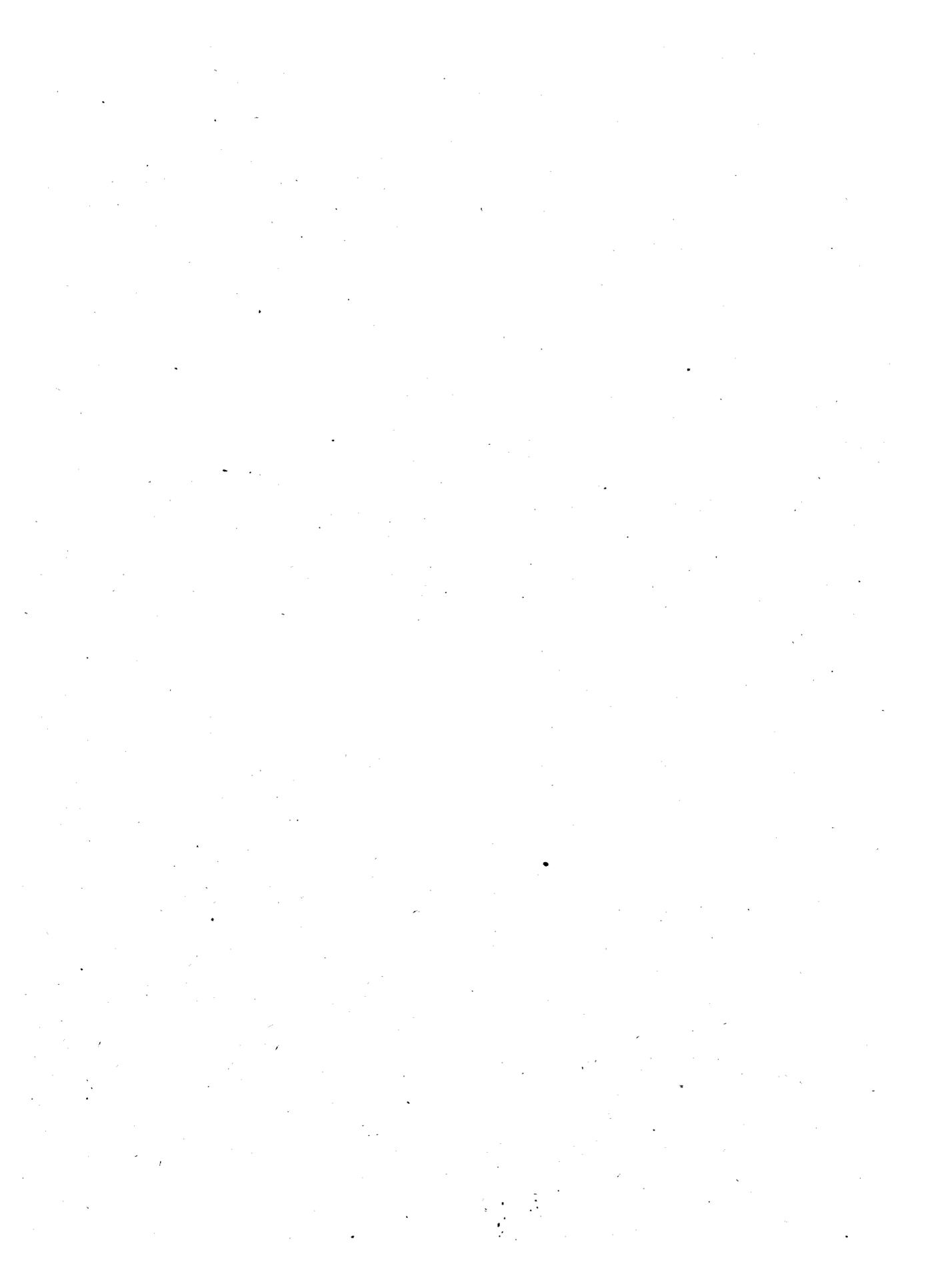
Incl.1-Record of trial.

Incl.2-Draft of ltr. for

sig. Sec. of War.

Incl.3-Form of Ex. action.

(Sentence confirmed. G.C.M.O. 456, 26 Aug 1944)



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

(335)

SPJGN
CM 259422

21 JUL 1944

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

11TH ARMORED DIVISION

v.)

Trial by G.C.M., convened at
Camp Cooke, California, 13
June 1944. Dismissal.

Second Lieutenant BRUCE
W. CLOSSON (O-1823705),
606 Tank Destroyer Bat-
talion.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Bruce W. Closson, Headquarters, 606th Tank Destroyer Battalion, did, at Waco, Texas, on or about 26 February 1944, unlawfully enter into a bigamous marriage with Miss Evelyn Schenck, he, then having a wife, Mrs. Gertrude I. Closson, living and not divorced.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 26 February 1944 married Miss Evelyn Schenck at Waco, Texas, while his wife, Mrs. Gertrude Irene Closson, whom he had married on 1 September 1937, was still living. His first marriage had not been dissolved either by divorce or annulment. These facts were established by the testimony of Miss Schenck and Mrs. Closson, by certified copies of the two executed marriage licenses and by a certified copy of the application for the second marriage license which bears the accused's signature (R. 6, 7-8; Pros. Ex. 1-3).

4. The evidence for the defense shows that a former company commander of the accused considered him an excellent officer. Mrs. Closson testified that the accused had been a good husband who did not drink to excess or associate with other women. A certified copy of a decree of annulment, dated 6 June 1944, of the Superior Court of California for San Diego County, which declared the accused's marriage to Miss Schenck "null and void" from the date of the decree, was admitted into evidence (R. 8-10, 11; Def. Ex. A).

The accused, after explanation of his rights as a witness, testified that on the evening and night of 26 February 1944 he was so intoxicated that he had no recollection of obtaining the license or the performance of the ceremony, but that he awoke the next morning in a hotel room with Miss Schenck who thereafter on 4 March 1944 accompanied him to San Diego, California, in his automobile. She visited some of her relatives and he reported to camp without discussing with her the procurement of an annulment. He had not sought legal advice in Waco, Texas, because he was unacquainted with any attorney there and had brought Miss Schenck to California where he knew attorneys who would assist him. The delay in securing the annulment had been occasioned by his difficulty in locating Miss Schenck after he had reported to camp. The annulment had been secured at his expense (R. 12-24).

5. In rebuttal the prosecution recalled Miss Schenck who related the accused's two months' courtship and the details of the marriage and the preliminaries thereto during all of which she vehemently asserted that the accused was sober. The accused had informed her that he had been divorced for about three years and she did not learn that such statement was untrue until about five days after they had arrived in California (R. 24-31).

6. The Specification alleges that the accused at Waco, Texas, on or about 26 February 1944 unlawfully entered into a bigamous marriage with Miss Evelyn Schenck while he had a wife, Mrs. Gertrude I. Closson, who was living and undivorced. The offense alleged is that of bigamy which has long been recognized as an offense under both the 95th and 96th Articles of War (CM 245278, (1944) 3 Bull JAG 150).

The prosecution's evidence shows beyond a reasonable doubt the accused's guilt as alleged. His asserted defense of intoxication on the occasion of the second marriage is both weak and nebulous when contrasted with the direct testimony to the contrary of Miss Schenck who the court within its province elected to believe. The contraction of a bigamous marriage is certainly conduct unbecoming an officer and a gentleman. Neither an expeditious nor a tardy annulment is a defense to the crime. The evidence, therefore, beyond a reasonable doubt establishes every essential element of the offense alleged and fully supports the court's findings of guilty of the Charge and its Specification.

7. The accused is about 30 years of age. The War Department records show that he has had enlisted service from 11 January 1933 to 10 January 1936 and from 20 May 1942 until 11 February 1943 when he was commissioned a second lieutenant upon completion of Officer Candidate School and that he has had active duty as an officer since the latter date.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb Judge Advocate.

Charles S. Ayler Judge Advocate.

Daniel H. Galen Judge Advocate.

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SPJGN
CM 259422

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

11 AUG 1944

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 Bruce W. Closson (O-1823705), 606th Tank Destroyer 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 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 such action meet with 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. 506, 22 Sep 1944)

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

(339)

SPJGQ
CM 259459

26 AUG 1944

UNITED STATES)

SEVENTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

First Lieutenant JAMES C.
MACFARLANE (O-1579962),
QMC, Officers Replacement
Pool.)

Trial by G.C.M., convened at
Fort Francis E. Warren, Wyoming,
30 June 1944. Dismissal.

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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. James C. MacFarlane, QMC, QM Officers Replacement Pool, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, did, without proper leave, absent himself from his station at Fort Francis E. Warren, Wyoming, from about 11 June 1944 to about 13 June 1944.

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

Specification 1: In that 1st Lt. James C. MacFarlane, QMC, QM Officers Replacement Pool, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, did, at Cheyenne, Wyoming, on or about 23 May 1944, with intent to defraud wrongfully and unlawfully make and utter to the Plains Hotel, a certain check, in words and figures as follows, to wit:

May 23 1944

National Bank of Detroit of Detroit, Mich.
Name of Bank Town
PAY TO THE
ORDER OF Plains Hotel \$10.00

Ten and no/100- - - - - DOLLARS

For value received, I represent that above amount is on deposit in said Bank or Trust Company in my name, is free from claims and subject to this check.

O-1579962

(Sgd) James C. MacFarlane
1st Lt. QMC

Form B-1—Prairie
Publishing Co., Casper
QMRP - Ft. Warren, Wyo.

and by means thereof, did, fraudulently obtain from the Plains Hotel \$10, lawful money of the United States, he the said 1st Lt. James C. MacFarlane, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Detroit for the payment of said check.

Specification 2: (Finding of not guilty).

Specification 3: In that 1st Lt. James C. MacFarlane, QMC, QM Officers Replacement Pool, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, did, at Cheyenne, Wyoming, on or about 11 June 1944, wrongfully drink intoxicating liquor with Corporal Alan M. Cohn and Private Boyd, enlisted men in the Army of the United States.

Specification 4: In that 1st Lt. James C. MacFarlane, QMC, QM Officers Replacement Pool, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, was at Cheyenne, Wyoming, on or about 10 June 1944, drunk and disorderly in uniform.

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

Specification: In that 1st Lt. James C. MacFarlane, QMC, QM Officers Replacement Pool, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, did, at Cheyenne, Wyoming, on or about 11 June 1944, wrongfully render himself unfit for duty by the excessive use of intoxicating liquor.

He pleaded guilty to Charge I and its Specification but not guilty to Charges II and III, respectively, and to each respective Specification thereunder. He was found guilty of all three of the Charges and of the Specifications thereunder, excepting Specification 2 of Charge II and excepting the words "and disorderly" in Specification 4 of Charge II. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to total forfeitures. The reviewing authority approved the sentence, remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

3. The legally competent evidence for the prosecution is summarized as follows:

Charge I - A.W. 61 (AWOL) Specification: Supporting accused's plea of guilty, the prosecution introduced a duly authenticated extract copy of the morning report of the QMC, Officers Replacement Pool, ASFTC, Fort Francis E. Warren, Wyoming, submitted at that post, wherein it was established that accused, then a member of that organization, was AWOL at noon on 11 June 1944 (Pros. Ex. 1). Captain Edward J. Adler, QMC, Commanding Officer of Training Company No. 34 (R. 6) to which accused was then attached (R. 9) testified that the latter was assigned to "duty officer" of that Company from noon, 11 June 1944 (Sunday) to noon 12 June 1944 (Monday) and that this assignment had been posted on the company officers' duty roster on 7 June (Pros. Ex. 2; R. 8). Accused not only did not report for duty at noon on Sunday, 11 June 1944 but was not present for duty on the following Monday or Tuesday, 12 and 13 June 1944 (R. 9-10). Captain Adler had not given him permission to be absent during that period. (R. 9). A copy of the duty officers' roster for 11 June 1944 showing an entry assigning accused to duty on that date was received in evidence - (R. 8; Pros. Ex. 2). Captain Howard C. Stallings, C.O. of the 9th Training Battalion, which includes Training Company No. 34 (R. 11), was unsuccessful in his efforts to locate accused (about 12:15 on Sunday 11 June 1944) for the purpose of relieving Lieutenant George Coon, his predecessor as duty officer. Captain Stallings did not see him until twelve thirty a.m. on 13 June 1944 (R. 12) when he placed him in arrest in quarters (R. 46). Captain Stallings at no time authorized accused to be absent during the period from 11 June to 13 June 1944 (R. 13).

