

OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 62

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 62

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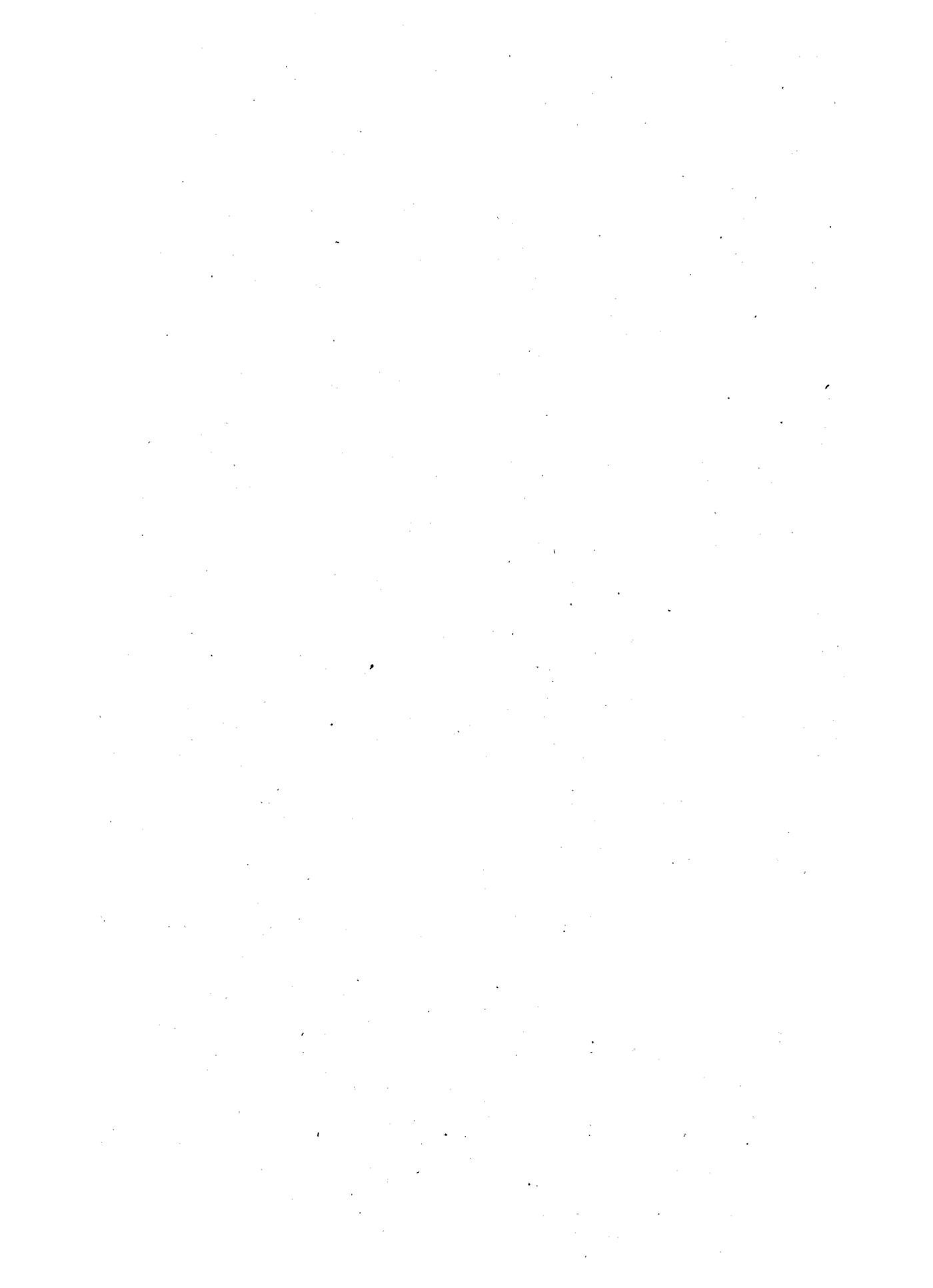
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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGQ - CM 312124

APR 24 1946

UNITED STATES	)	30TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Oschersleben, Germany, 20 May
Second Lieutenant WILLIAM T.	)	1945. Sentence: Dismissal and
JUETT, JR. (O-1032532), 30th	)	confinement for life. United
Reconnaissance Troop, Mechanized.)	)	States Penitentiary, Lewisburg,
	)	Pennsylvania.

OPINION of the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

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

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

Specification: In that Second Lieutenant William T. Juett, Jr., 30th Reconnaissance Troop, Mechanized, did, in the vicinity of Ligneuville, Belgium, on or about 16 January 1945, desert the service of the United States and did remain absent in desertion until he surrendered himself at Besancon, France, on or about 11 February 1945.

CHARGE II: Violation of the 94th Article of War.
(Finding of guilty disapproved by confirming authority.)

Specification: (Finding of guilty disapproved by confirming authority.)

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

ADDITIONAL CHARGES: Violation of the 96th Article of War.
(Nolle Prosequi)

(2)

Specification 1: (Nolle Prosequi)

Specification 2: (Nolle Prosequi)

Specification 3: (Nolle Prosequi)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Charge III and its Specifications and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, 30th Infantry Division, approved the sentence with the recommendation that, in light of accused's youth, previous good combat record, and the mitigating circumstances surrounding the offenses, the period of confinement adjudged be reduced to 35 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of the Specification of Charge II and Charge II, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

2. On 5 January 1946, the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, examined the record of trial and held it legally sufficient to support the findings, as confirmed, and the sentence. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. The Acting Assistant Judge Advocate General in charge of that Branch Office approved the holding of the Board of Review and on 5 January 1945 forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence.

3. The sentence was ordered executed on 19 January 1946 by General Court-Martial Orders No. 23, Headquarters United States Forces, European Theater, but thereafter, on 15 February 1946, by reason of the termination on 19 January 1946 of the powers conferred by the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48, 49, 50, and 50 $\frac{1}{2}$, General Court-Martial Orders No. 23, dated 19 January 1946, were rescinded by General Court-Martial Orders No. 44. The record of trial was thereupon forwarded to The Judge Advocate General, Washington, D. C., for appropriate action.

4. The record of trial has now been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C., and it adopts and concurs in the holding of the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, a copy of which said holding is annexed to the record of trial, and, for the reasons set forth therein, is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. A sentence to dismissal and confinement for life is supported by a finding of guilty of a violation of Article of War 58.

Lester A. Danielson , Judge Advocate
John A. Burns , Judge Advocate
Walter W. Davis , Judge Advocate

(4)

HEADQUARTERS, ARMY SERVICE FORCES

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON 25, D. C.

SPJGQ - CM 312124

MAY 9 1946

MEMORANDUM FOR THE UNDER SECRETARY OF WAR

SUBJECT: Record of trial in the case of Second Lieutenant William T. Juett, Jr. (O-1032532), 30th Reconnaissance Troop, Mechanized

1. Upon trial by general court-martial in the European Theater this officer was found guilty of (1) desertion in violation of Article of War 58 (Specification, Charge I), and (2) larceny of a Government jeep in violation of Article of War 94 (Specification, Charge II). He was sentenced to be dismissed the service, total forfeitures and confinement at hard labor for the term of his natural life, effective 23 May 1945. The reviewing authority approved the sentence with a recommendation that, in the light of his youth, his previous good combat record, and the mitigating circumstances surrounding the offense, the period of confinement be reduced to 35 years, and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. The Commanding General, United States Forces, European Theater, disapproved the findings of guilty of the Specification of Charge II and Charge II (larceny), confirmed the sentence, and pursuant to Article of War 50½ withheld the order directing execution of the sentence. Thereafter, the Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings as confirmed and the sentence, which said holding was approved by the Acting Assistant Judge Advocate General in charge of that Branch Office who then forwarded the record of trial to the Commanding General, United States Forces, European Theater. The sentence was ordered executed by appropriate orders, but these orders were rescinded and the record of trial was forwarded to The Judge Advocate General. The proceedings may properly be promulgated, with your action with respect to execution of the sentence, by War Department general court-martial orders.

2. The accused was a platoon leader of the First Platoon, 30th Reconnaissance Troop, Mechanized, which, on 16 January 1945, was engaged in patrolling a sector near Ligneuville, Belgium. Although the situation was tactical, the enemy was "pretty well dispersed and in no great strength * * * just scattered individuals throughout the area". Accused was ordered to report to the command post, and in company with two enlisted men proceeded to comply with this order. He was unable to or did not locate the command post, spent the night in a nearby village, and then in company with the two enlisted men went by jeep to Paris, France. One of the enlisted men accompanied him a short distance and then returned to his organization, while the other went to Paris with him but later returned to his organization. The evidence leaves no doubt that the accused absented himself without leave from his organization on 16 January 1945, and

that he remained absent therefrom until he surrendered himself at Besancon, France, on 11 February 1945. The evidence further supports the inference that this absence was attended by the intent requisite for conviction under Article of War 58, and shows that accused was mentally and legally responsible for his actions.

The accused testified in his own behalf that on 16 January 1945, while his organization was engaged in patrol duty, he left his platoon and encountered an American soldier with whom he became involved in an argument. The argument became so violent that he believed the soldier was going to shoot him and, therefore, shot him first. He felt that he had done something he "could not possibly get out of", and decided to go to Paris. He later surrendered himself at Besancon, France, at which time he was ill as a result of exposure and insufficient food. He was sent to a hospital in Dijon, France, and informed the officer of the day that he had escaped from enemy captors. While in the hospital he did not take the sleeping tablets which had been given him but retained them until he had accumulated 15 tablets. After he was turned over to the military police, he realized he was in "a mess that was going to get worse and worse as it went along" so he took all the tablets at one time. The diagnosis of his condition indicated that he was suffering from "Psychoneurosis, reactive depression, sv, with suicidal tendencies". A later psychiatric examination recited that he was "a narcissistic, egocentric, schizoid individual who is not psychotic", but was responsible for his actions.

3. Accused was inducted on 19 January 1942, completed officer candidate school, and was commissioned on 1 July 1943. On 1 November 1943, he joined his organization, and on 14 June 1944, D plus 8, arrived in France. He participated in hazardous operations until some time in July when he was wounded at St. Lo and hospitalized for ten weeks. He thereafter returned to his organization and served with it in the heavy fighting in the Battle of the Ardennes. His troop commander has stated that the performance of his duty prior to the offense was excellent, that his character was good, and that he was greatly admired and respected by the men serving under him. One officer of his organization testified that when he was given a mission he never questioned it in any way but always performed it promptly. He also stated that "the boys in his platoon * * * said * * * they would go to hell for him * * * [and that] * * * He was the best liked platoon leader in the whole platoon. He was not only liked by his whole platoon but by the entire company."

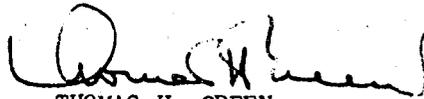
4. Accused's desertion, which occurred at one of the critical periods of the war, was a grave offense and cannot be condoned. In view, however, of his creditable record as a combat officer and the circumstances surrounding the commission of the offense, it is believed that the period of confinement should be reduced to eight years. In accordance with the policy of the War Department the place of confinement should be changed to a disciplinary barracks.

(6)

5. Inclosed is a form of War Department general court-martial orders designed to promulgate the proceedings and carry into execution the foregoing recommendation should it meet with your approval.

2 Incls

1. Record of trial.
2. Draft of GCMO



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 152, 28 May 1946).

WAR DEPARTMENT
Army Service Forces

(7)

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

SPJGK - CM 312137

5 JUN 1946

UNITED STATES)

SEVENTH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at APO 7,
c/o Postmaster, San Francisco, California,
12 and 15 November 1945. Dishonorable
discharge (suspended) and confinement
for one (1) year.

Private First Class JOHN
W. BROOKS (44047659), Head-
quarters Company, 3rd Battalion,
17th Infantry.)

OPINION of the BOARD OF REVIEW

KUDER, ACKROYD and WINGO, Judge Advocates.

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

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

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

Specification: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification: (Finding of not guilty).

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

Specifications: In that Private First Class John W. Brooks, Headquarters Company, Third Battalion, 17th Infantry, with intent to defraud SAN HWAN YUN and KANG WON KO, did, at APO-7, on or about 10 October 1945, unlawfully pretend to SANG HWAN YUN and KANG WON KO that Korean school children took watches from him, well knowing that said pretenses were false, and by means thereof did

fraudulently obtain from said SANG HWAN YUN and KANG WON KO the sum of ten thousand yen.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Original Charges and Specifications and guilty of the Additional Charge and its Specification. Evidence was introduced of one previous conviction by summary court-martial for absence without leave from about 4 March 1945 to about 7 March 1945 in violation of the 61st Article of War, for which he was sentenced to forfeit \$18.66 of his pay. In the instant case he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, suspended execution of the dishonorable discharge and designated the Philippine Detention and Rehabilitation Center, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 51, Headquarters Seventh Infantry Division, 22 December 1945. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50 $\frac{1}{2}$.

3. Evidence of fraudulently obtaining 10,000 yen alleged in the Specification of the Additional Charge, the only offense of which the accused was found guilty, is as follows:

On 4 October 1945 Mr. Sang Hwan Yun, a teacher in a Korean school in Chong-ju, Korea, was approached by the accused, whose organization was in the process of occupying the school. According to Mr. Yun's testimony, the accused

"*** told me that 20 watches were missing and he wanted to check whether they were stolen. When he told me he wanted to check the students, I told him they would not be in until 1400 and then he could come around. At 1400 all the students were assembled, about 200 of them, and this soldier told me that he would like to check them himself, but as he did not understand the language it would be easier for me to check the students myself. I checked the students but nobody had the watches. Then the soldier asked about checking the carpenters who were working on the school. I took the soldier to where the carpenters were and asked them about the watches, but they denied having the watches. The soldier then brought up the matter of the school organization and that they would have to do something about it and if the watches did not show up he would have to call the MP's and have every student checked. I did not want to get the people in charge of the school into any trouble if I could make personal compensation. At that time the soldier said that 21 watches were lost and the cost would be 20,000 yen, but he would cut it down to 10,000 yen. That was a large sum of money and I could not take care of it myself and would have to get in touch with the other members of the organization. The following day I talked with other members of the school committee. While we were sure the students did not take any

of the watches, we thought the school would be accused and thought we might as well pay the money and get it settled" (R. 11,12).

"One of the men who takes care of the finances of the school brought the money to me and I paid" the accused 10,000 yen (R. 25).

The Director of the school, Mr. Kang Won Ko, testified that it -

"*** took about three or four days to check the students for watches but nobody had the watches so we decided the students did not take them. Meanwhile [accused] came around two or three times. He said the watches were not his and if the watches were lost he would have to pay for them out of his own pocket and he did not have the money and if the watches were not returned, he would have to have money" (R. 13).

Mr. Ko "at first" told the accused -

"*** why not try to make the deal through the officer, but [accused] said that if that were the case, the officers would probably check every student, one by one, and as educational director, I did not believe in those things. I did not want the students to know that they were suspects. I was afraid it would have a serious effect on the children's psychology" (R. 14).

Mr. Yun was recalled as a witness for the prosecution and on cross-examination by the defense testified that accused had "said he thought the students might have stolen those watches so had to find out who got the watches *** and if I could not find the watches he would report it to the MP's. I thought that this would be too bad for us if the watches were not found for it would give us a bad name" (R. 24, 25).

Mr. Hack Chin Kim, the interpreter for the school authorities, testified that at some time "during this transaction" the accused showed him a bundle of money and "said it was 10,000 yen" (R. 26), and told Mr. Kim "not to talk about it to the other soldiers" (R. 25).

Private First Class Ralph J. Martin, a witness for the defense, testified that accused was watch repairman for his company, and on an unspecified date had in his possession twenty watches which he had kept in a room in a "building" and were subsequently "missing." Korean school children and American soldiers had access to the room where the watches had been kept (R. 26,27,28).

4. The Specification alleges in pertinent part that the accused did "with intent to defraud *** unlawfully pretend to Sang Hwan Yun and Kang Won Ko that Korean school children took watches from him, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said Sang Hwan Yun and Kang Won Ko" the sum of 10,000 yen. The offense alleged

is thus that of obtaining property by false pretenses, and the Specification follows the forms therefor prescribed in the Manual for Courts-Martial (App. 4, Forms 120,150). However, the evidence tends to show that the accused intended to and did extort the money from the school authorities by threatening to report his loss to his superiors and thus subject the children to further examination and injure the good reputation of the school. It was this threat which compelled the school authorities to give accused the money. They did not believe the children stole the watches and did not rely on the representations of accused that the children did steal them or might have stolen them. Furthermore, there was no proof that such representations were false and a fortiori no proof that accused knew they were false. Therefore the elements of the offense of obtaining property by false pretenses were not proved (see CM 270454, Kreis, 45 BR 289, 292; Randle v. United States, 72 App. D.C. 368, 113 Fed. (2d) 945; title 22, Sec. 1301, D.C. Code). The evidence tended to prove an offense analogous to blackmail (see CM 264680 (NATO 3117), Thomas, 3 Bull JAG 422; title 22, Sec. 2305, D. C. Code). The variance between the allegations and proof was fatal.

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

William B. Ruder , Judge Advocate
Gilbert G. Abroyd , Judge Advocate
Earl W. Wings , Judge Advocate

SPJGK - CM 312137

1st Ind.

Hq ASF, JAGO, Washington 25, D. C.

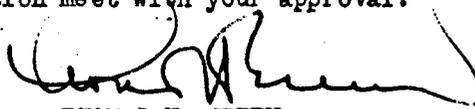
JUN 11 1946

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class John W. Brooks (44047659), Headquarters Company, 3rd Battalion, 17th 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 and the sentence and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which this accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect this recommendation, should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(G.C.M.O. 243, 31 July 1946).

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WAR DEPARTMENT
 In the Office of The Judge Advocate General
 Washington 25, D. C.

JAGQ - CM 312150

SEP 12 1946

UNITED STATES)

OKINAWA BASE COMMAND

v.)

Private JAMES E. MORRIS
 (34904776), 3078th Engineer
 Dump Truck Company, APO 331)

Trial by G.C.M., convened at
 APO 331, c/o Postmaster, San
 Francisco, California, 18
 December 1945. Dishonorable
 discharge (suspended), and
 confinement for five (5) years,
 Philippine Detention and Re-
 habilitation Center.

OPINION OF THE BOARD OF REVIEW
 WURFEL, OLIVER and McDONNELL, Judge Advocates

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

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

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private James E. Morris, 3078th Engineer Dump Truck Company, 1344 Engineer Combat Battalion, did, at APO 331, on or about 11 September 1945, assault Yoshi Odo with intent to rape, by willfully and feloniously assuming a threatening attitude, while only clothed in a shirt, by threatening with a knife, to wit a carbine bayonet, unsheathed, and by hurrying toward said Yoshi Odo, a female while said female was bathing in the nude.

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

Specifications: In that Private James E. Morris, 3078th Engineer Dump Truck Company, 1344 Engineer Combat Battalion, having received a lawful command from 1st Lt. Joseph S. Hunter, Company B, 52nd Military Police Battalion, his superior officer, to enter a Military Police Vehicle, did at APO 331, on or about 11 September 1945, willfully disobey the same.

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

Specification: In that Private James E. Morris, 3078th Engineer Dump Truck Company, 1344 Engineer Combat Battalion, did, at APO 331, on or about 11 September 1945, behave himself with disrespect toward 1st Lt. Joseph S. Hunter, Company B, 52nd Military Police Battalion, his superior officer, by saying to him, "you cock-sucker", and "you mother-fucking son-of-a-bitch", or words to that effect.

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

Specification: In that Private James E. Morris, 3078th Engineer Dump Truck Company, 1344 Engineer Combat Battalion, did, at APO 331, on or about 11 September 1945, behave in a disrespectful manner toward Technical Sergeant John E. Sawicki, Company B, 52nd Military Police Battalion, a noncommissioned officer who was in the execution of his office, by saying to him, "you cock-sucker", and "you mother-fucker", or words to that effect.

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

Specification: In that Private James E. Morris, 3078th Engineer Dump Truck Company, 1344 Engineer Combat Battalion, did, at APO 331, on or about 11 September 1945, wrongfully threaten to kill one Private Clarence S. Harrori, C-5, Military Government, ASCOMI, by gestures and stating "I'll kill you, you damn Jap, you, you", or words to that effect.

Accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 1, Charge I, and guilty of all Charges and of all other Specifications. Evidence of one previous conviction by summary court-martial of drunk and disorderly conduct in violation of Article of War 96, and of one previous conviction by special court-martial of using a Government vehicle without authority in violation of Article of War 94, was introduced. The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, suspended the execution of that portion thereof adjudging dishonorable discharge, and designated the Philippine Detention and Rehabilitation Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 6, Headquarters Okinawa Base Command, APO 331, 16 January 1946. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty as to all Charges and Specifications of which the accused was found guilty, except Charge 1 and Specification 2 thereof. This leaves for consideration the legal sufficiency of the evidence to sustain Specification 2 of Charge I and Charge I, in which it is alleged that accused assaulted Yoshi Odo with intent to rape. Only the evidence pertaining to this Specification will be reviewed.

3. Evidence for the Prosecution: Yoshi Odo, an Okinawan farmer girl, at about 1730, 11 September 1945 was taking a bath at the beach (R 19). While she was nude, two persons, one of whom she identified as the accused, approached her. Accused was clad only in a shirt and with his pants wrapped around him (R 19). Upon his approach, Yoshi started to put on her dress and another woman who was there ran away. He came in front suddenly, took his knife, opened it and said, "You and I will do this", in pidgin language. As soon as he took out his knife, which was five inches long, she ran away. She thought from his actions that he was going to kill her but did not know what he was saying (R 20). The bathing beach allocated to the natives adjoined the one allocated to military personnel (R 14).

4. Evidence for the Defense: It was stipulated that Sergeant Joe N. Davis would testify that the accused asked for and received permission to go swimming on 11 September 1945 and left the company area about 1630 (R 23; Def. Ex. A). It was further stipulated that Private First Class L. T. Jones would testify that from about 1630 to 1700 on 11 September 1945, he and accused were swimming together near Shitaiyadori and that accused had no contact with any natives during that time (R 23; Def. Ex. A).

After being advised of his rights, accused testified under oath substantially as follows: On the afternoon of 11 September 1945, he was working in the company area until 1630 at which time, with permission from his sergeant, he went down to the beach (R 23). Accused was in the pool at 1700. He washed his fatigues and left the pool about 1800. By this time he was alone. He started up the road, returning to his company, when he met a boy who wanted to trade sea shells for cigarettes (R 24). While they were talking, the MP's took accused into custody for being off limits (R 24). At that time accused was dressed in a pair of swimming trunks, had a fatigue jacket outside around his waist and carried in his hand a pair of wet fatigue trousers which he had washed (R 27). The first time he saw Yoshi Odo was at least a week after he was put into the stockade (R 24, 26).

5. In order to establish the offense of assault with intent to commit rape:

"The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice." (MCM 1928, par. 1491, p. 179).

In CM 199369, Davis, 4 BR 37, the Board of Review said, quoting from Robat v. State, 191 Tex. Cr. Rep. 468, 239 S.W. 966:

"It is essential that specific intent to commit rape be established by the testimony, and it must go beyond the mere possibility of such intent. *** The fact that the conduct attributed to the appellant was atrocious and merited punishment cannot take the place of proof establishing the elements of an assault with intent to rape.' (Underscoring supplied)".

Board of Review opinions in which it has been held that an intent to commit rape was not inferable from the circumstances are collected in CM Australia 2158, Trujillo, decided 6 July 1945 by the Board of Review for United States Army Forces in the Pacific, as follows:

"In late afternoon accused followed a six and one half years old girl to her home. He attempted to kiss her, exposed his private parts and placed his hand under her dress but did not attempt to remove her underclothing. Victim backed away; accused did not attempt to restrain her and left upon another's approach" (CM 199369, Davis, supra).

"About 1:00 A.M. a 17 years old girl was awakened by accused with his clothing removed standing next to her bed. He took hold of her shoulders and kissed her on the mouth. She got out of bed and put on the lights. Accused gave his name and outfit and 'without a bit of trouble' she led him to the door and he left saying that he was sorry" (CM 220805, Peavy, 13 BR 73).

"A 14 years old girl and her 9 years old sister were followed home by accused who grabbed victim from the rear. She fell to the ground on her stomach and he fell on top of her and put his hand on her leg under her dress, halfway between the hip and the knee. She knocked his hand away and he started to replace it but a stranger came to the door of the house and he fled" (CM 239839, Harrison, 25 BR 273).

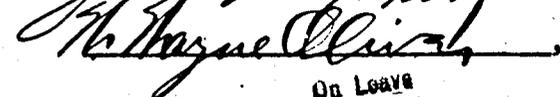
"Accused joined party of men and women previously unknown to him. At his invitation to go to his room to feed his dog, one woman accompanied him. He threw her on the bed, locked the door and turned out the lights, said he wanted to 'get hot', pulled up her skirt and opened his trousers. She screamed once, a man answered, but she screamed no more. He suddenly desisted. Held: The encouragement she had lent to his advances obviated the likelihood of intent to achieve his desire by any force necessary" (CM 245081, Whittiker, 24 B.R. 123).

"Accused, while out walking with an Army nurse, 'pinned' her to a tree and forcibly kissed her. He asked for another date that night and she consented 'provided he behaved himself'. That evening he forcibly seated her upon the ground, placed himself on her and attempted to have sexual intercourse. She screamed and struck him in the face. He struck her but immediately desisted from his attempts and assisted her to rise and took her home" (CM 244546, Klinkert, 28 BR 347).

In this case there is no evidence that accused either touched the girl, exposed his private parts to her, or spoke of intercourse. All that accused did was to draw a knife and menace Yoshi with it while saying something that she did not understand. This frightened her and she ran away and was not further molested by accused. This conduct of the accused constitutes an assault in violation of Article of War 96, but is wholly lacking in the essential element of intent to force sexual intercourse. Accordingly, it is the opinion of the Board of Review that the evidence is legally sufficient to sustain only so much of the findings of guilty of Charge I and Specification 2 thereof as involves a finding that the accused did at the time and place alleged commit an assault upon Yoshi Odo in violation of Article of War 96.

6. Accused stated that he was born in Roseville, Tennessee; he completed eight years of school and moved to Memphis in 1938, where he was a truck driver until inducted in July 1944. Accused arrived in Okinawa 12 August 1945. He was convicted by a summary court-martial in December 1944 for drunk and disorderly conduct and in January 1945 for misappropriation of a military vehicle for which he served 45 days of a six months sentence. Accused is 28 years of age, married, has one child, one step-child and a dependent grandmother.

7. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Charge I and Specification 2 thereof as involves findings of guilty of assault at the time and place and upon the person alleged, in violation of Article of War 96, legally sufficient to support the remaining Charges and Specifications and legally sufficient to support the sentence.

 , Judge Advocate.
 , Judge Advocate.
On Leave , Judge Advocate.

(18):

JAGQ - CM 312150

1st Ind

WD, JAGO, Washington, D. C.

SEP 21 1946

TO: The Under Secretary of War

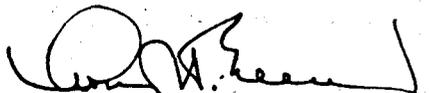
1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private James E. Morris (34904776), 3078th Engineer Dump Truck Company, APO 331.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of Charge I and Specification 2 thereof as involves findings of guilty of assault at the time and place and upon the person alleged, in violation of Article of War 96, be approved, and that all rights, privileges and property of which accused has been deprived by virtue of that part of the findings so vacated be restored.

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

2 Incls

1. Record of trial
2. Form of action



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 329, 31 Oct 1946).

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

(19)

JAGK - CM 312191

19 JUN 1946

UNITED STATES)

77TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at APO 77,
c/o Postmaster, San Francisco,
California, 14 December 1945. Dis-
honorable discharge and confinement
for life. Penitentiary.

Private First Class GLENN
R. McMAHAN (35219353),
Company A, 154th Engineer Combat
Battalion.)

REVIEW by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

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

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

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

Specification: In that Private First Class Glenn R. McMahan, Company A, 154th Engineer Combat Battalion, APO 928 c/o Postmaster, San Francisco, California, did, at APO 928 c/o Postmaster, San Francisco, California, on or about 8 November 1945, forcibly and feloniously, against her will, have carnal knowledge of Toshiko Ota.

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

Specification: In that Private First Class Glenn R. McMahan, ***, did, at APO 928 c/o Postmaster, San Francisco, California, on or about 8 November 1945, with intent to do bodily harm, commit an assault upon Shoji Ota by threatening him with a dangerous weapon to wit; a bayonet.

He pleaded not guilty to and was found guilty of both Charges and their 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, at such place as the reviewing authority may direct for the term of your natural life." The reviewing authority approved the sentence, designated the "United States" Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, paragraph 2801, of the District of Columbia Code.

William P. Kuder , Judge Advocate
Robert G. ... , Judge Advocate
Earl W. Wingo , Judge Advocate

(G.C.M.O. 203, 2 July 1946).

authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and, pursuant to Article of War 50½, withheld the order directing execution of the sentence.

3. Evidence for the prosecution: Accused and Technician Third Grade Webster Covington were members of the 809th Amphibian Truck Company, which, on 28 October 1945, was stationed at APO 73. About nine p.m. on that date they became involved in an argument, in the course of which accused was struck in the mouth by Covington, knocked to the ground and kicked in the stomach and leg (R. 17, Pros. Ex. A).

Other members of the company pulled Covington away from accused who arose and went to the supply room, where, advancing the pretext that he was going on guard duty, he asked for a rifle (R. 9; Prox. Ex. A). The Charge of Quarters took a rifle out of the rack but, noticing accused's swollen lip, anticipated something was wrong and turned to examine the guard roster before giving him the gun. As soon as the Charge of Quarters turned his back, accused seized the rifle and ran out, saying, "Don't stop me I'm coming out" (R. 9-10). He then began a search through the tents for Covington but was unable to find him (Pros. Ex. A).

Rifle in hand, accused approached Private First Class Henry L. Smith and "Sergeant Brownie", halted them and then waved them on saying, "You are not the ones I'm looking for." He added he would "get" the man he was looking for. According to Smith it was then "about 9:30 or 10:00 o'clock." Just before accused met Smith and Brownie, they had been talking to Covington who got out of sight on accused's approach. During this conversation, Covington had remarked that he had been fighting with "a new boy" and had asked for a knife so he could make a "come-back" (R. 6). After accused had passed on, Covington rejoined Smith and Brownie and the three men went to the supply room to draw rifles so that they could "get Joyce and bring him in" (R. 6-7, 9).

Accused had been gone from the supply room about fifteen minutes when Covington, Smith and Brownie arrived (R. 9). By "throwing their rank," Covington and Brownie procured rifles, with ammunition clips, and departed to search for accused (R. 9-10). Covington returned in five minutes, exchanged his rifle for another, and went out again. Ten minutes later Smith came back and turned in the rifle Brownie had taken out. The Charge of Quarters asked Smith to have Covington return his rifle, but the latter did not come back in until a half-hour later. When Covington came back, he commenced to remove the clip from the rifle, but, upon learning that accused still

had a rifle out, Covington decided to retain his and he put the clip back in the rifle and a round into the chamber. He was standing with the rifle at port arms when accused approached from the rear and said, "Don't move, I've got you covered." In the words of the Charge of Quarters, the following then transpired:

"Covington turned around facing Joyce with his rifle pointed at Joyce and Joyce pointed at him, vice versa, walked over to the partition — which they were separated only by a bed and the partition. Then Covington turned his rifle at port arms still holding his rifle in his hand, of course. * * * Covington took his rifle off Joyce and held it at port arms /Joyce's was pointed toward Covington's chest. * * * I don't really think it was up to his shoulder/. Then in some sort of conversation and some profanity, I couldn't understand any of it. I didn't know the nature of the argument. So Joyce after the few words they did have Joyce told Covington not to move / * * * I looked up in time to see the flame from the muzzle of the rifle/. I didn't actually see Covington move, but from the sound of his (Joyce's) voice, evidently Covington had started to turn the rifle on him. After Joyce had fired, he started out the back and slipped in a ditch (drainage ditch) exclaiming that he had shot Covington. I laid Covington on the bed to take off his garments to see his wound, which was a very small hole and the skin was bruised. Then Joyce came between the supply room and orderly room and pointed the rifle at me and said, 'Move Pearl before I get you to.' I made a hasty exit!" (R. 9, 11).

The sound of the rifle shot was heard by the company commander, Captain George G. Littell, in his quarters. He estimated the time as approximately 9:30 p.m. Arriving at the supply room, he saw accused there with a carbine in his hand (R. 13). The First Sergeant also came on the scene and ordered accused to surrender the rifle. He complied with the order and was taken into custody. He repeatedly remarked, "I hope I killed him, because he can't take advantage of me" (R. 13, 14-15).

Covington was removed to the hospital and, upon receiving a report a half-hour later that he was dead, Captain Littell said to accused, "Joyce I hope you're satisfied, the soldier is dead." Accused

replied that he was glad of it (R. 15). An autopsy performed on Covington's body showed that death was caused by hemorrhage resulting from a gun shot wound. The bullet entered just below the collar bone on the left side and exited in the back. The missile destroyed part of the "grave vessels" of the heart causing considerable hemorrhaging into the left chest cavity (R. 16).

On 29 October 1945, accused gave an investigator a voluntary statement concerning the shooting (R. 16-17, Pros. Ex. A). His account of events paralleled that given by witnesses for the prosecution. In part he stated:

"* * * I then looked over toward the supply room and I saw him inside of the supply room. I went over to the rear partition wall of the supply room and I put the clip into the carbine and a round in the chamber; as I came up to the partition wall Covington was facing me from inside the supply room and about four feet away (there was a cot with mosquito bar against the inside of the wall where I was standing); Covington had a carbine and looked like he was trying to put the clip into it; I told Covington to put his rifle down, but he refused and continued trying to get the clip in his carbine, so I fired one round from my carbine at him * * *."

Accused further claimed that he was "intoxicated" from drinking "Alak" but admitted that he knew what he was doing (Pros. Ex. A).

4. The defense offered no evidence. Accused, advised of his rights, elected to remain silent (R. 18).

5. It is alleged that accused "did, at APO 73, on or about 28 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Third Grade Webster Covington, a human being, by shooting him with a Carbine Cal. .30 M1", in violation of Article of War 92.

Murder is "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant without legal justification or excuse. A homicide which is done in self-defense on a sudden affray is excusable. MCM, 1928, par. 148a, pp. 162-3. "Malice aforethought" has been defined as follows:

"* * * Malice * * * 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 toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malice animo, where the fact had 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." Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711.

The Manual for Courts-Martial provides that "malice aforethought" may be found when, preceding or co-existing with the act by which death is caused, there is 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)." MCM, 1928, par. 148a, p. 163. Malice may be inferred from the use of a deadly weapon in a manner, likely to, and which does, cause death. Wharton's Criminal Law (12th Ed. 1932), Vol. I, sec. 420, p. 654-655. The words "deliberately" and "with premeditation" have been held to mean " * * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act." Wharton's Criminal Law, Vol. 1, sec. 420, p. 631.

It is undisputed that at the time and place alleged accused shot and killed Technician Third Grade Webster Covington. A half-hour to an hour previously accused had been involved in an argument with Covington and apparently had been rather severely beaten by him. Angered and revengeful accused went to the supply room, seized a rifle, and began a search for Covington. When the latter learned what accused was doing, he also armed himself with a rifle. Accused finally found Covington in the supply room. When Covington refused to drop his rifle and attempted to place a clip in it, accused shot him.

It is clear that accused is guilty of murder, unless the circumstances can be said to show that the killing was done in self-defense or in the heat of passion caused by adequate provocation. "To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty." MCM, 1928, par. 146a, p. 163. From the time accused seized a rifle until he fired the fatal shot, he was wholly the aggressor and the right of self-defense against his aggression lay in Covington's hands. In arming himself with a rifle and in attempting to load it when

accused surprised him in the supply room, Covington's actions were legitimately done in his own self-defense. The record does suggest that Covington sought a knife after the initial quarrel but there is no showing that accused was aware of Covington's intention or that Covington ever procured the knife. In the opinion of the Board of Review the circumstances are wholly inadequate to sustain a plea of self-defense on the part of the accused. Cf. CM 223574, Rowe, 14 BR 29, 36; CM NATO 550, Mitchell, 2 Bull. JAG 428.

To reduce the offense from murder to manslaughter, the shooting must have been done "in the heat of sudden passion caused by provocation." The provocation must have been "such as the law deems adequate to execute uncontrollable passion in the mind of a reasonable man." Assault and battery inflicting bodily harm constitutes adequate provocation but "where sufficient cooling time elapses between the provocation and the blow, the killing is murder, even if the passion persists." MCM, 1928, par. 146a, p. 166.

In the present case, at least a half-hour and possibly a full hour elapsed between the assault by Covington upon accused and the killing. During this period accused had procured a rifle and engaged in a search for Covington. It was a question of fact for the court whether there was sufficient time for malice to be substituted for passion. The Board of Review is of the opinion that there is substantial evidence in the record to support the finding that a reasonable cooling period intervened between the assault and the killing and that the shooting was deliberate, premeditated, and with malice. CM 221640, Loper, 13 BR 195, 208; CM 246101, Nickles, 29 BR 381; CM 260613, Albizu-Rosa, 39 BR 337, 342; CM 270744, Brazelle, 45 BR 345, 349.

6. The charge sheet shows that accused was about twenty-three years of age and that he was inducted at Camden, New Jersey, 21 December 1944.

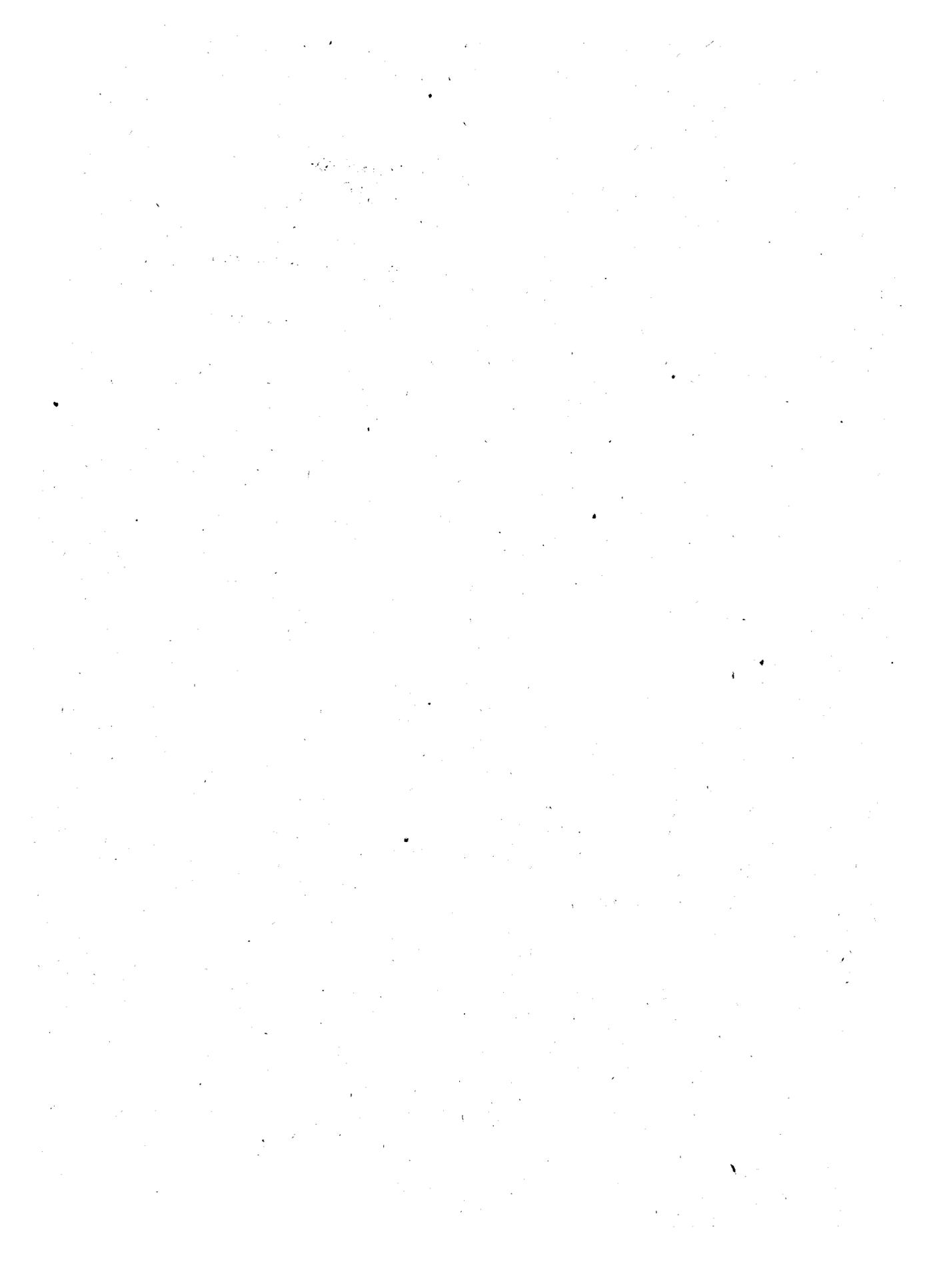
7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence either of death or 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 punished by penitentiary confinement for more than one year by Section 22-2401 of the District of Columbia Code.

Wilmot J. Baughm, Judge Advocate

Robert H. Cannon, Judge Advocate

James D. O'Shea, Judge Advocate



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

(29)

SPJGH - CM 312209

23 MAY 1946

UNITED STATES

v.

Second Lieutenant RUSSELL F.
SHELTON (O-2026842), Chemical
Warfare Service.

UNITED STATES ARMY FORCES
WESTERN PACIFIC

Trial by G.C.M., convened at
APO 932, 11 January 1946. Dis-
missal.

OPINION of the BOARD OF REVIEW
TAPPY, STERN 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 Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant RUSSELL F. SHELTON, Chemical Warfare Service, 32d Antiaircraft Artillery Brigade, did, at APO 932, during the period 1 August 1945 to 30 November 1945, wrongfully and dishonorably cohabit with one Illuminada Tindugan, a woman not his wife.

Specification 2: In that * * *, did, at APO 932, during the period 1 December 1945 to 13 December 1945, wrongfully and dishonorably cohabit with one Margarita Beloso, a woman not his wife.

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

3a. Specification 1 of Charge:

Illuminada Tindugan, a female laundress, commenced living with accused on 27 July 1945 in a house located at Tolosa, Leyte, Philippine Islands. In October 1945 Illuminada moved to Opon, Tolosa, Leyte, and accused lived there with her until 28 November 1945. Over this period of about four months the accused slept with Illuminada on the average of two nights a week and gave her 30 pesos a month to pay her rent and 20 pesos a month to pay for rice (R.7-9,11,13). During the four month period accused never ate any meals at

Illuminada's house, did not keep any personal possessions there such as clothing or toilet articles, and never took her to dances or introduced her to anyone as his wife (R.10,11,13). Although no judge or priest had solemnized any union between accused and Illuminada, nevertheless she considered herself married to accused (R.9). Ignacia Compas owned the house that Illuminada occupied at Tolosa from July until September or October 1945 and he knew that accused gave the girl money for food and rent and that accused stayed with her every night. Accused also asked Ignacia for permission to marry the girl (R.14,15).

Accused, in a voluntary statement (Pros. Ex. 1) given to the investigating officer, admitted that over a period of about three months he stayed overnight with Illuminada on the average of two or three times a week, giving her about 200 pesos over a period of four months. Accused admitted that he and Illuminada "more or less considered (themselves) married."

b. Specification 2 of Charge:

Margarita Beloso, another laundress, came from San Roque to Opon after accused asked her to occupy his house in the latter community. She lived in the house for some two or three weeks commencing 28 November 1945. During that time accused occupied the same room with her in that house on four different nights. He gave her 15 pesos for food but never gave her any money for clothes and never ate any meals with her (R.15-20). Carolina Garcia testified that she lived near Margarita during the several weeks commencing 28 November 1945 and Margarita told her that she was accused's girl friend (R.21,22). According to Technician Fifth Grade Raymond A. Erickson who lived in the house at Opon, Tolosa, accused stayed there overnight with Margarita on seven different occasions from 20 November 1945 to 13 December 1945 (R.30). From 22 November 1945 to 10 December 1945 accused slept in his regularly assigned quarters approximately five times (R.27).

In his voluntary statement (Pros. Ex. 1) accused stated that between 22 November and 13 December he was absent overnight from his quarters about four nights each week. He admitted that over a period of about ten days he remained overnight three or four times in a house that certain enlisted men had constructed, and that on those occasions Margarita Beloso spent the night with him and they engaged in sexual intercourse. Accused did not know if she occupied the house regularly and had not asked permission of the enlisted men for her so to do. Accused usually arrived at this house about 10 p.m. and left around 6 a.m. the following morning. At Margarita's request he gave her some forty or fifty pesos. He never discussed marriage, common law or otherwise, with Margarita.

4. In an unsworn statement made at the trial, accused recited that he enlisted in the Regular Army on 16 October 1939, re-enlisted for foreign service on 15 September 1941 and was commissioned a second lieutenant, Army of the United States, by direct appointment on 7 May 1945. He further stated he had served overseas for the past fifty-one months and had never previously been convicted of any offense by military court (R.31,32).

5. At the time accused's voluntary statement was introduced in evidence, the defense objected thereto on the grounds that accused was tried upon two Specifications but when the statement was taken, it appears there from that the investigating officer first read accused "seven allegations" which were involved in the investigation (R.25; Pros. Ex. 1). It does not appear that this investigation was the official investigation of the instant Charges under Article of War 70. Indeed, an examination of the documents accompanying the record of trial indicate that the official investigation under Article of War 70 was conducted by an officer other than the one who took this statement. Assuming this statement of accused was taken during a preliminary investigation to determine whether or not grounds existed for the institution of Charges, the statement was not rendered inadmissible against accused merely because it was taken during such preliminary investigation. Before the statement was taken, accused was fully advised of his rights under Article of War 24 and he thereafter elected to speak fully and freely with respect to his relations with the two women involved. In our opinion, the statement was properly admitted in evidence.

Accused was charged with wrongfully cohabiting with two different women, neither of whom was his wife, over two separate periods of time, one occurring from 1 August 1945 to 30 November 1945 and the other from 1 December 1945 to 13 December 1945. Wrongful cohabitation in military law connotes the living or dwelling together, as man and wife, of a man and woman who are not married to each other; it does not connote a mere sojourn, nor habit of visiting on occasion, nor even a remaining together for a time, but imports a continuous relationship (CM 218647, Moody, 12 BR 119; CM 257806, Engels, 37 BR231; 14 Corpus Juris Secundum 1132). It has also been said that illicit cohabitation involves a state of living together characterized by that "familiar and easy relationship" which permeates the relation of husband and wife (State v. Cassida, 67 Kan. 171, 72 P. 522).

The proof offered to establish the first cohabitation charged demonstrates that over a period of about four months, accused spent an average of two or three nights a week with a female, Illuminada Tindugan, and gave her particular sums of money each month for rent and food. Accused himself admitted that they considered themselves "more or less . . . married." Such a course of conduct indicates a continuous indulgence in, and assumption of, the incidents pertaining to the marital state and fully warranted the court's finding of guilty. That accused did not keep clothing and toilet articles in the house might, under certain circumstances, be some evidence to indicate that the relationship was something less than cohabitation. However, in view of the other evidence in this record of trial, it cannot be said that, as a matter of law, such facts here rendered the court's finding of guilty of Specification 1 unwarranted.

It is also our opinion that this offense was properly alleged as a violation of Article of War 95. Offenses against good morals in violation of public decency and propriety constitute violations of that Article of War,

(Winthrop, Mil Law & Prec., 2d ed., p. 718), and the instant offense, falling as it does within that category, has been held to be a violation thereof (CM 251104, Strader, 33 BR 137; CM 259933, Erno, 39 BR 57).

The evidence as to the second offense alleged shows that accused persuaded Margarita Beloso to come from San Roque to Opon where he provided her living quarters and over the two weeks' period alleged, he stayed with her about four nights, customarily arriving around 10 p.m. and leaving in the early morning. He gave her money for food but ate no meals with her. It is apparent from this evidence that accused had assumed to house and feed this woman and that he had access to her as he desired. He enjoyed favors legally reserved for the married male and he discharged at least some portion of the support obligation which the law imposes upon a husband. In the face of this evidence, it was for the court initially to determine whether the relationship of these two persons was tantamount to that of man and wife or whether it merely revealed an occasional sojourn together to permit indulgence in sexual intercourse. Upon this review we cannot say that the court was unwarranted in concluding as it did.

The testimony of Carolina Garcia that Margarita informed her that she was accused's girl friend was, of course, hearsay and inadmissible. However, that fact is conclusively established by other and competent evidence. Further, it had but little if any weight in establishing the offense alleged. Accordingly, the admission thereof cannot be said to have materially prejudiced the substantial rights of the accused and it did not constitute reversible error.

6. Accused enlisted in the Regular Army on 19 October 1939 and progressed to the grade of master sergeant. On 7 May 1945 he accepted a direct appointment as second lieutenant, Army of the United States. He left the United States for foreign service on 10 October 1941 and is authorized to wear the Asiatic Pacific Campaign Medal and Philippine Liberation Ribbon with one Bronze Star.

7. The court was legally constituted and had jurisdiction of the accused 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 of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tapp, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Krenshaw, Judge Advocate.

JAGH - CM 312209

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Russell F. Shelton (O-2026842), Chemical Warfare Service.

2. Upon trial by general court-martial this officer was found guilty of wrongfully cohabiting with one woman from 1 August 1945 to 30 November 1945 and of similarly cohabiting with another woman from 1 December 1945 to 13 December 1945, in violation of Article of War 95. He was sentenced to be dismissed from the service. The reviewing authority approved the sentenced and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

From approximately 1 August 1945 to 28 November 1945, accused consorted with a woman named Illuminada Tindugan who lived at Opon, Tolosa, Leyte, Philippine Islands. Over that period accused gave her money for rent and food and slept with her on the average of two nights a week, although he did not eat with her or keep clothing or toilet articles in the house. Accused stated that he and the woman considered themselves married.

Approximately 1 December 1945, a woman named Margarita Beloso came from San Roque to Opon, Tolosa, after accused invited her to occupy a house he claimed to own in the latter community. From then until 13 December 1945 accused slept with her four nights in that house, built and occupied by enlisted men, and furnished her money to purchase food. Enlisted men who occupied quarters in this house were aware of accused's relations with Margarita.

Accused's conduct was unbecoming an officer. I recommend that the sentence be confirmed and carried into execution.

(34)

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 205, 23 June 1946).

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

JAGK-CM 312219

16 SEP 1946

UNITED STATES)

v.)

Second Lieutenant EDWIN R. MURRAY,
 JR. (O-933341), Air Corps, 357th
 Bombardment Squadron, 331st
 Bombardment Group.)

HEADQUARTERS TWENTIETH AIR FORCE

Trial by G.C.M., convened at
 Twentieth Air Force, APO 234,
 2 February 1946. Dismissal.

OPINION of the BOARD OF REVIEW

SILVERS, McAFEE and ACKROYD, 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 on 2 February 1946 upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Edwin R. Murray, Jr, 357th Bombardment Squadron, 331st Bombardment Group, did, at APO 182, care of Postmaster, San Francisco, California, on or about 9 January 1946, wrongfully sell three one-fifth gallon bottles of whiskey to Seaman First Class Donald L Clark, 53d Construction Battalion.

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

3. For the Prosecution.

At about 1900 hours on the evening of 9 January 1946, First Lieutenant Glenn E. Bone, Air Corps, Provost Marshal of 315 Bomb Wing, observed a truck to stop in front of an unlighted barracks in the officers' quarters of the 331 Bomb Group Area. The truck was then seen to move on to a lighted barracks and a person dressed in "seabee clothes," later identified as Seaman First Class Donald L. Clark, dismounted and entered the building (R 9). The accused and Flight Officer Richard A. Phipps, 331 Bomb Group, were in this building. Seaman Clark approached accused and produced a \$50 bill offering to pay \$15 a bottle for some whiskey. Accused went to his footlocker, brought out three bottles of liquor, handed it to Clark and accepted the \$50 bill (R 8-22). Seaman Clark left the building carrying three bottles of whiskey and Lieutenant Bone entered finding accused searching for change so as to refund \$5 to Clark. Lieutenant Bone asked if he was familiar with the regulations concerning the sale of whiskey. Accused replied, "Yes, I am, \$15 a bottle is a little too high." Lieutenant Bone then asked accused what he was going to do with the money whereupon accused replied, "I am going to give it back to the man, which he proceeded to do" (R 9). The whiskey was confiscated by the Provost Marshal, introduced in evidence at the trial and withdrawn by consent of the court at the conclusion thereof (R 11; Pros. Ex. 2, 3, 4).

Without objection by the defense, there was received in evidence a copy of General Order 28-45, Headquarters, Island Command, Guam, dated 17 June 1945, the pertinent portion thereof being as follows:

"3. (c) Officers are forbidden to sell, barter or give alcoholic beverages to enlisted personnel, and are forbidden to purchase from, sell to, barter with or give alcoholic beverages of any kind, including beer, to natives."

The prosecution also offered in evidence a sworn statement made by the accused in the presence of First Lieutenant Courtney R. Johns, JAGD, the Investigating Officer. This statement was shown to have been voluntarily made and signed (R 28). The defense objected to the introduction of this statement on the grounds that "affidavits are not normally admissible," however the objection was overruled and the statement was received in evidence and marked for identification (R 29; Pros. Ex. 5). In his sworn statement the accused admitted the sale of the liquor as alleged, stated that the bottles were in a set consisting of one package and that he had never before sold any liquor to enlisted personnel (Ex. 5). Captain Boyd P. Chapman, Jr., 331st Bomb Group, was called as a character witness for the defense. He testified that he had known Lieutenant Murray since December 1944 and that, in his opinion, the accused was a "very fine, up-standing, straightforward, honest officer." He further stated that accused always did his job well and was liked by his fellow officers (R 32).

No further material evidence was presented by either the prosecution or defense and the accused, through counsel, elected to remain silent.

4. Except for the reference to "APO 182," the proof does not disclose the place where the offense was committed, however the court was authorized to, and obviously did take judicial notice that such Army post office refers to the Island of Guam, Marianas Group. The accused was therefore under the command of the Commanding General, Headquarters Island Command, Guam, and the offense herein alleged is shown to have been in direct violation of paragraph 3c, General Order No. 28-45, 17 June 1945, of such command.

It was not error for the court to admit in evidence the affidavit of accused, since it was proven to have been voluntary on his part and the fact that it was sworn to before the investigating officer during the investigation of the charge would not operate to render the same inadmissible (par. 114a, p. 114, MCM, 1928).

5. There is no dispute as to the facts in this case. The more serious problem is the application of the law to the facts and thus a determination of whether the acts complained of and proven constitute a violation of Article of War 95. In CM ETO 6881, 4 Bull. JAG 234, it was held that two officers who, after having fraudulently acquired considerable quantities of whiskey as a ration allowance for an imaginary battalion, openly and publicly peddled this whiskey (quoted at the ration station at $76\frac{1}{2}$ franks per bottle) to enlisted men at 1000 franks per bottle. The conduct of accused in that case was considered as being comparable to that of professional "bootleggers" and properly established their lack of the qualities demanded of an officer and gentleman. Such misconduct was therefore construed as coming within the purview of Article of War 95. It will be noted that in that case there was fraudulently procured large quantities of liquor, indicating an evil purpose to engage in illicit sales thereof, and the open "peddling" at exorbitant prices of the liquor so procured. The proof in the present case extends no further than to show that an enlisted man of the Navy, finding a light in accused's quarters, entered the building, made an offer to purchase three bottles of whiskey and that the accused, in violation of published orders, sold the seaman three bottles at what may be construed as an excessive price. In order for such act or acts to constitute a violation of Article of War 95, they must dishonor or disgrace the individual personally as a gentleman, seriously compromise his position as an officer and exhibit him as morally unworthy to remain an officer. The Board of Review is of the opinion that under the facts in this case there is no showing of such depravity on the part of accused, or such dishonor to the military profession as to render accused unworthy to associate with his fellow officers without their loss of self respect. CM 235382, Singlitary, 21 BR 389; CM 264728, Price, 42 BR 255; also CM 307051, Glass (1946). The Board of Review, therefore, holds that the record of trial is legally sufficient to support only so much of the findings of guilty as finds the accused guilty of the specification, in violation of Article of War 96.

6. War Department records show that accused is 24 years of age and unmarried. He was attending college, majoring in engineering, when inducted into the Army as a private, at Lincoln, Nebraska, in March 1943. After completion of the regularly prescribed courses of training at various air fields, he was, on 27 July 1945, commissioned a second lieutenant, Army of the United States. He has a total of 975 hours' flying time, 200 hours of which he was first pilot, and engaged in eleven combat missions, consisting of the bombing of Japan, the Philippines and Okinawa. He is authorized to wear the Asiatic Theater ribbon with two battle stars and the air medal.

7. The court was legally constituted and had jurisdiction over the accused and of the offense at the time of trial. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of the specification of the Charge and legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of Article of War 96, and legally sufficient to support the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Charles F. Silver Judge Advocate

Charles E. McFee Judge Advocate

Robert S. Lehman Judge Advocate

JAGK - CM 312219

1st Ind

WD, JAGO, Washington 25, D. C.

OCT 14 1946

TO: The Under Secretary of War

1. There are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edwin R. Murray, Jr. (O-933341), 357th Bombardment Squadron, 331st Bombardment Group.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Charge (violation of Article of War 95) as involves a finding of guilty of violation of Article of War 96 and legally sufficient to support the sentence to dismissal. The Board has, however, addressed to me a memorandum, which is inclosed, inviting attention to the fact that accused was released from active duty and separated from the service on 15 June 1946, following his trial but pending final action on the sentence. The Board expresses the opinion that the release of accused from active duty effected constructive or implied remission of the sentence previously adjudged and that the sentence may not now legally be carried into execution. I concur in that opinion and recommend that the proceedings be treated as having been abated and that no further action be taken by way of exercise of the confirming power or publication of the proceedings in a general court-martial order.

3. A form of indorsement on the record declaring the case abated is inclosed for your use should such action meet with approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls

- 1. Record of trial
- 2. Memo for TJAG
16 Sep 1946
- 3. Form of action

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

JAGH-CM 312242

25 SEP 1946

UNITED STATES)

THIRD INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
 Reinhardshausen, Germany, 9
 January 1946. Dismissal and
 total forfeitures.

Second Lieutenant EMERON A.
 ST. PIERRE (O-1331677),
 Company "H", 30th Infantry.)

 OPINION of the BOARD OF REVIEW
 HOTTENSTEIN, SOLF and SCHMAGER, 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 2nd Lt. EMERON A. ST. PIERRE, Company "H", 30th Infantry, did, without proper leave, absent himself from his station at Bettenhausen, Germany, from about 17 September 1945 to about 12 November 1945.

He pleaded not guilty to, and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was a member of Company H, 30th Infantry, stationed at Bettenhausen, Germany, during September, 1945. On or about 8 September, the accused was under orders to attend the I & E School at Oberammergau, Germany, for a five-day period from 10 September to 15 September. Upon completion of the course, accused was to return to his company (R 7, 8). Accused and Lieutenant Bishop, who was in the same regiment, received verbal orders from the battalion I & E officer and thereupon departed for school by jeep (R 17). The trip to Oberammergau took two days and the school course

started on Monday and ended on Saturday noon, during which period Lieutenant Bishop and the accused attended some classes together (R 14). At noon on Saturday, 15 September, the accused and Lieutenant Bishop left Oberammergau by jeep to return to their respective companies. They spent that night in Salzburg and the night of 16 September in Augsburg. On the following morning (17 September), the jeep driver and Lieutenant Bishop proceeded back to their organization arriving there that same evening, but accused "elected to remain at Augsburg." The accused informed Lieutenant Bishop that "he better stay there to enter the hospital, that his kidneys had been giving him trouble." However, Lieutenant Bishop took the bedroll of the accused back to his company (R 15). The accused was not present for duty with his company from 17 September to 12 November 1945. He did not have permission to remain away during that period (R 8, 9). He finally returned to his company on 12 November 1945 at Melsungen, Germany, the place to which the company had moved during his absence.

Over the objection of the defense, the prosecution introduced into evidence an extract copy of morning reports of Company H for 8 September, 13 November and 16 November 1945 showing accused from "Dy to TDY I & E Staff School sc 8th"; "TDY I & E School to Dy"; and "CORRECTION: 13 November 1945 REMARK: St. Pierre, Emeron A., O-1331677, 2nd Lt. (Inf.) TDY I & E School to Dy is revoked. SHOULD BE: TDY to AWOL, sc on or about 17 Sept. 1945, ALSO: AWOL to AR in Quarters sc 1500, 13 November 1945," respectively. And again, over defense objection, the trial judge advocate introduced into evidence letter orders of Headquarters Third Infantry Division, dated 7 September 1945, placing the accused on temporary duty with the I & E School at Oberammergau to attend an I & E course beginning 10 September and ending 15 September, upon completion of which temporary duty accused was to return to his proper organization and station.

4. Evidence for the defense: Lieutenant Bishop was recalled as a witness for the defense and testified that he had never seen the letter orders nor had he ever seen the accused in possession of written orders. In fact, Lieutenant Bishop and the accused had experienced great difficulty in securing a hotel room because they did not have written orders (R 23). On examination by the court, Lieutenant Bishop disclosed that when he registered at the school he learned that the course would terminate the following Saturday at noon (R 24). Lieutenant Terry, present company commander and former platoon leader of the accused's company, was recalled as a defense witness and testified that the remarks made on the company morning report for 16 November 1945 were placed there on orders received by him from the battalion commander. However, Lieutenant Terry admitted that he had seen copies of the letter orders before the accused returned to the company and that the witness knew that the other officers who had left with the accused returned on 17 September. While company commander, Lieutenant Terry never received any official communication from any military hospital pertaining to the accused (R 27, 28). The accused, after being advised of his rights as a witness, elected to remain silent (R 29).

5. The extract copy of the morning report for 16 November 1945, being patently based on hearsay, was incompetent and, therefore, was erroneously admitted into evidence over the objection of the defense (Dig. Op. JAG, 1912-40, Sec. 395(18); CM 231469, Marcellino; CM 273877, Coleman; CM 273922, Ortega). Further, the entry amounts to a mere conclusion of law. Since the principal facts from which this conclusion was drawn appear of record, these latter facts and circumstances rather than the conclusions are considered for the purpose of determining whether the evidence is legally sufficient to sustain the findings that the accused went "AWOL" on 17 September 1945. In the opinion of the Board, the competent admissible evidence in this case was so incriminating and compelling as to exclude "any fair and rational hypothesis except that of guilt" (par. 78a, MCM, 1928, p. 63). Therefore, in the face of ample other competent evidence to compel the findings, the error committed in admitting a morning report based on hearsay was not prejudicial to the substantial rights of the accused (CM 127490; CM 130415, Smith; Dig. Op. JAG, 1912-30, Sec. 1284, p. 364; CM 211829, Parnell; CM 255083, Hargrove; CM 261964, Erophy; CM 266722, Benton).

6. The admission into evidence of the letter orders placing the accused on temporary duty was proper. Assuming, from the testimony of Lieutenant Bishop, that the accused neither received nor saw the orders, prosecution had the right to show that the verbal orders and instructions given by the battalion I & E officer were issued pursuant to valid and competent authority. Further, a special order is binding upon the person concerned if delivered or made known to him (Dig. Op. JAG, 1912-30, Supp. VII, Sec. 47(2); CM 211586, Gerber). Here, the accused was under verbal orders to report to school at the time and place and for the period specified in the letter orders. It is clear that the gist of the written orders was orally transmitted to the accused. Hence, the letter orders upon which these instructions were made are properly admissible in evidence.

7. Despite the obvious error of improperly admitting into evidence the hearsay morning report, the prosecution established, by other competent and compelling evidence, a prima facie case of absence without leave. The burden then shifted to the defense to explain the absence. This the accused failed to do.

8. The accused is 29 years of age and married. The records of the War Department show his service as follows: Enlisted service from 17 March 1941; appointed second lieutenant, Army of the United States, from Officer Candidate School, and active duty on 30 January 1945. His overseas service includes some combat as an infantry platoon leader. There is no record of any previous disciplinary action.

(44)

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

[Signature], Judge Advocate
[Signature], Judge Advocate
On Leave, Judge Advocate

JAGH - CM 312242

1st Ind

WD, JAGO, Washington 25, D. C.

SEP 28 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Emeron A. St. Pierre (O-1331677), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his station at Bettenhausen, Germany from 17 September 1945 to 12 November 1945. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

On 8 September 1945 accused and another officer from his regiment left the organization on verbal orders to attend a course of instruction at the I&E School in Oberammergau, Germany from 10 September 1945 to 15 September 1945. Upon completion of the course, both officers were to return to their unit. The school's course terminated on 15 September 1945 at which time both officers started back, spending several nights at different cities en-route. On the morning of 17 September 1945 accused "elected to remain at Augsburg", Germany, stating that "he better stay there to enter the hospital, that his kidneys had been giving him trouble". The other officer returned to the unit that same evening. Accused reported back to his organization on 12 November 1945. No explanation was offered by the accused for his unauthorized absence. The company commander never received any official communication from a military hospital, pertaining to the accused.

The unexplained behavior of the accused in absenting himself without leave for a period of almost two months demonstrates that he is unworthy of his commission. 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.

4. Inclosed is a form of action designed to carry the foregoing recommendation into effect, should such recommendation meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1 - Record of trial

2 - Form of action

(G.C.M.O. 308, 15 Oct 1946).



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

SPJGN-CM 312266

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

WESTERN BASE SECTION)

v.)

Trial by G.C.M., convened at
 Marseille, France, 15 November
 1945. To be hanged by the neck
 until dead.)

Private HENRY GRAYER)
 (38314474), 176th Port)
 Company, 525th Port Battalion,)
 Transportation Corps.)

OPINION of the BOARD OF REVIEW
 BAUGHN, O'CONNOR and O'HARA, 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 Charges and Specifications:

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

Specification: In that Private Henry Grayer, One Hundred Seventy-Sixth Port Company, Five Hundred Twenty-Fifth Port Battalion, Transportation Corps, did, at Marseille, France, on or about 8 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class George B. Davis, a human being by shooting him with a pistol.

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

Specification: In that Private Henry Grayer, One Hundred Seventy-Sixth Port Company, Five Hundred Twenty-Fifth Port Battalion, Transportation Corps, did, at Marseille, France, on or about 8 October 1945, with intent to do

him bodily harm, commit an assault upon Private Richard Beatty, by shooting him in the shoulder, with a dangerous weapon to wit, a pistol.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence was introduced of three previous convictions: one by special court-martial for absence without leave for five days, in violation of Article of War 61 and two by summary court-martial both for violation of curfew regulations. 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, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for thirty years, and forwarded the record of trial for action under Article of War 48.

3. On 8 October 1945 about 1700 hours accused and Private Richard Beatty entered the Bar Elegant on the corner of the Rue Urban V and the Rue de Ruffi, Marseille, France (R. 9, 39). They ordered, and were served, a drink (R. 45). Beatty asked a waitress to let him see a bracelet she was wearing and she took it off and put it on the bar (R. 39). He put it in his pocket whereupon deceased "in [a] not very polite" tone demanded it (R. 28, 45). Accused interjected some remark and deceased persisted in his demand, stating that he had bought the bracelet for the waitress (R. 45). Beatty then gave the bracelet to deceased who in turn gave it to the waitress. The dispute seemed to end with that until Beatty pushed deceased and "asked him what he wanted to do about it." Deceased disclaimed any intention of causing trouble, insisting that he merely wanted to make sure that Beatty gave back the bracelet (R. 28).

At this point accused drew a gun (R. 28) variously described as an "automatic pistol" (R. 10), "a big American pistol" (R. 18), and as "too small to be an Army .45" and "of foreign make" (R. 84). The record is confused as to the precise location of the disputants but it is clear that accused and deceased were within very few feet of, and facing, each other, while Beatty was off to one side (R. 11, 12, 29, 40). Accused fired two (R. 10) or three (R. 50) shots, one of which may have been accidental (R. 13) but one of which was fired "directly toward Davis" (R. 34). Deceased started for the door, apparently preceded by another soldier, Dixon, and followed by Beatty and accused (R. 13, 30). As Beatty reached the door he felt "a sting" and said to himself "I'm shot" (R. 41). Deceased turned to the left as he emerged from the bar and hid behind a car at the corner of Rue Urban V and Rue de Ruffi (R. 15; Pros. Ex. 2). Accused staggered after him still firing (R. 15). Deceased came from behind the car and ran down the Rue de Ruffi, pursued a short way by accused, and then went through a gate (R. 15; Pros. Ex. 2). A discharged cartridge was found in the bar (R. 55).

Beatty turned to the right on coming out of the bar (the record

says he turned left but it is an obvious error). He looked back once and saw accused firing (R. 42; Pros. Ex. 2).

Dixon turned left, ran down Rue de Ruffi, through a gate and into a courtyard. He was joined by two or three other soldiers, all of whom were seeking shelter. They ran to one corner of the courtyard and, on hearing some shots in the direction whence they had just come, they ran across the courtyard to the other corner (R. 31, 32). They were trying to get into an apartment but apparently they were unsuccessful and when they looked around the courtyard for the first time they saw deceased lying in the courtyard at a spot which was about 50 meters from the bar (R. 17, 38). Five or ten minutes had elapsed - "it could have been less or it could have been more" - from the firing of the first shot (R. 38).

