OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 63

1946

R
16
B63
v.63

R
16
B63
v.63

Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 63

including

CM 313009 - CM 313980

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1946

00605

CONTENTS FOR VOLUME 62

CM No	ACCUSED	DATE	PAGE
313009	Kasprzyk	23 May 1946	1
313057	Siwy	8 July 1946	5
313118	Brown	9 Dec 1946	13
313119	Dickens	17 Jul 1946	21
313135	Cash	22 Oct 1946	25
313163	Hawkins	4 Sep 1946	29
313165	Hunter	26 Sep 1946	39
313212	Koftinoff	24 Jul 1946	45
313217	Morgan	19 Jul 1946	55
313323	Priamiano	24 Jul 1946	61
313445	Shirley	13 Sep 1946	65
313446	Cunnagin	25 Jun 1946	71
313453	Hughes	8 Aug 1946	81
313466	Daniels, Sellers	13 Jun 1946	91
313469	Lister	6 Aug 1946	97
313497	Green	5 Sep 1946	107
313541	Baer	13 Aug 1946	129
313544	Carson	28 Jun 1946	137
313545	Hogue, Allen	15 Aug 1946	153
313548	Stover, Fee	12 Sep 1946	161
313553	Hodgdon	19 Aug 1946	173
313562	Grove	17 Oct 1946	181
313593	Sawyer	16 Jul 1946	185
313595	Thomas	20 Jun 1946	193
313617	Williams	24 Oct 1946	199
313619	Coppock	2 Jul 1946	203
313648	Shaw	15 Aug 1946	205
313651	Gravelle	21 Oct 1946	211
313689	Davis	12 Mar 1947	215
313709	Velarde	14 Nov 1946	237
313721	Alston	21 Aug 1946	243
313723	Bassett	3 Oct 1946	253
313737	Dempsey	11 Jul 1946	259
313772	Payne	29 May 1946	267
313786	Howard, Walker	7 Aug 1946	273
313788	Wolfe	21 Aug 1946	283
313820	Vandewater	21 Aug 1946	291
313830	Friedman	9 Oct 1946	299
313847	Beezley	12 Dec 1946	307
313891	Weintraub	22 Aug 1946	317
313896	Taylor	21 Oct 1946	341
313956	Medina, Duran, Rainey	30 Oct 1946	343
313965	Holley	20 Jun 1946	357
313980	Allbright	7 Aug 1946	363

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

SPJGN CM 313009

UNITED STATES	WESTERN BASE SECTION UNITED STATES FORCES, EUROPEAN THEATER
v.	Trial by G.C.M., convened at Marseille, France, 27 February 1946. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private FRANK J. KASPRZYK (31137072), Company A, First Staging Area Battalion.	

HOLDING 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 on re-hearing upon the following Charge and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Frank J. Kasprzyk, Company A, First Staging Area Battalion, U. S. Army (then of the 3633d Quartermaster Truck Company, APO 772, U. S. Army), did, in conjunction with Private First Class Earl B. Davis, at Marseille, France, on or about 28 April 1945, feloniously take, steal, and carry away forty (40) automobile batteries of the value of more than fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to all Specifications and the Charge and was found not guilty of Specification 2 of the Charge and guilty of the remaining Specification and the Charge. 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 one year. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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.

3. On 26 January 1946, accused's case was "re-referred" for trial to the court appointed by paragraph 21, Special Orders No. 40, Headquarters Western Base Section, 23 February 1946, as amended, hereinafter referred to as the original order. That order named Major Grant J. Williams as Law Member and First Lieutenant Frank C. Stetson as Defense Counsel. Paragraph 22 of Special Orders 40, same Headquarters, 23 February 1946, hereinafter referred to as the additional order, also appointed a court and named Major Williams as Law Member and Lieutenant Stetson as Defense Counsel.

Special Orders No. 42, 25 February 1946, same Headquarters, hereinafter referred to as the amending order, provided in paragraph 59 that Lieutenant Stetson "is reld as Defense Counsel of the General Court-Martial aptd per par 22, SO 40, this Hq, cs, for the case of Pvt Frank J. Kasprzyk only," and in paragraph 60 that Lieutenant Stetson "is detailed as Law Member of the General Court-Martial aptd by par 22, SO 40, this Hq, cs, Vice Major GRANT J. WILLIAMS, 0365852, JAGD, this Hq, reld as a member and law member in the case of Pvt Frank J. Kasprzyk only."

On 27 February 1946, accused was tried by the court appointed by the original order. Lieutenant Stetson sat as Law Member and Major Williams was listed as absent - "Excused VOCG, other military duties."

Special Orders No. 71, 26 March 1946, hereinafter referred to as the correcting order, corrected the amending order by, in effect, relieving Lieutenant Stetson as Defense Counsel of the court appointed by the original order and appointing him as Law Member on that court in place of Major Williams, relieved. Both changes were, of course, for the trial of this accused only.

It is clear from the foregoing that Lieutenant Stetson sat as Law Member at the trial of accused at a time when there was no order which in express terms appointed him to that position. Unless, then, we can give retroactive effect to the correcting order or unless we can, by interpretation, discover the intent of the reviewing authority and give effect to it in the face of the express words of the amending order it follows that the court was without jurisdiction to try and sentence accused. CM 302976, Macklin; CM 265840, Brown, 43 BR 97; CM 239497, Goggan, 49 BR 289; CM 131672, par. 365 (1), Dig. Ops. JAG, 1912-40.

We have recently had occasion to consider the effect of an attempt to correct orders retroactively in CM 312655, Gaston; CM 312752, Cole, Jr.; CM 312829, Viscardi. At that time we quoted and affirmed the statement in CM 238607, Mashburn, 24 BR 307, to the effect that -

"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."

We concluded there, as we conclude here, that the correcting order could not be given a nunc pro tunc effect. It follows, therefore, that the correcting order could not constitute Lieutenant Stetson a member of the court for proceedings had before the date it was published.

The next question is whether the amending order can be interpreted so as to constitute Lieutenant Stetson a member of the court appointed by the original order, despite the fact that it refers in express terms to the court appointed by the additional order.

It may be urged that since the appointing authority referred this case for trial to the court appointed by the original order, he intended that it should be tried by that court, and, accordingly, in naming Lieutenant Stetson as Law Member for this case only, he must have intended to put him on the court appointed by the original order. In addition, the reference shows that the court appointed by the original order has been amended, and, unless the amending order accomplished that purpose, there are no other orders which even purport to do it.

This argument, however, seems to us to lay too much stress on the reference to trial. It is settled that it is not jurisdictional (CM 271153, Karsanoff; 46 BR 61) and it might be argued that the reviewing authority had, by constituting Stetson a member of the court appointed by the additional order, thus obliquely indicated his intention to transfer the case to that court. Moreover, the argument from the reference loses force when we consider that the reference was made on 26 January 1946 - almost one month before the court was appointed. This certainly does not indicate any unequivocal intent to have the matter tried by the particular members of that court. So far as the statement in the reference indicates that the reviewing authority believed that the court appointed by the original order had been amended, it seems to us to prove no more than the correcting order proves, i.e. that a mistake had been made.

These considerations might have considerable force if an attempt to carry out the amending order produced a meaningless or incongruous result. That is not the case. The amending order, as written, can be carried out to the letter, since Lieutenant Stetson was Defense Counsel on the court appointed by the additional order and Major Williams was Law Member on that court. It has a plain meaning and is free from error on its face, and we think it must be interpreted as written. It follows that the court was without jurisdiction to try and sentence accused, and that the

proceedings were void ab initio. CM 218157, Beadle, 11 BR 381; Mashburn, supra.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

Wilmot T. Baughn, Judge Advocate.

Robert J. Glaum, Judge Advocate.

Gerald T. O'Hara, Judge Advocate.

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

JAGH - CM 313057

8 JUL 1946

UNITED STATES	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 29 March 1946.
Private THADDEUS G. SIWY (32831896), Headquarters Peninsular Base Section	)	Dishonorable discharge (suspended), and confinement for five (5) years Disciplinary Training Center

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Thaddeus G. Siwy, Headquarters Peninsular Base Section, then Company D, 6th Armored Infantry Regiment, did, without proper leave, absent himself from his station at APO 251, United States Army, from about 22 March 1944 to about 20 October 1945.

After submitting a plea in bar of trial under the Statute of Limitations, which plea was overruled by the court, he pleaded guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, reduced the period of confinement to five years, ordered execution of the sentence as thus modified, and designated the MTOUSA Disciplinary Training Center, or elsewhere as the Secretary of War may direct, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 774, Headquarters Peninsular Base Section, APO 782, 8 April 1946.

3. The only substantial question presented by the record is whether the trial was barred by Article of War 39, it being evident that the arraignment of accused occurred more than two years after the date of the commission of the offense alleged.

4. Accused was arraigned on 29 March 1946. The evidence shows that he absented himself without leave from his station (Company D, 6th Armored Infantry Regiment, APO 251, United States Army) on 22 March 1944, and voluntarily surrendered himself to military control on 28 October 1945.

At the trial accused pleaded the statute of limitations (AW 39) in bar of trial. The plea was overruled by the law member, without objection by any member of the court.

The 39th Article of War provides in pertinent part:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *** Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: ***."

The period of limitation begins to run on the date of the commission of the offense. Absence without leave is not a continuing offense and is committed on the date the person absents himself (par. 67, MCM, 1928, (Cor. 4-20-43)).

When an accused pleads the statute of limitations in bar of trial, and when it appears from the record that the statutory period of limitations as to time has elapsed between the date of the alleged offense and the date of arraignment, the burden devolves upon the prosecution, if it proposes to combat the plea, to prove such absence or other impediment as will except the case from the operation of the statute. The burden is not upon the defense to prove that no such impediment existed, and unless such impediment existed the plea should be sustained. (CM 149051; CM 150340; CM 150341; CM 154086; Dig. Op. JAG, 1912-40, Sec. 396 (3)).

The trial judge advocate contended that the plea in bar should be overruled because accused was outside the jurisdiction of the United States during the time he was absent without leave.

The Board of Review takes judicial notice that accused's organization was stationed in Italy on 22 March 1944, when accused went absent without

leave. Although it was stipulated that accused returned to military control on 28 October 1945, it appears from the charge sheet and the record of trial that he was confined by the military police in Naples, Italy, on 20 October 1945 and was continuously confined in Italy until his trial on 29 March 1946 at Leghorn.

The ruling of the law member, in overruling the plea, is construed to mean that as accused went absent without leave in Italy and returned to military control in Italy, he was outside the territorial limits of the United States during his absence, and thus outside the jurisdiction of the United States within the meaning of Article of War 39.

Article of War 88 of the Articles of War of 1806 and Article 103 of the Articles of War 1874, predecessors to the present Article of War 39, barred trial of an accused after the lapse of more than two years between the commission of the offense and the order for trial "unless by reason of having absented himself" or some other manifest impediment, he had not been amenable to justice within that period. By act of Congress, dated 11 April 1890 (26 Stat. 54), Article of War 103 was amended by adding a provision barring trial of an accused for peacetime desertion after the lapse of more than two years between the commission of the offense and arraignment, "unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of limitation". The present Article of War 39, enacted in 1916 and reenacted in 1920, provides that the period of any "absence of the accused from the jurisdiction of the United States", and any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the periods of limitation. (CM 212634, Bergdoll; 10 BR 249, 254, 255) (Underscoring supplied).

The Attorney General of the United States in interpreting the provision "by reason of having absented himself" found in the 88th Article of War, supra, stated:

> "They certainly do not mean absence from the state or beyond seas, as those terms are ordinarily used in statutes of limitation, for they relate only to civil jurisdiction. To say that they mean absence from the company in which, or locality where, the offender enlisted, would seem to be a too narrow construction. I am inclined to think that it would be fair to hold that the absence contemplated by the article is an absence from the reach or jurisdiction of the military authorities. To avoid the limitation of the article, it would seem to be necessary that the accused should not only be absent, but that he should be where the military authorities by reasonable diligence could not make him amenable to justice". (14 Atty. Gen. 265-267)(Underscoring supplied).

In the following case, the question was raised as to whether a soldier who had deserted and who was for a considerable time thereafter employed on an army transport, had absented himself from the United States within the meaning of those words as used in the 103rd Article of War. It was held:

> "* * * that absence from the United States under the one hundred and third article of war means absence from the jurisdiction of the United States, and that absence from the geographical limits of the United States on a government vessel would not be such absence from the United States as is contemplated by the statute particularly where the deserter passed under the same name as that which he bore when he enlisted and deserted, as in this case." (C. 21760, July 9, 1907; 28321, May 11, 1911; Dig Op. JAG, 1912, p. 173, 174) (Underscoring supplied).

There can be no doubt as to the meaning of the "tolling absence" in the present Article of War (AW 39) for it clearly and unequivocally specifies it "to be absence from the jurisdiction of the United States".

Jurisdiction has been defined as the legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to a particular matter. It is the legal power to interpret and administer the laws in the premises. (Webster's New International Dictionary (Second Edition)). In its popular sense it has been defined as the authority to apply the law to the acts of men. (Wedding v. Meyler, 192 U.S. 573, 584). As applied to a sovereign, either state or nation, jurisdiction signifies the right to apply the law to acts of persons. (35 CJ 427).

From the initial date of the accused's absence without leave to the present date, the United States Army has maintained an occupational force in Italy. Military courts within that occupational force have jurisdiction over, and have the authority to apply the law to, all American military personnel within the territorial limits of that country. There is nothing in the record to indicate (nor did the prosecution contend) that the accused was without the territorial limits, the occupied zone of Italy during his absence. Further, there is nothing in the record to indicate that accused was beyond the reach or jurisdiction of the military authorities.

The Board of Review is of the opinion that accused, who was not shown to be physically absent from the territorial limits of a nation in which our military authorities exercised court-martial jurisdiction, was not absent from the jurisdiction of the United States within the meaning of Article of War 39. The contention of the prosecution that Article of War 39 did not apply because accused was outside the jurisdiction of the United States is untenable.

In so holding the Board of Review has carefully considered the language of the Federal court in the Davison case, wherein the court interpreted the "tolling absence" under Article of War 103, as follows:

> "* * * The 'absence' here intended is obviously, from the context, such an absence as interposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of the military courts; that is, absence from the United States." (In Re. Davison, 4 F 507, 510) (Underscoring supplied).

The foregoing language of the Federal court is not inconsistent with the opinion heretofore expressed by the Board of Review. In the Davison case, the accused deserted from the military authorities in the United States and was apprehended there. For the purposes of this decision, absence from the United States was absence from the jurisdiction of the military courts.

We need only consider then whether there was some "manifest impediment" which excepted the accused's case from the operation of the statute and, if no such impediment existed, what effect must be given to the accused's plea of guilty.

The term "manifest impediment" as used in Article of War 39 has been defined by the Boards of Review, The Attorney General and the courts. The Federal court has said that manifest impediments

> "* * * are such impediments only as operate to prevent the military courts from exercising its jurisdiction over him; as for instance, his being continuously a prisoner in the hands of the enemy, or of his being imprisoned under sentence of the civil court for crime and the like. * * *" (In Re. Davison, 4 F 507, 510, supra).