Charge II - Specification 1 (make and utter worthless check): On 23 May 1944 R. L. Whitesides, the manager of the Plains Hotel in Cheyenne, Wyoming, personally cashed a \$10 check for accused who presented it in person. The check was drawn on the National Bank of Detroit, dated 23 May 1944, payable to the Plains Hotel and signed by accused (R. 25). Mr. Whitesides gave accused the \$10 in cash and deposited the check in the American National Bank in Cheyenne. About a week later it was returned with the notation thereon "account closed" (R. 26).

It was stipulated on the record that if Leo Trocke were present in court he would testify in substance that he is the cashier of the National Bank of Detroit, and that accused maintains a commercial checking account

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in said bank, and that at the time of presentation of a certain check dated 23 May 1944 on the National Bank of Detroit, Michigan, payable to the Plains Hotel in the amount of \$10, signed "James C. MacFarlane, 1st Lt. QMC", James C. Macfarlane had insufficient funds on deposit in said bank to cover said check (R. 43).

Accused, after proper warning of his rights, voluntarily gave a written and sworn statement dated 16 June 1944 (R. 45; Pros. Ex. 5) to the investigating officer in this case, so much of which as is pertinent reads as follows:

"I came to Fort Francis E. Warren about 25 May 1944. I wrote several checks, including two to the Plains Hotel for ten dollars each prior to the 1st of June. These checks were written on a Detroit bank. My thought at the time of writing them was that when I got my pay on May 31st I could wire money to the bank sufficient to cover them. On the night when I got my pay I was down at the Plains Bar. While I was there I had my billfold in my raincoat pocket. I left my raincoat in the lobby. I had some loose bills and money in my pocket which didn't amount to much, but which I was using to pay for my drinks there. That night I returned to the fort and left my raincoat in the Plains. The next day I went down and my raincoat was there, but the wallet was gone. The wallet contained practically my whole month's pay. All the money that I had left was a little loose change in my pocket. I had intended to send a wire covering those checks, but hadn't gotten it done, and after my wallet was gone I didn't have enough money to do it. I went to the Red Cross and tried to borrow money to cover these checks, but was unable to do so. From that time on I was very worried as to what was going to happen to me because of the checks. On Saturday, 10 June 1944, when I went downtown to Cheyenne I was very worried about these checks. I started drinking. I went to the Mayflower and the Plains, and after drinking in several places I finally ended up at the Frontier Bar."

The original check was not introduced in evidence but a copy of it made from the original in the office of the Plains Hotel was introduced (R. 26, Pros. Ex. 3). This was explained by Mr. Nitchie, the assistant manager of the hotel, who testified that "two days ago" he delivered the original of the check in question to an unidentified sergeant who, as agent of accused, presented a letter of authorization and gave him (Mr. Nitchie) \$10 in cash to redeem the check (R. 30-57). Accused as a witness in his own behalf admitted that when he gave this check to the hotel on 23 May 1944 he had no knowledge of the standing of his account in the drawee bank nor whether or not there were sufficient funds in his account to cover it (R. 57).

Charge II - A.W. 95, Specifications 3 and 4 (drink intoxicating liquor with enlisted men; drunk in uniform). Corporal Alan M. Cohn,

Headquarters Company, ASFTC, at Fort Warren (R. 16), met accused for the first time on 10 June 1944, at about 11:30 p.m. in the bar of the Frontier Hotel, Cheyenne, Wyoming. Witness was drinking with his friends, Corporal Trustin B. Boyd and Private Francis A. Eheim, at the time. Accused joined them (R. 16) and drank with them (R. 17). He had been drinking sufficiently so that it was noticeable. His voice was peculiar (R. 20). He was neither loud nor disorderly (R. 21) and was not intoxicated (R. 22).

Major John S. Hanson, QMC, Headquarters ASFTC, Fort Warren, also saw accused about 10:45 p.m. on 10 June 1944 at the same bar (R. 37-38) which was crowded with both officers and enlisted men (R. 39). The accused "bumped into" witness and the latter, upon noticing that one of the bars on accused's uniform blouse was hanging loose, called his attention to it by remarking, "Lieutenant you are going to be deranked if you don't watch out". Accused told witness "he didn't give a dam whether he was or not" (R. 38). He further stated that Fort Warren was "a hell of a place to be". It was obvious from his language that he had been drinking heavily (R. 38) and witness believes accused was drunk because he was unsteady on his feet (R. 40). Witness talked with him about ten minutes (R. 39).

Private Eheim also saw accused at the bar of the Frontier Hotel on Saturday night, 10 June. In his group were his wife, Corporal Cohn and Private Boyd. Accused joined and drank with them (R. 41). He was drunk at the time (R. 42). Witness bases this opinion on the conversation of accused (R. 42). The bar was crowded with both officers and enlisted men but the officers were in groups here and there (R. 43).

Charge III - A.W.96 (rendering himself unfit for duty by the excessive use of intoxicating liquor). In addition to such of the evidence hereinbefore discussed as may have a bearing on this Charge and its Specification, the following evidence was adduced. About 10:30 o'clock Tuesday morning (13 June 1944) Captain Adler informed accused, in the latter's room at B.O.Q., Fort Warren, that the Regimental Commander desired to see him at once. The accused stated that he was not physically fit and requested Captain Adler to so advise the Regimental Commander (R. 9). The accused was examined professionally by Captain Milton B. Jacobson, Medical Corps, the same day and told the latter that he had been on a "binge" for four days (R. 35). Captain Jacobson's diagnosis was that accused was suffering from "acute alcoholism" (R. 35). He admitted that he could not say with certainty when the condition began and admitted that it was possible that accused could have been in condition for duty on 11 June, but expressed the opinion that it was improbable (R. 36).

4. Evidence for the defense:

As a defense witness Private Boyd testified that he saw accused, with whom he was slightly acquainted, in the bar of the Frontier Hotel on Saturday night, 10 June 1944 (R. 47) at about 11 p.m. Witness was with Corporal Cohn (R. 47-48). He had drinks with accused (R. 51) up until

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midnight and engaged him in general conversation. During that period he (the accused) was in no way disorderly and was not drunk. "I wouldn't say he was drunk and I wouldn't say he was sober" (R. 48). There were three enlisted men, one with his wife, in the crowd. Witness invited accused to his home when the bar closed and drove him over in his car (R. 49). They all had "some night caps" when they got to his house (R. 51). Accused stayed at Boyd's home overnight and witness saw him the next morning (Sunday) getting breakfast and reading the paper about 11:00 a.m. He then was sober and fit for duty (R. 49-52). Witness left shortly after that and accused said he was going to take a nap (R. 49). Witness returned at about 5:30 that afternoon and accused was still there "and we all had some drinks together" (R. 52). That night (Sunday) he and accused went out to the "State Line" where they drank beer (R. 52). Accused asked witness to call him the next morning (Monday) before he left so he could drive out to the Fort. This Private Boyd neglected to do (R. 49-50) and when he returned about 5:30 p.m. Monday evening (12 June) accused was still there. Accused was sober. Witness then drove him to the Frontier Hotel and left him (R. 50).

Having been properly advised in open court by the law member of his rights as a witness in his own behalf accused elected to be sworn as a witness (R. 53) and testified substantially as follows:

Accused worked for the National Bank of Detroit (bank upon which checks in question were drawn) for $4\frac{1}{2}$ years immediately preceding his entry into the Army (R. 53-54). He has continuously maintained a checking account with this bank, usually having his pay check sent directly there for deposit (R. 54). All statements pertaining to his account were sent to the home of his parents in Detroit and, as a consequence, he did not know at any given time just how much money he had on deposit (R. 54). He could only estimate. When he made and uttered the \$10 check to the Plains Hotel on 23 May he had no knowledge of the amount of his bank account and did not know whether or not he had sufficient money on deposit to pay it (R. 57). Since he had worked there and everyone knew him, the bank had, on previous occasions, honored checks for him when he did not have sufficient funds on deposit to cover them (R. 57). He had no specific arrangement with the bank (R. 67) but he fully believed the check would be paid (R. 57). He had no intent to defraud the hotel (R. 57). Accused drew partial pay for May 1944 before leaving his former station and spent this in moving to Fort Warren at the time he was transferred in the latter part of May (R. 56, 57). When he was notified that the check in question had been returned by the bank unpaid, he went to the Red Cross and endeavored to borrow money with which to take it up (R. 57). He did not succeed in this effort but did subsequently secure the money, and paid the check (R. 57).

Accused did not like it when he was transferred to the Quartermaster Pool at Fort Warren (R. 56).

He arrived at the Frontier Hotel Bar at about 10:30 o'clock on the night of 10 June 1944 (R. 57). When he got there he saw Private Boyd, with whom he was acquainted (R. 57-58). He drank liquor during the night but was not drunk or disorderly (R. 58). When the bar closed he went to the home of Private Boyd, at the latter's invitation (R. 58). He did not consider that there was anything out of the way in his doing this because it was not a public place and was "just an invitation from an individual to another individual" (R. 58). All of accused's previous service had been at air bases, where it was customary for officers and enlisted men to fraternize together and where it was not uncommon for them to have a drink together (R. 56).

Accused slept at the home of Private Boyd until about 11:00 o'clock Sunday morning, 11 June 1944 (R. 58). He knew he was supposed to go on duty as the duty officer of his organization at 12:00 o'clock and tried to reach Lieutenant Coon (officer whom he was to relieve) by telephone (R. 58). Being unable to contact Lieutenant Coon, he left word for him not to worry, that he would be out shortly (R. 58). Accused then ate and, being tired, decided he would just rest a few more minutes (R. 58). He returned to bed and again went to sleep. No one awakened him and he slept until about 5:30 p.m. (R. 58). He knew when he woke up this second time that he would be classified as AWOL, but the damage was already done (R. 59). He intended then to get back to camp by midnight, but did not request Boyd to take him (R. 59). He did request, however, that Boyd awaken him the next morning early enough to enable him to get to camp in time for duty (R. 59). Boyd failed to do this and it was "up in the morning" when he woke up (12 June), and he decided that he had better wait until evening before returning to camp (R. 59). Also, he had misplaced his hat and could not go out on the street until he had found it, which he did later during the day (R. 59). He was driven back to town the night of 12 June by Private Boyd and from there to camp by a person he met at the Frontier Hotel.

Accused was not physically incapacitated for work on 11 June 1944, either as the result of excessive drinking or from other causes, and could have performed his duties (R. 60).

On cross-examination and during examination by the court, accused stated that he had no knowledge that he did not have sufficient funds on deposit to pay the check which he gave the Plains Hotel until he was notified on 2 June 1944 that the check had been returned unpaid (R. 60). Just for fear he might not have sufficient money on deposit to cover the check he went to town on 31 May, after receiving his pay, with the intention of wiring additional money to the bank (R. 61) but his wallet and money were stolen before he reached the Western Union Office (R. 60). Accused had no idea why the returned check was marked "account closed" unless because of inefficiency of new personnel in the bank (R. 65). He did not make any effort to borrow money from any other officer with which to pay the check, in fact, elected not to avail himself of a loan that was tendered by one

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of the officers of his company, because he did not want to be borrowing in the same circle of officers with whom he worked (R. 66). He did not want to contact the bank or his parents because he did not want either to know that his accounts were not up to par (R. 66), and was afraid the bank might hold it against him when he seeks to return to work there (R. 67). Instead, he called a friend in California who was connected with the Red Cross, requesting him to wire the Red Cross organization at Fort Warren in accused's behalf (R. 66).

Accused had "several" drinks at the bars of both the Mayflower Hotel and the Plains Hotel before going to the Frontier Hotel Bar on the night of 10 June 1944, and he had several more after reaching the latter bar (R. 62). By "several" he meant two, three, or four (R. 65). He purchased these drinks with money which he had borrowed from a friend (R. 66). Accused recalled engaging in a general conversation about Fort Warren with Major Hanson and three other officers at the Frontier Hotel Bar on the night of 10 June 1944, but did not recall the details of the conversation, nor that the Commanding General was mentioned (R. 61). Accused had had "enough to drink" and was "feeling good" when he was at the Frontier Hotel Bar (R. 67). He drank only a few drinks after he arrived at the Boyd residence (R. 65).

It was two o'clock or later in the morning of 11 June before he went to bed at the Boyd residence (R. 63). He tried twice on the morning of the 11th to call Lieutenant Coon, once at about 11:00 o'clock and the second time about 45 minutes later (R. 63). When he called this second time he told someone to tell Lieutenant Coon that he was on the Post and would be down shortly (R. 63). He was, in fact, still at Boyd's house in Cheyenne at that time (R. 63). It was after this second phone call, when it was almost time to go on duty, that he again went to sleep (R. 63). He did not have a headache but was tired. He was not too tired to have gone on duty but felt that additional sleep would be beneficial (R. 64). He made no effort to get in touch with his company or to ascertain if Lieutenant Coon was still waiting for him to go on duty after he woke up about 5:30 in the afternoon of 11 June (R. 64). Instead, he drank some more (R. 67).