Medical examination within a relatively few minutes revealed that Davis was dead and that he had a gunshot wound in the right chest (R. 23). The bullet had travelled from the right lung to the left, and death was due to "acute massive loss of blood." A bullet, which the doctor who performed the post mortem thought was about .32 caliber, was removed from deceased's body (R. 57). With such a wound it would have been possible for Davis to have lived five or ten minutes and walked 50 yards (R. 58).

In the meantime accused followed Beatty a distance of about 200 yards. He helped Beatty into a truck and went to the hospital with him (R. 43). Beatty was suffering from a wound in the "posterior region of the shoulder, middle left axillary and his left front arm" which could have been caused by gunshot (R. 64).

There was considerable evidence bearing on accused's sobriety. Beatty testified that when he met accused it was evident that the latter had been drinking. Subsequently accused drank two or three glasses of "gin and cognac" and, at the Bar Elegant, about 20 or 25 minutes before the shooting, smoked a "Keefe" or "marijuana". He appeared to be a "little high," his head was shaking as it did when he smoked a "Keefe," he was not steady, but he walked all right (R. 44, 45, 68). According to a French civilian who was in the bar accused was "very drunk," he staggered, and had trouble handling the pistol (R. 19). A waitress in the cafe stated that he was "dead drunk," that he was leaning on the bar, and, for this reason, she refused to sell him any liquor (R. 51). Dixon stated that both Beatty and accused had been drinking and seemed to be very gay (R. 37). An Army doctor who had seen accused at the hospital about 1730 or 1800 hours when Beatty was treated, testified that he was forced to order accused from the X-Ray room because he "talk^{ed} back to me" but that, in his opinion, accused was sober (R. 65). In an extra-judicial statement, properly admitted in evidence, accused said that he had not used marijuana on the day in question and that he had not been drinking heavily (R. 73).

Lieutenant Colonel Henry D. Shipps, Medical Corps, testified that it was possible for a man who is drinking and smoking marijuana to lose his ability to form an intent (R. 59). He was unable to predict what the effect of a combination of one marijuana cigarette and three or four drinks of cognac would be on someone accustomed to smoking marijuana (R. 62, 63). He was somewhat familiar with a drug known as "Kief" or "Keefe" which was prevalent in Marseille. It looks and smells like marijuana but has little intoxicating effect (R. 62).

4. After an explanation of his rights, accused elected to make an unsworn statement through his counsel (R. 77). He stated that he had smoked marijuana cigarettes for about six years. When he left camp on the afternoon of 8 October 1945 he had four marijuana cigarettes in his pocket which he smoked, one of them after he had entered the Bar Elegant. In addition, he drank quite a bit of cognac. The cigarettes did not have the usual effect on him. He was armed with a "forty-five", and recalled firing it, but did not know why. He told the investigating officer that he had not smoked marijuana that day because he was afraid they would punish him for using them (R. 77).

In addition, accused's counsel, inserted into the record, without objection, a long quotation from "The Pharmacological Basis of Therapeutics" (A Textbook of Pharmacology, Toxicology and Therapeutics for Physicians and Medical Students) by Lewis Goodman, M.A., M.D., Assistant Professor of Pharmacology and Toxicology, Yale University, School of Medicine and Alfred Gilman, Ph.D., Assistant Professor of Pharmacology and Toxicology, Yale University, School of Medicine. It was there stated that the effects of cannabis or marijuana manifest themselves almost entirely on the central nervous system, combining elements of excitation and depression and varying with the personality of the individual, the route of administration, and the specie and potency of the cannabis. Soon after taking cannabis the subject enters a dreamy state of partial consciousness in which ideas are plentiful, disconnected, and uncontrollable. The subject may be either euphoric or sink into a moody reverie and experience panic states and fear of death. Illusions are common, behavior is impulsive. Delirium and mania can ensue, and violent acts have been committed under its influence. However, a study revealed no positive relation between violent crime and the use of the drug. Perhaps violent acts resulted because inhibitions are removed and personality traits exaggerated (R. 78-81).

5a. Specification of Charge I. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148, p. 162). From the use of a deadly weapon in a manner calculated to cause death or grievous bodily harm (MCM, 1928, par. 148a) we have little difficulty in concluding that accused is guilty of murder, assuming that the fatal bullet came from his gun and that his sensibilities were not so blunted as to render him incapable of entertaining the requisite intent. We accordingly turn our attention to those issues. There was no direct

proof that accused shot deceased and the conviction, if it be sustained, must rest on the probative force of circumstantial evidence which must, under the oft-quoted rule, be "sufficient to exclude every reasonable hypothesis except the one of defendant's guilt" (Buntain v. State, 15 Tex. App. 490; CM ETO 13416, Wells; Dig. Ops. JAG, 1912-40, Sec. 395(9)).

The uncontradicted evidence shows that accused fired directly at deceased in the cafe and that the latter ran out of the bar, pursued by accused who continued to fire at him, and was found dead of a gunshot wound in the chest about 50 meters from the bar door. Accused thus had an opportunity and a disposition to commit the crime, and actually attempted to do so. His exculpation, if he is exculpated, must rest on the fact that there is a reasonable possibility that someone else shot deceased. The strongest support for this theory is found on the distance that deceased travelled before he collapsed and the size of the fatal bullet extracted from deceased's body. As to the former, it may be said, that, although Davis died of "acute massive loss of blood," the medical testimony is clear that he could have walked 50 yards. Moreover, it should be pointed out that there is no reason to conclude that deceased walked or ran 50 meters - the distance from the bar door to the place where he was found - after he was shot because there is no evidence to show just exactly where he was shot. There is evidence that accused pursued him and examination of a diagram of the locale (Pros. Ex. 2) shows that pursuit covered almost half of the critical distance. It is possible that accused did not relent until he realized he had seriously wounded deceased and it is possible that after he realized this he desisted and went in search of Beatty.

So far as the disparity between the caliber of the fatal bullet and the caliber of the gun accused was said to be wielding is concerned, it is to be noted that it is far from clear that there was a disparity. Accused in his unsworn statement said he was carrying a .45 but the court was, of course, not required to believe him (MCM, 1928, par. 76). While a French civilian testified that accused had a "big civilian pistol," a statement from which the court could infer that it was an Army .45, an American soldier, who presumably had more knowledge whereof he spoke, stated that the gun in question was too small to be a .45 caliber weapon. In addition, the testimony that the fatal bullet was of .32 caliber was not at all positive but was no more than the belief of the doctor who performed the post-mortem.

Looking at the entire record, we conclude that the only reasonable hypothesis to explain Davis' death is that he was shot by accused. No other person present at the incident is shown to have been armed, much less to have shot at Davis or anyone else. Accused alone was actively engaged in trying to wound Davis and the possibility that some unknown individual succeeded where he failed seems to us so remote as to be improbable and unreasonable. For these reasons we think the

court properly concluded that accused perpetrated the crime. CM 222443, Lieberher, 13 BR 283.

In reference to the issue of intoxication the general rule is that it is no defense unless it is so complete that it affects accused's ability to entertain the requisite specific intent. There is no doubt that accused had been drinking but there is a conflict in the evidence as to how drunk he was. A French civilian stated he was "very drunk" and the waitress in the cafe stated he was "dead drunk." On the other hand the testimony of American soldiers went no further than to characterize him as "gay" or a "little high" with the additional remarks by Beatty that his head was shaking from the effect of smoking "a Keefe." On the other hand, a doctor who saw him from one-half to one hour after the shooting testified that he was sober. Accused in an extra-judicial statement denied that he had smoked marijuana that day and denied that he had been drinking heavily, a denial which he explained in his unsworn statement (where he claimed to have smoked 4 or 5 marijuana cigarettes and drunk considerable cognac) by saying that he was afraid he would be prosecuted for smoking marijuana. While this explanation has elements of reasonableness, that is not to say that the court was required to believe all of it, or give it full weight. There was a conflict in the evidence and it was for the trial court to resolve this conflict in the first instance. Their decision is entitled to weight here. CM 265441, York, 43 BR 19. Considering the fact that accused was capable of appreciating the fact that his comrade was engaged in a dispute with deceased, that he was able to pursue the latter and eventually kill him, together with testimony of witnesses which falls far short of indicating that accused was in that sodden condition where ability to know what one is doing is lost, we cannot say that they erred in their decision. CM 268694, Hamm, 44 BR 323; CM 269224, Wagoner, 45 BR 13; CM 274678, Ellis, 47 BR 271. For these reasons we think that the record is legally sufficient to sustain the findings of guilty of the Specification of Charge I and Charge I.

5b. The Specification of Charge II. Accused herein is charged with an assault with intent to do bodily harm on Beatty. The evidence shows that the latter was shot as he attempted to run out of the cafe. The fact that he felt a sting in his shoulder and exclaimed "I'm shot" as he attempted to get out of the door sufficiently indicate that. His statement was, of course, admissible as part of the res gestae (MCM, 1928, par. 115b). Similarly, there can be no doubt that accused fired the shot that struck Beatty. The only question presented by the record as regards this Specification is whether accused intended to inflict bodily harm on Beatty. It seems clear that he did not. Beatty was his comrade and accused was endeavoring to assist him in his dispute with deceased. As indicated above, however, accused was trying to kill Davis and the doctrine of transferred intent applies. Where as here accused intended to assault Davis and by mistake or accident assaults Beatty, he is guilty of an assault on the latter. MCM, 1928, par. 149; CM 252812, Scott, 34 BR 197.

Accused's ability to entertain the requisite specific intent was discussed above and need not be repeated again. The record is legally sufficient to sustain the findings of guilty of this Specification.

6. The charge sheet shows that accused is 23 years and 7 months of age and was inducted at Camp Beauregard, Louisiana, 20 October 1942, with no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to sustain the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of either death or life is mandatory upon conviction of murder, in violation of Article of War 92.

Wilmot J. Banglin, Judge Advocate.

Robert J. Blanner, Judge Advocate.

Gene D. O'Leary, Judge Advocate.

SPJGN-CM 312266 1st Ind
Hq ASF, JAGO, Washington, D. C. MAY 21 1946
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 Henry Grayer (38314474), 176th Port Company, 525th Port Battalion, 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. I recommend that the sentence be confirmed but, in view of all the circumstances, including accused's drunkenness, and the recommendation for clemency, I also recommend that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. I further recommend that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

3. Consideration has been given to correspondence from the Honorable Allen J. Ellender, United States Senate, and Mrs. Ora Lee Scott, written on behalf of the accused.

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 213, 8 July 1946)

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

(55)

SPJGK - CM 312273

25 APR 1946

UNITED STATES)

SEVENTH UNITED STATES ARMY

v.)

Trial by G.C.M., convened at
Heidelberg, Germany, 5 March 1946.
Dishonorable discharge and confine-
ment for two and one-half years.
Disciplinary Barracks.

Private First Class HARLAND
M. MASCARELLA (36920273),
700th Quartermaster Depot
Company.)

HOLDING by the BOARD OF REVIEW
MOYSE, KUDER and WINGO, 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 94th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private First Class Harland M. Mascarella, 700th Quartermaster Depot Company, did, at or near Ludwigsburg, Germany, on or about 2 January 1946 knowingly and wilfully misappropriate and apply to his own use approximately 72 dozen pair of socks of the value of about \$80.00, property of the United States intended for the military use thereof.

Specification 3: In that Private First Class Harland M. Mascarella, ***, did at or near Ludwigsburg, Germany, on or about 2 January 1946 knowingly and wilfully misappropriate and apply to his own use 5 comforters of the value of about \$14.00, property of the United States intended for the military use thereof.

Specification 4: In that Private First Class Harland M. Mascarella, ***, did at or near Stuttgart, Germany, on or about 4 January 1946 wrongfully sell to Wilhelm Schroeder and Jacob Kuba, approximately 72 dozen pair of socks of the value of about \$80.00, property of the United States intended for the military service thereof.

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

Specification: In that Private First Class Harland M. Mascarella, ***, did at or near Ludwigsburg, Germany, on or about 21 December 1945 knowingly and wilfully misappropriate and apply to his own use 4 packages of a value less than \$20.00, property of the Red Cross.

He pleaded not guilty to Specifications 1, 2 and 4 of Charge I, and guilty to the other Specifications of both Charges and to both Charges. He was found not guilty of Specification 1 of Charge I and guilty of the other Specifications of both Charges and of both Charges. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 3 of Charge I and of Charge I, and the Specification of Charge II and of Charge II; legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge I as involve a finding of guilty of misappropriation, at the time and place alleged, of approximately 72 dozen pairs of socks of the value of about \$80, property of the United States, in violation of the 96th Article of War; and not legally sufficient to support the findings of guilty of Specification 4 of Charge I. In view of this holding, discussion will be limited to those portions of the record of trial considered legally insufficient to support the findings.

4. Evidence of offenses alleged in Specifications 2 and 4 of Charge I.

On 2 January 1946 accused was "working *** as a checker" and "guard" at Warehouse No. 11, Ludwigsburg, Germany (R. 15,40,43). This warehouse was "run by the American Government and what is kept there is American property, clothing, blankets, comforters, socks" (R. 33). About 2330 hours, after prisoners of war working at the warehouse had left, accused and a companion "took a case of socks" from the warehouse and sold the socks two days later to two German civilians in Stuttgart (R. 16), for 5000 marks (R. 17). The socks were cotton, khaki-colored (R. 28). The case containing the socks was marked "72 doz socks Jugoslavia" (R. 20,28,30). The words "U.S. Government Property" did not appear on it (R. 20). Cases of socks in this warehouse had "markings on the box as to their being government property or to whom they belong *** a box with the name 'Jugoslavia' on it might mean this was Red Cross property from America to be issued to Jugoslavia prisoners of war for their help" (R. 34). It was duly stipulated that the value of the socks in question was \$80.00 (Pros. Ex. A; R. 36).

5. Specification 2, Charge I.

A required element of proof of misappropriation of property in violation of the 94th Article of War is "that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged" (MCM, 1928, par. 150i, p. 185). The only competent evidence of ownership by the United States adduced was that which showed the socks were at the time of misappropriation in a warehouse "run by the American Government." There was no marking on the case indicating that its contents were United States Government property, although cases of socks in this warehouse had "markings on the box indicating as to their being government property or to whom they belong." The only marking on the case indicating ownership was the word "Jugoslavia," which "might mean this was Red Cross property from America to be issued to Jugoslavia prisoners of war." The fact that the socks were cotton khaki did not warrant the court in inferring that they were property of the United States furnished or intended for the military service thereof, in view of the absence of the customary "U.S. Government" marking on the case, and the presence thereon of the word "Jugoslavia." Such an inference, derived from circumstantial evidence, would be pure conjecture, contrary to the facts established, based not even upon a mere probability, but at most upon a remote possibility.

"Circumstantial evidence creating a mere conjecture or a mere probability of guilt is not sufficient. The guilt of an accused must be founded upon evidence, which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except that of a defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence (16 C.J. 766, CM 233766, Nicholl, CM 238435, Rideau)". (CM 258020, Palomera, 37 BR 299.)

"The proof must be such as to exclude *** any fair and rational hypothesis except that of guilt" (MCM, 1928, par. 78, p. 63). Certainly the fair and rational hypothesis that the marking on the case indicated that the socks were property of the Red Cross intended for Jugoslav prisoners of war is not excluded by any of the evidence. The Board of Review is of the opinion that there was no evidence to prove beyond a reasonable doubt that the socks were furnished or intended for the military service of the United States, and that therefore the misappropriation thereof was not a violation of the 94th Article of War.

The misappropriation proved by the evidence, however, constituted a violation of the 96th Article of War. The socks were in the possession of the United States at the time they were misappropriated. Paragraph 149g, Manual for Courts-Martial, 1928, states with respect to larceny that

"Where general ownership is in one person and possession in another, a special owner, borrower, or hirer, it is optional to charge the ownership as in the real owner or in the person in possession" (p. 173).

This principle is equally applicable to misappropriation. "*** the word 'misappropriate' means 'to appropriate wrongly or misapply in use', especially 'wrongfully and for oneself' (Webster's New International Dictionary) *** The gist of the offense of misappropriation, and misapplication, is the application of the property to an unauthorized and wrongful purpose" (CM 243287, Poole, 27 BR 323, 326, III Bull JAG 236). A Specification alleging that accused "did *** wrongfully take and use *** one United States army pistol *** the property of the United States," laid under a Charge of violation of the 96th Article of War, was held to have alleged properly the offense of misappropriation (CM 239304, Stennis, 25 BR 126). When the property misappropriated is property of the United States furnished or intended for the military service thereof, the offense is a violation of Article of War 94. When the property misappropriated, whether the United States is the general owner thereof or has only some qualified possessory interest therein, is not furnished or intended for the military service of the United States, the offense is not a violation of Article of War 94, but, since such misappropriation is clearly to the prejudice of good order and military discipline, proof thereof sustains a finding of guilty of a violation of Article of War 96 (see CM 228573, Shurtliff, 16 BR 264; CM (NATO) 437, De Jonge).

Specification 4 of Charge I.

A required element in the proof of wrongful sale of property in violation of the 94th Article of War is "that such property belonged to the United States" (MCM, 1928, par. 1501, p. 185). Article of War 94 penalizes one "who *** sells *** property of the United States." In the opinion of the Board of Review, the words "property of the United States" must here be construed to mean property to which the United States has title. The crime is wholly statutory, and unknown at common law. It does not contain the element of violation of possession present in larceny, embezzlement or misappropriation. Sales deal with title, and the prohibition in the statute is levelled against unauthorized transfers of title to goods, an offense separate and distinct from unauthorized transfers of the goods themselves. A sale of property may be and frequently is executed without any change whatsoever in the physical status of the property sold. Since there was no evidence that the United States had title to the socks sold by accused, there was failure of proof of the wrongful sale of property of the United States in violation of the 94th Article of War as alleged and found.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge I as involve a finding of guilty of misappropriation, at the time and place alleged, of approximately 72 dozen pairs of socks of the value of about \$80, property of the United States, in violation of the 96th Article of War, and not legally sufficient to support the findings of guilty of Specification 4 of Charge I. The Board of Review holds the record

of trial legally sufficient to support the findings of guilty of Specification 3 of Charge I and of Charge I, and the Specification of Charge II and of Charge II, and the sentence.

Samuel Mayo, Judge Advocate
William B. Kuder, Judge Advocate
Earl W. Wingo, Judge Advocate

(60)

SPJGK - CM 312273

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

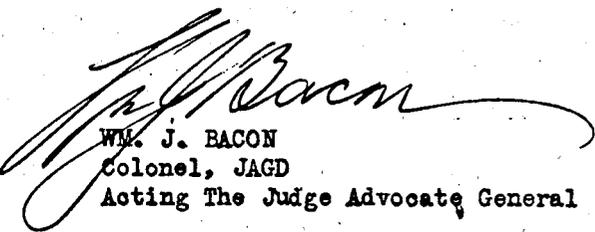
TO: Commanding General, Seventh United States Army, APO 758, c/o Postmaster,
New York, New York.

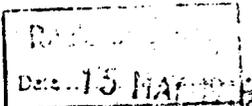
1. In the case of Private First Class Harland M. Mascarella (36920273), 700th Quartermaster Depot Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge I as involve a finding of guilty of misappropriation, at the time and place alleged, of approximately 72 dozen pairs of socks of the value of about \$80, property of the United States, in violation of the 96th Article of War; not legally sufficient to support the findings of guilty of Specification 4 of Charge I; and legally sufficient to support the findings of guilty of Specification 3 of Charge I and of Charge I, and the Specification of Charge II and of Charge II, and the sentence, which holding is hereby approved. Upon disapproval of the findings in accordance with this holding 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 312273).

1 Incl
Record of trial


WM. J. BACON
Colonel, JAGD
Acting The Judge Advocate General



U/1434

WAR DEPARTMENT
 In the Office of The Judge Advocate General
 Washington 25, D. C.

JACQ - CM 312274

NOV 2 1946

UNITED STATES	)	THIRD INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Bad Wildungen, Germany, 13
Private ROY C. TAYLOR	)	February 1946. Dishonorable
(32484551), 3420th Quarter-	)	discharge and confinement for
master Truck Company.	)	life. Penitentiary.

HOLDING by the BOARD OF REVIEW
DICKSON, OLIVER and McDONNELL, 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 holding, to The Judge Advocate General.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Roy C. Taylor, 3420th Quartermaster Truck Company, then a member of the 3687th Quartermaster Truck Company, did, at Friedensdorf, Germany on or about 12 October 1945 forcibly and feloniously, against her will, have carnal knowledge of Gerda Bamberger, a female under sixteen years of age.

Accused pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, 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 at Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. Evidence for the Prosecution. Gerda Bamberger, the alleged victim, testified as follows: She lives in Dautphe. She was fifteen years

old at the time of trial, having been born on 8 January 1931. She went to Friedensdorf at about 5:30 on 12 October 1945 (R 6). While returning from Friedensdorf, at about 6:15 P.M., she heard a voice behind her say "Where are you going" (R 6, 7). An American soldier came up to her, as she walked along the street, asked her where she was going, was told she was going home, and he told her he was coming along. He repeatedly tried to put his hands around her, and she as often pushed him aside because she didn't like this and told him to go home. He kept on asking if he could come along with her, "but I told him no". He then halted, and she "kept on going and didn't see him for quite a while". It was getting dark. She took a path leading behind a factory and in the direction of the main street that goes into Dautphe. She heard someone coughing behind her "and I turned around and saw him again". About ten minutes elapsed since she had last seen him (R 12). She started to run in order to get on the main road, but he caught her by the dress and held her. He showed her some small packages "chocolate and something else", and told her he would give her the chocolate if she would go with him, "but I told him that I didn't want those things, and that he should let me go because I wanted to go home". She then noticed a jeep pass along the highway and "made an attempt to get close to this jeep". At that time he picked her up, pushed her head against him so that she could hardly breathe, and started to walk off with her. She tried to push him away, he tried to kiss her, she told him if he wouldn't let her go she would report this to an American officer, "and because of this he hit me" on the side of the head and in the eye with his fist. "Then I fell and I am not sure exactly what happened, but when I came to he was kneeling on me and he had a knife in his hand" (R 7). Recalled by the court, she testified that he also hit her in the mouth, that she was unconscious for a short time, and that when she awoke "he was kneeling on my breast and had one hand on my neck and the other hand held a knife" (R 50). She pleaded with him to let her go but he just laughed. She tried to get hold of his knife and throw it away, and he jumped up and she "started on the way again". He caught her again "and knocked me down, and I am not sure of all the things he did or said to me. Now I am not sure of all the things he did to me" (R 7, 8). When recalled by the court, she said "I begged him to let me go but he just laughed. I tried to throw away the knife and he got up. I started to cry but he got hold of my neck and started to squeeze it tightly. Then he knocked me down again and after that I don't know anything" (R 50). When she came to she "noticed that he had undressed me"; the only articles of clothing off being "just my pants" (R 8, 45). The pants were "laying next to me". She had them on when she met accused, and did not take them off at any time (R 45), and she had them on before he knocked her down the last time (R 50). She did not notice anything else unusual (R 12). She was not soiled in any way except her face. The accused was no longer there and she didn't see him again that night. She does not know how long she was unconscious at that time (R 13). She then dressed and went home (R 8). When she got home she found in her pocket "the three little packages that the soldier showed me before" (R 8). She told her father that the soldier had given her the chocolate and "I ate it later on the same day" (R 11).

Testifying when recalled by the court, she said that accused mentioned giving her chocolate that night, but she said no (R 43), that she did not know how the food or candy got into her pocket (R 46, 47), that she did not ask him for the rations which he had in his pocket (R 46, 47), and that the articles which she found in her coat pocket when she got home consisted of three small cellophane-wrapped packages which she believed contained coffee, four cigarettes, and a candy bar and cookies in each package (R 47). She told her mother and father what happened to her (R 8); "I told the whole incident exactly how it happened", "The same as I told here before" (R 48). Prior to the day in question, she had seen this soldier quite a few times, "I think about four times". One time he gave her chocolate. "A few times he was in the yard of the woman where I was employed, and he always came up to me to ask me for my name, and I told him to shut up, 'I don't ask you what your name is'. So he told me his name was Tito" (R 9). On none of the four previous times was she ever entirely alone with the soldier and never went any place with him (R 12). On examination when recalled by the court she testified she had seen accused three times previously and that he only gave her chocolate "this one day when he met me in the yard" (R 43); that she did not on the night in question invite the accused to come to see her the next evening or the next day, and that she knows that he did come to her house the next evening (R 43).

During her initial appearance upon the witness stand she was asked no question, either in direct examination or cross-examination or by the court, regarding an act of coitus at the time in question or at any other time, and she made no mention of any such occurrence. As shown above, she testified that when she regained consciousness the second time she did not notice anything unusual except that she had been undressed (that is, her pants were off), and that she was not soiled in any way except her face (R 12, 13). When recalled by the court her testimony with respect to intercourse was as follows (R 43-49):

Examination by the Court

"Q. Have you ever had sexual intercourse with the accused?

"A. No."

* * * *

"Q. On this evening in question did you have any intentions of having sexual intercourse with the accused?

"A. No."

* * * *

"Q. Did the accused say anything to you about sexual intercourse?

"A. He told me one time that I was afraid of a baby".

* * * *

"Q. Do you know your father was just here in this court? ^{See} testimony of father wherein he asked that accused be pardoned if he admits the accusation.

"A. Yes.

"Q. Do you know what he was going to say?

"A. Yes.

"Q. How do you feel about that?

"A. It does make some difference to me. You must remember that this is my honor.

"Q. Did you ask your father to make that statement?

"A. No.

"Q. Are you worried about your honor or in seeing this man punished?

"A. I don't want that his punishment be too hard. If he does admit it, I wish that his punishment be light since there are so many similar cases.

"Q. What do you wish him to admit. You stated that he had no sexual intercourse with you?

"A. That he admits that I am telling the truth.

"Q. You stated a few minutes ago that the two of you did not have sexual intercourse, is that correct?

"A. No.

"A. What did you say?

Interpreter: I don't believe she got my question.

LM: Ask her the question again.

"Q. (By court). Did you state a few minutes ago that you and the accused did not have sexual intercourse together?

"A. Yes.

"Q. Did you have intercourse together?

"A. No.

"Q. What do you wish him to admit?

"A. That he admits that I am telling the truth and that he is sorry for what happened.

"Q. Did the two of you commence to have sexual intercourse together?

"A. No.

"Q. Do you understand what sexual intercourse is?

"A. Yes.

"Q. You are sure you understand?

"A. Yes.

"Q. This morning you testified that you were unconscious and you did not know what happened while you were unconscious, is that true?

"A. Yes.

"Q. Is it true then that you could have had sexual intercourse while you were unconscious?

"A. I don't know.

"Q. What is it that you want the accused to tell the truth about?

"A. That he admits that I am telling the truth, and that he admits that he hit me.

"Q. That he admits you are telling the truth about what, in addition that he hit you?

"A. That he admits that I am telling the truth about this incident."

* * * *

"Q. When you awoke and found that your pants had been taken off, was there any evidence that you might have had sexual intercourse while you were unconscious?

"A. No.

"Q. Did any part of your body hurt you or pain you other than your head?

"A. No."

* * * *

"Q. Let me ask one question again. Did you, on the night in question, start to have sexual intercourse with the accused? By 'start', I mean that you actually placed yourself on the ground in a position to have sexual intercourse?

"A. No."

* * * *

"Q. Did you ever have sexual intercourse with anyone?

"A. No.

"Q. Were you examined by a doctor?

"A. Yes.

"Q. Why were you examined by a doctor?

"A. Because there was a possibility that the American soldier had sexual intercourse with me. I didn't know while I was unconscious what he had done to me.

"Q. What did the doctor tell you?

"A. He didn't tell me anything".

* * * *

"Q. Are you sure that you have never had sexual intercourse with anyone?

"A. Yes.

"Q. Do you think you would know if you had had?

"A. Yes.

"Q. Even if it happened while you were unconscious?

"A. No.

"Q. Have you ever agreed, ever willingly agreed to have sexual intercourse even though it was never completed?

"A. No."

* * * *

"Q. Do you think your honor has been harmed?

"A. Yes.

"Q. In what way and why?

"A. It is not a small thing when one is attacked by a colored man.

"Q. Were you attacked by a colored man?

"A. He hit me.

"Q. Did that hurt your honor?

"A. (No answer).

"Q. Did that hurt your honor?

"A. Yes" (R 43-49).

Jacob Bamberger, father of Gerda, was at home on the evening of 12 October 1945 when his daughter came in about 7:30. She is fifteen years old, having been born on 8 January 1931 (R 14). "... my daughter came in all dirty, and her face was dirty. She fell into a chair and I looked at her and her face was all dirty and there was blood on her mouth" (R 14). He asked her what happened and made a bandage for her eye. "I told my wife to pack her and my wife took her clothes to see if anything could be found, and I told my wife to ask her if she had any pains". The wife did all that (R 18). The next morning he went to Dr. Brandt (R 14, 15), "because my daughter came home in this condition and she told me that when she regained consciousness that she was undressed", and "because she was wounded in the head and eye and lips" (R 17). The doctor came Saturday evening, the 13th (R 15). The father told the doctor "what had happened" and "to examine her to see if she had had sexual intercourse" (R 17). The reason he did not get a doctor the night the daughter came home was because "there was too much excitement and it took quite sometime until my daughter had finally gone to bed", and his wife couldn't have taken care of the daughter while he went for the doctor — "You must understand how excited women get and she was not in a condition to do anything by herself" (R 15). A Mr. Spann and his wife also lived in the house with the Bambergers and Mrs. Spann was there on that occasion (R 16). The father doesn't know how much chocolate his daughter came home with that night, but "She had a hand bag and on top there were a few things, a candy bar, some cookies and I believe four cigarettes" (R 16). On the following evening, about 7:00 or 7:30 o'clock, a soldier came to the house, with a German boy "who showed him our house"; "He wanted the little girl to deliver a package". This was before the doctor arrived (R 16, 17). The father does not know the soldier alleged by his daughter to have attacked her, and did not know who the soldier was who came to the house the following evening — "I only saw his shadow; It was dark" (R 16). He did not talk to the latter soldier — "It was dark and he was standing in the door and I couldn't recognize him. I only saw his shadow" (R 42). Later recalled at his own request, having told the trial judge advocate that "he had a few words he would like to say to this court", this father further testified (R 41, 42):

"Q. Mr. Bamberger, you asked me to allow you to make a statement to the court regarding this case. Do you wish to make that statement at this time?

"A. Yes.

"Q. Will you make that statement to the court?

"A. If the accused admits this accusation, then I ask that he be pardoned."

* * * *

Examination by the Court

"Q. Why do you make that statement?

"A. Because I believe in God and I think that the accused happens to be just the unlucky one who was caught, and that there were other cases where people did not get caught.

"Q. Did the other cases to which you refer concern your own daughter?

"A. No".

Doctor Brandt testified that he examined Gerda Bamberger at her home, he believes on the night of 13 October 1945 (R 18, 19).

"Q. What were the results of that examination?

"A. She had a wound. Her face was swollen and she had a wound at her private parts and on her breast and neck.

"Q. Did you examine the girl in regard to determining whether she had had intercourse or not?

"A. Yes.

"Q. And what did you determine?

"A. I believe that I had found a wound. The entrance to her private parts was big enough for two fingers, whereas the entrance on the virgin would be only big enough for one finger. On the bottom side was a small cut. This was in the evening so I ordered her to come to my office in daylight the next day, and I believe this was the 14th that she came to my office.

"Q. Did you examine her again that day?

"A. Yes; this was the last time I made an examination. To make sure I sent her to the hospital in Marburg.

"Q. Did you examine her hymen?

"A. Yes; there was a wound.

"Q. What were the results of that examination?

"A. There was a small cut in the back part of the hymen, but it was not bloody and some time had passed since the incident.

"Q. Are you of the opinion that she had been penetrated?

"A. Yes.

"Q. How recently before the examination?

"A. That I can't say.

"Q. Was it a matter of hours?

"A. One or two days, perhaps, because I didn't notice any blood. It was —

"Q. You also examined the wounds about her head, is that correct?

"A. Yes.

"Q. How serious were they?

"A. They were not too bad. Her face was swollen on the left side.

"Q. In your opinion as a doctor were these injuries about the head and neck sufficient to cause unconsciousness?

"A. Yes, I believe so. It could be, but I can't say with certainty" (R 19, 20).

Cross-examination

"Q. Doctor, you state that the entrance was large enough to admit two fingers, and that the normal virgin will admit only one finger. Is this a normal person, Gerda Bamberger?

"A. Yes.

"Q. Would one intercourse enlarge the opening to the size of two fingers, or would it take more than one?

"A. Yes.

"Q. Permanently?

"A. As it heals it will get smaller but not small enough as it was before.

"Q. In your opinion is this the first time this woman had ever had intercourse?

"A. Yes, I believe so" (R 20-21).

No examination was made for sperm cells in the vagina (R 21).

The investigating officer testified that investigation of the charges had been started by another officer who went home on rotation before the investigation was completed; that he was then appointed; that he presented to the witnesses the statements previously made to the former investigating officer; that the witnesses reaffirmed their prior statements, except accused; that accused said his former statement was not correct and, after full explanation of his rights, made, signed and swore to another statement and later an addition thereto. Before accused's written statements to the investigating officer were introduced the following question was asked the investigating officer by the trial judge advocate:

"Q. Tell the court in your own words what Private Taylor told you that day.

"A. Well, Taylor told me that he was standing near a guard post in the company and he saw this girl, and he asked if he could walk her home, and she said yes. He was walking her home on the road that went to Dautphe, Germany. He asked her if she would have intercourse with him. She said no, there were too many people on the road. She asked him if he would come up to see her the next night, I believe, and he said no, 'Not unless you give me a little bit of loving.' Then they entered a short cut path that led to Dautphe, and he stopped in preparation to having intercourse with her. He turned around and took his pants down, and when he turned around she was laying on the ground with her pants off. He said he started in and she seemed to have got scared or something, and wanted him to quit, so he stood her up and shook her and took her on up into the company area and left her off near a beer garden. He said he went back a few days later to see her again. Marie is the name he used to identify her. He was going to take some chocolate to her. He went to her house and told her that -- or he was told that the daughter was sick and he would have to go away."

The written statements were identified by the witness, and were admitted as Exhibit A (R 22-29). In those statements, both made on 19 November 1945, the accused said:

".... I saw this girl, Gerda Bamberger for the first time about 4 weeks ago, she told me her name was Mairie. I have been out 3 or 4 times with this girl.

"On Friday evening, 12 October 1945 about 5 o'clock. I saw and talk to this girl close to guard post No. 2, for five (5) minutes. I then walked towards Dautphe, Germany with this girl on the main road and asked her if I could have intercourse with her. She said no because there were too many people walking on the road and they would see us. I asked her if she couldn't stay there until it got a little darker. She asked me if I was coming to see her the next day and I told her I wasn't coming unless she stayed with me till it got darker and give me a little loving. At this time we were about 150 yds off the road on a little short cut path that leads to Dautphe. We stayed here for about two hours and about 7 o'clock walked up the path and on the main road up near the beer garden, and she asked me if I was coming to see her and bring her some chocolate the next day. I finally told her yes I would come and I would be there about 8 o'clock after I finished my work.

"While back in the short cut path before 7 o'clock I laid my combat jacket on the ground in preparation to having intercourse with the girl. I turned around for a minute and let my pants down and when I turned around again she was laying on the jacket and without any pants on waiting for me. She didn't protest when I started in but after awhile she became scared or frightened and I shook her, stood her up and took her up the path, to the main road close to the beer garden.

"I didn't see her taking off or putting on any pants and I did not strike or hit her except the shaking I gave her when I started to walk her home. I never hit her in the head.

"The next evening October 13, 1945 at about 7:30 I went to the place that I thought was her home but the civilians told me she works there. This evening October 13, 1945 I got a little boy at this place where she worked to take me to her house. I met her father, he was talking to me through a little window that was close to the ground and he said Mairie, as I called her, had been sick for three days. I asked him if I could bring some chocolate to Mairie who was in bed because I had promised it to her. And he said no, I should go away. I said good-night and went home. ...

"When I laid my jacket on the ground in preparation for intercourse, I laid about 2½ K rations that I had Previously told her she could have, beside the jacket. When she got up from the ground she took the K rations and still had them when I left her.

"On October 13, 1945 after I had returned from talking with the girls father, I told my room-mate a fellow we called Dude that I had gone to my chicks house and the old man had seemed mad about something and had shouted Go Away, Go Away, at me. ..."

4. Evidence for the Defense. Elizabeth Heck testified that the accused came to her yard on two occasions to visit Gerda. The first time was "Tuesday of the same week this incident occurred". She also saw him on "Friday and then again on Saturday evening". On Saturday evening "He asked for the little girl". "I told him that she was at home sick", and "he went to see the girl, and a little boy, about 13 or 14 years, he went with him". Accused never, in the witness' presence, called Gerda by her first name; "We told him her name was Maria", and when he came on Saturday evening the witness sent him to "Maria's" house. The witness only saw them together on Tuesday, and "He continually attempted to put his arm around her", and left after a little while (R 29-30). The witness never saw "these two" together when the girl acted friendly toward the accused, never saw them go off together alone, and the girl never showed her any gifts or food the accused had given her (R 31).

Being fully advised of his rights as a witness, the accused elected to be sworn and testified in his own behalf substantially as follows: He had seen Gerda Bamberger on several occasions prior to 12 October (R 32), "about five or six times that I can remember" (R 33). The first time she asked him for chocolate and he gave her some. He asked her how old she was and "she said eighteen years of age". She asked him whether he had a girl in Friedensdorf and he explained that he did not. After some further conversation he returned to his work in the kitchen. On the Friday here in question he did not have an appointment to meet the girl, but as he was going from the mess hall to his quarters he saw her standing in the intersection in front of his quarters. The preceding Friday he had asked her to have intercourse with him, and she had said to wait until Sunday when she wouldn't be working (R 34). She did not meet him on Sunday (R 34, 35).

"Q. What took place when you met her on Friday afternoon?

"A. When I met her on Friday afternoon, when I gets to her, she reaches out to shake hands and I shake hands with her and speaks to her. She asked me was I working and I told her no. She asked me why I hadn't been over to her home and I began to tell her about the lie she told me Sunday. She was telling me that when she told me that she didn't know she was going away that Sunday. She went some place with some of her people.

"Q. After that where did you and Gerda Bamberger go?

"A. Well, sir, when she got ready to go she asked me was I going with her, and I told her yes. We walked on up the highway and the guard post is pretty close from where I met her. I passed this guard post No. 2, I think it was and there was a bunch of soldiers standing around, and some of them hollered. We kept walking up the road. I am not good at distances, but I can look at something and maybe I can tell. About as far as that tree is at the bottom over there (indicating). It was a little farther than that. I don't know how many yards it was before we stopped, and she began to tell me she was thinking I have another girl because I hadn't been up. I was telling her I didn't have any other girl, and didn't want no other girl, and I didn't like nobody but her, just talking about stuff like that. We stopped there and talked for about a half an hour.

"Q. At any time during that time did you speak to her about having intercourse with her?

"A. Yes.

"Q. What did she say?

"A. Not at that time, but we stopped there on the highway. I guess maybe it was ten or fifteen paces below this little path that runs off to this field. We were standing there talking. We talked there about a half hour until she saw two or three civilian men coming up the road, and she looked at them and said, 'Come, civilian men no good.' We goes on across off the path that runs across this field, and I asked her to have intercourse with me. She said, 'No, too many people is looking.' I asked her why she couldn't stay until it got dark, 'and I have a lot of stuff I will give you.' She asked me what I would give her, I had a whole K ration and I had three whole ones, but the rest of them was broke down into small sections so they could get into my pockets. I knew I had three if not better than that. I told her I had a lot of stuff I would give her and she asked me was I coming to see her, was I coming the next day. I told her no, 'you stay here half an hour until dark and give me a little loving or I no come tomorrow, I am finished with you.' That was in this field. We steps over about four or five paces off to the right of this little path where we were standing on, and we talked until about 7:00 that night; or close to that. She pestered me about different things, different little things, like did I have any sisters, and I was telling her, yes, I had sisters, that I had four sisters. She asked me did my sisters do much work, and I told her no, my sisters didn't do much work, just a little work around the house; just telling her

things like that. We talked there until about close to 7:00. I asked her was she still scared of the people looking, and she said she wasn't scared of the people looking. I said to her, 'Come and give us loving.' She said yes. I steps up and takes this whole K ration out of my pocket and I had two up here. The whole one up here and the rest of it was broke down. I took the whole one and three or more of the little half packages. But anyway it is the same equipment that K rations came in. I think it is ten-in-one. I steps over and lays the K rations down, stepped off two or three paces and laid these K rations down on the ground. I pulls my combat jacket off and lays it down, and I turns back around to let my pants down. The girl goes on down and gets on the jacket, turns back around to her and she was laying on the jacket all ready. I was maybe three or four minutes at the longest before she did what she wanted to do. She told me to go away. The first time she told me I didn't really think she meant it. I thought she was threatening me like some persons do. She told me to go away. So the next time she told me, she gave me a little push and said, 'Go away.' I knew she meant it then. I stopped and asked her did she think she had finished, and I hadn't finished. She just told me, 'Go away', and pushed me again. I takes up her hand with my left hand, and before I even got it up like this, I said, 'Get the devil up and let's go.' I gets up and turned around and puts my pants back upon me, and picked my jacket up that she was laying on. She patted me and asked me what I — was I mad. At the time I didn't say anything to her. I just reached down and got my jacket and put it on. I goes on up the path with her, out to the highway, on up to a road that leads off to the beer garden near her house, right on around to her house. She asked me — I said to her, 'I must go to sleep.' She asked me was I coming back the next day to see her. I told her no. She asked me again and I told her no. The next day was a Saturday, and that was my busiest day. I finally told her, 'Why you no come,' Or she said to me, 'You mad at me.?' I finally told her — she said, 'Please come tomorrow and bring me some chocolate.' I finally told her, 'Okay, I will come.' Well, I comes on into my quarters, and the next night I went back.

- "Q. Taylor, at any time up to the time she left had you ever beaten this girl at all?
- "A. None whatsoever, sir. I jerked her hand a little bit. She had made me mad, but that is all I ever did to her.
- "Q. When you began to have intercourse with her did she object in any way?
- "A. Not a bit, sir.

"Q. The next night, which was Saturday night, did you go back to Frau Heck's house and ask for her?

"A. I went to this house where she worked at. I did just what I had promised her I was going to do. She told me to come back the next night and bring her some chocolate.

"Q. When you got to Frau Heck's house was she there? Was Gerda Bamberger there where she worked?

"A. Not at this house where she worked, no.

"Q. Did you go to Gerda Bamberger's house from Frau Heck's house?

"A. Yes, sir.

"Q. Did anybody go with you?

"A. A little boy went with me.

"Q. When you got over to Gerda Bamberger's house what happened?

"A. The little boy ran up on the porch and knocked on the door. He knocked one or two times and said, 'There is nobody there.' I goes on the porch and knocks myself and hollered in, 'Its Taylor.' So finally an old man hollered around at the back of the stairs and said, 'Hey.' I walked around to the back. I said, 'Good night,' to the old man. He said, 'Good night.' I asked him where was his daughter. He said she had been in bed sick for three days. So I knew he was lying. I said to him, 'One, two, three days?' He said yes, she has been in bed, 'krank' for three days.

"Q. Did he let you in the house?

"A. No, sir.

"Q. What did you do when he wouldn't let you in the house?

"A. Nothing, sir. I said to him that the girl said to bring her some chocolate, and I have it with me. 'Can I come in by the bed and give it to her?' He said, 'No, go away.'

"Q. What time of the day was this?

"A. That was at night, sir. After 7:00, I know. At least I think it was. Maybe 8:00, sir."

* * * *

"Q. The previous night, the night that you had intercourse with Gerda Bamberger, what time did you leave her on the road that led to the beer hall?

"A. About 7:00, sir."

* * * *

"CROSS-EXAMINATION

Questions by prosecution:

- "Q. Taylor, was it light or dusk or dark at the time that you actually had intercourse with this girl?
- "A. Sir, it was dark as it was going to get when I started having intercourse with the girl.
- "Q. As dark as night?
- "A. Yes, sir, it was as dark as it was going to get at the time. The moon wasn't too bright, but it wasn't dark. You know what I mean, it was as dark as it was going to get.
- "Q. Could you see what was going on pretty well?
- "A. What do you mean, what was going on?
- "Q. Could you see her laying there and see everything else that went on?
- "A. You could see her from a close distance. After I turned around you could see her.
- "Q. After you turned around you said that she was 'ready for me.' What do you mean by that?
- "A. She was laying on my jacket with her pants off. I guess she had put her pants under her.
- "Q. Did you see her pants at all?
- "A. No, sir.
- "Q. You never saw them all night?
- "A. No, sir.
- "Q. Don't know what they look like?
- "A. I don't know whether she had on pants or not, sir.
- "Q. Did she take them off or didn't she have any?
- "A. I don't know, sir.
- "Q. You admit having intercourse with her, though, is that right?
- "A. I started to have intercourse but she wouldn't let me finish.
- "Q. When did you take the rations out of your pocket?
- "A. I took them, all but two, out of my pockets. All but the two little sections I had in my pockets, and after we got up, going up the path, she patted me on the pockets and asked me what was there. I gave her the other two. When she left me she had all the rations.

- "Q. I mean the first ones that you took out of your pocket.
What did you do with them?
- "A. I laid part of them in my combat jacket, and I took them
and laid them where I had my combat acket.
- "Q. Did you see her pick them up?
- "A. Yes, sir, she got the rations.
- "Q. Did you see her pick them up?
- "A. I didn't see her when she picked them up, but I saw her
when she had the rations. She was standing there with the
rations when I walked off ready to go, asking me was I
mad.
- "Q. Did you see her get dressed after she finished — after you
finished?
- "A. No, sir, I didn't see her get dressed. When I walked back
up she was all dressed."

* * * *

"EXAMINATION BY THE COURT

* * * *

- "Q. Had you ever had intercourse with this girl before?
- "A. No, sir" (R 35-41).

5. The Specification alleges that the accused did "... forcibly and feloniously, against her will, have carnal knowledge of Gerda Bamberger, a female under sixteen years of age". The first question confronting us is whether this language appropriately alleges the crime of common-law rape, or the crime of statutory rape, or both; that is, the effect, if any, of the averment that the prosecutrix was under the federal statutory age of consent. The Supreme Court of the United States considered substantially the same question in In re Lane, 135 U.S. 443. In that case the indictment was so framed as to permit it to be construed as charging the common law offense of rape, or the statutory offense of carnally and unlawfully knowing a female under sixteen years of age. It alleged that: "Charles Lane on or about the 4th day of July with force of arms in and upon one Frances M. Skeed, a female under the age of sixteen years, then and there being, violently and feloniously did make an assault, and her, the said Frances M. Skeed, then and there, forcibly and against her will, feloniously did ravish and carnally know,". The trial court instructed the jury that the allegation respecting the will of the woman might be rejected as surplusage, and the rest of the indictment be good under the carnal knowledge statute. Denying a writ of habeas corpus, the Supreme Court said:

"It is next objected that the indictment is bad, inasmuch as it contains the double charge of a rape at common law and of the statutory offense under the act of February 9, 1889; and it is quite obvious that both these offenses can be made out from the language of the indictment, which is in a single count. The allegation that the offense was by violence and against the will of the woman, with the other allegations in the indictment, describe the offense of rape. The allegation that the defendant had carnal knowledge of a female under sixteen years of age makes out the offence under the statute of 1889. But the view of the court was, that the allegation that the carnal knowledge was against the will of the woman may be rejected as surplusage, and the rest of the indictment be good under the statute referred to. And, as the court instructed the jury in accordance with that view of the subject, and as the jury found the prisoner guilty not of the crime of rape but of the smaller crime of carnal knowledge of a female under sixteen years of age, the action of the court on that subject was probably correct. At all events, the court had jurisdiction of the prisoner, and it had jurisdiction both of the offence of rape and of carnal knowledge of a female under sixteen years of age. It was its duty to decide whether there was a sufficient indictment to subject the party to trial for either or for both of these offences. As no motion was made to compel the prosecuting attorney to elect on which of the charges he would try the prisoner, we think that there was no error in its ruling on the subject".

In CM 209548, Jones, 9 BR 77, the Specification of Charge I alleged that the accused "did with intent to commit a felony, viz., rape, commit an assault on Martha Rice Barnum, a female child of about 14 years of age, by willfully and feloniously holding her, putting his hand under her clothing, getting on top of her, and attempting to insert his male organ into her female organ".

The Board of Review said:

"But more than an assault with intent to commit common-law rape is alleged and found. The specification charges that the victim of the assault was a female child about fourteen years of age, and alleges specific acts amounting to an attempt to have intercourse with her. Thus, there are allegations of an offense consisting of acts which, in view of the age of the female, were the equivalent of an assault with intent to commit so-called statutory rape, the offense denounced by section 289 of the Federal Penal Code (U.S.C. 18:458) and section 803 of the Code of the District of Columbia (D.C.C. 6:32), in which neither force nor consent is an essential element.

* * *

"Inasmuch as the Specification, Charge I, alleged, as indicated above, two distinct offenses arising from the same transaction, it was, possibly, subject to an objection of duplicity. Par. 29b, M.C.M. No objection on this ground was made.

* * *

"Under the circumstances, and in the light of the wording of the specification, accused could not have been misled as to the offenses intended to be charged, and the defect in the specification was not, therefore, fatal". (Citing In re Lane, supra).

Rape may be committed on a female of any age (Par. 148b, MCM 1928). It is settled law, moreover, that mere surplusage in an indictment will be ignored if all the essential facts are charged (52 C.J. 1043). The rule with respect to averment of age in an indictment charging rape is set forth in 52 C.J. 1041, as follows:

"When, in an indictment or information for rape, or assault with intent to rape, force or want of consent is alleged, it is not necessary to allege the age of the female, or that she was over the age of consent, or under the age of consent, and if the female's age is alleged in such cases the averment may be disregarded as surplusage".

The Board of Review is therefore of opinion, based upon the foregoing authorities, that the duplicity of alleging more than one offense in a single specification, while not to be condoned or approved (Winthrop's Military Law & Precedents, Reprint 1920, pp. 143, 144), was not a fatal error in the absence of objection specifically directed against that imperfection, and that in such circumstances the averment that the prosecutrix was under sixteen years of age may be disregarded as surplusage.

6. We now consider the evidence. It has been set out in detail, because this is an unusual case. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not (Par. 148b, MCM, 1928). In the instant case the decision as to accused's guilt or innocence of the crime of rape rests upon the sole question of whether the evidence proves a sexual penetration. Exhaustive research has disclosed no case, either in military or civil jurisprudence, wherein the evidence was in all respects comparable or similar to the case under examination.

The testimony of the prosecutrix demonstrates beyond all doubt, by her choice of words and grammatical construction and evident knowledge concerning the intimate relationships of men and women, that she is

unusually intelligent and well versed for a girl of fifteen years. In her testimony she repeatedly and persistently denied that she had ever at any time had sexual intercourse with the accused or with anyone else, and that she and the accused did not commence or start to have sexual intercourse, and that she had never agreed to have sexual intercourse even though it was never completed. She testified that accused had talked to her about having intercourse in that he had told her that she was afraid of a baby. She detailed the assault by the accused and her resistance, and two lapses into unconsciousness. Her pants were still on when she lost consciousness the second time, and when she awoke they had been removed and the accused was gone. She does not know what the accused did to her while she was unconscious. But she testified that when she awoke and found her pants had been removed there was no evidence that she might have had sexual intercourse while she was unconscious, and that no part of her body hurt or pained her except her head. In this connection we view with particular concern the fact that this girl was only fifteen years old and had never had sexual intercourse. In the light of the common experience and knowledge of mankind, it is incredible that a fifteen year-old virgin child could be raped, while conscious or unconscious, and not immediately afterwards feel the inevitable painful indicia of the experience. The improbability of a child such as the prosecutrix emerging completely painless and insensible from the necessarily trying ordeal of first intercourse, particularly at the hands of the rapist whose brutishness and inconsiderateness are his common characteristics, places too great a strain upon credulity. Moreover, the doctor who examined the prosecutrix approximately twenty-four hours after the incident testified that he could not say with certainty that the injuries to her head and neck were sufficient to cause unconsciousness. In this state of the case, the testimony of the same doctor that there was a small cut on the back part of prosecutrix' hymen, and another at the bottom of the vagina and that in his opinion she had been penetrated perhaps one or two days prior to the examination, loses much of the significance ordinarily attaching to such testimony, and, while consistent with the possibility of sexual intercourse, may not be said to be inconsistent with lack of intercourse. Indeed all this medical testimony may very well be wholly consistent with the indicated conditions having been otherwise caused or produced.

The record contains both the investigating officer's testimony as to what accused told him about the offense as well as accused's two statements taken in writing by the investigating officer. The written statements were the best evidence of accused's admissions and there was no necessity to have the contents thereof summarized by a witness. However, such a practice has been held permissible, Litkofsky v. U.S., 9 F (2) 876, 380. The investigating officer testified, in summarizing accused's statement, that accused told him that he stopped on a pathway in preparation to having intercourse with the girl, and that both accused and the girl

removed their pants. Accused started in but the girl seemed to get scared and wanted him to quit. Accused stood up, shook the girl and escorted her to a place near the company area. Accused's written admission as received in evidence was substantially to the same effect except that the written evidence contained the further statement that the girl did not protest when accused started in.

What of the testimony of the accused? It is in substantial agreement with accused's pre-trial statements. He details his acquaintance and previous meetings and conversations with the prosecutrix, during which he had made a date with her for the preceding Sunday for the purpose of having sexual intercourse, which date she failed to keep. He gave his version of the manner in which he met her on the day in question and of accompanying her in the direction of her home at her request, and of their conversation during which he twice asked her to engage in intercourse. He testified that she declined, saying "No, too many people is looking"; that they entered the path that runs across the field; that he asked her to stay until it got dark; that after talking there just off this path until about 7:00 o'clock when it was as dark as it was going to get, and after he had agreed to go to see her the following night, she said she wasn't scared of people seeing them and agreed to have intercourse. He placed his jacket on the ground and turned around to let his pants down. When he turned back around "she was laying on the jacket all ready. I was maybe three or four minutes at the longest before she did what she wanted to do. She told me to go away". She again told him to go away, and "I knew she meant it then. I stopped and asked her did she think she had finished, and I hadn't finished. She just told me, 'Go away', and pushed me again. I takes up her hand with my left hand, and before I even got it up like this, I said, 'Get the devil up and let's go'." He went on up the path with her, out to the highway and "right on around to her house". She asked him to "please come tomorrow and bring me some chocolate", and he agreed. He never beat her at all; "I jerked her hand a little bit. She had made me mad, but that is all I ever did to her". She did not object when he began to have intercourse with her. Asked the suggestive question what time he left her "the night you had intercourse" with her, he said it was about 7:00 o'clock. To another suggestive question "was it light or dark at the time that you actually had intercourse with this girl", accused replied that it was as dark as it was going to get "when I started having intercourse with the girl". And again to "You admit having intercourse with her, though, is that right?", he answered "I started to have intercourse but she wouldn't let me finish". He answered in the negative the court's question "Had you ever had intercourse with this girl before?" In his extra-judicial statement he said she didn't protest "when I started in but after a while she became scared or frightened and I shook her, stood her up and took her up the path ———". He did not see her pants and doesn't know whether she had any.

The testimony of the accused and his pre-trial statements, together with the medical testimony of Doctor Brandt, may be said to be consistent with actual penetration of the prosecutrix. But this evidence does not stand alone. It stands beside the unequivocal and emphatic testimony of the prosecutrix that she did not have intercourse with the accused. Viewed in this light, we are of opinion that the statements of the accused in his testimony and pre-trial statements are also consistent with mere preparation for intercourse, or at most with mere contact of their sexual organs, and are not inconsistent with lack of actual penetration.

"The indispensable element of the crime of rape is penetration, but the slightest penetration will constitute the crime if accomplished by force and without consent. If there is an actual entrance of the male organ within the labia of the pudendum of the female organ, and such penetration accomplished without consent and by force, or under such circumstances that proof of any force other than that which is an ordinary incident of the act of coition is unnecessary, the crime of rape has been committed. In cases where the victim of the assault is in a state of stupefaction lack of consent is obviously apparent. Proof thereof is unnecessary and proof of force, other than the act of penetration itself, is not requisite under such circumstances (Wharton's Criminal Law (12 Ed.) sec. 682, p. 914). Proof of penetration, beyond every reasonable doubt is, of course, essential; but such proof need not be direct nor is it necessary that it be shown by testimony of the outraged female. Proof by circumstantial evidence may be made and it is sufficient if facts be proven from which penetration may be inferred. (Wharton's Criminal Law (12 Ed.) sec. 697, p. 936, and cases cited)" (CM 249224 Hope, 32 BR 69, 76).

Mere actual contact of the sexual organs is not sufficient to constitute penetration (52 C.J. 1015). "Proof of penetration need not be in any particular form of words; and it may be sufficiently shown by direct or circumstantial evidence. If penetration is the only inference comportable with the evidence it is sufficient. . . . A conviction cannot be based on contradictory testimony of the prosecutrix as to whether there was penetration" (52 C.J. 1090; emphasis supplied). As authority for the last-quoted rule, the following cases are cited: State v. Forshee, 199 Mo. 142, 97 S.W. 933; Vickers v. U.S., 1 Okl. Cr. 452, 98 P. 467. The same principle of law is laid down in Wharton's Criminal Law (12 Ed.) Sec. 724, p. 975, citing Allen v. State (Miss. Sup. Ct.) 45 So. 833, in addition to the foregoing cases. In the Forshee case, supra, the Court said:

".... conceding that an assault was made, the testimony of the old lady herself was so contradictory that the verdict cannot be allowed to stand. According to her own statements there was no penetration, and hence no rape. But, if it be said that, by other statements of Mrs. Cowan (prosecutrix), the jury could have found there was a penetration, as she was the only witness on this point, no man should be incarcerated in the penitentiary upon such contradictory evidence from the same witness" (Emphasis supplied).

A fortiori, we believe, a conviction for rape cannot be based upon the positive denials of the prosecutrix that there was any act of intercourse, where the other evidence upon that point, including the hypothesis that the intercourse occurred while she was unconscious, is of such inconclusive and chimerical character as that shown in this record. It is to be noted that in the Forshee case the prosecutrix stated there was no penetration.

It is true that the admissions of the accused may be sufficient proof of sexual intercourse (52 C.J. 1090, citing People v. Arnold, 80 Cal. A. 623, 252 P. 635; State v. Enright, 90 Iowa 520, 58 N.W. 901; State v. Duffy, 128 Mo. 549, 31 S.W. 98; and Mora v. State, 74 Tex. Cr. 26, 167 S.W. 344. But in each of those cases, however, the prosecutrix also testified to the act of intercourse). The true meaning of that general proposition of law is accurately reflected in Kaye v. U.S. (C.C.A. 7th), 177 F. 147, wherein the court applied the rule in a counterfeiting case, and said:

"The allegations that needed to be proven were unequivocally established by the defendant when he testified as a witness in his own behalf. So the questions whether, at the conclusion of the government's evidence, there was sufficient proof of the corpus delicti, whether purported oral and written admissions by defendant out of court were properly received in evidence, and the like, all become immaterial" (Emphasis supplied).

But, as previously indicated, the testimony of the accused in this case does not "unequivocally establish" the penetration. And penetration falls far short of being the "only inference comportable with the evidence".

With further reference to the possibility that intercourse occurred while the prosecutrix was unconscious, the following language of the Supreme Court of Georgia is peculiarly in point and compelling:

"A thorough examination of the testimony fails to show the fact that he did have any actual carnal knowledge of this

woman. Mrs. Fox (prosecutrix) testifies to much criminal conduct, and earnest effort on the part of the accused, and a stout resistance on her own, but she adds that she became unconscious and 'I don't know what was done to my person no more than if I had been buried ten feet under the ground'. This being the only testimony as to any actual rape having been committed, we do not think there is sufficient proof to justify the verdict". (Wesley v. State, 65 Ga. 731; Emphasis supplied).

We deem it appropriate, in view of the unusual nature of this case, to reiterate and emphasize the rule governing the weight and sufficiency of the evidence in rape cases. The law, and the peculiar reason therefor, is well stated in 52 C.J. 1087:

"The courts have repeatedly approved Sir Matthew Hale's statements in regard to the crime of rape, that 'it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent'; To be sufficient to sustain a conviction, the evidence must show beyond a reasonable doubt that defendant committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction. In cases of rape, the question of guilt or innocence should not be measured arbitrarily by the character of the evidence, whether positive or negative, direct or circumstantial; rather it should be decided by the weight of the evidence, and a conviction for rape will not be reversed for insufficiency of evidence because of the improbability of the facts presented by the state; but if all of the state's material evidence is contradictory, inconsistent, and unreasonable, and bears on its face inherent evidence of improbability, it is insufficient to support a conviction". (Emphasis supplied).

The Board of Review concludes that the evidence as a whole in this record is so inconsistent with any actual penetration, so incredible, and bears upon its face such inherent evidence of improbability, that it completely fails to measure up to that high degree of probative substantiality required to establish accused's guilt of rape beyond a reasonable doubt.

7. Although the evidence is legally insufficient to sustain a conviction of rape, it is sufficient to sustain a finding of guilty of the

lesser included offense of assault with intent to commit rape. The lesser offense has been defined as follows:

"The crime is committed when every element of the crime of rape excepting the element of penetration is present; or stated otherwise, an assault with intent to rape includes every ingredient of the crime of rape, except the active accomplishment of that crime" (52 C.J. 1026).

As discussed above, we have been able to find every element in proof of rape except that of penetration. The prosecutrix, on recall, gave testimony that accused continuously attempted to embrace her and kiss her and she resisted; she ran and he caught her and stifled her. When she threatened to report him he struck her and knocked her down twice, drew a knife and knelt on her and as a result she lapsed into unconsciousness. When she recovered consciousness her pants had been removed. The credibility of accused's testimony and statements that the episode was one of mutual agreement was for the court to decide. Accused's conduct was far more than assault and battery or indecent advances, paragraph 1491, MCM, page 179. It indicates an intent to ravish the victim and the record is legally sufficient to support a finding of guilty of assault with intent to commit rape.

8. The charge sheet shows that the accused is twenty-four years and four months old, and that he was inducted at Camden, New Jersey, on 16 December 1942, without prior service. The review of the staff judge advocate states that accused completed three years of grammar school; that he was employed as a farm laborer at \$18.00 per week; that after basic training he has served in the Army as a truck driver; that he arrived in England in March 1944 and in Germany in March 1945; that he was sentenced to forfeit \$21.00 and to be restricted for thirty days by summary court-martial on 14 July 1944 for willfully disobeying a non-commissioned officer; that on 20 December 1944 a special court-martial sentenced him to six months confinement at hard labor and forfeiture of \$25.00 for six months for public drunkenness and breach of arrest; and that his AGCT score is 43 (Grade V) which is far below average. Examined by a psychiatrist on 16 December 1945, accused was found to be mentally responsible.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to sustain only so much of the findings of guilty as involves a finding of guilty of assault with intent to commit rape upon the person and at the time and place alleged, in violation of the 93rd Article of War, and legally sufficient to sustain only so much of the sentence as

involves dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape by Article of War 42, being recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18 U.S.C., sec. 455 and Title 22, District of Columbia Code, 1940, sec. 501.

Charles M. Dickson, Judge Advocate

H. H. ..., Judge Advocate

Harold F. McDonnell, Judge Advocate

15 1946

JAGQ-CM 312274

1st Ind

WD JAGO, Washington 25, D. C.

TO: Commanding General, Third Infantry Division,
Camp Campbell, Kentucky

1. In the case of Private Roy C. Taylor (32484551), 3420th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of an assault by accused with intent to commit rape upon the person named and at the time and place alleged, in violation of the 93rd Article of War, and approval of 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 twenty years, you will have authority to order the execution of the sentence.

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

(CM 312274).

REC'D JA 5' DIV

15 1946



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGK - CM 312289

25 SEP 1946

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT
	)	No. 2, Fort Ord, California
v.)	
Second Lieutenant Theodore	)	Trial by G. C. M., convened at Fort
N. Terkleson (O-1825580)	)	Ord, California, 19 March 1946.
Infantry	)	Dismissal.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Theodore N. Terkleson, Headquarters, First Replacement Regiment (Infantry), Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, on or about 16 June 1944, at Baltimore, Maryland, wrongfully and unlawfully contract and enter into a marriage with Minnie Stewart of Baltimore, Maryland, while married to Mary Anne Terkleson, of South Bend, Indiana, a living person, and prior to obtaining a legal dissolution of his marriage to the said Mary Anne Terkleson.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial under the provisions of the 48th Article of War.

3. Evidence for the prosecution.

The prosecution offered in evidence an authenticated copy of a Marriage License and Certificate of Marriage which shows a valid marriage between the accused, Theodore Norman Terkleson, and Mary Anne Davis. This marriage occurred 3 July 1941 (R 6 Pros. Ex. 1). The prosecution also

offered in evidence an authenticated copy of a Marriage License and Certificate of Marriage which show a marriage between the accused Theodore N. Terkleson and Minnie Stewart. This marriage occurred 16 June 1944 (R 7 Pros. Ex. 3.). The prosecution then offered in evidence an authenticated copy of a divorce decree by the Circuit Court, St. Joseph County, State of Indiana, dated 21 December 1945 which dissolved the marriage between the accused Theodore N. Terkleson and Mary Terkleson (R. 7 Pros. Ex. 2). Captain Samuel L. Cederborg, a witness for the prosecution testified that he was appointed investigating officer to investigate certain matters concerning the accused. The accused was warned of his rights after which he made a voluntary statement to Captain Cederborg concerning the case. The statement made by accused was identified by Captain Cederborg and received in evidence as Prosecution Exhibit 4 (R 9). In the statement the accused admits his marriage to Mary Anne Davis on 3 July 1943 and that the marriage was terminated by divorce on 21 December 1945. The accused also admits that on 16 June 1944 he married Minnie Augusta Stewart.

4. Evidence for the Defense.

The accused was advised of his testimonial rights and elected to be sworn as a witness in his own behalf. The accused testified that he had married Mary Anne Davis in 1941 and of this marriage one child was born. While in the Army he has at all times contributed to the support of the family. He has not lived with Mary Anne Terkleson since March 1943. In March and September 1944 he attempted to secure a divorce but was not successful. In the summer of 1944 he was stationed at Fort Meade, Maryland. While at Fort Meade he met Minnie Augusta Stewart whom he had known for approximately eight years. That just prior to his marriage to Minnie Augusta Stewart he had orders for one week's leave. He went on a party with several officers and does not remember anything about the marriage. His first knowledge of the marriage was when he was on his way to Texas and one of his friends told him he was married to Minnie Augusta Stewart and that he had lived with her approximately three days. One child was born of this marriage. He did not live with Minnie Augusta Stewart after this occasion. His divorce from Mary Anne Terkleson was granted on 21 December 1945 (R 11-22).

5. The evidence produced by the prosecution and the admissions under oath of the accused establish, without doubt, that the accused did, as he was charged, enter into a bigamous marriage with one Minnie Stewart of Baltimore, Maryland, on 16 July 1944 while he was legally married to another woman who was still alive. Such an act constitutes bigamy in violation of Article of War 96 (C M 262206 Peck 41 B R 19).

6. War Department records show that accused is thirty one years old. He is a high school graduate. He was inducted into the Army of the United States October 28, 1942 and was assigned to the Tank Destroyer Training Center, Camp Hood, Texas. He attended Officer Candidate School and was commissioned temporary Second Lieutenant, Army of the United States, June 11, 1943, at the Tank Destroyer School. He entered on active duty on that same date. At the time of his induction into the Army he was working for Bendix Aviation Corporation earning \$87.00 per week.

Three efficiency reports and one special school report disclose that for the period July 1, 1944 - December 31, 1944, accused was rated "Unknown"; that for the Officers' Special Basic Course, No. 44 The Infantry School, October 19, 1944 - December 17, 1944, he was rated "Satisfactory"; that for the period January 1, 1945 - June 30, 1945, he was rated "Excellent", and that for the period July 1, 1945 - December 31, 1945, he was rated "Unknown".

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

Charles T. Sibers, Judge Advocate.

Carlton E. McAfee, Judge Advocate.

Edmund J. [unclear], Judge Advocate.

(92)

JAGX - CM 312289

1st Ind

WD, JAGO, Washington 25, D. C.

SEP 8 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Theodore N. Terkleson (O-1825580), Infantry.

2. Upon trial by general court-martial this officer was found guilty of bigamy 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. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding and the sentence and to warrant confirmation thereof.

3. The evidence shows that on 16 June 1944 the accused contracted a marriage with Minnie Augusta Stewart. At the time of the marriage the accused was married to Mary Anne Terkleson, and Mary Anne Terkleson was then living. The marriage of accused and Mary Anne Terkleson was dissolved by decree of divorce on 21 December 1945. The accused has a child by each wife.

The accused is 31 years of age. He graduated from high school, and at the time of his induction into the Army he worked for the Bendix Aviation Corporation. He attended Officer Candidate School and was appointed and commissioned a second lieutenant, Army of the United States, on 11 June 1943.

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

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

2 Incls

1. Record of trial
2. Form of action.



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 305, 14 Oct 1946).

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

JAGC-CM 312290

SEP 20 1946

UNITED STATES)

v.)

Second Lieutenant J.
 REXFORD SCHUSTER (O-787721),
 Air Corps.)

ARMY AIR FORCES
 FLYING TRAINING COMMAND

Trial by G.C.M., convened at
 Moody Field, Georgia, 19 and
 25 February 1945. Dismissal
 and fine of \$100.00

 OPINION of the BOARD OF REVIEW
 WURFEL, OLIVER and McDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant J. Rexford Schuster, Air Corps, Squadron B, 2225th AAF Base Unit, AAF Pilot School (Basic) was, at Valdosta, Georgia, on or about 9 January 1946, drunk and disorderly in uniform in a public place, to wit: the Union Lunch Room, 313 South Patterson Street.