The Attorney General has said that the impediment intended by the statute is an impediment "similar in kind to absence", or which "renders it impossible for a prosecution to take place" (14 Atty. Gen. 52), and does not mean merely "want of evidence" or "ignorance as to the offender or offense by the military authorities". (14 Atty. Gen. 265, 267). A similar interpretation has been placed on the words by military courts and tribunals: (CM 212634, Bergdoll; CM 197643, Smith).

A mere allegation to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offense, is not a good averment of a "manifest impediment" in the sense of the article. (R. 35640, Oct. 1874; Dig Op JAG, 1912, p. 171, 172).

Other than the mere assertion that accused was outside the jurisdiction of the United States, the prosecution did not prove, or attempt to prove, an

absence or other impediment as would except accused's case from the operation of the Statute of Limitations. The Board of Review, therefore, is of the opinion that the court erroneously overruled accused's plea in bar of trial.

It cannot be said under all the circumstances of the case, that accused intended to or did waive his rights in the premises by his plea of guilty. He pleaded guilty only after his plea in bar of trial was overruled by the court. Such being the case his trial upon this specification, in plain violation of the 39th Article of War, was erroneous and unauthorized.

5. The charge sheet shows that accused is about 24 years of age and that he was inducted at Buffalo, New York on 5 February 1943 to serve for the duration of the war plus six months. He had no prior service.

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

On Leave, Judge Advocate

A. Hettenstein, Judge Advocate

Joseph J. Sterns, Judge Advocate

JAGH - CM 313057 1st Ind

WD, JAGO, Washington 25, D. C. JUL 1 9 [illegible]

TO: Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and Executive Order No. 9556, dated 26 May 1945, is the record of trial in the case of Private Thaddeus G. Siwy (32831896), Headquarters Peninsular Base Section.

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 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. 256, 16 August 1946).

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

JAGQ CM 313118

Dec 9 1946

UNITED STATES v. Private EDWARD BROWN (33810235), 3716th Quartermaster Truck Company (Hv).	EIGHTH ARMY Trial by GCM, convened at Kobe, Honshu, Japan, 12 and 13 March 1946. Dishonorable discharge and confinement for life. Penitentiary.

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 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 Edward Brown, 3716 QM Trk Co, APQ 660, did, at Wakayama-Honshu Japan, on or about 10 December 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one T/5 Albert L. Dearing, a human being by shooting him with a carbine.

The accused pleaded "guilty except the words 'with malice aforethought,' 'deliberately' and 'with premeditation' and to the excepted words not guilty." He was found guilty of the Specification and the Charge. Evidence of two previous convictions by summary courts-martial, one for careless driving of a vehicle and disobedience of the lawful order of a noncommissioned officer, and the other for speed limit violation, 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, McNeil Island, Washington, 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 50½.

3. In the view we take of this case, no discussion of the evidence is necessary or appropriate.

4. At the appropriate time in the beginning of the trial, the accused was asked, by the trial judge advocate, whom he desired to introduce as counsel (R 2). "The accused stated he desired to be defended by: The defense counsel and assistant defense counsel." The trial judge advocate then announced the names of the accuser, the investigating officer, and the officers who forwarded the charges. Whereupon, the following proceedings were had (R 3):

> "Prosecution: The Prosecution has challenges against COL. ERNEST E. HODGSON, COL WILLIAM H. MCCUTCHEON AND 2ND LT. ELVIN C. LEAVITT, by virtue of knowledge of this on a previous occasion.
>
> "Pres: If there is no objection by the court these three will be excused."

By a certificate of correction, it appears that:

> "The Trial Judge Advocate then informed the court that, by previous special orders, Lieutenant Leavitt had been Assistant Trial Judge Advocate of the General Court-Martial and, in that capacity, had assisted the Trial Judge Advocate, the undersigned, in the preparation of subject case for trial on behalf of the prosecution; that Lieutenant Leavitt's representing the accused thereafter would not be ethical."

No objection was voiced. We deem it unnecessary to consider the irregularity of this procedure in so far as the two members of the court, Colonel Hodgson and Colonel McCutcheon, are concerned. As to them, suffice it to say that the provisions of paragraphs 57 and 58 of the Manual for Courts-Martial (1928) were not complied with, nor does it appear that the fourth paragraph of paragraph 38a of the Manual was applicable or had been resorted to.

The action of the trial judge advocate in challenging the assistant defense counsel, Second Lieutenant Elvin C. Leavitt, and the action of the president of the court in sustaining that challenge, is a different matter. So far as the researches of the Board of Review have disclosed, this action is without precedent in the annals of military justice. To begin with, the Manual for Courts-Martial plainly provides in paragraph 58b that "Only the members of a general or special court-martial are

subject to challenge". (Emphasis supplied). And Article of War 18 states that the members of a general or special court-martial may be challenged. Conforming to the mandate it has been held that the trial judge advocate is not subject to challenge (CM 117782 (1918), Sec. 375 (1), Dig. Op. JAG, 1912-40; CM 234622, Panettiere, 21 BR 79).

In Article of War 11 the Congress provided that "For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary" (Emphasis supplied). In the instant case the authority which appointed the court must be presumed to have considered it necessary to appoint three assistant defense counsel, one of whom was Lieutenant Leavitt. And in Article of War117 it was further enacted that "The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such cousel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11" (Emphasis supplied).

In CM 284066, Mejie (1945) the Board of Review said:

> "An examination of the history of court-martial procedure reveals that our military tribunals have not always recognized the right of an accused to be represented by counsel. Indeed, Winthrop states, ' * * * The admission of counsel for an accused in military courts is not a right but a privilege only * * *'. He then states that the Sixth Amendment to the United States Constitution, which guarantees that, ' * * * In all criminal proceedings the accused shall * * * have the assistance of counsel for his defense * * *', refers only to proceedings before criminal courts of the United States. Winthrop Military Law and Precedents, 2d Edition, Reprint 1920, p. 165. Without attempting to determine the correctness of this broad conclusion it is sufficient to observe that in 1920 Congress rephrased our present Article of War 17 and enacted our present Article of War 11, thereby assuring to all officers and soldiers the same, equal, basic right to be fairly and faithfully represented by counsel when tried by court-martial as is possessed by private citizens when tried in a Federal court."

The Supreme Court of the United States has frequently spoken upon the constitutional right of persons accused to be represented by counsel. In Johnson v. Zerbst, Warden, 304 U.S. 458 (1938), the Court said:

"The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty."

In Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, the Court held that the fact that the right of an accused person to have counsel for his defense was guaranteed expressly (as respects the Federal Government) by the Sixth Amendment, notwithstanding the presence of the due process clause in the Fifth Amendment, does not exclude that right from the concept of due process of law. The court said:

> "The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution. * * * The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right ' to have the assistance of counsel for his defense'. * * * The fact that the right involved is of such a character that it cannot be denied without violating those 'Fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * * is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. * * * ' * * * It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. * * * If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' While the question has never been categorically determined by this court, a consideration of the nature of the right and review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character. * * * We think the failure of the trial court to give them (accused) reasonable time and opportunity to secure counsel was a clear denial of due process. * * * To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the

Union may disregard. ' * * * In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel."

Citations to the same effect might be multiplied indefinitely, showing the vital importance attached by the courts of the land to the safeguarding of the constitutionally guaranteed right of accused persons to be represented by counsel, but there is no occasion for doing so. In the case before us the record shows that the basis for the trial judge advocate's unauthorized and unheard-of challenge of the assistant defense counsel was "by virtue of knowledge of this on a previous occasion", the previous knowledge having been gained while properly and legitimately assisting in the prosecution's preparation of the case prior to appointment as assistant defense counsel. In the other words, the participation of Lieutenant Leavitt in the defense of the accused, charged with a capital offense and on trial for his life, was objected to because he possessed knowledge as to what the case was about and what the facts and issues were; in short, he was by virtue of his knowledge of the case peculiarly well qualified to represent the accused adequately and effectively; and the accused had specifically stated that he desired to be defended by that officer. For all that appears, Lieutenant Leavitt, by virtue of this very knowledge of the case, if not indeed by experience and training, may well have been better qualified then any other member of the defense staff to represent the accused and protect his rights. Applying the cardinal principles laid down in the authorities cited above, we are of opinion and hold that defense counsel is not subject to challenge; and that the action of the court in depriving the accused of counsel appointed to defend him and whom he expressly accepted and introduced in open court as one of his desired counsel, constituted a wanton abridgement of his constitutional rights and a flagrant denial of due process of law, and injuriously affected his substantial rights within the meaning of the 37th Article of War. It is the opinion of the Board of Review that the same principle recently expressed by the United States Supreme Court as to whether an error was prejudicial under the Federal harmless-error statute (Sec. 269, Judicial Code, 28 U.S.C. 391), is applicable in determining whether an accused's substantial rights were prejudiced within the meaning of Article of War 37. In Kotteakos v. United States (10 June 1946), 90 L. Ed. 1178, the Court said: "That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of Section 269".

5. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously

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 not legally sufficient to sustain the findings of guilty and the sentence.

s/ Charles M. Dickson, Judge Advocate

s/ W. Wayne Oliver, Judge Advocate

s/ Francis Boyles, Judge Advocate

JAGQ CM 313118 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Eighth Army, APO 343, c/o Postmaster, San Francisco, California

1. In the foregoing case of Private Edward Brown (33810235), 3716th Quartermaster Truck Company (Hv), attention is invited to the 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. I recommend that the findings of guilty and the sentence be vacated.

2. The legal effect of the action by the court in sustaining the challenge to the assistant defense counsel, who was manifestly available and whom accused had stated he desired as his counsel, was to deny to accused the right guaranteed to him by Article of War 17 to be represented by available counsel of his own selection. It is my view that the pertinent provisions of Article of War 17 are mandatory and that the denial to accused of the right involved deprived the court-martial of the power to try the case.

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 313118).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JUL 17 1946

JAGQ - CM 313119

U N I T E D S T A T E S v. Private First Class ROBERT L. DICKENS (34488226), 4140th Quartermaster Service Company.	)	UNITED STATES ARMY SERVICE COMMAND C Trial by G.C.M., convened at Headquarters, United States Army Service Command C, APO 404, 13 and 14 February 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 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 Private First Class Robert L. Dickens, 4140th Quartermaster Service Company did, at APO 181, on or about 16 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kajuro Kimino, a human being, by hitting him with a club.

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

Specification: In that Private First Class Robert L. Dickens, 4140th Quartermaster Service Company did, at APO 181, on or about 16 November 1945, unlawfully enter the dwelling of Mrs. Haru Koike, with intent to commit a criminal offense, to wit, larceny therein.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural

life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, 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 50½.

3. Evidence for the prosecution. At approximately 6:10 o'clock in the evening of 16 November 1945, Mrs. Haru Koike was in her home, which was also used as a shop, polishing rice. With her were her two children, one a boy of 13 years (R 7, 15). The door was closed and the shop was closed for the night. Accused opened the door, entered and called for "papa". Mrs. Koike tried to tell him that her husband was not at home. Accused then went to a glass cabinet, removed a bottle containing a quantity of sake and departed with the bottle in spite of her protests. The sake was for the use of the family and accused had no permission to take it (R 9, 15, 16). One soldier who was with the accused testified that accused entered a house by pulling a door open and came out with some "whiskey" in a bottle (R 56, 57). Another companion saw him enter a home and come out with some object under his coat (R 67, 68).

Accused at that time had a "stick", the dimensions of which were variously given as from three feet long and the thickness of "two fingers" (R 56) to two or two and one-half feet long and the thickness of the witness' wrist (R 66). Accused went around a corner, out of the sight of his two companions; he returned shortly thereafter and said "I hit a fellow there" (R 57, 68, 69). Two boys testified that they saw accused hit Kimino who was urinating on the walk (R 18, 19, 20, 33). Kimino fell to the ground (R 26, 37). The testimony of the boys is confusing as to whether they saw accused hit Kimino with any object (R 25, 26, 27, 28, 33, 36, 40), but both heard a loud noise at the time (R 24, 28, 38).

The wife of Kojiro Kimino testified that about 6:15 p.m. on 16 November 1945 her husband found the latrine occupied and went outside. Soon afterwards he came back, got upstairs and fell down. The buttons were off his coat, his feet and hands were full of mud, his face was full of mud and bloody. She put him to bed and called the doctor, who administered first aid and left. Kimino complained about his head and the doctor was called again. About five o'clock the next morning Kimino ceased to breathe (R 43, 44, 45). A Japanese medical doctor testified that he visited the house of the Kimino family on 16 November 1945 twice in the evening and treated the patient. Just after six o'clock the next morning he examined the patient again and he was dead. Death was due to a fractured skull caused by a blow on the head (R 47, 49, 50, 51).

4. Evidence for the defense. Defense counsel stated that accused had been informed of his rights and no evidence was offered in his behalf (R 77).

5. 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 321433, Bischoff). In this case the undisputed evidence established that accused hit the deceased without provocation. The court was warranted in inferring from evidence that accused had a club before and after the incident and from evidence of a loud noise at the time of the blow, as well as the fractured skull of the deceased, that the club was used by the accused in delivering the blow. A stick or club, of the size described in the record, used with fatal effect, is certainly a deadly weapon. The intentional use of such a weapon upon the head of an unsuspecting stranger compels the conclusion that malice existed in the mind of the accused.

b. Charge II and Specification (housebreaking). The evidence established that accused pushed open the door of a house, entered, took a bottle of sake without the permission of the owner and carried it away. The best evidence of his intent in entering the house is his act after entering. The essential elements of the offense of housebreaking are supported by competent evidence in the record.

6. The charge sheet shows accused is approximately 27 years of age and was inducted at Camp Shelby, Mississippi, 11 December 1942. 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 substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18, paragraph 454, of the United States Criminal Code.

Seymour W. Wenig, Judge Advocate

H. Hayes Olitz, Judge Advocate

Walter N. Davis, Judge Advocate

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

JAGK - CM 313135

22 Oct 1946

UNITED STATES v. Private CARL A. CASH (13032119), 6960th Replacement Depot.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 21, 22, 23 and 25 January 1946. Dishonorable discharge and confinement for thirty-five (35) years. Penitentiary.

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 soldier named above.

2. The accused was tried upon the following charges and specifications:

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

Specification: In that Private Carl A. Cash, 6960th Reinforcement Depot, United States Forces, European Theater, (then of Detachment 6964, Ground Force Reinforcement Command), did, at Detachment 6964, Ground Force Reinforcement Command, APO 269, United States Army, on or about 2 March 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Paris, France, on or about 29 September 1945.

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

Specification: In that Private Carl A. Cash, 6960th Reinforcement Depot, United States Forces, European Theater, did, in conjunction with Jacques Provence, Jacques Jurquet, and an unknown person, at Paris, France, on or about 21 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Marianne Fenestre, a human being by shooting her with a pistol.