Staff Sergeant Henry Chilton testified that on 1 June 1944 accused asked if he was going to town and, upon being informed that he intended to go after retreat, accused requested that he go by the bar of the Plains Hotel and "pick up" his rain coat. "He said there was some money in it and I should look for the money and bring it to him". Sergeant Chilton and the first sergeant of his company found accused's rain coat hanging in the lobby of the bar on a coat rack but there was no money in either of its pockets. They delivered the coat to accused and informed him that they had not found the money (R. 46-47). The record is silent as to whether accused made any search or effort to recover his alleged stolen money.

It was stipulated that if Lieutenant Colonel John T. Eaton were present and testifying as a witness, he would testify that as commanding officer of accused between 1 November 1942 and 28 July 1943, as well as between 1 February and 21 May 1944, he had made efficiency ratings on accused six times for entry on the latter's WD AGO Form 66-1. The first rating given was that of "very satisfactory", the remaining five, that of "excellent" (R. 68).

It was also stipulated that if Leo Trocke were present he would testify that he has known accused about four or five years; that accused worked under his direct supervision at the National Bank of Detroit for about two years; and that he has always found accused to be honest, cooperative, progressive, and a willing worker (R. 68).

5. Notwithstanding the accused's pleas of guilty to Charge I and its Specification, sufficient of themselves to sustain the findings of guilty of this Charge and Specification, the prosecution adduced legal and competent evidence in addition to accused's pleas, consisting of duly authenticated extract copies of morning reports of his organization and of the testimony of his superior officers having personal knowledge of the facts, which was legally sufficient to establish his guilt of the offense alleged therein; and the accused fully admitted his guilt while testifying under oath at the trial. No question exists, therefore, as to the sufficiency of the record of trial to support the findings of the court thereon.

Specification 1 of Charge II: The evidence of record establishes without conflict that, as alleged in the Specification, on or about 23 May 1944 the accused made and uttered to the Plains Hotel, Cheyenne, Wyoming, his personal check in the amount of \$10, drawn on the National Bank of Detroit, Michigan, receiving from the hotel in exchange therefor \$10 in cash, and that the check was not honored by the drawee bank upon presentation for payment because accused did not have sufficient funds on deposit to meet it. Accused elected to testify as a sworn witness in his own behalf at the trial but did not testify that he believed at the time he made and uttered the check in question that he had sufficient funds on deposit in the bank upon which it was drawn to meet it. Instead, he testified that at the time of uttering the check he had no knowledge of the amount of his bank account and did not know whether or not he had sufficient money on deposit to pay it. In this same connection he testified that he never knew at any given time how much money he had on deposit, but contented himself with estimating the amount of his bank balance, hoping, no doubt, that from this the court would infer in his favor that the check was given in good faith and as the result of an honest miscalculation. To be weighed against this negative type of testimony, there is, however, the accused's own testimony given at the trial that even though he did not know until 2 June 1944 that the check in question had not been honored by the bank, he had nevertheless intended to wire money to the bank on 31 May 1944 to assure its payment. Furthermore, in his voluntary pre-trial statement to the investigating officer, accused stated, "my thought at the time of writing them (checks) was that when I got my pay

on May 31st I could wire money to the bank sufficient to cover them" (Pros. Ex. 5). These statements on the part of accused, together with his failure while testifying at the trial positively to assert his good faith at the time of uttering the check, and the stipulated evidence that his account was in fact insufficient, are convincing that he knew at the time he uttered the check to the Plains Hotel that he did not have money on deposit in the drawee bank with which to meet it. Even if he had made a deposit on 31 May it would have been too late, and there is no evidence of record from which it may be deduced or inferred that he intended or expected to have money on deposit to meet the check when it should be presented to the bank for payment.

The record of trial clearly warrants the conclusion and is legally sufficient to sustain the finding that at the time of uttering the check in question accused knew that it would not be paid on presentation at the drawee bank and that he intended to deceive and defraud the Plains Hotel, in violation of Article of War 95. The giving of a check on a bank where one knows or reasonably should know there are no funds to meet it, and without intending that there should be, is a violation of this Article of War. (Par. 151, MCM, 1928).

Specification 3 of Charge II: The accused admitted while testifying at the trial, and other evidence adduced by the prosecution establishes beyond any doubt, that he joined and drank liquor with a party of enlisted men, consisting of Corporal Cohn and Privates Boyd and Eheim, in the bar of the Frontier Hotel in Cheyenne, Wyoming, on the night of 10 June 1944. Private Boyd was the only member of the party with whom accused was acquainted beforehand, and their acquaintanceship had been of a very casual nature. Numerous other enlisted men and civilians were present in the bar at the time and, according to all of the evidence, accused obviously had already been drinking heavily. After the bar closed, accused repaired to the home of Private Boyd and continued to drink with him and others. He remained at Private Boyd's house and became AWOL as of noon on 11 June, but nevertheless, and despite the fact that he was supposed to be on duty at the time, resumed drinking with Boyd in the evening of that day. While recognizing that for an officer to drink intoxicating liquor with enlisted men is not per se a violation of Article of War 95, the Board of Review is of the opinion that in the instant case accused's conduct in so doing under the circumstances and to the extent shown by the evidence was clearly a violation of this Article of War.

Specification 4 of Charge II: By this Specification the accused is charged with having been drunk and disorderly while in uniform in Cheyenne, Wyoming, on 10 June 1944. The court found accused guilty of having been drunk as alleged but found him not guilty of having been disorderly. Taking into consideration the number of drinks accused admits having imbibed and the testimony of the various witnesses for the prosecution, the evidence of record is clearly sufficient to support the finding of the court that the accused was drunk in uniform at the time and place mentioned in the Specification. In the opinion of the Board of Review, however, the evidence is not legally sufficient to prove that he was

grossly drunk. While in substantial accord in their opinions that accused was clearly under the influence of intoxicating liquor at the time and place in question, the witnesses who testified at the trial were not unanimous in their opinions that he was drunk. Only one witness testified to any unsteadiness on the part of accused and even he declined to express an opinion as to whether or not accused had been drinking to such an extent as to affect his "ability to rationalize". The test for drunkenness and disorderly conduct as a violation of Article of War 95 as stated in the Manual for Courts-Martial, 1928, is "being grossly drunk and conspicuously disorderly in a public place" (par. 151). The record of trial is deemed legally insufficient to support the finding under Article of War 95, but legally sufficient to support the finding of guilty of the Specification as a violation of Article of War 96.

Charge III and its Specification: While the Specification fails to specify any particular duty or duties for which it is alleged that accused rendered himself unfit by the excessive use of intoxicating liquor, it has been heretofore held that this affords no basis for complaint or objection. C.M. 163424 (1924), Dig. Ops. JAG, 1912-1940, sec. 454 (91). It appears from the record that perhaps both the prosecution and the defense had primarily in mind while contesting the issues presented by this Specification the failure of accused to report for duty as duty officer at noon on 11 June 1944. If this were the only occasion to which the Specification could have application, it might well constitute an undue multiplication of charges growing out of one transaction, because accused is charged in other Specifications and Charges, under which he has been found guilty, of both the offense of being drunk on or about 10 June, from which drunkenness he had apparently not fully recovered, and of being AWOL on 11 June. But even if so considered, no substantial right of the accused has been injuriously affected, because the sentence, as approved by the reviewing authority, is mandatory for some of the other offenses of which accused was properly convicted, as herein determined. The evidence establishes, however, that even on Tuesday, 13 June, after he had returned to his station, accused still was not physically fit for duty; and it is not necessary that the date of an offense be proved exactly as stated in the Specification. The evidence is legally sufficient to support the findings irrespective of whether Sunday, 11 June or Tuesday, 13 June, be accepted as the date of disability. Accused had drunk heavily during the night of 10 June and continued to drink on into the morning of 11 June. He disregarded the call of duty on 11 June because of the urgent need which he felt for returning to bed, a need which, we may logically conclude from the evidence, was brought about by his excessive drinking and from no other cause. He was admittedly not physically fit for duty on Tuesday, 13 June, and was found, upon medical examination, to be suffering from acute alcoholism.

6. War Department records disclose that this officer is 29 years of age and is single. He is a graduate of both a high school and the Walsh School of Accounting and was employed in the credit department of the National Bank of Detroit, Michigan, before entering the service.

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He was inducted into the service on 15 September 1941 and attained the grade of Corporal. He was graduated from the ninth officer candidate class, The Quartermaster School, and commissioned a temporary second lieutenant, Army of the United States, on 16 October 1942, entering on active duty the same day. He was promoted to the rank of first lieutenant on 24 August 1943.

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 insufficient to support the finding of guilty of Specification 4 of Charge II as a violation of Article of War 95 but is legally sufficient to support the finding of guilty of the Specification as a violation of Article of War 96, is legally sufficient to support all other findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

William H. Lambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

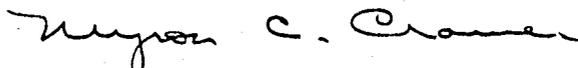
War Department, J.A.G.O., 4 Sep 1944 -To the Secretary of War.

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 James C. MacFarlane (O-1579962), QMC, Officers Replacement Pool.

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 4 of Charge II as a violation of Article of War 95 but is legally sufficient to support the finding of guilty of the Specification as a violation of Article of War 96 and to support all other findings and the sentence and to warrant confirmation of the sentence. I recommend that the finding of guilty of Specification 4 of Charge II be approved only as a violation of Article of War 96, and that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Consideration has been given to the attached telegram from the accused to the President dated 20 July 1944.

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



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

4 Incls.

- 1 - Record of trial.
- 2 - Dft. ltr. for sig.
of S/W.
- 3 - Form of action.
- 4 - Telegram fr. accused to
Pres. dated 20 July 1944.

(Finding of guilty of Specification 4 of Charge II approved only as a violation of Article of War 96. Sentence as approved by reviewing authority confirmed. G.C.M.O. 556, 13 Oct 1944)



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

SPJGV
CM 259540

8 AUG 1944

UNITED STATES

THIRD AIR FORCE

v.

First Lieutenant DALE S.
SWEAT (O-26299), Air Corps.

Trial by G.C.M., convened at
Drew Field, Tampa, Florida,
20 June 1944. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 1st Lt. Dale S Sweat, Section O, 345th AAF Base Unit (RTU F) Waycross Army Air Field, Waycross, Ga., did on or about 18 May 1944, at or near Valdosta, Ga., wrongfully violate Section II, paragraph 16a (1) (d) Army Air Forces Regulation Number 60-16, dated 6 March 1944, by flying a military airplane at an altitude less than five hundred feet above the ground.

He pleaded guilty and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

There is small variance in the testimony of Captain Prentice

O. Clark, Chief Warrant Officer William B. Conner, Captain Arlye M. McDermid and First Lieutenant Joseph E. Farmer, witnesses for the prosecution, to the effect that on 18 May 1944 they were members of a softball team playing on a diamond located on the campus of the Georgia State Women's College, Valdosta, Georgia. The field on which the diamond is located is bordered on the north and south by virgin long leaf pine trees, from 90 to 100 feet high, and on the east and west by residences (R. 5, 6). There were "quite a few" spectators watching the game (R. 10).

About 5:30 that afternoon a P-40 airplane, shown by other evidence to have been flown by the accused, flew over the field and diamond in a direction from east to west, or vice versa, and in such a manner as to attract the attention of the people present on the ground. Some of the witnesses observed the plane fly over the field twice, and some saw it fly over three times, the altitude of the flights preceding the final pass not being definitely established, the witnesses estimating the altitude of these prior flights as being "150 feet or higher" (R. 7), "500 feet or perhaps a little bit less" (R. 10), "300 feet" (R. 12). However at the time of the final pass of the plane over the field the game was halted and the plane was observed to pass over the field at a height level with the tops of the pine trees, that is from 90 to 100 feet high by all of the above witnesses (R. 6, 7, 11), except Captain McDermid who estimated the altitude of the plane on the last pass to have been between 150 and 200 feet (R. 9). The number R-69 on the plane was plainly seen on the last pass. This was the number of the plane flown by the accused between 1645 and 1815 on 18 May 1944 (R. 14; Ex. A).