Specification 2: In that Second Lieutenant J. Rexford Schuster, * * * did, at Valdosta, Georgia, on or about 9 January 1946, wrongfully point and aim a dangerous weapon, to wit: a pistol, at Genita Raulerson.

He pleaded not guilty to both Specifications and the Charge, and was found guilty of Specification 1, guilty of Specification 2 except the word "dangerous", and guilty of the Charge. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of one hundred dollars (\$100.00). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution: At about 0300, on 9 January 1946, accused made the first of five successive visits to the Union Lunch Room in Valdosta, Georgia. After ordering a cup of coffee he began annoying the waitress, Genita Raulerson, single and about 18 years of age. Accused asked her name, told her she was cute, kidded, worried and aggravated her (R 7, 9, 12). She paid no attention to accused and did nothing to offend him (R 7, 9, 12). Accused went out and came back and annoyed the waitress again (R 7). He returned for the third time about 0400 and again "picked at" the waitress (R 7). About 30 minutes later accused returned for the fourth time and the waitress said, "Go away and leave me alone" (R 7). Thereupon the manager of the cafe told accused to leave and accused left as requested. When accused came out of the cafe a cab driver saw accused talking to a civilian who told accused "You had better get in the cab and leave." Accused then complained to the cab driver that the civilian had drawn a knife on accused, claiming to be the waitress' father. The cab driver informed accused that the civilian was not the girl's father (R 15). Accused then went to the taxicab in which he had made several trips previously that night. The cab driver had left a German pistol in the front seat of the cab and had taken the clip out of the pistol about midnight (R 24). Also the cab driver testified that there was no shell in the chamber of the pistol and that the gun was not loaded (R 17, 25). Accused took the driver's pistol without the driver's knowledge or permission (R 17, 24, 25) and returned to the cafe for the fifth time. The waitress was back of the counter and asked accused "What do you want?", to which accused replied, "I want a big smile and I don't mean maybe" (R 8). Accused then drew a gun from under his field jacket and pointed it directly at the waitress (R 8, 17, 25). Accused did not make any threats to the waitress (R 11). The cab driver came in a few minutes later and observed accused with the gun pointed at the waitress (R 10, 17). The cab driver said to accused, "Let's get out of here" (R 18), or "Come on out of here before we get into trouble" (R 8). The cafe owner testified that accused still had the gun pointed at the waitress as he backed out of the cafe (R 9, 11). The cab driver testified that he took the gun out of accused's hand in the cafe, that he had no trouble in recovering his gun or in persuading accused to leave the cafe (R 18, 23). Accused was arrested in the same taxicab a few minutes later (R 31), and the pistol was found in the glove compartment of the taxicab (R 26, 27, 30).

In the opinion of the cafe owner accused was pretty well intoxicated, being one-half to two-thirds drunk (R 9, 10). In the cab driver's opinion, accused was as drunk as a man could be and still stand on his feet (R 19). The civil policemen who arrested accused testified that accused was wobbly, glasseyed and drunk (R 31, 32). When booked at the Valdosta police station between 0530 and 0600 accused was very drunk (R 41). When accused reported to his commanding officer at about 0800 he was in very poor shape and had a terrible hang-over (R 47).

4. Evidence for the Defense: Two Air Corps officers, qualified as experts in small arms, testified that an unloaded gun is not a dangerous weapon (R 53-57).

Accused testified that he went in a taxicab to a dance hall some distance from Valdosta, Georgia, at about 2100 on 8 January 1946. At the dance hall he drank a fifth of whiskey with a party of four acquaintances (R 59, 66) and rode back to Valdosta with his friends between 0100-0230 on 9 January 1946 (R 67). Accused was wearing his uniform and was completely belted and buttoned up (R 68). He went to the Union Cafe and teased the waitress (R 68) and then went to the taxicab company to reserve a cab for a trip at 0600. He returned to the Union Cafe where he again kidded the waitress (R 60) and the manager asked him to leave, which he did (R 61, 69). As accused stepped out of the cafe he was accosted by a stranger who told accused that he was the father of the waitress and resented accused's remarks to the girl (R 69). This man pulled a knife on accused but did not use it and walked away. Accused then learned from the cab driver that the stranger was not the girl's father (R 70), so he followed the stranger for about 200 feet and got back in the cab (R 75). Accused was angry at having the knife pulled on him (R 64) and borrowed the cab driver's gun, intending to scare his assailant (R 73). Accused knew the gun was not loaded (R 74). The cab driver made no response to accused's request to borrow the gun and accused did not know if the driver agreed to accused taking the gun (R 62, 71). At about 0330-0400 accused returned to the cafe for the third time and found that the assailant who pulled the knife was not there (R 63, 73). Accused had the gun under his field jacket (R 63). He ordered coffee and teased the waitress some more. Accused reached under his jacket for his wallet and took the gun out at the same time as he took his wallet out. He turned with the gun in his hand and this probably caused the waitress to believe he was pointing the gun at her (R 63, 64). Accused denied that he pointed the gun at the waitress and stated that he did not point it at her with intention of hurting her (R 72). The cab driver came in just after accused had pulled the gun, said "Let's go", and took the gun from accused (R 64). Accused and the driver left the cafe at once and the driver put the gun in the glove compartment of the vehicle (R 64).

Accused denied that he was drunk, testified that he had been drinking but knew everything that happened that night, and claimed that he did not stagger or use profane language (R 63). He was not drunk when arrested shortly afterward (R 64).

5. The evidence is legally sufficient to sustain the finding that accused was drunk and disorderly in uniform in the Union Lunch Room in Valdosta, Georgia, on 9 January 1946, as alleged in Specification 1 of the Charge. Both the cafe owner and cab driver testified that accused was drunk. That he was also disorderly at the same time and place is amply proved both by his repeated annoying of the waitress which resulted in

his being asked to leave the premises and by his subsequent unlawful use of a pistol in the same establishment. Accused's conduct was clearly of a nature to bring discredit upon the military service.

The finding of guilty of Specification 2 of the Charge to the effect that accused wrongfully pointed and aimed a pistol at Genita Raulerson is likewise fully supported by the evidence adduced.

"An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. * * * presenting a firearm ready for use within range of another, * * * are examples of assault. * * *.

"Furthermore, in an assault there must be an intent, actual or apparent, to inflict corporal hurt on another. Where the circumstances known to the person menaced clearly negative such intent, there is no assault" (Par. 1491, MCM, p. 177).

Applying the above rules to the facts in this case, it is clear that accused, by drawing and pointing the weapon as alleged and proved, committed an assault in violation of Article of War 96, notwithstanding the trial judge advocate's statements in argument (R 50, 52, 53) that accused was not charged with an assault. We are not called upon here to decide whether the assault was made with a dangerous weapon, since the court excepted the word "dangerous" in its findings.

First Lieutenant Harry E. Reed, Air Corps, was called as an expert defense witness on the question of the dangerous quality of an unloaded firearm. He was not sworn (R 53). Lieutenant Reed stated to the court that in his opinion an unloaded pistol was not a dangerous weapon. Since the court excepted the word "dangerous" from its findings it is obvious that the court gave some credence to Lieutenant Reed's statement, and that such testimony was favorable to accused is demonstrated by the court's exception. Hence the error resulted favorably to the accused and in no way prejudiced his substantial rights. It is true that Article of War 19 requires that evidence before a court-martial shall be given on oath or affirmation. Nonetheless, in our opinion, the failure to administer the oath to this defense witness in no way prejudiced the substantial rights of the accused within the purview of Article of War 37; rather the unsworn statement of the witness was decidedly helpful to the accused. The omission does not constitute reversible error. CM 119657 (1918); CM 121586 (1918), Sec. 376 (3) Dig. Op. JAG, 1912-40.

There is extensive testimony in the record as to the drunkenness of accused when he was arrested 30 minutes after he finally left the Lunch Room; there was further testimony as to his drunkenness still later when he was booked at the Valdosta police station; and the Commanding Officer of Moody Field testified that accused had a hang-over three or four hours

after the incident charged. This testimony as to accused's lack of sobriety at later times and places was immaterial and irrelevant and should have been excluded. However, following the rule in CM 273791, Jacobs, 47 BR 75, to the effect that a conviction should not be set aside where the evidence in support of the conviction is compelling and the evidence improperly admitted could not reasonably have affected the result, the error was not prejudicial.

6. Consideration has been given to a brief filed on behalf of accused by Garrigan, Keithley and O'Neal, Attorneys-at-Law, 318 Strong Building, Beloit, Wisconsin. Mr. Garrigan appeared before Board of Review No. 3 on behalf of accused on 15 July 1946.

7. On 29 July 1946 this office requested the Commanding General, Army Air Forces Flying Training Command, to have an examination made of accused to determine his mental condition and responsibility both at the time of offenses and at time of trial. In response to this request, a board of three medical officers, two of whom were neuropsychiatrists, examined accused at Brooks General Hospital, San Antonio, Texas. This board on 7 September 1946 found:

"1. That this officer was, at the time of the alleged offenses, namely, drunk and disorderly conduct, and pointing a pistol at a waitress on or about 8 January 1946, so far free from mental defect, disease and derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"2. That this officer was, at the time of the alleged offenses, so far free from mental defect, disease and derangement as to be able concerning the particular acts charged to adhere to the right.

"3. That this officer was, at the time of his trial, on or about 19 February 1946, sufficiently sane intelligently to conduct or cooperate in his defense."

8. War Department records show the accused is 21½ years old, single, and a graduate of Beloit, Wisconsin, High School in June 1943. He enlisted 21 July 1943 and was commissioned second lieutenant, Air Corps (AUS), 20 November 1944. He has had no overseas duty. After being commissioned he was given advanced flying training at Luke Field, Arizona, B-17 transition training at Kingman Field, Arizona; combat crew training at Ardmore, Oklahoma, and B-25 and A-26 training at Pampa, Texas. Late in 1945 he was assigned as Supply Officer at Hendricks Field, Florida, and was later transferred to Moody Field, Georgia, where he was stationed when the present offenses occurred. Accused's efficiency reports are not available.

On 15 February 1945 accused was given an administrative reprimand at Ardmore Army Air Field, Oklahoma, for being drunk and disorderly in uniform in public. On 21 November 1945 accused was reprimanded and forfeited \$75.00 of his pay, under the 104th Article of War, for being drunk under such circumstances as to bring discredit on the military service. This disciplinary action resulted from accused's attendance at a Salvation Army meeting in Sebring, Florida, in a drunken condition on 12 October 1945. During the course of the meeting the preacher pushed accused on the platform and proceeded to give a lecture on "temperance", using accused as an example. Several hours later, on 12 October 1945, accused was drunk and disorderly in a tavern in Avon Park, Florida. On 14 December 1945 at Hendricks Field, Florida, accused was again punished under the 104th Article of War for being drunk and disorderly, receiving a reprimand and one week's restriction. After the present trial accused was reported drunk at Moody Field, Georgia, on 5 March 1946, and he was confined at that station on 6 March 1946 because of his continued drunkenness. Since date of trial accused has been hospitalized at least three times with diagnosis of "Anxiety State". On 19 July 1946 a Disposition Board at Brooke General Hospital found as to accused: "Schizoid personality, manifested by chronic alcoholism, ideas of reference and tension state. LD: No EPTAD". The Disposition Board found no disability and found accused qualified for general service.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the 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 and the sentence and to warrant confirmation thereof. Dismissal and fine are authorized upon conviction under Article of War 96.

Seymour W. Wurfel, Judge Advocate

H. Hayne Oliver, Judge Advocate

Harold F. Mc Donnell, Judge Advocate

JAGQ-CM 312290

1st Ind

WD, JAGO, Washington 25, D. C.

00-8 1046

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant J. Rexford Schuster (O-787721), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place, and of wrongfully pointing and aiming a pistol at a waitress employed in the lunchroom where the public drunkenness and disorderly conduct occurred, in violation of Article of War 96. He was sentenced to be dismissed the service and to pay to the United States a fine of \$100.00. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that during the evening of 8 January 1946, and the early morning hours of 9 January 1946, the accused made five consecutive visits to the Union Lunch Room in Valdosta, Georgia. He was drunk. In the lunchroom he annoyed and aggravated a waitress, one Genita Raulerson, and demeaned himself in such an objectionable manner that the manager of the establishment asked him to leave during his fourth visit to the cafe. Thereafter the accused re-entered the cafe for the fifth time and resumed his protested attentions to the waitress. The evidence shows that when the waitress asked the accused what he wanted he replied "I want a big smile and I don't mean maybe", and thereupon drew a pistol from his field jacket and pointed it directly at the waitress. He made no verbal threats. A cab driver, who had been taking the accused to various places during the night, entered and took the accused away. The evidence shows that the accused still had the gun pointed at the waitress as he backed out of the cafe. Within a few minutes thereafter the accused was arrested by the police and was taken to the Valdosta Police Station where he was confined until he was released to military authorities the following morning. As a witness in his own behalf the accused denied that he was drunk, although he admitted considerable drinking. He testified in substance that he removed the pistol from his pocket in order to reach his wallet which he had to remove to make payment for refreshments he had purchased in the cafe, and that he did not point the gun at the waitress with any intention of hurting her.

5. The military career and assignments of the accused are outlined in the opinion of the Board of Review. His efficiency ratings are not available. War Department records show that on three previous occasions the accused has been punished under the 104th Article of War for being drunk and disorderly. As to one of those previous derelictions, it appears that the accused attended a Salvation Army meeting in a drunken condition, and that during the course of the meeting the preacher placed the accused upon the platform and proceeded to talk upon the subject of temperance, using the accused as the example of the evil of drink. After the present trial the accused was reported drunk at Moody Field, Georgia, on 5 March 1946 and was confined at that station on 6 March 1946 because of his continued drunkenness.

A neuropsychiatric examination of the accused at Brooke General Hospital, San Antonio, Texas, resulted in the conclusion that he was sane and responsible for his acts.

6. Consideration has been given to a brief filed on behalf of the accused by Messrs. Garrigan, Keithley and O'Neal, Attorneys-at-Law, Beloit, Wisconsin. Mr. Garrigan appeared before the Board of Review on 15 July 1946.

7. By a long-continued course of misconduct, culminating in the present trial by general court-martial, this accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed but that so much thereof as imposes a fine be remitted, and that the sentence as thus modified be carried into execution.

8. Inclosed is a form of action designed to carry this recommendation into effect, should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls

1. Record of trial.
2. Form of action
3. Psychiatrist Report
4. Brief by Messrs. Garrigan, Keithley and O'Neal

(G.C.M.O. 314, 18 Oct 1946).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

(101)

SPJGH - OM 312320

29 MAY 1946

UNITED STATES	)	NEWFOUNDLAND BASE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Harmon Field, Newfoundland, 18
Captain WENDELL BINGAMAN	)	February 1946. Dismissal and
(O-438952), Army Air Forces.	)	confinement for two (2) years.

 OPINION of the BOARD OF REVIEW
 TAPPY, STERN 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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Captain Wendell Bingaman, 1388th Army Air Forces Base Unit, North Atlantic Wing, Atlantic Division, Air Transport Command, did at Gander Field, Newfoundland, on or about 24 August 1945, feloniously embezzle by fraudulently converting to his own use about \$169.05, lawful money of the Dominion of Canada, value about \$153.68, property of Civilian Welfare Fund, Gander Field, Newfoundland, entrusted to him as Custodian of said fund.

Specification 2: In that * * *, did, at Gander Field, Newfoundland, on or about 12 September 1945, feloniously embezzle by fraudulently converting to his own use about \$214.03, lawful money of the Dominion of Canada, value about \$194.57, property of Civilian Welfare Fund, Gander Field, Newfoundland, entrusted to him as Custodian of said fund.

Specification 3: In that * * *, did, at Gander Field, Newfoundland, on or about 7 October 1945, feloniously embezzle by fraudulently converting to his own use about \$88.65, lawful money of the Dominion of Canada, value about \$80.59, property of Civilian Welfare Fund, Gander Field, Newfoundland, entrusted to him as Custodian of said fund.

He pleaded guilty to, and was found guilty of, all Specifications and of the 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 five (5) years. The reviewing authority approved the sentence, reduced the period of confinement to two (2) years and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that from 11 August 1945 to 12 November 1945, it was the practice for Mr. Philip Coughlin, Chief Clerk of Civilian Personnel and supervisor of the Civilian Recreation Hall and Civilian Canteen, Gander Field, Newfoundland, to gather regularly all funds from the two slot machines in the Recreation Hall and from the juke box in the Canteen and turn all such funds over to accused who was Custodian of the Civilian Welfare Fund (R.6,7,10). The funds taken from these slot machines and the juke box constituted assets of this Civilian Welfare Fund (R.11).

On 24 August 1945 Mr. Coughlin removed \$145.90 in Canadian money from the two slot machines and \$23.15 in Canadian money from the juke box which on that date he turned over to accused as Custodian of the Civilian Welfare Fund (R.7,8,11; Pros. Exs. A,B). These two amounts totalled \$169.05, Canadian money, and had a value of \$153.68 in American money (R.13). On 12 September 1945, Mr. Coughlin obtained the sum of \$214.03, Canadian money from the slot machines and the juke box which on that date he turned over to accused as Custodian of the Fund (R.8,11; Pros. Ex. C). This sum had a value of \$194.57 in American money (R.13). On 7 October 1945, Mr. Coughlin removed \$88.65, Canadian money, from the slot machines and turned it over on that date to accused as Custodian of the Fund although the receipt therefor was dated one month later (R.8,9,11; Pros. Ex. D). This sum had a value of \$80.59 in American money (R.13). On 7 November 1945 the sum of \$132.35, Canadian money, was removed from the slot machines by Mr. Coughlin and turned over to accused (R.9; Pros. Ex. E).

The Council Book for this Civilian Welfare Fund reflects monthly accounts from August 1945 to November 1945, inclusive, all certified as correct by accused. The accounts for the months of August, September and October 1945 showed no funds received during those months, but the November account reflects the receipt of the \$132.35 delivered to accused on 7 November 1945. The November account showed a balance of \$49.41 on hand which was the amount on deposit in the Fund on 12 November 1945 when First Lieutenant Edward F. Carlin succeeded accused as Custodian of the Fund (R.12,13; Pros. Ex. F).

On the morning of trial of this case, accused gave Lieutenant Carlin the total sum of \$265 in Canadian money to be credited to the Fund (R.13).

4. In an unsworn statement made to the court, accused admitted his guilt of the offenses charged and stated there was no "logical reason" for his defalcation except that it occurred "during a period of extremely low

morale and despondency aggravated by family difficulties which led to excessive gambling and drinking." He claimed that he always intended to refund the amount of his peculations and had repaid \$265 thereof in Canadian money (R.14). Realizing the seriousness of his offense he had ceased gambling and limited his consumption of alcoholic liquors (R.15). With respect to his military service he stated that he had completed all but eight days of twenty years' service in the Army and that never as an enlisted man or an officer had he previously been court-martialed or received company punishment or lost any time under Article of War 107. He requested leniency from the court so that he might continue his career in the military service (R.15).

5. Accused's pleas of guilty coupled with the conclusive evidence introduced by the prosecution as well as accused's admission of guilt made in open court abundantly support the court's findings of guilty of the Specifications and the Charge.

6. Accused is 38 years old, married and has two children. He enlisted in the Regular Army on 15 November 1925 and, except for a period of three months, has served continuously in the Army since that time. He held the grade of master sergeant on 17 August 1942 when he was discharged for the convenience of the Government to accept a commission as captain, Army of the United States.

7. Attached to the record of trial is a letter dated 27 March 1946 purporting to be signed by accused's mother and his wife in which clemency is requested on behalf of accused. It is stated therein that the petitioners have made restitution of the balance of the peculated funds. They ask that consideration be given to accused's long record of honorable service and the fact that he is the father of two minor children.

8. The court was legally constituted and had jurisdiction of the accused 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 of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Thomas N. Taffey, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Swettenham, Judge Advocate.

(104)

JAGH - CM 312320

1st Ind

WD, JAGO, Washington 25, D. C.

JUN 21 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Wendell Bingaman (O-488952), Army Air Forces.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of embezzling \$153.68 on or about 24 August 1945, \$194.57 on or about 12 September 1945, and \$80.59 on or about 7 October 1945, all from the Civilian Welfare Fund, Gander Field, Newfoundland, in violation of Article of War 93. He was sentenced to dismissal, total forfeitures and confinement for five (5) years. The reviewing authority approved the sentence, reduced the period of confinement to two (2) years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

Over the period from August to November 1945, inclusive, accused was Custodian of the Civilian Welfare Fund at Gander Field, Newfoundland, and in such capacity during the following months he received the following monies belonging to that Fund, viz: the sum of \$153.68 in August 1945, the sum of \$194.57 in September 1945, and the sum of \$80.59 in October 1945. He did not preserve these monies as trustee funds but appropriated them to his own use and failed to account therefor. On the morning of his trial for these offenses, accused delivered the sum of \$265 to the successor Custodian of this Fund as partial restoration of the amount peculated by him, leaving a balance of \$163.84 which accused's mother asserted she paid in March 1946.

4. Except for an intervening period of three months, accused had served as an enlisted man in the Regular Army from 16 November 1925 until 17 August 1942 when he was discharged for the convenience of the Government in the grade of master sergeant to accept a commission as captain, Army of the United States. Until perpetration of the present offenses, his record while in military service was unblemished.

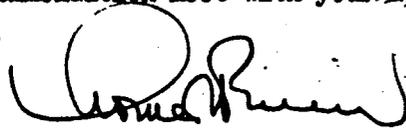
In view of the foregoing I recommend that the sentence be confirmed and carried into execution.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

2 Incls

1 - Record of trial

2 - Form of action



THOMAS H. GREEN

Major General

The Judge Advocate General

(G.C.M.O. 239, 26 July 1946)..



WAR DEPARTMENT
In The Office of The Judge Advocate General
Washington 25, D. C.

DEC 19 1946

JAGQ-CM 312330

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

EIGHTH SERVICE COMMAND

v.)

) Trial by G.C.M., convened at
) Camp Swift, Texas, 22, 25, 28,
) 29, and 30 January 1946.
) Confinement for life. U. S.
) Penitentiary, Leavenworth,
) Kansas.

) Obergefreiter HEINRICH BRAUN
) (81 G 28101), Gefreiter
) WERNER HOSSANN (81 G 28111),
) Obergefreiter ERICH VON DER
) HEYDT (81 G 58327),
) Obergefreiter WERNER JASCHKO
) (81 G 28112), Unteroffizier
) HELMUT MEYER (8 WG 4583),
) Obergefreiter GUNTHER MEISEL
) (8 WG 4579) and Unteroffizier
) ANTON BOEHMER (8 WG 4464),
) German Prisoners of War.

HOLDING by the BOARD OF REVIEW
DICKSON, OLIVER and BOYLES, Judge Advocates

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

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

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

Specification: In that Unteroffizier Anton Boehmer, Obergefreiter Guenther Meisel, Unteroffizier Helmut Meyer, Obergefreiter Werner Jaschko, Obergefreiter Erich Von der Heydt, Gefreiter Werner Hossann, and Obergefreiter Heinrich Braun, German prisoners of war, acting jointly and in pursuance of a common intent with persons unknown, did, at the Prisoner of War Camp, Hearne, Texas, on or about 17 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Hugo Krauss, a human being, by striking him with a pipe, wooden sticks and other instruments unknown.

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

Specifications: (Plea of statute of limitations in bar of trial sustained as to all accused).

Each accused pleaded not guilty to, and was found guilty of the Specification of Charge I and of Charge I. No evidence of any previous convictions was introduced as to any accused. With three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority approved the sentence as to each accused, designated the U. S. Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50g.

3. Upon the jurisdictional aspect of the case it was stipulated that each accused was on 17 December 1943 and on 21 January 1946 a German prisoner of war and that the United States was the detaining power of each accused (R 12, 13; Pros. Ex. A). This was sufficient to give the court jurisdiction under Articles 45 and 63 of the Geneva Convention providing that prisoners of war shall be subject to the laws, regulations and orders in force in the armies of the detaining power, and that prisoners of war shall be subject to the same courts and procedure as persons of the armed forces of the detaining power (II Bull. JAG 51-55). It was further stipulated by each accused that the requirements of Article 62 of the Geneva Convention relating to defense counsel and interpreters for accused had been complied with (R 14, 15; Pros. Ex. B). Following the surrender of Germany the Swiss Government declined to continue as the Protecting Power for German prisoners of war, hence it was not possible to give at least three weeks notice to the protecting power as provided by Article 60 of the Geneva Convention. However, the carrying papers show that notice of the proposed trial of each accused was sent to the Provost Marshal General three weeks prior to trial. Two German Army officers were present as official German observers (R 2). Every right and privilege guaranteed by international law to prisoners of war against whom judicial proceedings have been instituted was strictly observed.

4. The events in this case occurred in the area of Company 3, Compound I, Prisoner of War Camp, Hearne, Texas. The buildings housing Company 3 consisted of eight barracks numbered 1 to 8 inclusive, a mess hall, an orderly room and a latrine. The buildings were arranged in two parallel rows; on the row facing the company street were located the mess hall, the orderly room and barracks 1, 2, 3, 4 and 5; immediately to the rear was located the other row of buildings which consisted of the latrine and barracks 6, 7 and 8. A pathway separated the front row of buildings from the rear row, and the company street separated Company 3 from Company 1. The latrine was located to the rear of the orderly room and barracks 1 and 2; the long axis of the latrine was parallel to the pathway separating the two rows;

the long axis of all other buildings was at right angles to the pathway (Pros. Exs. C, D and E). It was stipulated that Prosecution Exhibits C, D and E correctly represented their respectively shown areas (R 20, 21, 22). Hugo Krauss, the victim, had a bunk at the end of barracks number 1 near the door opening onto the pathway (R 22, 30, 52, 96, 105; Pros. Ex. E; Def. Ex. 1). The prisoners of war slept on double-deck wooden cots (R 88). The bunks of the accused were located as follows: Boehmer, barracks #1, near the end toward the company street (R 34; Pros. Ex. D; Def. Ex. 1); Von der Heydt, barracks #4, (R 47, 133); Jaschko, barracks #4 (R 47, 57, 128); Hossann, barracks #1 (R 129; Pros. Ex. H-1); Meisel, barracks #7 (Pros. Ex. I); Meyer, barracks #2 (R 95, 98, 103, 125); Braun was a member of Company 1. Prisoners were permitted to visit between barracks in the same compound after the lights were out and the fences between the compounds were often cut and there was frequent visiting between compounds (R 93).

The deceased, Krauss, worked at the cold storage warehouse, and was the interpreter during formations of the company after working hours (R 83, 116, 123). Prior to 17 December 1943 he had reported to the American company commander certain incidents which had occurred in Compound I, one incident being a disturbance in Company 1 involving the beating of someone which accused Boehmer had quelled (R 84). The deceased generally kept away from the rest of the company. When he came off duty he seldom went to the barracks, but instead stayed most of the time in the orderly room. He had a radio, which he would turn off whenever any German music began (R 120). For a long time there had been arguments in which deceased was involved (R 121). After each meal the company always sang a German song. Deceased never participated in the singing and always left as soon as he finished eating (R 119). His parents lived in New York (R 120, 124). He had made statements-both that he was an American and a German, and had also wanted a furlough to go to his home in New York for Christmas and had said he would return as an American soldier (R 124). On 17 December 1943, arguments about and with deceased developed in the company about certain German news bulletins; some arguments about deceased included discussion of beating him; deceased was supposed to have made the statement that the news bulletins were not true and other prisoners contradicted him (R 116, 120, 121, 123, 136, 137). How those news reports got into the Compounds was known to the prisoners but, according to one of the accused, "Nobody did find that out from us"; "They just got there through the post office workers", the "post office" apparently being a device instituted by the prisoners (R 126). A short-wave radio set was secreted in the area, and it was believed that deceased had revealed it (Pros. Exs. H-1 and I). One Karl Osterhorn was the spokesman for the whole camp (R 115). "It was generally understood about the camp that Karl Osterhorn had decreed that anyone who should betray the shortwave radio set should be put to death" (Pros. Ex. I).

On the night of 17 December 1943 a number of German prisoners gathered in barracks #4 (R 48, 49); nearly all of them were armed with clubs.

The group stayed about an hour. The deceased's name was mentioned (R 48). About ten o'clock, seven to ten of the prisoners left barracks #4 through the door on the end next to the pathway (R 48, 51, 52, 58; Pros. Ex. E). The lights were out (R 52). The accused Von der Heydt, or a voice believed to be his, immediately thereafter made a statement to the effect that the group went into barracks #1 (R 49, 58), where the deceased's bunk was located. The deceased was in his bed. About 10:30 the sound of "loud beating from sticks and yelling from Krauss" (the deceased) was heard (R 23). Deceased was yelling, "Meyer, cut it out, I am bleeding" (R 23, 31, 50), or "Meyer, no", or "Meyer, help" (R 59). Prisoner Zehrer slept at the other end of barracks #1 (R 21, 30; Pros. Ex. E), eight or nine beds from deceased's bed (R 30), and was in bed (R 23); he was awakened by the sound of the beating and deceased's screaming (R 23, 31, 34). Prisoner Heypeter's bunk was in barracks #4 (R 45, 46; Pros. Ex. E); it was between twenty and thirty meters from barracks #4 to barracks #1 (R 52), and it was about thirty-five meters from Heypeter's bed to deceased's bed (R 55). Prisoners in barracks #4 (R 50), or Heypeter (R 52), opened a window in that barracks and listened. Heypeter heard the beating and deceased screaming; the blows could be heard distinctly and lasted about half a minute (R 50, 51, 55). The attackers disappeared before any of them could be seen or identified (R 23, 24, 31); one man came back, looking for something under the bed (R 24). Prisoner Merkel, slept under the deceased (R 23, 34, 35); he went to the other end of the barracks and awakened accused Boehmer (R 23, 34, 35); (Pros. Ex. D; Def. Ex. 1); Merkel told Boehmer, "Anton, wake up; they are beating Krauss" (R 23). Boehmer slowly dressed (R 23) or started putting on his pants - trying to button them and running at the same time (R 117, 119), started to deceased's bed, turned on the lights (R 117) and went to deceased (R 23, 117). Deceased was sitting in bed, was covered with blood, and he was screaming loudly (R 24, 117). Accused Boehmer went after a first-aid man and a litter, procured both and returned. Deceased had gone to the latrine; Boehmer followed him there, and followed him when he returned to his bed, and then put him on the litter; deceased was then taken to the hospital by Boehmer, Zehrer and others (R 25, 27, 117). On the operating table deceased was given first aid by an American doctor; his eyes were closed and thick and bloody; his head was bleeding from several places; his hands and arms were beaten (R 26). On the following morning the American company commander found deceased's bed was torn up and splattered with blood, his radio was smashed, and the walls and ceiling were also splattered with blood (R 88, 89).

Deceased was transferred to the McCloskey General Hospital, Temple, Texas, on 18 December 1943 and died there on 23 December 1943 (R 40, 43). A photostatic copy of Standard Certificate of Death, No 53318, Bureau of Vital Statistics of the State of Texas, bearing the impression seal of the State of Texas, and certified by the State Registrar of Vital Statistics to be a copy of the death record of Hugo Krauss was received without objection (R 64, 110; Pros. Ex. G). The certificate stated that Krauss died at McCloskey General Hospital at 11:03 p.m. on 23 December 1943, and that the primary cause of death was:

"Concussion, cerebral, fractured skull
Contributory causes were:
Multiple lacerations, etc., traumatic."

5. Against this background of the homicide and the circumstances and events preceding it, we examine the evidence pertaining to each accused individually.

a. Accused Gunther Meisel.

Accused Von der Heydt, as a witness in his own behalf, testified that before the attack Meisel told him to come to barracks #1 (R 133).

Prosecution evidence. Shortly after the attack, witness Zehrer saw Meisel in the latrine washing his hands (R 25). On 19 October 1945, after being fully advised of his rights, Meisel voluntarily made and signed a sworn statement, which was admitted without objection as Prosecution Exhibit I (R 76, 77, 78). The law member ruled that the statement could be considered as evidence against Meisel only, and not against any other accused, and the court was so instructed (R 78). The statement, in pertinent part, is as follows:

"*** All of Company 3 was waiting for the word. There were approximately 400 in Company 3 and not one person in the company said one word against the action. Everybody was for the beating, but many of them were too clever to join in. They encouraged us by talking for it. Everybody in the company disliked Krauss.

* * *

"*** Everybody in the whole company was talking about it. Group meetings were formed by prisoners in every barracks in Compound 1 to discuss the beating that everybody knew was to take place. Practically everybody joined in these groups.

"While these meetings were going on, I went to Barracks 1 of Company 3 to talk * * about the Krauss beating. *** I said, 'Taking any men from the Third Company is no good.' I thought the men should come from other companies because Company 3 would naturally be suspected, since this was Krauss' company. It was then decided by *** and I that *** should select the men from Company 4, *** and I then went to Company 4 to ask for the men. We talked to several persons, but we could secure no volunteers. *** and I went to Barracks 4. I guess *** had no trouble in getting the men, because he showed up in Barracks 4 right away with five or seven men. *** showed the men to me and said, 'This and this and this are the men.' I did not know any of them. They must have been from the First Company.

"At about 2200 hours a meeting was held in Barracks 4. Those present included me, *** the 5 to 7 men he brought and several men from Barracks 4. The meeting was to decide the best way to beat Krauss. I was the only man from the Third Company.

I would not even recognize the faces of the men *** brought to the meeting if I were to see them now. I saw them only by candlelight in this meeting and by the light from the Company 3 latrine at the time of the beating. I think they were from Barracks 4 and 5 of the First Company. *** We all talked in the ordinary way during the meeting. The men in Barracks 4 heard the discussion. They were all awake. Some of them joined in by saying, 'That is a good idea,' 'The best thing is to kill him right now,' and such things. I do not know the names of any of the men who said these things.***

"It was too early to attack Krauss because he was still awake. *** He spent the evening playing cards until about 10:30 P.M. He was strong and must have believed he could take care of himself. While in Barracks 1, I heard Krauss say, 'Let them come. I am not afraid.' He was talking loud. He knew somebody was coming.

"At the meeting we figured out what everybody was going to do. We had some guards standing outside to watch the tower guards. *** Six or eight of us were to beat Krauss. Everybody at the meeting had brought sticks of wood with them. I had a piece of pipe about 9 inches long and about $\frac{1}{2}$ inch or $\frac{3}{4}$ inch in diameter. I sharpened a piece of wood and drove it into the pipe so I could handle it. Several of the sticks brought by the others were 2 inch by 4 inch sticks about three feet long with one end whittled down so they could hold them. Spikes about $4\frac{1}{2}$ inches long had been driven through the sticks and the points of the spikes stuck out about $2\frac{1}{2}$ inches from the boards. I saw no stick with a razor blade in it. I saw no one with anything to burn Krauss. Someone was to turn off the light switch in Barracks 1. Everyone was instructed to bury their sticks at any place they could, immediately after the beating was finished. Nobody said how much Krauss should be beaten. All members of Barracks 1 had instructions to stay in bed and be quiet. Guards were on duty outside Barracks 1, but I do not know any of their names.

"While we were gathered in Barracks 4, someone reported that Krauss was asleep. This was about 2345 hours. We all carried our sticks and went to Barracks 1. As soon as we entered Barracks 1, we started beating Krauss. We were supposed to hit him at certain places, but we got nervous and hit him anywhere we could. All six or eight joined in the beating. I do not know the names of the others in the beating, ****.

* * *

"I was first at Krauss' feet. I hated his radio and wanted to beat it. I then went up toward his shoulders. I don't think I hit him on the head. I just hit him. My stick broke and I lost the pipe. Krauss got out of bed and everybody was nervous

and ran out of the barracks. We all scattered. I suppose the others went to their barracks. I went to Barracks 2. Everybody in Barracks 2 was standing at the windows looking out. I shall never forget those faces. Someone asked if Krauss was dead. I knew then the affair was serious. I had not intended to kill Krauss or to help the others kill him. I just wanted to beat him. I had tried not to hit him on the head because I did not want him to die.

"I walked through the Second Barracks and into the Fourth Barracks. I told them, 'It's all over.' I then went to the latrine to wash myself. My hands were bandaged because of injuries while I was working in the woods. Krauss' blood had sprayed the bandages. When I approached the latrine, I saw Krauss, Merkel and someone else standing on the steps of the First Barracks. I knew then he was not dead. Immediately after I entered the latrine, Krauss came in. He was bleeding all over. He said nothing, except he continued to cry and yell. He had been yelling since the beating started. He kept crying until he was taken to the hospital.

"I unwrapped my bandages, washed the blood off my fingers and rewrapped my hands so the blood stains on the bandages would be inside and would not show on the outside. I was very nervous and left the latrine while Krauss was still there. There may have been one or two others with Krauss. I am not sure. Zehrer and Merkel could have been with him. *** I remember seeing one of the clubs that was used in the beating in the wastepaper box in the latrine. I did not move the stick. I went from the latrine to Barracks 7 and got in bed immediately. All the other prisoners of Barracks 7 were in bed. I lit a cigarette, and while I was smoking it an American First Lieutenant and another American officer walked through the barracks, using flash lights to check the beds. I guess it had been about 15 minutes since the beating. After the American officers left, I remembered I had left my stick in Barracks 1. I got up and went in my night clothes to Barracks 1 to look for the stick. I did not find it. The lights were not on, but Krauss had already been taken away. I went back to Barracks 7 and went to bed for the rest of the night. Nothing else happened until the next morning when the American officers had an inspection for the whole compound. We were all checked for blood stains.

"When the investigation was conducted no one talked to me. If anyone had asked me at that time or later, I might

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have told them the whole story. From the time of the beating until now I have had a bad conscience. I felt afraid. I wanted to tell someone to get it 'off my chest.' My mother always told me that this sort of thing always come to light even as much as 20 years later. I have wondered why someone didn't ask me for the truth. I was expecting someone to come and talk to me all the time. I was glad--maybe-happy--when you came to talk with me about it. I am through with everything now. I have told you everything I know. I just feel sorry I can't tell you more names--but I don't know any more names. If there is a court-martial trial, I will tell the court the same things I have told you.

* * *

"**** It was generally understood about the camp that Karl Osterhorn had decreed that anyone who should betray the shortwave radio set should be put to death. It was believed that Krauss had reported the radio. I recognized Osterhorn when I saw him, but I knew him only slightly. I heard him say, at Krauss' funeral, 'This is the home he's been looking for' or something like that ****."

Defense evidence: Meisel made an unsworn statement that the reason for his pre-trial statement was "to get it off of my chest, everything". He did not believe Krauss should be beaten to death, and used an iron pipe because he hated Krauss' radio, and hit Krauss with the pipe because he got excited. At the time of the beating accused was a Nazi but has changed his beliefs and wants to get back to the United States after he is repatriated. About 3 months prior to his statement he had acquired religious beliefs which changed his viewpoint of the whole affair (R 139-141).

b. Accused Heinrich Braun.

Accused Jaschko, as a witness in his own behalf, testified that Braun visited him in barracks #4 on the night of 17 December 1943; that they talked about deceased's behavior but nothing was said about beating him; that he then took a walk with another, but Braun did not go along (R 129).

Prosecution evidence. Braun was seen in barracks #4 on the night deceased was beaten (R 47, 57); he and others stayed in that barracks about an hour, and deceased's name was mentioned but the witness does not know who mentioned it -- the lights were out and it was dark (R 48). Braun did not have a club, and when asked by another why he did not have one "Braun made the statement that he was strong enough; he could do it with his fists." The witness thinks that when he later looked out of the window Braun did have a club (R 48, 49). Braun asked one Gilliam why he was not going along, to which Gilliam replied, "I am already in bed" (R 49). Gilliam slept in barracks #4 (R 56); he testified that, after

telling Braun that he was not going with them, Braun called him "Coward--dog"; and that he did not hear Braun say anything else (A 58). Braun was one of the group that left barracks #4 - he was "one that went with them to the beating" (R 51).

Defense evidence. No evidence was offered by the defense as to Braun, and he did not testify.

c. Accused Werner Hossann.

Accused Jaschko, as a witness in his own behalf, testified that Hossann came into barracks #4 while he was talking with Braun; that he then took a walk in the camp with Hossann; that he went to barracks #1 with Hossann to get a book from him, as he had often done before; that Hossann walked to the door with him as he left; that he and Hossann often took walks at night because they did not have much free time to talk except at night; and that while he was in Hossann's barracks nothing unusual took place (R 129, 130).

Prosecution evidence. Zehrer testified that he went to an investigation held on 24 December after the beating; that with reference to that investigation he had a conversation with accused Boehmer and Hossann during which both accused told him that "I should not say anything" (R 27). Hossann was present with others in barracks #4 on the night of 17 December 1943 before the beating (R 46, 47, 57). Hossann told the witness "that later he was going to barracks 1 to see if Krauss is already asleep"; Hossann made that trip and came right back to barracks #4 and said "Krauss is already asleep (R 48). Hossann was assigned the job of being a lookout, but the witness does not know whether he did that (R 50). Hossann's job was assigned to him by "one of the beaters"; the witness does not know which individual made this assignment, and he does not know whether Hossann was in the group that left barracks #4 (R 52). After being fully advised of his rights, Hossann made and signed a sworn statement on 18 June 1945 (R 68-72); the statement in German was admitted without objection as Prosecution Exhibit H (R 70, 73), and an English translation, stipulated as being accurate, and also signed and sworn to by Hossann, was admitted as Prosecution Exhibit H-1 (R 73, 74). The law member ruled that this statement could only be considered against Hossann, and not against any other accused, and the court was so instructed (R 70, 74). The statement follows:

"On the 17th December 1943, Sergeant gave out the German news reports, which were heard by us. As I was sick in bed in the barracks with fever, because of an injection, Hugo Krauss came in and shouted around in the barracks, that those reports were false reports, the American reports were true. Krauss then is supposed to have betrayed the shortwave set. After the count Sergeant told the

company, that Krauss had again done something swinish, and that it was time, to give him the Holy Ghost. On account of that, the entire company was in an uproar, and men went from barracks to barracks. Finally we gathered in Barracks 4. After one of the men went to Barracks 1 and reported back, that Krauss slept, the men, who had gathered, about 10 men, one armed with a piece of iron pipe, the others armed with wood, went to Barracks 1 on the street leading to the latrine and the messhall. and I went to Barracks 1 on the camp street. My task was, to stand on the main light switch, which was pulled, together with I fulfilled this task. After the affair with Krauss I went back to Barracks 4 together with Then I went to the wash-room, to relieve myself and to wash my hands, and then to my bed in Barracks 1."

Defense evidence. Hossann made an unsworn statement that he was 19 years of age at the time of the homicide and that he did not take a more active part, other than as guard of the light switch, during the beating of Krauss because he was too weak and too young. He did not believe that Krauss should be beaten so severely as to cause his death (R 138).

d. Accused Werner Jaschko.

Prosecution evidence. Jaschko slept in barracks #4 (R 47, 57), and was in his barracks on the night of the beating (R 47). Deceased's name was mentioned by someone, but the witness did not know by whom (R 48). "One of the beaters", the witness does not know which, told Jaschko to watch the door of barracks #1 toward the street and make sure that nobody turned on the light switch (R 50, 52; Pros. Ex E). The witness does not know whether Jaschko was in the group that left barracks #4, nor whether he carried out his assigned task (R 52).

For the defense: Jaschko testified that he lived in barracks #4 of Company 3; that he was present at the 8:45 PM roll calls on 16 and 17 December 1943; that he went to his barracks after the count and was visited by accused Braun; that he and Braun discussed deceased's behavior but neither mentioned anything about beating him (R 128, 129); that accused Hossann came in and he and Hossann went for a walk in the camp; that Braun did not accompany them; that he went to barracks #1 with Hossann to get a book from him, as he had often done before; that he and Hossann often took walks at night because they did not have much free time to talk except at night; that while he was in Hossann's barracks nothing unusual happened; and that on his way back to his own quarters he heard a loud yell and figured that Hossann on reentering his barracks had knocked over a table or chair which excited the others in the barracks (R 129, 130).

e. Accused Erich Von der Heydt.

Prosecution evidence. Von der Heydt slept in barracks #4 (R 47). He walked to the door of barracks #4 with the group, but did not leave with the group and was in barracks #4 after the group departed. He then stated that the group went into barracks #1 (R 49). He told the group when they went out where deceased's bed was located in barracks #1 (R 50, 52). Witness Gilliam testified that after the group left he heard someone say "They are in", which he thought referred to barracks #1, and he also thought Von der Heydt was the one who said it -- but he is not sure (R 58).

Defense evidence: Von der Heydt made an unsworn statement that following the count of prisoners at 8:45 P.M. on 17 December 1943 there was a commotion among the prisoners; that he went to his own barracks, which was #4; that he then went to barracks #1 because accused Meisel told him to, and was back in his own barracks before 10:00 P.M. (R 133); that a beating of the deceased was discussed in barracks #4 that night; that he occasionally stood where the group was, and that on the second such occasion he told them "Do it half way and let it go"; that at first he was not interested in it and later wanted no part of it; that he was in his barracks when the group went out to beat deceased, and was in bed at the time deceased was beaten (R 134); that "I was in bed at the time they said, 'They are beating Krauss'"; and that he knew the barracks deceased slept in but not where he slept, and did not go out at any time that night to find out where deceased slept (R 135).

f. Accused Helmut Meyer.

The accused Boehmer, testifying in his own behalf, testified that as it was getting dark on the day deceased was beaten "I told Meyer to go through all the barracks and tell them they should not make any nonsense"; that he chose Meyer to go through the barracks "because Meyer always did that kind of work. Meyer separated the company into details and when something special came up I used Meyer for that purpose" (R 116); that Meyer and deceased were unfriendly (R 117); that Meyer read the daily Wehrmacht reports on 16 December 1943 (R 119); that on 17 December "there was a heavy air", and he sent Meyer through the barracks "on account of they were arguing among themselves on that afternoon in the company" about the news bulletins (R 120, 121).

Prosecution evidence. Meyer was company clerk of Company #3 (R 82). He and the deceased had had arguments at times, but were on friendly terms most of the time, and the deceased in his capacity as interpreter had frequent daily contact with Meyer (R 82, 83). Witness Heypeter testified that Meyer usually read the German news bulletins, but he does not remember who read them on 16 December 1943 (R 44, 45); that about 9:00 o'clock on the night of 17 December 1943, before the beating, Meyer came into barracks #4 and "said that we should not do anything on account of other fellows would take care of it. If there was going to be any noise we should stay

in our beds and not make any light"; that Meyer did not say what was about to happen (R 46, 47); that Meyer's statement was made to the whole barracks, and was about an hour before the beating (R 51); and that the statement was made shortly before the lights went out (R 47). Witness Gilliam, who slept in the bunk next to Heypeter (R 56), did not hear Meyer make any announcement (R 58, 59). Witness Geissler, who slept in barracks #6, testified that he was in bed on 17 December 1943 when Meyer came in after the lights were out, went to the middle of the barracks, and speaking loud enough for all to hear, "told us that we should not participate in anything"; and that Meyer said nothing else and went out (R 60, 61). During the beating, witness Zehrer, who was in barracks #1 where the beating occurred (R 22, 23, 30), heard the deceased yell "Meyer, cut it out, I am bleeding" (R 23, 31). Witness Heypeter, who was in barracks #4 (R 45, 46) heard the same exclamation by the deceased (R 50), through a window in barracks #4 which other prisoners (R 50) or Heypeter (R 52) had opened. Witness Gilliam, who slept in barracks #4 (R 56), heard deceased yell "Meyer, no", or "Meyer, help" (R 59). Apparently on the morning following the beating the witness Zehrer became apprehensive of his own safety; he testified that "I felt myself threatened by the second man that night of the meeting and I mentioned something to Unteroffizier Meyer about it"; that Meyer did not threaten him, but "told me that it should be kept quiet in the company" (R 30); that the "second man" is Franz Hazel (R 30); that "I told Meyer that I should watch myself or the same thing would happen to me"; that "Meyer told me that he would tell it to the company..... He told me that he was going to say it in front of the company"; that he does not know whether Meyer did so, but that he (Zehrer) never received any threats thereafter (R 32).

Defense evidence: The American company commander of Company 3 testified that Meyer argued over little incidents but did not engage in serious arguments; he is just a loud-mouth who did a lot of talking (R 92).

Prisoner Beschorner lived in the same barracks as Meyer; he did not hear Meyer make any statement about the deceased, nor did he hear any noise from any of the other barracks (R 95); he turned in to bed right after the count, was asleep after the lights went out and did not get up until the whistle blew the next morning (R 97).

Prisoner Bedau also slept in the same barracks as Meyer; he did not hear Meyer make any statement about deceased that night, was in his barracks all evening (R 98); and cannot say when it was that Meyer came in to the barracks, whether it was after the count, or whether he was there when the lights went out, or whether he saw Meyer about the time he (Bedau) went to bed (R 99, 100).

Prisoner Boehm, who slept in barracks #7, testified that Meyer came to barracks #7 about 9:00 o'clock the night of 17 December 1943 and said "Don't beat him", referring to the deceased; Meyer also said "Remain in your beds"; Meyer did not say that somebody else would do the job, and the

witness did not remember Meyer telling them to remain quiet (R 101, 102).

Prisoner Fleischman testified that he slept in the bunk over Meyer at the company street end of barracks 2 (R 103, 105). On 17 December 1943, witness and Meyer went to bed shortly after lights went out, and Meyer had said nothing about deceased before going to bed (R 103). Witness had never heard Meyer say anything against deceased (R 104). Witness was awakened later that night and saw people looking out the barracks windows, including Meyer who was wearing a night shirt (R 105, 108).

Meyer testified under oath in his own behalf that he was company clerk of Company 3 at the prisoner of war camp at Hearne, Texas, in December 1943 (R 122); that he was a friend of the deceased (R 123) and had known him since 3 June 1943 (R 127); that he had had serious arguments with deceased because deceased would state one day he was a German and the next that he was an American, and Meyer advised deceased not to make such statements (R 123); that there was also an argument when deceased wanted to go home on a Christmas furlough and said that he would return as an American soldier (R 124); that Meyer did not threaten deceased but merely advised him (R 124); that these arguments were harmless and in the nature of advice to deceased (R 124). Meyer read news bulletins to the other prisoners because it was his duty since he made most of the announcements as company clerk, and because the other prisoners asked him to do that for them; these bulletins were put on his table, they came from the other compounds "through the mail", and as to their source "nobody did find that out from us" (R 122, 123, 126). At about 6 or 7 P.M. on 17 December 1943 he received an order from accused Boehmer: "Meyer, go through all the barracks and tell them that the people should not have any nonsense" (R 125). In compliance with this order he made the announcement in all barracks except No. 1, where he understood Boehmer would make the announcement himself (R 125). He was not present at the 8:45 count on 16 or 17 December 1943 because he had been detailed by an American sergeant to watch the telephone in the orderly room during the count (R 124). He left the orderly room after the 8:45 P.M. count on 17 December 1943, went to barracks No. 2 and went to bed at about 10 P.M. He did not leave the barracks but was awakened later and went to the window and saw Boehmer carrying a litter (R 125, 126).

g. Accused Anton Boehmer.

Accused Meyer, as a witness in his own behalf, testified that between 6:00 and 7:00 O'clock on 17 December "Boehmer told me, 'Meyer, go through all the barracks and tell them that the people should not have any nonsense'; that he (Meyer) made that announcement in all the barracks, except barracks #1 where Boehmer intended to make the announcement himself (R125); and that when he (Meyer) was awakened later that night he looked out of the window and saw Boehmer carrying the litter off (R 126). Accused Jaschko, as a witness in his own behalf, testified that he was present at the final roll call about 8:45 P.M. on 16 December 1943, and at the same count on the following night,

and that he did not hear Boehmer make any unusual announcement on either occasion (R 128). Accused Von der Heydt, on the stand in his own defense, testified that he was present at the 8:45 count on 16 and 17 December 1943, and that "Boehmer said that somebody reported the news bulletins and you guys know what to do and not to do. I stood on the right wing from Boehmer and I heard Boehmer say something about treason or something like that. There was a commotion among the men. You know or I know what I have to do or something like that" (R 133).

Prosecution evidence: Boehmer was the spokesman or company leader for Company 3 at the Hearne, Texas, prisoner of war camp in December 1943 (R 44, 80). He had been chosen by the non-commissioned officers of Company 3, and appointed with the approval of the American company commander (R 81). He had obtained this position by reporting the former German company leader to the American authorities for influencing prisoners not to volunteer for work (R 82, 83). Boehmer's work was satisfactory, and, besides reporting other incidents, he had broken up a disturbance among the prisoners in adjoining Company 1, in which someone was being beaten (R 81, 84). He was recognized as the leader of the other prisoners of war in Company 3 (R 81), and his duty was to transmit and carry out orders issued by the American personnel of the camp (R 80). In his capacity as interpreter the deceased had frequent daily contacts with Boehmer, and they were never observed in any arguments (R 83). It was deceased who reported to the American company commander the disturbance in Company #1 and Boehmer's action in quelling it, and deceased reported other incidents but he never made any statement derogatory to Boehmer (R 84).

Witness Heypeter testified that Boehmer read the German news bulletins to the camp on 16 December 1943 at the 9:00 o'clock count of Company #3 (R 44). Heypeter also testified that Boehmer occasionally read the bulletins, but that he does not remember who read them on 16 December (R 45). He further testified that on that occasion Boehmer also said "If we have swine-hunder or traitors in our company you fellows know what to do. Beat them to death" (R 45); and that he does not know that deceased was ever present when the bulletins were read (R 51).

Witness Zehrer testified that at 8:45 P.M. at the nightly count on 16 December 1943 he heard Boehmer make an announcement to Company #3, from the back steps of the barracks in front of the latrine (R 17, 18, 19, 32); that there "Boehmer made the statement, 'There is a traitor among us and you fellows know what to do about it and for my concern you can beat him to death'" (R 18), or that "There is a traitor in our ranks, you know what to do about it. As far as I am concerned you can beat him to death", the witness being unable to say that those were the exact words; that deceased had gone to the orderly room and was not present at the time (R 32); and that, with reference to an investigation of the homicide on 24 December 1943, Boehmer told him that he (Zehrer) "should not say anything" (R 27).

Witness Gilliam testified that "Between the 16th and 17th, I saw Unteroffizier Boehmer make a speech to the company: 'We have a traitor among us and you know what you have to do!'; that this was before deceased was beaten, but he does not know who Boehmer was talking about (R 57).

Witness Geissler testified that on the day or the day before the beating he did not hear Boehmer make any unusual announcement, nor any announcement at all, although present at the roll call usually and that he was present at roll call on 16 December; that he did not see Boehmer during or after that roll call except while Boehmer was counting the men; and he cannot remember that Boehmer could have made an announcement (R 61, 62).

Defense evidence: Prisoner of war Beschorner testified that he was present at both the 8:45 P.M. roll call on 16 December 1943 and at the roll call on the night before and did not hear Boehmer make any announcement, although he was standing about 12 to 15 meters from Boehmer (R 94-95). Prisoner of war Fleischman testified that he was present at both the 8:45 P.M. roll call on 17 December 1943 and at the same roll call the night before and did not hear Boehmer make any unusual announcement (R 104).

Boehmer testified under oath in his own behalf. He stated that he had held the job of spokesman for Company 3 for about three months prior to 17-December 1943 (R 114, 115, 120). He had obtained the job through informing the American company commander that the prior German spokesman was obstructing the volunteering of the prisoners for work details (R 115). The deceased kept himself separated from the company; when he came off duty he very seldom went to the barracks, and stayed in the orderly room most of the time. He had a radio and would turn it off the instant any German music started (R 120). After each meal the company sang a German song; deceased never participated in that and always left as soon as he finished eating (R 119). For a long time arguments in which deceased was involved had been going on; none of the previous arguments had been about the news, "but there were a lot of other things they argued about" (R 121). The deceased, as company interpreter, was very close to Boehmer and they never had any serious arguments (R 116, 117), and he never made any statement against deceased (R 119). Boehmer had advised deceased to transfer because of the situation in the company, and two months before the beating had reported to the American company commander that deceased was in danger. Boehmer did not report to the American company commander that deceased was in danger on 16 or 17 December 1943, because the American company commander was very strict and "If I would have told him that, he probably would have ordered Krauss out of the company" (R 118). Accused Meyer read the daily Wehrmacht reports on 16 December 1943, and deceased was not present at the time (R 119). On the afternoon of 17 December, "It must have been on the day when Krauss was beaten", there was a lot of arguing in the company about the deceased (R 116); ".....they were arguing among themselves on that afternoon in the company. They argued about the news bulletin" (R 116, 120, 121, 136, 137). Boehmer does not remember what news the arguments

were about (R 121, 137). The arguments were between the deceased and other members of the company; the arguments had gone on all day (R 136). "It was supposed to have been this way that Krauss made the statement that it was not true and the other ones contradicted him" (R 137). There was nothing to lead Boehmer to believe that deceased was due for a beating (R 116), and he did not know on 17 December 1943 that there was some talk of beating the deceased - "No, I did not know anything about it. Only there was a heavy air" (R 120). Boehmer talked to deceased about the matter that evening when the argument was going on (R 116). About the time it was getting dark, Boehmer sent Meyer through the barracks - "I told Meyer to go through all the barracks and tell them they should not make any nonsense"; Meyer was chosen to do this "Because Meyer always did that kind of work. Meyer separated the company into details and when something special came up I used Meyer for that purpose" (R 116). Meyer was sent through the barracks to make that announcement "On account of they were arguing among themselves on that afternoon in the company" about the news bulletins (R 120, 121). Boehmer was present at 8:45 P.M. on 16 and 17 December 1943 when the count of the company was taken; he did not on either occasion make any statement to the company that anyone was due for special handling, and, as above stated, there was nothing which lead him to believe at that time that deceased was due for a beating (R 116); Boehmer did announce to the company at the 8:45 count on 17 December 1943:

"A. I told the company, everybody to listen there are not going to be any more news reports. That there would not be any more disturbances in the company any more. I am going to clear this matter and each one of you knows what they have to do and must not do.

"Q. What is the German word for disturbances?

"A. 'Schweinerie,' meaning a lot of nonsense which does not belong here.

"Q. This statement which you made, was directed toward the giving out of news only, is that right?

"A. Yes, sir, the statement I made I made on account of I sent Sergeant Meyer through the company and everybody knew what it was about.

"Q. Did you refer to the news or to the Krauss beating?

"A. The beating. On account of they were arguing all day long in the compound about it.

"Q. Arguing as to what?

"A. On account of the news bulletins, came the argument." (R 136; emphasis supplied).

Boehmer knew the camp spokesman, Osterhorn, but they were unfriendly because Osterhorn had caused him a lot of trouble and tried to get rid of him as company leader; Osterhorn did not give Boehmer any instructions concerning the beating of deceased (R 115).

Boehmer further testified that the first information he had about deceased being beaten was when he was awakened by Helmut Merkel (R 117). Boehmer put his pants on with some difficulty, trying to hold and button them and run at the same time, started toward deceased's bunk and turned back and switched on the lights, and then went to deceased (R 117, 119). He was surprised and frightened to find blood all over in the vicinity of deceased's bunk. Boehmer went to the infirmary, obtained a litter and a first aid man, returned to the barracks and found deceased in the latrine covered with blood. Boehmer followed deceased back to his bunk and put him on a litter and helped take him to the hospital (R 117). On the way to the gate someone yelled at Boehmer that deceased should be altogether beaten to death (R 118). The next morning Boehmer was placed in the guard-house (R 118).

6. Murder is the unlawfull killing of a human being with malice aforethought, without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (par. 148a, MCM, 1928). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death, and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard for human life. "Malice in law does not necessarily mean hate, ill will or malevolence, but consists in any unlawful act, wilfully done, without just excuse or legal occasion, to the injury of another person" (Wharton's Criminal Law, 12th Ed., Sec. 146). Malice is presumed from a deliberate unlawful act against another person, of such character as to show an abandoned and malignant disposition, as where an injury is caused by violence" (Ib, Sec. 148). It is inferred from all the facts of the case, as a presumption of fact (Ib, Secs. 159, 438, 439). Malice aforethought imports premeditation (Allen v. U.S., 164 U.S., 492, 41 L. Ed. 528, 17 S. Ct. 154). "Premeditation and deliberation, as an element of murder, consist in the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill. In this connection the word 'premeditation' means simply entertainment by the mind of an intent or design to kill"; and, being established, the length of time it existed is immaterial -- the homicide will be murder (Wharton's Criminal Law, 12th Ed., Sec. 420). "It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act, as if it entered ten years before" (Ib., Sec. 507).

The evidence shows that Hugo Krauss, a German prisoner of war, was savagely attacked and brutally beaten with a piece of iron pipe and spiked clubs while in his bed in barracks #1 of company #3 of the Prisoner of War Camp at Hearne, Texas, late on the night of 17 December 1943. It appears that by his actions and attitude he had incurred the ill will, and indeed the hatred, of other German prisoners of war; and that they suspected him of betraying the secret short-wave radio set, by which, it may reasonably be concluded, the German news reports were being received. On the night of 17 December 1943 a meeting of a number of the German prisoners of war was held in barracks #4; detailed plans for beating deceased were carefully worked out, including the posting of guards and lookouts; and the group then left barracks #4 and the beating of deceased occurred immediately thereafter. The circumstances surrounding the beating, and the nature of the injuries inflicted, indicate a purpose to kill. The cruel and brutal treatment the deceased received shows an intention to do something more than merely to whip him. That his death was the result of the wounds he received during the beating was established by the Standard Certificate of Death of the State of Texas; the competency of the official vital statistics records of a state to prove the facts recited is settled (CM 283737, Macintyre (IV Bull. JAG 421, 422)).

7. The record shows that the accused Meisel and Braun were present at the scene of the beating.

Meisel, according to his own pre-trial statement introduced in evidence, was present at the meeting in barracks #4, helped plan and make arrangements for the beating of deceased, and actually participated in the beating by striking deceased repeatedly with a piece of iron pipe. In an unsworn statement at the trial, he said that he made his pre-trial statement "to get it off my chest, everything". The record of trial is legally sufficient to sustain the findings of guilty as to accused Meisel.

The legality of the convictions of the other six accused depends on whether they aided and abetted the one known assailant, Meisel, and are therefore liable under the Federal statute making aiders and abettors liable as principals. That statute (18 U.S.C.A. 550) is as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal".

It will be noted that the formula of the statute is "aids, abets, counsels, commands, induces or procures". It appears from the authorities that the necessary elements are:

- (1) Preconcert of action or prior arrangement with the principal actor, plus presence at the crime; or

- (2) Overt act aiding or encouraging the crime, done with intent to aid or encourage (CM 310421 (ETO 10860, 23 BR-ETO 193), Smith & Toll; CM 312657, Reck & Montgomery, V Bull. JAG 207,208).

Accused Braun, a member of a different company, was present at the meeting in barracks #4. He was one of the group that left barracks #4; he was "one that went with them to the beating". That evidence fully justified the court in inferring that Braun was actually present with the others when the deceased was beaten. But mere presence at the crime is not enough to support a finding of guilty (CM 238485, Rideau, 24 BR 263; CM 312657, Reck & Montgomery, V Bull. JAG 207, 208; 16 C.J. 132; 14 Am. Jr. 829). The conviction of accused Braun, however, does not rest solely upon his presence at the crime. During the meeting in barracks #4 he made the statement that his reason for not being armed with a club was that "he could do it with his fists"; and when another prisoner who was already in bed declined to go along with the group, Braun called him a "Coward - dog". Thus, in addition to his presence at the crime, the record establishes that Braun shared and was actuated by the common purpose and intent of the group, and his actual encouragement of the action taken. His preconcert of action in the prior arrangements is clear. The record is legally sufficient to sustain the findings of guilty as to him.

The remaining five accused were not present at the scene of the beating. The legality of their convictions, too, depends on whether they aided or abetted in the beating and thereby became liable as principals. To test the sufficiency of the evidence upon this point, the acts of these remaining accused, prior to and at the time of the crime, will now be examined.

Accused Hossann lived in barracks #1, in which the deceased also lived. He was present at the meeting in barracks #4 at which the beating was planned. He went to barracks #1 to ascertain whether deceased was asleep, and reported back to the group that "Krauss is already asleep". According to his own pre-trial statement, admitted in evidence, he was assigned the job of standing guard over the main light switch in the street, and "I fulfilled this task" while the armed group went to barracks #1; and "After the affair with Krauss I went back to barracks 4". In an unsworn statement at the trial, Hossann stated that he did not take a more active part during the beating because he was too weak and too young. His assigned part in the plan of action was one of utmost importance; to have flooded the deceased's barracks with light at the crucial moment would have revealed the identity of the assassins to all present in the building. His part in the plot was therefore a vital aid to its successful execution. The record is legally sufficient to sustain Hossann's conviction.

Accused Jaschko lived in barracks #4, and the mere fact that he was present there during the time the meeting was in progress does not per se, therefore, raise any inference against him. One of the beaters told Jaschko

to watch the door of barracks #1 at the company street end and guard the light switch, but there is no competent evidence whatsoever in this record that he did either, or that he left barracks #4 with the group. While the accused Braun was in barracks #4, Jaschko discussed deceased's behavior with him but no mention was made of any beating. Jaschko then went for a walk with accused Hossann and to the latter's barracks #1 to get a book; nothing unusual happened while he was in Hossann's barracks, and when Jaschko was returning to his own barracks he heard a loud yell in barracks #1 and figured Hossann had knocked over a table or chair and other prisoners had started yelling about it. There is no competent evidence whatever in this record tending in any way to prove that accused Jaschko did or said anything at any time to aid, abet, counsel, command, induce or procure the commission of the crime. The record of trial is not legally sufficient to sustain the findings of guilty as to him.

Accused Von de Heydt lived in barracks #4. When the group which met there left, he told them where the deceased's bed was located in barracks #1, and walked to the door of barracks #4 with them. After the group departed he watched them and announced their entry into deceased's barracks. In an unsworn statement at the trial Von der Heydt said that after the 8:45 count that evening (exact time does not appear) he went to barracks #1 because accused Meisel told him to; that a beating of deceased was discussed in barracks #4; that he occasionally stood where the group was, and at one time told them to "Do it half way and let it go". By informing the group as to the location of deceased's bed and by counseling them to "do it half way", he definitely and overtly aided and encouraged the beating, with the clear intent so to do.

"It is well settled, however, that an accessory before the fact need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him" (22 C.J.S. 164).

Von der Heydt's conviction is amply sustained by the record.

Accused Meyer. About dark on 17 December 1943, because of arguments going on in the company about and with the deceased concerning the news bulletins, accused Boehmer told Meyer "to go through all the barracks and tell them they should not make any nonsense". Meyer entered barracks #4 about 9:00 o'clock that night and "said that we should not do anything on account of other fellows would take care of it. If there was going to be any noise we should stay in our beds and not make any light", but he did not say what was about to happen. Meyer went into barracks #6 after the lights were out and "Told us that we should not participate in anything". About 9:00 o'clock he entered barracks #7 and said "Don't beat him", referring to the deceased; and also said "Remain in your beds". Even if

those statements were actually made by Meyer, and do not represent merely the interpretation placed by the witnesses upon his announcement, they do not bear any inculpatory inference; they do not necessarily imply any sinister purpose or plan or action by Meyer toward the deceased; they are not inconsistent with the announcement Boehmer had instructed Meyer to make -- "that they should not make any nonsense"; even the statement that "other fellows would take care of it" is just as consistent with a belief by Meyer that an effort toward amicable settlement of the arguments was to be made, as with violence against the deceased. Meyer testified that about six or seven o'clock, he made the announcement according to Boehmer's instructions in all the barracks except #1, where he understood Boehmer would make it himself.

During the beating the deceased yelled "Meyer, cut it out, I am bleeding", or "Meyer, no", or "Meyer, help". There is no competent evidence that Meyer was present at that time or participated in the beating, in view of which it is our opinion that the deceased's outcries do not of themselves incriminate Meyer; they may as well have been spontaneous and random agonized general appeals to Meyer for assistance as direct pleas to him personally to desist; those cries do not inexorably denote the external stimulus of Meyer's presence. Although accused Boehmer testified that Meyer and the deceased were unfriendly, Meyer testified that they were friends notwithstanding their serious but harmless arguments which were in the nature of advice to the deceased. And, as said by the Board of Review in the Smith & Toll case, supra:-

"A trial court cannot ramble about in the field of suspicion but is bound by the stubborn common law presumption of innocence to choose from equally plausible inferences those favorable to the accused.

"If the circumstances make one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion which would mitigate his guilt' (People v. Galbo, supra, citing People v. Lamb (N.Y. Ct. of App.), 2 Abb. Pr. N.S. 148)".

Meyer told a witness on the following morning that the matter should be kept quiet in the company; he also said that he would announce to the company that that witness, feeling he had been threatened, had said "I should watch myself or the same thing would happen to me". But the fact that Meyer made those statements does not necessarily suggest even, let alone prove, that he participated either in the planning or the execution of the beating. His acts subsequent to the offense, unless material to show preconcert of action with the principals, affect only his liability, if any, as an accessory after the fact. Thus in Bishop on Criminal Law, 9th Ed. Sec. 692, it is said:

"In reason one who renders this subsequent assistance, thus adding his will to an evil thing after another has done it, does not thereby become a partaker in the guilt because only when an act and evil intent concur in time, is a crime committed".

It was held with respect to one charged as an aider and abettor in a stabbing case that:

"What he said [and did] after the fatal wound was given must also be excluded, because it could not encourage, aid, or abet Matthews [the principal] to give it ..." State v. Williams, 78 N.C. 523).