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

Specification 1: In that Private Carl A. Cash, ***, did, in conjunction with Private Leo Cinaglia, and Private Ray Holbert at Paris, France, on or about 16 September 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Henri Eustratiades, twenty

thousand (20,000) francs, French currency, and one (1) watch, the property of the said Henri Eustratiades, of the total value of more than four hundred dollars ($400.00).

Specification 2: In that Private Carl A. Cash, ***, did, in conjunction with Private Leo Cinaglia, and Private Ray Holbert and an unknown French soldier, at Paris, France, on or about 18 September 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the person of Louis Contet, one thousand (1,000) francs, French currency, property of Louis Contet, and from the person of Suzanne Contet, two thousand (2,000) francs, French currency, property of Suzanne Contet, and from the person of Albert Thouin, six thousand (6,000) francs, French currency, one (1) ring, one (1) pen and one (1) wrist watch, the property of Albert Thouin, and from the person of Miss Delaye, two (2) rings, property of Miss Delaye, and from the person and presence of Albert Poureau sixteen thousand (16,000) francs, French currency, and one (1) wrist watch, property of Albert Poureau and from the person of Roger Marin two thousand (2,000) francs, French currency, and one (1) wrist watch, property of Roger Marin, of a total value of more than five hundred and forty dollars ($540.00).

Specification 3: In that Private Carl A. Cash, ***, did, in conjunction with Jacques Provence, Jacques Jurquet, and an unknown person, at Paris, France, on or about 21 September 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons and presence of Jean Nicolai, Denise Besnard, Yvonne Rimoldi, and Alphonse Velghe, money and jewelry of the value of about one hundred thousand (100,000) francs, French currency, the property of the aforementioned, of the value of about two thousand dollars ($2,000.00).

He pleaded not guilty to all charges and specifications. He was found guilty as follows:

"Of the Specification and Charge I -- Guilty.
"Of the Specification and Charge II -- Guilty.
"Of Specification 1, Charge III -- Guilty.
"Of Specification 2, Charge III, Guilty, except the words and figures 'one thousand (1,000)', substituting therefor the words and figures 'five thousand (5,000)'; and except the words and figures, 'sixteen thousand (16,000)', substituting therefor the words and figures, 'fourteen thousand (14,000)'; and except the words and figures, 'five hundred and forty dollars ($540.00)', substituting therefor the words and figures 'five hundred and eighty dollars ($580.00)'; of the excepted words, Not Guilty, of the substituted words, Guilty.

"Of Specification 3, Charge III, Guilty, except the words 'Denise Besnard,' substituting therefor the word 'and'; and except the words 'and Alphonse Velghe'; and except the words and figures, 'one hundred thousand (100,000)', substituting therefor the words and figures 'twenty-seven thousand nine hundred (27,900)'; and except the words and figures 'two thousand dollars ($2,000.00),' substituting therefor the words and figures 'five hundred fifty-eight dollars ($558.00)'; of the excepted words, Not Guilty, of the substituted words, Guilty.

"Of Charge III -- Guilty."

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, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to thirty-five years and designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. He forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of evidence and the 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 of 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).

Clinton D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Lenhoff, Judge Advocate

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

JAGQ-CM 313163

SEP 4 1946

UNITED STATES v. Second Lieutenant CLIFFORD C. HAWKINS (0-1595566), 180th Replacement Company, Detachment 39, 19th Replacement Depot, United States Forces, European Theater.	WESTERN BASE SECTION Trial by G.C.M., convened at Paris, France, 7 February 1946. Dismissal, total forfeitures and confinement at hard labor for three (3) years.

OPINION by the BOARD OF REVIEW

WURFEL, OLIVER and MCDONNELL, Judge Advocates

---

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

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

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

Specification 1: In that Second Lieutenant Clifford C. Hawkins, 180th Replacement Company, Detachment 39, 19th Replacement Depot, United States Forces, European Theater, (then of Detachment 67, 19th Replacement Depot), did, without proper leave absent himself from his organization at Detachment 67, 19th Replacement Depot, Etampes, France, from about 18 September 1945 to about 18 October 1945.

Specification 2: In that Second Lieutenant Clifford C. Hawkins, 180th Replacement Company, Detachment 39, 19th Replacement Depot, United States Forces, European Theater, (then of Detachment 67, 19th Replacement Depot), did, without proper leave, absent himself from his organization at Detachment 67, 19th Replacement Depot, Etampes, France, from about 19 October 1945 to about 25 November 1945.

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

Specification: In that Second Lieutenant Clifford C. Hawkins, 180th Replacement Company, Detachment 39, 19th Replacement Depot, United States Forces, European Theater, (then of Detachment 67, 19th Replacement Depot), having been duly placed in arrest at the 19th Replacement Depot, Etampes, France, on or about 19 October 1945, did, at 19th Replacement Depot, Etampes, France, on or about 19 October 1945, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. The prosecution announced that it had evidence of one previous conviction, which was received without objection, read to the court and is appended to the record as Exhibit E (R 12). This is a certificate setting forth four absences without leave of two days each and one for five days. It also states:

"Previous conviction:

"Sentenced to forfeit nine hundred ($900.00) dollars pay at rate of $75.00 per month, per GCMO #50, Hq 15th U. S. Army, dated 10 July 1945."

Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution. The initial unauthorized absence alleged in Specification 1, Charge I, and the termination thereof, were shown by extract copies of a morning report of accused's organization (R 6; Pros. Exs. A and B). The initial unauthorized absence alleged in Specification 2, Charge I, and the termination thereof, were likewise shown by extract copies of morning reports (R 7; Pros. Exs. C, D, D-1).

To establish that the accused was placed in arrest and broke said arrest, as alleged in the Specification of Charge II, the prosecution introduced an extract copy of a morning report (R 7; Pros. Ex. C), which included the following entries with reference to the accused:

"Dy to arrest in qrs as of 1130 19 Oct. From arrest in qrs to AWOL as of 2000 19 Oct."

4. Evidence for the defense. The defense introduced the report of a Board of Officers, dated 23 January 1946, convened under Paragraph 35c, MCM, 1928, and AR 420-5 (R 9; Def. Ex. A). According to this report the Board found:

"1. That 2D LT CLIFFORD C HAWKINS, 0-1595566, (prisoner), Paris Detention Barracks, is sane and responsible for his actions at the present time, and is so far free from all mental defect, disease, or derangement as to be able to distinguish between right and wrong and to adhere to the right and to be able to cooperate in his own defense; and

"2. That 2D LT CLIFFORD C HAWKINS, 0-1595566, (prisoner), Paris Detention Barracks, was sane and responsible for his actions during the time when he is alleged to have committed certain acts for which disciplinary action is now pending; and

"3. That 2D LT CLIFFORD C HAWKINS, 0-1595566, (prisonêr), Paris Detention Barracks, has shown evidence of a Psychoneurosis, mixed type, severe, acute, with severe anxiety, depressive and amnesic features, in an individual with moderate predisposition under prolonged moderate stress; and

"4. That at the time of his alleged offense his judgment and behavior were severely and adversely influenced by this condition and therefore every consideration should be shown in weighing his guilt, and/or in mitigation if found guilty, even though he must be considered sane and responsible; and further the Board finds

"5. That 2D LT CLIFFORD C HAWKINS, 0-1595566, (prisoner), Paris Detention Barracks, shows sufficient improvement in his condition to warrant the opinion

"6. That return to active duty and assignment to actual duties is the most appropriate therapeutic measure."

Defense also introduced an extract from accused's W.D., A.G.O. Form 66-1 (R 9; Def. Ex. B), showing the record and character of his service. Accused testified under oath as to his background and military duties, stating his age, residence, marital status, civilian occupation, date of entry into the Army, date of arrival in England and France; that in July 1945 he was assigned to 3187th Quartermaster Service Company as a platoon leader guarding prisoners of war, which required about one hour of his time daily; that in August 1945 he was sent to the 17th Replacement Depot and to the 19th Replacement Depot in September 1945, at which places he had no duties and did nothing except "tried to read" (R 10, 11).

5. The admission in evidence of the extract copy of the morning report introduced as Prosecution Exhibit A was objected to by the defense. The only ground of objection requiring notice here was that "the officer who authenticated the morning report does not have any prescribed duty to know the truth of the entry" (R 5). The same objection was made to admission of the extract copy introduced as Prosecution Exhibit B (R 6). Defense made the same objections to Prosecution Exhibits C, D and D-1, but as to Prosecution

Exhibit C went further and based objection upon the additional ground, although ineptly phrased, that the entry showing the accused placed in arrest of quarters was inadmissible to prove that fact, over objection (R 6, 7).

The objection that the entries in these extract copies were not made by an authorized person apparently arises from the fact the officer who authenticated the entries on Prosecution Exhibits A, B, C, and D is shown on B and C to be the Personnel Officer of the Replacement Depot detachment, although on A and D his capacity is not shown. A different officer, whose capacity is not shown, authenticated the entry on Prosecution Exhibit D-1. The entries on these five exhibits were dated 19 September, 19 October, 20 October, 26 November and 12 December 1945, respectively. Inasmuch as the same objection was made to each, it will be assumed that the officer authenticating each entry acted in his capacity as Personnel Officer of the Replacement Depot detachment. As such, did he have authority to authenticate morning reports of the detachment? We answer the question affirmatively. Prosecution Exhibits A, B, and C are extract copies of the morning reports of Detachment 67, Ground Forces Replacement Command, and Prosecution Exhibits D and D-1 are extract copies of the morning reports of Detachment 69 of the same command. This situation was confronted and the same question disposed of in CM 308927, Williams (CM ETO 19210), wherein the Board of Review said:

> "2. The extract copies of morning reports offered in evidence in support of Specifications 1 through 6 of Charge I show that the reporting unit in each case was Detachment 71, Ground Force Reinforcement Command, that the original morning report was dated after 8 July 1945 and was signed by the Personnel Officer, 71st Reinforcement Battalion (Pros. Exs. A-H). Accused was attached-unassigned to Detachment 71, 2nd Reinforcement Depot, Namur, Belgium (R 4-5, 10; Pros. Exs. A-H). A Personnel Officer was not after 8 July 1945 authorized as such to authenticate original morning reports of units of a lower echelon than his own (CM ETO 18295, Jones et al; CM ETO 18839, Bender; see CM ETO 18561, Rosamilia and CM ETO 19033, Tonielli. However, Army Regulations 345-400, WD, 3 January 1945, provide in paragraph 43a that 'morning reports will be signed by the Commanding Officer of the reporting unit, or by any officer designated by the Commanding Officer'. After 8 July 1945 such regulations governed the authentication of morning reports in the European Theater (Ibid).
>
> As stated in CM ETO 18561, Rosamilia, supra
>
> > 'It is clear that the Company Commander would have no authority to "designate" the Battalion Personnel Officer not a member of his company and not subordinate to him, to sign the morning report, since the use of the word "designate" implies the exercise of command power.'

The foregoing language is not applicable in the instant case in view of the judicially noticeable fact that in the European Theater each reinforcement battalion is authorized to operate a numbered detachment of the Ground Force Reinforcement Command, the number of which detachment corresponds to the number of the battalion operating it (MCM, 1928, par. 125, p. 135; see Circular No. 1, Ground Force Replacement System, European Theater, 22 June 1944). It may be presumed in the absence of evidence to the contrary that entries in the morning report were made by a proper, duly authorized officer (CM ETO 5234, Stubinski). It may thus be presumed that the Personnel Officer of the 71st Reinforcement Battalion (who was also the Personnel Officer of Detachment 71, Ground Force Reinforcement Command) was duly authorized by the Commanding Officer of Detachment 71 to authenticate original morning reports of the latter unit, there being no evidence to the contrary. It follows that the extract copies were properly admitted in evidence and establish accused's guilt of Specifications 1 through 6 of Charge I. * * *"

We hold, therefore, that the entries were properly authenticated and that the extract copies were admissible.

6. The Specification of Charge II alleges that "having been duly placed in arrest at the 19th Replacement Depot, Etampes, France, on or about 19 October 1945," the accused broke said arrest on the same day. To establish the arrest, the only evidence introduced was the first entry contained in the extract copy of the morning report introduced as Prosecution Exhibit C, reading "Dy to arrest in qrs as of 1130 19 Oct," as above stated. Does such evidence prove that accused was duly placed in arrest? We think so. This evidence does not show by whom nor by what authority the accused was placed in arrest. Officers may properly be placed in arrest:

"By commanding officers only, in person, through other officers, or by oral or written orders or communications. The authority to place such persons in arrest or confinement will not be delegated. Subject to such limitations as may be imposed by superior competent authority the term 'commanding officer' includes the commanding officer of a garrison, post, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors" (Par. 20, MCM, 1928).

The burden of proving that the accused was duly placed in arrest is upon the prosecution (Par. 139a, MCM, 1928). It has been held that the

presumption of legality of arrest referred to in paragraph 139a of the Manual extends only to the grounds for the arrest and not to the authority to arrest, and that the latter must be proved (Dig. Op. JAG 1912-1940, Sec. 427(3), 250.413, April 29, 1938; CM 249824, Graves, 32 BR 207 and cases there cited).

In CM ETO 8706, Twist (1945), where the only evidence of accused's being placed in arrest was a morning report entry, it was held that "Since this was admitted without objection, it is deemed competent to show the status alleged . . . ." Such was not the case here; the admission of the extract copy was objected to by the defense. However, we do not consider objection or lack of objection on the part of the defense as being the decisive factor in such a case. Moreover, we are of opinion that the decisions holding that the presumption of legality of arrest extends only to the grounds for the arrest and not to the authority therefor established a distinction without a difference. Public officers are presumed to perform their duties properly (Par. 112a, MCM, 1928). This presumption applies, until the contrary be shown, to the acts of officers of the Army (CM 239068, Knierim, 25 BR 35). Assuming that the presumption may be indulged that sufficient cause existed for placing in military arrest a person subject to military law, we can find no basis in reason for holding that it may not also be presumed that proper military authority ordered the arrest. Indeed, it would appear that the latter presumption follows a fortiari, lacking evidence to the contrary. We believe that the above-cited decisions limiting the presumption to the grounds for arrest only are unsound in principle and should not longer be followed.

The evidence of previous convictions (R 12; Ex. E) should not have been considered by the court. It shows a previous conviction by general court-martial but fails to set forth the offenses of which accused was convicted. Further, it shows five previous absences without leave with nothing to indicate that accused was convicted of these offenses by court-martial. In fact, the previous conviction referred to concerned only two of those absences. The evidence of the other absences without leave was clearly inadmissible (MCM, 1928, par. 79c, p. 66).

However, since this error did not prejudice the accused's rights insofar as the findings of guilty are concerned, and since the sentence imposed is within the legal limits provided by law, the error does not require the disapproval of either the findings of guilty or the sentence.

Although it is impossible to measure the probable effect of the error upon the action of the court in arriving at the sentence, the Board of Review is of the opinion that the record can be completely purged of

the effect of the error by an appropriate remission by the confirming authority (CM 243015, Fisher, 27 BR 257; CM 270462, Ricker, 45 BR 295).