4. For the defense:

The accused after having his rights as a witness explained to him elected to testify under oath. He testified that he received his wings on 31 May 1943 and was commissioned 1 June 1943 after graduating from the United States Military Academy. He has been flying for the last six months and has been an instructor since 1 December 1943. He was a platoon lieutenant in the Cadet Corps at the academy and has never received a black mark against his record since his cadet days. He believes his efficiency ratings have ranged from excellent to superior. On 18 May 1944 he had flown over the Georgia State Women's College for the purpose of dropping a note to a student who attends that college. He was at an altitude less than 500 feet on the last two passes over, but did no acrobatics and did not have the plane at a dangerous altitude at any time. When he was going over the college he was flying from east to west, at approximately 500 or 600 feet altitude, made a flat turn and came back over the campus, and threw his note out right over the swimming pool, this flight being

at an altitude of about 200 feet. After dropping the note while going from west to east he turned, flew back over the college, gained altitude, and flew home (R. 16).

Major R. C. Banbury, commanding officer of the accused, testified that accused's reputation as to character and flying ability was excellent, that he was an excellent instructor until this one instance, and that everything he knew about accused was very good. If accused is retained in the Army he would desire to have him as an instructor in his organization (R. 19).

Colonel J. S. Holtner, group commander of accused, likewise testified that accused is eager, his attention to duty is above par, his reputation is excellent, and if accused is retained in the Army he would like to have him as an instructor (R. 21).

5. The evidence shows that accused several times flew a military airplane over the campus of the Georgia State Women's College, Valdosta, Georgia, on the afternoon of 18 May 1944. The last pass was made at an altitude of 90 to 100 feet, and accused himself admitted that two of the passes were below an altitude of 500 feet, the last pass, according to accused being at an altitude of around 200 feet. The line of flight of accused's plane over the campus took him directly over a baseball diamond where a softball game was in progress, the game being witnessed by "quite a few" spectators.

6. War Department records show that accused is 23 years of age. He was appointed a cadet of the United States Military Academy on 1 July 1940, and upon graduation was appointed a second lieutenant in the Air Corps of the Regular Army on 1 June 1943. He was promoted to first lieutenant 1 December 1943. The Adjutant General's Office reports that there are no efficiency reports on file in that office pertaining to accused.

7. A letter of clemency signed by the president of the court trying this case and addressed to Commanding General, Third Air Force, states that the court unanimously requests that the sentence of dismissal be commuted to a sentence of restriction of accused to his post for three months and a forfeiture of \$75 per month for eight months. The court recommends clemency for the accused because of his exemplary record as a cadet in the United States Military Academy, and as an officer, the high regard in which he is held by his superior officers, and his ability as an instructor.

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8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, 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.

Thomas M. Jaffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Truitt, Judge Advocate.

SPJGV
CM 259540

1st Ind.

War Department, J.A.G.O., **11 OCT 1944** 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 Dale S. Sweat (O-26299), 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, to support the sentence and to warrant confirmation of the sentence.
3. Consideration has been given to the recommendation for clemency unanimously made by the court, to the inclosed letter from Miss Bettye Bowen in which she requests clemency, and also to the attached memorandum of Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 7 October 1944, recommending that the sentence be commuted to a forfeiture of pay in the amount of \$100 per month for twelve months. I concur in the recommendation of General Giles.
4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



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

- 5 Incls.
- Incl.1-Record of trial.
 - Incl.2-Ltr from Miss Bettye Bowen.
 - Incl.3-Memo from Gen Giles 7 Oct 44.
 - Incl.4-Dft of ltr for sig S/W.
 - Incl.5-Form of action.

(Sentence confirmed but commuted to forfeiture of \$100 pay per month for twelve months. G.C.M.O. 587, 25 Oct 1944)



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

1 AUG 1944

(359)

SPJGH
CM 259541

UNITED STATES)

v.)

Second Lieutenant JAMES D.
WADE, JR. (O-693714), Air
Corps.)

THIRD AIR FORCE

Trial by G.C.M., convened at
Barksdale Field, Louisiana,
20 June 1944. Dismissal, total
forfeitures and confinement for
one (1) year. Disciplinary Bar-
racks.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant JAMES D. WADE, JR., 5th Tow Target Squadron, Palacios Army Air Field, Palacios, Texas, having been restricted to the limits of Palacios Army Air Field, Palacios, Texas, did, at Palacios Army Air Field, Palacios, Texas, on or about 25 March 1944, break said restriction by going to Bay City, Texas.

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

Specification: In that Second Lieutenant James D. Wade, Jr., 5th Tow Target Squadron, Palacios Army Air Field, Palacios, Texas, on temporary duty at Barksdale Field, Louisiana, did, at Barksdale Field, Louisiana, absent himself without proper leave from about 25 April 1944 until apprehended at Fort Smith, Arkansas, on or about 4 May 1944.

He pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one (1) year.

Evidence was considered of a previous conviction by a general court-martial of absence without leave for two days in violation of the 61st Article of War and of making a false official statement in violation of the 96th Article of War. 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 the 48th Article of War.

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3. Evidence for the prosecution:

a. The Charge: General Court-Martial Orders No. 147, Headquarters Third Air Force, Tampa, Florida, 22 February 1944 (Ex. A), shows a sentence adjudged 4 February 1944 and approved by the reviewing authority, which includes restriction of accused "to the limits of the post where he may be serving for two (2) months" (R. 7).

Second Lieutenant Robert O. Davison testified by deposition (Ex. B) that on his tour of duty as Officer of the Day at Army Air Field, Palacios, Texas, on 26 March 1944, he discovered that the bed of accused had not been slept in and that his blouse was missing from his room. He made a thorough check of the field but could not locate accused and thereupon reported his absence to Captain Walter W. Dickson, commanding officer of the 5th Tow Target Squadron. The depositions (Exs. C and D) of Second Lieutenant Peter T. Brennan and Captain Stanley R. Potts, show that on 26 March 1944, Lieutenant Brennan, acting on instructions from Captain Dickson, made a search for accused and located him in room No. 27, Bay Tex Hotel, Bay City, Texas. He informed accused that Captain Dickson requested accused to return to the field as soon as possible. At about 6:20 on the morning of 27 March Lieutenant Brennan received a telephone call from accused asking transportation back to the Army Air Field. Accompanied by Captain Potts and a warrant officer, Lieutenant Brennan called at the Bay Tex Hotel for accused and gave him a ride back to the field (R. 7).

b. Additional Charge: Paragraph 32 of an extract (Ex. E) of Special Orders Number 110, Headquarters, Army Air Base, Barksdale Field, Louisiana, dated 19 April 1944, shows accused ordered to proceed immediately from Army Air Field, Palacios, Texas to Army Air Base, Barksdale Field, Louisiana, for the purpose of general court-martial proceedings and to return upon completion of the proceedings. It was stipulated between the prosecution, defense counsel and accused, that accused arrived at Barksdale Field, Louisiana on 22 April 1944, and signed the official register at headquarters; that the following day accused could not be found; and that a search made by the provost marshal on 25 April 1944 failed to reveal his whereabouts (R. 7-8).

Mr. Lamar Higgins, a police officer of Fort Smith, Arkansas, testified by deposition (Ex. G) that on 4 May 1944, he found accused registered at the Southern Hotel, Fort Smith, Arkansas, that he went to the room occupied by accused, placed him under arrest and turned him over to the provost marshal, Camp Chaffee, Arkansas. An extract copy (Ex. F) of a morning report of the Post Stockade, Camp Chaffee, Arkansas, shows accused from arrest in hands of civilian authorities to confinement in hospital, 4 May 1944; and released from confinement in hospital, 8 May 1944. Accused left under guard to return to Barksdale Field (R. 8-9).

On 24 May 1944 the accused after being advised of his rights gave a sworn statement (Ex. H) to Captain Edward W. Napier, Jr., investigating officer. He stated therein that he was a member of the 5th Tow Target Squadron stationed at Army Air Field, Palacios, Texas, that on or about 22 April 1944 he was brought to Barksdale Field by military aircraft and on

arriving signed the officers' register at Headquarters and obtained quarters at the "BOQ". He visited the officers' club during the afternoon and "contacted" the office of Captain Wilkerson (the trial judge advocate) advising "them" of his presence on the field. He stated that on the following morning Captain Wilkerson "called" him to come to his office but he went back to bed. During the afternoon he was awakened by another call from Captain Wilkerson and was again told that Captain Wilkerson wanted to see him. At about 5:00 p.m. he went to the office of Captain Wilkerson but found it locked. The accused stated that on returning to his quarters he started drinking vodka and from that time until he was "picked up" at Fort Smith, Arkansas, he did not remember anything that occurred or any place he had been. This period of time was "a complete blank" in his memory. When he "found" himself in Fort Smith, he requested a city officer to place him in the hands of military authorities, which was done, and he was taken to the hospital at Camp Chaffee where he remained until about 8 May 1944. He had no permission to leave Barksdale Field. The accused further stated that at times he considered himself a "heavy drinker" and in the past had suffered from loss of "recollection or memory" during the periods he was under the influence of liquor (R. 9-10).

4. No evidence was offered by the defense. The accused elected to remain silent (R. 10).

5. a. The Charge: It is shown by the evidence and admitted by the plea of guilty that accused, stationed at Palacios Army Air Field, Palacios, Texas, was restricted to the limits of his post for a period of two months by a duly approved sentence of a general court-martial, adjudged 4 February 1944. On or about 25 March 1944 he broke his restriction by going to Bay City, Texas, as alleged.

b. Additional Charge: The evidence further shows and it is admitted by the plea of guilty that the accused without proper leave absented himself from his station at Barksdale Field, Louisiana, where he was on temporary duty, from about 25 April 1944 until he was apprehended at Fort Smith, Arkansas on 4 May 1944.

6. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 22 October 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 1 October 1943.

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

(362)

legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War or 96th Article of War.

Samuel M. Davis, Judge Advocate.

Robert J. Cannon, Judge Advocate.

J. J. Lott, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

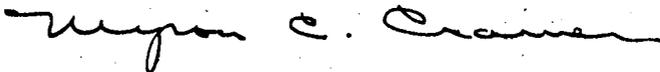
14 AUG 1944

- To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James D. Wade, Jr. (O-693714), 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 broke a restriction to the limits of his post imposed upon him (Spec., the Chg.) and on another occasion was absent without leave for about nine days (Spec., Add. Chg.). The court considered evidence of one previous conviction by a general court-martial of absence without leave for two days and of making a false official statement, for which he was sentenced to be restricted to the limits of his post for two months and to forfeit \$50 per month for six months. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for one year be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

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



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

3 Incls.

Incl.1-Record of trial.

Incl.2-Drft. of ltr. for
sig. Sec. of War.

Incl.3-Form of Ex. action.

(Sentence confirmed but forfeitures and confinement remitted.
G.C.M.O. 550, 10 Oct 1944)

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

(365)

21 JUL 1944

SPJGH
CM 259545

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
	)	CAMP CROFT, SOUTH CAROLINA
v.)	
Private ARCHIE B. ROWE	)	Trial by G.C.M., convened at
(35931978), Company D,	)	Camp Croft, South Carolina,
34th Infantry Training	)	4 July 1944. Dishonorable
Battalion, Camp Croft,	)	discharge and confinement for
South Carolina.	)	seven (7) years. Reformatory.

HOLDING by the BOARD OF REVIEW
DRIVER, O'CONNOR 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 pleaded guilty to and was found guilty of being absent without leave in violation of the 61st Article of War and of larceny involving a value of more than \$20 but less than \$50 in violation of the 93rd Article of War. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to seven years, and designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement.
3. Immediately after the prosecution had rested the defense moved that accused be permitted to change his plea of guilty to the Specification alleging larceny, to a plea of not guilty. The court denied the motion. Whether or not the accused should have been permitted to change his plea, the Board of Review holds that the denial of the motion did not prejudice any of his substantial rights as the evidence, aside from the plea of guilty, is legally sufficient to support the findings of guilty of all Specifications and Charges.
4. The only question requiring consideration by the Board of Review is whether a Federal Reformatory was correctly designated as the place of confinement.

A Federal Reformatory may be designated as the place of confinement only in cases where confinement in a penitentiary is authorized by law (CM 220093, Unckel). The 42nd Article of War provides:

* * no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act of omission of which he is convicted is recognized as an offense of civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States * * * or by the law of the District of Columbia * * * and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary * * *.

Larceny is recognized as an offense of a civil nature, punishable by penitentiary confinement by the law of the District of Columbia if the property is of a value of \$50 or more (22 D.C. Code 2201). The maximum limit of punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for the larceny of property valued at more than \$20 but less than \$50 is one year. The offense of a civil nature must by itself be sufficient to support the reformatory confinement. Since the value of the property involved in this case is not over \$50 it follows that confinement in a Federal Reformatory is not authorized by the Manual for Courts-Martial or the District of Columbia Code.

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, total forfeitures and confinement at hard labor for seven (7) years in a place other than a penitentiary, Federal reformatory or correctional institution.