The offense of aiding and abetting, as a principal, is separate and distinct from that of accessory after the fact. The Federal statute making aiders and abettors liable as principals, did not abolish the distinction between such offenders and accessories after the fact (U.S. v. Johnson) (C.C.A. 7th), 123 F (2d) 111, rev. on other grounds, 319, U.S. 503, 87 L. Ed. 1546; Morei v. U.S. (C.C.A. 6th), 127 F (2d) 827). "An accessory after the fact cannot be convicted on an indictment charging him as principal" (Wharton's Criminal Law, 12th Ed., Sec. 285), for the offense is not a lesser included one (People v. Galbo, 218 N.Y. 283, 112 N.E. 1041, 2 A.L.R. 1220, 1226).

On the facts shown by the competent evidence in this record, we are of opinion that the evidence is wholly insufficient as a matter of law to show that Meyer did anything by word or deed which could fairly be said to have aided or encouraged the crime, or to have been so intended. On the contrary, every act and word of his was directed toward the opposite result -- toward the forestalling of violence. His conviction is not sustained by the record.

Accused Boehmer was the spokesman or company leader for company #3, of which the deceased was also a member, and the two were, by reason of their respective positions, in frequent daily contact; they were never observed in any arguments. In fact, it is a reasonable inference that the deceased had made a commendatory report on Boehmer when he reported the latter's action in quelling at least one disturbance in which a prisoner was being beaten; at least the deceased never made any derogatory statement about Boehmer to the American company commander. The accused Von der Heydt, in an unsworn statement at the trial, said that either on 16 or 17 December 1943 at the count of the company "Boehmer said that somebody reported the news bulletins and you guys know what to do and not to do..... I heard Boehmer say something about treason or something like that. You know or I know what I have to do or something like that".

One prosecution witness testified that at the count of company #3 on 16 December 1943 Boehmer made the statement "If we have swine-hunder or traitors in our company you fellows know what to do. Beat them to death."

Another prosecution witness testified that at the nightly count on 16 December 1943 Boehmer made the statement, "There is a traitor among us and you fellows know what to do about it and for my concern you can beat him

to death", or "There is a traitor in our ranks, you know what to do about it. As far as I am concerned you can beat him to death". That witness also said that, with reference to an investigation of the homicide on 24 December 1943, Boehmer told him that he should not say anything.

A third prosecution witness testified that "Between the 16th and 17th, I saw Unteroffizier Boehmer make a speech to the company: 'We have a traitor among us and you know what you have to do'", but the witness did not know who Boehmer was talking about.

Under oath as a witness in his own behalf, Boehmer testified that arguments involving the deceased had been going on in the company for a long time; that none of these previous arguments had been about the news; that he was very close to deceased because of their positions in the company; that they never had any serious arguments and he never made any statement against the deceased; that previously he had advised deceased to transfer out of the company because of the situation, and two months previously had reported to the American company commander that deceased was in danger, but did not do so on 16 or 17 December 1943 because the American company commander was very strict and probably would have ordered deceased out of the company. Either on the 16th or 17th of December, "It must have been on the day when Krauss was beaten", there was a lot of arguing in the company about and with deceased, about the news bulletins. Reputedly deceased had labeled certain news as untrue and the other prisoners contradicted him. Boehmer testified that there was nothing to indicate to him that deceased was due for a beating, and he did not know on 17 December that there was some talk of beating the deceased, but "Only there was a heavy air". He talked to the deceased about the matter that evening while the arguments were going on. Then about dark Boehmer "told Meyer to go through all the barracks and tell them they should not make any nonsense"; he selected Meyer to do this because he always used Meyer for any special assignment.

He further testified that neither on 16 or 17 December did he, at the count of the company, make any statement that anyone was due for special handling. But Boehmer further testified that he did make an announcement to the company at the 8:45 count on 17 December 1943; his testimony with reference to that announcement is again quoted as follows:

"A. I told the company, everybody to listen, there are not going to be any more news reports. That there would not be any more disturbances in the company any more. I am going to clear this matter and each one of you knows what they have to do and must not do.

"Q. What is the German word for disturbances?

- "A. 'Schweinerie,' meaning a lot of nonsense which does not belong here.
- "Q. This statement which you made, was directed toward the giving out of news only, is that right?
- "A. Yes, sir, the statement I made I made on account of I sent Sergeant Meyer through the company and everybody knew what it was about.
- "Q. Did you refer to the news or to the Krauss beating?
- "A. The beating. On account of they were arguing all day long in the compound about it.
- "Q. Arguing as to what?
- "A. On account of the news bulletins, came the argument" (R 136; emphasis supplied).

Boehmer testified that the first information he received about the deceased being beaten was when Helmut Merkel awakened him and told him about it; that he then went to deceased, was surprised and frightened to see his condition, obtained a first-aid man and a litter, and helped take deceased to the hospital.

In our examination of the record as to Boehmer we have been much concerned to ascertain whether he made two separate statements to the assembled company on 16 and 17 December 1943; or whether he made only one statement and, if so, the time when it was made and what he said therein. The witnesses Heypeter and Zehrer placed the time of that announcement at the count on 16 December; it is also true, however, that the witness Gilliam testified it was "between the 16th and 17th", and the co-accused Von der Heydt said he was present at the count on both nights and heard Boehmer's announcement - without saying at which of those times it was made. Boehmer himself testified only with respect to one announcement made by him, and said that it was made at the 8:45 count on the 17th. He testified that he made his announcement on the 17th and that he made it "on account of I sent Sergeant Meyer through the company and everybody knew what it was about". The evidence is uncontradicted that Meyer was instructed by Boehmer to make the "no nonsense" announcement, and that Meyer made it, between six o'clock and nine o'clock on the night of the 17th. If the traitor-in-our-midst announcement had been made on the 16th, it is incredible that the enraged prisoners thereby further incited to violence by the virtual command of their leader would not have noted well and long remembered any subsequent countermanding order given by the same leader on the 17th. The announcement which Boehmer said he made on the 17th was diametrically opposed to and would have been a definite and final countermand of the traitor-in-our-midst statement.

The record as a whole leads to the inescapable conclusion that Boehmer made but one announcement, and that it was made at the 8:45 count on the night of the 17th of December 1943 after he had instructed Meyer to make the "no nonsense" announcement.

It is to be observed that although Boehmer testified that he had no reason to believe that deceased was due for a beating, and did not know on 17 December 1943 that there was talk of beating the deceased, he also testified expressly that his announcement to the company at 8:45 that evening had reference to the beating of the deceased. It thus appears from this accused's own mouth that he did in fact know that a beating of the deceased was being discussed and argued by the prisoners. Turn the light of this fact upon Boehmer's testimony that his reason for not reporting deceased's danger to the American company commander at that time was a fear that the commander "probably would have ordered Krauss out of the company", and a most singular significance is seen in his failure to make such a report. Deceased's being ordered or transferred out of the company because of the danger of being beaten would have thwarted the beating. Likewise, Boehmer's admitted knowledge that a beating of the deceased was being fomented, and his testimony that he had reference to the beating when making the announcement to the company, illuminate the statements which three prosecution witnesses and one co-accused said that he made in his announcement, viz:

"..... somebody reported the news bulletins and you guys know what to do and not to do", with remarks about treason, or

"If we have swine-hunder or traitors in our company you fellows know what to do. Beat them to death", or

"There is a traitor among us and you fellows know what to do about it and for my concern you can beat him to death", or "There is a traitor in our ranks, you know what to do about it. As far as I am concerned you can beat him to death", or

"We have a traitor among us and you know what you have to do".

We cannot say that the court was not justified in finding that Boehmer's announcement to the company shortly before the beating included the statements attributed to him by the witnesses. That the subject of those statements was the deceased there can be no reasonable doubt, and coming from Boehmer they were in truth tantamount to a command; he was the company leader, his was the voice of leadership and authority. Those statements, or a statement to that effect, coming from the company leader--

then possessed of knowledge that a beating of the deceased was being discussed among the members of the company, and made in the course of an announcement having particular reference to that beating, clearly and indubitably constituted the most effective type of abetting, counseling, inducing and encouraging that could have been indulged in by any member of that company. Boehmer's prior action in dispatching Meyer with the "no nonsense" announcement cannot be said to exculpate him in any way; it is not as though he had dispatched Meyer after making those statements to the company and had thereby recanted and countermanded those words and thus attempted to prevent any action being taken upon them. Indeed, he did just the opposite; by his statements to the company, made with full knowledge that the beating of deceased was brewing, he effectively countermanded and cancelled the "no nonsense" order he had previously directed Meyer to announce. His later action in telling witness Zehrer, with reference to an investigation of the homicide, that he should not say anything, unlike the case of the accused Meyer, not only shows but emphasizes his pre-concert of action with the principals. His action in rendering assistance to the deceased pales into insignificance.

In CM 302791, Kaukoreit, et al. (26 August 1946), the accused Kaukoreit was a senior non-commissioned officer of a surrendered German company in Italy, which had not yet passed into the actual physical control of the Allies. He convened an "emergency court-martial" which was nothing more than a meeting of ten men in the company street. At this meeting it was unanimously agreed that one Weiss, a member of the unit, should be put to death for alleged disobedience of orders and insubordination. Kaukoreit ordered that the execution be carried out "at the best opportunity". Four days later he told one of the accused that "tonight would be a good night to kill Weiss" and that he would post as sentries two men who could be trusted. The other accused killed Weiss that night. Although Kaukoreit was not present at the homicide, the Board of Review held that, by conceiving and organizing the plot and setting the stage for its furtive execution, he was an accessory before the fact and liable as such under the Federal statute (18 U.S.C.A. 550, supra) making aiders and abettors liable as principals. The same reasoning and law is applicable here. The record of trial is legally sufficient to sustain Boehmer's conviction.

8. The record of trial shows the respective ages of the accused as follows:

Unteroffizier Boehmer	- 32 years
Unteroffizier Meyer	- 26 years
Obergefreiter Meisel	- 24 years
Obergefreiter Braun	- 25 years
Obergefreiter Von der Heydt	- 44 years
Obergefreiter Jaschko	- 23 years
Gefreiter Hossann	- 21 years

9. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as noted above, no errors injur-

iously affecting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to sustain the findings of guilty and the sentences as to accused Jaschko and Meyer, and legally sufficient to sustain the findings of guilty and the sentences as to accused Meisel, Braun, Von der Heydt, Hossann and Boehmer. Death or imprisonment for life is mandatory upon conviction under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sections 454 and 567, Title 18, United States Code, and by Sections 2401-2404, Title 22 of the District of Columbia Code.

Charles M. Dickson Judge Advocate

H. Hayes Oliver Judge Advocate

James Butler Judge Advocate

JAGQ - CM 312330

1st Ind

DEC 27 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Fourth Army, Fort Sam Houston, Texas

1. In the case of Obergefreiter Heinrich Braun (81 G 28101), Gefreiter Werner Hossann (81 G 28111), Obergefreiter Erich Von Der Heydt (81 G 58327), Obergefreiter Werner Jaschko (81 G 28112), Unteroffizier Helmut Meyer (8 WG 4583), Obergefreiter Gunther Meisel (8 WG 4579) and Unteroffizier Anton Boehmer (8 WG 4464), German Prisoners of War, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Meisel, Braun, Von der Heydt, Hossann and Boehmer and legally insufficient to support the findings of guilty and the sentences as to accused Jaschko and Meyer, which holding is hereby approved. Upon disapproval of the findings of guilty and the sentences as to accused Jaschko and Meyer, you will have authority to order execution of the sentences as to the accused Meisel, Braun, Von der Heydt, Hossann and Boehmer.

2. In view of all the circumstances it is recommended that the terms of confinement be reduced, in the case of Meisel to 15 years and in the cases of Braun, Von der Heydt, Hossann and Boehmer to 10 years.

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

(CM 312330).

1 Incl
Record of Trial



HUBERT D. HOOVER
Colonel, JAGD
Acting The Judge Advocate General

In the Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 312356

17 SEP 1946

UNITED STATES)

VIII FIGHTER COMMAND

v.)

Private First Class CALVIN C.
PREATER (32917493), 14th Major Port
Processing Center; and Privates
HENRY LEFFEW (36778028), and MYRON
W. SICINSKI (35065527), both of
2224th Quartermaster Truck Company
(Avn).)

Trial by G.C.M., convened at
Honington, Suffolk, England, 21-22
February 1946. Preater and Leffew:
Dishonorable discharge and confine-
ment for ten (10) years. Federal
Reformatory, Chillicothe, Ohio.
Sicinski: Dishonorable discharge
and confinement for two (2) years.
Penitentiary.

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences as to the accused Preater and Leffew. In view of this holding, discussion will be limited to that portion of the record of trial concerning the accused Sicinski.

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

CHARGE I: (Finding of guilty disapproved by reviewing authority).

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

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

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

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

Specification 2: In that Private Henry Leffew, 2224th Quartermaster Truck Company (Aviation), AAF Station 375, APO 636, US Army, and Private Myron W. Sicinski, 2224th Quartermaster Truck Company (Aviation), AAF Station 375, APO 636, US Army, acting jointly and in pursuance of a common intent, did, at AAF Station 139, APO 559, US Army, on or about 29 December 1945, wrongfully take and use without proper authority a certain motor vehicle,

to wit, GMC 2½ ton 6 x 6 truck, registration number 4706184, property of the United States, of a value of more than fifty dollars (\$50.00).

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

Specification: In that Private Henry Leffew, 2224th Quartermaster Truck Company (Aviation), AAF Station 375, APO 636, US Army, and Private Myron W. Sicinski, 2224th Quartermaster Truck Company (Aviation), AAF Station 375, APO 636, US Army, acting jointly and in pursuance of a common intent, did, on the Ipswich-Norwich Road, near Yaxley, Suffolk, England, on or about 29 December 1945, through neglect, suffer a motor vehicle, registration number 4706184, GMC 2½ ton 6 x 6 truck, of a value of more than fifty dollars (\$50.00), military property belonging to the United States, to be damaged by wrongfully driving said motor vehicle at an excessive rate of speed and off the said road, and causing said motor vehicle to strike and collide with a British General Post Office communications pole.

He pleaded not guilty to and was found guilty of, each Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2 of Charge I, and Charge I, and Specification 1 of Charge II, reduced the period of confinement to two years, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

4. Evidence for the prosecution.

It was stipulated by and between the prosecution, defense counsel and accused that Mrs. Betty Phillips of Hoxne, England, would testify that at about 6:30 p.m. on 29 December 1945 accused Sicinski and Leffew arrived at her home in Hoxne in "an American truck." She got into the truck with the two accused and the trio proceeded through Eye towards Ipswich at "a reasonable rate of speed." Accused Leffew was driving and Mrs. Phillips was seated in the middle, between accused Leffew and Sicinski. On approaching a left hand turning the driver, accused Leffew, went over to the right hand side of the road to avoid a cyclist and lost control of the vehicle. The truck then "darted" across the road to the left striking a telephone pole, and came to rest on its side. Mrs. Phillips and the two accused got out of the truck and a man "who appeared to be injured" talked to accused. Mrs. Phillips did not hear any of this conversation. Accused then "went to telephone" and she walked back towards Eye. In a few minutes accused caught up with her (R. 108, Pros. Ex. A).

Mr. Sidney Upson of Yaxley, England, testified that about 7:00 p.m., on December 29, 1945, he was riding his cycle along the Ipswich-Norwich main road and, as he approached the turning to Eye, saw "the lights of a lorry" approaching from the direction of Eye and "coming very fast." He was riding of the left hand side and, as he passed the turning, noticed that the "lorry" was beginning to turn the corner going towards Ipswich in the same direction as he was cycling. At this time he was "about a foot off the grass verge" on his left and was about twenty or thirty yards past the turning. The "next instant" he was thrown off his cycle, the "back part" of the truck having struck him and his cycle. When the truck turned the corner it "went right on to the opposite side of the road, on to the grass verge." It then swung sharply over to the left side of the road and crashed into a telegraph post which stood about five feet off the road's edge, breaking the post off just above the ground. The truck laid over on its side and came to rest in the ditch along the side of the road about fifty or sixty yards from the corner. Mr. Upson was "dazed" for a few minutes but then got up and noticed two American soldiers and a girl emerge from the truck. One of the soldiers was the accused Leffew. A Mr. Everson was on the scene at the time. Mr. Upson, Mr. Everson and the occupants of the truck went to Mr. Hawse's shop located nearby and Mr. Upson asked Mr. Hawse to call the police. When Mr. Hawse complied with this request the occupants of the truck left and were not seen by Mr. Upson again. About a quarter of an hour later Constable Chapman, of the Yaxley police, arrived. Mr. Upson had been a "lorry" driver for twelve or thirteen years and "imagined" the truck was going "nearly 50 miles per hour." He saw tire marks on the grass "verge," but could see no skid marks on the road. He had a white light at the front and a red light at the rear of his cycle (R. 100-103).

Mr. Alfred Everson of Thorndon, England, testified that about 7:00 p.m. on 29 December 1945 he was cycling on the main Diss-Ipswich road and just as he was approaching the crossroad, where the road from Eye intersected on his right, he saw the lights of a "lorry" approaching from Eye about 40 or 50 yards away. The "lorry" was "approaching the main road very fast" and just as he noticed it coming he met Mr. Upson cycling towards him. He turned off the main road to his left and after he had proceeded about 20 yards he heard a crash. He got off his cycle and went back and saw an "American lorry" on the left hand side of the road, partly overturned on its left. It had crashed into a telephone post, breaking the post off about a yard from the ground. The post was wedged in between the radiator and wheel of the "lorry." He asked if anyone was hurt and an American said that nobody had been hurt. There was one American standing on the grass with a young lady and another was getting out of the truck on the right hand side. One of the Americans was accused Sicinski. The occupants of the truck, Mr. Upson and Mr. Everson went to Mr. Hawse's shop and Mr. Hawse called the police. The occupants of the truck thereupon left the shop and Mr. Everson did not see them again. The truck "must have been traveling very fast - between 40 and 50 miles an hour - much too fast to approach the main road on the bend to turn on to the main road." It was raining at the time (R. 104-107). Constable William

Chapman of Yaxley testified that the truck was an American GMC, number 4706184S. The right hand side door was "practically torn off" and "there was damage to the gear box." In the back of the vehicle there was a "kitbag" with the name "Myron W. Sicinski" written or printed on it, and also a wooden trunk with the name "Lieutenant P. Joyce" on it. The next morning the truck was towed away by Corporal Giles of the American military police. Constable Chapman found a trip ticket in the "windscreen." There was a name on it that he could not recall but which was not "Leffew" and "it was from Thorpe Abbots" (R. 109-113).

Corporal Bernard H. Thompson testified that from the middle of December to 30 December 1945 he was stationed at Thorpe Abbots, Station 139, with the 878th Chemical Company, and that he was the only motor vehicle dispatcher of that organization. He had in his motor pool on 29 December 1945 a $2\frac{1}{2}$ ton GMC truck, number 4706184, which had been dispatched during that day to one Private First Class Silver and which was supposed to be turned in at 1700. It had not been dispatched again during the evening of 29 December 1945. On 30 December 1945 he again saw this vehicle at Thorpe Abbots at which time it was in a wrecked condition, and unable to move under its own power (R. 120-122). Sergeant Robert Frick testified that on 30 December 1945 he was stationed at Thorpe Abbots, Station 139, with the 878th Chemical Company, at which time he was asked by the Motor Maintenance Officer to make a damage report on a vehicle numbered 4706184. As a result of his inspection of this vehicle he found that the front bumper was bent and considerably cracked, the front axle was bent, the transfer case was broken, a front spring was damaged beyond repair and a front fender was bent very badly (R. 126-128).

Miss Dorothy Howroyd testified that on 1 January 1946 she had a conversation with accused Sicinski and Leffew "about a truck they had both taken from Thorpe Abbots base." The examination of the witness relative to this conversation was as follows:

- "Q. What do you mean by 'both'? A. Both Leffew and Sicinski.
 "Q. Was Leffew present too? A. Yes.
 "Q. You were talking to both of them? A. Yes.
 "Q. At this pub in Ipswich? A. Yes.
 "Q. Tell me what conversation took place there that evening.
 A. They took the truck from the base, they said.
 "Q. Did they say which base? A. Yes, Thorpe Abbots.
 "Q. What did they say happened to the truck? A. They were driving it along the road coming to Ipswich.
 "Q. Did they say where they were on the road? A. No, they did not.
 "Q. What else did they say? A. They said they thought they were on the main road and they were doing about fifty miles an hour, and they came to a turning on the road, and they saw a cyclist on the wrong side of the road. In trying to avoid him they lost control and the truck went in a ditch.

"Q. Did they say anything else? A. That Sicinski's kit was in the back of the truck.

"Q. Who said that? A. Sicinski himself.

"Q. What part of this conversation was related to you by Private Sicinski and what part by Private Leffew? A. I do not know.

"Q. Were both present throughout the entire conversation? A. Yes.

"Q. Who did the talking? A. Both of them.

"Q. Both talked to you? A. Yes.

"Q. Concerning this accident? A. Yes.

"Q. Would you say that the conversation you have related represents the statements of both? A. Yes.

* * *

"Questions by defense:

"Q. Did they say which one was driving the truck? A. Leffew.

"Q. Did Leffew say he was driving? A. Yes.

"Defense: No further questions.

* * *

"Questions by prosecution:

"Q. Did they indicate they were alone - just the two of them?

A. No. there was a girl in the truck with them.

"Q. Did they indicate who the girl was? A. No." (R. 98,99,100)

5. Evidence for the defense.

Accused Leffew, having been advised of his rights, elected to be sworn as a witness to testify only as to matters covered by Specification 2, Charge II, and the Specification of Charge III. He testified that on 29 December 1945 he was stationed at Thorpe Abbots, Station 139, with the 878th Chemical Company, and that at 6:00 p.m. on the evening of that day he "got" a 2½ ton truck. He had no authority to take this vehicle. He left the Thorpe Abbots base in the truck but returned to a barracks there upon discovering that he had no cigarettes with him. Inside the barracks he informed the occupants that he was "taking a little trip to Ipswich tonight" and asked if anyone wanted to come with him. Accused Sicinski said he would like to go and that he had some "things" he would like to take to the railroad station so that he could send them to the cleaners the next day. Accused Leffew said, "OK, throw it aboard and we'll go," whereupon accused Sicinski put his belongings in the back of the truck and the two accused left. Accused Sicinski did not know that accused Leffew had no authority to take the truck and, although both accused belonged to the same organization and both were stationed at Thorpe Abbots, they did not live in the same barracks and did not know each other "personally." About a quarter of a mile from the base accused Leffew "happened to think" that he could take a short-cut off the main road to Ipswich and pick up his girl friend, Mrs. Betty Phillips, at the same time. This he did, reaching her home in Hoxne about 6:30 p.m. The two accused and Mrs. Phillips then proceeded towards Ipswich in the truck. Accused Leffew intended to take Mrs. Phillips to a "show" in Ipswich that night but did not know what accused Sicinski intended to do and did not ask him what his plans were. There was no conversation as to whether accused Sicinski would accompany them to the "show." Accused Sicinski

and his luggage were to be "dropped off" at the railroad station. The luggage consisted of a barracks bag and a foot locker. Accused Leffew did not testify concerning the "accident" (R. 150-153).

Accused Sicinski, having been warned of his rights as a witness, elected to remain silent (R. 154).

6. Aside from the presence of accused Sicinski in the vehicle involved in the collision on 29 December 1945, the only evidence linking him with its wrongful taking and use and the negligent damaging thereof is the purported conjunctive admission of accused Sicinski and Leffew made to the witness Dorothy Howroyd on 1 January 1946. This witness was allowed to use the plural pronoun "they" in relating to the court what amounted to merely a summation by her of the entire conversation she had with both accused in which she stated, inter alia, that "they took the truck from the base, they said" and that "they said they thought they were on the main road and they were doing about fifty miles an hour, and they came to a turning on the road, and they saw a cyclist on the wrong side of the road. In trying to avoid him they lost control and the truck went into a ditch." Upon being queried as to what part of the conversation was related to her by accused Leffew and what part by accused Sicinski, witness replied, "I do not know." The logic behind the admission in evidence against one joint accused of the statements made out of court but in his presence of his fellow wrongdoer, after the consummation of the joint offense, rests upon the duty of the silent accused to speak out and deny his alleged participation in the reprehensible act. It is manifest that this logic cannot apply here, for if, for example, that part of the conversation concerning the unauthorized taking of the truck had been simply a statement by accused Leffew that "I took the truck" accused Sicinski would not have been implicated and therefore would have had no duty to exculpate himself. Had the witness been able to state that accused Leffew said, "We took the truck" or, of course, that accused Sicinski said he had taken it, then the case would have been otherwise. This, however, she could not do. For the same reason that part of Miss Howroyd's testimony which seemingly implicates accused Sicinski in the wrongful use and negligent damaging of the vehicle is equally objectionable. Therefore, the Board of Review is of the opinion that the testimony of Miss Howroyd must be excluded in its consideration of the legal sufficiency of the record of trial as it relates to accused Sicinski. (See CM NATO 1978, Mercier, 3 BR (NATO-MTO) 327,332).

As to Specification 2, Charge II.

The only evidence remaining, then, which tends to implicate the accused Sicinski in the wrongful taking and using of the vehicle as charged in the Specification under discussion is his mere presence therein from the time it left Thorpe Abbots until the time it crashed into the telephone pole on the Ipswich road. There can be little doubt that accused Leffew was

driving the vehicle. It does not appear from the evidence that accused Sicinski took the truck or knew that it had been wrongfully taken, nor does it appear that the vehicle was in his custody or that he exercised control over it in any manner. Likewise, there is no evidence that at or prior to the time of the collision he was engaged in a joint unlawful enterprise with the other occupants of the truck (see CM 234964, Furtado, 21 BR 217). His presence in the vehicle is explained by the sworn testimony of the accused Leffew to the effect that accused Sicinski was merely being taken to the railroad station in Ipswich and this testimony is fully corroborated by that of Constable Chapman who found accused Sicinski's baggage in the back part of the truck. The conclusion is inescapable that accused Sicinski was merely a passenger. In CM 312079, Smith, accused Smith and Clay were apprehended by a civilian policeman riding in a recently stolen automobile. Accused Smith was driving and, when questioned by the policeman, stated that the car belonged to him. Accused Clay "was a passenger" in the automobile. The Board of Review said,

"As to accused Clay, the only evidence tending to connect him in any way with the wrongful taking and asportation of the vehicle is the fact that he was a passenger in the automobile when the civilian policeman apprehended both accused. There is no proof that Clay took the automobile or knew it to have been wrongfully taken, and there is nothing in the evidence to form the basis of a reasonable inference that Clay intended to, or did aid, abet, encourage, or otherwise assist Smith in the commission of the offense alleged. There is no proof that Smith's acts were the result of any plan or arrangement between the accused ***. Furthermore, there is no evidence that Clay, either by word or act exercised any control over the automobile so as to indicate possession thereof and thus raise the presumption that it was taken by him.

"To infer Clay's guilt from the facts as established in this case would be basing a finding of guilt upon pure conjecture or at most upon a mere possibility, which is not sufficient to sustain such a finding."

The Board of Review is of the opinion that the rule of law announced in the cited case applies with equal force to the case at bar insofar as it concerns the wrongful taking of the Government vehicle as alleged in the Specification under consideration. The Board of Review is also of the opinion that mere proof of accused Sicinski's presence in the vehicle in question at the time accused Leffew "picked up" Mrs. Phillips in Hoxne and at the time of the collision caused by the obviously negligent driving of accused Leffew is insufficient to show that accused Sicinski participated in the wrongful use thereof. There is no evidence tending to prove that accused Sicinski knew that accused Leffew's sole purpose in going to Ipswich was to take Mrs. Phillips to the "show" and there is no reason to suppose that accused Sicinski would have known that the truck was being put to improper use by

the mere fact that accused Leffew was taking a civilian passenger to Ipswich. As will appear from the following discussion of the Specification to Charge III, accused Sicinski's status as a mere passenger at the time of the collision does not make him an aider and abetter to the negligent operation of the vehicle.

As to the Specification, Charge III.

It has been held that paragraph 143 of the Manual for Courts-Martial, 1928, contemplates trial under the 83rd Article of War only in those cases where accused had an obligation or duty with respect to the care of the Government property damaged other than that imposed upon persons generally (Dig Op JAG, 1912-1940, sec. 441(2)). Thus, the accused must have had control of the property damaged or have acted in such a manner as to be chargeable as an aider and abetter with the person who did have actual control thereof at the time it was suffered to be damaged, etc., through neglect. The word "neglect," as used in this Article, implies a failure to do one's duty (see CM ETO 393, Caton, 1 BR (ETO) 325). Here, even though it is clear that the Government vehicle in question was damaged as a result of the negligent driving of the accused Leffew, there is no evidence that accused Sicinski gave instructions to the driver, that he exercised control over the vehicle at any time or that he otherwise became a participant in the dangerous operation thereof by word or act.

Although there may well be occasions when a military passenger riding in a military vehicle which is being driven in a manner likely to result in its damage or destruction has a duty arising from the circumstances to take whatever action is available to him to curb such negligent operation, there is no evidence whatsoever in this case as to the conduct of accused Sicinski relative to the operation of the vehicle, nor is there any evidence tending to show that accused Sicinski was otherwise engaged in a joint unlawful enterprise with the occupants of the truck at the time of its negligent operation. The Board of Review is of the opinion that the mere presence in the vehicle of accused Sicinski is not sufficient to support a conviction under the 83rd Article of War. In this respect, this case is easily distinguishable from CM ETO 393, Caton, supra.

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence as approved by the reviewing authority as to accused Sicinski but legally sufficient to support the findings of guilty and the sentence as to accused Preater and Leffew.

Robert E. Sibert, Judge Advocate
Charles E. McAfee, Judge Advocate
Robert E. DeLong, Judge Advocate

JAGK - CM 312356

1st Ind

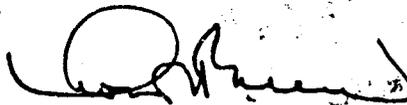
WD, JAGO, Washington 25, D.C.

TO: The Adjutant General

1. In the case of Private First Class Calvin C. Preater (32917493), 14th Major Port Processing Center, and Privates Henry Leffew (36778028), and Myron W. Sicinski (35065527), both of 2224th Quartermaster Truck Company (Avn), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and sentences as to the accused Preater and Leffew, but legally insufficient to support the findings and sentence as to the accused Sicinski, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, upon disapproval of the findings and sentence as to the accused Sicinski you will have authority to order the execution of the sentences as to accused Preater and Leffew.

2. In view of the inactivation of the VIII Fighter Command, it is recommended that War Department general court-martial orders be published in this case. I recommend that the confinement imposed as to Preater and Leffew be reduced to five years and that the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement. Draft of general court-martial order in accordance with the foregoing recommendation is inclosed.

3. Please return the foregoing holding by the Board of Review, together with this indorsement and copies of the published War Department general court-martial orders.

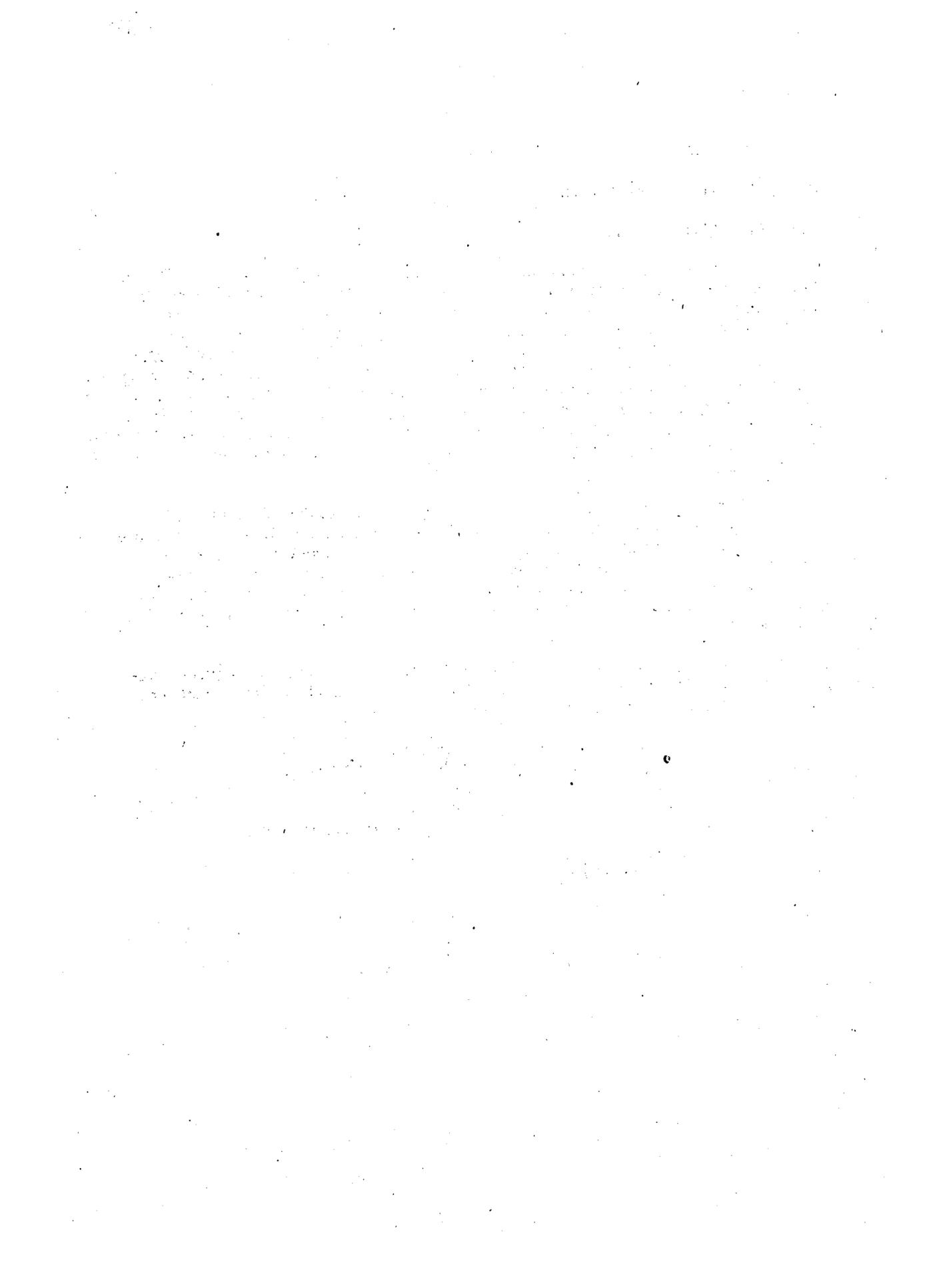


THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Draft of GCMO

(G.C.M.O. 306, 15 Oct 1946).



WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGQ - CM 312398

APR 19 1946

UNITED STATES	)	CHANOR BASE SECTION, COMMUNICATIONS
	)	ZONE, UNITED STATES FORCES, EUROPEAN
v.	)	THEATER
	)	Trial by G.C.M., convened at Le Havre,
Private SOLOMON THOMPSON	)	France, 27 July 1945. Sentence: To
(34228769), Company A, 1697th	)	be hanged by the neck until dead.
Engineer Combat Battalion)	

OPINION OF THE BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Solomon Thompson, Company A, 1697th Engineer Combat Battalion, did, at Herrsching, Germany, on or about 17 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Cloyd A. Smith, a human being by shooting him with a rifle.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charge and specification. Evidence was introduced of one previous conviction by summary court for insubordination to a superior officer in violation of Article of War 63. All the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Chanor Base Section, Theater Service Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

2. On 29 December 1945, the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, examined the record of trial and held it legally sufficient to support the findings and the sentence. The

Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. On the same day the Acting Assistant Judge Advocate General in charge of that Branch Office approved the holding of the Board of Review and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence. The sentence was ordered executed on 22 January 1946 by General Court-Martial Orders No. 29, Headquarters United States Forces, European Theater.

3. The execution of the sentence was stayed by the Commanding General, United States Forces, European Theater, pending further orders, by General Court-Martial Orders No. 36, Headquarters United States Forces, European Theater, dated 25 January 1946, by reason of the termination on 19 January 1946 of the powers conferred by the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48, 49, 50, and 50 $\frac{1}{2}$. The record of trial was thereupon forwarded to The Judge Advocate General, Washington, D. C., for appropriate action.

4. The record of trial has now been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C., and it adopts and concurs in the holding of the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, with the exception of the word "men" in line 38 of page 2 which the record shows should be "statements", a copy of which said holding is annexed to the record of trial, and, for the reasons set forth therein, is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

Hester A. Danielson, Judge Advocate
John G. Barnes, Judge Advocate
Walter W. Davis, Judge Advocate

SPJGQ - CM 312398

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUN 11 1946

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 Solomon Thompson (34228769), Company A, 1697th 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 of guilty and the sentence and to warrant confirmation of the sentence. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls

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

(G.C.M.O. 220, 9 July 1946).

WAR DEPARTMENT
 Army Service Forces
 In the Office of The Judge Advocate General
 Washington 25, D. C.

SPJGQ - CM 312404

MAY 24 1945

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

v.)

Private HARRY A. DUVAL)
 (35243378) and Private)
 BERNARD L. FULLER (33679672),)
 both of Troop A, 125th Cavalry)
 Reconnaissance Squadron, Mech-)
 anized.)

HEADQUARTERS XIX CORPS

Trial by G.C.M., convened at
 Headquarters XIX Corps Artil-
 lery, Friedberg, Germany, 13
 and 15 June 1945. As to ac-
 cused Duval: Dishonorable
 discharge and confinement for
 life. Penitentiary. As to
 accused Fuller: Dishonorable
 discharge and confinement for
 ten (10) years. Federal Re-
 formatory.

HOLDING by the BOARD OF REVIEW
 OLIVER, CARROLL and DAVIS, Judge Advocates

1. Accused were arraigned separately and, after specifically waiving ob-
 jection thereto, were tried together upon the following Charges and Specifi-
 cations:

DUVAL

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

Specification: In that Private Harry A. Duval, Troop A, 125th Cavalry
 Reconnaissance Squadron, Mechanized, did, at Flensburg, Hessen,
 Germany, on or about 15 May 1945, forcibly and feloniously, against
 her will, have carnal knowledge of Maria Schaeffer.

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

Specification 1: In that * * * did, at Flensburg, Hessen, Germany,
 on or about 15 May 1945, unlawfully enter the dwelling of Maria
 Schaeffer, with intent to commit criminal offenses therein, to wit,
 rape, assault and trespass.

Specification 2: (Disapproved by Reviewing Authority.)

FULLER

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: Identical with Specification 1 of Charge II against accused Duval except for the substitution of the name of accused Fuller.

Specification 2: (Disapproved by Reviewing Authority.)

Each accused pleaded not guilty to all Charges and Specifications. Accused Fuller was found not guilty of the Specification of Charge I and Charge I, and each accused was found guilty of all the remaining Charges and Specifications preferred against him. Evidence was introduced of one previous conviction by special court-martial against Duval for absence without leave for 18 days in violation of Article of War 61. No evidence of previous convictions was introduced against Fuller. Three-fourths of the members of the court present at the time the vote was taken concurring as to Duval, and two-thirds concurring as to Fuller, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct: Duval for life and Fuller for ten years. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge II as to each accused, approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for Duval and the Federal Reformatory, Chillicothe, Ohio, as the place of confinement for Fuller, and forwarded the record of trial for action pursuant to Article of War 50½.

2. On 14 September 1945 the Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence as to Duval, but legally insufficient to support the findings of guilty of the remaining Charges and Specifications as to each accused and the sentence as to Fuller. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. On the same date the Assistant Judge Advocate General in charge of that Branch Office, by first indorsement directed to the Commanding General, XIX Corps, invited attention to the holding and advised him that he now had authority to order execution of the sentence as to accused Duval under the provisions of Article of War 50½. By obvious clerical inadvertence the express statement by the Assistant Judge Advocate General regarding his approval of the holding, was omitted from the first indorsement. Prior to the inactivation

of that Branch Office on 15 February 1946, no official statement was made concerning such approval by the Assistant Judge Advocate General.

3. The record of trial has been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C., and it adopts and concurs in the holding of the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, a copy of which holding is annexed to the record of trial, and for the reasons set forth therein, is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence as to Duval, but is not legally sufficient to support the findings of guilty of the remaining Charges and Specifications as to each accused and the sentence as to Fuller. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92.

10 JUN '46 PM



Th. H. Stewart, Judge Advocate
Donald H. Carroll, Judge Advocate
Walter H. Davis, Judge Advocate

SPJGG - CM 312404

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUN 7 1945

TO: The Adjutant General

1. Attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence as to accused Duval, and legally insufficient to support the findings of guilty of the remaining Charges and Specifications as to each accused and the sentence as to accused Fuller, which holding is approved.

2. The accused were tried by a general court-martial appointed by the Commanding General, XIX Corps, on 13 and 15 June 1945. Duval was found guilty of rape and of two specifications of housebreaking, and Fuller was found guilty of two specifications of housebreaking. Each accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor at such place as the reviewing authority might designate, Duval for life and Fuller for ten years. The reviewing authority disapproved the findings of guilty as to each accused of one of the specifications of housebreaking, approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for Duval and the Federal Reformatory, Chillicothe, Ohio, as the place of confinement for Fuller, and, pursuant to Article of War 50 $\frac{1}{2}$, withheld the orders directing the execution of the sentences. The XIX Corps has been inactivated. The proceedings should be promulgated by a War Department general court-martial order. Duval is confined in a disciplinary training center in the European Theater. It is indicated in the file that steps were taken several months ago to release Fuller from confinement.

3. The evidence briefly stated shows that one Maria Shaeffer, her two children, her parents and her brother lived in a house in Flensburg, Germany, on 15 May 1945. About midnight on said date, the two accused knocked on the door of the home and were admitted by the elderly father of Maria Shaeffer. At that time she was upstairs in bed but when called by her father and brother went downstairs. She was dressed. The accused drank wine which they had brought with them. Duval solicited sexual intercourse with Maria Shaeffer, which was refused. Both accused carried loaded weapons and Duval procured the family bread knife and threatened Maria with it. Fuller was present in the room at this time. Duval then took her by the arm and led her outside of the house onto the street. He had his carbine with him. He forced her to the ground and then raped her. Upon completion of the act, they returned into the house. Fuller then took her by the arm, escorted her outside of the house and compelled her to have sexual intercourse with him. He also carried a weapon. When Fuller had completed the act, he and the woman entered the house. After a space of time, Duval again took her outside where he again raped her. After this event, the woman succeeded in running away. There is no question as to the identity of the accused Duval as the rapist. While the evidence was conflicting on the

question of consent, there is substantial evidence in the record of trial that the woman acted under fear of her life or great bodily harm in the case of the first Duval intercourse.

4. The charge sheet shows that Duval was 32 years, two months, of age when he committed the offense of rape. He had one admissible prior conviction by special court for absence without leave. The Staff Judge Advocate as a result of a post-trial interview with Duval stated that, prior to his induction into the Army, he was drunk about once a week but was never arrested for drunkenness. He experienced a short period of combat. A neuropsychiatric examination on 22 May 1945 showed that Duval was of sound mind at the time of the commission of his offense. After carefully reviewing the circumstances surrounding Duval's offense, I believe that the period of confinement should be reduced to twenty years and I so recommend.

5. Draft of War Department general court-martial orders promulgating the proceedings in both cases, reducing the term of confinement of Duval and directing the execution of the sentence of Duval as modified is inclosed herewith.

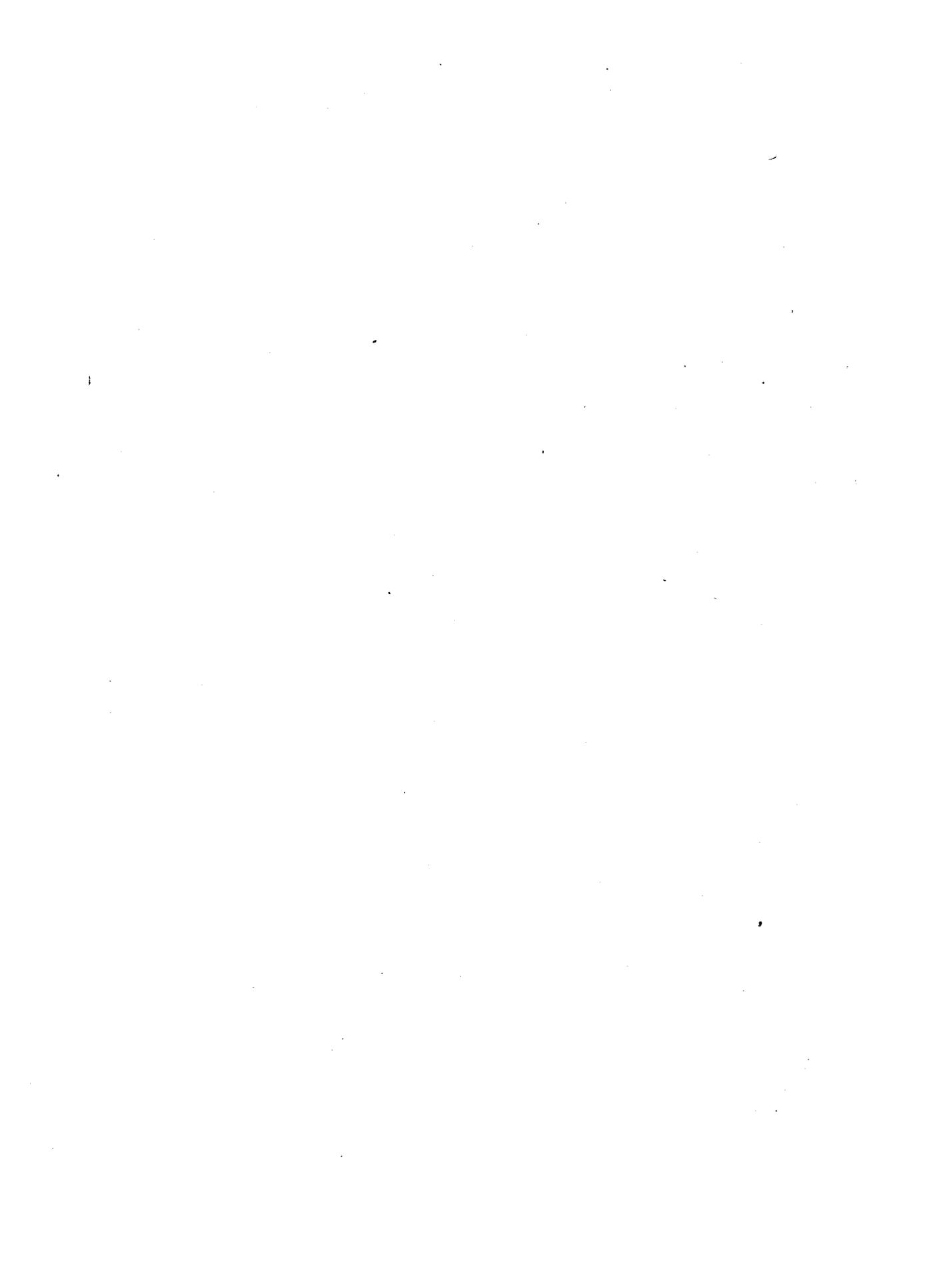
6. Return of this correspondence and inclosures, together with ten copies of the published order, is requested.



THOMAS H. GREEN
Major General
The Judge Advocate General

- 3 Incls
1 - Copy Holding B/R w/ETO
2 - Draft of GCMO
3 - Record of trial

(G.C.M.O. 177, 13 June 1946)•



receiving as profit to himself about 15,000 Reichsmarks, of a value of about \$1,500.

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

Specification: In that * * *, did at Weimar, Thuringia, Germany, during the period from about 9 May 1945 to about 15 June 1945 wrongfully and unlawfully convert to his own use and benefit about 96,000 German Reichsmarks, value about \$9,600, property of the Weimar German Post Office, seized by Provisional Military Government Detachment No. 71 about 9 May 1945.

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

Specification 1: In that * * *, did at Weimar, Thuringia, Germany, on or about 20 May 1945 wrongfully engage in currency transactions whereby he received Allied German Marks in exchange for German Reichsmarks.

Specification 2: In that * * *, did at Weimar, Thuringia, Germany, on or about 13 June 1945, wrongfully advise K. J. Vogler, a civilian, to leave town to avoid arrest, he, the said Lieutenant Colonel Brown, then knowing that the said K. J. Vogler was wanted by Military Government Detachment GLC9 and that a warrant had been issued for his arrest.

He pleaded not guilty to the Charges and Specifications, and was found guilty of all Charges and Specifications except the words and figures "96,000 Reichsmarks" and "\$9,600" in the Specification of Charge I and in the Specification of Charge III, substituting therefor in each Specification the words and figures "30,000 Reichsmarks" and "\$3,000" respectively; of the excepted words, not guilty, and of the substituted words, guilty. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence, but in view of accused's excellent past record recommended remission of the confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The Provisional Military Government Detachment 71, with accused exercising command, took over its operational duties in Weimar, Germany, on 24 April 1945, and remained there until 6 or 9 June 1945 (R. 8, 29, 38; Pros. Ex. C, p.4). Accused called at the Weimar post office on 5 May 1945 and announced that all money and stamps in the treasury were confiscated. Nothing was taken away, however, at this time (R. 8). About 9 May 1945, the

Detachment Fiscal Officer, a "Lieutenant Crowe," entered the post office and carried away all the money which he placed in a box in the Detachment safe. No receipt was ever given the post office for the confiscated funds, and no report of the seizure was ever made by the Detachment to "higher headquarters." (R. 8; Pros. Ex. C, pp.4-5). The manager of the post office personally observed that the funds included nine original packets each containing 20,000 Reichsmarks in twenty mark pieces. An examination of the books of the post office disclosed that 196,307 Reichsmarks had been taken (R. 8).

The postmaster made a request, about 1 June, for the return of the 196,307 Reichsmarks (R. 20). Kurt Vogler, a German employee of the Detachment, testified that accused instructed him to inform the postmaster that the money had been turned over to higher headquarters and that a statement should be furnished showing how the post office arrived at the amount of money demanded. Vogler carried out these instructions (R. 20). A few days later, around 3 June, accused took 100,000 Reichsmarks of the seized funds and had Vogler return them to the post office (R. 8, 20-21; Pros. Ex. C, p.5). This was the only part of the money ever returned (R. 9). Just before the Detachment was relieved from duty - early in June - accused turned over 20,000 Reichsmarks from the post office funds to Vogler and instructed him to exchange them for allied military marks. Accused admitted, in a pre-trial statement, that he ordered the exchange and said the reason was that "we always felt that American currency was of more value than German currency. Everybody felt that" (R. 18-19; Pros. Ex. C, pp.7-9). Vogler was able to exchange about 9,000 Reichsmarks at a Reichsbank and a winery and gave accused the proceeds (R. 19; Pros. Ex. C, pp.8, 9). The rate of exchange was one German Reichsmark for one allied mark (R. 34). Administrative Memorandum No. 35, Supreme Headquarters, Allied Expeditionary Force, 25 October 1944, revised 7 December 1944, prohibited military personnel from "Participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies" (R. 16; Pros. Ex. A). Accused also claimed that he turned over several bags of "small currency" from the post office funds to Vogler "to take to the bank, have it counted, and then turn it over to the post office, preferably in notes of a larger denomination" (Pros. Ex. C, pp. 5-6). He admitted, however, that he never asked Vogler for a receipt (Pros. Ex. C, p.7).

At various times during May and June 1945 accused purchased rings and other items of jewelry from a Weimar jeweler. Vogler, acting in behalf of accused, made payments totalling 20,000 Reichsmarks on these purchases (R. 21-22; Pros. Ex. B).

On the night of 13 June 1945, Vogler went to accused's quarters and returned the major part of the 20,000 Reichsmarks, entrusted to him by accused, which he had been unable to exchange for allied marks (R. 19-20). Vogler still had in his desk at Detachment headquarters 2763 marks

which accused had given him on another occasion (R. 24-25). Accused said to Vogler, "Get away from here, somebody from the new Military Government is looking for you, they have a warrant out for your arrest." Vogler replied that he had no place to go and no money whereupon accused tendered him 1,000 marks (R. 19-20). Earlier that evening an enlisted man from the Military Government Detachment which relieved Detachment 71 called on accused and told him that Vogler was in trouble and was wanted for questioning. In his pre-trial statement accused denied any knowledge of the nature of Vogler's troubles or knowledge that a warrant had been issued for Vogler's arrest although he admitted telling him that "If you are in trouble, the best thing would be to get away" (R. 30; Pros. Ex. C, pp. 11-12).

Shortly after Detachment 71 was relieved from duty accused gave Captain Gottlieb E. Schmoker, an officer of the Detachment, a box containing money from the post office funds in large denominations. Accused instructed Captain Schmoker to hold it for "safekeeping." About 28 June accused repossessed the box (R. 35-37; Pros. Ex. C, pp. 5-6).

Testimony concerning a bond transaction involving accused showed that about 20 May he gave Vogler a $3\frac{1}{2}\%$ German Treasury bond and requested that he convert it into marks. Vogler cashed the bond at the Reichsbank for 15,150 Reichsmarks and gave accused the money. Accused returned 150 marks to Vogler for his services (R. 17-18, 23, 27, 31-32). When questioned accused stated that he found the bond in an abandoned house. He insisted that under such circumstances the bond was his own property. He readily admitted that Vogler was acting as his personal agent in cashing the bond (Pros. Ex. C, pp. 7-8).

4. Evidence for the defense: Accused, after being advised of his rights as a witness, elected to make an unsworn statement (R. 57-58). He stated that his rights had been impaired by the speed of the original investigation in June 1945, by the speed of the present trial including the fact that he had been allowed only five days to prepare his defense, and by his inability to secure witnesses. He further asserted that there was a civilian employee of the post office, absent at the time of trial, whose testimony would raise a serious question about the amount of money that was removed from the post office (R. 58).

Defense counsel also made a statement in accused's behalf. He complained that the investigation by the Inspector General's Department and by the investigating officer appointed under Article of War 70 were conducted with great speed and that accused was not allowed to present a full statement concerning the case; that at the investigation his request for counsel, for a more impartial investigating officer and for delay to allow the presentation of additional facts, were denied; and that the investigating officer was not qualified to act because accused had previously consulted him as an attorney. From 30 June 1945 until 3 February 1946 accused heard nothing further about the case. While on terminal leave he was recalled to duty and brought to trial.

By reason of the lapse of time many essential witnesses were no longer available. It was difficult to secure witnesses located in the Russian zone of occupation and the defense was unable to determine whether or not there were witnesses at Weimar, now in the Russian zone, who might assist accused (R. 59).

The stipulated testimony of Lieutenant Colonel Lynn H. Stockman, Inspector General's Department, who investigated the case, showed that the money from the post office was brought to the Detachment by two enlisted men and First Lieutenant William M. Crowe. One of the enlisted men confessed taking 1,000 Reichsmarks and the other confessed taking 2,000 Reichsmarks from the fund while it was in their custody. Lieutenant Crowe denied any knowledge of these thefts (R. 40; Def. Ex. 2).

The stipulated testimony of Lieutenant Colonel George A. Logan, Jr., disclosed that during the investigation by the Inspector General's Department, Colonel Logan, as accused's superior officer, requested him to return any post office funds in his possession. Accused repossessed the money he had placed in Captain Schmoker's custody and turned it over to Colonel Logan on 28 June 1945. The amount was 58,308 Reichsmarks, German paper currency. Accused also delivered up four cigarette cases, 19 rings, 5 necklaces, 3 bracelets, 1 pendant and 1 pair cuff links (R. 56, 58; Def. Ex. 11).

Captain Schmoker testified that during the administration of Weimar Military Government Detachment 71 each officer was charged with so many duties that they were unable to carry them out properly (R. 41). It was the policy of the Military Government officials to take charge of German property when it was necessary for safekeeping (R. 62).

The reputation of Vogler for truth and veracity was declared to be bad by Mrs. Ruth Kuehne, and by Lieutenant Colonel Frank Watson, both with the Military Government organization. Neither witness would believe him under oath (R. 44-45, 48). The stipulated testimony of Bruno Treybe, Chief of the Criminal Office of Weimar, to the same effect, was received in evidence (R. 48; Def. Ex. 3).

Testimony that accused's character was good and that his efficiency as an officer was excellent, was given by Lieutenant Colonel Frank Watson, Major Gerald C. Sola, Lieutenant Colonel William H. Riheldaffer, Lieutenant Colonel Howard P. Morley and Lieutenant Colonel Fenner H. Whitley (R. 48-54). Similar testimony was received by stipulation from Brigadier General T. F. Wessels, Deputy Theater Provost Marshal; Colonel Azel F. Hatch, superior officer of accused from 24 April to 6 June 1945; Mr. Guy E. Snavelly, Executive Director, Association of American College; Mr. Edward Halloway, Attorney, New York City; Mr. George H. Denny, Chancellor, University of Alabama; General Amos Fries, General Merritte Ireland, General Bolivar Lloyd, General Frank Watson and Admiral Harry Hamlet (all

retired) and General Harvey Kutz, Ordnance (R. 55-56; Def. Exs. 4-7, 9-10).

It was stipulated that accused's WD AGO Form 66-1 showed that between 15 August 1942 and 18 May 1943 his efficiency ratings (3) were "excellent" and between 19 May 1943 and 19 December 1945 his ratings (8) were "superior." He had the following awards: four Combat Stars, Bronze Star Medal, and Military Cross, 1st Class, of Belgium (R. 56; Def. Ex: 8).

5. The Specification of Charge I, as amended by the court's findings, alleges that accused, at Weimar, Germany, between 9 May 1945 and 15 June 1945, wrongfully appropriated to his own use 30,000 Reichsmarks, valued at \$3,000, property of the United States taken from the enemy, in violation of Article of War 79. The Specification of Charge III, as amended, alleges the same offense except that the Reichsmarks are alleged to be the property of the Weimar Post Office and seized by Provisional Military Government Detachment No. 71. This Specification is laid under Article of War 95.

The evidence shows that accused, the commanding officer of a Military Government Detachment, personally announced the confiscation of the funds held in the post office; that a few days later the money in the form of 196,307 Reichsmarks was taken by a subordinate; that no receipt was given for it; that the postal authorities were informed, at accused's direction, that it had been turned over to "higher headquarters" although in fact not even a report of the seizure had been made to superior authority; and that, on demand, 100,000 Reichsmarks were returned to the post office. It further shows that the money came into accused's custody; that he gave 20,000 Reichsmarks to his agent Vogler to convert it into allied marks; that he spent about 20,000 Reichsmarks on jewelry; that after his detachment was relieved from duty he entrusted to an officer of his detachment for safekeeping a portion of the fund; and that, during the course of an investigation by the Inspector General, accused, on demand of his superior officer, reclaimed the sum he had so entrusted and surrendered it. At the same time he gave up certain items of jewelry. The fund so surrendered amounted to 58,308 Reichsmarks.

We think that the evidence sustains the court's findings that accused misappropriated 30,000 Reichsmarks of the fund seized from the post office. It seems clear from the record that after he had returned 100,000 Reichsmarks accused made up his mind to appropriate the remainder. He actually tried to convert 20,000 Reichsmarks into allied marks not through the United States Army Finance Department which one could expect him to use if he had nothing to conceal, but through civilian sources. His extensive purchases of jewelry plus the fact that he surrendered some items of jewelry when called upon to account for the fund forms the basis for an inference that some of it was used to buy the jewelry. When his

detachment was relieved he did not turn over the fund to his successor but gave it to a junior officer of his command for safekeeping. At no time was a receipt given to the postal authorities and they were misinformed as to what had been done with the money. Nor was any report ever made to superior authority that it had been seized. It is thus clearly shown, in our opinion, that accused intended to convert the entire fund remaining in his hands after he returned the 100,000 Reichsmarks. Although accused was found guilty of converting only 30,000 Reichsmarks, a figure apparently based on a rough calculation of the money that was not actually recovered, the error is in his favor and is not a ground for complaint on his part.

There is a question as to the ownership of the fund presented by what seems to be the conflicting allegations of the Specification of Charge I and the Specification of Charge III. In the former the money is alleged to be "public property of the United States taken from the enemy" while in the latter it is alleged to be "property of the Weimar German Post Office, seized by Provisional Military Government Detachment No. 71."

In our opinion the money seized was property of the United States taken from the enemy. Article of War 79 declares that "All public property taken from the enemy is the property of the United States* * *." SPJGW 1945/8200, par. 327 FM 27-10. There is a suggestion in the record that some of the money might have belonged to German citizens who had deposited it with the post office in some sort of savings account. Apparently, however, this money could not be segregated and there is no positive indication that the funds were not in their entirety public property. The Hague Regulations provide that if there is any doubt as to whether property is public or private it should be treated as public property until ownership is definitely settled. Par. 322 FM 27-10; SPJGW 1945/6216.

In our opinion, however, the conclusion reached does not require the disapproval of the Specification of Charge III. It has been held that in a charge of conversion under Article of War 96 it is not necessary to allege ownership. CM 246616, Holdstock; 30 BR 121. A similar principle applies in the case where the conversion is charged as a violation of Article of War 95. To be sure, an erroneous allegation of ownership may be more misleading than no allegation, but in this case accused was fully informed of the offense charged and we do not believe he could have been misled by the allegation that the fund was the property of the post office. The conversion of part of the fund under the circumstances revealed by this record is a violation of Article of War 95. CM 256678, MacDonald, 36 BR 325; CM 275518, Linville, 48 BR 55.

There was evidence that the Reichsmark was exchangeable on a parity with the allied mark. Moreover the court was entitled to take

judicial notice of the official rates of exchange (CM ETO 12453 Marshall) viz: one Reichsmark or one allied mark equals \$.10 (par. 4, Sec. VI, Finance Circular Letter, Hq. ETOUSA, 22 Jan 45).

With the exception noted the record is legally sufficient to sustain the findings of guilty of these Specifications.

6. The Specification of Charge II. It is here alleged in substance that accused in violation of the 80th Article of War unlawfully disposed of a bond of the German Reich which was property of the United States by virtue of having been captured. The evidence, including accused's extra-judicial admissions, shows that, acting through Vogler, he cashed a 3½% German Treasury bond which he had found in an abandoned house and for which he received 15,000 Reichsmarks. Accused's contention was the bond was his own property.

Article of War 80, however, specifically forbids the sale or other disposition for personal profit of abandoned as well as captured property by persons subject to military law and it has been held that private property may be "abandoned" property under the meaning of that Article. SPJGW 1945/8200; SPJGA 1946/2390. When accused found the bond it became property of the United States and should have been surrendered by him without delay. SPJGW 1945/8200.

7. Specifications 1 and 2 of Charge IV. Specification 1 in substance alleges that on or about 20 May 1945 accused wrongfully engaged in currency transactions whereby he received allied marks for Reichsmarks while Specification 2 alleges that on or about 13 June 1945 he wrongfully advised Vogler to leave Weimar knowing that a warrant had been issued for his arrest.

With respect to the first Specification the evidence shows that accused gave Vogler 20,000 Reichsmarks and instructed him to exchange them for allied marks. It further shows that Vogler succeeded in exchanging 8000 or 9000 of the marks. Administrative Memorandum No. 35, SHAEF, 25 October 1944 prohibited allied military personnel from

"b. Participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies."

There is no direct proof that accused instructed Vogler to proceed through authorized sources or indeed what were authorized sources. However, it was common knowledge in the Theater, of which the court could take judicial notice, that United States military personnel were permitted to exchange currency only through a United States Finance Office. It can be inferred, also, that accused knew Vogler was going to employ unauthorized sources. Accused was engaged in converting to his own use a substantial sum of money. There was necessity, therefore, that he conceal as far as possible that he was in possession of this money. An

attempt to exchange such a large sum through authorized sources might have led to an embarrassing inquiry. A German citizen was the sort of person who could most successfully employ unauthorized channels and least successfully authorized sources. Finally, accused permitted Vogler to retain this large sum of money for approximately two weeks - an unnecessarily long time if a proper exchange was contemplated - and apparently accepted with equanimity that Vogler could only exchange about 9000 Reichsmarks - the sort of thing one might expect if an illegal currency transaction was made. In our opinion the record of trial is legally sufficient to sustain the findings of guilty of the Specification.

With respect to Specification 2 the evidence shows that accused advised Vogler to "get away from here" because the Military Government had issued a warrant for his arrest. Such conduct is clearly a violation of Article of War 96.

8. In a brief and argument submitted to the Board the credibility of Vogler was assailed on the grounds, as shown by the record, that he was a German, that he had been convicted of making a false statement, and that some witnesses thought his reputation for truth and veracity in the community was bad. In addition, to some extent he was an accomplice and heed should be paid to the admonition of the Manual that,

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

In a case before us under Article of War 48, as is this, we have the power to judge of the credibility of the witnesses and weigh the evidence although the findings of the court, who saw and heard the witnesses, are entitled to considerable weight. CM 243466, Calder, 27 BR 365; CM 302846, Dayton. After a careful examination of the record we do not believe the court erred in its findings. With respect to the misappropriation of the funds seized from the post office the conviction rests to a substantial extent on the testimony of other witnesses and on accused's extra-judicial admissions. Accused admitted extra-judicially that he instructed Vogler to dispose of the Treasury Bond and to convert Reichsmarks into allied marks. Of course, Vogler alone testified that he was told by accused to leave because there was a warrant out for his arrest, but in view of accused's admission that he told Vogler that it would be best for him to leave if he were in trouble and in view of Vogler's knowledge of accused's previous illegal activities, the court was not unwarranted in believing that accused made that statement and we are not inclined to disturb their findings.

9. The substance of the unsworn statements of accused and his counsel have been set forth above. It is to be noted that at no time

was a request for a continuance addressed to the court. Manifestly, unless there is something in the case to indicate that there might otherwise be a miscarriage of justice, neither the Board nor the court can take cognizance of complaints such as these unless they are accompanied by a motion in some form or other for a continuance. If it becomes a rule of law that on a mere statement by accused and his counsel to the effect that his right has been prejudiced by the speed of the trial we are required to disapprove the findings then it is no exaggeration to say that few cases would be without such a statement and few could be sustained. We find nothing in the record to show that accused's substantial rights were prejudiced either by the conduct of the preliminary investigation or the trial. Accused was a major at the time of the trial approximately 51 years of age. The character witnesses he was able to furnish demonstrate that he was not without experience in the world. It is difficult to believe that knowing, as he must have known, that a conviction would probably result in a dishonorable end to his career and imprisonment he would content himself with a mere statement to the effect that he needed more time to prepare his defense and not take vigorous steps to see that the court granted him the time he needed.

10. War Department records show that accused is approximately 52 years and 5 months of age. He is a graduate of Washington & Lee University from which he received A.B. and A.M. degrees and of Columbia University where he received A.M. and Ph.D. degrees. He has been a professor, a president of a university, a writer and lecturer, and a personnel consultant. He is married and has two children. He was appointed a second lieutenant, National Army, on 1 June 1918. On 24 June 1924 he was appointed a captain in the Staff Specialists Officers' Reserve Corps and on 3 July 1928 transferred to the Adjutant General's Department. He was reappointed a captain in that branch on 23 June 1929 and at his request reappointed a captain in the Specialist Reserve on 3 July 1929 and promoted to major, 22 August 1929. On 22 August 1934 and 1939 he was reappointed a major in the Specialist Reserve. He was ordered to active duty 15 August 1942 and promoted to lieutenant colonel, Army of the United States, on 28 December 1945. He is entitled to wear the European Theater Ribbon and the Bronze Star. In addition, he was awarded the Military Cross, First Class by the Belgian Government.

11. The court was legally constituted and had jurisdiction of the person and the offenses. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge III as involves a finding that accused did, at the time and place alleged, wrongfully and unlawfully convert to his own use 30,000 German Reichsmarks, value as alleged, which were seized by Provisional Military Government Detachment No. 71 about 9 May 1945, and legally sufficient to support all other 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 dismissal, total forfeitures, and confinement at hard labor for life are authorized upon conviction of a violation of Articles of War 79, 80, and 96.

Erwin Schindler, Judge Advocate.

M. Hostenstein, Judge Advocate.

G. G. G. G., Judge Advocate.

(166)

JAGN-CM 312414

1st Ind

WD, JAGO, Washington, D. C.

SEP 1 1 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel William M. Brown (O-201349), Provisional Military Government Detachment No. 71.
2. Upon trial by general court-martial this officer was found guilty of wrongfully appropriating to his own use and benefit public property of the United States taken from the enemy, Reichsmarks of the value of about \$3,000, in violation of Article of War 79 (Chg. I, Spec.); unlawfully disposing of captured property of the United States, German bonds, in violation of Article of War 80 (Chg. II, Spec.); wrongfully and unlawfully converting to his own use and benefit property of the Weimar German Post Office, seized by the Provisional Military Government, Reichsmarks of the value of about \$3,000, in violation of Article of War 95 (Chg. III, Spec.); wrongfully engaging in currency transactions and wrongfully advising a German civilian to leave in order to avoid arrest, both in violation of Article of War 96 (Chg. IV, Specs. 1, 2). No evidence was introduced of any previous conviction. He was sentenced to dismissal, total forfeitures, and confinement 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, recommending that the period of confinement imposed be remitted.
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of Charge III as involves a finding that accused did, at the time and place alleged, wrongfully and unlawfully convert to his own use 30,000 Reichsmarks, value as alleged, which had been seized by the Provisional Military Government Detachment No. 71 (this element of legal insufficiency affects only the ownership of the money), legally sufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.
4. The evidence, briefly summarized, shows that the Provisional Military Government Detachment No. 71, commanded by accused, took over its operational duties in Weimar, Germany, on 24 April 1945, and remained there until 6 or 9 June 1945. Accused called at the Weimar post office on 5 May 1945 and announced that all money and stamps in the treasury were confiscated. About 9 May 1945 the Detachment fiscal officer removed about 196,307 Reichsmarks from the post office and placed them in

the detachment safe. No receipt was ever given the post office for the confiscated funds and no report of the seizure was ever made by the detachment commander to higher headquarters.