7. War Department records show that accused was born on 26 April 1912, is married and has no children. He is a high school graduate and attended the University of Minnesota two years, majoring in economics. His civilian occupations, between 1928 and 1942, consisted of work as a shipping clerk and porter in a shoe store, hotel porter, junior librarian on a WPA project, Pullman porter and stock room clerk. He was inducted on 26 January 1943 and served as an enlisted man until commissioned a temporary second lieutenant, QMC, Army of the United States, on 13 August 1943, upon completion of Quartermaster Officer Candidate School. He was convicted by general court-martial, on 3 July 1945, of two absences without leave of two and five days, respectively, and breach of arrest, for which he was sentenced to forfeit $75.00 per month for twelve months. The extract copy of accused's W.D., A.G.O. Form 66-1, introduced as Defense Exhibit B, shows the following performance ratings between 13 August 1943 and 12 August 1945: one very satisfactory, seven excellent, and three superior; and that he departed the United States for foreign duty on 3 June 1944.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial which may not be rectified by the discretionary action of the confirming authority. In the opinion of the Board of Review, the record of trial is legally sufficient to sustain the findings of guilty and to support the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Seymour W. Wurfel, Judge Advocate

Thayne Olsen, Judge Advocate

Harold F. McDonnell, Judge Advocate

(36)

JAGQ - CM 313163 1st Ind

WD, JAGO, Washington 25, D. C. SEP 14 1945

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 Clifford C. Hawkins (0-1595566), 180th Replacement Company, Detachment 39, 19th Replacement Depot.

2. Upon trial by general court-martial this officer was found guilty of two specifications of absence without leave, for approximately thirty-one days and thirty-eight days, respectively, in violation of Article of War 61, and of breach of arrest, in violation of Article of War 69. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action 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 sustain the findings of guilty and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that the accused was absent without leave for the two periods stated above. He testified as to his background and military duties, and that he had no duties at the 19th Replacement Depot and did nothing except "tried to read." The defense introduced a report of a board of medical officers that accused was sane and responsible for his actions and able to cooperate in his defense; that he "has shown evidence of a psychoneurosis, mixed type, severe, acute, with severe anxiety, depressive and amnesic features, in an individual with moderate predisposition under prolonged moderate stress"; that at the time of his offenses "his judgment and behavior were severely and adversely influenced by his condition and, therefore, every consideration should be shown in weighing his guilt, and/or in mitigation if found guilty"; and that accused "shows sufficient improvement in his condition to warrant the opinion that return to active duty and assignment to actual duties is the most appropriate therapeutic measure."

5. During the period between 13 August 1943 and 12 August 1945, accused received one efficiency rating of very satisfactory, seven of

excellent, and three of superior. He went overseas on 3 June 1944. He served as an enlisted man from induction on 26 January 1943 until graduation from Officer Candidate School and commission as a temporary second lieutenant on 13 August 1943. He was convicted by general court-martial on 3 July 1945 of two absences without leave for two and five days, respectively, and of breach of arrest, for which the sentence as approved was forfeiture of seventy-five ($75.00) dollars per month for twelve months.

6. The evidence of previous convictions offered by the prosecution should not have been admitted nor considered by the court. This evidence (Prosecution Exhibit E) shows a previous conviction by general court-martial but fails to set forth the offenses of which accused was convicted. Further, it shows five previous absences without leave with nothing to indicate that accused was convicted of these offenses by court-martial. In fact, the previous conviction referred to concerned only two of those absences. The evidence of the other absences without leave was clearly inadmissible. As pointed out by the Board of Review, the record can be completely purged of the effect of this error by an appropriate remission by the confirming authority. In view also of the finding of the sanity board above referred to that accused's judgment and behavior were severely and adversely influenced by his condition, I therefore 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 - Record of Trial
2 - Form of Executive Action

I G.C.M.O. 294, 4 October 1946).

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

JAGK - CM 313165

26 SEP 1946

UNITED STATES v. First Lieutenant WILLIAM A. HUNTER (0-1587333), Quartermaster Corps.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Marseille, France, 22 December 1945. Dismissal, total forfeitures and confinement for five (5) years.

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. Accused was tried upon the following charges and specifications:

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

Specification: In that First Lieutenant William A. Hunter, Sergeant Thomas C. Raulerson, and Private First Class James L. Egan, all of Company B, 1st Staging Area Battalion, acting jointly, and in pursuance of a common intent, did, at or near Calas, France, on or about 15 August 1945, wrongfully and knowingly sell about three hundred (300) blankets, of the value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant William A. Hunter, Sergeant Thomas C. Raulerson, and Private First Class James L. Egan, all of Company B, 1st Staging Area Battalion, acting jointly, and in pursuance of a common intent, did, at or near Calas, France, on or about 22 August 1945, wrongfully engage in business in violation of Paragraphs 2 and 3, A G Letter, AG 004 OpGA, Headquarters, European Theater of Operations, United States Army, 4 April 1945, by selling certain personal property, viz, one (1) one-ton motor, for personal profit.

SEPARATE CHARGE AS TO FIRST LIEUTENANT HUNTER:

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

Specification: In that First Lieutenant William A. Hunter, Company B, 1st Staging Area Battalion, did, at or near Calas, France, on or about 1 September 1945, feloniously embezzle by fraudulently converting to his own use, about twenty-six thousand (26,000) francs, lawful currency of France, of the value of about five hundred and twenty dollars ($520.00), the property of Private First Class James L. Egan, entrusted to him, the said First Lieutenant William A. Hunter, by the said Private First Class James L. Egan, through Sergeant Thomas C. Raulerson, who was then acting for thesaid Private First Class James L. Egan.

He pleaded guilty to Charges I and II and the specifications thereto, not guilty to the Separate Charge and its specification, and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor 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. For the prosecution.

During the early part of the summer of 1945 the accused, who was a supply officer, Sergeant Thomas C. Raulerson and Private First Class James L. Egan entered into an agreement to sell Army blankets and other property from the supply room of the First Staging Area Battalion, located near Calas, France (R. 30, Pros. Ex. 1). On 15 August 1945, German prisoners of war, acting on orders from Sergeant Raulerson, loaded an Army truck with several hundred U.S. Government blankets, the number thereof being estimated from two hundred to four hundred (R. 12-17). Vogislaw Maricic, a Jugoslav, who was present at the loading purchased the blankets and on the following day, 16 August 1945, after the blankets had been delivered to Madam Blanc's place in Marseille, France, he paid to Raulerson and Egan the sum of 40,000 Francs (R. 11-18). From this amount of money accused received 20,000 Francs as his share in the deal (R. 24,30, Pros. Ex. 1). At the suggestion of the prosecution the court took judicial notice of the value of Army blankets as set out in Army Regulations and that the total amount involved exceeded fifty dollars (R. 35). On some date prior to the sale of the blankets accused and the two enlisted men heretofore named decided to sell a one-ton motor which had been left in the vicinity of the supply room by departing troops. On or about 22 August 1945 Sergeant Raulerson ordered a group of German prisoners to load the motor on a truck and it was hauled away (R. 13). For the delivery of this motor the Yugoslav paid Egan 40,000 Francs (R. 18). The accused received 20,000 Francs or one-half of this money (R. 30, Pros. Ex. 1).

The court took judicial notice of letter AG 004 OpGA, Hq. ETO, USA, dated 4 April 1945, the pertinent provisions thereof being read into the

record as follows:

> "Subject: Prohibition Against 'Engaging in Business'. To: Commanding Generals: 1. It is the policy of the Theater Commander that personnel subject to military law in this theater shall not, so far as can be avoided, disturb the economy of the liberated countries nor use their presence here in order to obtain or to lay plans to obtain any commercial advantages for themselves or for others. 2. Pursuant to this policy, all personnel subject to military law are prohibited from 'engaging in business' in this theater. 3. The term 'engaging in business' is defined to include: a. Buying, selling or dealing in securities, except savings bonds regularly purchased from the issuing government; postage stamps; real estate; or any kind of property in this theater for present or future personal profit or investment. (As to dealing in currency, reference is made to letter, this headquarters, AG 121 O;GA, subject: 'Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and certain transactions Involving French Currency Except Through Official Channels', dated 23 September 1944). b. Acting as agent, intermediary or conduit in any business transaction for gain in this theater for any person, firm or corporation, wherever located or planned to be located. c. Using the Army Postal System or other Army Communications systems for sending or receiving communications relating to any unauthorized business transacted, or to be transacted, in this theater." (R. 34)

On or about 1 September 1945, accused proposed to Raulerson that for a 20% commission he would convert Francs into American money. Raulerson thereupon turned over to accused 30,000 Francs, which belonged to Egan. Accused converted about 4,000 Francs (eighty American dollars) and told Raulerson he would give him the balance at a later date, however, he kept the remaining 26,000 Francs and used the money for his own personal benefit (R. 25-28, Pros. Ex. 1).

4. For the defense.

After having been fully advised of his rights under Article of War 24 accused elected to make an unsworn statement. He asserted that prior to the alleged offenses he had lost heavily at gambling, that he had given checks covering his losses, advising the recipients thereof that he did not have sufficient funds on deposit to cover the checks but would reimburse the holders with money from his pay and allowances. He further stated that he was threatened with court-martial action by one of the holders of his checks and that he entered upon the series of transactions for which he was being tried in order to obtain funds to pay his debts. Accused assumed full

responsibility for the sales of the property and admitted taking and applying to his own use the 26000 Francs belonging to Egan.

5. At the close of the prosecution's evidence, the defense made a motion for a finding of not guilty as to the Separate Charge and its specification on the grounds that the 26,000 Francs, alleged to have been embezzled, were the proceeds from the sale of stolen property, that title could not pass to Egan and consequently the accused could not deprive Egan of property which was not his. The motion was properly denied.

> "It is no defense that the principals have no right, as against third parties, to the money which the servant embezzles, or that their title was wrongful. If he fraudulently take it on their account and then embezzle it, the offense is complete. Nor is it any defense that the money embezzled was the proceeds of the sale of liquor kept in violation of law." (Wharton's Criminal Law, 12th Ed., sec. 1287, p. 1599.)

The pleas of accused, his voluntary admissions and the uncontradicted evidence, render unnecessary any further discussion of this case.

6. War Department records show that accused is 25 years of age and that he entered the Army as a private in May 1939. He was commissioned a second lieutenant, AUS, in January 1943. He was promoted to first lieutenant on 1 February 1945. The greater part of his military experience has been in the category of motor maintenance and supply.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction for a violation of Articles of War 93, 94 or 96.

Charles W. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Schroyer, Judge Advocate

JAGK - CM 313165 1st Ind

WD, JAGO, Washington 25, D. C. SEP 30 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 First Lieutenant William A. Hunter (O-1587333), Quartermaster Corps.

2. Upon a trial by general court-martial the accused (together with two enlisted men of his company) was convicted of wrongfully selling about 300 U. S. Government blankets, in violation of the 94th Article of War, and of engaging in business for personal profit in violation of Article of War 96 by wrongfully selling a one-ton motor. Accused was also convicted of fraudulently converting to his own use about 26,000 Francs, property of Private First Class James L. Egan, who was one of his confederates in selling Government property. He pleaded guilty to the specifications alleging wrongful sale of the blankets and motor and guilty to their respective charges. He pleaded not guilty to the specification and charge alleging embezzlement of the Francs. 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 a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

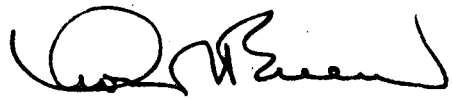
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

As shown by his confession, which was properly admitted in evidence, the accused on some date prior to 16 August 1945 entered into an agreement with Sergeant Raulerson and Private First Class Egan, both of his company, to sell Government property and divide the proceeds. All were members of Company B, 1st Staging Area Battalion, stationed near Salas, France, and accused was supply officer. On or about 15 August 1945 they sold a truck load (about 300) blankets to a Yugoslav for 40,000 Francs, and accused received half of the sale price. They later sold a one-ton motor for 40,000 Francs and accused received one half of the money received in this transaction. Accused later received 30,000 Francs from Raulerson (property of Egan) on a promise to convert same to U. S. money. He converted about 4,000 Francs and kept the rest of the money for his own use.

This officer claims to have lost heavily at gambling and was attempting to cover his losses by selling Government property. Sergeant Raulerson 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 years. Private First Class Egan 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 a period of three years. Both of these sentences have been ordered executed and the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, was designated as the place of confinement in each case.

4. As shown by the record, the frauds perpetrated by this officer, and the example he set before enlisted men of his command render him unworthy of the trust and respect accorded military personnel. I therefore recommend that the sentence be confirmed but that so much of the confinement as is in excess of three years be remitted, that as thus modified the sentence be carried into execution, and that a Federal Reformatory be designated as the place of confinement.

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. 313, 18 October 1946).