Samuel M. Driver, Judge Advocate.

Robert Cannon, Judge Advocate.

(On leave), Judge Advocate.

1st Ind.
25 JUL 1944

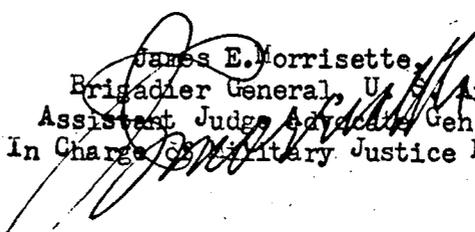
War Department, J.A.G.C.,
Infantry Replacement Training Center, Camp Croft, South Carolina.

- To the Commanding General,

1. In the case of Private Archie B. Rowe (35931978), Company D, 34th Infantry Training Battalion, Camp Croft, South Carolina, 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 seven 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, and under the provisions of Article of War 50 $\frac{1}{2}$, and Executive Order No. 9363, dated July 23, 1943, you now 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 259545).


James E. Morrisette,
Brigadier General, U. S. Army,
Assistant Judge Advocate General
In Charge of Military Justice Matters.



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

SPJGV
 CM 259563

31 JUL 1944

UNITED STATES)

92D INFANTRY DIVISION

v.)

Private ISAAC M. GRANT)
 (32318674), Medical)
 Detachment, 370th Infantry.)

Trial by G.C.M., convened at
 Fort Huachuca, Arizona, 30
 June 1944. Dishonorable dis-
 charge (suspended) and confine-
 ment for five (5) years. Ninth
 Service Command Rehabilitation
 Center, Turlock, California.

OPINION of the BOARD OF REVIEW
 TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

2. The only question requiring consideration is whether this trial by court-martial is null and void for the reason that a member of the court testified as a witness for the prosecution and thereafter resumed his seat upon the court and participated in all its deliberations.

3. At the inception of the trial the prosecution offered in evidence an extract copy of the morning report of the Medical Detachment, 370th Infantry, which bore the signature "Clifford J. Blair", Major, Medical Corps, Commanding, as certifying officer. The defense objected to its admission in evidence unless it could be "shown that this is an extract copy of the morning report" (R. 7). The law member ruled that the document was inadmissible until the genuineness of the signature had been established by the prosecution (R. 7). After a

short recess, the court reconvened and Major Frederick R. Krug, a member of the court, was called as a witness by the prosecution and testified that he was well acquainted with the signature of Major Clifford J. Blair and that the signature appearing on the proffered extract copy of the morning report was the signature of Major Blair. He also identified a signature appearing on a War Department signature card as that of Major Clifford J. Blair (R. 8-10). The witness was excused, resumed his place upon the court and thereafter the proffered extract copy of the morning report and the War Department signature card were admitted in evidence (R. 10; Pros. Exs. A, B).

4. No officer is eligible to sit as a member of a general court-martial if he is a witness for the prosecution (AW 8). If at any stage of the proceedings any member of the court be called as a witness for the prosecution he shall, before qualifying as a witness, be excused from further duty as a member of the court (MCM, 1928, par. 59). Thus, if a member of a general court-martial testifies as a witness for the prosecution, whether or not his testimony be prejudicial to accused or even though it relate merely to an unimportant collateral issue, he is ineligible as a matter of law to resume his place upon the court and if he be permitted so to do the entire proceedings are null and void (Dig. Op. JAG, 1912-40, sec. 365 (8); 1 Bull. JAG 321-322). The prohibition is absolute and is in nowise dependent upon whether or not the testimony of the member injuriously prejudiced substantial rights of the accused. The rule is a derivative from a fundamental precept of our jurisprudence, military as well as civil, that our courts, their functions and their members shall remain separate and apart from the prosecution of cases to be determined before them. Thus Major Krug's ineligibility could not be waived, and his participation in the proceedings rendered the findings and sentence null and void.

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 and the sentence.

Thomas M. Jaffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Truethen, Judge Advocate.

SPJGV
CM 259563

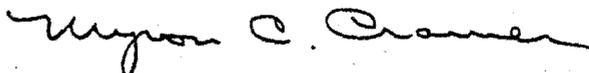
1st Ind.

War Department, J.A.G.O., ^{To the Secretary of War.}
2 AUG 1944

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (Pub. No. 325, 75th Cong.), is the record of trial in the case of Private Isaac M. Grant (32318674), Medical Detachment, 370th Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in said 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 herewith is a form of action designed to carry into effect the recommendation hereinabove made, should it meet with your approval.



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

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

(Findings and sentence vacated by order of the Acting Secretary of War. G.C.M.O. 437, 16 Aug 1944)



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

(373)

SPJGK
CM 259564

1 AUG 1944

UNITED STATES)

97TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at Fort
Leonard Wood, Missouri, 10 July
1944. Dismissal, total forfeitures
and confinement for five (5) years.

Second Lieutenant EUGENE
J. HARMON (O-1323259),)
Infantry.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant Eugene J. Harmon, 303rd Infantry, being indebted to Hotel Lincoln, New York, New York in the sum of fifteen dollars and twenty-two cents (\$15.22) for room rent and telephone charges did, with intent to defraud said Hotel Lincoln, at New York, New York, on or about 25 February 1944, move from said hotel without paying said indebtedness.

Specification 2: In that Second Lieutenant Eugene J. Harmon, 303rd Infantry, being indebted to Hotel Taft, New York, New York in the sum of three dollars and ninety-one cents (\$3.91) for room charges, did with intent to defraud said Hotel Taft, at New York, New York, on or about 25 February 1944 move from said hotel without paying said indebtedness.

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

Specification 1: In that Second Lieutenant Eugene J. Harmon, 303rd Infantry, did, at Camp Polk, Louisiana, on or about 18 December 1943, with intent to deceive, wrongfully and unlawfully make and utter to Rapides Bank & Trust Company,

(374)

Camp Polk, Louisiana, a certain checks in words and figures as follows, to wit:

RAPIDES BANK & TRUST CO. 84-23
In Alexandria

ALEXANDRIA, LA. 18 December 1943

ORDER OF Cash PAY TO THE
\$25.00

Twenty-five ----- DOLLARS

With Exchange

VALUE RECEIVED AND CHARGE TO ACCOUNT OF

TO National Bank of Lansdowne

Lansdowne, Penna.

Eugene J. Harmon
2nd Lt Inf

and by means thereof did fraudulently obtain from said Rapides Bank & Trust Company twenty-five dollars (\$25.00), lawful money of the United States, he the said Second Lieutenant Eugene J. Harmon then well knowing that he did not have and not intending he should have sufficient funds in any account with the National Bank of Lansdowne, Lansdowne, Pennsylvania for the payment of said check.

NOTE: And 6 other specifications in substantially the same form as Specification 1 except as to payees, amount of specified checks, dates, and drawee banks.

Specification 2: Payable to Rapides Bank and Trust Company, in the amount of \$50.00, dated 24 December 1943.

Specification 3: Payable to Rapides Bank and Trust Company, in the amount of \$50.00, dated 24 December 1943.

Specification 4: Payable to Hotel Lincoln, New York, in the amount of \$30.00, dated 20 February 1944.

Specification 5: Payable to Hotel Lincoln, New York, in the amount of \$25.00, dated 21 February 1944.

Specification 6: Payable to Hotel Taft, New York, New York, in the amount of \$15.00, dated 24 February 1944.

Specification 7: Payable to Hotel Taft, New York, New York, in the amount of \$15.00, dated 24 February 1944.

Specification 8: In that Second Lieutenant Eugene J. Harmon, 303rd Infantry, having received a lawful order from Major Nelson A. Voorhees, Post Adjutant, Fort Jay, New York, on 4 March 1944 to proceed without delay from Fort Jay, New York to Fort Leonard Wood, Missouri, and upon arrival at Fort Leonard Wood, Missouri to report to the Commanding General, 97th Infantry Division, said Major Nelson A. Voorhees being in the execution of his office, did fail to obey the same.

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

Specification: In that Second Lieutenant Eugene J. Harmon, Company "M", Three Hundred Third Infantry, having been duly placed in arrest in quarters on or about 23 May 1944, did at Fort Leonard Wood, Missouri on or about 31 May 1944 break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Second Lieutenant Eugene J. Harmon, Company "M", Three Hundred Third Infantry, did, without proper leave, absent himself from his organization at Fort Leonard Wood, Missouri, from about 31 May 1944, to about 3 July 1944.

He pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for 25 years. The reviewing authority approved the sentence, reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. The undisputed evidence shows that on 17 February 1944 the accused registered at the Hotel Lincoln in New York City (Pros. Ex. 1). On 25 February 1944, being indebted to the hotel in the amount of \$15.22, the accused moved from the hotel without notice and without paying this indebtedness (R. 11, Ex. 1). On 24 February 1944 the accused registered at the Hotel Taft in New York City (Ex. 5). On 25 February 1944, being indebted to the Hotel Taft in the amount of \$3.91 he moved from that hotel

without notice and without paying his bill (R. 12, Ex. 5). On 18 December 1943 the accused made and signed a check in the amount of \$25 on the National Bank of Lansdowne, Pennsylvania, and by means thereof obtained \$25 from Camp Polk Facility, Rapides Bank and Trust Company of Alexandria, Louisiana (R. 11, Ex. 2). On 24 December 1943 the accused made and signed two checks in the amount of \$50 each upon the National Bank of Lansdowne and by means thereof obtained \$100 from the Camp Polk Facility, Rapides Bank and Trust Company (R. 11, Ex. 2). On 18 December 1943 and 24 December 1943 the accused did not have sufficient funds in the Lansdowne Bank for the payment of any of the foregoing checks, his account being at that time overdrawn (R. 12, Ex. 4). On 20 February 1944 and 21 February 1944 the accused made, signed, and negotiated checks in the amounts of \$30 and \$25, respectively, upon the Vernon Bank, Leesville, Louisiana, and by means thereof obtained \$55 from Hotel Lincoln, New York City (R. 11, Ex.2). On 24 February 1944, the accused made, signed, and negotiated two checks of \$15 each upon the Vernon Bank, Leesville, Louisiana, and by means thereof obtained \$30 from Hotel Taft of New York City (R. 11, Ex.2). To induce the credit manager of the hotel to cash the checks the accused represented himself as having been overseas for several months and as having been wounded in Africa (R. 12, Ex. 5). The accused has never had any overseas service (R. 13). The accused had never had an account with the Vernon Bank (R. 11, Ex.3). Under date of 4 March 1944 Major Nelson A. Voorhees, Post Adjutant, Fort Jay, New York, issued a written order instructing the accused to proceed without delay to Fort Leonard Wood, Missouri, and to report to the Commanding General, 97th Infantry Division (R. 12, Ex. 6). The accused failed to obey this order (Ex. 6). On 23 May 1944, the accused was placed in arrest in quarters (R. 12, Ex. 7). On 31 May 1944, he breached this arrest and left without authority. On 31 May 1944, the accused went absent without leave and voluntarily returned to military control on 3 July 1944 by surrendering himself to the military police in Chicago, Illinois (R. 13,14,16; Ex. 8).

The accused offered no evidence and declined to testify, but authorized his counsel to make an unsworn statement that the indebtedness and the checks described in Charges I and II and the Specifications thereunder had been paid.

Apart from the accused's plea of guilty, the undisputed competent evidence fully supports the findings of guilty as to Charge I and the Specifications thereunder. The evidence shows that accused while a registered guest of Hotel Lincoln left the hotel without notice and without paying his bill of \$15.22 and moved to Hotel Taft. After spending one day at Hotel Taft he left that hotel without notice and without paying his hotel bill of \$3.91. Assuming that these circumstances alone are not sufficient to support an inference of fraud, when we add to them the further fact that before leaving Hotel Lincoln accused gave that hotel two worthless checks in the total amount of \$55.00 (Specifications 4 and 5, Charge II), and one day before leaving Hotel Taft he gave that hotel two worthless checks of \$15 each (Sps. 6 and 7, Chg. II), it is the opinion of the Board of Review that sufficient foundation is laid to support a

legal inference that accused left the hotels with intent to defraud in violation of Article of War 95.

With reference to Charge II (Specifications 1 to 7, inclusive), the evidence shows that while accused was in the South he issued three worthless checks on a bank in the North in which his account was then overdrawn, and that when in the North he issued four worthless checks upon a bank in the South in which he had never had any account. The only plausible inference in the light of all the evidence is that accused intended to defraud the payees of the checks.

Proof of guilt of the remaining Charges and Specifications is so clearly established as to render unnecessary any discussion thereof.