On 1 June 1945 the postmaster made a request for the return of this money. Kurt Vogler, a German employee of the detachment, testified that accused instructed him to inform the postmaster that the money had been turned over to higher headquarters. A few days later, however, accused had Vogler return 100,000 Reichsmarks to the post office. This was the only part of the money ever returned. Just before the detachment was relieved from duty - early in June - accused turned over 20,000 Reichsmarks from the post office funds to Vogler and instructed him to exchange them for allied military marks. Accused stated, in a pre-trial statement, that he ordered the exchange and said the reason was that "we always felt that American currency was of more value than German currency." Vogler was able to exchange about 9,000 Reichsmarks at a Reichsbank and a winery and gave accused the proceeds. The rate of exchange was one German Reichsmarks for one allied mark. Administrative Memorandum No. 35, Supreme Headquarters Allied Expeditionary Forces, 25 October 1944, prohibits military personnel from "participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies."

At various times during May and June 1945 accused purchased rings and other items of jewelry from a Weimar jeweler. Vogler, acting in behalf of accused, made payments totaling 20,000 Reichsmarks on these purchases.

On the night of 13 June 1945, Vogler went to accused's quarters and returned the major part of the 20,000 Reichsmarks intrusted to him by accused, which he had been unable to exchange for allied marks. Accused said to him "get away from here, somebody from the new Military Government is looking for you, they have a warrant out for your arrest." In his pre-trial statement accused denied any knowledge of the nature of Vogler's trouble or knowledge that a warrant had been issued for Vogler's arrest although he admitted telling him that "if you are in trouble, the best thing would be to get away."

Shortly after Detachment No. 71 was relieved from duty, accused gave Captain Schmoker, an officer of his detachment, a box containing money from the post office funds. Accused instructed Captain Schmoker to hold it for "safekeeping." The funds were returned to accused about 28 June 1945.

About 20 May accused gave Vogler a $3\frac{1}{2}\%$ German treasury bond and requested that he convert it into marks. Vogler cashed the bond at the Reichsbank for 15,150 Reichsmarks and gave accused the money. Accused returned 150 marks to Vogler for his services. When questioned accused stated that he found the bond in an abandoned house.

Both the accused and his counsel made unsworn statements to the effect that sufficient time had not been granted them in which to prepare their defense and that the pre-trial investigating officer was not qualified to act as such.

Stipulated testimony introduced by the defense indicated that 3,000 Reichsmarks were stolen by two enlisted men from the post office funds while being transferred from the post office to the detachment; that on 28 June 1945, upon request by accused's superior officer, accused turned over to him the money he had placed in Captain Schmoker's custody which amounted to 58,308 Reichsmarks; that accused also delivered at this time, a quantity of jewelry which he (accused) had previously purchased; and that the reputation of Vogler for truth and veracity was declared to be bad.

Testimony that accused's character was good and that his efficiency as an officer was excellent, was given by Lieutenant Colonel Frank Watson, Major Gerald C. Sola, Lieutenant Colonel William H. Ribeldaffer, Lieutenant Colonel Howard P. Morley and Lieutenant Colonel Fenner H. Whitley. Similar testimony was received by stipulation from Brigadier General T. F. Wessels, Deputy Theater Provost Marshal; Colonel Azel F. Hatch, superior officer of accused from 24 April to 6 June 1945; Mr. Guy E. Snavely, Executive Director, Association of American Colleges; Mr. Edward Halloway, Attorney, New York City; Mr. George H. Denny, Chancellor, University of Alabama; General Amos Fries, General Merritte Ireland, General Bolivar Lloyd, General Frank Watson and Admiral Harry Hamlet (all retired) and General Harvey Kutz, Ordnance. A brief and argument submitted by Mr. Joseph Moss has been carefully considered by the Board.

It was stipulated that accused's WD AGO Form 66-1 showed that between 15 August 1942 and 18 May 1943 his efficiency ratings (3) were "excellent" and between 19 May 1943 and 19 December 1945 his ratings (8) were "superior." He had the following awards: four Combat Stars, Bronze Star Medal, and Military Cross, 1st Class, of Belgium. He holds A.M. and Ph.D. degrees from Columbia University.

5. I recommend that the sentence be confirmed and ordered executed and that a United States Disciplinary Barracks be designated as the place of confinement.

6. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

SPJGN-CM 312416

6 June 1946

UNITED STATES)

v.)

Private SAM D. LAWRENCE)
(34955622), Headquarters)
and Service Company, 1331st)
Engineer General Service)
Regiment.)

UNITED STATES ARMY
SERVICE COMMAND 24

Trial by G.C.M., convened at
APO 901, 27 February 1946. Dis-
honorably discharge and con-
finement for twenty (20) years.
Penitentiary, McNeil Island,
Washington.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, 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 Lawrence was tried with Private First Class J. B. Pittmon upon the following Charges and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private First Class J. B. Pittmon, Company A, 1331st Engineer General Service Regiment, APO 901, and Private Sam D. Lawrence, Headquarters and Service Company, 1331st Engineer General Service Regiment, APO 901, did, at APO 901, on or about 18 January 1946, in the night time feloniously and burglariously break and enter the dwelling house of Chum Soon Ye, with intent to commit a felony, viz: larceny, therein.

Specification 2: In that Private First Class J. B. Pittmon, Company A, 1331st Engineer General Service Regiment, APO 901, and Private Sam D. Lawrence, Headquarters and Service Company, 1331st Engineer General Service Regiment, APO 901, did, at APO 901, on or about 18 January 1946, by force and violence and by putting him in fear, feloniously take steal and carry away from

the person of Yim Keong Chai 61, yen, lawful money of Korea, the property of Yim Keong Chai, value about \$4.00.

Specification 3: In that Private First Class J. B. Pittmon, Company A, 1331st Engineer General Service Regiment, APO 901, and Private Sam D. Lawrence, Headquarters and Service Company, 1331st Engineer General Service Regiment, APO 901, did, at APO 901, on or about 18 January 1946, by force and violence and by putting her in fear, feloniously take steal and carry away from the person of Chun Soon Ye, 925 yen, lawful money of Korea, the property of Chun Soon Ye, value about \$61.00.

Specification 4: In that Private First Class J. B. Pittmon, Company A, 1331st Engineer General Service Regiment, APO 901, and Private Sam D. Lawrence, Headquarters and Service Company, 1331st Engineer General Service Regiment, APO 901, did, at APO 901, on or about 18 January 1946, with intent to commit a felony, viz, murder, commit an assault upon Kim Chong Kwan by willfully and feloniously shooting the said Kim Chong Kwan in the arm with a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and all Specifications. Evidence was introduced of one prior conviction by special court-martial for using insulting language to a noncommissioned officer and failing to obey the lawful order of a noncommissioned officer, in violation of Articles of War 65 and 96. 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 thirty years. The reviewing authority approved the sentence, remitted ten years of the confinement imposed, 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 $\frac{1}{2}$. (The record has been previously examined in the Office of The Judge Advocate General as to Pittmon).

3. The evidence is legally sufficient to support the findings of guilty. The only question requiring consideration here is whether or not the record of trial is legally sufficient to support the sentence.

4. The court in closed session " * * * and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring * * *," sentenced the accused to dishonorable discharge, total forfeitures, and confinement at hard labor for thirty years. Article of War 43 provides that no person shall be " * * * sentenced to life imprisonment nor to confinement for more than ten years except by concurrence of three-fourths of all the members present at the time the vote is taken." Thus, it is clear that the court in the present case, by imposing a sentence of thirty years, exceeded its power under the above Article. The " * * * excessive sentence is not void ab initio because it is a divisible sentence," however, and could have been reduced to a legal sentence by the reviewing authority. MCM (1928), par. 87; CM 185899 (1929), Dig. Op. JAG 1912-1930, p. 632, sec. 1280; SPJ&J 1943/10205, 7 July 1943.

5. In a similar case, forwarded for action under Article of War 50¹, the Board of Review, in holding the record legally sufficient to support a sentence involving dishonorable discharge, total forfeitures and confinement at hard labor for ten years only, stated:

"When confinement in excess of ten years is imposed under a sentence in which only two-thirds of the members of the court concur, the error may be corrected by reducing the confinement to ten years or less (CM 185899, Polk and Jenkins)." CM 238825, Jones, 24 BR 367-371 (1943).

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

Wilmot T. Baughn, Judge Advocate

Robert J. O'Connor, Judge Advocate

_____, Judge Advocate

(172)

SPJGN-CM 312416

1st Ind.

15 June 1946

Hq, ASF, JAGO, Washington 25, D. C.

TO: Commanding General, United States Army Service Command 24, APO 901,
c/o Postmaster, San Francisco, California.

1. In the case of Private Sam D. Lawrence (34955622), Headquarters and Service Company, 1331st Engineer General Service Regiment, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years be approved. Thereupon you will have authority to order the execution of the sentence.

2. Designation of the United States Penitentiary, McNeil Island, Washington, as the place of confinement continues to be proper notwithstanding approval of a sentence of only ten years. The provisions of Section II, War Department Circular 25, 1945, requiring designation of a federal correctional institution or reformatory as the place of confinement in such a case are not considered applicable in view of a previous trial. As a result of the aforementioned trial, which was by a general court-martial convened by your headquarters on 25 February 1946, the accused is now under an approved sentence to life imprisonment in the same penitentiary for the offense of murder, in violation of Article of War 92 (CM 312523).

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

(CM 312416).

Thomas H. Green

THOMAS H. GREEN

Major General

The Judge Advocate General

WAR DEPARTMENT
 Army Service Forces
 In the Office of The Judge Advocate General
 Washington 25, D. C.

SPJGQ - CM 312433

MAY 24 1948

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

v.)

General Prisoner RAYMOND R.)
 BISCHOFF (32463243), 4th Train-)
 ing Company, Disciplinary Train-)
 ing Center, Chanor Base Section,)
 United States Forces, European)
 Theater.)

WESTERN BASE SECTION, UNITED)
 STATES FORCES, EUROPEAN THEATER)
 Trial by G.C.M., convened at)
 Paris, France, 15, 16 and 17)
 January 1946. Dishonorable)
 discharge and confinement for)
 life. Penitentiary.)

REVIEW by the BOARD OF REVIEW
 OLIVER, CARROLL and DAVIS, Judge Advocates

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

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

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

Specification: In that General Prisoner Raymond R. Bischoff, 4th Training Company, Disciplinary Training Center, Chanor Base Section, United States Forces, European Theater, did, at Paris, France, on or about 10 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Sergeant Bennie Back, a human being, by shooting him with a pistol.

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

Specification 1: In that General Prisoner Raymond R. Bischoff, 4th Training Company, Disciplinary Training Center, Chanor Base Section, United States Forces, European Theater, did, at Paris, France, on or about 9 November 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence

of Berthe Legrand, eight thousand (8,000) francs, French currency, the property of Monsieur Hermentier, and from the person of Emile Ringot six hundred (600) francs, French currency, the property of Emile Ringot, of a total value of about one hundred and seventy-two dollars (\$172.00).

Specification 2: In that General Prisoner Raymond R. Bischoff, 4th Training Company, Disciplinary Training Center, Chanor Base Section, United States Forces, European Theater, did, at Paris, France, on or about 10 November 1945, with intent to do him bodily harm, commit an assault upon Technician Fifth Grade Mobley M. Nobles, by shooting him in the hand with a dangerous weapon, to wit, a pistol.

Specification 3: In that General Prisoner Raymond R. Bischoff, 4th Training Company, Disciplinary Training Center, Chanor Base Section, United States Forces, European Theater, did, at Paris, France, on or about 10 November 1945, with intent to do him bodily harm, commit an assault upon Private First Class Marvin E. Trapp, by shooting him in the leg with a dangerous weapon, to wit, a pistol.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and the Specification thereunder, and of Charge II and Specifications 2 and 3 thereunder. He was found guilty of Specification 1 of Charge II, except as to the amounts alleged, the court substituting "between seven thousand (7000) and eight thousand (8000)", "between five hundred (500) and six hundred (600)", and "at least one hundred and fifty dollars (\$150.00)" for the amounts appearing in the Specification. Evidence of two previous convictions was introduced, one by general court-martial for larceny of chocolate bars, property of the United States, the other by general court-martial for absence without leave from 19 February 1945 to 7 March 1945 and for misappropriating a motor vehicle, property of the United States. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved only so much of the findings of guilty of Specifications 2 and 3 of Charge II as finds accused guilty of committing assaults with intent to do bodily harm upon the persons alleged by shooting at them with a dangerous weapon, to wit, a pistol, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and pursuant to Article of War 50½ withheld the order directing execution of the sentence.

3.a. Charge II, Specification 1 (Robbery). Evidence adduced by the prosecution proved that accused entered a cafe in Paris operated by Madame Legrand about 1730 hours 9 November 1945. When accused was alone with Madame Legrand he pulled out a pistol and told her in French to give him money. He opened drawers and removed between 7000 and 8000 francs. M. Ringot then came into the cafe. Accused put his pistol into Ringot's stomach, demanded money, opened Ringot's coat, extracted his wallet, and removed between 500 and 600 francs.

Shortly thereafter accused left the cafe (R 30, 31, 36, 37). In a voluntary extra-judicial statement accused admitted displaying a pistol in the cafe and taking money from a woman and a man (R 77; Pros. Ex. A). It was stipulated that the money taken from Madame Legrand was the property of Monsieur Hermentier (R 55).

b. Charge I and Specification (Murder); Charge II, Specifications 2 and 3 (Assaults). At 2315 hours 9 November 1945 military policemen, Sergeant Back, Technician Fifth Grade Nobles and Private First Class Trapp, took custody of accused at a French police station in Paris and drove him to the office of the Criminal Investigation Division. After accused had been questioned, the three military policemen started to drive him to an ordnance organization to check his status. The four got into a jeep. Sergeant Back was in the driver's seat, Trapp seated at his right, Nobles was in the back seat on the left, and accused was on his right. All three of the military policemen were armed with U. S. Army calibre .45 pistols which were carried in holsters on their right hips (R 42, 43, 56, 57). Nobles turned to his left to fix the radio. Accused was heard to tell Sergeant Back to stop the jeep and, when the witnesses looked at him, he had a .45 calibre pistol in his hand (R 43, 56, 62). The jeep was stopped and accused got out on the right side. Nobles thought he heard Sergeant Back undo his holster and work the slide. Three or four shots were heard and both Nobles and Trapp saw one flash from accused's pistol. Neither knew who fired the first shot. Trapp's pistol was not removed from the holster at any time from the beginning to the end of the incident (R 59). The accused had Nobles' pistol (R 45, 49). Nobles was struck in the right finger of his right hand, and a bullet went through Trapp's right leg (R 44, 45, 58, 59, 64). Sergeant Back also was hit (R 45). An autopsy was performed upon the body of Sergeant Back on 10 November 1945. His death was due to a wound caused by a fast moving projectile. The wound ran from just above the collar bone on the right side to the base of the neck on the left side. There was no indication which was the point of entrance and which was the point of exit (R 68, 69, 70, 71). In a voluntary extra-judicial statement the accused related the following (R 77, Pros. Ex. A):

"When the MPs and I got into the jeep outside CID headquarters, I got into the back seat and sat on the right of one of the MPs. Another MP drove and another sat in the front seat. The driver was a sergeant. As we were driving in the vicinity of the Opera, the MP in the back seat with me turned to his left and began adjusting the radio. This MP was carrying his pistol, a U. S. automatic, Cal. .45, in a holster on his right side. As the MP was adjusting the radio, I unfastened the flap on the holster and removed the weapon. I threw the safety off but I do not remember whether or not I worked the slide. The sergeant who was driving looked around and said, 'What's going on here?' I said, 'I don't want no trouble, sarge. All I want to do is get out of here and go.' At the time I said this I had my pistol pointed toward the front of the jeep but not

at either of the MPs. By this time I was out of the jeep and standing beside it. I had jumped out of the jeep as I was talking to the sergeant who had slowed the jeep down and stopped it when he saw that I had a weapon. As I stood beside the jeep I said again, 'I don't want no trouble. I'm going to leave you now. I don't want no trouble.' During this time the sergeant was saying, 'Okay, okay, okay, kid, take it easy, sure you can go.' I started to back away, saying 'Watch your guns now.' I had taken only about one step when a shot was fired and in a few seconds I felt something warm in the area of my abdomen and I knew that I had been hit. I had taken a few steps back after the shot was fired and before I realized that I was hit. As soon as I knew that I was wounded, I returned the fire. I did not know at that time how many shots I had fired. I ran off down the street for a distance equivalent to about six city blocks and came to a Metro station. I stopped there and put my hand on a rail. At that time, I did not feel particularly weak but my right leg was stiff. Two French civilians, a man and a woman, saw that I was hurt and came to my assistance. They aided me into the Metro station and onto the Metro and took me to a French hospital. On the Metro, the pistol fell out of my pocket. The Frenchman picked it up and I noticed that the slide was to the rear."

4. Evidence introduced by the defense may be summarized as follows: It was stipulated that a medical officer would testify that "during a routine examination upon Benny B. Back, ASN 34582856, who was brought to the 241st General Hospital, being dead upon admission, at approximately 0015 hours, 10 November 1945, an expended bullet was found lying next to his skin, which was apparently a bullet which struck Sergeant Back (R 79, Defense Ex. 1.) This bullet was traced to the hands of a ballistics expert (R 80; Def. Ex. 2; R 84, 85, 86, 89, 91, 92). Sergeant Back was issued pistol number 1582337, Nobles was issued pistol number 1579921, Trapp was issued pistol number 1582349 (R 81, 82). At 0200 hours 10 November 1945 a .45 calibre pistol was found in the right front seat of Sergeant Back's jeep. A shell was in the chamber, it was not on safety, and four or five rounds remained in the clip. It was the pistol issued to Sergeant Back (R 84; Def. Ex. 3). A ballistics expert testified that in his opinion the bullet referred to above was probably fired from pistol number 1582337 (Sergeant Back's) and was most probably not fired from pistol number 1579921 (Nobles' pistol which accused took) (R 89, 90, 94); but that it is possible that the bullet was fired from gun number 1579921; that the dissimilarities between the markings on the questioned bullet and the test bullet fired from pistol number 1579921 are not sufficiently outstanding in their characteristics to constitute conclusive evidence that the questioned bullet could not have been fired from that gun; that "there were no dissimilarities of such importance to be considered" between the questioned bullet and the test bullet fired from pistol number 1582337; that "it is entirely possible, since in this case, which

is unusual, there are no outstanding irregularities present there, which I could use to form a definite opinion", that a bullet fired from a large number of "regular forty-fives" might bear the same marks as those on the questioned bullet (R 92, 93, 94); that he cannot say beyond a reasonable doubt from which of the two pistols the questioned bullet was fired (R 95, 96); and that he was not told which pistol was in the possession of Sergeant Back until after the test report had been written (R 97).

Accused was admitted to a hospital at 0330 hours 10 November 1945 and operated on for a gunshot wound (R 97; Def. Ex. 5).

After his rights as a witness were duly explained (R 98, 99), accused elected to make an unsworn statement as to his civilian and military background and as to the events leading up to his apprehension. He admitted taking money illegally from people in Madame Legrand's cafe (R 107). He was then sworn (R 109) and related substantially the same story with respect to the shooting incident as is contained in his extra-judicial statement (R 110, 111, 112). He testified that when he left the jeep and was backing away he heard the report of a weapon, felt a sharp pain, put his hand to his stomach, felt a warm substance, and "flew all to pieces". He could not see straight, but remembers firing and running (R 111, 112). He did not fire at any particular person (R 112) and would not have used his weapon if he had not been wounded by the shot fired by Sergeant Back (R 113). He worked the safety of the pistol before landing on the pavement but cannot recollect if the weapon was ever on safety (R 115, 116).

The defense introduced a number of letters attesting the good character of the accused in civilian life (R 116; Def. Exs. 6 through 12).

5. In rebuttal the prosecution introduced expert testimony to the effect that chemical tests on the questioned bullet, made about 16 November 1945, showed no blood present (R 118, 119); this expert witness testified that whether any blood originally upon the questioned bullet would have been removed by subsequent handling would depend on the amount and location of blood upon the bullet and the manner of handling, upon how much blood was originally upon the bullet and where it "had been in order to receive the blood"; that the normal procedure in that office with reference to physical evidence, such as a bullet, which is to be subjected to chemical test, is to handle it with tweezers, but the witness didn't know whether such procedure was actually followed in this case nor what happened while the bullet was in the possession of others (R 119-123); that if a bullet passes through the chest or vital organs of the body, such as the neck or jugular vein, there definitely would be blood on it, which would not be wiped off as it came through "unless it went through material like plaster"; and that if it came through quite a bit of flesh on the neck "there would be enough blood to make the benzidine test" (R 123), which test is the most sensitive that any technicians know of for testing blood (R 120), and which test was used on this bullet (R 118). When accused was admitted to the hospital

early on 10 November 1945, a big pistol, forty-five millimeters, was found in his pocket. The clip was empty (R 127).

6.a. Charge I and Specification (Murder). Murder is the unlawful killing of a human being with malice aforethought, without legal justification and excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par. 148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death, and an intent to kill may be inferred from an act of accused which manifests a reckless disregard for human life (CM ETO 12850, Philpot).

The evidence in this case establishes that accused, while being transported by three military policemen, took the pistol of one, commanded that the vehicle be stopped, dismounted, and then fired at the occupants when he was shot by the driver. In the exchange of shots the driver was killed and the other two military policemen were wounded. It seems probable that Sergeant Back, the driver, fired the first shot, wounding the accused.

Despite the strenuous efforts of the defense to prove that the fatal bullet came from the weapon of the deceased, the court found to the contrary, such a finding being implicit in the finding of guilty. There being substantial evidence to support this finding of the court, it will not be disturbed by the Board of Review (CM ETO 8837, Wilson; CM ETO 11621, Trujillo et al).

The defense also insisted that inasmuch as accused had been wounded by a bullet from deceased's weapon before he returned the fire, the homicide occurred in the heat of passion based on adequate provocation and was manslaughter, not murder. This contention overlooks the circumstances. Accused had committed a felony, had been arrested by the French police and turned over to the custody of the American military police. We need not decide with technical nicety accused's exact status at the time of the homicide. He was in the custody of the military police and it was their duty to prevent his escape. A military guard is justified in shooting to prevent an escape if no other possible means are adequate (MCM, 1928, par. 148a, p. 162; United States v. Clark (C.C., E.D. Mich., 1887), 31 Fed. 710. See 1 Wharton's Criminal Law (12th Ed., 1932), sec. 534). Accused had at gun point forced the driver, who had lawful custody of him, to stop the vehicle; had gotten out of the vehicle and, with the pistol still drawn upon his custodians, was beginning the consummation of his escape by backing away. The only means of preventing his escape available to Sergeant Back was to shoot him. This he was entitled to do. An analogous situation was presented in Turner v. United States (C.C.A. 4th, 1921), 272 Fed. 112. There was evidence in that case that the defendant attempted to rob deceased at the point of a pistol. Deceased shot and wounded the defendant who shot back and killed the deceased. A conviction of murder in the first degree was affirmed. The court said (p. 113):

"If the defendant brought on this shooting by attempting to rob the deceased at the point of a pistol, he cannot avail himself of the plea of self-defense."

Similar reasoning leads us to the opinion that in this case, having brought about a situation in which it was the right and the duty of his antagonist to shoot at him, the accused cannot be heard to say that he fired in self-defense not to claim that his act was committed in the heat of a sudden passion caused by adequate provocation.

The court's finding that the shooting was attended by malice aforethought is clearly warranted.

b. Charge II, Specification 1 (Robbery). The testimony of the witnesses for the prosecution, the confession of the accused and the admission in his unsworn testimony amply sustain the findings of guilty.

c. Charge II, Specifications 2 and 3 (Assaults). The evidence establishes that accused fired a pistol in the direction of the vehicle in which the victims were sitting. Both were wounded, although it is not clearly shown that the wounds were caused by bullets from the weapon in the hands of the accused. However, it is clear that accused shot into the vehicle, and that is an assault on each individual therein (1 Wharton's Criminal Law (12th Ed., 1932), sec. 804). Intent to do bodily harm may be inferred from the use of a deadly weapon. The findings, as approved by the reviewing authority, are sustained by substantial evidence.

7. Evidence of two previous convictions was improperly received and considered by the court (MCM, 1928, par. 79c, p. 66). Inasmuch as the sentence imposed was mandatory, no substantial rights of the accused were prejudiced thereby.

8. The charge sheet shows accused is approximately 25 years of age, and was inducted at Fort Dix, New Jersey, in August 1942. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence. Confinement

in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18, paragraph 163, of the United States Criminal Code.

Arthur H. O'Leary, Judge Advocate
Donald G. Carroll, Judge Advocate
Walter W. Davis, Judge Advocate

WAR DEPARTMENT
 Army Service Forces
 In the Office of The Judge Advocate General
 Washington 25, D. C.

SPJGQ - CM 312458

MAY 29 1946

UNITED STATES)

SECOND AIR FORCE

v.)

First Lieutenant VERNON O.)
 PICKLE (O-805107), Air Corps,)
 Squadron E, 237th Army Air)
 Forces Base Unit (CCTS (VH)).)

Trial by G.C.M., convened at
 Clovis Army Air Field, Clovis,
 New Mexico, 20 February 1946.
 Dishonorable discharge and
 confinement for two (2) years.

OPINION of the BOARD OF REVIEW
 OLIVER, CARROLL and DAVIS, 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 First Lieutenant Vernon O. Pickle, Air Corps, Squadron E, 237th Army Air Forces Base Unit (formerly Combat Crew Detachment), did, without proper leave, absent himself from his organization and station at Kirtland Field, Albuquerque, New Mexico, from about 7 August 1945 to about 22 November 1945.

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, at such place as the reviewing authority may direct, for two years. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge and of the Charge as involves a finding of guilty of absence without leave from about 17 August 1945 to 22 November 1945, in violation of Article of War 61, approved the sentence, and forwarded the record of trial for action pursuant to Article of War 48.

3. For the prosecution. A duplicate original of the morning report of "KF 9-14 237th AAF BU ACP-VH In Tng AC Kirtland Fld, Albuquerque, New Mexico," dated 7 August 1945, was offered in evidence, an entry therein relating to accused stating "Dy to AWOL 0300". The report was signed by Captain Louis R. Martin, AC, "Comdt of Crews". The admission of this copy was objected to by the defense upon the grounds that it affirmatively appeared from the testimony of the personnel officer that he did not compare the copy with the original, that he had no personal knowledge of the facts recited in the entry; that the evidence was incompetent, irrelevant and immaterial; and that proper foundation for introduction of the copy had not been laid (R 8, 11). It does not affirmatively appear that this copy of the morning report was ever admitted in evidence by the court; the last expression by the court upon the subject was "It appears to me that the defense has good cause for objection" (R 9); and the last action by the court was when, after further argument upon the objection, the President said "Let me see it" (R 11). However, a strong and sufficient inference that it was admitted arises from the fact that the court later granted prosecution's request "to withdraw Prosecution's Exhibit No. 1, and substitute a certified copy for the record" (R 19, Pros. Ex. 1).

It was stipulated that the extract copy of the Ninth Service Command Military Police Station Detachment, Los Angeles, California, is a true authenticated copy of the morning report of that detachment. This extract copy was accepted in evidence as Prosecution's Exhibit No. 2, and showed the following entry, dated 22 November 1945, relating to accused "2130 - V. O. Pickle to conf" (R 13, 14).

It was further stipulated that the investigating officer would, if present, testify that, after warning accused of his rights under the 24th Article of War, he secured from accused a sworn written statement which was freely and voluntarily given (R 14). This statement was substantially as follows:

At approximately 0400 on 8 August 1945 accused left Kirtland Field, Albuquerque, New Mexico, driving an automobile owned by a Mrs. Woody of Roswell, New Mexico, at whose store he arrived at about 1200, after having had considerable trouble with the car which had a "cracked block" (R 15). Unable to repair the car, he started from Roswell on his way back to Albuquerque at approximately 1500, intending to hitchhike or take a bus. At the edge of Roswell he was picked up by a man driving a sedan. They rode about a half hour. The next thing accused knew, he "had a hazy recollection of walking through the desert" in daylight. He walked all day the next day in the desert, sleeping that night in the desert. He continued walking, finally reaching Roswell at about 2400 the following night. At Roswell he secured a taxicab, told the driver to take him to Roswell Army Air Field, and learned from the driver that the date was approximately the 15th or 16th of August, and that the first declaration of V-J Day had been made. Accused was extremely ragged, had cuts on his hands and shoulders, and was suffering from headaches, which he attributed to lack of food and water and to walking in the desert. None of his personal belongings were missing except about \$40 from his wallet.

The next morning he borrowed a clean uniform from an officer and, at about 1300, returned to Roswell, where he saw Mrs. Woody but did not tell her about his experience after leaving Roswell on or about 8 August, or about his lapse of memory during the period (R 16). He stayed in Roswell for three or four days, spending his time going to shows, reading, and visiting with Mrs. Woody. At about 1700 on either the 18th or 20th of August he left Roswell and went to Artesia, New Mexico. The next morning he went to Carlsbad, New Mexico, where he stayed a few hours, after which he left for a town in Texas, where he arrived the following morning and registered at a hotel under an assumed name. After a short time he went to Amarillo, Texas, where he stayed for four or five days, again registering under an assumed name. Upon leaving Amarillo he started hitchhiking, going into Colorado, staying in various towns and finally arriving in Denver, where he stayed in a small hotel under an assumed name.

From Denver he started hitchhiking and freight-train riding, and about two weeks later arrived, with about \$20 in his pocket, in Los Angeles, California, on a freight train. He then went to South Gate, a suburb of Los Angeles, and there found a dry river located at the edge of town and a crane-break [sic] about 300 to 400 yards from a railway bridge.

Accused dug out a place in the sand approximately five feet wide, six to seven feet long, and a foot and a half deep, and lived in this crane-break [sic] until 22 November 1945, when he was picked up by the civilian authorities in South Gate (R 17).

During the period he stayed there, he did not make any contacts, work, or associate with people. His only purchases at the stores were coffee and bread. The rest of the time he was securing various types of vegetables from abandoned gardens. Most of the time he spent reading discarded newspapers and magazines. When he was picked up by the civilian authorities, he was dressed in blue levis, sport shirt, and brown coat. He did not run or attempt to escape from civilian authorities after being apprehended, but did "try to convince them that he was a discharged veteran from the Army Air Forces." After being taken to the police station in South Gate, he admitted that he had been absent without leave from "KAAF", Albuquerque, New Mexico, since on or about 7 August 1945. While he was traveling across the country to Los Angeles, he was wearing a summer uniform and continued to wear insignia at all times. The civilian clothes he wore were found in salvage dumps.

Accused had no particular excuse for going absent without leave other than the fact that he did not think that the Army would believe his story regarding his experience in the desert, "and for this reason, it was a day to day thought of not returning to military control". He did not intend to desert but did intend to turn himself in to proper military control as soon as he had sufficient moral courage to do so.

After returning to Roswell on or about the 15th or 16th of August, he was well-oriented as to time and location, feels that he had full control of his

mental and physical faculties, was well aware of the fact that he was absent without leave, and continued to be aware of that fact during the entire period of his absence (R 18).

4. For the defense. After an explanation of his rights, accused elected to be sworn as a witness and testified substantially to the matters set forth in his written statement above referred to, and further testified as follows:

He is 26 years old and is married, with three children, ages one, two, and three. When he was six months old, his mother abandoned him, left his father, and he was adopted by his grandparents on his father's side. When he was five and a half years old, his mother kidnapped him from his grandparents. At the age of seven and a half years, he was kidnapped by his grandparents, with whom he lived during the remainder of his childhood (R 21). Because of these conflicts, he was apprehensive concerning his own marriage.

On 7 August 1945, on his way back to Albuquerque he hitched a ride and rode about a half hour. His next memory was of walking in the desert. He walked for a night and a day. About midnight the next night, he arrived at Roswell, his clothes badly torn up. He had several days' growth of beard and was in "pretty bad shape generally". At the air base he went to the visiting officers' quarters, signed in, cleaned up, and stayed there that night. The next day he went into town and stayed in town "possibly four or five days". He left Roswell, went to Amarillo, then to Denver, where he stayed several days, and finally to Los Angeles, where he stayed about a month and a half, until he was picked up. While there, he lived the life of a tramp.

"Several times I was on the point of turning myself in, but I had my personal problem--the fact that I didn't know where I had been or what I had done for those ten days; the fact that the war was over, that I probably would not be shipped overseas or anything of that kind--I just couldn't seem to find the courage, the initiative to turn myself in."

He had no intention of deserting, but "thought from one day to the next that the next day would be the last day and that I would turn myself in" (R 22).

While he was at the visiting officers' quarters at Roswell, he was, he believed, all right, except that he was confused over what had happened. He did not return to Albuquerque at that time; he learned that the war was over; he was very confused by what had happened and by his own problem, and wanted to be completely alone to be able to think (R 23).

At the visiting officers' quarters he registered under an assumed name. He made no report to the police in regard to money (R 25).

Something that might have had some bearing on his actions was the following: Two weeks before he had had an experience with his military superiors, who had

disbelieved the fact, when he was two hours late for a morning formation, that he had been hit and robbed in town, despite the fact that they took him to a hospital and treated him for a bump on his head and gave him "a blood alcohol which was negative". Therefore, it did not seem reasonable to him that they would believe his story about the ten days absence (R 26).

The clinical record of a general hospital, pertaining to accused, was introduced in evidence as Defense Exhibit "A" (R 20). This record set forth a detailed account of the physical and psychiatric examinations made of accused. The diagnosis was stated to be:

"Dissociative reaction, severe, manifested by a fugue like state from 7 to 17 August 1945; with unconventional behavior characterized by depression and migratory life of a tramp from 17 August to 22 November 1945, improved, minimal stress of marital conflict and fear of going overseas, moderate predisposition with marked impairment."

It was stipulated that Major George A. Goder, Medical Corps, a neuro-psychiatrist, would, if present, testify that on 10 December 1945, he made a psychiatric examination of accused and that he made a written report reflecting his findings. This report was introduced in evidence as Defense Exhibit "B" (R 29). The two concluding paragraphs of this report were as follows:

"SUMMARY: This man is the product of an unusually unstable and insecure childhood and adolescence. It is felt that he is sane and mentally competent; that he knows right from wrong and can choose right from wrong. There is no reason for the undersigned to doubt the authenticity of the amnesia as claimed by the patient since his is the type of unstable personality in whom amnesias occur when the environment becomes intolerable, and it is felt that he cannot be held responsible for his actions during the period of amnesia. However, there is no psychiatric reason for belief of responsibility for his actions following his return to Roswell about the 15th or 16th of August. Certainly this man's unfortunate background of insecurity and instability would be a mitigating circumstance in considering disciplinary action for his misbehavior.

"DIAGNOSIS: Hysterical reaction, severe, with amnesia, complete, from August 5, 1945 to September 16, 1945."

5. The evidence is ample and uncontroverted that accused was absent without leave from his organization and station from about 17 August 1945 to 22 November 1945, the period approved by the reviewing authority. The morning report (Pros. Ex. 1) and the accused's own testimony established the original absence without leave on 7 August 1945. This condition of absence without leave was presumed to have continued, in the absence of evidence to the contrary, until

the accused's return to military control (MCM, 1928, par. 130a, p. 143), and his return to military control was shown by the evidence to have occurred on 22 November 1945.

The objections of the defense to the morning report were without merit. Under the Army Regulations then and now in effect, morning reports are prepared in triplicate and the third copy is forwarded to the unit personnel section to become a permanent official record of that section. This copy, as well as the copy retained by the reporting unit and the copy forwarded to The Adjutant General, is an "original record" within the meaning of Manual for Courts-Martial, 1928, paragraph 116a, page 119. (SPJGJ 1944/3281, 4 April 1944; III Bull. JAG 96.) It was not required, therefore, in the present case, that the personnel officer should have compared the copy sent to his section with either of the other copies, nor that he, as the official custodian of the third copy, have personal knowledge of the facts stated therein.

Article of War 61 was designed to cover cases in which a person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there (MCM, 1928, par. 132, pp. 145-146). The defense attempted to show that accused's absence during approximately the first ten days of the period alleged was without his fault, because he was suffering from amnesia. The court apparently rejected this contention, for it found the accused guilty of absence without leave from 7 August 1945 to 22 November 1945. The reviewing authority, however, approved only so much of the findings as involved a finding of guilty of absence without leave from 17 August 1945 to 22 November 1945, thus giving the accused the benefit of any doubt as to whether during the first ten days his absence was without his fault. This finding as approved was amply supported by the evidence, the accused himself stating that when he returned to Roswell about 17 August, after walking in the desert, he was all right, except that he was confused over what had happened, and that the period of approximately ten days was the only time he had suffered any lapse of memory.

6. The court sentenced accused to be "dishonorably discharged" the service. Since accused was a commissioned officer, this portion of the sentence was inappropriate. The sentence should have been phrased "to be dismissed the service". "Dishonorable discharge" and "dismissal" are, however, legal equivalents, and the irregularity in form can be cured by action of the confirming authority (CM 249921, Maurer, 32 BR 229; CM 265445, Alexander, 43 BR 31; CM 271119, Simpson, 46 BR 53).

7. War Department records show that accused is 25½ years and is married (he testified at the trial that he has three children). He graduated from high school. From May 1941 to July 1942 he was employed as an assistant foreman and as a foreman of stock rooms in a chain and electric-hoist producing concern. He was inducted into the Army of the United States on 10 August 1942. Upon completion of the prescribed course of training at Army Air Forces Advanced Flying

School, Napier Field, Dothan, Alabama, he was commissioned a second lieutenant on 28 May 1943, and immediately entered upon active duty as such. On 4 July 1945 he was promoted to the rank of first lieutenant.

8. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty, as approved by the reviewing authority, and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

W. H. [Signature], Judge Advocate
Donald S. Carroll, Judge Advocate
Walter W. Davis, Judge Advocate

JAGQ - CM 312458

1st Ind

Hq WD, JAGO, Washington 25, D. C.

JUN 14 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Vernon O. Pickle (O-805107), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from about 7 August 1945 to about 22 November 1945. He was sentenced "to be dishonorably discharged", total forfeitures and confinement at hard labor for two (2) years. The reviewing authority approved only so much of the findings of guilty of the Specification as involves a finding of guilty of absence without leave from about 17 August 1945 to 22 November 1945, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

The evidence shows that accused went absent without leave from his station at Kirtland Field, Albuquerque, New Mexico, on 7 August 1945. He testified that on 8 August 1945 he arrived at Roswell, New Mexico, driving an automobile belonging to a Mrs. Woody of Roswell. The car was damaged and he started back to Albuquerque, intending to hitchhike or take a bus. He was picked up by a man driving a sedan and they rode for half an hour. The next thing accused knew he was walking through the desert. He made his way back to Roswell and learned that the date was the 15th or 16th of August. He spent three or four days in Roswell then started traveling through Texas, New Mexico and Colorado, finally arriving at a suburb of Los Angeles. There he lived in a cane-break as a tramp, until he was picked up by the civilian authorities on 22 November 1945.

It appears from psychiatric examinations that accused is the product of an unusually unstable and insecure childhood and adolescence; but that he is sane, knows right from wrong and can choose right from wrong. The reviewing authority credited his story of amnesia and excluded the period of claimed amnesia from the approved finding. Accused admitted that after his return to Roswell he was aware of the fact that he was absent without leave and continued to be aware of that fact during the entire period of his absence.

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

4. Inclosed is a form of action designed to carry this recommendation into effect should it meet with your approval.



THOMAS H. GREEN
Major General.
The Judge Advocate General.

2 Incls

- 1 - Record of Trial
- 2 - Form of action

(G.C.M.O. 204, 28 June 1946).

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

(191)

SPJGK - CM 312510

18 APR 1946

UNITED STATES)

SECOND SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Private EDWARD R. SCOTTI
(32925070), attached un-
assigned to MP & PG Detach-
ment, 1201st SCU, Fort Jay,
New York.)

Trial by G.C.M., convened at Fort
Jay, Governors Island, New York,
15 March 1946. Dishonorable dis-
charge and confinement for five
(5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Edward R. Scotti, attached unassigned to MP&PG Detachment, 1201st SCU, Fort Jay, N.Y., then a member of Co "B", 16th Bn, 5th Trng Rgmt., Camp Gordon, Ga., presently in-activated., did, at Camp Gordon, Ga., on or about 7 January 1945, desert the Service of the United States, and did remain absent in desertion until he was apprehended at Paterson, New Jersey, on or about 9 February 1946.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by a general court-martial on 20 July 1944 for larceny of property of the United States, in violation of Article of War 94. He was sentenced in that case to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months, but the execution of the dishonorable discharge was suspended. On 14 November 1944 the unexecuted portion of the confinement was suspended and accused was released from confinement on 14 November 1944. In the present case 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 six years. The reviewing authority approved the sentence but remitted one year of the confinement adjudged and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The findings and the sentence are invalid in view of the fact that

Captain Charles L. Palmer was present and sat as a member of the court without having previously been detailed thereon. The court which tried accused was appointed by the Commanding General, Second Service Command, by paragraph 21, Special Orders 43, dated 20 February 1946. By paragraph 21, Special Orders 58, Headquarters Second Service Command, 11 March 1946, Captain Charles L. Palmer was detailed as a member of the general court-martial appointed by paragraph 30, Special Orders 8 of that headquarters, dated 10 January 1946, vice Lieutenant Colonel Ralph A. Visco. The trial of accused took place on 15 March 1946. The record of trial shows that Captain Charles L. Palmer was present and participated in the trial. Paragraph 14 of Special Orders 80, Second Service Command, dated 5 April 1946, provides as follows:

"14. Paragraph 21, Special Orders No. 58, this Headquarters, 11 March 1946 as reads:

'CAPT CHARLES L PALMER 0202124 ORD DEPT is detailed as member of General Court Martial aptd to meet at Ft Jay NY by Par 30 SO 8 this Hq 10 Jan 46 vice LT COL RALPH A VISCO 0258361 ORD DEPT reld.', is corrected to read:

'CAPT CHARLES L PALMER 0202124 ORD DEPT is detailed as member of General Court Martial aptd to meet at Ft Jay NY by Par 21 SO 43 this Hq 20 Feb 46 vice LT COL RALPH A VISCO 0258361 ORD DEPT reld.' (250.42 SPGEM)"

It thus appears that Captain Palmer without any authority whatsoever served as a member of the court which tried accused. It has been repeatedly held that where an individual without authority sits as a member of a general court-martial and takes part in all proceedings, including findings and sentence, such proceedings are thereby invalidated (CM 265840, Brown; CM 239497, Goggan, 49 ER 290; CM 238607, Mashburn, 24 ER 308; CM 218157, Beadle, 11 ER 383). An order published subsequent to such a trial detailing the unauthorized individual as a member of the court, does not operate nunc pro tunc to validate his presence at the trial (Mashburn, Beadle, supra, CM 302975, Machlin).

4. The Board of Review therefore holds that the record of trial is not legally sufficient to support the findings and sentence.

Wm. M. Mays, Judge Advocate
William B. Kuder, Judge Advocate
Earl W. Wings, Judge Advocate

SPJGX - CM 312510

1st Ind

APR 25 1947

Hq ASF, JAGO, Washington 25, D. C.

TO: Commanding General, Second Service Command, Army Service Forces,
Governors Island, New York 4, New York

1. In the case of Private Edward R. Scotti (32925070), attached unassigned to MP & PG Detachment, 1201st SCU, Fort Jay, New York, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50 $\frac{1}{2}$, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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

(CM 312510).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial



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

JAGH - CM 312517

9 OCT 1946

UNITED STATES)

v.)

Private First Class THADDEUS W.)
 KOSYDAR (21100905), Combat Crew)
 Section, 234th Army Air Forces)
 Base Unit and Corporal VERNON)
 BAILEY (13142876), Squadron A,)
 234th Army Air Forces Base Unit)

SECOND AIR FORCE

Trial by G.C.M., convened at
 Clovis, New Mexico, 30 and 31
 January and 1, 2, 4 and 5
 February 1946. Each: Dishon-
 orable discharge and confinement
 for five (5) years. Disciplinary
 Barracks

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates

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

2. In a common trial the accused were tried upon the following Charges and Specifications:

KOSYDAR

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private First Class Thaddeus W. Kosydar, Combat Crew Section, 234th Army Air Forces Base Unit, did, at Clovis Army Air Field, Clovis, New Mexico, on or about 4 December 1945, feloniously take, steal and carry away one .30 caliber U. S. Model 1903A3 Springfield rifle, value about \$51.00; one .22 caliber Remington Match Master rifle, value about \$22.00; and one .45 caliber automatic pistol, value about \$35.00, of a total value of about \$108.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private First Class Thaddeus W. Kosydar, Combat Crew Section, 234th Army Air Forces Base Unit, did, at

Clovis Army Air Field, Clovis, New Mexico, on or about 5 October 1945, in conjunction with Corporal Vernon Bailey, feloniously take, steal and carry away three body assemblies, camera, aircraft, type K-17, value about \$1500.00; two body assemblies, camera, aircraft, type K-22, value about \$1500.00; one aircraft camera, type K-18A, value about \$1800.00; three cone assemblies, six inch Metrogon lens, value about \$3,127.17; two cone assemblies, forty inch lens, value about \$521.30; three filter assemblies, lens, plastic, A25 red vignetting correction for six inch cone, value about \$90.00; one filter unit, lens, type A6, value about \$109.50; one finder assembly, vertical view, type A-2, value about \$66.00; three intervalometer cameras, type B-3A, value about \$420.00; and one gun sight aiming point camera, type N-6, value about \$215.00, all of a total value of about \$9,348.97, property of the United States, furnished and intended for the military service thereof.

BAILLEY

CHARGE: Violation of the 94th Article of War.

Specification: In that Corporal Vernon Bailey, Squadron "A", 234th Army Air Forces Base Unit, did, at Clovis Army Air Field, Clovis, New Mexico, on or about 5 October 1945, in conjunction with Private First Class Thaddeus W. Kosydar, feloniously take, steal and carry away three body assemblies, camera, aircraft, type K-17, value about \$1500.00; two body assemblies, camera, aircraft, type K-22, value about \$1500.00; one aircraft camera, type K-18A, value about \$1800.00; three cone assemblies, six inch Metrogon lens, value about \$3,127.17; two cone assemblies, forty inch lens, value about \$521.30; three filter assemblies, lens, plastic, A25 red vignetting correction for six inch cone, value about \$90.00; one filter unit, lens, type A6, value about \$109.50; one finder assembly, vertical view, type A-2, value about \$66.00; three intervalometer cameras, type B-3A, value about \$420.00; and one gun sight aiming point camera, type N-6, value about \$215.00, all of a total value of about \$9,348.97, property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to the Charge and the Specifications. Of Specification 1, the accused Kosydar was found guilty, except the words "one .30 caliber U. S. Model 1903A3 Springfield rifle, value about \$51.00" substituting therefor the words "one .30 caliber U. S. Model 1903A3 Remington rifle, value about \$51.00", of the excepted words not guilty, of the substituted words guilty. He was found guilty of Specification 2 of the Charge, and guilty of the Charge. The accused Bailey was found guilty

of the Charge and its Specification. No evidence of previous convictions was introduced. Each accused was sentenced to be reduced to the grade of private, dishonorable discharge, total forfeiture and confinement at hard labor for five (5) years. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty and the sentence as to the accused Bailey. The question for consideration as to accused Kosydar is whether fatal error was committed in calling Kosydar as a witness for the prosecution against Bailey. The evidence material to the consideration of this question is hereinafter summarized.

4. Two extra-judicial confessions of the accused Kosydar were admitted into evidence (Pros Ex 28; R 68, 100-106; Pros Ex 29; R 112-115). Kosydar was called as a witness for the defense for the limited purpose of testifying as to the circumstances surrounding the taking of the statements and to rebutt prosecution's evidence of the voluntary nature of the statements (R 77-89). Thereafter without objection by the defense, the trial judge advocate recalled the accused Kosydar as a witness for the prosecution, against the accused Bailey (R 159). The record of trial reveals the following preliminary proceedings:

"Prosecution: If the court please, we would like to call Pfc. Thaddeus W. Kosydar as a witness, his testimony to be used only against the accused, Vernon Bailey.

President: Very well. * * *

The accused, Thaddeus W. Kosydar, was then recalled to testify for the prosecution against the accused, Vernon Bailey. He was reminded that he was still under oath.

DIRECT EXAMINATION

Questions by prosecution:

Q. Are you the same Pfc. Kosydar who has testified in this court previously?

A. Yes, sir.

Q. Do you know the accused, Cpl Vernon Bailey?

A. Yes, sir.

President: I think at this time it would be very much in order to make a brief explanation to the witness of the nature of the questions. Pfc. Kosydar, you are appearing as a witness in the case against

Cpl. Bailey. You are required to answer any questions put to you having to do with the particular case as long as, in your own mind, it does not incriminate you yourself. Take plenty of time to answer the questions and give the defense an opportunity to object to any questions put by the prosecution. If a question is not clear, don't hesitate to ask to have it made clear. Don't hesitate, if you think the question strengthens the case against you, not to answer it.

Prosecution: I would like to correct your statement in one respect. Pfc. Kosydar should take time to answer a question, but it is not within the province of the defense to determine whether it would incriminate the witness himself.

President: Didn't I make that clear? Yes; you are right." (R 159).

The accused Kosydar then testified that he had known Bailey approximately a year, and that he had been stationed at Salina and Clovis with him. He testified that he and Bailey had purchased a car together. He declined to answer many of the questions propounded by the trial judge advocate, on the ground that the answers might tend to incriminate him (R 159-163). The prosecution attempted to have Kosydar declared a hostile witness (R 162) and to get a ruling requiring Kosydar to answer the trial judge advocate's question on the grounds that the answers would not incriminate the witness because similar answers had already been read into the record in his extra-judicial confession (R 162). However, the court refused to compel the witness to answer the prosecution's questions. There was no cross-examination by the defense. The record is silent as to whether the prosecution had entered into an arrangement with Kosydar whereby he agreed to testify as a witness for the prosecution. The accused did not thereafter testify as a witness in his own behalf.

5. The non self-incrimination clause of the Fifth Amendment of the Constitution of the United States provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself."

Article of War 24 provides in pertinent part:

"No witness before a military court * * * shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

The term "witness" as used in this Article includes without doubt an accused (Counselman v Hitchcock, 142, US 547; United States v Kinball, 117 Fed 156, 160). The phrase "to incriminate himself" is defined as follows:

"to expose to an accusation or charge of crime; to involve oneself or another to criminal prosecution or the danger thereof" (Black Law Dict, 3d Ed, p 946).

It has been held that the rights and immunities under Article of War 24 of an accused on trial before a court-martial are identical with the rights and immunities of a defendant on trial before a Federal civil court (CM ETO 2297, Johnson and Loper, 6 BR ETO 291, 303).

In considering the question presented the following principle is fundamental:

"The guaranty that a person shall not be compelled to be a witness against himself precludes a person from being subjected to an inquisition or called as a witness by the state in any judicial inquiry which has for its primary object the determination of that person's guilty or innocence of a given offense" (70 C. J., sec 888, p 734; Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746; Lees v. United States, 150 U. S. 476, 37 L. Ed. 1150, Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97).

In order to safeguard and make effective this constitutional guaranty against self-incrimination it is the universal rule that the prosecution must not in open court, before the jury, call the accused to the stand as a witness.

"Since that procedure could only have, as its chief effect, the emphasizing of his refusal, should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle (that is the principle against self-incrimination)" (4 Wigmore, Evidence, 2nd Ed, sec 2268).

"Whenever the accused, because of some incident in the trial and through no fault of his, is forced to testify for fear that adverse inferences might be drawn from his failure, then he had not volunteered as a witness and has not waived his rights. Such waiver only follows where liberty of choice has been fully accorded" (Powell v Commonwealth, Va, 189 SE 433, 110 ALR 90, 95).

Consistent with and in elaboration of the foregoing proposition, it is the almost unanimous conclusion of American courts that in the trial of a criminal case it is improper for the prosecuting attorney, or the court, in the presence of the jury, to call upon the defendant or his counsel to produce a document as being his possession (see annotation in 110 ALR, p 101 for complete citation of authorities; CM 232661, Nelson,

19 BR 157). The leading case of this subject is McKnight v. United States, 115 Fed 972, wherein the court held it to be a prejudicial infraction of the constitutional right of accused for the prosecution's attorney, upon suggestion of the court and as a basis for introduction in evidence of a copy of an agreement, to demand of the accused, in the presence of the jury, that he produce the original of the agreement. Upon a later appeal of the case after a re-trial, the Circuit Court of Appeals said in explanation of its ruling in the earlier appeal:

"To say to a defendant in the presence of a jury 'If you do not produce such and such document, we will prove its contents by the best evidence within reach', is a method of compelling a defendant to become a witness against himself, as most unjust inferences may be drawn from a refusal to comply with such a demand, and even more dangerous results from compliance. It was upon this ground that upon the former writ of error we held the defendant to have been illegally prejudiced by the demand made upon him in the presence of the jury" (McKnight v. United States, 122 Fed 926, 930).

The foregoing authorities support the conclusion that the trial judge advocate committed serious prejudicial error with respect to Kosydar when he called him to testify as a witness for the prosecution. When he made the demand, Kosydar was placed in a position wherein he was compelled to testify for fear of adverse inference if he refused the demand. His appearance as a witness was in no sense voluntary (CM ETO 2297, supra).

We cannot infer from the defense counsel's failure to object to the prosecution's demand, that the accused appeared as a voluntary witness for the prosecution, nor that there was an out of court arrangement between the prosecution and Kosydar that he testify as a witness for the prosecution. The accused's refusal to answer any material question put to him by the prosecution negatives such an inference.

The voire dire examination of the accused and his refusal to answer any material questions did not remove the prejudicial effect of the accused's substantial rights. It was the prosecution's demand which imposed upon him an awkward election which inflicted the injury, and his refusal to answer the material questions put to him by the prosecution and the court, unfairly tended to create a prejudicial inference against him in the minds of the court. It stripped him of his right to remain silent without creating such an unfavorable inference. This error seriously affected the accused's substantial rights within the meaning of Article of War 37. The right against self-incrimination provided by the Fifth Amendment and Article of War 24 is so fundamental that its infringement is a lack of due process which can not be cured merely by other clear and compelling evidence of guilt.

The instant case is distinguished from the case of Johnson and Loper (CM ETO 2297, supra), wherein it was held that the two accused cured similar error by subsequently appearing as voluntary witness in their own behalf and repeating the damaging testimony each accused gave as a witness for the prosecution. In the instant case the accused Kosydar voluntarily testified in his own behalf for the limited purpose of showing that his extra-judicial confession was not voluntary. Thereafter the prosecution called him as an involuntary witness for the prosecution. He did not again appear as a voluntary witness after he was excused as an involuntary witness for the prosecution.

6. Since the privilege against self-incrimination is a right of a witness and not of an accused against whom he testifies, the error did not effect the substantial rights of the accused Bailey. Furthermore, there was nothing in Kosydar's testimony which harmed Bailey.

7. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty and the sentence as to the accused Kosydar and legally sufficient to support the findings of guilty and the sentence as to the accused Bailey.

D. H. Stentz, Judge Advocate
William A. Goff, Judge Advocate
On Leave, Judge Advocate

JAGH - CM 312517

1st Ind

0012517

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Fifteenth Air Force, Colorado Springs, Colorado

1. In the case of Private First Class Thaddeus W. Kosydar (12100905), Combat Crew Section, 234th Army Air Forces Base Unit and Corporal Vernon Bailey (13142876), Squadron A, 234th Army Air Forces Base Unit, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence as to Kosydar and is legally sufficient to support the sentence as to Bailey, which holding is hereby approved. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the sentence as to Kosydar be vacated. You now have authority to order the execution of the sentence as to Bailey.

2. It is noted that action by the reviewing authority was taken by the Commanding General, Second Air Force. However, the First Indorsement your file JA 250.452 x SJA 300114 dated 14 August 1946, in answer to basic communication from this office subject: "Record of Trial in the Case of Private Marion Taylor", dated 2 August 1946, sets forth facts indicating that your headquarters is the successor in command to the Second Air Force.

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

(CM 312517).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

SPJGN-CM 312523

UNITED STATES)

UNITED STATES ARMY
 SERVICE COMMAND 24

v.)

Private SAM D. LAWRENCE
 (34955622), Headquarters
 and Service Company, 1331st
 Engineer General Service
 Regiment.)

Trial by G.C.M., convened at
 APO 901, 25 February 1946.
 Dishonorable discharge and con-
 finement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
 BAUGHN, O'CONNOR and O'HARA, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Sam D. Lawrence, Headquarters and Service Company, 1331st Engineer General Service Regiment, APO 901, did, at APO 901, on or about 18 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Kim Tuk Kwam, a human being by shooting him with a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. After evidence was introduced of one previous conviction by special court-martial for using insulting language to a noncommissioned officer and for failing to obey the lawful order of a noncommissioned officer, 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 rest 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. Evidence for the prosecution: Accused and Private First Class J. B. Pitmon, both members of the 1331st Engineer General Service Regiment, APO 901, left their camp about three o'clock in the afternoon of 18 January 1946, and went into the town of Taejon, three miles away (R. 17-18, 20, 34, Pros. Ex. 4). They drank a bottle of saki before leaving and another on the way to town (R. 21). After visiting a house of prostitution and a saloon, they started "down the main road toward camp," about six-thirty that evening. They carried a bottle of saki from which they drank as they walked along. About half way back to camp, just after crossing a railroad trestle, they encountered a Korean man walking toward them. According to Pitmon, accused struck the Korean and knocked him off the path, which, at this point, was built up three feet above the level of the adjoining fields (R. 18). Accused then pulled a P-38 pistol "out of his bosom," jumped down to where the Korean lay, and fired (R. 18, 21, 23, 24). It was then about seven-thirty or eight o'clock and quite dark, but Pitmon saw the flash of the pistol (R. 24). Accused took a purse attached to a chain from the Korean and, after catching up with Pitmon, who had walked on a few paces, handed him a knife (R. 18-19). Accused threw the purse away but put the chain in his pocket (R. 18). Pitmon, after identifying in court a knife, introduced in evidence by the prosecution as Exhibit 1, as the knife handed him by accused, on further examination withdrew his identification (R. 22-23).

Accused and Pitmon were involved in some further trouble with Koreans the same evening and were taken to the company dispensary (R. 11, 20). A search of accused's clothing revealed a knife and a chain (R. 11-17; Pros. Exs. 1, 2).

The body of Kim Tuk Kwan was found in a rice field just outside of Taejon the following morning. The place was near a railroad trestle alongside a raised path which, after crossing the trestle, continued north along the river. It was the only path at that point (R. 6, 34-35). A doctor, who examined the body at about 10:00 a.m. that day, testified that death was caused by a bullet wound. The bullet entered the right cheek of the deceased and came out through the top of his head. Due to the frozen condition of the body, it is impossible to tell exactly when death had occurred, although the doctor thought it had not been instantaneous (R. 6-7). No autopsy was performed (R. 7).

The widow of Kim Tuk Kwan identified the knife and chain found on accused as the property of her husband. When he left home about noon, on 18 January 1946, the last time she saw him alive, he had the knife and chain on his person (R. 9-10, Pros. Exs. 1, 2).

4. Evidence for the defense: Accused testified in his own behalf (R. 25). He asserted that on the afternoon of 18 January 1946 he went into Taejon with Private Pitmon. They entered a cafe and had "three or four setups of saki." From there they went to the "Green Gardens" where they bought "four bottles." Each drank one bottle and put another in his pocket (R. 26, 30). Accused also went to the railroad station and had "one glass * * * about three inches high" (R. 30). When they finally started back to camp, accused was "feeling high" (R. 28). Outside of town they met a Korean and Pitmon pulled a pistol from his bosom and told accused to grab the Korean, which accused did. Pitmon searched the Korean's pockets and transferred the contents to his own pockets. The Korean commenced to run and, at Pitmon's order, accused struck him (R. 27). The Korean fell off the path and accused walked on. He was pretty drunk by this time (R. 29). There was the sound of a shot and then Pitmon rejoined him. Accused asked Pitmon, "What he shot for or was it him that shot?" but Pitmon did not answer (R. 27). Accused denied that he had a gun on his person at the time or that he had ever owned one (R. 28).

Captain Nathan Itzbicky, Medical Corps, stated that it is impossible to determine the cause of death without an autopsy if there are no outside visible injuries (R. 31). From the fact that a deceased "had a bullet hole entering the cheek and coming out the top of his head," it could not be said whether he died prior to having been shot (R. 32).

The stipulated testimony of Pyon Myong Chun showed that he had been held up by two unidentified negro soldiers about seven or seven-thirty in the evening of 18 January 1946, near a trestle "outside Mulong Ri, on a path leading along the river." A weapon of some type was held against his throat (R. 32).

5. Rebuttal evidence for the prosecution: Private First Class Lee Thompson of accused's regiment testified that he had sold a P-38 pistol to accused "right after Christmas of 1945" (R. 35). Testimony that accused was sober "on the night of January 14, 1946" was given by First Lieutenant John J. Mattimoe. The latter had picked up accused just outside of camp and had given him a ride in a jeep. Accused talked coherently, did not stagger and had no detectable odor of liquor on his breath (R. 35).

A voluntary pre-trial statement made by accused was introduced in evidence (R. 34, Pros. Ex. 4). In this statement accused asserted that a Korean was shot by Pitmon. The statement continued with an account of some further difficulties with some other Koreans who chased them. Accused admitted firing the pistol once at his pursuers, who eventually caught him and beat him. Lieutenant Mattimoe and another officer rescued him (Pros. Ex. 4).

6. It is alleged that accused did "at APO 901, on or about 18 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Kim Tuk Kwan, a human being, by shooting him with a pistol," in violation of Article of War 92.

Murder is "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant without legal justification or excuse. MCM, 1928, par. 148a, p. 162. "Malice aforethought" has been defined as follows:

"* * * Malice * * * 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 toward 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." Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711.

The Manual for Courts-Martial provides that "malice aforethought" may be found when, preceding or co-existing with the act by which death is caused, there is an "intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not * * * intent to commit any felony." MCM, 1928, par. 148a, p. 163-4. Malice may be inferred from the use of a deadly weapon in a manner, likely to, and which does, cause death. Wharton's Criminal Law (12th Ed. 1932), Vol. I, sec. 420, p. 654-655. The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act." Wharton's Criminal Law, Vol. I, sec. 420, p. 631.

The evidence is sufficient to prove beyond any reasonable doubt that at the time and place alleged, accused shot and killed Kim Tuk Kwan. The testimony of Pitmon that accused knocked a Korean into the ditch, pulled out a pistol, jumped down after the Korean and fired the pistol, coupled with other testimony that at the place where the shot was fired, Kim Tuk Kwan was found dead the following morning with a bullet wound in his head, furnishes ample support for the conclusion that accused fired the fatal shot. The medical testimony satisfactorily establishes that death resulted from a bullet wound in the head.

The testimony of Pitmon was flatly contradicted by accused who testified that Pitmon held the gun and fired the shot. It was the function of the court-martial to determine the issue resulting from the conflict in the testimony and their acceptance of Pitmon's version of the killing should not be disturbed in the absence of sound reasons indicating that the conclusion reached was erroneous. In the opinion of the Board of Review, the

finding of the court-martial was the only proper result which could be reached under all the facts and circumstances of the case. Accused's version of the killing and his veracity as a witness are discredited by the testimony concerning his ownership of a gun, while Pitmon's account of events surrounding the killing is corroborated by the discovery of deceased's property in accused's possession.

In firing a pistol at the head of the deceased, it is plain that it was accused's intention to kill him. Malice may be inferred from his use of a deadly weapon in the manner shown, as well as from the fact that the killing occurred in the perpetration of the crime of robbery, a felony. Deliberation and premeditation are clearly shown.

Accused contended that he was drunk at the time of the killing.

"It is a general rule that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for a 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." MCM, 1928, par. 126a, p. 136.

"Before intoxication can be relied upon as reducing the degree of the crime, the intoxication must have been of such a degree as in fact to render the slayer incapable of attaining the purpose, intent, or malice, that the law deems an ingredient of the offense * * *." 26 Am. Jur., p. 237.

The record does not show that accused was so deprived of mental capacity as to be unable to deliberate or premeditate. In his testimony and in his statement to the investigating officer, accused recalled the events preceding and following the killing without seeming difficulty, indicating that his mental faculties were not seriously impaired at the time of the shooting. The record contains, moreover, the testimony of an officer, who gave accused a ride in a jeep later that evening, that he exhibited no signs of intoxication whatever at that time. The Board is of the opinion that the record fails to show that accused was intoxicated to such a degree that he was unable to entertain the specific intent requisite for the offense of murder. The Specification and Charge are proven beyond reasonable doubt.

7. The Charge Sheet shows that accused is twenty-four years of age, and that he was inducted into the Army on 4 April 1944.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence either of 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 for more than one year by Sec. 22-2401 of the District of Columbia Code.

Wilmet T. Bangham, Judge Advocate

Peter J. Cannon, Judge Advocate

James D. ..., Judge Advocate

JAGH - CM 312532

25 JUN 1946

UNITED STATES)

v.)

Second Lieutenant FRED J.)
DUERST (O-2101344), Air)
Corps)

ARMY AIR FORCES
FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Williams Field, Chandler, Ari-
zona, 12 March 1946. Dismissal

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, 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 93d Article of War.

Specification: In that 2d Lt Fred J. Duerst, Squadron B, 3010th Army Air Forces Base Unit, did, at Williams Field, Chandler, Arizona, on or about 31 January 1946, feloniously take, steal, and carry away an officer's short coat, value of about thirty (\$30.00) dollars, property of 2d Lt Ben F. Pace.

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

3. Upon arraignment accused pleaded guilty to the Charge and Specification. Being then and there advised by the president of the court of the meaning and effect of his plea, accused stated that he understood the meaning and effect thereof and wished his plea of guilty to stand. Prosecution thereupon rested and accused made an unsworn statement. His unsworn statement, among other things, was to the effect that he was intoxicated at the time of the alleged larceny to the extent that he did not know what he was doing, and that he had no intention of taking the coat or depriving the owner of it permanently. Such statement being inconsistent with accused's plea of guilty, the court directed that a plea of not guilty to the Charge and Specification be entered for accused.

The prosecution introduced evidence showing that during the first part of February 1946, Lieutenant Ben F. Pace of Williams Field, Chandler, Arizona, visited the officers' club at the field wearing his short overcoat. When he was ready to leave the club for his barracks, the coat was missing from the place he had left it, and he proceeded to the Provost Marshal's Office and reported the loss. While there he filled out a lost or stolen property form and was advised to be on the lookout for the coat at the bachelor officers' quarters, the officers' club and officers' mess hall. On or about 5 February 1946 Lieutenant Pace saw his coat hanging on the rack at the officers' mess and shortly thereafter saw accused remove it from the rack and put it on. It was then that he questioned accused as to the ownership of the coat and accused informed him that he (accused) had purchased the coat at the post exchange. Lieutenant Pace then requested accused to meet him the following morning at the Provost Marshal's Office. Thereupon Lieutenant Pace went to the Provost Marshal's Office and reported that he had located the officer who had his overcoat and had requested this officer to meet him at the Provost Marshal's Office the following morning at 9:30. The following morning (6 February 1946) Lieutenant Pace went to the Provost Marshal's Office but accused did not report as he had agreed. About 3:45 that afternoon, the Assistant Provost Marshal, First Lieutenant Leonard E. Andrews, and Lieutenant Pace proceeded to the Continuation Club where they found accused. Lieutenant Andrews requested accused to accompany him to the Provost Marshal's Office which he readily consented to do. After starting to the Provost Marshal's Office in Andrews' car, accused was asked about the overcoat and replied that it was at the Continuation Club. Andrews drove back to the Club and accused went inside. Shortly thereafter he returned to Andrews' car with the coat. Lieutenant Andrews, Lieutenant Pace and accused then proceeded to the Provost Marshal's Office where Pace identified the coat as his property. Accused was asked by Lieutenant Andrews where he got the coat and replied that he had purchased it at the post exchange. Lieutenant Pace then left the office and Lieutenant Andrews advised accused of his rights under the 24th Article of War. Accused then reiterated his statement that he had purchased the coat at the post exchange on the field. Andrews directed one of his men to check the sale slips at the post exchange and accused then said he had taken the coat from the officers' club, had cut the patch off the left shoulder and had written his name twice in the bottom of the lining.

Lieutenant Pace identified Prosecution Exhibit #1, received in evidence without objection, as his overcoat. He identified the coat by a certain stain in the middle of the lining which had existed before he lost it. At this point in the trial, the coat was exhibited to the court and Lieutenant Pace pointed out the places where accused's name had been written in ink or indelible pencil. Later that day, after he had been questioned by the Provost Marshal, accused returned Lieutenant Pace's hat to him stating that he had taken it from the officers' club at the same time he took the coat.

The officer detailed to investigate the Charge against accused, after first warning him of his rights under the 24th Article of War, took a sworn, voluntary statement from accused on 6 February 1946. In this statement accused admitted that he removed a short overcoat from the officers' club on or about the night of 30 January 1946; that he did not know to whom it belonged; that he also took a service cap which did not belong to him; that he had a service cap of his own but must have left it at the club; that he had been drinking but was not drunk; that he wrote his name in the coat twice; that he had never owned a short overcoat and had never purchased one at the post exchange as he had previously stated to Lieutenant Pace; that he does not know if he intended to return the coat when he took it; does not know if he intended to keep the coat when he wrote his name in it; and that he returned the service cap to Lieutenant Pace the day on which he admitted taking the coat.