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

JUL 24 1946

JAGQ - CM 313212

UNITED STATES v. First Lieutenant PETER M. KOFTINOFF (0-1642279), Squadron A, 4136th Army Air Forces Base Unit (Area Command), Tinker Field, Oklahoma City, Oklahoma.	OKLAHOMA CITY AIR TECHNICAL SERVICE COMMAND Trial by G.C.M., convened at Tinker Field, Oklahoma City, Oklahoma, 8 April 1946. Dismissal and confinement for two (2) 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Peter M. Koftinoff, Squadron A, 4136th Army Air Forces Base Unit (Area Command), Tinker Field, Oklahoma City, Oklahoma, then of Squadron K, 112th Army Air Forces Base Unit, Westover Field, Massachusetts, did, at Westover Field, Massachusetts, between the dates of 1 December 1945 and 15 December 1945, knowingly and wrongfully misappropriate two (2) winter flying jackets, value about $24.00; three (3) flashlights, value about $1.72; eight (8) pliers, value about $7.05; nine (9) adjustable jaw wrenches, value about $5.43; one (1) hand drill, value about $2.00; one (1) electric drill, value about $28.95; two (2) adjustable pipe wrenches, value about $2.88; seventeen (17) box wrenches, value about $10.68; thirty (30) socket wrenches, value about $3.08; one (1) ratchet socket handle, value about $1.53; one (1) cross point screw driver, value about $.25; one (1) four inch cross point screw drivers, value about $.20; seven (7) open end wrenches, value about $1.78; one (1) 1/2 inch open end wrench, value

about $.31; two (2) 3/8 inch open end wrenches, value about $.50; two (2) 5/16 inch open end wrenches, value about $.54; three (3) 15/64 inch open end wrenches, value about $.81; one (1) socket handle, value about $.83; thirty-two (32) drills, value about $4.50; one (1) triangle, value about $.25; one (1) tap, value about $.83; five (5) abrasive points, value about $2.25; five (5) air clocks, value about $1.00; one (1) two inch extension bar, value about $.20; one (1) 7 inch nipper, value about $1.25; one (1) center head, value about $.75; one (1) protractor head, value about $2.52; three (3) screw extractors, value about $.53; three (3) steel counter sinks, value about $2.20; one (1) socket extension bar, value about $.68; one (1) close quarters screw driver, value about $.14; one (1) stone, value about $.48; three (3) jewel snips, value about $2.07; twelve (12) feet of air hose, value about $1.56; one (1) nipper, value about $.75; one (1) pair blue lens, value about $.39; one (1) 12 inch rasp, value about $.59; five (5) 1/8 inch reamers, value about $3.20; one (1) extension cord, value about $3.38; one (1) pound of silk cord, value about $1.00; one (1) wire stripper, value about $4.25; nine (9) punchers, value about $.75; one (1) wire staple paper fastening machine, value about $21.80; two (2) transparent triangles, value about $.50; one (1) aircraft mark plotter, value about $1.50; one (1) 18 inch transparent triangle, value about $1.22; one (1) 5 inch navigation Douglas design protractor, value about $5.00; two (2) tin snips, value about $2.50; one (1) expansion bit, value about $.85; three (3) boxes of paper fastening staples, value about $1.50; one (1) level, value about $4.60; one (1) 100-foot steel measure tape, value about $6.10; two (2) screw drivers, value about $.28; one (1) combination set, value about $7.80; one (1) 8 inch adjustable pipe wrench, value about $.52; one (1) hexagon set screw wrench, value about $.23; eight (8) pencils, value about $.56; ten (10) marking pencils, value about $.60; one (1) incomplete head set, value about $3.34; one (1) volt ohm milliammeter, value about $28.10; one (1) 3 inch bench clamp vise, value about $2.85; one (1) jewelers screw driver, value about $.31; one (1) caliper, value about $1.65; one (1) spring joint divider, value about $1.12; one (1) scriber, value about $.27; two (2) sheet holder forceps, value about $2.40; one (1) stone, value about $1.20; one (1) tap and die set, value about $10.00; one (1) type C-5 cable tensiometer, value about $83.00;

one (1) drill holder No. 1-60, value about $1.45; four (4) emery wheels, value about $.92; one (1) feeler (Wright 83548) gage, value about $.90; one (1) spark plug wrench, value about $1.00; five (5) 20 ampere fuses, value about $.37; four (4) abrasive cup wheels, value about $.92; one (1) pipe strap wrench, value about $.90; one (1) 15 inch flexible machine finger, value about $.50; one (1) 24 inch flexible machine finger, value about $.75; one (1) weeding igniter, value about $.12; thirteen (13) set screw wrench, value about $.98; nineteen (19) drive pin punches, value about $2.78; one (1) 1/2 cold flat chisel, value about $.15; four (4) offset screw drivers, value about $.61; one (1) file, value about $.10; one (1) cotter pin extractor, value about $.18; one (1) 26 leaf thickness gage, value about $2.10; two (2) 10-160 tire gages, value about $2.50; one (1) socket extension bar, value about $.54; one (1) 3/8 inch socket wrench handle, value about $.72; one (1) 5 inch socket wrench bar, value about $.38; twelve (12) files, value about $2.48; one (1) 9 inch smooth bottom iron jack plane, value about $1.28; two (2) calipers, value about $6.00; one (1) pair rubber gloves, value about $3.00; one (1) A-5 inspection lamp assembly, value about $1.39; one (1) pound wire lead solder, value about $2.42; one (1) syringe hydrometer, value about $1.00; two (2) 2 quart vacuum bottle, value about $5.40; three (3) cotton head mops, value about $1.35; one (1) lamp assembly, value about $6.85; one (1) socket handle, value about $.90; one (1) sliding T bar handle, value about $.63; two (2) socket wrench ratchet handles, value about $3.19; two (2) 9/16 inch sockets, value about $.36; seven (7) 5/8 inch sockets, value about $1.26; ninteen (19) sockets, value about $3.42; one (1) 5/16 inch Wright socket, value about $.13; one (1) 3/8 inch X 7/16 inch Universal socket, value about $.63; one (1) 3/8 inch X 11/16 inch Universal socket, value about $.75; one (1) 3/8 inch X 5/8 inch Universal socket, value about $.70; one (1) 3/8 inch X 1/2 inch Universal socket, value about $.66; one (1) 3/8 inch X 9/16 inch Universal socket, value about $.68; one (1) 3/8 inch X 3/8 inch Universal socket, value about $.62; four (4) 3/8 inch Universal socket joints, value about $3.08; one (1) 3/8 inch X 3/4 inch Universal socket, value about $.75; two (2) 9/32 inch sliding T bar handles, value about $.96; one (1) pair 12 inch shears, value about $.75; one (1) pair 9 inch pinking shears, value about $3.30; one (1) 2 ounch brass hammer, value about $.30; three (3) 3 ounce brass hammer, value about $1.05; one (1) ball pein hammer, value about $.40; one (1) 2 ounce ball pein hammer, value about $.20; one (1) cellulose hammer, value about $2.90; one (1) cellulose hammer, value

about $1.15; one (1) cellulose hammer, value about $1.99; four (4) rawhide mallets, value about $2.68; three (3) cellulose hammers, value about $1.20; one (1) pair needle-nose pliers, value about $.80; one (1) pair slip joint combination pliers, value about $.96; one (1) tap, value about $1.16; one (1) wheel, value about $.70; one (1) one piece working suit, value about $4.12; one (1) cloth hood, value about $.88; one (1) wool knit torque, value about $.71; one (1) pair winter combat trousers, value about $8.00; one (1) M-3 trench knife, value about $1.35; one (1) M-8 trench knife scabbard, value about $.95; one (1) mechanical table type can opener, value about $2.84; two (2) 45 caliber automatic pistols, value about $70.00; two (2) 45 caliber barrel assemblies, value about $6.80; one (1) M 1916 holster, value about $1.60; one (1) M-1942 cooking stove, value about $7.07, total value of about $510.48, property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution. A photograph of a number of assorted tools and other items was introduced into evidence as Exhibit A (R 7). The items shown in that photograph were found at the home of accused's wife and were displayed in the court room. Two shipping tickets, bearing the name and address of accused's wife, were found attached to boxes containing portions of the above items in his wife's home. These shipping tickets were admitted into evidence as Exhibits C and D (R 10). After accused's rights had been explained to him he made a voluntary extra-judicial statement which was admitted into evidence as Exhibit B (R 10). Relevant portions of this statement are as follows:

"On or about 1 and 15 December, 1945, I made shipments of Air Corps Property to my wife, Mrs. Peter M. Koftinoff, 521 N.W. 5th Street, Oklahoma City, Okla. The first shipment was one foot locker and two wooden boxes, and the second shipment was two foot lockers, full of Government property. At that time I was assigned as Assistant Quartermaster Supply Officer at the Westover Field, Massachusetts, Squadron 'K'.

* * * *

"On 11 March, 1946, I accompanied Investigator Mehl to the Patrol Headquarters where I examined the Government Property. After examining it and identifying it as the property I sent to my wife's residence at Oklahoma City, Okla., from the Westover Field, Mass., I placed my initials on a number of the articles for identification purposes. I have also carefully examined two lists of property, one list consisting of 11 pages of items and the other list consisting of one page, which indicates the Government property I shipped from the Westover Field, Mass., to my wife's residence in Oklahoma City, Okla. I have initialed these lists. One shows the value of the property as $479.93, while the other shows the value of the property as $20.37.

"All of the Government property I shipped to my wife's residence for storage, I picked up while overseas and when the group came back to the United States, I packed it up and brought it back with other Government property. ---- I knew that it was not proper for me to ship this property, knowing same to be Government property, to my wife's residence in Oklahoma City, Okla., from the Westover Field, Mass. I did not have any authority to ship this Government property from Westover Field. In this connection I wish to state that I saw some of the items were marked 'U. S. Property' before I shipped them. I know it was my duty as an officer to turn in all surplus or found items."

Exhibit E is a tabulation of items showing description, number, cost and total value. It is the same list examined by accused and initialed by him (R 13). This list corresponds to the items set forth in the Specification. It was stipulated that all the property described in the Specification was between the dates of 1 December 1945 and 15 December 1945, and still is, property of the United States Government, furnished and intended for the military service thereof, and that said property, at the time mentioned, was of the Government list price value of approximately $510.48 (R 14; Ex. F).

4. Evidence for the defense. Accused's step-son testified that the items depicted in Exhibit A, or some exactly like those, were shipped to his mother. He went to the railroad depot to pick them up. The items were in wooden boxes and foot lockers which were nailed or bolted closed. He opened the containers without authority and sold some of the items without authority (R 15, 16). After accused had been advised of his rights as a witness he elected to be sworn and testified in his own behalf (R 25). Accused served eighteen months overseas as Squadron Supply Officer and as Group S-4. It was very difficult to secure equipment. When he returned to Westover Field his group was deactivated

and he supervised the turning in of the Group's equipment (R 25, 26). He signed a Category I statement and desired to remain in the service. Accused applied for the Regular Army, but upon learning of a physical defect, let his application drop. He did, however, expect to be transferred into a supply job in another Group. The items in Exhibit A are like items he sent from Westover Field to his wife's residence for storage (R 26, 27). He stated his intention as follows:

> "My intention was for her to store them at the residence and when at such time when I had joined some permanent organization, knowing the difficulty we had overseas in obtaining tools and equipment, I thought at that time I would be assigned to a permanent organization and I would bring these with me to the benefit of that organization." (R 27).

On cross-examination accused testified that he thought the property on display was the same property he shipped his wife, and would not say it is not. He doesn't consider any of it his private property (R 29), and that all of it is Government property (R 33). He was planning to turn it all back to the Government, but admitted that most of the tools could be used in his former trade (R 31, 34).

It was stipulated that accused indicated his desire to be retained on active duty indefinitely by signing in Category I (R 14). Accused's Form 66-2 was admitted into evidence as Defense Exhibit 1 (R 14). It shows his performance ratings as superior and excellent.

5. The evidence clearly shows that accused shipped numerous items of property to his wife's home with knowledge that he had no authority to do so and knowing that the articles were Government property. It was adequately proved that the articles were the property of the United States, furnished and intended for the military service thereof, and that the total value of the articles was as alleged. The proof failed to show competently that the individual articles were of the alleged values, but in view of the proof as to the total value of all the items, this failure is of no importance.

6. War Department records show that accused is 26 years of age, that he was born in British Columbia and is a naturalized citizen of the United States. He was inducted into military service on 29 September 1941 and served as an enlisted man until 19 January 1943 when he was commissioned a temporary Second Lieutenant, Army of the United States. He

was promoted to temporary First Lieutenant 25 November 1943. His performance ratings have been excellent and superior. He had no prior military service. Before entering service he was employed as an electrician's helper and as a supervisor for a building block firm.

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. 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 of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 94.

Seymour W. Wurfel, Judge Advocate

T. Wayne Olivey, Judge Advocate

Walter W. Davis, Judge Advocate

JAGQ - CM 313212 1st Ind

WD JAGO, Washington 25, D. C. AUG 9 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 Peter M. Koftinoff (0-1642279), Squadron A, 4136th Army Air Forces Base Unit (Area Command), Tinker Field, Oklahoma City, Oklahoma.

2. Upon trial by general court-martial this officer was found guilty of misappropriating a large number of tools, articles of clothing, instruments and miscellaneous items, property of the United States, furnished and intended for the military service thereof, of a total value of $510.48, 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 may direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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.

The evidence shows that while serving as supply officer overseas accused accumulated a quantity of tools and other miscellaneous items for which he was not accountable. When his unit returned to the United States for deactivation, accused sent five boxes of these articles to his wife's home in Oklahoma City, Oklahoma. When his step-son opened these boxes without authority and sold some of the contents, the transaction was discovered. Accused did not deny these facts but claimed that he wishes to stay on active duty, thought he would be transferred as a supply officer to another organization and, knowing the difficulties involved in obtaining these materials, planned to have them shipped to him for the use of his new organization.

4. Accused is 26 years of age and is married. He was born in British Columbia and is a naturalized American citizen. Accused was inducted into the Army 29 September 1941 and served as an enlisted man until 19 January 1943 when he was commissioned a temporary Second Lieutenant, Army of the United States, after completion of the Signal Corps Officer Candidate School. He was promoted to temporary First Lieutenant on 25 November 1943. Accused has served eighteen months in the European Theater. His performance ratings have been excellent and superior. I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, and that the sentence as thus modified be carried into execution.

5. 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.CM.O. 259, 16 Aug 1946).

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

JUL 19 1946

JAGQ - CM 313217

UNITED STATES v. Private WILLIE MORGAN, JR. (34743898), Company B, 1908th Engineer Aviation Battalion.	OKINAWA BASE COMMAND Trial by G.C.M., convened at APO 331, 19 March 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 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 Willie Morgan, Jr., Company B, 1908th Engineer Aviation Battalion, did, at or near Kyeda, Okinawa, on or about 5 January 1946, forcibly and feloniously, against her will, have carnal knowledge of Toyo Tamashiro.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. 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 life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, 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 50½.

3. Evidence for the prosecution. On the afternoon of 5 January 1946 Toyo Tamashiro and others were transporting a load of lumber when a truck driven by three negroes stopped and she was told to jump on the truck. Toyo became frightened and started to run. She was caught by one of the "colored boys" and placed on the truck. After a struggle they finally put her on the seat and drove off, holding her down on the front seat and placing

a handkerchief over her mouth when she began yelling for "MP", (R 8, 9, 15). The truck turned left off the highway and drove up into the hills. The victim then described the happenings in the following words:

> ". . . and three of them got hold of me and laid me down on the ground. And two of them held me down on the ground so I couldn't jump or kick around much and one of them started to take off his trousers. Well it was life and death between the colored boys and me so I started to wiggle around but couldn't wiggle around much and they took off their trousers and grabbed hold of my belt of my trousers and took the belt off and I put it back again and this happened about four or five times. And after that one of the colored boys grabbed my both arms and put them behind my head and held me down and the other colored boy pulled my trousers off and the third one raped me.
>
> * * * * *
>
> "Q. How many men raped you?
> "A. Three of them.
>
> * * * * *
>
> "When the third one was raping me the MP came up and when the MP came, one of the boys who was watching right by the truck yelled out and let the third one know the MP was coming up. When the third one was raping me the MP came up and all three of them went in the bushes and hide, and I started to run to the MP and started to tell the story about the raping that was going on. Then the MP asked how many men were there and I told the MP one, two, three. Then the MP asked me what I was doing there and I told him I was raped by three men. . . ." (R 9).

The witness then identified a Lieutenant Anderson as the military policeman who came up when she was being raped (R 10). She did not identify the accused (R 7). Lieutenant Anderson then testified that, after receiving a call, he left camp with another military policeman, turned off a side road and came upon a truck with one negro by it. He then noticed a native girl at the side of the truck; she was pulling up a native costume and was nervous. The witness tried to talk to her and gathered "that three negroes had intercourse with her and she hadn't received anything in return and had been slapped around." The witness then found a second negro lying in the grass. He couldn't find a third negro but the other military policeman, Private Edges, went over a hill ("It was just over the bank". R 14) and brought the accused back with him (R, 11, 12, 18). This witness stated that he was the person brought into the court for identification (R 12). Private First Class Edges testified that he was with Lieutenant Anderson on the afternoon of 5 January 1946, they

found an Army truck in the hills and he "believes" that accused is the man he got out of the bushes; "I saw this man lying on his stomach in this ditch" (R 13, 14).