4. War Department records show that accused is 23 years old. He did not attend college. Upon completion of the prescribed course of training at the Infantry School, Fort Benning, Georgia, he was commissioned a second lieutenant of Infantry, Army of the United States, 2 August 1943.

5. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Articles of War 96, 69 and 61.

Wm. C. Jones, Judge Advocate.
William J. [unclear], Judge Advocate.
Samuel [unclear], Judge Advocate.

(378)

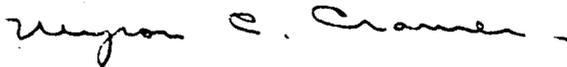
1st Ind.

War Department, J.A.G.O., 12 AUG 1944 - 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 Eugene J. Harmon (O-1323259), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed as approved by the reviewing authority, but that the forfeitures be remitted; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement; and that the sentence as thus modified be carried into execution.

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



Myron C. Cramer,
Major General,

The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

Incl.2-Draft of ltr. for
sig. Sec. of War.

Incl.3-Form of Ex. action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 491, 11 Sep 1944)

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

(379)

SPJGQ
CM 259669

- 2 SEP 1944

UNITED STATES	)	PACIFIC WING, AIR TRANSPORT COMMAND
v.)	
First Lieutenant HARRY L. ECKHARD (O-580697), Air Corps.	)	Trial by G.C.M., convened at Station #20, Pacific Wing, Air Transport Command, Army Air Forces, APO 929, 19 June 1944. Dismissal, total for- feitures and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 58th Article of War.

Specification: In that First Lieutenant Harry Lynn Eckhard, Station #20, Pacific Wing, Air Transport Command, Army Air Forces, did, at APO #929, on or about 6 May 1944, attempt to desert the Service of the United States by boarding a certain military airplane which was about to depart from Station #20, with intent permanently to absent himself without proper leave from his post and proper duties.

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

Specification 1: In that First Lieutenant Harry Lynn Eckhard, Station #20, Pacific Wing, Air Transport Command, Army Air Forces, did, at APO #929, on or about 4 May 1944, wrongfully, without authority, and with intent to deceive his superior officer, First Lieutenant Edwin Chambers, Jr., falsely make and utter a certain purported official radiogram in words and figures as follows:

(380)

"CG PW ATC
HQ STA #1
APO 953

CO STA #20 PW ATC APO 929

ISSUE ORDERS W/O DELAY ASSIGNING 1ST LT HARRY L.
ECKHARD, AC 0580697 TO HQ ATC WASH

113258

RYAN"

Specification 2: In that First Lieutenant Harry Lynn Eckhard, Station #20, Pacific Wing, Air Transport Command, Army Air Forces, did, at APO #929, on or about 5 May 1944, wrongfully, without authority, and with intent to deceive his superior officer, First Lieutenant Edwin Chambers, Jr., falsely make and utter a certain purported official radiogram in words and figures as follows:

"CO STA #25 PW ATC APO 922
CO STA #20 PW ATC APO 929

ISSUE ORDERS W/O DELAY ASSIGNING 1ST LT HARRY L.
ECKHARD AC 0580697 TO HQ ATC WASH FOR PERM CHA
OF STA

CHARLES"

Specification 3: In that First Lieutenant Harry Lynn Eckhard, Station #20, Pacific Wing, Air Transport Command, Army Air Forces, did, at APO #929, on or about 5 May 1944, wrongfully, without authority, and with intent to deceive his superior officer, First Lieutenant Edwin Chambers, Jr., falsely make and utter a certain purported official radiogram in words and figures as follows:

"5 AACS 5544, 6611E 0812
CG PW ATC STA 1 APO 953
CO PW ATC STA 20 APO 929

REF TWX THIS HQ 1132C ISSUE ORDERS IMMEDIATELY
ASSIGNING 1ST LT HARRY L. ECKHARD AC 0580697
TO HQ ATC WASH FOR PERM CHA OF STA

RYAN"

Specification 4: In that First Lieutenant Harry Lynn Eckhard, Station #20, Pacific Wing, Air Transport Command, Army Air Forces, did, at APO #929, on or about 6 May 1944, wrongfully, without authority, and with intent to deceive

his superior officer, First Lieutenant Edwin Chambers, Jr., falsely make and utter a certain purported official letter in words and figures as follows: to wit:

HEADQUARTERS
PACIFIC WING, AIR TRANSPORT COMMAND
ARMY AIR FORCES
APO No. 953
Station #1

(2a)

4 May 1944

SUBJECT: Transfer of Officer.

TO: Commanding Officer, Station #20, Pacific Wing,
Air Transport Command, APO 929

1. Issue orders without delay assigning 1st Lt. Harry L. ECKHARD, O-586097, AC, to HEADQUARTERS, AIR TRANSPORT COMMAND, Washington 25, D.C. on permanent change of station.

By command of Brigadier General RYAN:

/s/ L.S. Howell
/t/ L.S. HOWELL
Lt. Col., A.G.D.
Adjutant General"

and did falsely and without authority, simulate thereon the signature of L. S. Howell, his superior officer.

Specification 5: In that First Lieutenant Harry Lynn Eckhard, Station #20, Pacific Wing, Air Transport Command, Army Air Forces, did, at APO #929, on or about 4 May 1944, with intent to deceive First Lieutenant Edwin Chambers, Jr., his Commanding Officer, officially state to the said First Lieutenant Edwin Chambers, Jr., that he had received an official radiogram signed RYAN, from the Fifth Army Airways Communication System, Jackson's Drome Tower, APO #929, which statement was known by the said First Lieutenant Harry Lynn Eckhard to be untrue.

He pleaded not guilty to Charge I and its Specification; guilty to Charge II and each respective Specification thereunder; and was found guilty of all Charges and Specifications, except the words "absent himself without leave from his post and proper duties" contained in the Specification of

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Charge I, the court having substituted the words "to absent himself without proper leave from his organization in order to shirk important service, to wit: overseas duty" in lieu of the excepted words. No evidence of previous convictions was introduced at the trial. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of two years. The reviewing authority disapproved "so much of the finding of guilty of the Specification (as amended) of Charge I as involves the finding of guilty as to the substituted words "In order to shirk important service, to wit: overseas duty", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

At all times pertinent to the matters involved in the instant case, the accused was in the military service of the United States, assigned to duty at Station #20, Pacific Wing, Air Transport Command, Army Air Forces, APO No. 929 (R. 6; Exs. 4, 5, 6); First Lieutenant Edwin Chambers, Jr., was the Commanding Officer of Station #20 (R. 5); Colonel Chester Charles was apparently Commanding Officer of Station #25, Pacific Wing, Air Transport Command (given name supplied from Staff Judge Advocate's review; command deduced from Ex. 2); and Brigadier General William Ord Ryan was Commanding General of the Pacific Wing, Air Transport Command, APO No. 953 (reflected by official documents appearing in the record and by Ex. 1).

About 8:30 o'clock on the morning of 4 May 1944 the accused personally delivered to Lieutenant Chambers, in the latter's office, in the presence of First Lieutenant John W. Collins (R. 31), and thereafter to Second Lieutenant Lambert L. Marshall, Adjutant of Station #20 (R. 20), what purported to be a radiogram from "Ryan" (R. 7, 8, 21). This instrument, wholly typed, even to the name of the purported sender, was introduced in evidence as the Prosecution's Exhibit #4 (R. 7, 8) and reads as follows:

"CG PW ATC
HQ STA# 1
APO 953

CO STA# 20 PW ATC APO 929

ISSUE ORDERS W/O DELAY ASSIGNING 1st LT HARRY L. ECKHARD AC 0580697

TO HQ ATC WASH

11325S XXXPN

RYAN"

Neither Lieutenant Chambers nor Lieutenant Marshall indicated to accused that they questioned the authenticity of this purported radiogram at the time it was presented to them (R. 7, 19, 20, 31). Instead, Lieutenant Chambers told accused that he would be relieved of all duties and that he (Chambers) would issue the orders, as ostensibly directed (R. 8, 18); and Lieutenant Marshall told him that the orders would be issued as soon as he (Marshall) received authority from Lieutenant Chambers (R. 21). When accused had departed, however, a conference was held between Lieutenants Chambers, Marshall, and Collins with regard to whether the instrument was a genuine radiogram (R. 8). It did not appear to have been written on a teletype machine, nor did it contain Pacific Wing serial and identification numbers as it should have (R. 8, 21). Lieutenant Chambers thereafter recalled the accused to his office and asked him where he got the message, to which accused replied that he had got it from "AACS, from the crypt room" (R. 8-9, 31). Lieutenant Chambers later checked with Captain Huffman, AACS, to see if the message came through that organization and also sent a wire to Wing Headquarters requesting verification of the radiogram (R. 9).

During this same morning of 4 May 1944, after the accused had been questioned about where he obtained the purported radiogram above set out, another purported radiogram, this one ostensibly from "Charles", was delivered to Lieutenant Marshall at his desk by an enlisted man whom he does not recall and whose identity he has not since been able to ascertain (R. 21). This instrument was introduced in evidence as the Prosecution's Exhibit #5 (R. 9) and reads as follows:

"CO STA# 25 PW ATC APO 922

CO STA# 20 PW ATC APO 929

ISSUE ORDERS W/O DELAY ASSIGNING 1st LT HARRY L ECKHARD AC 0580697

TO HQ ATC WASH FOR PERM GHA OF*ATB* STA

CHARLES"

Lieutenant Marshall delivered this second instrument to Lieutenant Chambers (R. 9), who "knew it was not (a genuine instrument) because of the identical mistake in the second radiogram that I noticed in the first" (R. 10). Lieutenant Chambers asked the accused where he got this second instrument, to which accused replied, "from the AACS" (R. 10). Lieutenant Marshall had already called both the 5th AACS and the 5th AAF Intermediate Base to see if such a message had come through either organization (R. 21). Later a radiogram was sent by Lieutenant Chambers to Station #25 requesting "authorization of the radiogram" in question (R. 9).

While discussing this second instrument with the accused, Lieutenant Chambers told him that there would be a delay in writing the orders because it was necessary for him (Chambers) to get more information from

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Wing Headquarters before he could issue them. The accused thereupon offered to get the information for him but Lieutenant Chambers told him that he would himself get it the following morning (R. 10).

About 9:00 o'clock on the morning of 5 May 1944 the accused personally delivered to Lieutenant Marshall (R. 21), who in turn promptly called it to the attention of Lieutenant Chambers (R. 22, 10), still another purported radiogram, which was introduced in evidence as the Prosecution's Exhibit #6 (R. 16) and reads as follows:

"5 AAC5 5544 6611E o812
CG PW ATC STA 1 APO 953
CO PW ATC STA 2o APO 929

REF TWX THIS HQ 1132C ISSUE ORDERS IMMEDIATELY ASSIGNING 1st LT
HARRY L ECKARD ECKHARD AC o58o697 TO HQ ATC WASH FOR PERM CHA OF STA

RYAN"

Either immediately or shortly after accused had delivered this third purported radiogram to Lieutenant Chambers, the latter received a wire from Headquarters, Pacific Wing, Air Transport Command, the nature of which is not shown of record (R. 11). He thereupon relieved the accused of all duty and informed him that there would be a delay in issuing his orders for transfer, as a result of which he (accused) would be unable to get away from Station #20 immediately as he had hoped (R. 11-12).

During this same morning of 5 May 1944 a person who represented himself to be Sergeant Plokky, and that he was calling from AAC5, called Lieutenant Chambers on the telephone and gave him certain numbers which he claimed were identification numbers of the three purported radiograms set out above (R. 15). Lieutenant Chambers recognized the voice and certain peculiarities of speech of this person as those of accused (R. 15).

Lieutenant Chambers did not personally indicate to the accused that he thought the purported radiogram orders were false (R. 19). He may even have told accused on the afternoon of 5 May 1944, "that is a good deal, you getting orders to go home" (R. 20). He did not have authority to issue orders for a change of station and the reason he told the accused that he would issue such orders was because the latter's "behavior and manner was such that some of the officers in the organization expressed some concern as to what he might do", and Lieutenant Chambers wanted to find out from Wing Headquarters what action he himself should take in the matter (R. 19).

On 5 May 1944, after the accused had delivered the third purported radiogram (Ex. 6) and after Lieutenant Chambers had received the above-mentioned telephone call, Lieutenant Cooper requested the accused to go to AACS with him, which accused did (R. 31). The accused knew where the code room was, and again represented it to be the place where he had obtained the messages (R. 31). The officer and sergeant who were in charge of the code room and message center stated, in the presence and hearing of the accused, that the message (Ex. 6) was not an AACS message and, further, that there was no Sergeant Plokky in their organization (R. 31-32).