4. After having his rights as a witness explained, accused elected to remain silent. No witnesses were introduced and no evidence offered in accused's behalf.

5. The evidence clearly demonstrates that on the night of January 30 or 31, 1946, accused, without permission, took and carried away from the officers' club at Williams Field, Chandler, Arizona, a short overcoat which was owned and possessed by Second Lieutenant Ben F. Pace. His acts of removing an identifying shoulder patch and writing his name in the lining of the coat in two places fully warranted the court in inferring his felonious intent permanently to deprive the owner of his property. No evidence was introduced to show the value of the coat to be \$30 as alleged, but it was physically before the court for inspection and appraisal. Under such circumstances, the court was justified in concluding that it was of some value. Since no confinement was imposed by the court and since the table of maximum punishments is inapplicable to accused, the variance is immaterial (CM 244666, Schallenberg, 28 BR 385). The findings of guilty of the Charge and its Specification are fully sustained by the record.

6. War Department records show accused to be 26 years of age and single. He completed high school in June 1938 and graduated from Visalia Junior College with an A.A. degree in June 1942. While attending Junior College, he received civilian pilot training and qualified as an instructor. The Charge Sheet shows that he had service as a naval cadet from September 1942 to August 1943, that he enlisted in the Enlisted Reserve Corps 26 October 1943 and that he entered on active duty on 23 August 1944. Subsequently on 17 December 1944 he became an aviation cadet and on 16 October 1945 was appointed a second lieutenant in the Army of the United States.

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

On Leave

_____, Judge Advocate

R. L. Hunter, Judge Advocate

Joseph J. Stern, Judge Advocate

JAGH - CM 312532

1st Ind

WD, JAGO, Washington 25, D. C.

JUL 11 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Fred J. Duerst (O-2101344), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of an overcoat of a fellow officer, in violation of Article of War 93. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

4. On the night of January 30-31, 1946, accused, without permission, took and carried away from the Officers' Club at Williams Field, Chandler, Arizona, a short overcoat owned by Second Lieutenant Ben F. Pace. He promptly removed an identifying shoulder patch and wrote his name in the lining of the coat in two places with ink or indelible pencil. A few days thereafter accused was seen wearing the overcoat and when questioned as to its ownership first asserted that he had purchased the coat at the post exchange but shortly thereafter admitted that he had removed it from the Officers' Club without permission, removed the identifying shoulder patch and written his name in the lining of the coat in two places. These acts on accused's part clearly indicated his felonious intent permanently to deprive Lieutenant Pace of his property.

5. The larceny was deliberate and demonstrates unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution.

6. Inclosed is a form of action designed to carry the foregoing recommendation into effect, should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1 - Record of trial

2 - Form of action

(G.C.M.O. 231, 23 July 1946).



In the Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 312533

3 OCT 1946

UNITED STATES)

v.)

Major JAMES B. MOORE (O-346397),)
Finance Department.)

MIAMI AIR TECHNICAL SERVICE COMMAND

Trial by G.C.M., convened at
Miami, Florida, 6 and 8 March
1946. Dismissal, fine of
\$2,957.58, and confinement for
five (5) years.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Major James B. Moore, FD, 4006th AAF Base Unit, Miami Air Technical Service Command, Miami, Florida, duly appointed and being at the time an accountable disbursing officer of the United States, did, at the Miami Air Technical Service Command, Miami, Florida, on or about 26 February 1945, receive public money in the amount of \$1336.91, lawful money of the United States, which he was not authorized to retain as salary, pay or emolument, and wrongfully fail to render his accounts for the same as provided by law.

Specification 2: In that Major James B. Moore, ***, duly appointed and being at the time an accountable disbursing officer of the United States, did, at the Miami Air Technical Service Command, Miami, Florida, on or about 29 March 1945, receive public money in the amount of \$386.53, lawful money of the United States, which he was not authorized to retain as salary, pay or emolument, and wrongfully fail to render his accounts for the same as provided by law.

Specification 3: In that Major James B. Moore, ***, duly appointed and being at the time an accountable disbursing officer of the United States, did, at the Miami Air Technical Service Command, Miami, Florida, on or about 25 April 1945, receive public money in the amount of \$770.56, lawful money of the United States, which he was not authorized to retain as salary, pay or emolument,

and wrongfully fail to render his accounts for the same as provided by law.

Specification 4: In that Major James B. Moore, ***, duly appointed and being at the time an accountable disbursing officer of the United States, did, at the Miami Air Technical Service Command, Miami, Florida, on or about 26 May 1945, receive public money in the amount of \$206.40, lawful money of the United States, which he was not authorized to retain as salary, pay or emolument, and wrongfully fail to render his accounts for the same as provided by law.

Specification 5: In that Major James B. Moore, ***, duly appointed and being at the time an accountable disbursing officer of the United States, did, at the Miami Air Technical Service Command, Miami, Florida, on or about 1 June 1945, receive public money in the amount of \$257.38, lawful money of the United States, which he was not authorized to retain as salary, pay or emolument, and wrongfully fail to render his accounts for the same as provided by law.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to pay to the United States a fine of \$2,957.58 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 under Article of War 48.

3. Evidence for the Prosecution.

It was stipulated by and between the prosecution, defense counsel and accused that from 20 January 1945 to 13 June 1945 accused was the accountable finance officer for the Miami Air Technical Service Command and that, as such, from on or about 24 January to on or about 26 April 1945 his duties included receiving and accounting for moneys received from sales of services when properly tendered to him in his official capacity by personnel of the Miami Beach Service Base, Miami Beach, Florida, and that from 20 January 1945 to 13 June 1945 he was not on leave or otherwise absent from the Miami Air Technical Service Command (R. 6).

On 26 February 1945, Captain Kenneth H. Wood, Assistant Communications Officer, Miami Beach Service Base, forwarded to accused check No. 46487 in the amount of \$601.69 (Pros. Ex. 2) and check No. 46488 in the amount of \$735.22 (Pros. Ex. 4), both checks drawn by the Southern Bell Telephone and Telegraph Company, Inc., Jacksonville, Florida, payable to the Treasurer of the United States, and representing the Government's commission on coin

box collections from pay telephones. Each check was properly indorsed by Captain Wood "for Credit to the Treasurer of the United States" and each was accompanied by five copies of General Accounting Office Form 1044, a collection voucher setting out the purpose for which the collections were received (Pros. Ex. 1 and 3). Additional checks drawn by the same company payable to the Treasurer of the United States and for the same purpose were forwarded by Captain Woods to the accused as follows:

- On 29 March 1945, check #50679 in the amount of \$386.33 (Pros. Ex.6)
- On 24 April 1945, check #53516 in the amount of \$220.90 (Pros. Ex. 8)
- On 25 April 1945, check #54019 in the amount of \$549.66 (Pros. Ex.10)

Each of these checks was likewise indorsed by Captain Wood for credit to the Treasurer of the United States and accompanied by five copies of Form 1044 properly executed (Pros. Exs. 5,7,9). Each check was stamp indorsed by accused "Pay to the Order of First State Bank of Miami Springs for Deposit to the Treasurer of the United States to Official Credit of J. B. Moore, Major, F.D.", checks #46487 and #46488 on 27 February 1945, check #50679 on 2 April 1945 and checks #53516 and #54019 on 28 April 1945. Further indorsements show that each check was forwarded by the First State Bank to the clearing house for collection through which each was paid, checks #46487 and #46488 on 2 March 1945, check #50679 on 5 April 1945 and checks #53516 and #54019 on 2 May 1945. Captain Wood received back from accused three of the five copies of Form 1044 he had forwarded with each check, these returned copies being signed by the accused signifying that he had received the checks mentioned therein "subject to collection." Of these returned copies, Captain Wood, in each case, retained one copy, forwarded one copy to the Army Regional Accounting Office, Atlanta, Georgia, and the other to the Division Engineer, S.A.D., Atlanta, Georgia (R. 7-21).

On 26 May 1945 accused, in reply to a letter from the Army Regional Accounting Office, Atlanta, Georgia, dated 22 May 1945, ^{requesting} explanation as to why he had not reported collections listed on copies of Form 1044 received from the collecting officer dated 24 April 1945 and 25 April 1945 in the sums of \$220.90 and \$549.66 respectively, stated that he had no record of these transactions, and requested information relative thereto, which was furnished by the Regional Accounting Office (R. 21,22; Pros. Ex. 11). The copies of Form 1044 referred to in this communication could not be located in the files of the Finance Office, Miami Air Technical Service Command, at the time of the inquiry concerning them, and accused, upon being informed of this fact, asked his assistant to get copies thereof from Captain Wood. In addition to the above mentioned Forms 1044 (copies of Pros. Exs. 7 and 9), the Forms 1044 reflecting the checks forwarded by Captain Wood on 26 February 1945 and 29 March 1945 (copies of Pros. Exs. 1,3 and 5) were missing from the files of accused's office at this time. Accused, with his two assistants, reported these irregularities to accused's commanding officer. The signature receipting for the Forms 1044 accepted

in evidence as Prosecution's Exhibits 1,3,5,7 and 9 was accused's signature. It was accused's policy to receive all collection vouchers (Forms 1044) himself. Normally, of the two copies retained by his office, one would go to the office files and the other would be forwarded to the Regional Accounting Office. All collection vouchers taken in during each day's business would be "processed into the collection account" and would be scheduled on the Schedule of Collections, WD FD Form 52. The Schedule of Collections would be made up in duplicate, one copy, with supporting collection vouchers attached, being forwarded to the Regional Accounting Office and the other retained in the files of accused's office. The vouchers represented by Prosecution's Exhibits 1,3,5, 7 and 9 were never scheduled on accused's Schedule of Collections (R. 22-30). The retained copies of the Certificates of Deposit for the checks admitted in evidence as Prosecution's Exhibits 2,4,6,8 and 10 were on file in accused's office at the time the Regional Accounting Office identified the transactions recited in the Forms 1044 dated 24 and 25 April 1945 (Pros. Exs. 7 and 9) pursuant to accused's request (R. 33). Accused handled all cash collections personally and was the only person in his office who could check the balance between the Schedule of Collections, made up by his accounting section, and the cash in hand and in the bank. When the Schedule of Collections was completed each day, the accounting section, before forwarding it, would present it to accused who, if he agreed with it, would say, "all right, it balances" (R. 37,39,41,42).

First Lieutenant Grover C. Ritchie, Quartermaster Corps, Sales Officer of Miami Beach Station Motor Pool, turned over to accused \$206.40 in cash on 26 May 1945 and \$257.38 in cash on 1 June 1945, each transaction being evidenced by a properly executed WD QMC Form 389, a voucher setting forth the cash sales of Government property for which the collections were made. Each Form 389 was signed by accused signifying that he had received the moneys mentioned therein. These forms are processed for accounting purposes in the same manner as General Accounting Office Forms 1044 (R. 43,44; Pros. Exs. 12 and 13).

Mr. Eli Baer, a lawyer and employee of the legal department of the General Accounting Office, Washington, D.C., testified from the original Accounts Current, General Accounting Office Form 1019, and Schedules of Collections, WD FD Form 52, rendered by accused and filed with the General Accounting Office. Form 52 was approved by the Comptroller General for use by the War Department. The Account Current is the monthly account of a disbursing officer to which are attached, among other supporting vouchers, the daily Schedules of Collections. There were no entries on accused's Schedule of Collections for 26 February 1945, 27 February 1945 or 28 February 1945 showing collections in the amounts of \$601.69 and \$735.22 from Captain Kenneth H. Wood and accused's Account Current for the month of February balanced with his receipts and disbursements for that month as shown by his supporting vouchers (R. 60-63; Pros. Exs. 14A, B and C, 15A, B and C; 16A, B and C, 17). There were no entries on accused's

Schedule of Collections for 30 March 1945, 31 March 1945 or 2 April 1945 showing a collection in the amount of \$386.33 received from Captain Kenneth H. Wood and accused's Account Current for the month of March balanced with his receipts and disbursements for that month as shown by his supporting vouchers (R. 63-65; Pros. Exs. 18,19A,B and C, 20,21). There were no entries on accused's Schedule of Collections for 26 April 1945, 27 April 1945 or 28 April 1945 showing collections in the amounts of \$220.90 and \$549.66 or in the amount of \$770.56 from Captain Kenneth H. Wood and accused's Account Current for the month of April balanced with his receipts and disbursements for that month as shown by his supporting vouchers (R. 66-69; Pros. Exs. 22A and B, 23 A and B, 24,25). There were no entries on accused's Schedule of Collections for 26 May 1945, 28 May 1945 or 29 May 1945 showing a collection in the amount of \$206.40 from First Lieutenant Grover C. Ritchie and accused's Account Current for the month of May balanced with his receipts and disbursements for that month as shown by his supporting vouchers (R. 69-71; Pros. Exs. 26A and B, 27A, B and C, 28, 29A and B). There was no entry on accused's Schedule of Collections for 1 June 1945, 2 June 1945 or 4 June 1945 showing a collection in the amount of \$257.38 from First Lieutenant Grover C. Ritchie (R. 71,72; Pros. Exs. 30,31A and B, 32A, B and C). It was stipulated between the prosecution, defense counsel and the accused that the Schedules of Collections on file in the General Accounting Office pertaining to the account of accused for the period 1 February 1945 through 15 June 1945 do not include any reference to the Forms 1044 and 389 identified as Prosecution's Exhibits 1,3,5,7,9,12 and 13 (R. 77). Prosecution, defense counsel and accused further agreed to stipulate that the signatures appearing on Prosecution's Exhibits 14 to 23 inclusive and 25 to 32 inclusive "appear" to be accused's signature to the best of accused's "knowledge and belief" (R. 82). Prosecution offered in evidence a Schedule of Collections dated 11 August 1945 referring to the account of the accused but not signed by him and purporting to have been prepared under the authority of a board of officers appointed by "Confidential Letter Order, Hq., MIATSC" to close the accounts of accused, which included all the Forms 1044 and 389 identified as Prosecution's Exhibits 1,3,5,7,9,12 and 13. Prosecution also offered in evidence an Account Current for the period 1 June 1945 to 13 August 1945, likewise referring to the account of accused but not signed by him and purporting to have been prepared under the authority of the same board of officers, which corrected the balance as shown on prior Accounts Current filed by accused and showed a "shortage in cash account" of \$2,957.61. This amount, with the exception of an item of \$0.03 not material to the case, is the sum of the collections referred to in Prosecution's Exhibits 1,3,5,7,9,12 and 13. The Schedule of Collections was admitted in evidence without objection by the defense as Prosecution's Exhibit 33 and the Accounts Current was admitted in evidence subject to objection by the defense as Prosecution's Exhibit 34. Both exhibits were identified by Mr. Baer as being part of the official records of the General Accounting Office (R. 73-76).

Evidence for the Defense.

After his rights as a witness were explained to him, accused elected to remain silent, and no evidence was introduced in his behalf (R. 88).

5. Each Specification herein sets out an offense in violation of Section 90, Federal Criminal Code, 18 U.S.C. 176, which statute reads as follows:

"Failure to render accounts. Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years."

The offense denounced by the above statute is not the imputed embezzlement of the money but the failure of the officer or agent of the United States to render his accounts for the same as provided by law. The offense may be complete without any actual embezzlement of the money. It is committed when there is a failure to comply with the requirements of law in rendering his accounts of money received by him. Such an offense, not being included in the definition of embezzlement contained in ^{the} Manual for Courts-Martial, 1928, paragraph 149h, is properly laid under the 96th Article of War within the classification of "crimes or offenses not capital" (CM ETO 1631, Pepper, 5 BR (ETO) 125,141; MCM, 1928, par. 152c; CM NATO 154, Armstrong, 1 BR (NATO-MTO) 97).

Any officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, must render his accounts monthly. Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the General Accounting Office for settlement. The heads of any of the departments may require such other returns or reports from the officer or agent as the public interest may require (31 USC 496). The Comptroller General prescribes the forms, systems, and procedures for administrative appropriation and fund accounting in the several departments and establishments (31 USC 49). The above monthly account is rendered on General Accounting Office Form 1019, "Account Current." Paragraph 2g, AR 35-780, 22 May 1942, in effect when the offenses here charged were committed, required disbursing officers receiving funds to take up and account for the specific amounts thereof on WD FD Form 52, "Schedule of Collections." This form was approved by the Comptroller General and is an itemized daily summary of collections. It is forwarded with the Account Current as a voucher.

The phrase "as provided by law" contained in the above quoted statute prescribing a failure to render accounts includes rules and regulations made and promulgated by heads of departments of the Federal Government

under the authority of 31 U.S.C. 496 heretofore adverted to. Army Regulations are rules and regulations within the purview of the foregoing rule (CM ETO 1631, Pepper, supra and cases therein cited). Thus, the duty to account on Form 52 as required by Army Regulations is a duty provided by law, and a failure to properly perform such duty may be punished as provided in Section 90 of the Federal Criminal Code. A monthly account being required by statute, similar omissions with respect to the Account Current are likewise punishable.

There can be little doubt that accused failed to properly account for the checks forwarded to him by Captain Wood on 26 February, 29 March, 24 April and 25 April 1945, which checks are the subjects of Specifications 1, 2 and 3 and that he likewise failed to account for the cash sums transmitted to him by Lieutenant Ritchie on 26 May and 1 June 1945 which are the subjects of Specifications 4 and 5. When the board of officers appointed to close out accused's account filed the final Schedule of Collections, dated 11 August 1945, and the final Account Current for the period 1 June to 13 August 1945, with the General Accounting Office the above collections appeared thereon and accused's cash account showed a corresponding shortage. These records, being properly identified as part of the files of the General Accounting Office, were properly admitted in evidence under the provisions of section 93 of the Federal Criminal Code, 18 U.S.C. 179, which reads as follows:

"Record evidence of embezzlement. Upon the trial of any indictment against any person for embezzling public money under any provision of sections 173-178 of this title, it shall be sufficient evidence, prima facie, for the purpose of showing a balance against such person, to produce a transcript of the books and proceedings of the General Accounting Office, as required in civil cases, under the provision for the settlement of accounts between the United States and receivers of public money."

However, aside from this final account, the evidence against accused is overwhelming. Nowhere on the daily Schedules of Collections, prepared under his authority, for the period 1 February through 15 June 1945 do the collections above referred to appear and his Accounts Current, through and including the month of May, which was the last month for which he filed such an account, consistently balance with his Schedules of Collection. Accused handled all cash collections personally and was the only person in his office who could check the balance between the Schedule of Collections, made up by his accounting section, and the cash in hand and in the bank. The said schedules were always brought to his attention before being forwarded and became official only through his approval. Each of the checks which made up the amounts listed in Specifications 1, 2 and 3 were deposited

in accused's official bank account and paid in due course and the certificates of deposit were found in the files of his office. The resulting situation was one in which only the accused could explain what had happened to the missing collections. While it is true that no comment can be made upon accused's failure to testify in his own behalf, nevertheless a burden of explanation devolved upon him. As was said by the Board of Review in the Pepper case, cited supra, pages 139,140,

"It is both reasonable and just to require the accused to go forward with proof of facts of which he alone may have knowledge and which may serve to exculpate him from responsibility. In opposition, no injustice is inflicted if he refuses or fails to accept such challenge and remains silent in the face of his inculpatory conduct. *** The instant case is a classical example of the necessity for such practical rule of procedure. Manifestly accused, and accused alone, possessed the knowledge which might have explained the irregular practice in his office and the disappearance of the four separate sums of money. He elected to remain silent when confronted with highly incriminating evidence. He therefore has no cause for complaint if such evidence and legitimate inferences therefrom are resolved against him."

In the case at bar the Federal statute in question makes criminal a failure to properly account for public moneys on the part of the officer receiving same. Once such a failure is shown, it behooves the accused to come forward with proof of extenuating or exculpatory circumstances, if any there be. No such circumstances have been shown here.

Counsel for the defense, at the close of the evidence for the prosecution, moved for findings of not guilty of the Charge and all Specifications, relying on the case of Dimmick v. United States, 121 Fed. 638, on the ground that there was no proof that accused had knowingly and willfully failed to account. In the cited case the accused therein was convicted of a violation of R.S. 5492, 18 U.S.C. 177, which statute made punishable a failure to deposit money of the United States when required so to do by the Secretary of the Treasury or the head of any other proper department. The indictment charged that the accused "knowingly, willfully and feloniously" failed to make deposit as required and the court in its opinion affirming the conviction said that an offense was made out under the statute when a "willful and felonious" failure to comply with the specified requirements of the Secretary of the Treasury or the head of the proper department was shown. Neither this statute nor the statute in question in the instant case, both of which are couched in much the same terms, contain the words "knowingly," "willfully" or "feloniously" and the court in the case cited by the defense counsel may well have used the terms "willful" and "felonious" by way of reference to the proof required by the indictment as drawn, as an interpretation of the words "when required so to do by the Secretary of the

Treasury" in the statute under consideration, or as an indication that the failure to deposit must have been intentional. In this connection it may be observed that the court approved the trial judge's charge to the jury that, in order to hold the accused guilty of a violation of the statute, they must find that his failure to deposit was "intentional and willful".

In the instant case, the law member properly overruled the motion of the defense counsel for findings of not guilty, for even if it be considered to be the law that an intentional and willful failure to account must be proved to sustain a conviction under the statute involved here, such a finding is warranted upon all the legitimate inferences to be drawn from the evidence presented by the prosecution (CM 201537, Fouts, 5 BR 157,241). The pleadings are sufficient to warrant a conviction under the statute, for they are addressed to it by the use of the word "wrongfully" in each specification and follow precisely its wording. In the opinion of the Board of Review, the evidence is amply sufficient to support the court's findings that accused wrongfully failed to render his accounts as provided by law and as alleged in the respective specifications. The Board is also of the opinion that such failure was in violation of section 90 of the Federal Criminal Code and of Article of War 96.

6. War Department records show that accused is thirty-four years of age and is married. He is a high school graduate. From 13 January 1931 to 12 January 1941 accused served as an enlisted man in the Regular Army, the period from 6 June 1935 to 5 June 1938 being spent in the Hawaiian Department. He attained the rank of Staff Sergeant and his character ratings for the term of his enlisted service were "excellent." On 12 January 1941 accused was discharged to accept active duty with the Air Corps as a second lieutenant, Field Artillery Reserve. On 4 December 1941 he was transferred to the Finance Reserve and was promoted to the temporary grade of first lieutenant in the Army of the United States on 1 February 1942. He was promoted to the temporary grade of captain on 25 September 1942 and to the temporary grade of major on 27 November 1943. He served overseas in the Greenland Base Command from 27 February 1942 to 16 April 1943.

7. The court was legally constituted and had jurisdiction over the accused and of 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 of the sentence. Dismissal is authorized upon a conviction of an officer of a violation of the 96th Article of War, and a fine in a sum equal to the sum embezzled is mandatory upon a conviction of a violation of section 90 of the Federal Criminal Code.

Chute D. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Robert E. Stephens, Judge Advocate

(224)

JACK - CM 312533

1st Ind

WD, JAGO, Washington 25, D. C.

OCT 15 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major James B. Moore (O-346397), Finance Department.

2. Upon trial by general court-martial the accused was found guilty of wrongfully failing to render his accounts for certain public moneys as provided by law in violation of Article of War 96. He was sentenced to be dismissed the service, to pay to the United States a fine of \$2,957.58 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 under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

From 20 January 1945 to 13 June 1945 accused was the accountable finance officer for the Miami Air Technical Service Command and, as such, received checks and moneys belonging to the United States in the following amounts and on the following dates:

<u>Date</u>	<u>Checks</u>	<u>Amount</u>
26 February 1945	"	\$601.69
26 February 1945	"	\$735.22
29 March 1945	"	\$386.33
24 April 1945	"	\$220.90
25 April 1945	"	\$549.66
26 May 1945	Cash	\$206.40
1 June 1945	"	\$257.38

The checks were deposited for collection to accused's official credit shortly after their receipt. Accused failed to enter the above items on his daily Schedule of Collections and the amounts thereof were not included on his monthly Account Current. Accused handled all cash collections personally and was the only person in his office who could check the balance between the Schedule of Collections, made up by his accounting section, and the cash in hand and in the bank. The Schedules were brought to his attention before

being forwarded and became official only through his approval. Section 90 of the Federal Criminal Code provides that every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years. The amount of accused's fine is equal to the sum of the amounts shown above.

4. The accused is 34 years of age and is married. He is a high school graduate. From 13 January 1931 to 12 January 1941, accused served as an enlisted man in the Regular Army, the period from 6 June 1935 to 5 June 1938 being spent in the Hawaiian Department. He attained the rank of staff sergeant and his character ratings for the term of his enlisted service were "excellent." On 12 January 1941 accused was discharged to accept active service with the Air Corps as a second lieutenant, Field Artillery Reserve. On 4 December 1941 he was transferred to the Finance Reserve and was promoted to the temporary grade of first lieutenant in the Army of the United States on 1 February 1942. He was promoted to the temporary grade of captain on 28 September 1942 and to the temporary grade of major on 27 November 1943. He served overseas in the Greenland Base Command from 27 February 1942 to 16 April 1943.

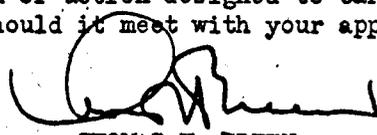
5. Careful consideration has been given to three letters written by accused and protesting his innocence which accompany the record of trial, and letters written in his behalf by the Honorable Claude Pepper, United States Senator from Florida, and the Honorable Allen J. Ellender, United States Senator from Louisiana.

6. According to the Staff Judge Advocate's review, accused's organization was informed on 5 March 1946 by the Riggs National Bank of Washington, D.C. that accused had overdrawn his personal checking account in that bank in the sum of \$889.05, the overdraft occurring when a check in the amount of \$2400 drawn by and payable to another and indorsed for deposit by accused was dishonored by the drawee bank with the notation that the check was a forgery. Accused's offer to repay this overdraft at the rate of \$100 per month was refused by the bank. Accused stated that the check was given to him by the payee thereof in payment of a gambling debt.

7. It appears from the accompanying papers that the Board of Officers appointed to close out accused's account found him indebted to the United States in the sum of \$2963.19 and that this finding was approved by the Secretary of War. This sum apparently includes the amount considered by the court in arriving at the amount of the fine imposed by its sentence. I have been informed by the Office of the Chief of Finance that accused's pay and longevity are being applied to this indebtedness to the extent that, as of 1 October 1946, the amount of \$1,593.73 had been collected by

the United States, leaving an unpaid balance of \$1369.44. Although there are no mitigating circumstances to accused's failure to account as required by law for the Government moneys coming into his possession, which failure in a position of public trust clearly indicates that he is unworthy of his commission, nevertheless, due to his long service and the partial restitution effected by the stoppage of his pay, I recommend that the sentence be confirmed but that the fine and so much of the confinement as is in excess of three years be remitted and that the sentence as thus modified be carried into execution. I also recommend that a United States disciplinary barracks be designated as the place of confinement.

8. Inclosed is a form of action designed to carry into execution the foregoing recommendation should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

- 5 Incls
1. Record of trial
 2. Form of action
 3. Three ltrs fr acc'd
 - (1) to IG 5 May 46
 - (2) to JAG, 20 June 46
 - (3) to IG, 19 July 1946
 4. 2 ltrs fr Sen Ellender,
26 Apr 46 and 26 Mar 46
 5. Ltr fr Sen Pepper, 22 May 46

G.C.M.O. 321, 24 Oct 1946).

WAR DEPARTMENT
 In the Office of The Judge Advocate General
 Washington 25, D. C.

JAGQ - CM 312584

JUN 17 1946

UNITED STATES)

v.)

Private First Class PURSEL)
 COLLEY (34753598), Battery)
 "B", 349th Field Artillery)
 Battalion.)

XV CORPS, UNITED STATES ARMY

Trial by G.C.M., convened at
 Bamberg, Germany, 19 and 20
 February 1946. Dishonorable
 discharge and confinement for
 life. Penitentiary.

REVIEW by the BOARD OF REVIEW
 OLIVER, TREVETHAN and DAVIS, 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 holding, 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 Pursel (NMI) Colley, Battery B, 349th Field Artillery Battalion, did, at Dinkelsbuhl, Germany, on or about November 29, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill on e Josef Filberich, a Hunman [sic] being, by shooting him with a pistol.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, 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, 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 may be stated as follows: On the evening of 29 November 1945 accused was in the room of Sergeant Owens. Owens owned a German pistol which he missed several days afterwards. A pistol was identified by him as the one in question and was admitted into evidence as Prosecution's Exhibit 1 (R 11, 12). Later in the evening of 29 November accused was at the enlisted men's club in the town of Dinkelsbühl. He appeared to have a holster on his side (R 15). During the evening accused asked the bartender for beer and, when informed there was no more, pulled out a pistol and pointed it toward the bartender. The pistol was about the size of and resembled a pistol shown to the witness (bartender) (R 22, 23). Accused left when the club closed about 2240 hours (R 16) and was last seen walking in the direction of headquarters with another soldier (R 25). Around midnight of 29 November the bell was rung at a certain house in Dinkelsbühl. Frau Ozolins, who was awakened by the bell, went to the door and asked in German who was there. A man answered in German that he was looking for a place to sleep and threatened to break in the doors if they were not opened. The shadow of a man could be seen through the glass panels, standing in a vestibule outside the door. Mr. Filberich came out and said "...we won't open the doors...", then there were three shots. Mr. Filberich ran back to his room, fell on the floor and said "...he caught me, after all...". The man outside the door spoke both German and English. (R 28, 29, 30, 31 and 32.) Photographs of the house were admitted into evidence as Prosecution's Exhibit 2 (R 32). They disclose a two-part door, each upper half containing six translucent panels. A round hole appears in one panel, the approximate center of this hole being five feet five inches from the floor (R 53). There were no other holes in the door (R 45) and it was closed and locked during the entire episode. The shots came through the window in the door (R 49, 50). A doctor was called to the house of Mr. Filberich and found him suffering from wounds caused by a small calibre weapon (R 35; Pros. Ex. 3). Another doctor was called to the hospital and observed that Joseph Filberich was suffering from two wounds on the front side of both thighs, just below the groin. Filberich died as a result of the great loss of blood due to this injury (R 36; Pros. Ex. 4). On the morning of 30 November 1946 accused was arrested as a suspect. When seen by the arresting officer his uniform was dirty and in a state of disorder (R 37, 38). He had a cut on the finger of his right hand and states he didn't know how it was received. He said he bled very freely when he was cut (R 41). Accused told another witness that he cut his hand on a can (R 42). Medical examination of accused's hand the next day showed lacerations on back of his right index finger and right fourth finger and a scratch on his right forearm. The cuts were jagged. A moderate swelling over the knuckle indicated an impact at the time of injury (R 59; Pros. Ex. 16).

A bullet was found in a pillow in the house where the shooting occurred (R 44). Three slivers of wood were cut from the fence in front of the railroad station in Dinkelsbühl (R 53, 54). Three blocks of wood were chiseled from the floor of the corridor of the house (R 54). These items together with the trousers worn by accused were submitted to a laboratory and tests showed that

blood was present on all of them and that the blood on the blocks and slivers of wood and on the trousers was Group "O" (R 55; Pros. Ex. 11). Accused's blood is Group "O" (R 59; Pros. Ex. 15); but so is the blood of 45% of the white race (Pros. Ex. 11).

The pistol was found on 17 December 1945 on the east side of the railroad dam in Dinkelsbuhl. It was rusted (R 46, 47, 48). Laboratory tests indicated the presence of nitrates in the pistol and this would signify "that this gun had been fired recently, or that it had not been cleaned since the last time it was fired" (R 51; Pros. Ex. 7). Ballistics tests were performed on the bullet found in the house and on test bullets fired from the pistol; "It was found that they are all identical with respect to calibre, type of ammunition, number, direction of turning and relative widths of land and groove markings. Also the microscopic examination disclosed that all bullets specimen show the markings of a gun bore which was worn to the extent that only one side of the land made a distinct mark on the bullets. In addition, there were found several similarities in the minute striations on all bullets which were placed there by the firing weapon. Although there were no real outstanding similarities in these minute striations, there were definitely no significant dissimilarities." The opinion of the examiner was that the pistol very probably fired the bullet in question (R 59; Pros. Ex. 12).

After accused was warned of his rights (R 60, 61, 65, 66) he signed a statement which reads in part as follows (R 66; Pros. Ex. 17):

*** I arrived at Dinkelsbuhl at the 969 FA Bn on 29 November 1945, at about 1700 hours. *** About nine or nine thirty I started towards town and the club *** I was carrying a .32 caliber automatic pistol in a holster on my belt on the right side. I don't know the kind or make of the pistol. I walked up to the bar and had one beer. When they closed the club I was one of the last to leave. I am not a big drinker, when I take one drink even a small one it goes all over me. Outside the club I asked how to get to the CP and some sergeant, while he was directing me, saw a soldier and asked him to take me to the CP. We walked about to the bridge, where we split. I don't remember which direction I went, but I remember entering the door of a house, and turning on the light in the hallway. I found a doorbell which I remember ringing. I remember talking to a lady, and later hearing a man's voice, but I don't remember what I said. I remember firing my pistol twice but I don't remember whether I fired it through the door. I left the house but I don't remember picking up any empty cartridges. I don't remember the direction I walked, but I do remember falling down the bank onto the railroad tracks. The next thing I recall is seeing the guard beside the fire, where I slept until almost daylight, when I returned to the CP. Before I returned to the CP, I noticed I had lost the pistol, and I guessed it was at the place I had fallen. I went to this spot but I could not find the pistol. It was then I returned to the CP.

"I don't know how I cut my finger but I first noticed it when I felt the blood getting cold on my fingers. I don't know whether this was before or after I fired the pistol. I bleed very easily whenever I am cut, and I bleed a lot. I wiped the blood from my hand on my pants. The pistol which I had that night did not belong to me but belonged to Sgt. Owens."

4. When the prosecution offered the foregoing statement in evidence the defense counsel objected upon the ground that it was not voluntary, and indicated a purpose to put the accused on the stand to testify upon that single question. The trial judge expressly stated that he understood "that the accused is only going to testify as to the statement which is under discussion here". Accused was accordingly sworn and took the stand to testify only to the circumstances pertaining to his being warned under the 24th Article of War before he made the statement (R 61, 62). He testified as to his limited education and stated he didn't remember what Agent Eckels told him before questioning him. Accused didn't remember Eckels telling him that he didn't have to say anything that might be used against him. He was trying to tell Eckels the best he could what he knew, Eckels just told him to tell the truth about what he knew (R 63). On cross-examination accused admitted that Eckels didn't threaten him or offer a reward for signing the statement. In the same cross-examination the following testimony was elicited by the prosecution (R 64):

"Q. Did you tell him the truth?

A. I told him the truth as I knowed it, sir.

Q. And did you later tell Lieutenant Clark that what you had told Agent Eckles was true?

* * *

A. I don't remember talking to him about it, sir.

Q. All right, when you signed this statement, did you do it of your own free will?

A. Yes, sir. I did.

Q. And you told Agent Eckels that the things in it were true?

A. That's right, sir."

After Prosecution's Exhibit 17, the statement of the accused, was received into evidence and read to the court, defense counsel objected to the sentence beginning "...I remember firing my pistol twice..." on the ground that "the accused says that he didn't state that, but that it was written in this way and he signed the paper anyway." This objection was overruled and the law member

stated that defense counsel might endeavor to refute the statement by recalling Agent Eckels or by placing the accused on the stand (R 67). The defense did neither, although the matter was specifically called to the attention of defense counsel by the court after the prosecution rested, and the defense requested that the objection be stricken from the record. And after the accused's rights were explained to him he elected to remain silent (R 68).

It was stipulated that the blood on the rope which was used as a tourniquet for Mr. Filberich was type "O" (R 67).

5. Murder is the unlawful killing of a human being with malice aforethought, without legal justification and excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par. 143a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death, and an intent to kill may be inferred from an act of accused which manifests a reckless disregard for human life.

The evidence in this case establishes that some person stood in the vestibule before the door of deceased's house and, after demanding admittance into the house, fired a weapon through the door when admittance was refused and that deceased was struck and killed by a bullet. A finding that murder was committed was proper.

The bulk of this record consists of evidence adduced by the prosecution to establish that accused was the perpetrator of this murder. This evidence was circumstantial. Among the facts proved by the prosecution which connected the accused to the crime were the following: on the night in question accused was in the town where the murder occurred and had in his possession a pistol which "probably" fired a bullet found in the house after the shooting. Blood found in the corridor of the house corresponded in type to accused's blood. He had cut his hand that night and bleeds freely. Accused remembered going to a house that night, entering a hallway, ringing a doorbell, carrying on a conversation with a woman, hearing a man's voice, and firing a pistol twice although he did not remember whether he fired it through the door. His memory of the occurrence ties into the events described by the occupants of the house. The cumulative effect of the prosecution's evidence leads inescapably to the conclusion that accused was the person who fired the fatal shots.

Several questions raised by the record of trial have caused us some concern. The stipulated testimony contained in Prosecution's Exhibits 7, 11 and 12 describe tests performed to determine, respectively, the presence of nitrates in the pistol, the presence of blood and the types thereof on the trousers, blocks and slivers of wood, and whether the pistol fired the bullet found in the house of the deceased. The stipulations describe these witnesses as members

of the Criminal Investigation Division, but nothing is said as to their qualifications as experts or as to their ability to carry out the described experiments. If these witnesses were not experts, qualified by training and experience to make and interpret the tests and analyses, their testimony would be entitled to no evidentiary weight. In our view, however, we cannot assume, under the circumstances disclosed by this record, that these witnesses were not qualified as experts in their respective fields. The stipulated testimony of each is in technical terms and describes scientific processes which are not ordinarily known to persons untrained and unskilled in such matters, and which are expected to be within the peculiar knowledge of persons who are so trained and skilled. We feel that where the stipulated testimony is of such character as thus to demonstrate patently and conclusively upon its face that the witness possesses expert knowledge of the subject matter, the stipulation that he will so testify constitutes an admission that he is fully qualified to speak as an expert.

Inasmuch as the accused testified only to the circumstances pertaining to his being warned under Article of War 24 before he made the extra-judicial statement, Prosecution's Exhibit 17, the questions asked him on cross-examination by the trial judge advocate must be considered. When the prosecution offers in evidence an extra-judicial statement of an accused, the accused has the right to testify freely concerning the manner in which his confession was procured without being at the same time required to testify against himself. CM 275738, Kidder, 48 BR 145. In a case wherein an accused became a witness on his own behalf for this expressly limited purpose, the prosecution's question - "Was the statement you made true?" - was held to be highly improper and the admission of the confession was held to be an error (CM 282871, Marquez, 11 BR (ETO) 105). The reasoning of the latter case is that:

"The question and the affirmative answer by accused, in view of the fact that the statement was subsequently received in evidence, were substantially a confession of his guilt in open court and constituted an invasion of his privilege to remain silent on the issue of his guilt, which privilege he significantly elected to assert both at the time he appeared as a witness for the limited purpose and later when his rights were explained to him. The failure of the accused to insist upon his privilege and of his counsel to object when the question was asked, do not constitute waiver under the circumstances. The improper question and the answer elicited, may well have influenced the law member in ruling that the confession was voluntary, and the court in finding that accused committed the offense charged ... The testimony of accused that his statement was true may have lead the law member to conclude that any improper methods used to secure the statement in this case did not in fact so influence the mind of the accused as to induce him to make a false confession and that therefore the statement was voluntary. It cannot be said that the testimony of Agent Crovo and accused, independently of the latter's admission of the truth of his statement, contain

legal evidence of such quantity and quality as practically to compel a finding that the statement was voluntarily given (citations)."

It is apparent from these two decisions that the questions asked accused in this case on cross-examination as to the truth of his statement were flagrantly improper. It does appear to us, however, that the other evidence, taken as a whole is compelling that the statement was voluntarily made. But was the accused damaged in other ways? The defense objected to the most material sentence in the statement on the ground that accused had not made it. However, the defense did not recall Agent Eckels or place the accused on the stand, as suggested by the law member, although his attention was called again to these possibilities, and he requested that his objection to the sentence in the statement be stricken from the record. It is impossible for us to speculate as to whether the improper cross-examination had anything to do with the decision of defense counsel or the accused not to take the stand in an effort to refute the objectionable sentence in accused's statement. We can see that the admissions by the accused in his testimony to the effect that his extra-judicial statement was true would cast a considerable cloud of doubt over his testimonial attempts to impeach the statement; but on the other hand, proper cross-examination could elicit testimony from the accused that his statement was true even if he had not previously so admitted. We are of the opinion that the record contains legal evidence of such quantity and quality as practically to compel in the minds of reasonable and conscientious men the findings of guilty and that the improper cross-examination did not injuriously affect the substantial rights of the accused.

6. The charge sheet shows accused is 25½ years of age and was inducted on 14 June 1943 at Ft. Benning, Georgia. He had no prior service.

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

8 46 PM



DISPATCHED
WAR DEPARTMENT
J. A. G. O.

W. Wayne Oliver, Judge Advocate
Robert C. Freethan, Judge Advocate
Walter W. Davis, Judge Advocate

G.C.M.O. 303, 11 Oct 1946)

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

JAGH - CM 312587

10 SEP 1946

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

NINTH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
 Wasserburg, Germany, 5 February
 1946. Dishonorable discharge
 and confinement for life.
 United States Penitentiary.

Private First Class TODOSIO
 J. GARCIA (38583776), Head-
 quarters Company Ninth In-
 fantry Division)

 REVIEW by the BOARD OF REVIEW
 HOTTENSTEIN, SOLF and SCHWAGER, 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 First Class Todosio J. Garcia, Headquarters Company Ninth Infantry Division, did, at or near Gabersee, Bavaria, Germany, on or about 1600 hours, 22 November 1945 commit the crime of sodomy, by feloniously and against the order of nature having carnal connection, (per os) with Sophie Herbert, a German woman.

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

Specification: In that Private First Class Todosio J. Garcia, Headquarters Company Ninth Infantry Division, did, at or near Gabersee, Germany, on or about 1600 hours, 22 November 1945, forcibly and feloniously, against her will, have carnal knowledge of Sophie Herbert.

He pleaded not guilty to, and was found guilty of, each Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor "for 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 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review, except as hereinafter set forth.

4. Some question arises as to the voluntary nature of accused's confession which was introduced into evidence over the defense counsel's objection (R 12, 13, Pros Ex A). As a result of a psychiatric examination of the accused made on 7 January 1946, at the 98th General Hospital, it was determined that he was in a constitutional psychopathic state of inadequate personality and emotional instability with a mental age of approximately eight years (R 12). Before making the statement in question accused was warned of his rights under the 24th Article of War by the Military Police Sergeant, who questioned him (R 9) as follows:

"Q. Of what rights did you warn him?

A. His rights under the 24th AW.

Q. Just what did you tell him?

A. I told him that he could either talk now or he could keep quiet and talk first to his lawyer or whatever officer came down from his company to speak with him.

Q. Did you tell him anything more?

A. I told him it would go easier with him if he would tell the truth in the beginning and not have to correct other statements.

Q. Just what did you say to him?

A. That it would go easier with him if he told the truth in the beginning."

The general rule as to the effect on confessions of statements that it would be better to tell the truth and similar exhortations is given by American Jurisprudence (20 Am. Jur. 438) as follows:

20 Am. Jr. 438 (sec. 508) " * * * There is some difference of opinion as to whether saying to the accused that it would be better for him to tell the truth or to confess constitutes such an inducement as will make a confession obtained in consequence of it involuntary. In England, the tendency of the

courts is to regard advice to tell the truth or to confess or tell all about the crime, when given by a person in authority, as sufficient to render involuntary any resulting confession, and there is some support for this view in the United States /citing Bram v. United States, 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183/when the exhortation to the accused is made by a person in authority, as distinguished from a private person. The prevailing opinion, however, is that telling the accused that it would be better for him to speak or tell the truth does not furnish any inducement, or a sufficient inducement, to render objectionable a confession thereby obtained, unless threats or promises are applied. /Citing Sparf v. United States, 156 U.S. 51, 39 L. Ed. 343, 15 S. Ct. 273./"

More recent examples of the majority rule are:

Fitter v. United States, 258 F. 567 (CCA NY 1919)
Murphy v. United States, 285 F. 801 (CCA Ill. 1923)

The rule as laid down in the Manual is as follows:

"Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strongminded soldier might not be influenced by words and circumstances which might influence an ignorant, dull-minded recruit." MCM, 1928, par. 114a (Underscoring supplied).

The Board, after considering the language employed by the sergeant in warning accused, together with the later warnings he received from two officers, before voluntarily repeating, swearing to and signing his confession, is of the opinion that the statement made by the accused was not induced by hope of benefit or by fear. While the procedure used by the Military Police Sergeant in warning and questioning the accused in this case was not one to be approved, the Board feels that accused's confession was not rendered involuntary as a result thereof.

5. In view of the above and the fact that the testimony submitted, in addition to accused's confession, was compelling, 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.

6. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 278, Criminal Code of the United States (18 USC, 457).

R. Hottelstein, Judge Advocate
William H. Self, Judge Advocate
On Leave, Judge Advocate

JAGK - CM 312642

24 SEP 1946

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

ARMY AIR FORCES TECHNICAL
TRAINING COMMAND

v.)

First Lieutenant CLYDE C.
DICKERSON (O-371340), Corps
of Engineers.)

Trial by G.C.M., convened at Chanute
Field, Illinois, 19 March 1946.
Dismissal.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 85th Article of War.

Specification 1: In that 1st Lt. Clyde C. Dickerson, CE, Squadron C, 3502d AAF Base Unit, was, at the Office of the Post Engineer, Chanute Field, Illinois, on or about 13 February 1946, found drunk while on duty as Assistant Post Engineer.

Specification 2: In that 1st Lt. Clyde C. Dickerson, ***, was, at the Office of the Post Engineer, Chanute Field, Illinois, on or about 14 February 1946, found drunk while on duty as Assistant Post Engineer.

He pleaded not guilty to the Charge and its Specifications but guilty of being "drunk on military reservation" at the time and place alleged in each Specification in violation of Article of War 96. The court found accused guilty of the Specifications and Charge. No evidence of previous convictions was submitted. 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. For the prosecution.

In view of his plea of guilty to being drunk on the Chanute Field Military Reservation on 13 February 1946 and 14 February 1946 in violation of Article of War 96, the discussion of the evidence will be directed more specifically to the question of whether accused was on a duty status

at the times and place alleged. In compliance with proper orders the accused reported for duty at Chanute Field, Illinois, on Monday morning 11 February 1946. He was verbally assigned to the Office of the Post Engineer, but he had not been given any specific duties to perform (R.8). Lieutenant Colonel Royal V. St. John, AC, Post Engineer, gave him the manuals that would orient him with his expected duties (R. 9). One of the Assistant Post Engineers was normally assigned to Property and Supply, one had charge of the Maintenance Section, and one had charge of Operations (R. 8). On Tuesday, 12 February 1946, the accused flew to Truax Field with First Lieutenant John W. Mulheron, AC, one of the Assistant Post Engineers (R. 9). By paragraph 67, Special Orders No. 44, Headquarters, Chanute Field, 13 February 1946, accused was assigned duty as Assistant Post Engineer (R. 7, Pros. Ex. 1). At about 0900 hours on 13 February 1946 accused entered the Post Engineers Office. He did not remove his overcoat although the room was warm. His speech was indistinct, his breath smelled of alcohol, and his motion was unsteady. At about 1100 hours, and at the request of Lieutenant Colonel St. John, Lieutenant Mulheron took accused to his quarters (R. 12-13). On the following morning when Lieutenant Mulheron went to his office he found accused "slouched" over his desk, obviously drunk. Lieutenant Mulheron secured the assistance of Mr. Joseph M. Williams, Administrative Assistant to the Post Engineer, and the two removed accused to his quarters (R. 13,15). Accused had not been assigned a desk and there is no evidence that he performed any military duties (R. 8,16). A clinical report dated 28 February 1946, and made by Captain Kenneth M. Kelley, Jr., MC, Army Air Forces, Regional Station Hospital, Chanute Field, Illinois, was received in evidence. This report shows accused's condition as follows: "4. Diagnosis: Alcoholism, acute" (R. 12, Pros. Ex. 2).

For the defense.

After explanation of his testimonial rights, accused elected to be sworn as a witness in his own behalf. He stated that he had been sent overseas in May 1943, served with the 29th Replacement Battalion in Africa, was transferred to the 3rd Infantry Division for the invasion of Italy, "got a little sick" and was sent back to the 396th Battalion where he was subsequently hospitalized for about a month. He later took part in the invasion of Southern France, and testified that he had about eighteen years total service in the Army, including five years service as an officer and five months of actual combat. Accused states that he had experienced domestic troubles since returning from overseas and had spent about five months in various hospitals (R. 17-20).

4. The record indicates that the defense was based solely on the contention that accused, admittedly drunk on the two occasions mentioned in the specifications, was not "drunk on duty as Assistant Post Engineer" within the meaning of Article of War 85. This is quite novel, in that it presupposes that if an officer's condition was such as to preclude him from performing duties, he could not be drunk on duty. Although under this

Article it is necessary that accused be found drunk while actually on duty, the fact that he became drunk before going on duty, while material in extenuation, is immaterial on the question of guilt (MCM, 1928, par. 145). The evidence shows accused to have been in a duty status on both 13 and 14 February 1946, that he was drunk on both occasions and at the place where he was required to be for duty. It is not necessary to show that he was drunk while actually performing duties. A somewhat similar state of facts was considered by the Board of Review in CM 209988, Cromwell, 9 BR 169, wherein the accused went to his office, sat down in a chair and went to sleep, but was later ordered to leave the premises because it was apparent that he was too drunk to perform his duties. It was held in that case that accused was drunk on duty within the purview of Article of War 85.

5. War Department records show that accused is 36 years of age, married and the father of three children. He graduated from the Fort Dodge, Iowa, High School in 1929 and served as an enlisted man in the Iowa National Guard from 4 January 1928 until 8 June 1936. On 3 July 1936 he enlisted in the National Guard, District of Columbia. He was appointed second lieutenant, Corps of Engineers, National Guard of the United States in the Army of the United States 13 August 1939, and entered upon extended active duty in the Army of the United States 3 February 1941. Accused was appointed first lieutenant, Corps of Engineers, 26 May 1942, with date of rank from 1 February 1942.

6. The court was legally constituted and had jurisdiction over the accused and of 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 of the sentence. Dismissal is mandatory upon conviction of an officer of a violation of Article of War 85 committed in time of war.

Chas. D. Silvers, Judge Advocate

Charles E. McAfee, Judge Advocate

Robert S. Abry, Judge Advocate

(212)

JAGK - CM 312642

1st Ind

SEP 28 1946

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

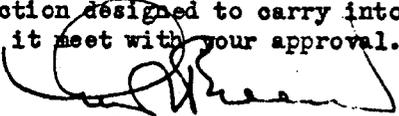
1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Clyde C. Dickerson (O-371340), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of two specifications of being drunk on duty in violation of Article of War 85. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board 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 record shows that after reporting for duty at Chanute Field, Illinois, and being assigned as Assistant Post Engineer, the accused was, on 13-14 February 1946, drunk and unable to perform any duties. Clinical report of the Army Air Forces Regional Hospital, Chanute Field, dated 28 February 1946, shows his condition to be "Alcoholism, Acute." War Department records show this officer to have a prior history of hospitalization for alcoholism. There was forwarded with the record of trial in this case a petition recommending clemency and signed by six members of the general court-martial which heard the case. The reviewing authority also addressed a letter dated 8 April 1946 to the Secretary of War and attached same to the record which recommended that the execution of the sentence be suspended. However, on 4 August 1946, there was forwarded to this office by the Commanding General, Chanute Field, Illinois, a request that in view of the "repeated acts committed by subject officer" the recommendations for clemency be ignored. Attached to this communication are affidavits of five officers and one enlisted man attesting to continued drunkenness and misconduct on the part of accused since his trial. The affidavits indicate that accused lacks the stability of character required of an officer. However, in view of the clemency recommendations made by both the court and the reviewing authority, I recommend that the sentence of dismissal be confirmed but that the execution thereof be suspended during good behavior of the accused.

4. Inclosed is a form of action designed to carry into effect the foregoing recommendation, should it meet with your approval.


THOMAS H. GREEN

Major General
The Judge Advocate General

4 Incls

1. Record of trial

2. Form of action

3. Ltr fr CG, Chanute Field
dtd 31 July 46, w/8 incls

4. Ltr fr CG, Scott Fld, 5 July 46, w/2 incls

4 (G.C.M.O. 312, 18 Oct 1946).

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

SPJGN-CM 312655

UNITED STATES)

v.)

Private WILLIAM GASTON
 (34384363), Attached Un-
 assigned to MP & PG De-
 tachment, 1201st SCU, Fort
 Jay, New York.)

SECOND SERVICE COMMAND
 ARMY SERVICE FORCES)

Trial by G.C.M., convened at
 Fort Jay, New York, 15 March
 1946. Dishonorable discharge
 (suspended) and confinement for
 five (5) years. Disciplinary
 Barracks.)

OPINION of the BOARD OF REVIEW
 BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William Gaston, attached unassigned to MP&PG Detachment, 1201st SCU, Fort Jay, N.Y., then a member of 445th Port Co., Fox Hills, SI, N.Y., did, at Fox Hills, Staten Island, N.Y., on or about 4 July 1945, desert the Service of the United States, and did remain absent in desertion until he was apprehended at New York, N.Y., on or about 30 January 1946.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct,

for five years. The reviewing authority approved the sentence but suspended the dishonorable discharge imposed until the soldier's release from confinement, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 121, Headquarters Second Service Command, Governors Island, New York, 6 April 1946.

3. The accused was tried on 15 March 1946 by a court appointed by paragraph 21, Special Orders No. 43, 20 February 1946, Headquarters Second Service Command, hereinafter referred to as the original order. Lieutenant Colonel Ralph A. Visco was designated as a member of the court by that order. By paragraph 21, Special Orders No. 58, 11 March 1946, same headquarters, hereinafter referred to as the amending order, Captain Charles L. Palmer was detailed "as member of General Court-Martial aptd to meet at Ft. Jay, NY by Par 30 SO 8 this Hq 10 Jan 46 vice LT. COL. RALPH A. VISCO 02058361 ORD DEPT reld." The original order contained the conventional statement that any unarraigned cases referred to the Trial Judge Advocate of the General Court-Martial appointed by paragraph 30, Special Orders No. 8 would be brought to trial before the court appointed by the original order. Captain Palmer sat on the court which tried accused and participated in all the proceedings at accused's trial and the record does not list Lieutenant Colonel Visco as either present or absent. By paragraph 14, Special Orders No. 80, 5 April 1946, same headquarters, hereinafter referred to as the correcting order, the amending order was corrected so as to constitute Captain Palmer a member of the court appointed by the original order - the court that tried accused - vice Lieutenant Colonel Visco, relieved.

It is clear that Captain Palmer sat as a member of the court which tried accused although, at the time, there were no competent orders in existence constituting him a member of that court. Unless, then, retroactive effect can be given to the correcting order it follows that the court was without jurisdiction to try and sentence accused. CM 302975, Macklin; CM 265840, Brown, 43 BR 97; CM 239497, Goggan, 49 BR 289; CM 131672, par. 365(1) Dig. Ops. JAG, 1912-40.

It is noted at the outset that the amending order is not meaningless. It did appoint Captain Palmer to a court and there was such a court in existence and it is not until 5 April 1946, the date of the issuance of the correcting order, that there is any suggestion that there was a mistake made in the designation of the court on which he was to sit. However that may be, the situation is analogous to that existing in CM 238607, Mashburn, 24 BR 307, where the Board said (p. 308),

*Where the proceedings are invalid for the reasons

stated above, [officer not detailed sat as member] they cannot be validated retroactively by orders issued in amendment of the order or orders detailing the court. Such orders are, regardless of their form, effective only from the date of promulgation."

To paraphrase the language used in CM 218157, Beadle, 11 BR 381, the correcting order failed entirely to give Captain Palmer the status nunc pro tunc of a detailed member of the court appointed by the original order so that he was authorized to sit as a member of that court in the trial of this case on 15 March 1946. It follows that the court was without jurisdiction to try and sentence accused and the proceedings were void ab initio. Mashburn, supra; Beadle, supra.

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

Wilmot T. Baughn, Judge Advocate.

Robert J. Cluney, Judge Advocate.

Geneadon, Judge Advocate.

(246)

SPJGN-CM 312655 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

MAY 21 1946

1. Herewith transmitted for your action under Article of War 50¹/₂, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private William Gaston (34384363), Attached Unassigned to MP & PG Detachment, 1201st SCU, Fort Jay, New York.

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 and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 241, 30 July 1946)•

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGQ - CM 312657

MAY 23 1946

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

THIRTEENTH AIR FORCE

v.)

Trial by G.C.M., convened at Fort Statesburg, APO 719, 7 and 8 February 1946. Sentence as to each accused: Dishonorable discharge and confinement for life. Penitentiary, McNeil Island, Washington.

Private First Class GEORGE W. RECK (36691185), 403rd Bombardment Squadron (H), 43rd Bombardment Group (H), Fifth Air Force, and Private MASON J. MONTGOMERY (39859996), Headquarters Squadron, Fifth Air Force.)

HOLDING of the BOARD OF REVIEW
OLIVER, CARROLL and DAVIS, Judge Advocates

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

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

Both Accused:

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

Specification: In that Private First Class George W. Reck, and Private Mason J. Montgomery, both of Fifth Air Force, acting jointly and in pursuance of a common intent, did in conjunction with one Exequiel Segovia, at APO 75, on or about 26 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gene Calvo, a human being, by stabbing him with a knife.

Reck:

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

Specification: In that Private First Class George W. Reck, Fifth Air Force, did, in conjunction with Private Robert F. Miller, Fifth Air Force, at Quezon City, Manila, Luzon, on or about 10 August 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Sylvio R. Viola about 17,560 pesos lawful money of the Philippine Commonwealth, value about \$8,780.00, about 100 pieces of assorted jewelry, including one large diamond, 2 rings set with diamonds and pearls, and 6 diamond stickpins, value about \$40,000, and cloth, shirts, and socks, value about \$1,000.00, the property of Sylvio R. Viola, of the total value of about \$49,780.00.

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

Specification: In that Private First Class George W. Reck, Fifth Air Force, having been duly placed in confinement in Fifth Air Force Stockade on or about 12 August 1945, did, at Okinawa, Ryukyus Islands, on or about 27 September 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private First Class George W. Reck, did, at APO 710, on or about 27 September 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Manila, Philippine Islands, on or about 27 November 1945.

Montgomery:

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

Specification: In that Private Mason J. Montgomery, Headquarters Squadron, Fifth Air Force, having been duly placed in confinement in Fifth Air Force stockade on or about 23 September 1945, did, at Okinawa, Ryukyus Islands, on or about 27 September 1945 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: Nolle prosequi.

Specification 2: In that Private Mason J. Montgomery, Headquarters Squadron, Fifth Air Force, did, at APO 710, on or about 27 September 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Manila, Philippine Islands, on or about 27 November 1945.

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

Specification: Nolle prosequi.

The accused Reck pleaded not guilty to and was found guilty of Charges I, II, III and IV and the Specifications thereunder. The court made immaterial exceptions and substitutions with respect to the values alleged in the Specification of Charge II. Accused Montgomery pleaded not guilty and was found guilty of Charges I, V and VI and the Specifications thereunder. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, 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.a. Charge I (Murder). The evidence for the prosecution shows that on the evening of 25 November 1945, the accused Montgomery and Reck, and Gene Calvo, the deceased, all dressed in United States Army officers uniforms, visited a number of bars in Manila where they had several drinks. At about 11:30 p.m. they were joined by Exequiel Segovia and others. After consuming more liquor the four left the Old Mansion Club at closing time accompanied by Vivencia Alicante, Elinio Flores, and a girl employee of the establishment. Outside the club an argument and fight developed between Segovia and the deceased and the latter was knocked to the ground. Accused Reck appeared to be mad at Calvo but did not participate in the fight. The party left the night club in two jeeps driven by Reck and Montgomery (R 8, 10). During the ride accused Reck asked deceased "Where is the 500 pesos you owe me?" Deceased replied that he had no money and Reck said, "This is one time you're going to pay." He then stopped the jeep and ordered deceased to get out. Both accused went into a nearby rice paddy with Segovia and deceased. Alicante, who remained in the jeep, heard noises like "socking-hitting" coming from the rice paddy. Montgomery and Reck returned to the jeep and were joined by Segovia about two minutes later (R 10). Segovia held a knife in his hand, his clothes were bloody, and he said to Alicante "You do not know anything" (R 10, 11). Some military policemen stopped by the parked jeeps, but after a short conversation with Montgomery they drove on (R 9, 11). On the morning of 26 November, the body of deceased was found in the rice paddy about 60 feet from the highway (R 16). Photographs of deceased (R 17, 20, 36, 37; Pros. Exs. 1, 2, 3, 14, 15 and 16) were received in evidence. Three photographs (Pros. Exs. 1, 2 and 16) showed numerous stab wounds in this body. There were thirty-two stab wounds (R 38).

In a voluntary statement (R 22; Pros. Ex. 9) made on 30 November 1945 accused Reck gave his account of the events on the evening of the killing as follows:

"When Montgomery and I reached the courtyard in front of the Old Mansion, I saw that Segovia and Calvo had been in an argument. Calvo had the last bottle of whiskey that I had purchased in his hand and looked like he was going to hit Segovia with it. I took the bottle away from him telling him at the same time, 'Give me my whiskey before you break it.'

"I then took the girl and Calvo in my jeep and Monty took Segovia, Alcanto, 'Joey', 'Pops', and Flores in his jeep. Monty followed me to the girl's house where I turned off my motor but not my lights, and went into the house of the girl. After ten minutes I came out of the house. Segovia was in the back seat of my jeep with Calvo. Alcanto was outside the jeep. I noticed that Calvo was bleeding about the face. I walked around to the rear of the jeep and asked what the trouble was. Calvo asked me to take him home, and not have him with Segovia and Alcanto.

"Segovia at this point told me to get in the jeep and drive. I drove down the road, came to a bridge and took a road to right. This road was a dead end so when I got half way up it I stopped and said, 'Let's let Calvo out here'. Then Segovia pulled a gun out and said, 'No! turn around and get out here.' I drove over the bridge and out Sta Mesa.

"Out Sta Mesa a ways, Segovia told me to stop the jeep. This I did and Alcanto and Segovia told Calvo to get out of the jeep. Calvo didn't want to get out of the jeep but Segovia and Alcanto pulled him out. Alcanto either searched Calvo while we were riding or just after they pulled Calvo out of the jeep because when I climbed out of my side and walked around the jeep to where Alcanto, Segovia and Calvo stood, Alcanto already had some things in his hand that he had taken from the pockets of Calvo.

"Segovia and Alicanto took Calvo down the slope and into the rice paddy. Monty and I also, walked down into the rice paddy to see what they were going to do with Calvo. As we approached, Calvo was knocked down. I think Alicanto was the one that knocked him down. He went down head first, face in mud. After Calvo was knocked down Alicanto talked to Segovia in Tagalog and left us and went up on the bank of the jeep.

"I took my foot and turned him over so that I could see if he was hurt bad or not. Monty knelt down beside him to see if he was OK and at that time Segovia drew his gun again. I told to put the gun away. He then put it in his belt and Monty and I turned around and walked away.

"As Monty and I were climbing the bank toward the jeeps I heard a groan that came from the direction of Segovia and Calvo.

"I turned my head along enough to see Segovia hit Calvo about five times with his closed fist. I continued on to the jeep and sat down behind the wheel. I said something to Monty like, 'Let's go' and Monty went over to his jeep. At this time an MP Jeep pulled up beside Monty's jeep and asked what the trouble was. I didn't hear what was said and so when the MPs left I asked Monty what they wanted. He told me that he said that he had motor trouble.

"After the MPs left Segovia came up out of the rice paddy without Calvo. He was wiping his hands off on his handkerchief. Segovia rode in the front seat and Alicanto rode in back of my jeep.

"Monty had Flores, 'Pop' Joey in his jeep. Flores was left off at P. Noval Street and 'Pops' was let off a couple of blocks from Axcarrage on Rizal Avenue. The rest of us went to Segovia's on Rizal Avenue.

"At Segovia's house I took off my socks, Segovia changed his clothes and he burnt some papers of Calvo."

The accused Montgomery also made a voluntary statement (R 29; Pros. Ex. 10) on 29 November 1945 in which he related that:

"* * * We then proceeded to the Old Mansion arriving there at about 2330. In the party at that time were RECK, SEGOVIA, FLORES, (floor manager of the Windsor Club), Pop, (an employee of the Windsor), CALVO and myself. We bought three quarts of whiskey and some food and when the place closed up, the party moved downstairs. I was the last one downstairs, and when I got there, I looked out in front of the club and saw SEGOVIA fighting with CALVO. I saw SEGOVIA knock CALVO down, and also saw SEGOVIA pull a small gun from his clothing. I think the gun was a .32 cal. revolver with a shiny pearl handle. I heard SEGOVIA make the statement, 'Spanish Mestiza no good; I'm going to kill him'. Quite a few people were present who witnessed this squabble, including a drunk American Lieutenant who was arguing with RECK. I have not seen the American Lieutenant neither before nor since. I intervened in the squabble and made SEGOVIA put the gun back in his pocket. All our aforementioned party were present during the fight outside of the Old Mansion. During the aforementioned fight, SEGOVIA was speaking most of the time in Tagalog, but I did hear him mentioning something about money. In the meantime, RECK had met a girl at the Old Mansion and decided to take her to her home. SEGOVIA and ALICANTE wanted to take a jeep and take CALVO home, but I suspected that they were going to harm him, so I opposed the idea. However, RECK told them they could ride in his jeep and that he wouldn't let anything happen to CALVO.

"Two jeeps then left the Old Mansion and in RECK'S jeep were RECK and his girl in the front, SEGOVIA, ALICANTE, and CALVO in the rear. In my jeep beside myself were FLORES, POP, Compadre (alias JOEY, another Filipino we met for the first time upon leaving the club). We drove out Sta Mesa and as I recall the girl lived in a house on Sta Mesa Blvd. RECK went inside with the girl, and he was already inside when my jeep pulled up in front of the other jeep. As I arrived there, I noticed that CALVO was on the outside of the jeep talking to the two who were still inside, and they began to hit him. ALICANTE was holding CALVO by the shirt and was pulling him between the jeep top braces. When I saw this, I walked up to the jeep and told ALICANTE not to hit him, and I believe both SEGOVIA and ALICANTE said, 'He is no good'. SEGOVIA was in the jeep when I first walked up, but then after I stopped ALICANTE from hitting CALVO, SEGOVIA got out of the jeep and started pushing CALVO around. By this time, several Filipinos had come up and were standing around watching. SEGOVIA was holding his right hip pocket as though he were holding the butt of the gun he had back at the Old Mansion. RECK then came out of the girl's house and was able to stop SEGOVIA from pushing CALVO around. RECK then talked SEGOVIA and CALVO into getting into his jeep, and told me to follow them. I volunteered to take CALVO home in my jeep but CALVO himself said that he would ride in RECK'S jeep.

"I followed RECK'S jeep away from the girl's house and some place along the road I passed his jeep. I drove quite a distance ahead of RECK and after driving over the Sta Mesa bridge some distance, I noticed that I had lost RECK, so I turned around and started back to look for him. Still riding with me were FLORES, Compadre, and Pops. When RECK drove away from the girl's house, he had SEGOVIA, CALVO and ALICANTE with him.

"After turning around on Sta Mesa Blvd, headed toward Manila, I noticed RECK'S jeep parked on the right hand side of the road heading away from Manila. I again made a V turn, pulled up in front of RECK'S jeep. I noticed that the surrounding country consistin of wide open fields to the right and did not notice any houses in the vicinity. I believe that I was the only one in my jeep that got out. I walked back to RECK'S jeep, saw RECK standing near the rear of his jeep. I believe ALICANTE was either sitting in the jeep or standing beside him, for I do remember seeing him. I asked RECK where CALVO was. RECK replied, 'He is down there with SEGOVIA.' RECK pointed down off the boulevard into a rice field. RECK added that SEGOVIA had told the others to stay where they were. I looked over to where RECK had pointed

and saw CALVO and SEGOVIA standing about fifty feet from us. I asked RECK to go down there with me after RECK said something about SEGOVIA beating CALVO up. RECK and I then walked down off the boulevard into the field where CALVO and SEGOVIA were standing.

"When we got down to CALVO and SEGOVIA, I noticed that CALVO'S pockets were turned inside out. Both were standing up and facing each other, and SEGOVIA had his gun out in his right hand and pointed at CALVO. I knew that CALVO had received about 500 pesos from RECK earlier in the day and that he should have had most of it left. CALVO had received that money as a result of black market transaction involving some Army parachutes that RECK had bought from him, and from which RECK and I intended to resell in the black market. I then said to CALVO, 'What goes on; where is your money?' CALVO started to say something to me but SEGOVIA hit him in the face. CALVO fell to the ground, and seemed to be yelling or swearing in Tagalog. As CALVO lay on the ground, he was grunting and moaning. SEGOVIA then pulled a gun, which he had just put back in his pocket a minute before, -pointed the gun at CALVO. I rushed over and grabbed SEGOVIA, and both RECK and I told him to put his gun away. He turned around and warned me that if I didn't get away, I also would get hurt. However, he did put his gun in his belt. He then walked over to the other side of CALVO, and said something in Tagalog, but I did hear the words 'Spanish mestiza' and 'squealer'. CALVO then turned to me and told me not to get involved. I saw SEGOVIA kick CALVO in the head as he used the word 'squealer' again, and I said 'Jesus Christ, don't do that. Let him alone.' He then pulled the gun a third time and pointed it at CALVO, but RECK talked him into putting it back into his belt. SEGOVIA then told RECK and me to go back to the jeep, and I said to RECK, 'Let's get the hell out of here.' RECK said, 'Let's go.' As I turned I saw him pull something out from his right side. I looked closely and say that it was a knife wrapped up in a handkerchief. I would say that the knife had a four inch blade but I couldn't tell at the time what kind of knife it was. SEGOVIA then bent over, and I saw him raise the knife in his right hand and plunge it downward and into CALVO'S chest. RECK and I at that time were about fifteen feet away. I saw him raise the knife again and repeat the same action. RECK and I ran back to the jeep. In about three minutes SEGOVIA joined us at the jeep, and said to us, 'Keep your mouth shut or you will get the same thing.' He also insisted that we take him to his wife's house off Rizal Avenue. At the time the crime occurred, RECK, CALVO, SEGOVIA and I were the only ones in the immediate vicinity. By the time we got back to the jeeps, the other passengers were all nearby the vehicles.