4. Evidence for the defense. After his rights as a witness were explained the accused elected to give sworn testimony in his own behalf (R 19). He stated that after he got off duty on the afternoon of 5 January 1946, "we" got in the truck and went on down the road, and up a side road. There was a woman up on the hill, and accused jumped off the truck to defecate; several military policemen came up and asked what the men were doing; so accused, hearing this and a "carbine click", fell on his stomach and one of the military policemen found him. He denied that any woman was in the cab of his vehicle and that he had intercourse with any woman on that date. He didn't recognize the woman who testified at the trial. His companions that afternoon were Thomas J. Boswell and Benjamin E. Gratton. As far as he knows, no other negro men were in the vicinity (R 20). He testified further that Boswell and Gratton were in the truck while he was defecating; that when he saw the girl and jumped off the truck to defecate, she was about 25 feet away, and that he went out of sight of her -- "a little better than 20 yards"; that the girl was already there when they stopped, and that he saw no one with her (R 21, 22). Boswell testified as a witness for the defense. He admitted that he had been convicted of rape on Toyo Tamashiro (R 23). He stated that he, Gratton and the accused drove to the top of a hill on the afternoon of 5 January 1946 and saw a woman coming out of the bushes at the top of the hill. When the vehicle stopped, accused wanted to defecate and had not returned to the truck at the time the military police arrived (R 23, 24). Gratton also testified for the defense. He stated that he and Boswell had intercourse with a native girl, the only one he saw on that hill that day, before the accused went to defecate and when accused got back the military police were there. He couldn't recognize the girl (R 26, 27).

5. The unsatisfactory testimony of the prosecuting witness is corroborated and to some extent rectified by the other evidence. She stated that the negroes "raped" her but did not testify specifically to penetration. However, the law does not require that penetration be established by the use of particular language. The rule is stated in 52 Corpus Juris 1058 as follows:

> "The fact of penetration may be proved by either direct or circumstantial evidence. The prosecutrix may testify that defendant had 'intercourse' with her, such expression leaving no doubt as to her meaning that it was 'sexual intercourse'."

And in 52 Corpus Juris 1090-1091 it is said:

"Proof of penetration need not be in any particular form of words; .... If penetration is the only inference comportable with the evidence it is sufficient."

In State v. Booker, 114 Kan. 438, 219 P. 255, the court, holding penetration sufficiently shown, said:

"The prosecutrix testified that the defendant had carnal knowledge of her. It is presumed that she knew what the expression 'carnal knowledge' meant."

And in State v. Williams, 263 Mo. 605, 173 S.W. 1051, the court used the following language in holding that penetration was proved:

". . . the testimony of prosecutrix was that after she refused his request ... defendant forced her to assume a position on her back ... and while holding her down in that position . . . 'ravished' her ... The word is one of plain English, and has a well-defined meaning. ... It therefore follows that the word 'ravished' when used with the context shown by the testimony must necessarily include the act of penetration."

Upon the same reasoning we hold that the testimony of the prosecutrix in this case that she was "raped" sufficiently establishes penetration, considering all the circumstances disclosed by the record and the context in which she employed the word. Her testimony as to lack of consent is adequate to support the findings in this respect.

Toyo Tamashiro testified that three negroes attacked her. Military police who were called to the scene found three negro soldiers in the immediate vicinity, one of whom was the accused, and no others. The accused and defense witnesses testified to being a group of three and being with a woman in the "hills". The identity of the accused as being one of the negroes referred to by the prosecutrix is fully established, even though she was unable to make the identification. Again we turn to the law. The rule with respect to the sufficiency of identification in a rape case is set out in Corpus Juris as follows:

"The evidence must be sufficient to show beyond a reasonable doubt that defendant is the person who committed the offense. The identification is sufficiently proved either by direct or circumstantial evidence. ... But the failure of the prosecutrix to identify defendant's face is immaterial, where there is other evidence to identify him as the person who committed the offense. The confessions or admissions of defendant are sufficient identification." (52 C.J. 1089).

The prosecutrix testified that she was "raped" by all three of the men who carried her off. Accused denied having intercourse with any woman that afternoon and this denial was corroborated by defense witnesses. The court was warranted in believing the prosecutrix on this issue. Even if the court had rejected her testimony in this respect, it was still warranted in finding accused guilty as charged, as an aider or abettor, substantial evidence of joint action being found in the testimony of the prosecution's witnesses.

6. The charge sheet shows accused is approximately 22½ years old and that he was inducted at Fort Benning, Georgia, 12 March 1943. 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. 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. A sentence of death or imprisonment for life is mandatory upon a conviction of rape, in violation of Article of War 92.

Seymour W. Wenfeld, Judge Advocate

Thayne Plaisted, Judge Advocate

Walter W. Dorne, Judge Advocate

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

JUL 24 1946

JAGQ - CM 313323

UNITED STATES	)	THIRD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Bad Wildungen, Germany, 30 August 1945. Death.
Private PETE R. PRIAMIANO (6991543), Company A, 10th Engineer Combat Battalion.	)	

OPINION of the BOARD OF REVIEW
WURFEL, OLIVER 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 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 Pete R. Priamiano, Company "A", Tenth Engineer Combat Battalion, did, at Pietravairano, Italy, on or about 27 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 23 May 1945.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by summary court-martial for absence without leave from 21 November 1943 to 9 December 1943 was received. Accused was sentenced to be shot to death by musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution. The morning report of accused's company showed him to be absent without leave on 27 December 1943 (R 7, Ex. A). A member of accused's company testified that accused was present with the company during part of December 1943, that he ceased to be present

around Christmas of that year and that the witness did not see him until the present. Accused did not appear for roll calls shortly after Christmas 1943 (R 7, 8, 9). On 23 May 1945 a member of the Police Investigation Section apprehended accused in Naples, Italy. Accused was dressed in civilian clothes and when first apprehended spoke only Italian. While he was being escorted to the Provost Marshal's Headquarters accused admitted that he was an American soldier and that he had been absent without leave for "quite a long time" (R 11, 16). When asked for identification papers accused produced a card containing his picture covered partly by the Italian seal (R 12, Ex. B). Also found in accused's possession were: a card headed "Headquarters E-2N50", which is a pass issued to civilian workers (R 13, 14, Ex. C); a document headed "Municipio di Napoli" (R 14; Ex. D); and a paper from the commanding officer of Company "B", 386th Engineer Battalion (Sep) Penbase South APO 782 U.S. Army which certifies that accused is an interpreter at that depot (R 15; Ex. E).

4. No witnesses were called by the defense. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to make an unsworn statement through counsel. He asserted that he came overseas with his present organization and made the landings at Fedala, French Morocco, and at Sicily and Italy. He suffered concussions from blasts three times. At the end of the Volturno campaign the blast effects began to give him unbearable pain. While in combat he lost both his parents and nothing made sense to him any more. Accused asked the court to consider that he was a regular army man and had volunteered for overseas duty (R 19, 20).

5. Desertion is absence without leave accompanied by the intention not to return (MCM, 1928, par. 130a, p. 142). The absence without leave was established by the extract copy of the morning report and testimony. Testimony also proved accused's return to military control at the time and in the manner alleged. The duration of accused's absence, the wearing of civilian clothes, his successful efforts to appear as an Italian civilian and the acceptance of employment as such in the capacity of interpreter with the United States Army, warranted the court in finding that the requisite intent was present.

6. Accused stated that his age was approximately 24 years, not 25 years as stated in the charge sheet. He enlisted at Columbus, Ohio, 8 January 1940. Accused 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. 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 of the sentence. A sentence of death is authorized upon conviction of the offense of desertion in time of war in violation of Article of War 58.

Seymour W. Wurfel, Judge Advocate.
Wayne Olivier, Judge Advocate.
Walter W. Davis, Judge Advocate.

(64)

JAGQ - CM 313323 1st Ind

WD JAGO, Washington 25, D. C. 9 August 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 Pete R. Priamiano (6991543), Company A, 10th Engineer Combat Battalion.

2. Accused was found guilty of desertion in violation of Article of War 58 and was sentenced to be shot to death by musketry. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Accused left his company on 27 December 1943 in Italy and was apprehended in Naples on 23 May 1945. When apprehended he was wearing civilian clothes and pretended to be an Italian civilian. He was carrying the usual documents carried by Italian civilians and also papers which indicated that he was employed as an interpreter by the United States Army.

3. The accused is 24 years of age and enlisted at Columbus, Ohio, 8 January 1940. He had one previous conviction for absence without leave for a period of 18 days. At the trial accused made an unsworn statement through counsel in which it was stated that he made combat landings in French Morocco, Sicily and Italy and that he suffered blast concussions three times. He also stated that he lost both his parents while in combat, that the blast effects began to give him unbearable pain and he lost all sense of responsibility.

4. I recommend the sentence be confirmed, but in view of all the circumstances and in order to bring the sentence within the standards of the postwar clemency program, recommend that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for eight years and that a United States Disciplinary Barracks be designated as the place of confinement.

5. 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of Trial
2. Dft ltr for sig Sec of War
3. Form of Executive action

(G.C.M.O. 290, 1 October 1946).

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

JAGK - CM 313445

13 SEP 1948

UNITED STATES	)	TWENTIETH AIR FORCE
v.	)	Trial by G.C.M., convened at Headquarters Twentieth Air Force, APO 234, 4 April 1946. Dismissal.
First Lieutenant HAROLD J. SHIRLEY (0-856813), Air Corps.	)	

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 upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Harold J. Shirley, Headquarters 19th Bombardment Group, did on or about 6 March 1946 at U. S. Naval Barracks, Camp Wise, Naval Supply Center, Navy Number 926, wrongfully offer to sell whiskey to Seaman First Class Jesse L. Ammons.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

He pleaded not guilty to all specifications and the Charge. He was found guilty of Specification 2 of the Charge and of the Charge, but not guilty of Specifications 1, 3 and 4. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

At about 9:30 P.M. on 6 March 1946, at Camp Wise, Navy Number 926,

the accused approached Seaman First Class Jesse L. Ammons, a colored sailor, and offered to sell him one-fifth of whiskey for the sum of twenty dollars. Ammons refused to buy because he did not have enough money. The accused was wearing a raincoat and glasses (R. 7,9). In response to a report that a man was selling whiskey in camp, Seamen First Class George C. Anderson, Thomas M. Mayberry and William L. Crawford, each of them being masters at arms, went to one of the barracks in the camp where they saw the accused talking to Ammons. A number of sailors were around the door. When the masters at arms entered the accused started to run, at which time Crawford and Anderson forcibly restrained him. When asked his name the accused stated that his name was Stone. Upon being asked for his identification card the accused stated that he did not have one. The accused was then searched and when his raincoat was opened it was discovered that he was an officer. His true name was found in his pocket book. A box carried by accused was opened and found to contain one fifth of whiskey. The accused was taken to the office of the master at arms. On the way to the office Seaman Mayberry fired one shot into the air in order to disperse the crowd which had gathered (R. 11,15). The camp executive officer, Lieutenant Robert M. Rogers (JG USNR), was called and he inquired of the accused concerning his (accused's) activities that evening. The accused stated to Lieutenant Rogers that he had lost considerable money gambling and wanted to get some of his losses back before going home. When he returned home he planned to marry. In the Air Corps this offense carried a dishonorable discharge and this would ruin his chances at home. His mother was ill and it would be a great shock to her. He started with three bottles of whiskey and had sold two of them. The accused also asked Lieutenant Rogers to let him go without filing charges. Lieutenant Rogers then suggested that the accused return the next day and talk with Commander Leffler (R. 21,22). During the investigation of this case the accused having been warned of his rights prepared and handed to the investigating officer a written statement, which was admitted into evidence, wherein he stated substantially the same things as related by Lieutenant Rogers and the other witnesses for the prosecution (R. 24, Pros. Ex. 3).

4. For the defense.

The defense offered two witnesses, Major Edwin L. Murrill (R. 35) and Captain Todd G. Williams (R. 36), and each testified that the reputation of the accused for character, truth and veracity was excellent. The accused was a good officer, cooperative and efficient.

The defense also offered in evidence, without objection, a statement by Technical Sergeant Adam M. Roney (Def. Ex. 1) and a statement by Lieutenant Colonel Harry Maley (Def. Ex. 2), both of whom gave the accused an excellent rating for performance of duty.

The accused, cognizant of his rights as an accused before a courts-martial, was sworn and testified that about three days prior to 6 March he

had given an enlisted man a ride to Camp Wise. This man asked him (accused) if he had any liquor for sale and stated that he would pay as much as $20 a quart. This man then asked accused to come to the water tower on Thursday night. The accused did not intend to go to the water tower. About 5 P.M. on 6 March 1946 he felt depressed so he took a few drinks. He then decided to go down the island. He took two bottles of whiskey and a third bottle which was almost empty. He drank the remainder from the third bottle and placed the other two in a glove compartment of his weapons carrier. He went to a USO show and then to Camp Wise. He parked the weapons carrier on the main highway and walked into camp. A colored man approached him, saying, "What you say Mac." "Did you bring something down?" This man was Ammons. Ammons asked how much, and the accused said one bottle. Ammons then stated that he had $12 but he could get the rest at the barracks. Accused did not want to go to the barracks, but Ammons stated that as he was wearing a raincoat no one would think anything about it. They went to Hut No. 15 but Ammons was unable to get any money. They then went to Ammons' barracks, but again Ammons was unable to get money. The accused then started to leave and Ammons made a statement which sounded threatening. The accused did not hear all of the statements but the last words were, "If I get my cut." The master at arms came in and Anderson asked him what he was carrying. The accused said V-disks. He handed the box to Anderson and started to walk away. One of the masters at arms grabbed his arm and said that he was going to the office with them. There was a large mob outside the hut which started to close in upon the accused. About fifty feet from the hut the accused was "pushed." The master at arms, thinking accused was attempting to escape, knocked him down. While down, the accused received a couple of kicks. He heard a gun go off and thought they were trying to shoot him. The mob backed away and they went to the office. When asked his name the accused replied Stone. The master at arms then started to search him. They were getting rough and accused was afraid of them. He then stated that he was an officer and they quieted down. He tried to talk the master at arms into letting him go. Lieutenant Rogers came in and accused tried to tell a story that would cause the lieutenant to let him go without charges being prepared. The statement introduced as prosecution's Exhibit 3 was made in the hope that Colonel Miles would order punishment under Article of War 104. The accused was willing to sell a bottle of whiskey to Ammons. He left one bottle of whiskey in the weapons carrier and when he returned the weapons carrier was gone. He did not sell this bottle of whiskey (R. 37-47).