Captain P. H. Huffman, Army Airways Communication System, APO 929 (5th AACS), testified that neither of the three purported radiograms hereinabove set out is a genuine or authentic radiogram message; that neither of them had been received through AACS at Station #20; and that there has been no Sergeant Plokky in his organization (R. 32-33). The messages sent by Lieutenants Chambers and Marshall to the Headquarters from which the respective messages had ostensibly been sent requesting confirmation of the messages brought no confirmation of either of them (R. 24). The stipulated testimony of Brigadier General William Ord Ryan is that he neither directed, authorized, nor ratified either the writing or sending of either of the messages purporting to be from "Ryan" (Exs. 4 and 6); that he neither authorized, directed, approved, nor ratified the issuance of orders or directions to issue orders transferring accused from Station #20; and that no one had authority to sign his name to any radio, teletype, letter, or other message concerning or affecting the transfer or purported transfer of the accused from Station #20, Pacific Wing, ATC, to Headquarters, ATC, Washington, D. C. (R. 5, Ex. 1). The stipulated testimony of the only persons having access to the teletype room of Station #1, Headquarters, Pacific Wing, is that neither the message contained in Exhibit 4 nor that contained in Exhibit 6 nor any similar message passed through that office (R. 5, Ex. 2). Captain Roland E. Loudon, AC, PW-ATC, Adjutant at Station #25, and Staff Sergeant Nelson O. Kimball, Message Center Chief at Station #25, both testified that the purported message from "Charles" (Ex. 5) is not an official communication from Headquarters of Station #25, Pacific Wing, Air Transport Command (R. 33-34).

Prior to 4 May 1944 (date upon which the first of the purported radiograms was delivered) the accused had expressed himself to Lieutenant Chambers as being dissatisfied with his station and assignment, and, about the middle of April 1944, he had submitted to Headquarters, Station #20, a written request for transfer (R. 6-7). Lieutenant Chambers returned this application for transfer to accused for corrections as to form (R. 7) and it was not thereafter rewritten or again presented (R. 17).

About 7:00 o'clock on the morning of 6 May 1944 Lieutenant Chambers and First Lieutenant John S. Peterson were near the motor pool when they saw the accused drive out in a jeep in which he had his baggage

(R. 12, 38). Lieutenant Chambers asked him where he was going, to which accused replied that "he was going down to the line (the apron by the operations and traffic offices at Jackson Drome, R. 12) to weigh in his baggage" (R. 12, 38). Lieutenant Chambers told him it would be all right to "weigh in" his baggage but that he would not get away that day, and instructed the accused to report to him after turning in the jeep, to which accused said "O.K." (R. 12). Lieutenant Chambers made no effort to stop the accused (R. 41) but instructed Lieutenant Peterson, who was "P & T officer" for the day, and whose duty it was to check airplanes before they departed the station, to watch accused "on the line" (R. 39). Shortly afterwards, Lieutenant Peterson discovered a "B-4 bag", to which was attached a tag bearing the name of accused and listing "Washington, D. C.," as the place of final destination (R. 13, Ex. 7), in compartment C of a plane on the line (R. 39). He had the bag removed from the plane and reported the matter to Lieutenant Frost (R. 40).

First Lieutenant Jack S. Frost, operations officer, accompanied by a member of the military police, entered the plane, a C-54 Transport which was divided into several compartments, and found the accused in the radio operator's seat in the nose compartment thereof (R. 42). The door leading from this compartment to the passenger compartment was not closed (R. 42). Lieutenant Frost asked him what he was doing there, to which accused replied, "nothing" (R. 42). Lieutenant Frost told accused that the plane was about to be loaded, and the latter said, "O.K." Lieutenant Frost thereupon told him to get off the plane, that it would not be loaded until he had done so, and the accused complied (R. 42). It was not necessary to use force in order to get accused off the plane (R. 40, 43). The record of trial does not disclose what time this plane was scheduled to depart Station #20, nor its destination.

There were obviously places on the plane where it would be much easier to hide than on the flight deck where accused was found (R. 43). The crew of this particular plane included a radio operator (R. 43).

Lieutenant Chambers arrived on the scene just after the accused had alighted from the plane and told accused to return to the Camp Area and report to the Adjutant and to then remain within the confines of the area (R. 13, 42). When he had himself returned to the Camp Area, Lieutenant Chambers asked the accused why he put his baggage on the plane, to which the latter replied that he "was sending it on ahead" (R. 13). In response to Lieutenant Chamber's inquiry as to whether it had been his intention to depart the island without orders, the accused stated that "he had knowledge of other officers on transfer entering upon their travel without orders and the orders being forwarded later" (R. 24).

Later during the same day (6 May), while Lieutenant Marshall was out for lunch, a letter, sealed in a government "official business" envelope which was addressed to the Commanding Officer of Station #20, (R. 26, Ex. 9), purporting to be signed by L. S. Howell, as Adjutant General, by command of Brigadier General Ryan, and of the tenor following (R. 16, Ex. 8) was placed on his desk (R. 22), to wit:

"1. Issue orders without delay assigning 1st. LT HARRY L. ECKHARD O-580697 AC to HEADQUARTERS AIR TRANSPORT COMMAND Washington 25, DC. on permanent change of station."

Sergeant George A. Stewart supplied accused with a Station #1 letterhead about 11:30 or 12:00 o'clock, noon, on 6 May 1944, and saw the heading and subject, "transfer of officer", of a letter accused wrote (R. 35). Private Kenneth G. Ahrenholtz also saw accused writing this letter and saw "By command of Brigadier General Ryan" and the name, "L. S. Howell", signed thereto (R. 36). He furnished accused with an envelope of the same kind as Exhibit #9. The latter placed the letter in this envelope and then placed the letter and envelope in a magazine and left with them (R. 37). First Lieutenant Joe B. Taylor was in the orderly room at Headquarters, Station #20, about the noon hour of 6 May 1944 and saw the accused enter and leave it while Lieutenant Marshall was absent (R. 37). He did not, however, see accused leave anything in the orderly room (R. 37). The stipulated testimony of Lieutenant Colonel L. S. Howell is that he neither signed nor authorized any one to sign the above letter for him and that he had neither issued nor authorized the issuance of any orders for a change of assignment or station for accused (R. 5, Ex. 2).

A written and signed statement, voluntarily made by accused to the officer who investigated this case after he had been duly advised of his rights in the matter, was introduced in evidence as Exhibit #10 (R. 44) and reads in pertinent part as follows:

"I do not care to cross examine any of the witnesses who have made statements. The statements are correct.

"I did prepare the messages myself, and presented them as alleged, with the hope of getting back to Washington, D. C., to my wife and boy. The first message, signed by 'RYAN' was prepared by me on the typewriter at Tech Supply; the 'CHARLES' and second 'RYAN' messages, and the 'HOWELL' letter were prepared by me on a typewriter at the Squadron (ATC) Supply. The statement of Lt. CHAMBERS regarding my leaving the ATC area with my baggage and getting aboard the plane is correct. I prepared and attached the Personal Property Identification Tag that was on my baggage.

"I have been dissatisfied at Station #20 for sometime. Shortly after my arrival I was aware that Lt. CHAMBERS was discriminating against me, for what I didn't know. He ordered me, and Lt. TAYLOR to stand roll call at 0605 every other morning, excusing the rest of the Officers. He assigned me to five duties that kept me busy all the time, often sixteen hours a day. All this time I couldn't keep from thinking of my wife and son, who were back home. Colonel CHARLES paid a visit to our Station and severely reprimanded me as he didn't like the way I combed my hair. He also made the statement that he didn't like the way that I rolled my pant legs up two folds from the bottom to keep cool. He threatened me with dismissal from the service because I refused to rise when he entered the Officers' Club. All this lead up to the cause of me doing what I did. Seemingly small things, but under the adverse conditions overseas, they were tremendous."

4. Evidence for the defense;

Lieutenant Taylor, recalled as a witness for the defense, testified that he had lived in the same tent with accused early in March and had noticed a light colored identification tag, which he was unable to describe in detail, on the accused's B-4 bag shortly after the latter's arrival at Station #20 (R. 46). This bag had such a tag on it before the accused carried it down to "the line" on the morning of 6 May (R. 47). Tags such as were found on the accused's bag when it was removed from the plane could be procured at Hamilton Field, Hickam Field, or most any other field along the transport route (R. 48).

Having been first advised of his rights as a witness, the accused elected to make an unsworn statement. He placed the tag which was introduced in evidence on his bag when he left Hamilton Field. A large group left Hamilton Field together quite early in the morning and they had been given tags and told to put them on their bags themselves. The same tag which he then placed on his bag remained thereon until removed by Lieutenant Chambers (R. 50). The accused lives in Washington, D. C. (R. 50).

It was stipulated that the "66-2(1)" card of the accused shows that between 1 August 1942 and 2 February 1944 the efficiency ratings given the accused were three of "excellent" and three (the last three) of "superior" (R. 50).

5. Lieutenant Collins, having been recalled as a witness by the court, testified that tags of the nature found on accused's bag were in use at the air field of Station #20 and would have been accessible to the accused there (R. 51-52). They were for use on baggage to which the passenger might not have access during a trip (R. 51). He did not recall whether or not the accused "weighed in" his baggage on 6 May (R. 53). No passenger is supposed to load

his own baggage (R. 53). Compartment C of the ship on which the accused was found would be loaded through the nose of the plane (R. 52), the remaining compartments through the passenger compartment (R. 53).

6. Charge I and its Specification alone require discussion, because there is no question about the legal sufficiency of the record of trial to support the findings on Charge II and each of its respective Specifications. Not only did the accused plead guilty to Charge II and each respective Specification thereunder, such pleas constituting judicial confessions of guilt, legally sufficient of themselves to sustain the findings of guilty, but the prosecution introduced evidence, clear and convincing in nature, which establishes beyond any doubt each essential element of the offenses alleged in these Specifications. The making and uttering of false instruments of the nature involved in the instant case and the making of a false official statement, all with the intent to deceive his superior officer, constitute violations of Article of War 95. Dig. Ops. JAG 1912-1940, sec. 453(18).

The Specification of Charge I avers that the accused "did * * * attempt to desert the service of the United States * * * with intent permanently to absent himself without proper leave from his post and proper duties".

It is clear from the language that the kind of desertion intended thereby is the desertion described in M.C.M. 130a, p. 142 as "absence without leave accompanied by the intention not to return". It was equally clear that the charge did not involve the kind of desertion described in Article of War 28 - "Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter".

In the preparation of the Specification it is apparent that the No. 15 Form of Specification appearing in M.C.M. App. 4, p. 240 was used. This form is prepared in the alternative so that the author of the Specification can use either that part which is suitable for the kind of desertion alleged in the subject Specification or that part suitable for the type of desertion described in Article of War 28 above.

The prosecution having elected to charge the accused with an attempt to commit the former type of desertion by averring the specific intent required, a court-martial may not properly find the accused guilty of the latter or any different type of desertion. One is not a lesser included offense of the other, they are separate and distinct offenses (C.M. 224765 and C.M. 224932 (1942), 14 Board of Review 179, 207).

"The offense of desertion is defined as '*** absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service' (M.C.M., 1928, par. 130). Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '*** in order to avoid hazardous duty ***', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved."

The court in the instant case expressly found the accused not guilty of the words "absent himself without leave from his post and proper duties" and substituted the alternative form of desertion verbatim from Form 15 referred to which describes the other type or kind of desertion (A.W. 28). It is clear from this action that the court intended to change the charge from one kind of desertion to another. Apparently it was convinced that the accused did not intend permanently to absent himself from his post and proper duties but intended to shirk important service on the Pacific Island where he was stationed by attempting to quit his organization. The evidence in support of such a conclusion was clear and convincing while the evidence to support a finding of a specific intent to desert the service altogether was of a doubtful nature.

The court, however, in its efforts to effect the change of specific intent neglected to strike out the word "permanently", which is customarily used in connection with the type of desertion charged and not in describing desertion with intent to avoid hazardous duty or to shirk important service within the meaning of Article of War 28. This was evidently an inadvertent mistake on the part of the court as, otherwise, the finding is ambiguous and might be interpreted to mean that the accused had both, or either, specific intents. Having substituted verbatim the words describing desertion under Article of War 28 as they appear in Form 15 we are convinced that the court intended only to substitute that type of desertion for the other.