"As we started back to town, I had the same three passengers in my jeep that I had on the way out. ALICANTE and SEGOVIA rode with RECK. I dropped FLORES off at his home, near the railroad

crossing on Rizal. I then drove POPS to his home. I don't know the exact location of his home but it was on this side of the river. After I let him out, the other jeep which had been following me, SEGOVIA got out and insisted on riding with me. I allowed him to do so, and he told JOEY to get into Reck's jeep, with RECK AND ALICANTE. RECK then hollered over from his jeep on the other side of the street, and said to SEGOVIA, 'You'd better let Monty alone. He didn't do nothing.' SEGOVIA told RECK that I would be all right, but then just as we started off he told me that I had better keep my mouth shut or I would find out what would happen. We then went to SEGOVIA'S house somewhere off Rizal Ave. His wife was there when we arrived, but she didn't say anything. Here SEGOVIA changed his clothes. He took off his white checkered shirts and light colored trousers and told his wife to take care of them. The shirt was drenched with blood. I then saw him wash an ordinary scout knife off in the sink, and he made a motion for my benefit by slashing the knife in the direction of his throat, and smiled at me. It conveyed to me what he had said earlier - that I had better keep my mouth shut or dire consequences might result."

b. Charge II (Robbery). The evidence is uncontradicted that accused Reck, in conjunction with others, robbed Silvio R. Viola as alleged.

c. Charges III, IV, V and VI. The evidence shows and each accused admits that he was duly confined and escaped from confinement at Okinawa on or about 27 September 1945; that they represented themselves to be commissioned officers; and that they earned their livelihood by gambling. These factors considered with the length of absence, terminated by apprehension in Manila, provided sufficient basis upon which the court could determine that each accused intended to remain permanently absent from the service (CM 234521, Culberson, 21 BR 29; CM 270939, O'Gara, 45 BR 371).

4. Each accused, after explanation of his rights as a witness, elected to remain silent (R 39). No evidence was introduced by the defense.

5.a. Charge I and Specification. Since the evidence shows that the wounds causing Calvo's death were delivered not by either of the accused but by Segovia, the question presented is whether accused may be held as principals.

The actions of the accused in transporting Segovia away from the scene of the crime, and in talking to the military police without revealing the crime may be eliminated from consideration. Such actions do not make accused principals but may have a bearing as to whether they are accessories after the fact. (People v. Galbo (1916), 218 N. Y. 283, 112 N. E. 1041.) The Federal Statute making aiders and abettors liable as principals (18 U.S.C.A. 550) did not

abolish the distinction between such offenders and accessories after the fact (United States v. Johnson (C.C.A. 7th, 1941), 123 F (2d) 111, rev. on other grounds, 319 U. S. 503, 87 L. Ed. 1546; Morel v. United States (C.C.A. 6th, 1942), 127 F (2d) 871).

The Statute (18 U.S.C.A. 550) uses the words: "aids, abets, counsels, commands, induces or procures". It appears from the authorities that the necessary elements are:

- (1). Preconcert of action or prior arrangement with the principal actor, plus presence at the crime; or
- (2). Overt act aiding or encouraging the crime done with intent to aid or encourage (CM ETO 10860, Smith and Toll).

The evidence establishes that the accused were present at the crime. There is not, however, any substantial evidence of a preconcert of action or prior arrangement, as there is nothing in the evidence from which valid inferences of preconcert may be drawn. The presence of other persons in the party, some of whom were strangers to the accused, goes far to refute any inference of prearrangement which might be drawn from the fact that accused transported Segovia and Calvo to the scene of the latter's death. The argument between Reck and deceased in the jeep was personal to Reck; Segovia and Montgomery had no interest in the subject matter thereof. Nor can it be said that the accused committed any overt act aiding or encouraging the crime. Although they transported Calvo and his killer, followed or accompanied them from the jeeps to the actual scene, and accused Reck told Calvo to get out of the jeep, this is not sufficient to show an intent on the part of either accused to aid or encourage Segovia in the commission of the offense. Knowledge is prerequisite to intent. The evidence not only fails to charge accused with knowledge of Segovia's purpose but indicates the contrary. If the accused knew of Segovia's intent to murder Calvo it is highly improbable that they would take a group of witnesses with them.

Possibly Segovia's testimony would have supplied the missing elements but he refused to testify. The validity of the record must rest on the evidence adduced and the missing elements cannot be supplied by straining the facts unreasonably.

The substance of the prosecution's case merely shows the presence of the accused at the scene of the crime. This is insufficient to support the findings of guilty (CM 238485, Rideau, 24 BR 263; 16 C. J., sec. 121, p. 132; 14 Am. Jur., sec. 89, p. 829).

While the foregoing conclusion renders consideration of other elements of proof as to this Charge and Specification unnecessary, the Board of Review wishes to point out the unsatisfactory nature of the evidence as to the cause

of death. In every homicide the proof must show that the life of a human being has been taken and that the death was occasioned by the criminal act or agency of another (26 Am. Jur., 475). No expert testimony was offered with respect to the cause of Calvo's death. The non-expert opinion of the photographer who took photographs of the body and of the scene was improperly received.

"A lay witness who has viewed the body and examined the wound or wounds may give his opinion as to the cause of death, and an ordinary witness may testify as to the cause of death where it is within his personal knowledge. So, where the opinions of experts are not available, nonexperts, after describing the wounds, may state whether, in their opinion, they caused the death." (40 C.J.S. 1204, emphasis supplied.)

There is no evidence that the witness "examined the wounds"; he did not in any way "describe" the wounds; his testimony goes no further than to show that he looked at the body and the wounds, counted them and indicated them on the photographs introduced as exhibits (R 38); and there is no evidence that expert opinion was not available. The remaining competent evidence was circumstantial. This evidence showed that Calvo, the deceased, was seen alive late in the night of 25 November 1945 in the presence of the accused and Segovia; that the three escorted him to a deserted spot near the Santa Mesa Boulevard; that an altercation developed between the deceased and Segovia and Segovia was seen to raise a knife and plunge it into deceased's chest; and that the next morning deceased's dead body was found in apparently the same location. The body contained thirty-two wounds and photographs showing the wounds were before the court.

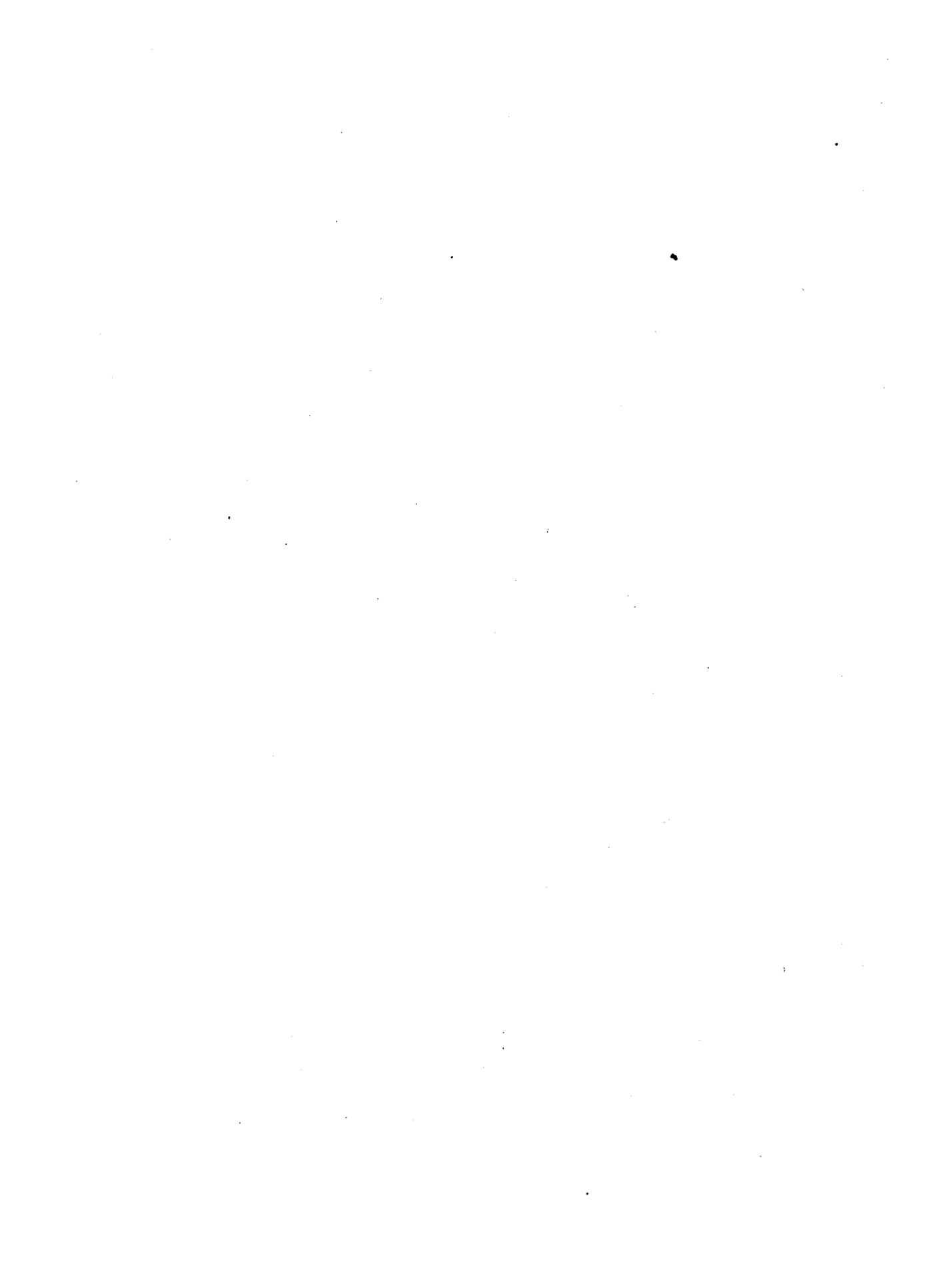
While it is true that the cause of death may be proved by circumstantial evidence or by non-expert opinion, the circumstantial evidence, as with any other fact sought to be so established, must be strong and compelling; and non-expert opinion should be admitted only upon a showing of compliance with the prerequisites therefor set out in the above quotation. Both circumstantial evidence and non-expert testimony should be considered with caution, and the prosecution should not rely upon such proof to the exclusion of medical testimony unless medical testimony is unavailable. The cause of death is one of the basic elements of the corpus delicti in a prosecution for murder and should not, in fairness to the accused and the court, be left to inference and conjecture.

b. Charges II, III, IV, V and VI and Specifications. Competent evidence in the record sustains the findings of guilty of these Charges and Specifications.

6. The charge sheet shows accused Reck is approximately 24 years of age and was inducted on 11 September 1943 at Chicago, Illinois. He had no prior service. The charge sheet shows accused Montgomery is approximately 21 years of age and was inducted on 22 May 1943 at Phoenix, Arizona. He had no prior service.

7. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as noted above, no errors injuriously affecting the 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 is legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved by the reviewing authority and the sentences. Confinement in the penitentiary is authorized by Article of War 42 for the offenses of desertion and robbery, the latter being an offense of a civil nature punishable by penitentiary confinement for more than one year by Title 18, paragraph 163, of the United States Criminal Code.

H. Wayne Oliver, Judge Advocate
Donald R. Carroll, Judge Advocate
Walter W. Davis, Judge Advocate



WAR DEPARTMENT
 In the Office of The Judge Advocate General
 Washington 25, D. C.

JAGQ - CM 312685

JUN 17 1946

UNITED STATES)

FIRST AIR FORCE)

v.)

Trial by G.C.M., convened at
 Seymour Johnson Field, North
 Carolina, 11 March 1946. Dis-
 missal and total forfeitures.

Second Lieutenant LOUIS TORZSAS)
 (O-787214), Air Corps, D Squadron,)
 123d Army Air Forces Base Unit)
 (Central Assembly Station), Sey-)
 mour Johnson Field, North Carolina.)

OPINION of the BOARD OF REVIEW
 OLIVER, TREVETHAN and DAVIS, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the above-named officer 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 Louis Torzsas, Air Corps, D Squadron, 123d Army Air Forces Base Unit (Central Assembly Station), did, at New York, New York, on or about 31 December 1945, present for approval and payment, a claim against the United States, by presenting to Colonel C. K. McAlister, Finance Department, New York, New York, an officer of the United States duly authorized to approve and pay such claims, a pay and allowance account voucher, in the amount of \$147.95 for the full month of December 1945, which claim was false and fraudulent in that Second Lieutenant Louis Torzsas had on 17 December 1945, at Seymour Johnson Field, North Carolina, received a partial payment against December 1945, pay and allowances in the sum of \$60.00 and was not, therefore, entitled to the sum of \$147.95 and which claim was then known by the said Second Lieutenant Louis Torzsas to be false and fraudulent.

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

Specification 1: (Findings of not guilty.)

Specification 2: In that Second Lieutenant Louis Torzsas, Air Corps, D Squadron, 123d Army Air Forces Base Unit (Central Assembly Station), did, at Seymour Johnson Field, North Carolina, on or about 1 November 1945, with intent to defraud, wrongfully and unlawfully make and utter to Luther R. Arbuckle, a certain check, in words and figures as follows, to wit:

No. _____ Nov. 1 1945

Clifton Nat'l Bank
Clifton, New Jersey

Pay to the order of _____ Cash

Fifty _____ 00/00 Dollars

oo
\$50 oo _____ /s/ Louis Torzsas
2nd Lt, AC O-787214

B & P No. C.760 MADE IN U.S.A.

and by means thereof, did fraudulently obtain from Luther R. Arbuckle \$50.00, he, the said Second Lieutenant Louis Torzsas, then well knowing that he did not have and not intending that he should have any account with the Clifton National Bank, Clifton, New Jersey, for the payment of said check.

Specification 3: In that Second Lieutenant Louis Torzsas, Air Corps, D Squadron, 123d Army Air Forces Base Unit (Central Assembly Station), did, at Seymour Johnson Field, North Carolina, on or about 2 November 1945, with intent to defraud, wrongfully and unlawfully make and utter to Luther R. Arbuckle, a certain check, in words and figures as follows, to wit:

No. _____ Nov. 2 1945

Clifton Nat'l Bank
Clifton, New Jersey

Pay to the order of _____ Cash

Fifty _____ 00/00 Dollars

oo
\$50 oo _____ /s/ Louis Torzsas
O-787214

B & P No. C.760 MADE IN U.S.A.

and by means thereof, did fraudulently obtain from Luther R. Arbuckle \$50.00, he, the said Second Lieutenant Louis Torzsas, then well knowing that he did not have and not intending that he should have any account with the Clifton National Bank, Clifton, New Jersey, for the payment of said check.

Specification 4: (Findings of not guilty.)

Accused pleaded not guilty to all Charges and Specifications, was found guilty of Charge I and its Specification, was found not guilty of Specifications 1 and 4 of Charge II, guilty of Specifications 2 and 3 of Charge II except the words "with intent to defraud", "fraudulently", "well knowing that he" and "not intending that he should have" of which words he was found not guilty, and was found not guilty of Charge II but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3.a. Charge I and Specification. The prosecution offered in evidence a stipulation signed by the prosecution, defense counsel and the accused to the admission of which defense counsel objected on the grounds that it practically constituted a confession. Notwithstanding the objection, the stipulation, which was worded as follows, was admitted in evidence (R 8, Pros. Ex. 1):

"It is hereby stipulated and agreed by and between the prosecution, the defense and the accused as follows:

"That the accused did on 31 December 1945, present for approval and payment to Colonel C. K. McAllister, Finance Department, New York, New York, an officer of the United States duly authorized to approve and pay such claims, a Pay and Allowance Voucher in the amount of \$147.95, the same being for full pay less debits for the month of December 1945."

Prosecution's Exhibit 2 was admitted in evidence after Second Lieutenant George A. Finnan, Jr., Deputy Finance Officer to Captain G. E. Brenneman, Seymour Johnson Field, had identified it as a partial payment voucher paid on 17 December 1945 to accused in the amount of \$60 (R 8, 9; Pros. Ex. 2). On the face of the voucher appeared the following stamp impressed and initialled matter, viz:

"Audited by: FM
Identified by: G
Paid by: G
Approved by: B"

The initials following the colons on the several lines of this matter indicated that one Gaither, cashier in the Finance Office, was satisfied with accused's

identification and paid him, and that Captain Brenneman checked the signature on the voucher and assured himself that it was payable. The use of this stamp and initial method of notation was in accordance with verbal instructions from Colonel Wilson, at one time Staff Finance Officer for First Air Force (R 8, 9). Prosecution's Exhibit 10, a Pay and Allowance Account for the month of December 1945, paid by Colonel C. K. McAlister, Finance Department, New York City, shows that accused was paid the balance of \$147.95 claimed thereon for the month of December, after deducting total debits of \$185 and \$6.70 from total credits claimed of \$339.65 (R 32, 39, Pros. Ex. 10).

On 11 January 1946, Colonel Ivan W. McElroy, Commanding Officer of Seymour Johnson Field, interviewed accused and the latter, after he had been warned of his rights under Article of War 24, admitted that he had drawn a partial payment in December and that he had also drawn full pay for the month of December at another station (R 21).

b. Charge II, Specifications 2 and 3. Major Albert R. Lederer, the investigating officer in these proceedings, interviewed accused and after warning him of his rights exhibited to him photostats of two checks each of which bore accused's name as maker and was drawn on the Clifton National Bank, Clifton, New Jersey, payable to cash in the amount of \$50, one check being dated 1 November 1945 and the other 2 November 1945. Accused admitted that he had written the two checks and stated that he had given them to a Lieutenant Arbuckle as substitutes for checks previously given to that officer by accused, the entire transaction being the result "of a gambling debt or something like that" (R 17-20, Pros. Exs. 4, 5).

According to the deposition of Frank G. Yingling, Jr., auditor of the Clifton National Bank, Clifton, New Jersey, accused had never had an account with that bank although accused's wife, Natalie W. Torzsas, had a checking account with it from 9 May 1945 to 23 November 1945 when it was converted into a savings account. Regularly each month from the time her account was opened the bank received an allotment check for \$185. The two checks dated 1 and 2 November 1945, in the amount of \$50 each and bearing accused's name as maker were received by the bank but were not paid because accused had no account. An unsuccessful effort was made by the bank to contact Mrs. Torzsas on the day the checks were received and thereafter that same day the checks were dishonored before she had knowledge of the situation (R 20, Pros. Ex. 6).

During his interview with Colonel McElroy accused was asked about these checks and he stated that he had authorized an allotment to the bank, that he sent in a signature card when he was going overseas, that he did not find out that they never received it and that the account was in his wife's name alone until after he had drawn some checks on it (R 24).

4. After receiving explanation of his rights accused elected to give sworn testimony in his own behalf. He admitted that he submitted a Pay and Allowance

Account to Colonel McAllister in New York City on 2 January 1946 which reflected debits of \$185 and \$6.70 charged against a total credit of \$339.65 and showed a balance of \$147.95 claimed thereon for the month of December 1945 which was paid to him. He stated that he had visited his home over the holidays, quite tired from the volume of work he had performed at the Separation Center, and that he "just completely forgot" that he had drawn a partial payment (R 27, 28, Def. Ex. A).

With respect to the two checks accused testified that he authorized a Class E allotment of his pay in the amount of \$185 to the Clifton National Bank commencing 1 April 1945. A day or so after authorizing the allotment accused wrote the bank informing it of his action and stating that the account to be credited with the allotment deposits was to be the joint account of accused and his wife. Accused and his wife both signed the letter (R 30). Thereafter accused received a letter from the First National Bank of Clifton which the court refused to receive in evidence. In reply thereto accused wrote that bank that if the monthly allotment was received by it instead of the Clifton National Bank he wished the account to be a joint one. He also stated in his letter that if the allotment was not eventually received by that bank around the 10th of the month, his signature card and letter should be referred to the Clifton National Bank (R 31).

Accused further testified that the two checks in question were given to a Lieutenant Arbuckle during the first week of October 1945 but were postdated to 1 and 2 November 1945 at the lieutenant's request. After giving these two, plus other checks, he then attended a Personal Affairs School for two weeks and upon his return learned from his wife that the bank had returned certain checks drawn by accused after being unable to contact her. Accused then redeemed various checks he had drawn on the Clifton National Bank aggregating \$70 in amount but he was unable to locate Lieutenant Arbuckle and redeem the two checks that had been given to him (R 33-35).

5. At the inception of the trial, defense counsel objected to the prosecution's introduction of a stipulation signed by defense counsel and accused in which it was stated that accused had presented to an appropriate Finance Officer a pay voucher for the full pay due him for the month of December 1945, less certain debits. The basis of the defense's objection was that the stipulation practically constituted a confession and should therefore be rejected by the court (MCM, 1928, par. 126b). Clearly, it did not constitute a confession. However, the objection should have been sustained for other reasons hereinafter mentioned.

A stipulation as to facts relevant in the trial of a case by courts-martial is nothing more than a consensual agreement by the prosecution, defense and accused that the stipulated facts may be considered by the court as if competent evidence establishing them had been introduced. It concedes the existence of facts and dispenses with proof thereof. However, the admissibility of the stipulation depends upon the consent of the parties (Dig. Op. JAG 1912-1940, sec. 395 (28); TM 27-255, p. 61; 50 Am. Jur. P. 605). Furthermore, acceptance of a stipulation rests within the discretion of the courts-martial and no stipulation should

be accepted by the court "where any doubt exists as to the accused's understanding of what is involved" (MCM, 1928, sec. 126b). Even after stipulations have been accepted as of record by the court they may be withdrawn upon a showing of proper cause therefor (MCM, 1928, sec. 126b).

From the foregoing, it is apparent that to be binding upon the parties to a controversy a stipulation must not only be consented to by the parties involved but the court must have accepted it of record, at least as to executory stipulations, after concluding that no misunderstanding existed in the minds of the parties as to the meaning and effect of the stipulation. Thus, although accused and defense counsel had prior to trial signed a written stipulation, they were not bound as if by contract so that the accused was irrevocably committed to the facts stated therein. When offered in evidence the court should have satisfied itself, before admitting the stipulation, not only that the parties had consented but that neither misunderstood what was involved (CM 158581). When defense counsel objected to the admission of this stipulation it became patent that at the time of trial the defense then had greater appreciation of the effect of the stipulation than it had when it was entered into. Clearly, counsel's objection was more than sufficient to raise a doubt as to accused's understanding of the stipulation and its implications and the court should have rejected it. In view of the foregoing, it becomes unnecessary for us to decide whether, with respect to an executory stipulation, an accused is always entitled to withdraw his consent therefrom at any time before the stipulation has been received in evidence by the court or otherwise made of record in the proceedings.

Striking the stipulation from the record, the remaining competent evidence presented by the prosecution shows that on 17 December 1945 accused was paid \$60 on a partial payment voucher; that he was thereafter paid the sum of \$147.95 claimed by him on another pay voucher as the balance due him for the month of December 1945, after deducting debits of \$185 and \$6.70 from total credits of \$339.65; and that he admitted to Colonel McElroy that he had drawn a partial payment in December and had also drawn full pay for the month of December. This evidence establishes nothing more than that accused was paid a partial payment of \$60 in December and that he also was thereafter paid his full pay for December. There is not a scintilla of evidence that he was not entitled to both amounts paid him from which evidence the court might have inferred the intent to defraud. So far as the record reveals he may have had an accumulation of undrawn pay which justified both vouchers. There being no proof that accused was not entitled to the sums paid to him there is no proof from which the intent to defraud could reasonably have been inferred by the court.

Not only does the competent evidence offered by the prosecution fail to sustain the court's findings of guilty of the fraudulent offense alleged in Charge I and its Specification, but furthermore we cannot sustain such findings upon the accused's own testimony. He testified that after deducting debits of \$185 and \$6.70 he obtained a balance of \$147.95 on a December pay voucher, having forgotten

that he had previously drawn a partial payment. Such a statement might cause one to suspect that accused was not entitled to the total sum claimed on the two vouchers but accused certainly does not admit it nor does he admit any intent to defraud. Clearly, the scant testimony given by him falls far short of establishing beyond a reasonable doubt that he was not entitled to the two sums paid to him. Accordingly, the findings of guilty of Charge I. and its Specification are not sustained by the record of trial.

The prosecution's evidence, plus accused's sworn testimony, adequately establishes that he made and uttered the two checks alleged in Specifications 2 and 3 of Charge II, and that the checks were not paid by the drawee bank because he had no account there. The court found accused not guilty of fraudulently uttering these checks but guilty only of wrongfully issuing them without maintaining a sufficient bank account to pay them. The court's findings of guilty of the lesser included offense were obviously induced because of the proof that accused had a monthly allotment of \$185 to the drawee bank which was deposited to the account of his wife.

The essential elements of this offense are (a) that accused issued a check when he knew or ought to have known that his bank account was insufficient to pay it and (b) that the check was not paid by the drawee bank because of such insufficiency (CM 286548, Welch; CM 282335, McCarthy; CM 252273, Clark, 34 BR 25). Proof that the check was issued as a result of an honest mistake may constitute a defense but proof that it was issued carelessly affords no legal excuse, since negligence is the essence of the offense (Welch and McCarthy cases, supra).

Even if accused's testimony be believed, it establishes at the very best that he was advised confusion existed as to which of two banks was receiving his allotment. He failed to take adequate steps, despite that situation, to determine to which bank it was being sent and to insure that the account was established as a joint account between him and his wife. Without any assurance that an account had been opened in the drawee bank and that he was entitled to draw thereon, he was content to issue checks upon the probability that such was the fact. In our opinion the court was entitled to find that such conduct constituted negligence since had accused exercised due diligence he would have known the true status of the bank account. The evidence warranted the court's findings of guilty of Specifications 2 and 3 of Charge II.

6. War Department records show that accused is 27 years of age and married. In civilian life he was employed as a casting cleaner in a concern manufacturing aircraft engines. He entered military service on 19 August 1942 and rose to the enlisted grade of staff sergeant. On 30 September 1944, after successfully completing the bombardier course of instruction at Victorville Army Air Field, Victorville, California, accused was commissioned a second lieutenant, Army of the United States, and assigned to duty with the Air Corps. He departed overseas for foreign duty in March 1945. There is indication in his official War Department file that in March 1945 he uttered four checks aggregating \$140 in amount without maintaining a sufficient bank balance to pay them.

7. The court was legally constituted and had jurisdiction of the accused 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 support the findings of guilty of Charge I and its Specification, and legally sufficient to support the findings of guilty of Charge II and of Specifications 2 and 3 thereof, and to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

W. Howard Oliver, Judge Advocate
Robert C. Brewster, Judge Advocate
Walter H. Davis, Judge Advocate

JAGQ - CM 312685

1st Ind

WD JAGO, Washington 25, D. C.

JUL 11 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Louis Torzsas (O-787214), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of presenting a false and fraudulent claim for pay and allowances to a finance officer of the United States Army on or about 31 December 1945 (Charge I, Specification), in violation of Article of War 94, and guilty of negligently making and uttering two checks aggregating \$100 in amount without maintaining a bank account to pay them (Charge II, Specifications 2, 3), in violation of Article of War 96. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support the findings of guilty of Charge II and of Specifications 2 and 3 thereof and to support the sentence and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that accused issued two checks for \$50 each, dated 1 and 2 November 1945, respectively, and drawn on a bank in which accused's wife, but not accused, had a checking account. Accused had an allotment of \$185 per month to that bank which was credited to his wife's account. According to accused's testimony he believed the bank account to be in the joint names of himself and his wife, but without exercising due diligence to ascertain that fact he carelessly drew these checks on that bank.

5. In view of the fact that no moral turpitude but only carelessness with respect to personal financial matters is involved in accused's offenses, I recommend that the sentence be confirmed but commuted to a reprimand and a fine of \$100 and that the sentence as thus modified be carried into execution.

(268)

6. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 - Record of Trial
2 - Form of action

(G.C.M.O. 234, 23 July 1946).

WAR DEPARTMENT
In the Office of The Judge Advocate General (269)
Washington 25, D. C.

JUN 28 1946

JAGQ - CM 312714

U N I T E D S T A T E S)	UNITED STATES ARMY FORCES
)	WESTERN PACIFIC
v.)	Trial by G.C.M., convened
)	at APO 358, 19 February 1946.
Private PHILLIP D. BROWN)	Dishonorable discharge and
(32293902), 101st Chemical)	confinement for life. Federal
Processing Company,)	Penitentiary.
Chemical Warfare Service.)	

REVIEW by the BOARD OF REVIEW
OLIVER, TREVETHAN and DAVIS, Judge Advocates

1. The record of trial in the case of the above named soldier 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 Phillip D. Brown, 101st Chemical Processing Company, did, at APO 75, on or about 4 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ticman Bonifacio, a Filipino civilian by throwing a live armed white phosphorus grenade into a public bar in which said Ticman Bonifacio was located.

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

Specification 1: In that Private Phillip D. Brown, 101st Chemical Processing Company, did, at APO 75, on or about 4 November 1945, with intent to do bodily harm, commit an assault upon Jose Gutierrez, by throwing a dangerous thing to wit, a live armed white phosphorus grenade, into a cafe in which the said Jose Gutierrez was located.

Specification 2: In that Private Phillip D. Brown, 101st Chemical Processing Company, did, at APO 75, on or about 4 November 1945, with intent to do bodily harm, commit an assault upon Rafael Gaspar, by throwing a dangerous thing to wit, a live armed white phosphorus grenade, into a cafe in which the said Rafael Gaspar was located.

Specification 3: In that Private Phillip D. Brown, 101st Chemical Processing Company, did, at APO 75, on or about 4 November 1945, with intent to do bodily harm, commit an assault upon Marcelina Navarro, by throwing a dangerous thing to wit, a live white phosphorous grenade, into a cafe in which the said Marcelina Navarro was located.

Specification 4: In that Private Phillip D. Brown, 101st Chemical Processing Company, did, at APO 75, on or about 4 November 1945, with intent to do bodily harm, commit an assault upon Mercy Deyro, by throwing a dangerous thing to wit, a live armed white phosphorous grenade, into a cafe in which the said Mercy Deyro was located.

Specification 5: In that Private Phillip D. Brown, 101st Chemical Processing Company, did, at APO 75, on or about 4 November 1945, with intent to do bodily harm, commit an assault upon Juan Solema, by throwing a dangerous thing to wit, a live armed white phosphorous grenade into a cafe in which the said Juan Solema was located.

Accused pleaded not guilty to all charges and specifications and was found guilty of Charge I and its Specification and all the specifications of Charge II. No finding with respect to Charge II appears in the record. Evidence of two previous convictions for absence without leave was introduced. He was sentenced to dishonorable discharge, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 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 pursuant to Article of War 50 $\frac{1}{2}$.

3. The prosecution introduced evidence to show that on the evening of 4 November 1945, accused had been drinking in a saloon located in Bayanan, Muntinlupa, Rizal (R. 6, 13, 18). Around 8 p.m., after leaving the saloon where some fifty people were congregated, drinking and dancing, accused and about three other soldiers boarded a truck located in front of the saloon, the accused seating himself in the cab. As the truck pulled away a grenade was thrown "from the front" of the truck (R. 6, 8-10, 12, 13, 16-18). It exploded at the door of the saloon. After the explosion, a small boy, Ticman Bonifacio, who had been in front of the saloon was found dead. His body bore multiple fragmentation wounds and the tissue about the entrance of the wounds was burned (R. 7-8, 11, 12, 17). Also, as a result of the explosion, Jose Gutierrez was injured in the arm (R. 7); Rafael Gaspar was injured in the foot (R. 7, 12); Marcelina Navarro was injured on the right hip or leg (R. 7, 17); Mercy Deyro was injured around the hip or waist (R. 7, 17), and Juan Solema was injured in the back (R. 18). Some eighteen people in all suffered injury as a result of the grenade explosion (R. 9, 13).

Private First Class Jess W. Whitehouse, a military policeman, was patrolling in a jeep at the time and, hearing the explosion, he drove to the scene and pursued a truck for about four blocks before he halted it some five or six hundred yards from the saloon. Accused was driving the truck when it was halted (R. 14, 15).

In a voluntary statement made by accused on 5 November 1945, he stated that on the evening of 4 November 1945 he and several other soldiers visited the cafe where Mercy worked. He administered a dose of morphine to himself and then commenced drinking whiskey with the others. Eventually they left the cafe to return to their truck and as accused climbed aboard it, Allen, one of the enlisted men, gave accused a white phosphorus grenade and stated that he also had one which he was going to throw. Accused's statement continues as follows (Pros. Ex. A):

"* * * Then I got in the front of the truck and started off and I threw the grenade and also Allen must have thrown it. There was two pops and I heard them and then I heard two blast one right behind the other. * * *"

After proceeding along the road a ways the truck was overtaken and halted by military police riding in a jeep. Accused further stated that he used morphine and had a hypodermic needle with him but that he did not take morphine shots "very often" and he guessed "that must be the reason why I done what I done".

A white phosphorus grenade is a hand munition with a bursting radius of about fifteen yards. It is used as an anti-personnel weapon. Its phosphorus content bursts and ignites spontaneously upon contact with air and will cause flesh burns. The thin metal casing of the grenade shatters on detonation (R. 21).

4. After his rights had been explained accused elected to give sworn testimony and he testified as follows. In civilian life he was a musician and he had become addicted to morphine and marihuana which he continued to use after he entered the Army. He had been in the Chemical Warfare Service for about two months prior to occurrence of the incident here under consideration and in that period of time he had seen white phosphorus grenades explode and had even exploded some himself. He did not believe they were "very dangerous" (R. 23). He had five such grenades in his possession at his camp. While at the cafe he administered a dose of 4 cubic centimeters of morphine to himself and drank liquor. When he left the cafe, he jumped on the truck, sat in the driver's seat, was handed a grenade by Allen and "just threw it" to his left and toward the saloon (R. 24-26). At the time he experienced no other feeling than sleepiness. He recognized the type of

grenade Allen handed him and he pulled the pin before he threw it (R. 26, 27). After the explosion accused drove the truck from the scene (R. 25).

Captain William Greer, Medical Corps, testified that morphine addiction lessens the "senses of reason, will-power, and judgment" and often causes the addict to "consider himself in another world" (R. 29). One tell-tale mark of the morphine addict is the multiple pin-point scars on the skin where the drug has been injected (R 30). Upon examination of accused the witness stated he could see no multiple signs of needle scars, although he did observe a lesion on his right forearm which was typical of syphilis and might be a place where he had received needle injections (R. 31).

5. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought exists if the person killing had the intent to kill or has knowledge that his act which causes death will probably cause death 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" (MCM, 1928, 148a). It is not necessary that the accused entertain the specific intent to kill a particular person. It has been determined that the requisite malice is established as a matter of law if the proof shows that an accused recklessly and wantonly fired a loaded weapon in a crowded room or toward a group of people or in a barracks where other individuals were present (CM 293962, Gutierrez, and cases cited therein). Within the experience of mankind it is so extremely probable that such conduct will cause death or serious bodily harm to some person in the immediate vicinity that the law imputes to the actor the requisite malice aforethought.

Turning to the facts before us, the conviction must be sustained if the proof establishes that accused knowingly launched in the direction of others a deadly force well calculated to cause death or serious bodily harm and that, as a result, some person within the zone of danger was killed. We are convinced that the proof here establishes those facts. Accused knowingly and willfully drew the pin from a white phosphorus grenade and hurled it at or toward a group of people with the result that several were injured and one little boy was killed. Accused knew the type of grenade he threw and, indeed, had previously exploded them. Although he claims that he did not know they were "very dangerous" the court was entitled to disbelieve that testimony. Obviously, from having previously discharged such munitions he knew of their bursting and scattering effect. Since they were anti-personnel munitions of war and he was a soldier who had previously detonated such munitions, it could only follow that he must have realized they were deadly instruments.

Accused asserted that two grenades were thrown, one by him and one by another enlisted man, Allen. Even were that true, it is quite apparent that

Allen and accused acted in concert in hurling the grenades and, accordingly, accused would be responsible if either one or both grenades caused the alleged injury and death. However, none of the witnesses testified that more than one grenade was thrown or more than one explosion occurred. Accordingly, upon such evidence the court was warranted in concluding that accused alone launched the deadly instrument.

Accused also testified that he had taken a morphine injection during the course of this evening in addition to the liquor he had consumed. However, there is no convincing evidence that accused's condition was such that he did not know what he was doing when he hurled the grenade. His own testimony reveals that when he threw the grenade the only reaction he was then experiencing from his indulgences was that he felt sleepy; he remembered stepping aboard the truck and hurling the grenade at the saloon door. His own testimony establishes his mental responsibility for his actions.

In our opinion, the proof establishes beyond a reasonable doubt that accused wantonly and recklessly hurled a deadly munition at or toward a group of people with disastrous effect. Such conduct clearly establishes the requisite malice aforethought and, accordingly, accused was properly convicted of the murder of Ticman Bonifacio.

Accused is also charged with five assaults with intent to do bodily harm with a dangerous weapon, committed upon five individuals who were each injured as a result of the grenade explosion. The essential elements of this offense are that (a) the accused assaulted a certain person with a particular weapon or instrument and (b) such weapon or instrument was used in a manner likely to produce death or great bodily harm. The proof conclusively establishes accused's commission of an assault by exploding a white phosphorus hand grenade among a group of people which included the ones alleged in the five Specifications to have been injured thereby. That such instrument was well calculated to cause death or great bodily harm is only too apparent from the nature of the instrument itself as well as from the injuries it actually occasioned. Clearly, the evidence sustains the findings of guilty of Specifications 1 to 5, inclusive, of Charge II.

6. When opportunity was presented to the defense to exercise accused's rights to challenge members of the court, the defense counsel stated (R. 3):

"The accused wishes to challenge Lieutenant Colonel Buckley peremptorily, and Lieutenant Linxwiler and Lieutenant Moore for cause, in that . . ."

The President instructed defense counsel to handle the challenges one at a time, whereupon Lieutenant Colonel Charles C. Buckley was challenged

peremptorily, was excused and withdrew (R. 3). The defense then challenged Lieutenant Linxwiler for cause, "in that he is a member of the Chemical Warfare Service. This trial will center about certain facts that are concerned with Chemical Warfare, which I believe would cause him to be prejudiced." There followed an exchange of remarks by the trial judge advocate and defense counsel, after which the law member made the following ruling, without any questioning of the challenged member and without any reference of the matter to the court (R. 3):

"Subject to objection by any member of the court present, it is the ruling of the court that the challenge be not sustained. Lieutenant Linxwiler will continue as a member of the court."

Defense counsel then stated "The defense has no further challenges", and, in response to the trial judge advocate's question whether the accused objected "to trial by any member of the court remaining present", defense counsel answered "He does not" (R. 4).

The function of determining the existence or nonexistence of alleged grounds of challenge, and the relevancy and validity of challenges for cause, is within the sole province of the court and is not within the competence of the law member alone. The action of the law member was error (pars. 51 and 58, MCM, 1928; CM 216397; Fleming, 11 BR 139; CM 243215, Owen, 27 BR 305; CM 267760, Lawrence, 44 BR 113). However, the error did not injuriously affect the substantial rights of the accused, because (1) no valid grounds for challenge for cause were shown, (2) the statement of the defense counsel that the defense had no further challenges for cause and that the accused did not object to being tried by the court as then constituted was a waiver of whatever right the accused had to further challenge, subject, of course, to the fact that a subsequent showing of bias or other valid cause would afford ground for further challenge (CM 196619, Goyette, et al., 3 BR 27; CM 199465, Lichtenberger, 4 BR 81), and (3) the commission of the offense with which the accused was charged was clearly proved not only by the evidence of the prosecution but also by the accused himself when he testified under oath that he threw the grenade which caused the death and injuries (CM 243215, Owen, supra).

The record does not indicate any finding with respect to Charge II, although it shows findings of guilty with respect to all the Specifications thereof. A finding of guilty of a Specification appropriate to its Charge requires a finding of guilty of the Charge (par. 78b, MCM, 1928, p. 64) and as these Specifications were appropriate to the Charge, the only finding possible for the court to make with respect to Charge II was

"guilty". Furthermore, the designation of the wrong article of war or the failure to designate any article is immaterial provided the Specification alleges an offense of which courts-martial have jurisdiction (par. 28, MGM, 1928, p. 18). In our opinion the failure of the record to indicate a finding with respect to Charge II does not prejudice the rights of the accused (CM 241956, Blount, 26 BR 371).

7. According to the charge sheet accused is 24 years of age and was inducted into the military service on 11 May 1942.

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 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 so punishable by penitentiary confinement under Section 275, Criminal Code of the United States (18 U.S.C. 454).

W. Wayne Oliver, Judge Advocate
Robert C. Brewster, Judge Advocate
Walter W. Davis, Judge Advocate

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

SPJGN-CM 312752

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

v.

Private MARK COLE, JR.
 (36468557), Attached Un-
 assigned to MP & PG De-
 tachment, 1201st SCU, Fort
 Jay, New York.

SECOND SERVICE COMMAND
 ARMY SERVICE FORCES

Trial by G.C.M., convened at
 Fort Jay, New York, 15 March
 1946. Dishonorable discharge
 (suspended) and confinement for
 five (5) years. Disciplinary
 Barracks.

OPINION of the BOARD OF REVIEW
 BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Mark Cole Jr., attached un- assigned to MP&PG Detachment, 1201st SCU, Fort Jay, N.Y., then a member of Co "H", 1st Trng. Rgmt., Fort Devens, Mass., did, at Fort Devens, Mass., on or about 14 August 1944, desert the Service of the United States, and did remain absent in desertion until he was apprehended at New York, N.Y., on or about 8 January 1946.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct,

for ten years. The reviewing authority approved only so much of the finding of guilty of the Specification as involved a finding that the accused did, at the time and place alleged, desert the service of the United States and remain absent in desertion until apprehended at New York City, New York, on 6 January 1946. He approved the sentence but reduced the period of confinement to five years, suspended the dishonorable discharge imposed until the soldier's release from confinement, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 119, Headquarters Second Service Command, Governors Island, New York, 3 April 1946.

3. The accused was tried on 15 March 1946 by a court appointed by paragraph 21, Special Orders No. 43, 20 February 1946, Headquarters Second Service Command, hereinafter referred to as the original order. Lieutenant Colonel Ralph A. Visco was designated as a member of the court by that order. By paragraph 21, Special Orders No. 58, 11 March 1946, same headquarters, hereinafter referred to as the amending order, Captain Charles L. Palmer was detailed "as member of General Court-Martial Aptd to meet at Ft. Jay, NY by Par 30 SO 8 this Hq 10 Jan 46 vice LT. COL. RALPH A. VISCO O2058361 ORD DEPT reld." The original order contained the conventional statement that any unarraigned cases referred to the Trial Judge Advocate of the General Court-Martial appointed by paragraph 30, Special Orders No. 8 would be brought to trial before the court appointed by the original order. Captain Palmer sat on the court which tried accused and participated in all the proceedings at accused's trial and the record does not list Lieutenant Colonel Visco as either present or absent. By paragraph 14, Special Orders No. 80, 5 April 1946, same headquarters, hereinafter referred to as the correcting order, the amending order was corrected so as to constitute Captain Palmer a member of the court appointed by the original order - the court that tried accused - vice Lieutenant Colonel Visco, relieved.

It is clear that Captain Palmer sat as a member of the court which tried accused although, at the time, there were no competent orders in existence constituting him a member of that court. Unless, then, retroactive effect can be given to the correcting order it follows that the court was without jurisdiction to try and sentence accused. CM 302975, Macklin; CM 265840, Brown, 43 BR 97; CM 239497, Goggan, 49 BR 289; CM 131672, par. 365(1) Dig. Ops. JAG, 1912-40.

It is noted at the outset that the amending order is not meaningless. It did appoint Captain Palmer to a court and there was such a court in existence and it is not until 5 April 1946, the date of the issuance of the correcting order, that there is any suggestion that there was a mistake made in the designation of the court on which

he was to sit. However that may be, the situation is analogous to that existing in CM 238607, Mashburn, 24 BR 307, where the Board said (p. 308),

"Where the proceedings are invalid for the reasons stated above, [officer not detailed sat as member] they cannot be validated retroactively by orders issued in amendment of the order or orders detailing the court. Such orders are, regardless of their form, effective only from the date of promulgation."

To paraphrase the language used in CM 218157, Beadle, 11 BR 381, the correcting order failed entirely to give Captain Palmer the status nunc pro tunc of a detailed member of the court appointed by the original order so that he was authorized to sit as a member of that court in the trial of this case on 15 March 1946. It follows that the court was without jurisdiction to try and sentence accused and the proceedings were void ab initio. Mashburn, supra; Beadle, supra.

4. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

Wilmot T. Baughm, Judge Advocate.

Robert J. Hansen, Judge Advocate.

James E. O'Hara, Judge Advocate.

SPJGN-CM 312752 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

MAY 21 1946

1. Herewith transmitted for your action under Article of War 50¹/₂, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Mark Cole, Jr. (36468557), Attached Unassigned to MP & PG Detachment, 1201st SCU, Fort Jay, New York.

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 and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M?O. 183, 14 June 1946).

JUL 3 1946

JAGQ - CM 312754

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

v.)

First Lieutenant HARRY J.
DIETERICH (O-1845554), AUS,
attached unassigned 1909
Service Command Unit, Southern
District, Los Angeles,
California.)

1909 SERVICE COMMAND UNIT

Trial by G.C.M., convened at
Los Angeles, California, 28
March 1946. Dismissal and
confinement for two (2) years.
Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
WURFEL, OLIVER and DAVIS, Judge Advocates.

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

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

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

Specification: In that 1st Lieutenant Harry J. Dieterich, AUS, attached unassigned 1909 Service Command Unit, Southern District, Los Angeles, California, (formerly 1961 Service Command Unit, Mitchell Convalescent Hospital, Camp Lockett, California), while on duty as Post Exchange Officer, did, at Camp Lockett, California, on or about 8 February 1946 feloniously embezzle by fraudulently converting to his own use nine hundred sixty dollars and seventy-five cents (\$960.75), lawful money of the United States, the property of the Post Exchange, Mitchell Convalescent Hospital, Camp Lockett, California, entrusted to him by the said Post Exchange, Mitchell Convalescent Hospital, Camp Lockett, California.

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

Specification 1: In that 1st Lieutenant Harry J. Dieterich, AUS, attached unassigned 1909 Service Command Unit, Southern District, Los Angeles, California, (formerly 1961 Service Command Unit, Mitchell Convalescent Hospital, Camp Lockett,

California), while on duty as Post Exchange Officer, did, at Camp Lockett, California, on or about 8 February 1946 feloniously embezzle by fraudulently converting to his own use nine hundred sixty dollars and seventy-five (\$960.75), lawful money of the United States, the property of the Post Exchange, Mitchell Convalescent Hospital, Camp Lockett, California, entrusted to him by the said Post Exchange, Mitchell Convalescent Hospital, Camp Lockett, California.

Specification 2: (Finding of not guilty).

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

Specification: In that 1st Lieutenant Harry J. Dieterich, AUS, attached unassigned 1909 Service Command Unit, Southern District, Los Angeles, California, (formerly 1961 Service Command Unit, Mitchell Convalescent Hospital, Camp Lockett, California), while on duty as Post Exchange Officer, did, at San Diego, California, on or about 8 February 1946, wrongfully and without proper authority, sell to Norbom Sales Company five hundred forty-nine (549) B.V.D. swim suits of the value of about nine hundred sixty dollars and seventy-five cents (\$960.75), property of the Post Exchange, Mitchell Convalescent Hospital, Camp Lockett, California.

Accused pleaded not guilty to all charges and specifications and was found not guilty of Specification 2 of Charge II and guilty of all other charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for five (5) years. The reviewing authority approved the sentence but remitted three (3) years of the confinement, designated the Pacific Coast Branch, United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution. As the accused was found not guilty of Specification 2, Charge II, the evidence introduced to support this specification will not be discussed.

It was stipulated that on or about 8 February 1946 the accused was on duty as Post Exchange Officer, Mitchell Convalescent Hospital, Camp Lockett, California (R. 13). A large quantity of swim suits were in the post exchange warehouse, which were purchased at a time when it appeared

that there was to be a swimming pool at the camp. It later developed there was to be no swimming pool and the swim suits constituted overstocked items (R. 31, 41). A discussion was had between accused and a civilian employee of the post exchange as to the disposal of these suits. The employee had made arrangements with Norbom Sales Company whereby the latter would purchase 549 of these suits at \$1.75 each. The accused expressed doubts as to the regularity of the sale, as Norbom Sales Company was not the original vendor of the suits, but stated that if the sale could be put through on a cash basis, the employee could go ahead with it. (R. 17, 18). A plan was then worked out whereby the swim suits, which were in the warehouse, were requisitioned by accused's Exchange (R. 25; Ex. 2), but were not delivered to it (R. 58), but instead were sent by truck to Norbom Sales Company who were to pay for them in cash (R. 21). Accused stated that he was going to San Diego and would collect the money (R. 23). It was stipulated that if two named witnesses were present they would testify that accused appeared at the Norbom Sales Company on 8 February 1946, was paid \$960.75 in cash and delivered a receipt for that amount to Norbom Sales Company (R. 13, 14). About 11 February 1946 accused stated to another employee: "Well, Mac, we've finally got rid of the bathing suits . . . Tomorrow morning or the following morning I will give you the money and you ring it up in the cash register just like a regular sale" (R. 58). However, accused never gave the witness the money (R. 59). An audit of the Post Exchange made during the latter part of February 1946 disclosed neither the swim suits nor an equivalent amount of money (R. 80). The auditor talked to the accused about shortages, mentioned the item of \$960.75 and accused stated "As far as the swimming suits, I got that money and it was hot on my hands. I didn't know how to get it in the PX books and it just left" (R. 84, 85).

An employee of the Post Exchange testified that the B.V.D. Corporation was the original vendor of the bathing suits in question; that the actual cost per suit was \$1.74 and a fraction, and the landing cost, including freight, was \$1.79263 (R. 45, 46). The \$960.75 was never deposited in the Exchange accounts nor was it run through the cash registers (R. 47). While accused was confined to his quarters on 13 March 1946 he told the witness that he still had \$300 left from his deal and gave it to the witness to deposit. The remaining \$660.75 was never received (R. 48).

In a hearing before a board of officers on 13 March 1946 the accused admitted that he had retained \$960.75 received from Norbom Sales Company for the sale of the swimming suits (R. 106). After his rights had been duly explained, accused voluntarily answered questions of the investigating officer, the questions and answers were taken down verbatim and were received in evidence as Prosecution's Exhibit 4 (R. 115). In this statement accused admitted (5 March 1946) that he had not deposited the \$960.75, that

\$300 was still in his possession and that he was short \$660.75. He further stated that the sale to Norbom Sales Company had his approval. He presumed that he just passed the \$660.75 away, probably in consumption and slot machines (R. 114, 115, 117, 118).

It appears from certificates inserted in the record between pages 124 and 125 that a quantity of the reporter's notes were found on the floor by the person cleaning up the courtroom, were thrown into the wastebasket and subsequently burned. A statement appearing in the record at page 128, signed by the accused, defense counsel, the trial judge advocate and all the members of the court states that pages 125 to 127, inclusive, are a true and complete summary of the testimony and proceedings covering the portion of the proceedings for which the stenographic notes were destroyed.

4. Evidence for the defense. Two officers testified as to accused's good reputation for truth, veracity and honesty, that he worked long hours and was very conscientious about his work (R. 125).

After his rights as a witness were explained, accused elected to be sworn as a witness and testified in his own behalf. He stated that he was opposed to the sale to Norbom Sales Company and suggested that if the sale be made that it be for cash. He knew it was contrary to regulations to sell Post Exchange property to civilian firms other than the original vendors. He puzzled and worried about the sale; did some drinking, meanwhile retaining the money in his possession. About a week or ten days after receiving the money he realized that he didn't have the entire amount. He did not know what happened to it; it had been commingled with his personal funds and he did not know how much he had put into slot machines (R. 125). On cross-examination he admitted that the proceeds of the sale did not go through the cash register and were not deposited, except the \$300 deposited after he had been confined. In discussing the matter he had insisted that the sale was contrary to Army Regulations except where service command approval was obtained. No such approval was obtained for this sale (R. 132, 134, 135).

Defense Exhibit A is a letter of commendation from the accused's commanding officer (R. 126); Defense Exhibits B, C and D are letters from fellow officers as to his good character (R. 140).

5. The Manual for Courts-Martial, 1928, provides that "The record must show all the essential jurisdictional facts, and will set forth a complete history of the proceedings had in open court in a case . . . For details . . . see App. 6." (par. 85b, p. 71). Appendix 6, setting forth

the form for record of trial by general courts-martial, indicates that the questions asked of witnesses and their responses should be set forth verbatim, and it is customary to do so. The acceptance of a summary instead of a verbatim transcript of testimony should be done only under unusual circumstances. We think such circumstances are present in this trial. Since the summarization was approved by the accused, his counsel and every member of the court, no substantial rights of the accused will be prejudiced by considering the summary on pages 125 to 127 of the record as part thereof.

No detailed discussion of the evidence or of the law is necessary in this case. The evidence in its most favorable aspect to the accused shows that he approved a cash sale of bathing suits to an unauthorized purchaser, collected the proceeds, and then apparently became apprehensive about the sale and neglected to turn in the proceeds until he had dissipated the larger part thereof for his personal use. The sale was in fact unauthorized (par. 15, AR 210-65, 12 June 1945), was made by the Post Exchange with the approval of the accused, and the proceeds were paid to him personally in his capacity as Post Exchange Officer. Consequently accused's conversion of these funds constituted embezzlement. Paragraph 20a, AR 210-65, 12 June 1945, defines the duties and responsibilities of exchange officers as follows: "The exchange officer is in executive control of the exchange. He is responsible for its management and accounting, the performance of duty and discipline of assistants and employees and is the custodian of its property and funds". And paragraph 20c (7) of the same regulation further provides that "Funds of exchanges are entrusted to officers of the Army in their official capacity, and their misapplication is punishable under the Articles of War".

6. War Department records disclose that this officer is 39 years of age and is married, although he has been separated from his wife since 1938 by mutual agreement. Prior to entering military service he performed administrative duties with DePaul University, Chicago, Illinois. He was inducted into military service 20 June 1942 and served as an enlisted man until he was commissioned a second lieutenant on 31 March 1943 upon completion of Officer Candidate School. He was appointed a first lieutenant 11 August 1944. Most of his military career since he became an officer has been with the Army Exchange Service. The ratings given him as well as the letters of recommendation attached to the record indicate excellent character prior to this offense.

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. 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 either Article of War 93 or 96 and is mandatory upon conviction of a violation of Article of War 95.

Seymour W. Warfel, Judge Advocate
A. Payne Rivers, Judge Advocate
Walter W. Davis, Judge Advocate

JAGQ - CM 312754

1st Ind

WD JAGO, Washington 25, D. C.

AUG 1 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Harry J. Dieterich (O-1845554), AUS, attached unassigned 1909 Service Command Unit, Southern District, Los Angeles, California.

2. Upon trial by general court-martial this officer was found guilty of embezzling \$960.75, property of a Post Exchange, while he was the Post Exchange Officer, in violation of Articles of War 93 and 95, and of wrongfully selling 549 swim suits of the value of \$960.75, property of the Post Exchange, to Norbom Sales Company. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to two years, designated a disciplinary barracks as the place of confinement and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that a post exchange at Camp Lockett, California, of which accused was officer in charge, had on hand a large overstock of swim suits. One of the civilian employees conducted negotiations with the Norbom Sales Company and the latter agreed to buy the suits at \$1.75 each. Accused was then consulted and expressed doubts as to the regularity of the sale since the purchaser was not authorized to buy under Army Regulations. He stated, however, that if the sale could be made on a cash basis the employee was to go ahead with it. In order to conceal the unauthorized nature of the transaction the post exchange requisitioned the suits from the warehouse where they were stored, but, instead of delivering them to the post exchange, delivered them directly to the Norbom Sales Company. Accused called at the company office in San Diego, California, and was given the purchase price of \$960.75 in cash. He did not turn in the proceeds. He commingled them with his personal funds and spent a portion "in consumption and slot machines". An audit was held of the post exchange and the shortage was uncovered.

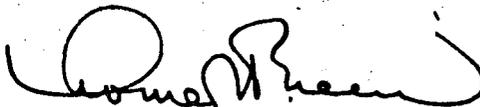
The accused appeared before a board of officers and substantially admitted his guilt, as he did to the investigating officer. While he was in arrest in quarters he gave an employee \$300 to deposit, stating that was what he had left. He testified that he was puzzled and worried about the sale and did some drinking while the money was in his possession.

5. Accused's prior commissioned service and his reputation for honesty and hard work among his fellow officers, was excellent. He is 39 years of age. In view of his record and prior good service the court unanimously recommended to the reviewing authority that the entire period of confinement be remitted.

6. I recommend that the sentence as modified by the reviewing authority be confirmed and carried into execution.

7. Inclosed is a form of action designed to carry this recommendation into effect should it meet with your approval.

2 Incls
1 - Record of Trial
2 - Form of action



THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 253, 8 Aug 1946).

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGQ - CM 312773

JUN 18 1946

UNITED STATES)
)
 v.)
)
 Captain ALBERT EDWARD JOHNSTON,)
 JR. (O-1289093), Anti-Tank Com-)
 pany, 10th Infantry.)

5TH INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Campbell, Kentucky, 19
March 1946. Dismissal.

OPINION of the BOARD OF REVIEW
OLIVER, TREVETHAN and DAVIS, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the above-named officer 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 Captain Albert E. Johnston, Jr., 10th Infantry, was at Camp Campbell, Kentucky, on or about 20 February 1946, drunk and disorderly while in uniform.

Specification 2: In that Captain Albert E. Johnston, Jr., 10th Infantry, did, at Camp Campbell, Kentucky, on or about 20 February 1946, wrongfully strike Private First Class Edward H. Worley about the head and face with his fists.

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

Specification 1: In that Captain Albert E. Johnston, Jr., 10th Infantry, did, at Camp Campbell, Kentucky, on or about 20 February 1946, wrongfully strike First Lieutenant Harold D. MacGregor in the face with his fists.

Specification 2: In that Captain Albert E. Johnston, Jr., 10th Infantry, did, at Camp Campbell, Kentucky, on or about 20 February 1946, wrongfully strike Captain Charles R. Fleming in the face with his fists.

Accused pleaded guilty to all Specifications, not guilty to Charge I but guilty of a violation of Article of War 96, and guilty to Charge II. He 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 testimony of the numerous witnesses introduced by the prosecution abundantly establishes that around 10 or 10:30 p.m. on the evening of 20 February 1946, the accused, in uniform, was standing at the bar of the 10th Infantry Officers' Club, Camp Campbell, Kentucky. Other officers were also present and enjoying the facilities of the club. Second Lieutenant Dan W. Davis, who was on duty as Officer of the Guard that night and had just completed a check of the guard, entered the club accompanied by the driver of his jeep, Private First Class Edward H. Worley, who he invited there to have a drink of coca cola (R 9-12, 17, 22, 29). Turning to Private Worley accused inquired if he were a First Sergeant to which the former replied that he was a Private First Class. He then asked Worley where his chevrons were and told Lieutenant Davis to see that they were sewed on Worley's uniform. Accused then made some remark about beating Worley out of the door of the club whereupon Worley turned and proceeded to leave the club. Accused started after him, drew back his arm knocking Lieutenant Davis' glasses to the floor, and without any provocation struck Worley a blow behind the ear. Lieutenant Davis stepped between the two and Worley promptly left the club (R 9, 13, 15, 18-21, 41-43). Accused had been drinking whiskey that night and in the opinion of the bartender, Private First Class John L. Taylor, he had consumed too much and was drunk (R 44, 45). Lieutenant Davis observed that accused was not steady and he did not seem to be in full possession of his physical and mental faculties (R 27, 29).

After this incident Lieutenant Davis approached First Lieutenant Harold E. MacGregor, the club officer, who was playing cards at a nearby table with several other officers (R 9, 34). Lieutenant MacGregor thereafter stepped to accused and urged him to return to his quarters, but accused refused to do so, couching his refusal in vile language, and promptly struck Lieutenant MacGregor with his fist. The latter then announced to all the guests that the club would be closed for the night and thereafter accused struck the lieutenant twice more. These blows landed variously on the lieutenant's nose, lip and shoulder breaking the skin (R 9, 13, 30, 35, 36, 43, 47, 53, 56, 79). Captain Charles R. Fleming and First Lieutenant Lyle A. Parker then approached accused and without using force or provoking language tried to prevail upon him to leave the club. Accused swung his fist at Lieutenant Parker who parried the blow, and then he struck Captain Fleming in the face almost knocking him to the floor. Captain Fleming and Lieutenant Parker then promptly left the club, it being a few minutes before 11 p.m., and went to the latrine in their Bachelor Officers' Quarters (R 9, 13, 14, 31-33, 43, 44). Lieutenant MacGregor believed that accused was unable to conduct himself properly because of the liquor he had consumed (R 38). Captain Fleming was of the opinion that he was drunk (R 33, 81). First Lieutenant Norman R. Bullard

who had observed the foregoing events was of the opinion that accused was under the influence of liquor because, although he did not stagger, his eyes were slightly bloodshot and he talked like a man under the influence of intoxicants (R 10).

While Lieutenant Parker and Captain Fleming were in the latrine of their Bachelor Officers' Quarters, along with First Lieutenant John W. Harrop and Chaplain Joseph R. Andrews, sometime between 11 p.m. and midnight that night, accused entered and again without any provocation he attacked Captain Fleming and pushed or tossed him violently to the floor. As Captain Fleming arose and sought to leave the latrine accused caught him violently by the shirt tearing several buttons from it (R 14, 15, 33, 49, 50, 57, 83). At that time Lieutenant Harrop observed that accused was not walking steadily and that his speech was thick (R 49). Chaplain Andrews was of the opinion that accused had been drinking excessively (R 58).

Sometime soon after the foregoing incident Second Lieutenant Richard W. Pascoe, who was the Military Police Duty Officer on this evening, found accused in his quarters and observed that he had been drinking although he was orderly and recognized the lieutenant (R 51, 52).

4. The defense introduced evidence to show that, in the opinion of Colonel Tom R. Stoughton and Lieutenant Colonel Alden P. Shipley, both of the 10th Infantry, accused had performed his duties as regimental athletic officer and as commanding officer of the Anti-Tank Company in a superior manner (R 61, 62, 64, 65). Accused had also received a letter of commendation from the Commanding General of the 5th Infantry Division for his work as head coach of the 10th Infantry football team (Def. Ex. 1). According to accused's Officer's Qualification Card, WD AGO Form 66-4, he had received no efficiency rating lower than excellent since commencement of his service as a commissioned officer in August 1942. His qualification card also contains entries indicating that he served in the European Theater of Operations from September 1944 to July 1945 and was awarded the Combat Infantry Badge and two Bronze Service Stars (Def. Ex. 2).

In his sworn testimony to the court accused stated that he had served over five years in the Army and he expressed his sorrow for the events that had occurred, apologized to all concerned and requested the opportunity to remain in the Army and demonstrate that his conduct "was really a mistake" (R 67).

5. At the inception of the trial, after accused pleaded guilty to all Specifications in violation of Article of War 96, he was incorrectly advised by the law member of the effect of his pleas. The law member stated that in view of the pleas of guilty accused could be sentenced to a maximum of restriction to limits for not more than three months and forfeiture of pay for any length of time the court might adjudge (R 6). Clearly, such instruction was erroneous. The Table of Maximum Punishments does not apply to officers (MCM

1928, par. 104a) and, for a violation of Article of War 96, an officer may be sentenced to such punishment as the court-martial may in its discretion adjudge, including dismissal the service (AW 96). Had the court sentenced accused upon his pleas of guilty without receiving evidence, so much of the sentence imposed as exceeded the maximum stated by the law member would be illegal (CM 144220, Cerveny; CM 128305, Ramos). Furthermore, since the court sentenced accused to dismissal and since that type of punishment is of a quality all its own, and does not include restriction or forfeitures and, accordingly, may not be mitigated to any lesser punishment but may only be commuted by the President of the United States or by such officer of the Government as may have been delegated the authority to commute, it is apparent that the entire sentence imposed would have been a nullity.

However, accused was not convicted solely upon his pleas of guilty. The prosecution presented abundant evidence to establish commission of the offenses alleged. Where evidence is presented fully to establish the accused's guilt, any erroneous instruction by the court or law member as to the maximum sentence imposable is not materially prejudicial and the sentence adjudged, if within legal limits, is valid although it exceeds the maximum stated in the explanation (Cerveny and Ramos cases, supra). In addition, accused pleaded guilty to the first two offenses as violative of Article of War 96 only but he was found guilty thereof as violative of Article of War 95 as alleged. Accordingly, the sentence here imposed could in no event be affected by the erroneous instruction of the law member since accused had pleaded not guilty to a violation of Article of War 95 and, accordingly, received no instructions as to the punishment imposable under that Article of War.

a. Charge I, Specification 1. Under this Charge and Specification it is alleged that the accused was drunk and disorderly at Camp Campbell on 20 February 1946 in violation of Article of War 95. Even though an accused be not grossly drunk, nevertheless he may be guilty of a violation of Article of War 95 under a specification charging drunkenness and disorderly conduct if his entire conduct during the period of inebriation is so disgraceful and shameful as in fact to constitute conduct unbecoming an officer and a gentleman (CM 226357, Betette, 15 BR 89; CM 239172, Strauss, 25 BR 75; CM 234558, Field, 21 BR 41; CM 271286, Kelley, 46 BR 89; Winthrop, Mil. Law and Prec., 2nd Ed. rep. p. 717). Even excluding from consideration the evidence introduced to prove the specific batteries alleged in the other Specifications (see Kelley case, supra), the remaining evidence demonstrates that accused was drunk or under the influence of liquor, although not grossly so, at Camp Campbell on 20 February 1946, while at his officers' club; that he swore foully at the club officer as he belligerently declined to follow the latter's advice to return to his quarters; that he attempted to strike Lieutenant Parker; and that after finally leaving the club when his conduct compelled the club officer to close it for the night, he entered the latrine of his Bachelor Officers' Quarters and without provocation pushed or tossed another officer violently to the floor and then caught the officer forcibly by the shirt as he arose from the floor and sought to leave the latrine. In our opinion that entire course of conduct was so disgraceful and shameful as amply to warrant the court's findings.

b. Charge I, Specification 2. The evidence amply demonstrates that accused committed an unprovoked assault upon an enlisted man by striking him with his fists. Such conduct has been held violative of Article of War 95 at least when the assaulting officer is sober (Dig. Op. JAG 1912-40, p. 341; CM 238970, Hendley, 25 BR 1; CM 239609, Mulroy, 25 BR 215). However, it has been held that when the officer is grossly drunk and strikes one of several enlisted men who are trying to subdue him, the offense is only violative of Article of War 96 (CM 215734, Rush, 11 BR 35). It was also held violative only of Article of War 96 for an officer who had been drinking to strike an enlisted man who had also been drinking and who was in the custody of the military police and using mildly obscene language in protesting his imminent confinement in the guardhouse (CM 251542, Ball, 33 BR 277). From these cases it may be gleaned that generally when an officer knowingly and without provocation strikes an enlisted man he has so abused the authority and trust of his office and so imposed upon the position of the enlisted man that his conduct can only be considered disgraceful and dishonorable. On the other hand, where the officer is grossly drunk and is engaged in a physical encounter with an enlisted man, although his drunkenness may be disgraceful, his assault upon the soldier during the fracas is rather a part of a common scuffle than a disgraceful abuse of his authority. Apparently, in the Ball case the Board of Review concluded that the officer's intoxication coupled with the soldier's alcoholic condition and his verbal objection to arrest brought the case within the category of a common brawl rather than within the more serious class involving the realized abuse of the authority of position. Whether or not we think these principles were rightly applied to the facts of the Ball case is here immaterial; it suffices that we believe the principles themselves to be sound law.

Turning to the facts here before us we find that although accused was intoxicated at the time he struck the enlisted man, he was not grossly drunk. Accused could walk without difficulty, could talk and, judging from his conversation with the enlisted man and the Officer of the Guard, had full realization of his surroundings and the personalities involved. Furthermore, there was not the slightest provocation by the enlisted man, either by verbal or physical action, to indicate that the incident had resemblance to a common scuffle between individuals. On the contrary, it was an unprovoked assault upon an unoffending enlisted man by an officer not so bereft of his senses that he did not know what he was doing. Such conduct can be nothing but disgraceful and dishonorable and in our opinion the court correctly concluded that accused's conduct was violative of Article of War 95.

c. Charge II, Specifications 1 and 2. The proof amply demonstrates that accused assaulted the two officers as alleged in these two Specifications. Such conduct constituted a violation of Article of War 96 (MCM, 1928, par. 152c).