5. The evidence shows that the accused offered to sell one-fifth of whiskey to Seaman Jesse L. Ammons as charged in Specification 2 in violation of Article of War 96. The selling of whiskey, by an officer to an enlisted man, has been held to be conduct prejudicial to good order and military discipline (CM 235382, Singletary, 21 BR 389; CM

264728, Price, 42 BR 255, and CM 307051, Glass). The conduct of an officer in offering whiskey for sale to an enlisted man is conduct prejudicial to good order and military discipline and an offense under the 96th Article of War.

6. War Department records show that accused is 30-2/12 years of age and unmarried. He graduated from Phillips Exeter Academy in 1933 and from Harvard University in 1937, receiving the B.A. degree. From August 1939 until inducted into the Army on 21 March 1941 he was engaged in the radio industry. Upon completion of the prescribed course of training at the Officers Candidate School, Fort Monmouth, New Jersey, he was appointed and commissioned a second lieutenant, Air Corps, Army of the United States, 28 November 1942. He was promoted to the temporary grade of first lieutenant on 2 October 1944. On 30 June 1945 he was awarded the Air Medal for meritorious achievement between 24 March 1945 and 7 June 1945 while participating in aerial flights as a member of combat fighting against the Japanese.

7. 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Chester E. Filson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Bachenheimer, Judge Advocate

JAGK - CM 313445 1st Ind

WD, JAGO, Washington 25, D. C. SEP 23 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 First Lieutenant Harold J. Shirley (0-856813), Air Corps.

2. Upon trial by general court-martial in April 1946, this officer was found guilty of offering for sale a bottle of whiskey to an enlisted man of the Navy in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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.

On the night of 6 March 1946 at a Navy barracks at Camp Wise on an island in the Pacific, accused, a white officer in Headquarters, 19th Bombardment Group, wearing a raincoat which concealed his uniform, offered to sell a bottle of whiskey for $20.00 to a colored enlisted man of the United States Navy, not a member of his organization. Accused had gone to the barracks with two bottles of whiskey. After the offer was made accused accompanied Seaman Ammons to barracks occupied by other colored enlisted men of the Navy in an effort to get money to consummate the sale. He attracted attention and was taken in custody. At the time of his apprehension a crowd gathered and it became necessary for a master-at-arms to discharge his pistol into the air in order to quell the crowd and remove the accused from the area.

The accused is a Harvard graduate. He served creditably in combat. His conduct in disguising himself and entering an area occupied by enlisted men of the Navy and offering whiskey for sale on a profit basis, indicates that accused lacks the qualifications which should be inherent in an officer of the United States Army.

4. Following his trial in this case, accused was, in July 1946, again tried by general court-martial, found guilty of knowingly and wrongfully applying to his own use and benefit articles of Government property of the value of $62.45, furnished and intended for the military service, in violation of Article of War 94, and sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence.

The record of trial was examined by the Board of Review and found legally sufficient to support the sentence. Upon execution of the sentence in this, the earlier, case, proceedings in the subsequent case will be treated as abated.

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

6. 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. 295, 4 October 1946).

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

JAGQ - CM 313446

JUN 25 1946

U N I T E D S T A T E S	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at MacDill Field, Florida, 14 March 1946. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private GARNETT H. CUNNAGIN (16067837), Squadron A, 324th Army Air Force Base Unit, Chatham Field, Georgia.	)	

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

Specification: In that Private Garnett H. Cunnagin, Squadron A, 324th Army Air Force Base Unit, Chatham Field, Georgia, then of the 425th Base Headquarters and Air Base Squadron, Chatham Field, Georgia, did at Chatham Field, Georgia on or about 2 January 1944 desert the service of the United States and did remain absent in desertion until he surrendered himself to military control at Detroit, Michigan on or about 22 December 1945.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions, for possession of liquor in violation of local law and for an absence without leave of seven days, 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 twenty (20) years. The reviewing authority approved the sentence, reduced the period of

confinement to ten (10) years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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 50½.

3. Evidence for the prosecution. Before any evidence was introduced, the trial judge advocate made a statement to the court, the substance of which, as shown in the record of trial, is as follows:

> "The trial judge advocate then made an opening statement in which he advised the court that the accused could not be found guilty of being absent without leave, as the limitation on time as set forth in AW 39 had run against this offense. The trial judge advocate further advised the court that the court could either aquit /sic/ the accused or find him guilty of AW 58 as charged." (R 6.)

A morning report entry of accused's organization, as shown by an extract copy thereof, on 14 February 1944 revoked a previous remark and showed him as "Dy to AWOL as of 1700 2 Jan 44" (R 6; Ex. A). Stipulated testimony showed that on 22 December 1945 accused surrendered to a military policeman, stating that he had been absent without leave since 2 January 1944 and was giving himself up because he had learned the authorities were looking for him. He was dressed in civilian clothes (R 6). Stipulated testimony of a hotel manager was introduced to the effect that he employed the accused under an assumed name and that accused made use of this alias for 16 days (R 7).

4. Evidence for the defense. It was stipulated that if the investigating officer were to testify he would state that accused told him he went absent without leave because of the illness of his wife, that he did not intend to desert and that as soon as he made enough money to take care of his wife he turned himself in (R 7). A statement from a doctor, describing an operation performed on accused's wife in 1941 and giving his opinion that her condition would have a tendency to make her introspective and worry, was admitted as Defense's Exhibit 2 (R 7). Mrs. Halie Cunnagin, accused's wife, testified that accused telephoned her from Kansas in January 1944 and that she told him she was confined to the hospital and didn't have much money. Shortly after that accused came home and stayed for a little less than two years. He didn't go back for there was no one to look after her. Accused worked and wore his uniform with coveralls over them. He wanted her to hurry up and get well so that he could go back to the Army. The Red Cross was not successful in helping Mrs. Cunnagin (R 8, 9, 10, 11). Another witness related a conversation accused had with a military policeman in July 1945. Accused stated that if his wife could "make it", he would go back to the Army. After the military policeman learned accused had been away for one and one-half years he stated: "If I had been out that long, I don't believe I'd go back." (R 13, 14.)

After his rights as a witness were explained, accused was sworn and testified as a witness in his own behalf (R 14). He stated that after he telephoned

his wife and learned she was ill and had no money he applied for a leave and was told it was impossible until after his classification at the new base to which he had been transferred. He then went to Chicago where his wife was and from there went to Detroit. In Detroit he worked as a motor mechanic for 23 months. He also took a job at a hotel under an assumed name as he didn't think he could hold two jobs under one name. He wanted to get enough money to leave for his wife so that he could turn in, and did turn himself in when he obtained enough money. He never had any intention to desert (R 15, 16, 17). On cross-examination he admitted leaving the service of the United States Army on 8 January 1944. He has a 1940 LaSalle automobile in his wife's name and he made from $80 to $100 a week during his absence.

In rebuttal the prosecution introduced in evidence a special order dated 1 January 1944 transferring accused to Great Bend Army Air Field and another special order dated 14 February 1944 deleting accused's name from the first order (R 26; Exs. B and C).

5. It is apparent from this summary of the evidence that the only issue in this case was whether accused intended not to return to the military service. The period of unauthorized absence was admitted and defense counsel tried to show only that accused was guilty of absence without leave and not desertion. On the evidence in the record the court could have found either way without criticism. The advice to the court by the trial judge advocate that the court could only find accused guilty of desertion or acquit him must be considered in the light of these circumstances. The record also shows that the law member was not present for this trial.

That the court could have found the accused guilty only of the lesser included offense of absence without leave, and, in the absence of a plea of the Statute of Limitations (AW 39) seasonably interposed by the defense, could have adjudged punishment accordingly, notwithstanding the fact that more than two years had elapsed between the date of the offense and the date of arraignment, is firmly established law (CM 201537, Fouts, 5 BR 157, CM 231504, Santo, 18 BR 235; CM 274482, Talbott, 47 BR 185). Unquestionably, therefore, the statement of the trial judge advocate was erroneous as the accused had not raised this defense.

Under these circumstances the erroneous statement of the trial judge advocate was highly injurious to the accused. The accused had the right to have the court decide the case free from a misapprehension that they must find accused guilty of desertion or nothing. We cannot overlook the effect the statement of the trial judge advocate would have on the mind of any trier of facts, however conscientiously he might try to do his duty. The trial judge advocate's statement to the court was wholly gratuitous and uncalled for. Paragraph 75b of the Manual for Courts-Martial provides that:

> "After the pleas the trial judge will, to the extent required by the court, read the parts of this manual or of authoritative

military precedents (see 128) that are pertinent to the definition, proof, and defense of the offenses charged." (Emphasis supplied.)

This record states, immediately before the trial judge advocate's statement: "By direction of the court the following matters were read to the court by the trial judge advocate, to wit: None." (R 6; emphasis supplied.)

The accused was entitled as of absolute right to have the court decide upon the facts shown in evidence whether he was guilty of desertion or merely of absence without leave. It will never do to permit a court's deliberations upon the facts, and its determination of guilt or innocence upon the basis of facts presented, to be influenced by any consideration as to what the result of a verdict so arrived at under their oaths will be insofar as possible further legitimate defensive action is concerned. Stated differently, a court's conscience in judging the credibility of witnesses and in weighing the evidence and in determining the facts in issue upon which guilt or innocence hinges, must never be influenced by advice that a certain decision within its competence to make upon the evidence will make available to the accused a further defensive opportunity which he would not otherwise have. That such advice by the trial judge advocate here may have been so relied upon by the court and may have had such influence cannot be ignored, particularly in view of the fact that a finding of guilty of absence without leave would not have been irreconcilable with the evidence.

Moreover, whatever may have been the design and purpose of the trial judge advocate in making such an unwarranted statement to the court, we are constrained to the view that it may well have been calculated to deprive the accused of any opportunity later to plead the statute of limitations in the event the court should find upon all the evidence that he was guilty of absence without leave only. At any rate, precisely that result occurred. Furthermore, the accused's rights were adversely and injuriously affected in another way. By being deprived of the right to have the court find him guilty of absence without leave, notwithstanding it might have believed that only such a finding was compatible with the evidence, he was sentenced to be dishonorably discharged for desertion in time of war. Such a discharge strips the recipient of his citizenship rights, but this ignominy does not attach to a dishonorable discharge for absence without leave.

Lastly, the error and prejudicial effect of the trial judge advocate's statement is not ameliorated by the fact that he suggested the alternative of acquittal. He knew that he had evidence of the initial unauthorized absence, and he knew that he had obtained stipulations or agreements to stipulate as to the time, place and manner of the termination of the absence, as well as stipulations that certain witnesses would testify as to accused's admissions of absence on the date

alleged and his reasons for so doing. The trial judge advocate knew that with this evidence before it the court could not reasonably acquit the accused completely.

We therefore conclude that the error of the trial judge advocate injuriously affected the substantial rights of the accused (CM 134183, Dig. Op. JAG, 1912-40, sec. 395 (55), p. 236).

6. The charge sheet shows accused is approximately 29 years of age and enlisted 4 February 1942 at Chicago, Illinois. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously 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 support the findings of guilty and the sentence.

W. Thayne Rivise, Judge Advocate

(DISSENT), Judge Advocate

Walter W. Davis, Judge Advocate

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

JAGQ - CM 313446

JUN 25 1946

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at MacDill Field, Florida, 14 March 1946. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private GARNETT H. CUNNAGIN (16067837), Squadron A, 324th Army Air Force Base Unit, Chatham Field, Georgia.	

DISSENT BY TREVETHAN, Judge Advocate

I cannot concur in the opinion of the majority that the comment of the trial judge advocate constituted such error as substantially prejudiced the rights of the accused.

At the inception of the trial the trial judge advocate informed the court that since the statute of limitations provided by Article of War 39 had run upon the lesser included offense of absence without leave as contained within the desertion charged, the accused could not be found guilty of that offense but could either be acquitted or found guilty of desertion as charged. To determine the propriety of this remark we must first determine what the law is with respect to the situation commented upon by the trial judge advocate. We have said that an accused is presumed to know the law (CM 201537, Fouts, 5 BR 157) and accordingly I do not feel that I will have taken an unlicensed step if I presume that a court-martial possesses similar knowledge.

The trial judge advocate was correct when he stated the statute of limitations had run upon the offense of absence without leave as contained in the offense charged since Article of War 39 provides for a two year statute of limitations with respect thereto. It was decided in CM 231504, Santo, 18 BR 235, that if an accused is charged with desertion and is found guilty of absence without leave which occurred more than two years before his arraignment and defense counsel does not raise the plea of statute of limitations, the conviction is valid. In concludingits opinion in that case the Board of Review definitely stated that, "until the court finally adjourns" the accused has "the opportunity of asserting his right in open court". With that conclusion I am in entire accord. When an

accused is charged with and tried for desertion, the first time he will realize that the law appertaining to absence without leave is vitally relevant to his case is when and if the court returns findings of guilty of absence without leave and, clearly, at that time he is entitled to enter all proper objections to the validity of that finding. Indeed, it is established that if, by exceptions and substitutions, a court-martial returns findings of guilty of an offense against which the statute of limitations has run, the court may advise an accused in open court of his right to plead that statute in bar (MCM, 1928, par. 78a).

Applying the foregoing law to the instant case it is clear that:

(a) Findings of guilty of absence without leave for the period alleged in the Specification fell within the statute of limitations barring prosecution therefor; and,

(b) If the court had returned such findings of guilty of absence without leave, defense counsel could then upon pronouncement of the findings properly assert the defense of the statute of limitations or the court of its own motion could have advised accused of his right so to do and the conviction would then have been a nullity.

Had the trial judge advocate opened trial of the instant case by expounding the foregoing law to the court and then had he concluded with the remark that, in view of the time element involved in the Specification under consideration, the only conviction that the court could return which would withstand attack from the statute of limitations would be a conviction of desertion, his statement would be nothing more than an exposition of the law. Now, let us see if the trial judge advocate in effect said anything more than just that.

Turning to the record of trial we find that the statement made by the trial judge advocate is not reported verbatim. We find only the reporter's summary that the trial judge advocate advised the court that the accused could not be found guilty of absence without leave because the statute of limitations under Article of War 39 had run thereon. That statement, to me, means nothing more than that if the court returned findings of guilty of absence without leave such findings would be tantamount to an acquittal because of the bar of the statute of limitations. And that is exactly what the result would have been if after such findings were made defense counsel asserted the plea of the statute of limitations or the court exercised its authority to advise the accused that such plea might be entered. In net effect, the court was being advised of the legal implications following upon application of the statute of limitations to the included offense of absence without leave. Since the court is presumed to know the law it cannot be error to advise them of the net effect of what they are presumed to know.

There is another aspect of this problem that we must not overlook. Article of War 39 states that after the statute of limitations has run upon a particular

offense no accused "shall be liable to be tried or punished by a court-martial" for that offense. Certainly, if the trial judge advocate had read that Article of War to the court there could be no complaint. Again let me state, that Article provides unequivocally that no person "shall be tried or punished". If it prohibits trial for offenses barred by the statute, it means no person can be convicted of any such offense since no person may be convicted without a trial. Thus, irrespective of the law evolved about Article of War 39, I find that the trial judge advocate stated to the court no more than is written in the very Article itself. I cannot call that prejudicial error.