As stated above this was improper. The reviewing authority, recognizing the inability of the court properly to find the accused guilty of an attempt to desert in a manner involving a specific intent different from that alleged in the Specification, attempted to cure the error by striking out the words "in order to shirk important service, to wit, overseas duty". By striking out this specific intent, it so happens, that because of the inadvertent error made in making the substitutions, the finding substantially describes the desertion in its usual and ordinary sense and in the sense originally charged. The effect, however, is to find the accused guilty of the very type of desertion of which the court has found him not guilty. In the opinion of the Board the reviewing authority does not have the authority to effect such a change so as to bring about this result. Exceptions and substitutions may be made by a reviewing authority so as to describe a lesser included offense. The reviewing authority in the subject case has made the same error as the court - it has endeavored by an exception to find the accused guilty of an offense entirely different from the one of which the court found him guilty and which is not a lesser included offense. The record of trial is therefore legally insufficient to support the findings of guilty of Charge I and its Specification.

6. Brigadier General William Ord Ryan, Commanding General, Pacific Wing, Air Transport Command, Army Air Forces, was the appointing and reviewing authority in the instant case. Three of the false messages, for the making and uttering of which the accused was convicted herein, purported to have emanated from his headquarters. His testimony to the effect that none of them was issued either by him or under his authority was reduced to writing, signed by him, and by stipulation was introduced in evidence by the prosecution. Neither of these situations nor the combination of the two is deemed sufficient, under all the facts and circumstances, to disqualify him either from appointing the court or from acting as the reviewing authority. There is nothing to indicate that he had any personal knowledge of the facts of the case other than that he knew he had neither issued nor authorized the issuance of the messages in question. His testimony on this point was strictly negative in its nature. The instruments which were falsely made and uttered in his name are not of a nature calculated to affect him adversely either as an individual or in his official capacity, nor are they of a nature calculated to create any personal feeling of animus or ill will toward the accused. The latter confessed the falsity of the instruments and his authorship of them in his voluntary pre-trial statement to the investigating officer, pleaded guilty to each Specification involving the false messages, and there was no issue whatever made by the evidence on any fact touched upon in the stipulated testimony of General Ryan. Clearly, the latter was neither the accuser nor the prosecutor within contemplation of Article of War 8 (par. 5a, M.C.M. 1923). Nor is there anything to indicate that he had formed or expressed any opinion on the case as a whole or upon any element of either of the offenses alleged and

about which there was any conflict in the evidence (SPJGJ 250.452). We hold that no substantial right of the accused has been injuriously affected as a result of General Ryan's acting as the appointing and reviewing authority (Article of War 37). This holding should be considered as limited to the facts of this particular case.

7. Since the record of trial is legally insufficient to support the finding of guilty of Charge I and its Specification, and the only remaining charge alleges a violation of Article of War 95, it is legally sufficient to support only so much of the sentence as provides for dismissal.

8. War Department records disclose that this officer is 26 years of age and married. He is a graduate of a twelve grade public school but has not attended college. He served as an enlisted man in the Air Corps from 17 February 1937 until 31 July 1942, attaining the grade of Staff Sergeant. He was discharged on 31 July 1942 to accept appointment as temporary warrant officer (JG), which he did on 1 August 1942. Having satisfactorily completed the course of training at officer candidate school, Army Air Forces Technical Training Command, Miami Beach, Florida, he was appointed and commissioned a temporary second lieutenant, Army of the United States, on 24 July 1943 and entered on active duty the same day. He was promoted to the rank of first lieutenant on 28 October 1943. The records do not disclose that this officer has ever been employed in any civilian occupation. He has been principally engaged in airplane maintenance and repair work during his Army career.

9. The court was legally constituted. In the opinion of the Board of Review, the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, but is legally sufficient to support all remaining findings and so much of the sentence, but only so much thereof, as provides for dismissal and to warrant confirmation of the sentence to the extent stated. Dismissal is mandatory upon conviction of a violation of Article of War 95.

William H. Lambell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

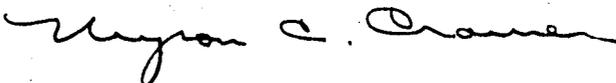
1st Ind.

War Department, J.A.G.O., **11 SEP 1944** - 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 Harry L. Eckhard (O-530697), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, but legally sufficient to support the remaining findings and to warrant confirmation of only so much of the sentence as provides for dismissal. I recommend therefore that the findings of guilty of Charge I and its Specification be disapproved; that only so much of the sentence as provides for dismissal be confirmed and that the sentence, as thus modified, be carried into execution.

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



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

3 Incls.

- 1 - Record of trial
- 2 - Dft. ltr. for sig. S/W
- 3 - Form of Executive action

(Findings of guilty of Charge I and its Specifications disapproved.
Only so much of sentence as provides for dismissal confirmed.
G.C.M.O. 598, 31 Oct 1944)



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

(395)

SPJGV
CM 259672

3 AUG 1944

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

FIRST AIR FORCE)

v.)

) Trial by G.C.M., convened at
) Walterboro, South Carolina,
) 23, 24 and 27 June 1944.
) Dismissal.

)
) Second Lieutenant FREDERICK
) D. McIVER, JR. (O-819456),
)
) Air Corps.)

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 Second Lieutenant Frederick D. McIver, Junior, Air Corps, Section F, 126th Army Air Forces Base Unit (Fighter), did, without proper leave, absent himself from his organization and station at Army Air Base, Walterboro Army Air Field, Walterboro, South Carolina, from about 10 May 1944 to about 16 May 1944.

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

Specification: (Finding of not guilty).

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

3. The accused having been found not guilty of Charge II and the Specification thereunder the evidence pertaining to this Charge and Specification will not be discussed.

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

Accused's unauthorized absence from 10 May 1944 to 16 May 1944 was shown by the original morning report of accused's organization, received in evidence without objection (R. 7; Ex. 1).

Captain Albert R. Ribansky, investigating officer, testified that after full warning as to his testimonial rights accused made a written sworn statement. This statement was received in evidence (R. 37; Ex. 3). Paragraph 2 of the statement is as follows:

"As to Charge I against me, on the Specification of AWOL I offer the following explanation. I did not leave Army Air Base, Walterboro Army Air Field on 10 May 1944 as charged. I left at 0100, 13 May 1944. I went to Richmond, Virginia to see my wife. Before I left Selfridge Field to come here, our class was promised a leave. My wife is pregnant, and realizing that after our training was completed that no leave of any kind would be granted, I wanted to see my wife before we were alerted. I was worried about the condition of my wife, and that is the only reason why I left the base."

He also told Captain Ribansky that after leaving the base on 13 May 1944 he had gone to Savannah where he caught a bus for Richmond (R. 36).

5. For the defense.

It was stipulated that accused's name does not appear on the morning reports of his organization from 10 May to 16 May 1944 inclusive (R. 39).

Second Lieutenant Elbert Hudson, a member of accused's organization, testified that he spent a Saturday evening with the accused shortly after he arrived at Walterboro on 9 May 1944, and he believes it was the first Saturday after the 9th, which would be 13 May 1944. When warned by the court that he was under oath this witness said he realized that, and that was why he could not testify for sure as to the date, but as he remembers the evening "we were crying because we weren't somewhere other than Walterboro, because Saturday night was usually our night to howl. Other than that I can't stand up and swear up and down that on that night he was with me. I know he was with me one night shortly after I got here" (R. 40).

On cross-examination when confronted with accused's statement that he had left Walterboro Army Air Base at 0100 on 13 May 1944 he said he would not swear that a particular Saturday night was the one he had in mind (R. 41).

Second Lieutenant Rixie H. McCarroll, another member of accused's organization, testified that on Saturday night, 13 May 1944, the accused came into Barracks 308 on the base, where witness and others were playing cards and spending the evening in what witness "would call a bull session" (R. 42).

When on cross-examination this witness was likewise confronted with accused's statement as to when he left the base at Walterboro witness replied he did not then see how accused could have been on the base on the night of 13 May (R. 43).

On examination by the court this witness said that what impressed on him that the Saturday night he saw accused was 13 May was that "We had this bull session and were griping about the difference between spending Saturday night in Walterboro rather than in Michigan, and I know that the topic of our discussion was about how we were spending that first Saturday night down here" (R. 43).

Second Lieutenant Wilbur F. Long, also a member of accused's organization, testified that he saw accused in a bus station in Walterboro on 14 May 1944, and bought a bus ticket for Savannah, and later that day he saw him in the Lincoln Inn in Savannah (R. 44). Accused was also seen in the Lincoln Inn in Savannah between 9 and 10 p.m. on 14 May 1944 by Second Lieutenant Arthur J. Wilburn, also a member of accused's organization (R. 46).

6. The evidence shows that accused absented himself without leave from his organization and station at Walterboro Army Air Field, Walterboro, South Carolina from 10 May 1944 to 16 May 1944. Accused himself admitted an unauthorized absence, but claimed he was absent only from 13 May to 16 May 1944, he having left his station at Walterboro Army Air Field on 13 May to visit his pregnant wife in Richmond.

The record shows that at the conclusion of the closing arguments by both defense and prosecution the court was closed, then opened and data concerning accused's age, pay, service, etc. was read to the court. The court closed and upon reopening the president announced that upon secret written ballot, two thirds of the members present at the time the vote was taken concurring found the accused not guilty of Specification 1, Charge II, "and the court orders a rehearing before a new trial for the Specification of Charge I" (R. 49). The president then began reading paragraph 89 of the

Manual for Courts-Martial, and determined that it referred to the President of the United States and not to the president of a court. He thereupon announced "The findings and statement will be stricken from the record. The court will be adjourned until 9:00 o'clock tomorrow morning" (R. 49).

The court met on 24 June 1944 pursuant to adjournment and immediately closed. Upon reopening the president stated the court would not announce its findings at this time, and that the court would be adjourned until further notice.

The court met again on 27 June 1944 at the call of the president. Three of the nine members of the court who had been present at the prior meetings were absent. The court was closed and upon secret written ballot, two thirds of the members present concurring found the accused guilty of Charge I and its Specification and not guilty of Charge II and its Specification.

In the same closed session, the court upon secret written ballot, two thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed the service (R. 50). The court was opened and the president announced the findings and sentence.

The attempt by the court at the conclusion of the trial on 23 June 1944 to order a rehearing as to Specification 1, Charge I, was absolutely null and void. The remarks of the president that his statement and the "findings" would be stricken was merely an attempt to kill something already dead.

At the meeting on 24 June the court met and merely announced that its findings would not be announced. Meeting again on 27 June the court again made findings that the accused was not guilty of the Specification of Charge II and Charge II, merely thereby reaffirming its previous finding as to that Specification and Charge, and guilty of the Specification of Charge I and Charge I. This irregular procedure by the court must be considered in light of the provisions of paragraph 78d, Manual for Courts-Martial, providing that "a court may reconsider any finding at any time before the same has been announced or the court has opened to receive evidence of previous convictions". It is true that the court did open to receive evidence of previous convictions at the conclusion of the trial on 23 June and thereafter made its announcement of the abortive attempt to order a rehearing as to the Specification of Charge I. The record does not disclose that any findings were made by the court on Charge I and its Specification at this session on 23 June.

No findings were announced at the meeting of the court on 24 June. The record discloses that at the adjourned meeting of the court on 27 June findings of guilty of Charge I and its Specification were made and announced. The net result therefore is that the court did not at any time reconsider any findings on the Specification of Charge I and Charge I after hearing the data as to previous convictions, but made its findings initially on 27 June after it had heard the evidence as to previous convictions on 23 June. Thus the provisions of the Manual cited above do not apply. The Board of Review is of the opinion that this was merely a procedural error, and did not injuriously affect the substantial rights of the accused, particularly as the trial judge advocate announced that there was no evidence of previous convictions. No legal findings as to Charge I and its Specification having been made previously, and the irregular proceeding of the court being merely procedural, the Board of Review is of the further opinion that findings made on 27 June 1944 as to this Charge and Specification are therefore legal and valid.

7. War Department records show that accused is 24 years of age. He graduated from high school and attended the University of Pennsylvania for one year. He entered military service 8 November 1940 and was appointed aviation cadet 28 February 1943. After completing the Flying Training Command Course of Instructions at Tuskegee Army Air Field, Tuskegee, Alabama, he was appointed second lieutenant, Army of the United States, on 7 January 1944.

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

Thomas M. Jaffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. French, Judge Advocate.



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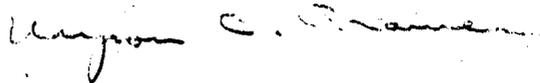
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War Department, J.A.G.O., 16 AUG 1944 - To the Secretary of War.

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 Frederick D. McIver, Jr., (O-819456), 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, to support the sentence and to warrant confirmation of the sentence. 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,
Major General,
The Judge Advocate General.

3 Incls.

Incl. 1 - Record of trial.

Incl. 2 - Dft. ltr. for sig. S/W.

Incl. 3 - Form of action.

(Sentence confirmed. G.C.M.O. 544, 5 Oct 1944)