6. War Department records show that accused is 27 years of age. After spending one year at college he entered private employment and worked as assistant

foreman in the shipping department of a woolen concern. He enlisted in the Army on 6 March 1941. On 1 August 1942, after successfully completing the course of instruction at the Infantry School, Fort Benning, Georgia, he was commissioned a second lieutenant. On 22 January 1943 he was promoted to first lieutenant and on 21 December 1943 he was promoted to the grade of captain.

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

W. H. Haynes Oliver, Judge Advocate
Robert E. Sweetman, Judge Advocate
Walter W. Davis, Judge Advocate

JACQ - CM 312773

1st Ind

WD JAGO, Washington 25, D. C.

JUL 3 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Albert Edward Johnston, Jr. (O-1289093), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform (Charge I, Specification 1) and of wrongfully striking an enlisted man (Charge I, Specification 2), both in violation of Article of War 95, and guilty of wrongfully striking two fellow officers (Charge II, Specifications 1 and 2), in violation of Article of War 96. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

On the evening of 20 February 1946, accused visited the 10th Infantry Officers' Club, Camp Campbell, Kentucky, where he commenced drinking and became quite drunk. Around 10:30 p.m. the Officer of the Guard entered the club to have a drink of coca cola with an enlisted man who was his assigned jeep driver during his tour of duty. The accused opened a conversation with the Officer of the Guard and, after quibbling about the failure of the enlisted man to have his private first class chevrons upon his sleeves, accused followed the enlisted man as he was leaving the club and, without provocation, struck him on the head. Thereafter the club officer, Lieutenant Harold E. MacGregor, approached accused and suggested he return to his quarters. Accused refused so to do, couching his refusal in foul language, and struck the club officer thrice with his fist, about his face and shoulder. Following that incident, Captain Charles R. Fleming and Lieutenant Lyle A. Parker sought verbally to persuade accused to leave the club whereupon accused, again without provocation, swung at Lieutenant Parker who parried the blow and then struck Captain Fleming in the face almost knocking him to the floor. The club was then closed for the night because of the disturbance accused had created. A short time later accused entered the latrine of a Bachelor Officers' Quarters where he approached Captain Fleming and Lieutenant Parker and, again without provocation,

assaulted Captain Fleming by pushing or tossing him violently to the floor and, after the Captain arose and sought to leave the latrine, he clutched him vigorously by the front of his shirt tearing off several buttons. Accused pleaded guilty and as a witness apologized to all concerned for his conduct.

Accused served overseas in the European Theater of Operations from September 1944 to July 1945 and was awarded the Combat Infantry Badge and two combat Service Stars. Three of the six members of the court recommended that because of accused's "previous good character and efficiency" the sentence to dismissal be suspended. I recommend that the sentence be confirmed but in view of the recommendation for clemency and all the circumstances in the case recommend it be suspended.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 - Record of trial
2 - Form of Action

(G.C.M.O. 232, 23 July 1946).

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

JAGN-CM 312782

U N I T E D S T A T E S	)	NINTH SERVICE COMMAND
	)	ARMY SERVICE FORCES
v.)	
Private RICHARD T. BRYANT	)	Trial by G.C.M., convened at
(20903390), Attached Un-	)	Presidio of San Francisco,
assigned Headquarters Company,	)	California, 1 April 1946.
1927 Service Command Unit.	)	Dishonorable discharge and con-
	)	finement for seven (7) years.
	)	Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
 BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Richard T. Bryant, attached unassigned Headquarters Company, 1927 Service Command Unit, Presidio of San Francisco, California, formerly attached unassigned Company B, 2nd Replacement Battalion, Pittsburg Replacement Depot, Pittsburg, California, did, at Pittsburg Replacement Depot, Pittsburg, California, on or about September 18, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at San Francisco, California, on or about February 11, 1946.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by a general court-martial for desertion, in violation of Article of War 58. 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 ten years. The reviewing authority approved only so much of the finding of guilty of the Specification of the Charge as involves a finding of guilty of absence without leave from about 18 September 1943 to about 11 February 1946, in violation of Article of War 61; reduced the period of confinement to seven years; ordered the sentence executed but suspended the execution of that portion thereof providing for dishonorable discharge until the soldier's release from confinement; and designated the Pacific Coast Branch, United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War might direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 216, Headquarters, Ninth Service Command, Fort Douglas, Utah, 11 April 1946.

3. The evidence is sufficient to establish the absence without leave of accused as alleged and the only question presented by the record is whether Article of War 39 is a bar to accused's conviction.

That Article, in substance, provides that no person shall be liable to be tried for absence without leave committed more than two years before his arraignment. No period of limitation is provided for wartime desertion. Accused was arraigned and tried on 1 April 1946 for desertion commencing 18 September 1943. However, by the action of the reviewing authority, he stands convicted of absence without leave commencing on 18 September 1943, an offense to which he could have pleaded the Statute of Limitations as a complete bar, if given an opportunity.

The Manual for Courts-Martial provides that,

"* * * Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A. W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense." MCM, 1928, par. 87b, p. 74.

This principle was applied in CM 217172, Rosenbaum, 11 BR 225. It was there stated:

"It follows that the reviewing authority, after he had approved only so much of the findings of guilty of desertion as involved a finding of guilty of absence without leave, was without power to consider such

absence as a basis of punishment because punishment for such absence was barred by Article of War 39. As the accused was tried upon this single Specification, the record of trial is not legally sufficient to support the sentence."

The rationale behind it was discussed in CM 231504, Santo, Jr., 18 BR 235; 3 Bull. JAG 56, 57, where the Board said:

"The Board has not overlooked the holding in CM 217172, Rosenbaum, that a reviewing authority, after he had approved, in a case where more than two years had elapsed between the date of absence and the date of arraignment of accused, only so much of the findings of desertion as involved a finding of guilty of absence without leave, was without power to consider such absence as a basis of punishment because punishment for such absence was barred by Article of War 39. That holding was premised upon the specific language of paragraph 87b, Manual for Courts-Martial, 1928, limiting the action of the reviewing authority. That restriction is based in logic upon the fact that the action of the reviewing authority in approving only so much of the findings as involve absence without leave, is taken after the trial has been completed, entirely in the absence of the accused and in a situation where accused may not assert his rights. The paragraph does not purport to limit similarly the authority of the court to adjudge punishment where the accused is present and has, until the court finally adjourns upon his case, the opportunity of asserting his right in open court."

There being no evidence in the record to warrant the conclusion that the running of the statute was tolled, it follows that the findings of guilty should be disapproved.

4. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

Wilmot D. Banglin, Judge Advocate
Arthur J. Cannon, Judge Advocate
James A. Adams, Judge Advocate

(300)

JAGN-CM 312782

1st Ind

WD, JAGO, Washington 25, D. C.

JUL 11 1946

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Richard T. Bryant (20903390), Attached Unassigned Headquarters Company, 1927 Service Command Unit.

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 and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

- 1 - Record of trial
- 2 - Form of Executive action

(G.C.M.O.244, 31 July 1946).

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington 25, D. C.

(301)

JUL 11 1946

JAGG - CM 312812

UNITED STATES)

FOURTH AIR FORCE

v.)

First Lieutenant BENJAMIN)
F. BAER (O-806604), Squadron)
A, 423rd Army Air Forces)
Base Unit.)

Trial by G.C.M., convened at
Walla Walla Army Air Field,
Washington, 22 March 1946.
Dismissal and confinement for
three (3) years.

OPINION of the BOARD OF REVIEW
WURFEL, OLIVER and DAVIS, 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 First Lieutenant Benjamin F. Baer, Squadron A, 423rd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Walla Walla Army Air Field, Washington, from about 19 November 1945 to about 31 December 1945.

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

Specification 1: In that First Lieutenant Benjamin F. Baer, Squadron A, 423rd Army Air Forces Base Unit, did, at Walla Walla Army Air Field, Washington on or about 8 November 1945, wrongfully and unlawfully make and utter to the Officers' Mess a certain check in words and figures as follows, to wit:

Fort Worth National Bank
Fort Worth, Texas

DATE Nov. 8 1945

PAY TO W.W.A.A.F. OFFICERS' MESS OR ORDER \$ 51.09/100

Fifty one and 00/100 ----- DOLLARS

/s/ Benjamin F. Baer
1st Lt. A.C. O-806604

in payment of Club dues, meal ticket, and the sum of \$10.00, he, the said First Lieutenant Benjamin F. Baer, then well knowing that he did not have and not intending that he should have sufficient funds in the Fort Worth National Bank for the payment of said check.

Specification 2: In that First Lieutenant Benjamin F. Baer, Squadron A, 423rd Army Air Forces Base Unit, did, at Walla Walla Army Air Field, Washington, on or about 9 November 1945, wrongfully and unlawfully make and utter to the Officers' Mess, a certain check in words and figures as follows, to wit:

Fort Worth Nat'l Bank
Fort Worth, Tex.

DATE Nov. 9 1945

PAY TO W.W.A.A.F. OFFICERS' MESS OR ORDER \$ 10.00/100
Ten and 00/100 ----- DOLLARS

/s/ Benjamin F. Baer
1st Lt. A.C. 0-806604

and by means thereof, did wrongfully obtain from the said Officers' Mess the sum of \$10.00, he, the said First Lieutenant Benjamin F. Baer, then well knowing that he did not have and not intending that he should have sufficient funds in the Fort Worth National Bank for the payment of said check.

Specification 3: In that First Lieutenant Benjamin F. Baer, Squadron A, 423rd Army Air Forces Base Unit, did, at Walla Walla Army Air Field, Washington, on or about 10 November 1945, wrongfully and unlawfully make and utter to the Post Exchange a certain check in words and figures as follows, to wit:

November 10 1945 NO. -----

FONT WORTH NATIONAL BANK, FT. WORTH, TEX.

PAY TO THE 423rd AAF BASE UNIT EXCHANGE
ORDER OF Walla Walla, Washington \$ 25.00/100
Twenty five and 00/100 ----- DOLLARS

/s/ Benjamin F. Baer
1st Lt. A. C. 0-806604

and by means thereof, did wrongfully obtain from the said Post Exchange the sum of \$25.00, he, the said First Lieutenant Benjamin F. Baer, then well knowing that he did not have and not intending that he should have sufficient funds in the Fort Worth National Bank for the payment of said check.

Specification 4: In that First Lieutenant Benjamin F. Baer, Squadron A, 423rd Army Air Forces Base Unit, did, at Seattle, Washington, on or about 28 November 1945, wrongfully and unlawfully make and utter to the Seattle First National Bank a certain check in words and figures as follows, to wit:

SEATTLE, WASHINGTON- November 28 1945
PENNA.

THE PENNSYLVANIA COMPANY 3-2 PHILA. SEATTLE

Main Office 15th & Chestnut St. BRANCH

PAY TO Cash-----OR ORDER \$ 30.00/100

.. Thirty and no/100 -----DOLLARS.

/s/ Benjamin F. Baer
1st Lt. A.C. 0-806604

and by means thereof, did wrongfully obtain from the said Seattle First National Bank the sum of \$30.00, he, the said First Lieutenant Benjamin F. Baer, then well knowing that he did not have and not intending that he should have sufficient funds with the Pennsylvania Company 3-2 Bank for the payment of said check.

Accused pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications, and was found guilty of all Charges and Specifications. Evidence of two previous convictions was introduced, showing that accused was convicted on August 17, 1944 of absence without leave for five days and embezzlement of \$1000, in violation of Article of War 61 and Article of War 94. The sentence as approved and ordered executed by the reviewing authority was forfeiture of \$100.00 per month for six months and suspension from promotion for one year (CM 299564). Again on 30 April 1945, he was convicted of absence without leave for ten days in violation of Article of War 61. In that case a sentence of dismissal was, by action of

the Secretary of War, commuted to a reprimand and forfeiture of \$25.00 pay per month for six months (CM 280144). In the present case accused was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

Under Charge I and its Specification in addition to accused's plea of guilty the extract copy of morning report of his squadron (R. 7; Pros. Ex. 1) shows accused carried from "Dy to AWOL" on 19 November 1945, and the extract copy of morning report of the Prison Office, Portland Army Air Base, Oregon (R. 7; Pros. Ex. 2) shows accused was placed in confinement on 31 December 1945.

Accused while stationed at the Walla Walla Army Air Base made, issued and received value for the following series of checks:

- a. To the WWAAB Officers' Mess, on 8 Nov. 1945 a check on the Fort Worth National Bank in the sum of \$51.00 (R. 18; Pros. Ex. 12).
- b. To the WWAAB Officers' Mess, on 9 Nov. 1945, a check on the Fort Worth National Bank in the sum of \$10.00 (R. 18; Pros. Ex. 13).
- c. To the 423rd AAF Base Unit Exchange, Walla Walla, Washington, on 10 Nov. 1945, a check on the Fort Worth National Bank in the sum of \$25.00 (R. 13; Pros. Ex. 6).
- d. To the Seattle First National Bank on 28 November 1945, a check on the Pennsylvania Company of Pennsylvania in the sum of \$30.00 (R. 19; Pros. Ex. 14).

The accused admitted in writing (R. 20; Pros. Ex. 16) that he signed and passed these four and other checks and at the trial so testified (R. 21, 22). As to checks a and b, Captain Younkman, Officers Mess Officer, testified the regular books of entry of the mess showed that these two checks were entered against the accused in the "bad check account" on 23 November 1945 (R. 20). As to check c, Captain Diekmann, Exchange Officer, testified that the exchange check register showed that this check was charged back against the exchange (R. 13).

Mr. Ben King, manager of the bookkeeping department of the Fort Worth National Bank testified by deposition that the accused's account was over-drawn \$0.67 on 27 October 1945, that no deposits were made to it after 20 October 1945 and that the bank refused payment of checks a, b and c because of insufficient funds (R. 16; Pros. Ex. 9).

Mr. Harold Phillerick, Assistant Vice-President of the Seattle First National Bank, testified by deposition that his bank cashed check d, giving the accused \$30.00 for it and that this check was returned with the notation that the account was closed (R 16; Pros. Ex. 10). Mr. Robert Sherman, Assistant Treasurer in charge of the bookkeeping department for the Commercial Trust Branch of the Pennsylvania Company, testified by deposition that accused had closed his account with that bank on 11 May 1945, that during the period 31 October 1945 to 15 December 1945 the bank returned unpaid by reason of "no account" thirty checks totaling \$550.98, signed Benjamin F. Baer, including one for \$30.00 drawn to cash and returned on 5 December 1945 (R 17; Pros. Ex. 11).

4. Evidence for the Defense:

The accused elected to testify in his own behalf and stated that at the time he uttered checks a, b and c, he believed he had \$75.00 on deposit in the Fort Worth Bank (R 22, 28), and that he had no intent to pass a check with insufficient funds. As to check d, accused testified that he did not close out the account in the Pennsylvania Company, that he thought he had \$100.00 in it and that he thought his mother had deposited \$225 in this account (R 29). However, his mother did not answer accused's request that she deposit money for him nor did the bank ever advise him that any deposit had been made (R 23), nor was he sure that he had \$100 in the account (R 24). Accused stated that he never received bank statements from either the Fort Worth or Pennsylvania banks (R 23, 30), that he kept no record of checks that he cashed (R 30) and that his mother had made several checks good on his request (R 27). All the checks have been made good (R 24, 25). Accused further testified on cross-examination that in uttering checks a, b and c he issued \$86.00 worth of checks against an account in which he believed he had only \$75.00 (R 28).

5. The evidence of accused's guilt of all Charges and Specifications is clear and conclusive. The admission, without objection, of evidence that accused had from 31 October to 15 December 1945 issued thirty bad checks against the Pennsylvania Company was not error. A primary issue before the court was the accused's knowledge that he did not have sufficient funds in the bank for payment of the four checks.

"Where criminal intent and guilty knowledge are issues involved in the offenses charged against accused, his recent acts of a similar nature are admissible in evidence against him under paragraph 112b, M.C.M." (Dig. Op. JAG 1912-1940, Section 395 (7)).

It should be observed that the accused is not charged with intent to defraud and this element is not an issue in this case. As stated in III Bull. JAG, July 1944, page 290, section 454 (67):

"The negotiation by an officer of worthless checks without intent to defraud is conduct of a nature to bring discredit upon the military service in violation of A. W. 96 (CM 224286 (1942), 14 B.R. 97, 1 Bull. JAG 215).

* * * *

"A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his carelessness or neglect."

The burden referred to has not been sustained in this case.

Subsequent restitution of the sums involved is no defense (CM 275648, Creighton, 48 BR 123).

The record discloses the Trial Judge Advocate erroneously read to the court that portion of Remington's Revised Statutes of the State of Washington pertaining to the definition of larceny and declaring the maximum punishment therefor to be fifteen years. However, the compelling evidence fully establishes the commission of the present offenses charged and the error did not substantially prejudice the rights of the accused. Any improper effect it may have had in influencing the court's determination of the sentence imposed was corrected by the modification thereof made by the reviewing authority (CM 258372; Holmes, 38 BR 6).

6. War Department records show the accused is 26 years of age, a high school graduate, and single. He attended the University of Virginia for one year until 7 July 1941, majoring in chemistry and taking Naval ROTC work.

He was an enlisted man from 8 January 1942 to 15 September 1942, and an aviation cadet from 15 September 1942 to 29 June 1943.

He was commissioned a temporary second lieutenant, AUS, on 30 June 1943 and on 15 June 1944 was promoted to temporary 1st lieutenant. In May, June and July 1944 accused was awarded Oak Leaf Clusters for operational missions. In August 1944 he was awarded the Distinguished Flying Cross for operational missions. For the period 1 July to 12 August 1944 his efficiency report rendered by his squadron commander was "Unsatisfactory." His previous court-martial convictions are set out in paragraph 2, supra.

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

Seymour H. Wurzel, Judge Advocate.
Thayne O'Brien, Judge Advocate.
Walter H. Davis, Judge Advocate.

JAGQ-CM 312812

1st Ind

NOV 15 1945

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Benjamin F. Baer (O-806604), 423rd Army Air Forces Base Unit.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from 19 November to 31 December 1945, in violation of Article of War 61 (Specification, Charge I) and of cashing four checks without sufficient funds in the bank for their payment, in violation of Article of War 96 (Charge II, Specifications 1, 2, 3 and 4). No fraud was alleged or found. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years.

The reviewing authority approved the sentence, reduced the term of confinement to three years and forwarded the record of trial for action under Article of War 48.

3. Accused pleaded guilty to being absent without leave from 19 November to 31 December 1945. Between 8 November and 28 November 1945 he issued and received value for four checks, in the amounts of \$51, \$10, \$25 and \$30, drawn on banks in which he did not have sufficient funds for payment. The first three were drawn on the Fort Worth National Bank and the fourth on The Pennsylvania Company. On 8 November 1945 and at all times thereafter his account at the Fort Worth Bank was overdrawn. His account with The Pennsylvania Company was closed on 11 May 1945 and was not thereafter reopened. All checks were returned unpaid marked insufficient funds or no account. In January 1946, after his apprehension, accused made restitution as to all four checks. Accused testified that he never received bank statements from either bank, that he kept no record of the checks he drew, and that his mother had made good several checks for him at his request. He further testified that at the time he drew the three checks on the Fort Worth Bank totaling \$86 he believed he had only \$75 in that account, and that he was not sure what amount he had in The Pennsylvania Company account in November 1945.

4. Accused has been twice previously convicted by courts-martial. On 17 August 1944 he was convicted of absence without leave and embezzlement of \$1000 of Government funds, and sentenced to forfeit \$100 a month for six months and to be suspended from promotion for one year. On

30 April 1945 he was found guilty of absence without leave for ten days and sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. This sentence was commuted to a reprimand and forfeiture of \$25 pay per month for six months.

On two occasions in 1944 accused received disciplinary punishment under Article of War 104 for absence without leave. While awaiting trial on the present charges accused was absent without leave from 4 March to 8 March 1946.

Accused was examined by a psychiatrist on 5 February 1946 and found to be mentally responsible for his actions. Again during the months of August and September 1946 the accused underwent extensive observation by a board of psychiatrists who found him to be free from mental defect and fully responsible for his actions. Upon my recommendation, made pursuant to the request of accused's family and in view of all the circumstances of this case, the accused was hospitalized at Fitzsimmons General Hospital from 30 August 1946 until approximately 18 September 1946, for observation and examination as to his mental condition. The report of the Board of Officers which conducted this examination has been received and is attached. The Board found that the accused has no psychiatric disorder or disability, and recommended return to general military duty. The Board further found that accused's intelligence is average, that his judgment is impaired and insight is lacking, and that there is no evidence to indicate that he ever had any disease or derangement which would render him incapable of distinguishing between right and wrong and adhering to the right.

5. Accused received the Air Medal with clusters and the Distinguished Flying Cross for operational missions as a pilot in 1944. Colonel H. M. Reedall (Retired) and Mr. R. R. Stephens, an uncle of the accused, have appeared before me and the Board of Review and have requested clemency.

6. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence be confirmed but that so much of the confinement as is in excess of one year be remitted, that the sentence as thus modified be carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

7. Inclosed is a form of action designed to carry this recommendation into effect should it meet with your approval.

31231-

3 Incls

1. Record of trial
2. Form of action
3. Report of Medical Board



THOMAS H. GREEN
Major General
The Judge Advocate General



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

SPJGN-CM 312829

UNITED STATES

v.

Private HENRY M. VISCARDI
 (32519235), Attached Un-
 assigned to MP & PG De-
 tachment, 1201st SCU, Fort
 Jay, New York.

SECOND SERVICE COMMAND
 ARMY SERVICE FORCES

Trial by G.C.M., convened at
 Fort Jay, New York, 19 March
 1946. Dishonorable discharge
 (suspended), and confinement
 for three (3) years. Dis-
 ciplinary Barracks.

OPINION of the BOARD OF REVIEW
 BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Henry M. Viscardi, attached unassigned to MP&PG Detachment, 1201st SCU, Fort Jay, New York, then a member of Company "C", 2nd Regiment (Housing) ASF, PRD, Indiantown Gap, Penna., did, at Indiantown Gap, Penna., desert the Service of the United States, on or about 4 June 1945, and did remain absent in desertion until he was apprehended at New York, N.Y., 16 January 1946.

By appropriate exceptions and substitutions he pleaded not guilty to the Specification and the Charge but guilty of absence without leave in violation of Article of War 61. He was found not guilty of the

Specification and the Charge but guilty of 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, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence but suspended the dishonorable discharge imposed until the soldier's release from confinement, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 117, Headquarters Second Service Command, Governors Island, New York, 3 April 1946.

3. The accused was tried on 19 March 1946 by a court appointed by paragraph 21, Special Orders No. 43, 20 February 1946, Headquarters Second Service Command, hereinafter referred to as the original order. Lieutenant Colonel Ralph A. Visco was designated as a member of the court by that order. By paragraph 21, Special Orders No. 58, 11 March 1946, same headquarters, hereinafter referred to as the amending order, Captain Charles L. Palmer was detailed "as member of General Court-Martial aptd to meet at Ft. Jay, NY by Par 30 SO 8 this Hq 10 Jan 46 vice LT. COL. RALPH A. VISCO O2058361 ORD DEPT reld." The original order contained the conventional statement that any unarraigned cases referred to the Trial Judge Advocate of the General Court-Martial appointed by paragraph 30, Special Orders No. 8 would be brought to trial before the court appointed by the original order. Captain Palmer sat on the court which tried accused and participated in all the proceedings at accused's trial and the record does not list Lieutenant Colonel Visco as either present or absent. By paragraph 14, Special Orders No. 80, 5 April 1946, same headquarters, hereinafter referred to as the correcting order, the amending order was corrected so as to constitute Captain Palmer a member of the court appointed by the original order - the court that tried accused - vice Lieutenant Colonel Visco, relieved.

It is clear that Captain Palmer sat as a member of the court which tried accused although, at the time, there were no competent orders in existence constituting him a member of that court. Unless, then, retroactive effect can be given to the correcting order it follows that the court was without jurisdiction to try and sentence accused. CM 302975, Macklin; CM 265840, Brown, 43 BR 97; CM 239497, Goggan, 49 BR 289; CM 131672, par. 365 (1) Dig. Ops. JAG, 1912-40.

It is noted at the outset that the amending order is not meaningless. It did appoint Captain Palmer to a court and there was such a court in existence and it is not until 5 April 1946, the date of the issuance of the correcting order, that there is any suggestion that there was a mistake made in the designation of the court on which he was to sit. However that may be, the situation is analogous to

that existing in CM 238607, Mashburn, 24 BR 307, where the Board said (p. 308),

"Where the proceedings are invalid for the reasons stated above, [officer not detailed sat as member] they cannot be validated retroactively by orders issued in amendment of the order or orders detailing the court. Such orders are, regardless of their form, effective only from the date of promulgation."

To paraphrase the language used in CM 218157, Beadle, 11 BR 381, the correcting order failed entirely to give Captain Palmer the status nunc pro tunc of a detailed member of the court appointed by the original order so that he was authorized to sit as a member of that court in the trial of this case on 19 March 1946. It follows that the court was without jurisdiction to try and sentence accused and the proceedings were void ab initio. Mashburn, supra; Beadle, supra.

4. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

Wilmet T. Bangham, Judge Advocate.

Robert J. Blum, Judge Advocate.

James T. O'Hara, Judge Advocate.

(314)

SPJGN-CM 312829

1st Ind

Hq ASF, JAGO, Washington, D. C.

MAY 21 1946

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Henry M. Viscardi (32519235), Attached Unassigned to MP & PG Detachment, 1201st SCU, Fort Jay, New York.

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 and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

2 Incls

1 Record of trial

2 - Form of action



THOMAS H. GREEN

Major General

The Judge Advocate General

(G.C.M.O. 131, 14 June 1946).

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

JACH - CM 312874

25 JUN 1946

UNITED STATES)

FIRST AIR FORCE

v.)

Trial by G.C.M., convened at
Mitchel Field, New York, 8
April 1946. Dishonorable
discharge and confinement at
hard labor for six (6) months
at Mitchel Field, New York

Private First Class JOHNY
B. RANDOLPH (33211068),
Squadron H, 110th Army Air
Forces Base Unit)

HOLDING by the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specification:
CHARGE I: Violation of the 96th Article of War.

Specification: In that Private First Class Johny B. Randolph, Squadron H (Headquarters), 110th Army Air Forces Base Unit, then assigned Squadron A, 811th Army Air Forces Base Unit, did at Phenix City, Alabama, on or about 31 August 1945, unlawfully marry one Olive E. Adams, the said Private First Class Johny B. Randolph then having a living wife, to wit: Mabel Marie Cale.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six (6) months. The reviewing authority approved the sentence, designated Mitchel Field, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. By the Specification, there is described an offense which is alleged and shown by the evidence to have been committed on 31 August 1945. The Charge Sheet shows that accused enlisted at Charlottesville, Virginia on 28 November 1945 for three years after prior service extending from 26

(316)

August 1942 to 7 November 1945. Informal communication by the Office of The Judge Advocate General with the Office of The Adjutant General confirms the fact that the records of War Department show that accused was honorably discharge on 7 November 1945. The Charge was preferred on 13 March 1946 and the case was tried on 8 April 1946.

The Manual for Courts-Martial, 1928, paragraph 10, states:

"The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service".

It has been held by the Board of Review and The Judge Advocate General, and it is well settled that a court-martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by the 94th Article of War, committed in a prior enlistment at the expiration of which he was discharged (CM 200925, Mackiewicz, 5 BR 9; CM 210757, Bargas, 9 BR 343). In the opinion of the Board of Review, the court that tried the accused was without jurisdiction to try him for the offense alleged.

4. For the reasons above stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

22 JUL 46 AM



On Leave

_____, Judge Advocate

Al Hattenstein, Judge Advocate

Joseph J. Stern, Judge Advocate

(317)

JAGH - CM 312874

1st Ind

JUL 12 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, First Air Force, Mitchel Field, New York

1. In the case of Private First Class Johnny D. Randolph (33211068), Squadron H, 110th Army Air Forces Base Unit, I concur in the holding of the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be disapproved.

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

(CM 312874)

1 Incl
Record of trial



THOMAS H. GREEN
Major General
The Judge Advocate General



WAR DEPARTMENT
 Army Service Forces
 In the Office of The Judge Advocate General
 Washington 25, D. C.

SPJGQ - CM 312890

MAY 6 1946

UNITED STATES)

101st AIRBORNE DIVISION

V.)

Trial by G.C.M., convened at Auxerre, France, 24 September 1945 and 1 October 1945. Sentence: Dishonorable discharge and confinement for life. United States Penitentiary, Lewisburg, Pennsylvania.

Private FLOYD W. CRAVER)
 (34311403), Company I, 506th)
 Parachute Infantry)

REVIEW by the BOARD OF REVIEW
 DANIELSON, BURNS and DAVIS, Judge Advocates

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

2. Accused was tried upon the following charges and specifications:

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

Specification 1: In that, Private Floyd W. Craver, Company I, 506th Parachute Infantry, did, near Saalfelden, Austria, on or about 27 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Captain Edward Altacher, German Army, a human being, by shooting him with a pistol.

Specification 2: In that Private Floyd W. Craver, Company I, 506th Parachute Infantry, did, near Saalfelden, Austria, on or about 27 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Major Martin R. G. Watkin, British Army, a human being, by shooting him with a pistol.

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

Specification: In that Private Floyd W. Craver, Company I, 506th Parachute Infantry, did, at or near Saalfelden, Austria, on or about 27 May 1945, with intent to commit a felony, viz. murder, commit an assault upon Sergeant Charles E. Grant, Company E,

506th Parachute Infantry, by willfully and feloniously shooting the said Sergeant Charles E. Grant in the head with a pistol

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

Specification: In that Private Floyd W. Craver, Company I, 506th Parachute Infantry, did, at Auxerre, France, on or about 8 September 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Chablis, France, on or about 9 September 1945.

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

Specification: In that Private Floyd W. Craver, Company I, 506th Parachute Infantry, having been duly placed in confinement in the 101st Airborne Division Stockade on or about 13 August 1945, did, at Auxerre, France, on or about 8 September 1945, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications preferred against him. Evidence was introduced of two previous convictions by summary courts-martial for absence without leave of one and three days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, 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, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. On 27 May 1945 the accused and one Private First Class Dewey H. Hogue, both members of Company I, 506th Parachute Infantry (R 7), spent the afternoon together in the company of two girls (R 10), during which time the four of them consumed one bottle of cognac (R 10, 11). At about 1930 hours (R 9) the accused and Hogue took over a German civilian car (R 11, 26) and returned to their billet at Zell am See, Austria (R 7, 11). Here they went to their separate rooms and cleaned up, and at about 2030 hours (R 7, 11), having secured the services of a German chauffeur (R 7, 11, 21), they started out for a ride in the direction of Saalfelden, Austria (R 7, 21). Accused rode in the back seat and had a bottle of cognac from which Hogue saw him take one drink (R 7, 10, 11). Hogue and accused were each armed with a German luger (R 10, 13). Several miles from Zell am See the car ran out of gas (R 7) and the accused stopped a passing German civilian car (R 7, 12, 25), the driver of which was wearing the uniform of an

officer of the German Army with white arm band (R 7, 29, 45). The accused noticed and desired a pistol which the German carried, which he was entitled to do (R 42, 43), and accused attempted to take it away from him (R 7, 12). Hogue interceded and told the German to drive on (R 7, 12). The car started off and was about 20 feet away when the accused fired three to five shots into the rear of the car (R 7, 13, 25), using Hogue's luger which Hogue had left in the rear seat of the car (R 7, 13). Accused's own luger was then in his holster (R 13). The German car veered into a ditch about 40 yards away (R 7, 13) and Hogue recovered his gun from accused (R 8) and told accused to go to the car and see if he had hit the driver (R 8). Accused then went to the car in the ditch, pushed the driver, backed up, fired a shot and said, "That finished him. I shot him in the head" (R 8, 14, 26). Accused then entered the car and attempted to start it (R 8, 14). As Hogue and the German chauffeur approached the car the accused said to Hogue, "Something happened. A man was murdered" (R 8, 15), and said to the German chauffeur, "Don't look in or there will be two of you" (R 8, 14). Hogue urged accused to get out of the car and he emerged with his luger and another smaller pistol, remarking, "This one has never been fired" (R 8, 17). Hogue testified that at this time the accused appeared to be insane (R 8, 16), that his eyes were sticking out of his head and were perfectly red, like balls of fire (R 8, 16). The accused and the German chauffeur then started down the road in the direction of Zell am See to search for gasoline, Hogue stating that he would remain with the car (R 8, 17). As soon as they rounded a curve he started for Saalfelden to secure an ambulance and report the matter (R 8, 17). Enroute thereto he heard a shot from the direction taken by accused (R 8, 17, 18). Upon arrival at the CP in Saalfelden, Hogue reported the events of the evening and a searching party was organized and an ambulance called (R 8, 41). When they returned to the scene the car in which Hogue and accused had been riding was gone (R 8, 22). The other car was still there and the occupant was examined by a medic and found to be dead as a result of four or five shots through the body and one shot through the head (R 47, 48). He was identified as Edward Altacher, captain of the German Army (R 47). Meanwhile, the accused and the German chauffeur had met some Russians on the road and asked them if they knew where there was any gasoline and accused fired in front of the feet of the Russians (R 22, 26). Accused and the chauffeur continued to a farmhouse and then returned to the car and found that Hogue had departed (R 22). Accused got the car started and he and the chauffeur returned to the farmhouse, which was about five kilometers away (R 22, 26), where they were served a few drinks (R 27). A sketch of the vicinity of the farmhouse drawn by the German chauffeur was received in evidence, without objection by defense (Pros. Ex. A, R 28). During the thirty or forty minutes they were in the farmhouse the accused appeared to be normal except for being a little drunk (R 32). Major Martin R. G. Watkin and Warrant Officer Dodd of the British Army while driving by noticed and stopped to check the German civilian car parked in front of the farmhouse (R 60, 61). Accused immediately came out of the house (R 27, 61), stated that it was his car and asked for a push to get it started, to which Major Watkin agreed (R 61). It was apparent that accused had been drinking

but his conversation was rational, he recognized them as being British, knew that it was his car and that it would be necessary to push it in order to get it started (R 63). An American truck came along at this time and slowed down or stopped when accused called for help, but when the British major said that he was helping the truck started on (R 34, 61). Accused thereupon fired two shots at the truck (R 34, 61) which stopped, and Sergeant Charles E. Grant dismounted and came back demanding to know who had fired the shots (R 34, 61) and accused replied that he had (R 61). Grant asked for his gun (R 34, 38) and accused thereupon fired at Grant who fell over backwards in the road (R 27, 39, 61). Grant was not armed (R 38). The accused then turned and started firing at Major Watkin and his companion, Warrant Officer Dodd (R 27, 65, 66), both of whom ran to take cover. The German chauffeur who was present saw no one else firing (R 31). Major Watkin ran down an alley where his body was discovered a few minutes later by Warrant Officer Dodd and an American soldier who had been in the truck with Grant (R 61). Grant was still lying in the road with a bullet wound in his forehead (R 34, 61). Doctors were secured from a nearby German hospital (R 34, 61), and Grant was removed to the hospital (R 34). Major Watkin was found to be dead as a result of a bullet wound (R 54, 55). Shortly after midnight the accused was apprehended near the hospital, about four or five hundred yards from the scene of the shooting (R 50-52), at which time he was staggering and evidently under the influence of liquor, although his speech was intelligible and he appeared to be in control of his mental and physical faculties (R 43, 44, 51). At the time of his apprehension he was in possession of a .32 cal. pistol which did not appear to have been fired (R 51, 53).

The accused was confined in the Regimental Guardhouse (R 42, 52), and later, upon order of Headquarters, 506th Parachute Infantry, dated 13 August 1945, was placed in confinement in the 101st Airborne Division Stockade (R 56, 57). The confinement order was received in evidence, without objection by defense (Pros. Ex. B, R 56). Although he had not been released or set at liberty by proper authority (R 57), he was not present at a roll call formation held on 9 September 1945 at approximately 1630 hours and was not found after a search of the entire stockade and all installations (R 57). He was apprehended by French civilian police near Chablis, France, on 9 September 1945 in the afternoon and turned over to American Military Police (R 67, 68).

After the defense introduced evidence to the effect that accused was insane at the time of the shootings on 27 May 1945, the prosecution called as a witness the Division Neuropsychiatrist of the 101st Airborne Division (R 83) who had examined accused on 24 September 1945 (R 83) and who had previously studied reports and findings of a prior examination of accused, dated 16 July 1945, by a board of five members convened under the provisions of AR 600-500 (R 84). A study of the reports of the Board revealed that two members thereof considered accused sane, two considered him insane and that the fifth member was undecided (R 84). The Division Neuropsychiatrist testified that in his opinion, based upon a study of the reports and findings and his own personal

examination, the accused was sane at the time the alleged offenses were committed and at the time of trial; that he was intoxicated at the time the alleged offenses were committed on 27 May 1945; that at the time of the alleged offenses on 8 September 1945 he was able and is now able to tell right from wrong and to adhere to the right (R 84); and that in his opinion the accused was not suffering from a psychosis or from psychoneurosis at the time of the alleged offenses or at time of trial (R 84, 96). A written report of his findings was received in evidence over objection by defense (Pros. Ex. C, R 84, 85).

4. A sworn statement previously made by accused relative to his escape from the Division Stockade was received in evidence in which he asserted that he feared to remain there because of abusive and brutal treatment (Def. Ex. "A", R 82).

The defense called as witnesses two neuropsychiatrists of the 227th U. S. General Hospital who had examined accused on 7 June 1945 (R 68, 77) and who were of the opinion that accused was insane at the time of the shootings on 27 May 1945, did not know right from wrong and was not able to adhere to the right (R 71, 74, 79). It was their opinion that accused was a dope addict, and this opinion was corroborated by statements of accused who told them that he had smoked several marihuana cigarettes on the morning of 27 May 1945 (R 72-75, 78). One of the psychiatrists admitted that he was one of a board of three members who examined accused on or about 7 June 1945 and that his opinion of insanity was the minority opinion of the board and was not concurred in by the other two members (R 80, 81). Written statements of the findings of the two witnesses were also received in evidence (Def. Exs. "B" and "C", R 98).

5.a. Murder of Captain Altacher and Major Watkin (Specifications 1 and 2, Charge I). Murder is the killing of a human being with malice aforethought and without legal justification and excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par. 148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death, and an intent to kill may be inferred from an act of accused which manifests a reckless disregard for human life (CM ETO) 12850, Philpot).

Clear, undisputed evidence establishes that at the times and places alleged, accused caused the deaths of Captain Edward Altacher and Major Martin G. Watkin by shooting them with a pistol. The court's findings that the shootings were attended by malice aforethought is supported not only by the inferences of malice arising out of his acts, but also by abundant evidence of an intent to kill, and were, therefore, clearly warranted (CM ETO 10740, Rollins; CM ETO 7315, Williams; CM ETO 10532, Marks).

b. Assault with intent to murder (Specification, Charge II). An assault with intent to commit murder is an assault aggravated by the concurrence of a

specific intent to murder (MCM, 1928, par. 1491, p. 178). The evidence discloses that accused, without legal justification or excuse, at the time and place alleged, shot Sergeant Charles E. Grant in the head with a pistol, and abundantly justifies the inference that the overt act was accompanied by a specific intent to murder. The record of trial clearly supports the findings of the court (CM ETO 2899, Reeves; CM ETO 4269, Lovelace; CM ETO 5137, Baldwin)

c. Escape from confinement and desertion (Specifications of Charge III and Charge IV). The evidence discloses that accused was placed in confinement, that he escaped therefrom on 8 September 1945, and that he was apprehended the following day, 9 September 1945. Although the absence was of short duration, it was initiated by an escape from confinement when accused was being held for trial and was terminated by apprehension, and the court was justified in concluding that the intent requisite for desertion existed. The findings of the court were, therefore, supported by substantial competent evidence (CM ETO 960, Fazio).

6. An issue as to the sanity of accused at the time the offenses were committed on 27 May 1945 was raised by the evidence. One nonexpert witness for the prosecution and two expert witnesses for the defense were of the opinion that he was insane at that time. On the other hand there was evidence as to his appearance and actions at the time in question which was consistent with sanity, and the testimony of an expert witness for the prosecution who believed he was sane and free of any psychosis at that time. An issue of fact as to his sanity on 27 May 1945 thus was tendered for resolution by the court. It being the function of the court to resolve this conflict in the evidence, and its findings of guilty, in which inhered a finding of sanity, being supported by substantial competent evidence, the Board of Review will not intrude its opinion on this issuable fact (CM ETO 9611, Prairiechief; CM ETO 9877, Balfour).

In addition to its findings of guilty, which are in the usual form, the court made contemporaneous findings of sanity which it expressed in this manner (R 102):

"Upon secret written ballot, a majority of the members present concurring, the court finds the accused:

"Sane on 27 May 1945 as to Specification 1 and 2 of Charge I, and sane as to the Specification of Charge II."

Inasmuch as its findings of guilty necessarily involved a finding of sanity, the court was not required to make a special finding on this issue (CM ETO 9611, Prairiechief; CM ETO 9877, Balfour; CM 262735, Kaslow, 41 BR 113). A finding of sanity being essential to findings of guilty, the concurrence of two-thirds of the members of the court on this question is required except when it is considered as an interlocutory question, in which event it may be resolved adversely

to accused by a majority of the court (AW 31). The question presented is whether the special finding of sanity, which reflects the concurrence of only a majority of the members of the court and not the concurrence of two-thirds of the members of the court, impeaches the findings on the general issue. We are persuaded that it does not. We believe the question presented here is similar to that often raised when a jury makes special findings of fact. In such cases it is clearly established that the special findings do not impeach the verdict on the general issue unless they are irreconcilable therewith (Bass v. Dehner (CCA 10th, 1939) 103 F. (2d) 28, cert. den. 308 U. S. 508; Thayer v. Denver & R.G.R. Co., 25 N.M. 599, 185 Pac. 542; Drouillard v. Southern Pacific Company, 36 Calif. App. 447, 172 Pac. 405). The word "majority", meaning "the greater of two numbers regarded as parts of a whole" (Webster's Collegiate Dictionary, 5th Ed.), does not necessarily suggest concurrence by less than two-thirds of the members of the court. Accordingly, we conclude that the special finding of sanity does not qualify or impeach the findings on the general issue.

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

Robert A. Danielson, Judge Advocate
John A. Burns, Judge Advocate
(Dissent), Judge Advocate

(G.C.M.O. 172, 12 June 1946).

as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

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

William B. Ryder , Judge Advocate
Albert G. Skroyd , Judge Advocate
Earl W. Wingo , Judge Advocate

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

JAGN-CM 312909

UNITED STATES

v.

First Lieutenant BASCOM F.
BATTS, JR. (O-909420), Air
Corps.

) WESTERN BASE SECTION
) UNITED STATES FORCES, EUROPEAN THEATER
)
) Trial by G.C.M., convened at
) Paris, France, 31 January 1946.
) Dismissal, total forfeitures,
) and confinement for one (1)
) year.

OPINION of the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, 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 94th Article of War.

Specification 1: In that First Lieutenant Bascom F. Batts, Junior, 444th Bombardment Squadron, 320th Bombardment Group, United States Forces, European Theater, did, at or near Paris, France, on or about 24 October 1945, knowingly and willfully misappropriate about one hundred and ten (110) pounds of coffee, about one (1) case of milk, and about two (2) cases of fruit juice, of a total value of more than twenty dollars (\$20.00), property of the United States furnished and intended for the military service thereof.

Specification 2: In that * * *, did, at or near Paris, France, on or about 27 October 1945, knowingly and willfully misappropriate about fifty (50) pounds of soap, about fifty (50) pounds of sugar, and about one (1) case of milk, of a total value of less than twenty dollars (\$20.00), property of the United States furnished and intended for the military service there__.

Specification 3: In that * * *, did, at or near Paris, France, on or about 5 November 1945, knowingly and willfully misappropriate about thirty (30) kilograms of coffee, about one hundred (100) pounds of soap, and about fifty (50) pounds of sugar, of a total value of less than twenty dollars (\$20.00), property of the United States furnished and intended for the military service thereof.

Specification 4: In that * * *, did, at or near Paris, France, on or about 10 November 1945, knowingly and willfully misappropriate about three (3) cases of soap, of a total value of less than twenty dollars (\$20.00), property of the United States furnished and intended for the military service thereof.

He pleaded guilty to, and was found guilty of, the Charge and the Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: On 25 October 1945, accused and some friends came to the hotel in Paris where Madame Odette Girondeaux lived and offered to sell her "American foods." The merchandise, consisting of soap, sugar, coffee and milk, was in a car driven by one of accused's companions by the name of "Elliott." Accused remarked that he wished to get rid of the stuff as he was returning to the states. Madame Girondeaux agreed to make the purchase, and the merchandise, after being placed temporarily in a room occupied by Elliott, was eventually removed to her quarters (R. 5-6). The containers in which the merchandise was packed bore "American marks" (R. 6).

Five or six additional times between 25 October 1945 and 9 November 1945, Madame Girondeaux purchased American coffee, sugar and soap. Accused was with the driver on two or three of the occasions when delivery was made. He, however, did not personally collect for the merchandise (R. 7). About 13 November military police raided her room and carried away all of her purchases (R. 8). The stipulated testimony of Agent George W. Smith of the Criminal Investigation Division showed that three bags of coffee, fifteen cans of milk, five and one-half cases of soap, and three bags of sugar, property of the United States, were confiscated (R. 9).

After accused was taken into custody, he made, on 15 November 1945, a voluntary statement concerning his activities (R. 10; Pros. Ex. A). He related that on 24 October 1945 he and "Cohen" Elliott

obtained from their mess sergeant 110 pounds of coffee, one case of milk, and two cases of fruit juice, and went to Paris. The following day they made an agreement with "Claudette" whereby she agreed to sell the foodstuffs for them, the coffee at 500 francs a kilo [2.2 pounds], the milk at 100 francs a can, and the fruit juice at 150 francs a can. She gave them a 5000 franc advance payment. They returned to camp on 27 October, procured 60 kilo of coffee, 50 pounds of soap, 50 pounds of sugar, one case of milk and one case of juice from the mess sergeant, transported it to Paris and placed it in Cohen's room. Cohen told accused the next day that 24 pounds of coffee had been sold for 5000 francs. On 5 November the accused and Cohen obtained 30 kilo of coffee, 100 pounds of soap, and 50 pounds of sugar from the mess sergeant after they had presented him with three bottles of liquor. This merchandise was taken to Claudette's room where Cohen received 28000 francs of which he paid accused 3000 francs. Accused procured 50 pounds of soap from a supply officer on the morning of 10 November and Cohen obtained an unspecified amount of soap and coffee. After this merchandise was loaded in a car they picked up two more cases of groceries and transported the lot to Paris where some was placed in Claudette's room and the balance in Cohen's room. Accused and Cohen returned to camp on 12 November and on the way accused inquired where all the money from the sales had gone. Cohen displayed "a stack of money-orders" made out to himself. Accused "was mad but could do nothing." Two days later he was taken into custody by C.I.D. agents (Pros. Ex. A).

The court took judicial notice of quartermaster price lists establishing prices on the items involved in this case as follows:

Coffee	.22 to .28 per pound
Milk, evaporated	.05 per 6 oz. can
	.68 per #10 can
Fruit juice	.08 per 12 oz. can
	2.10 per gallon can (R. 11).

4. Evidence for the defense: Accused, advised of his rights as a witness, elected to testify under oath (R. 11-12). He stated that he was 24 years of age with a bachelor of science degree in electrical engineering. After entering the Army in June 1942 he spent 10 months in a training school and became a radar maintenance engineer. In October 1943 he went overseas (R. 12-13). At the time of the offenses involved in the present case he was a signal officer for the 320th Bomb Group and, in connection with signal requisitions, he made about two trips a week to Paris (R. 13). He committed the offenses alleged in the Specifications in order to get money to have a good time before he went home. From these transactions he realized approximately 20,000 francs of which he spent all but 4500 francs. The franc was then worth about two cents. This was the first time he had experienced disciplinary action since he had been

in the Army. His civilian record was equally clear (u. 13-14).

An extract from accused's service record showed that he attended Vanderbilt University for one year and the University of Missouri for three years, being graduated from the latter school in 1942. During his period of Army service he received two ratings of "very satisfactory" and ten ratings of "excellent." He had been awarded four bronze service stars for various campaigns (R. 13; Def. Ex. A).

5. The four Specifications of the Charge allege that on four different occasions, 24 and 27 October, 5 and 10 November 1945, at Paris, France, accused misappropriated coffee, milk, fruit juice, and soap, property of the United States, furnished and intended for the military service. The value of the property misappropriated is alleged, in the first Specification, to be "more than twenty dollars," and in the remaining three Specifications, to be "less than twenty dollars." The Specifications are laid under the 94th Article of War.

Misappropriating means devoting to an unauthorized purpose. The Manual for Courts-Martial prescribes the following proof under Article of War 94 to establish the offense:

- (a) That the accused misappropriated certain property in the manner alleged;
- (b) that such property belonged to the United States, and that it was furnished and intended for the military service thereof, as alleged;
- (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done; and
- (d) the value of the property, as specified. MCM, 1928, par. 150i.

The pleas of guilty entered by the accused were supplemented by evidence offered by the prosecution independently establishing the commission by accused of the offenses alleged. The woman who purchased the major part of the misappropriated merchandise identified accused as one of the group who sold and delivered the merchandise to her. Accused's confession detailed the manner in which he, and a companion, obtained the property and disposed of it. It is clearly shown that the merchandise was the property of the Government since it was obtained from Army supply sources and bore the customary markings of Army property. Accused admitted misappropriation of the following property in his confession:

308 pounds of coffee
 2 cases of milk
 3 cases of fruit juice
 200 pounds of soap
 100 pounds of sugar

On the witness stand accused again admitted the offenses and asserted that he realized 20,000 francs (\$400) from the sale of the property. The value of the property is shown to be in excess of that alleged in the Specifications. The findings of guilty of the Specifications and the Charge are clearly sustained.

6. War Department records disclose that accused is about 25 years of age having been born 11 July 1921. He is a native of Missouri, was graduated from the Kirkwood, Missouri, High School in 1938 and from the University of Missouri in 1942. During his summer vacations he worked as a signalman on the railroad. He had three years of R.C.T.C. training and on 17 June 1942 was appointed a temporary second lieutenant in the Army of the United States. He entered upon active duty on 23 June 1942. The Staff Judge Advocate's Review states that accused was promoted to the grade of first lieutenant on 1 January 1945.

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

Wilmot T. Bangs, Judge Advocate.

Robert J. Clouse, Judge Advocate.

George T. O'Leary, Judge Advocate.

(334)

JAGN-CM 312909
WD, JAGO, Washington, D.C.
TO: The Under Secretary of War

1st Ind

JUL 29 1946.

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Bascom F. Batts, Jr. (O-909420), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, the misappropriation, on four different occasions, of Government property, in violation of Article of War 94. 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 two years. The reviewing authority approved the sentence but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

Accused, a signal officer for the 320th Bomb Group, was stationed at a camp outside of Paris. In concert with an enlisted man and to defray the cost of his pleasure trips into the city he took with him soap, sugar, coffee and milk, which he had procured from the supply room of his organization, and sold them to French civilians. Although the record indicates more extensive activities he was convicted of misappropriating Government property valued at less than \$20.00 on three occasions, and at more than \$20.00 on one occasion. Accused testified that he received about \$400.00 from the proceeds of the sales.

Accused's previous military record is good and his civilian record is declared to be above reproach. Offenses of this character, however, cannot be condoned. I accordingly recommend that the sentence, as approved by the reviewing authority, be confirmed and ordered executed, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to various character references

and pleas for clemency submitted by Honorable John L. McClellan, United States Senate, who has also made representations by telephone on behalf of accused.

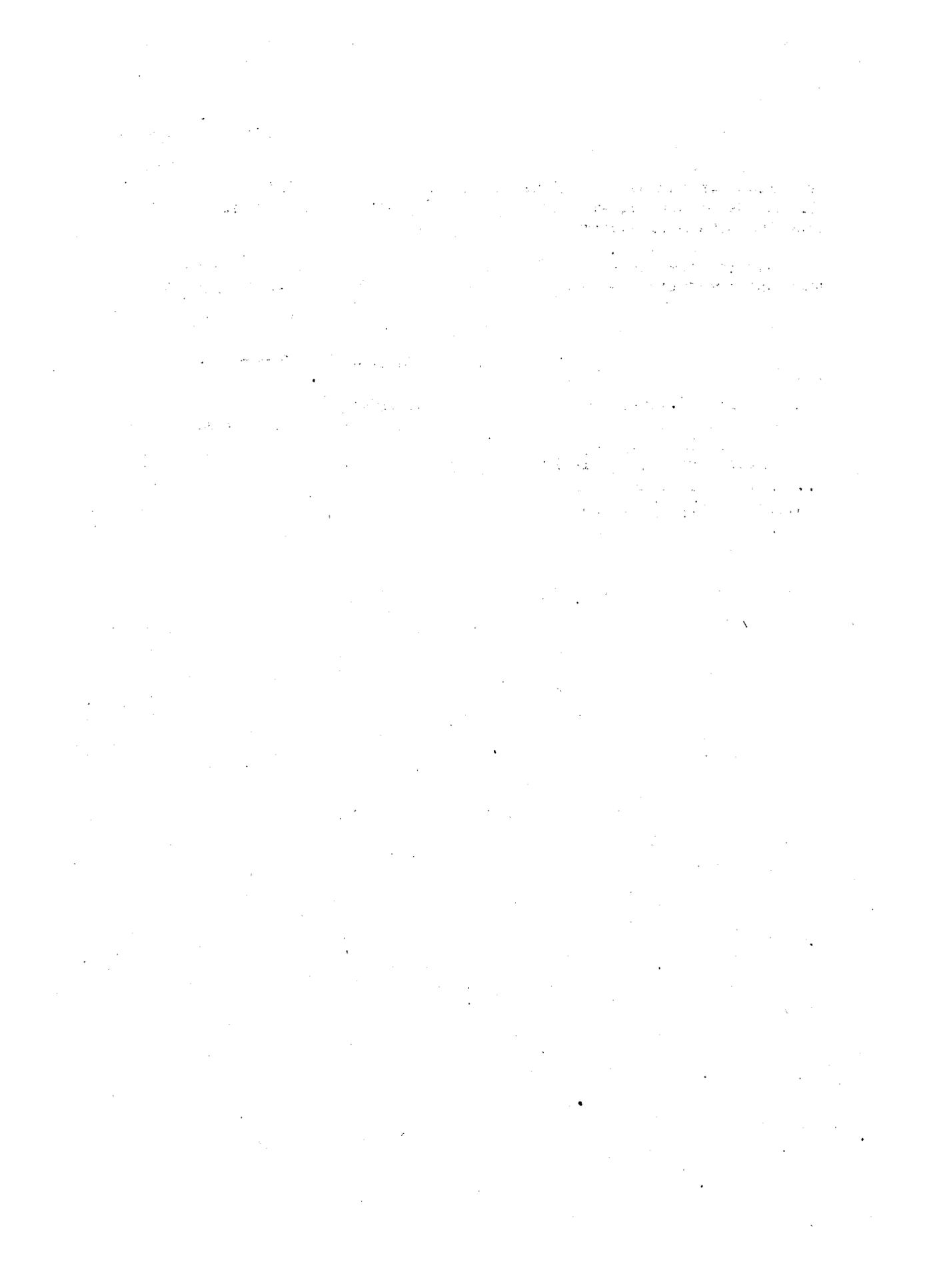
5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

- 3 Incls
1 - Record of trial
2 - Form of action
3 - Character references submitted by Hon. McClellan

(G.C.M.O. 252, 5 Aug 1946).



WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington 25, D. C.

(337)

JAGK - 312990

11 SEP 1946

UNITED STATES)

WESTERN BASE SECTION
US FORCES, EUROPEAN THEATER

v.)

Private First Class GAVINO
MANZANARES, JUNIOR (38165467),
Battery A, 445th Antiaircraft
Artillery Automatic Weapons
Battalion (Mobile), US Forces,
European Theater.)

Trial by G.C.M., convened at
Le Havre, Seine Inferieure,
France, 6 March 1946. Dis-
honorable discharge and con-
finement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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: That Private First Class Gavino Manzanares, Battery A, 445th Antiaircraft Artillery Automatic Weapons Battalion, (Mobile), did, at Rouen, France, on or about 23 December 1945, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Solange Barre.

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, at such place as the reviewing authority may direct, for the term of your natural life." The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or

imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, paragraph 2601, of the District of Columbia Code.

Christy A. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert L. L. L., Judge Advocate

WAR DEPARTMENT
 In the Office of The Judge Advocate General
 Washington 25, D. C.

JAGQ - CM 312996

JUL 22 1946

UNITED STATES)

v.)

Staff Sergeant HOWARD BYRD)
 (32804555), 4213th Quarter-)
 master Service Company.)

UNITED STATES ARMY FORCES)
 WESTERN PACIFIC)

Trial by G.C.M., convened at)
 APO 718, 15 February 1946.)
 Dishonorable discharge, total)
 forfeitures and confinement for)
 life. Penitentiary.)

 REVIEW by the BOARD OF REVIEW
 WURFEL, OLIVER and DAVIS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Staff Sergeant Howard Byrd, 4213th Quartermaster Service Company, did, at APO 718, on or about 25 December 1945, forcibly and feloniously, against her will, have carnal knowledge of PILAR PADILLA.

Accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction by Summary Court-Martial of drunk and disorderly conduct in violation of the 96th Article of War was introduced (R 89). Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 pursuant to Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution discloses that the events of this case occurred on Christmas Day 1945 at the "Blue House" in the barrio of Lahug, Cebu City, Cebu, Philippine Islands. This building was then used as a Field Grade Officers' Quarters and Mess (R 13). The ground floor contained officers quarters, a recreation room, the room occupied by the accused (R 62) and a dining room for houseboys (R 30). The officers' dining room was upstairs (R 27). There was a tent located in the front yard (R 36) about 13 feet from the house (R 53). At that time the accused, Staff Sergeant Howard Byrd, was in the military service and was mess sergeant of the Field Officers' Mess at "Blue House" (R 7, 14).

The prosecutrix, Pilar Padilla, is a Filipino woman, thirty years of age. She had been married and had one child (R 32). Her husband, when last heard from, was a soldier on Bataan. The child had died and Pilar was a laundress for American troops (R 33). She lived with her mother-in-law (R 33). Pilar did accused's laundry when he was assigned to an MP unit and met him in that way, but never had a date with him (R 41). Christmas morning accused went to the house of the mother-in-law looking for Pilar. She was not there and accused, after searching the house for her and being told that she had moved, in the presence of a third person, Felicidad Daro, angrily said, "if Pilar would not appear in the Blue House he would burn Pilar's mother-in-law's house" (R 77).

Christmas afternoon Pilar brought accused's laundry to the Blue House and, finding accused was not there, "I was sitting in the yard" (R 34). Accused came between 1730 and 1800 (R 34, 49) and Pilar gave him his laundry and asked him why he told her mother-in-law that if she did not go to the Blue House he would burn her house down. Accused then grabbed Pilar's hands, held them behind her back with one of his hands, covered her mouth with the other, and took her into the tent. Inside the tent he "boxed" or struck her with his fist and she fell on a cot located in the tent. Accused forced her hands behind her back while Pilar was lying on her back, meanwhile holding a hand over her mouth and told her that if she shouted he would kill her (R 35, 36). Accused then pulled down the drawers or "pants" of Pilar with his left hand, threw them under the cot (R 51), then opened his trousers, pulled out his penis and inserted it in her vagina. Pilar struggled and attempted to get away but was unable to do so because accused was "straddled" across her with both his legs on her legs; her feet and legs were spread wide apart and she was not able to move (R 37, 38). Accused ejaculated into Pilar's vagina (R 43). Accused then buttoned his trousers with one hand, still covering Pilar's mouth with the other, raised her from the cot meanwhile holding her two hands tightly behind her back, and took her to his room on the first floor of the "Blue House." While accused was taking her there, he loosened his grip over her mouth. At that time Pilar told accused that she was not going with him because he might rape her again, and accused immediately tightened his grip on her mouth and told her that "if I would cry he would kill me" (R 39, 44, 45). Pilar was crying at the time (R 15) and tried to get away from him but could not because of

weakness from blows previously received (R 39, 46). Accused pushed her inside his room (R 15) and there he again inserted his penis in her vagina and again ejaculated (R 39, 45). She did not know whether accused used a rubber prophyllactic (R 43). Pilar lost track of how many times accused hit her in the course of the afternoon and was "groggy" from the blows (R 46). Accused told Pilar that she must stay with him the "whole night," that "if you will go out I will kill you," and then accused left (R 39). Shortly thereafter Filipino houseboys knocked on the door of the room, the door was opened and Pilar, who was standing by the door crying (R 30), told them that she had been raped by Sergeant Byrd (R 39), and then told an American Major about "the incident which happened to me" (R 40). Pilar had bruised and swollen lips and a small bruise on her chin (R 30, 31).

This account of the prosecutrix is corroborated by the testimony of several other witnesses. Osorio Zarzosa, for seven months a dishwasher at the Officers' Mess, was in the dish washing room and could see into the tent which was about four meters away. At 5:30 in the afternoon Zarzosa saw Pilar in the tent sitting on the cot and saw accused approach her. Accused immediately embraced Pilar and "wrestled the woman's body with his arm hardly." "The woman struggled herself to free from Sergeant Byrd" (R 49, 50). The following excerpts from the testimony of Zarzosa are significant:

"A. Sgt. Byrd embraced the girl tightly. The woman tried to struggle to free herself, but Sgt. Byrd was close to her. Sgt. Byrd encircled the woman's body by his right hand holding both hands of the woman at the back of her and his left hand covering the mouth of the woman.

Q. Was the woman sitting down or lying down?

"A. At that time the woman was lying down on a cot.

Q. You show me how Sgt. Byrd embraced the woman.

"A. Sgt. Byrd embraced Pilar this way: (The witness, using the TJA as model, placed his hands in such a manner that one arm of Sgt. Byrd was around the woman locking her two arms and the other hand covering her mouth)

Q. What happened next?

"A. Sgt. Byrd unbuttoned his trousers, pulled his pecker out and inserted it into the woman's vagina.

Q. What was the girl doing at the time?

"A. The girl struggled to free herself from the grip of Sgt. Byrd.

Q. Tell the court where Sgt. Byrd's legs were?

"A. Sgt. Byrd's legs were above the upper legs of the woman."

* * *

"Q. Tell the court how Sgt. Byrd took the pants of the woman off?

A. He took the woman's pants off and threw them under the cot. The right hand was holding the body of the girl. The left hand threw the pants of the woman under the cot."

* * *

"A. When the woman struggled to free herself from Sgt. Byrd, Sgt. Byrd slapped her face.

Q. What did the girl do then?

"A. The girl screamed bitterly, but her voice was hardly audible because her mouth was covered by the left hand of Sgt. Byrd.

Q. Was the girl carrying anything in her hands the first time Sgt. Byrd came up to her?

"A. Yes, Sir, she was carrying laundry." (R 50, 51, 52)

Juan Roseliosa, a sweeper at the mess, testified that Christmas Day while he was under the Blue House sitting on a wooden cot he saw accused with one hand grab both of Pilar's hands behind her back and with the other hand placed over her mouth pushed her inside his room (R 15). Pilar was crying (R 15) and told accused she did not want to go with him (R 16) "inside the room because you might rape me again" (R 16, 17). Roseliosa heard Pilar crying inside the room but did not see anything inside the room (R 17). Accused left his room and went away in a truck and immediately thereafter Roseliosa saw Pilar kneeling on the floor in accused's room crying. Pilar then told Roseliosa that accused had raped her (R 20).

Ireneo Rosal, who had been a waiter at the Mess for nine months, testified that on Christmas afternoon when he went downstairs in the Blue House (R 22) he went to the window of accused's room (R 23), at which point he was about seven feet away from accused and Pilar (R 24). Rosal heard Pilar crying inside accused's room and heard her say, "Why will you rape me when you had already raped me in the tent?" (R 22). At this time accused was standing beside Pilar and had one arm around her body locking her arms (R 23). Accused slapped Pilar's face. Pilar tried to cry but her voice did not come out because her mouth was covered by accused's hand (R 23). When Rosal went back to work he last saw accused and Pilar sitting side by side on the bed and Pilar was crying (R 25).

Fructuoso Gocotano, who worked at the Blue House, testified that on Christmas after accused left the house he talked to Pilar (R 28). While Gocotano was in the houseboy's dining room some five to six yards from accused's room he heard Pilar calling for her mother. He went to accused's room and asked Pilar what the trouble was and she said she had been raped by Sergeant Byrd (R 29, 30). Gocotano saw a black spot on Pilar's chin and a bruise and a little blood on her lips (R 29, 30, 31).

Between 1000 and 1100 on 26 December 1945, Pilar was examined by a medical officer (R 8, 9). She was upset, crying and meaning. Examination

externally showed no evidence of anything abnormal but she did have an abrasion on her chin and a tiny cut on her lip (R 10). Internally, there were a few small abrasions on the neck of the cervix and a small cervical laceration which may or may not have been caused by the act of penetration (R 8) and was not conclusive evidence of sexual penetration (R 10). Smears from four areas of the vagina were taken and upon microscopic examination were found to be negative (R 8). It would be possible for the test to be negative for spermatozoa even though an orgasm had occurred in intercourse on the day previous. The negative result could be caused either by the use of preventive measures while engaged in intercourse or by the failure of the applicators, by which the smears are taken, to pick up spermatozoa (R 9). No gonococci germs were found in the vaginal smears (R 11). However, if such germs had been introduced, they might die in the vagina in a period of hours and not be observed (R 12).

4. The accused was informed of his rights and elected to give sworn testimony in his own behalf (R 68, 69) as follows: Accused had known Pilar Padilla for some time past, had gone out with her and had upon previous occasions been "intimate" with her as often as two or three times a week (R 70). Sometime after 1645 hours he saw and talked to Pilar in the tent and she told him that she was pregnant and "made mention of P40.00"; "she asked me for the forty pesos which she stated she badly needed" (R 71). Pilar was crying and accused asked her to stop crying. Accused then invited Pilar and two other women who were with her to go to his room for something to eat (R 72). Pilar accompanied accused to his room, and accused there asked her to go home, but Pilar said, "she wasn't going anywhere" (R 72). Accused then left on a truck telling Pilar "Don't try to wait until I get back" (R 73). He did not strike Pilar or use any force to make her go with him from the tent to the room (R 73). Accused asserted he had gonorrhoea on Christmas (R 73).

Other witnesses called on behalf of the defendant testified as follows: Between 1600 and 1630 hours Major Thummel went to Major Huffman's room which was located on the lower floor of the "Blue House" (R 58). Accused came to Major Huffman's room about 1600 hours (R 61). There was a distribution of Christmas gifts such as cigarettes to the mess personnel in Major Huffman's room (R 58), and the accused assisted in the distribution (R 61). The mess personnel left the room about 1730 hours (R 61) but accused stayed and talked for a time and those present drank beer (R 58). At about 1745 hours accused left the room and shortly thereafter Major Huffman also left (R 61). Major Thummel remained in Major Huffman's quarters between about three quarters of an hour and an hour and a quarter (R 59) after accused left. Major Huffman departed from the room about five minutes after accused left (R 61). Major Huffman's room was about 35 feet from the room of the accused on the same floor (R 62). Major Huffman noticed nothing unusual around the premises at that time and place (R 62). Accused left Major Huffman's room with Private First Class Frierson who was a cook (R 64). A boy came to Frierson and told him that accused was beating up a girl in his tent (R 64). Frierson went to the tent of

accused and saw a girl sitting and crying and accused was sitting on the cot (R 64). Later on Frierson went to the room of accused and saw "the girl standing at a table" (R 65). Accused told the girl not to leave the room until he came back (R 65). Frierson and accused went to Talisay for a swim. The girl was afraid but Frierson did not pay much attention to her because she was crying (R 67). When accused and Frierson returned the girl was no longer there (R 65).

5. In our opinion the evidence in this case clearly establishes a premeditated brutal rape. The evidence of the prosecutrix, including the facts of use of force, lack of consent, penetration and of complaint by her shortly after the attack, is fully corroborated by other witnesses. The testimony of the accused that he told Pilar to go away is contradicted not only by the prosecutrix (R 39) but by Frierson who was called as a witness for the accused (R 65). Accused denied having told Pilar's mother-in-law he would burn down her house if Pilar did not come to the Blue House (R 75). Under all these circumstances, the court was entirely warranted in disbelieving the account given by the accused.

Counsel for the accused sought to impeach the corroborating witnesses by stressing their failure to intervene. Their conduct in this respect is graphically explained by the witness Rosal in the following excerpt from his testimony (R 25):

"Q. Then, why did you not try to help her. Did you call someone to come to her assistance?

A. No, Sir.

"Q. Why not?

A. In that case, Sir, it was difficult for me to stop Sgt. Byrd. As you know, Sir, we are working under Sgt. Byrd and if we interfere with his business the likelihood will be he will get mad at me and most likely I will lose my job."

6. Accused is 29 years of age and was inducted into the military service on 13 February 1943. His commanding officer testified that accused's services as a mess sergeant were superior and that his character was excellent, and that he never caught him telling falsehoods (R 62). Accused was eligible to return to the United States before Christmas, but at the request of his superiors, volunteered to remain a while longer to maintain the efficiency of the Field Officers' Mess. A request for clemency signed by five members of the court, the trial judge advocate and defense counsel is attached to the record following Exhibit I. After considering this recommendation however, the reviewing authority approved the sentence without recommending leniency.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the

findings of guilty and the sentence. 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 rape, recognized as an offense of a civil nature and punishable by death under Section 278, Criminal Code of the United States (18 USC 457).

Seymour W. Kurland, Judge Advocate

H. Hayne Oliver, Judge Advocate

Walter H. Davis, Judge Advocate