The trial judge advocate concluded his remark by stating that the court could either acquit accused or find him guilty of desertion as charged. That concluding remark must be considered as an integral part of the entire text of the trial judge advocate's statement. When so considered, it can only mean that, since the statute of limitations prevented unassailable findings of guilty of absence without leave, the only valid and unimpeachable findings that could be returned by the court would be acquittal or findings of guilty of desertion. Since, as I have said above, findings of guilty of absence without leave would be tantamount to an acquittal, it seems clear to me that the conclusion stated by the trial judge advocate was a proper conclusion.

The majority opinion is bottomed upon the propositions that the right to assert the plea of the statute of limitations is personal to the accused; that since he had not entered such a plea the court could legally find him guilty of the included absence without leave; and that the net effect of the trial judge advocate's remark was to foreclose the court from any consideration of the question of absence without leave. The fallacy of that position, in my opinion, is that the majority fail to appreciate <u>when</u> the defense could raise the plea of the statute of limitations. As I have said above, the defense could properly raise that plea as soon as findings of guilty of absence without leave were returned and indeed, the court could then so instruct the accused to that effect. Accordingly, if we follow out the thought of the majority to its logical conclusion, the first time the trial judge advocate could remark to the court about the legal implications of findings of guilty of absence without leave would be <u>after</u> the court had returned such findings and defense had raised the plea which made the findings a nullity. I cannot subscribe to a proposition which permits a trial judge advocate to remark to the court about applicable law only after the court's opportunity to consider that law has passed.

Furthermore, the majority opinion fails to consider the rights and duties of the prosecution. At the inception of a trial by court-martial the trial judge advocate may inform the court about matters of law "pertinent to the definition, proof, and <u>defense</u> of the offenses charged" (MCM, 1928, par. 75<u>b</u>) (underlining added). In my opinion, the statute of limitations is certainly matter in defense if it bars findings of guilty or punishment of an offense lesser included within that charged, and, accordingly, it is matter that the trial judge advocate might

properly comment upon at the inception of the trial. And his right so to do is not so limited that it may only be exercised after defense counsel has entered pleas he need not then make and generally never will. In addition, the majority fail to appreciate the dilemma facing the prosecution. The trial judge advocate knew that if the court returned findings of guilty of absence without leave in all probability they would prove to be a nullity. It would not do for him to wait until the court returned such findings and defense had so pleaded as to destroy them, nor can I agree that the law so required. To permit the trial judge to expound law only after it is no longer material to the question or helpful to the court is, at the very least, according him an extremely useless right.

In view of the foregoing I do not agree that the opening remarks made by the trial judge advocate constituted prejudicial error. Further, I find that there is abundant evidence in the record of trial to sustain the findings of guilty and the sentence. Accordingly, I hold the record of trial to be legally sufficient to support the sentence.

Robert C. Trevethan, Judge Advocate

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

JAGQ - CM 313453

AUG 8 1946

UNITED STATES v. First Lieutenant EDWARD C. HUGHES (0-1591216), C. E., Town Major Team #21, Company B, 3rd Military Government Regiment.	THIRD UNITED STATES ARMY Trial by G.C.M., convened at Munich, Germany, 15-16 January 1946. Dismissal and confinement for one (1) year.

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 Charges and Specifications:

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

Specification: In that First Lieutenant Edward C. Hughes, Town Major Team # 21, Company B, 3rd Military Government Regiment did, without proper leave, absent himself from his command at Bamberg, Germany from about 23 November 1945 to about 25 November 1945.

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

Specification 1: In that First Lieutenant Edward C. Hughes, Town Major Team #21, Company B, 3rd Military Government Regiment did, at Bamberg, Germany, on or about 23 November 1945, knowingly and willfully apply to his own use and benefit, one ¼ ton, 4x4 truck, of the value of more than $50, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Edward C. Hughes, Town Major Team #21, Company B, 3rd Military Government

Regiment, did, in conjunction with Izaak J. Meyer, a civilian employee of Town Major Team #21, at or near Berlin, Germany on or about 25 November 1945, wrongfully and knowingly sell to one Fritz Zimmerman for 16000 Reichs marks certain food rations, to-wit: 2 - 5 pound cans dry whole milk, 3 cans dehydrated eggs, 1 large tin corned beef, 4 small cans meat, 1 - 5 pound can cocoa, 10 pounds coffee, 5 pounds tea, 3 - 6 3/4 pound cans peanut butter, 1 large can preserved butter, all of the value of approximately $44, property of the United States furnished and intended for the military service thereof.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. Accused was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority approved only so much of the findings of guilty of Specification 2 of Charge II as involved findings that the accused did, in conjunction with the person and at the time and place alleged, wrongfully and knowingly sell to the person and for the sum alleged, 2 cans dry whole milk, 2 cans dehydrated eggs, 4 small cans meat, 1 can cocoa, 10 pounds coffee, 5 pounds tea, 1 can peanut butter, 1 can preserved butter, all of some value, property of the United States, furnished and intended for the military service thereof; approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Jurisdiction of the Court. Defense counsel by special plea challenged the jurisdiction of the court on the ground that, on 7 January 1946, the date of the order appointing this court, the Commanding General, Third U. S. Army, did not have jurisdiction to appoint as members of courts-martial officers assigned to the Office of Military Government for Bavaria (R 7). This contention was based on General Order 337, Hq USFET, 14 December 1945, a true copy of which is attached to the end of the record of trial as an unnumbered exhibit. General Order 337 provided, in part:

"1. On the effective date of this order, 1 January 1946, the Offices of Military Government for Bavaria, Wuerttemberg-Baden, and Greater Hessen will each become an independent command under their respective directors, who will report directly to the Commanding General, US Forces, European Theater. * * *.

"2. On the effective date of this order, the Commanding Generals, Eastern and Western Military Districts, will cease to command or supervise the activities of these offices or subordinate offices of Military Government within their districts, but will retain general court-martial jurisdiction."

The first indorsement to the charge sheet indicates that the Eastern Military District and the Third U. S. Army were at that time one and the same command (R 6), as does the special orders appointing the court to which the charges were thereby referred for trial. The special orders appointing the court which tried the case was issued by Headquarters, Third United States Army, and was issued by command of the same commander who commanded Third United States Army and Eastern Military District at the time of the original reference of the case for trial. All personnel of the court, the prosecution and the defense were assigned to the 3rd Military Government Regiment under the Office of Military Government for Bavaria (R 1, 2). The defense contended that the retention of courts-martial jurisdiction by Third Army preserved only the power to try persons assigned to the Military Government commands and not the power to appoint officers so assigned to serve as members of Third Army courts (R 9, 10). This plea to the jurisdiction was overruled by the court (R 15), and properly so. There is incorporated into the record, at its end as an unnumbered exhibit, a document which the defense concedes is an express authorization by the Commanding Officer of the Office of Military Government for Bavaria, making all the personnel of this court, the prosecution and the defense, specifically available by name for detail to the court by the Commanding General, Third U. S. Army. Such authorization, even though informal, and subsequent detail pursuant thereto, is valid and a court so convened is properly constituted (II Bull. JAG, No. 1, Jan. 1943, Sec. 365 (2) CM 227864).

4. Evidence for the Prosecution. A suscinct statement of the facts of this case is given by the accused himself in the following voluntary statement made by him on 26 November 1945, which the prosecution introduced in evidence not only without objection, but with the express approval of the accused (R 56; Pros. Ex. 2):

> "My duties are Assistant Town Major of Town Major Team No. 21, Bamberg, Germany. At about 1800 hrs, 23 November 1945, I left Bamberg, Germany, from my office and dwelling at No. 21 Hain Strasse together with Izaak J. Meyer, a civilian administrative clerk employed by the U. S. Army, in a ¼ ton truck, which is part of Town Major Team No. 21's equipment, for Berlin. Neither Meyer nor I had any legal authority to use the jeep or to visit Berlin. * * * We arrived in Berlin at approximately 0800 hrs, 24 November 1945. I drove over to 134/135 Wilhelms Ave, Wilmersdorf, Berlin, to the apartment of Ursula Scharner, a German civilian. Meyer took the jeep and drove over to the Regina Hotel, on Kurfuerstendamm, where he intended to get a room. I remained in Ursula Scharner's apartment from 0800 hrs 24 November 1945 to approximated 1445 hrs, 25 November 1945. At approximately 1515 hrs, 25 November 1945, I met Meyer at the Roxy Cafe on Kurfuerstendamm where we had something to eat. I left Meyer at about 1630 hrs and returned to the apartment where I remained until the MPs and C.I.D. entered the apartment at

about 2330 hrs, 25 November 1945. * * * I did not make any sale of any of the items which I brought to Berlin nor did I sell any other items carried in the jeep by Meyer and myself.

"On 21 November 1945, I discussed with Izaak J. Meyer about a proposed trip to Berlin and I suggested that we take along certain items of personal PX rations and items of canned foodstuffs which I knew were in the cellar of the house at No. 21 Hain Strasse, Bamberg and which had been accumulated from mess supplies from approximately 19 April 1945 to the present time. On 23 Nov. 1945, at about 1700 hrs, Meyer went down to the cellar and loaded certain items of foods into the jeep. I did not suggest the specific items by number. Meyer was to retain the proceeds from the sale of his personal property and I was to retain the proceeds from the sale of my PX rations and the two bottles of whiskey. Meyer was to dispose of the items of food from the cellar and was to give me fifty per cent of the proceeds of the sale."

* * *

The value of the jeep was stipulated to be more than $50 (R 66). Accused's commanding officer did not authorize him to take the jeep nor to go to Berlin (R 65) and did not have authority to do so (R 70). Nor did the commanding officer authorize accused or Meyer to take any rations out of the building which housed Town Major Team No. 21 (R 67).

Meyer testified that he removed from the building and placed in the jeep two or three cans of milk powder, two cans of powdered eggs, one can of peanut butter, one can preserved butter, one can cocoa, 4 small cans of meat (R 34), ten pounds of coffee and five pounds of tea (R 40). These were Army rations from the basement of the Bamberg office of Town Major Team No. 21 drawn for use in the mess hall (R 27, 39). They were in addition to food prepared by the kitchen help sufficient for a two-day trip (R 38). Values of ration items were stipulated as to certain size cans (R 74, 75). However, the size of the cans taken by Meyer was not definitely established. Meyer further testified that a couple of days before 23 November 1945 accused and he spoke about going to Berlin and taking rations (R 22). "Everybody was speaking about the prices you get in Berlin"; accused suggested they take rations with them, sell them, and split fifty-fifty (R 44). Lottie Zimmerman was the housekeeper for Town Major Team No. 21 and her uncle Fritz Zimmerman had a restaurant in Berlin. She gave her uncle's address to the accused (R 42, 43). Meyer went to Zimmerman's on the morning of 24 November and put the rations in a corner of Zimmerman's back room (R 73, 74). About noon the next day Meyer removed the rations from the duffel bag (R 24) gave them to Zimmerman (R 27) who took them upstairs (R 28), and that afternoon Zimmerman paid Meyer 16,000 Reichs marks for the rations and Meyer put the money in a bag with the rest of the luggage. Later that afternoon, accused visited Zimmerman's apartment, stayed a half hour, ate lunch and made an appointment for the next day (R 28, 29).

Prosecution Exhibit 1 (R 35) is a driver's trip ticket the accused made out for himself directing him to report to Headquarters Russian Control Council, Berlin. Accused had no authority to go there (R 70), and neither he nor Meyer went to any such place while in Berlin (R 42).

5. Evidence for the Accused. Accused elected to give sworn testimony. Much of it is personal history set forth in a later paragraph hereof.

Accused among other things testified that he never abandoned the idea of selling the rations (R 97), that he wanted to be present when the rations were sold because he wanted to be sure they got a "fair" price for the rations and that he did not trust Meyer to give him his share of the money (R 90, 91). The reason accused delayed the ration sale and did not make it on the spot while he was at Zimmerman's was that Ursula Scharner was a "stronger incentive" and he wanted to get back to her (R 87). Accused summarized the state of facts relied upon by him as follows:

> "* * * I still do not see where it has been positively shown against me that I actually and physically made the sale. I was not apprehended in the possession of goods; I was not apprehended with the money for those goods, and if this deal had been completed and I had been aware that the deal was completed, there is no reason why I shouldn't have had possession of that money right there. That's the only claim I have to the fact I did not know the sale was actually made. I wasn't handed the money, when we had agreed to sell the things and split fifty-fifty. * * *"

6. The evidence of accused's guilt of all Charges and Specifications is clear and conclusive. The whole transaction was typical of black market operations. Accused from 23 to 25 November 1945 absented himself from his station without authority and went to Berlin for personal reasons, and is therefore guilty of the Specification of Charge I and of Charge I. Accused on 23 November 1945 without authority took a motor vehicle, Government property, from Bamberg to Berlin for his personal use and to further his black market transaction and is therefore guilty of Specification 1 of Charge II. Accused, acting jointly with Meyer, did by joint action wrongfully take Government rations furnished and intended for the military service, of some value, from Bamberg to Berlin for the purpose of selling them unlawfully. On 25 November 1945, Meyer sold the rations to Zimmerman and received a sum of money therefor. Accused at no time abandoned the criminal confederacy. The fact that he was not present at the final event completing his wrongful agreement is immaterial, as is the fact that he was apprehended before receiving his fifty percent of the money from Meyer. From accused's statements, extra-judicial and judicial, and from the testimony of Meyer, it is plain that the entire venture was the result of their joint preconcert and planning.

Section 550, Title 18, U.S.C.A., provides:

"'Principals' defined. 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. (R.S. Sections 5323, 5427; Mar. 4, 1909, c. 321, Section 332, 35 Stat. 1152)."

Under this statute, unless one directly commits an offense, or is an aider and abettor, or an accessory as defined by law, he is not guilty, say the courts. The destinctions of guilt between principals, aiders and abettors, and accessories, were abolished by that statute, and all are charged as principals and are equally guilty. In Morei v. United States, 127 F. 2d 827, the court said:

"It is said that where the distinction between accessories before the fact and principals is abrogated by statute so that participants in the crime, who would be accessories before the fact, are called and punished as principals, it is still necessary to apply the common law rules in order to determine whether a person, who is absent when a crime is committed by another, is guilty as a principal under the statute; and that at common law an accessory before the fact is one who was not present actually or constructively, when the offense was committed, but who counseled, procured, or commanded another to commit it. * * * 'Those present assisting one who personally commits a felony are "aiders and abettors", and are guilty as principals, while those who are absent, but who counseled the commission of the crime, "are accessories before the fact".' * * * A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it. * * * there must exist a community of unlawful intention between him and the perpetrator of the crime. The concept of an accessory before the fact presupposes a prearrangement to do the act * * *; and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal."

Applying the foregoing rules to the facts before us, it becomes clear that the role played by the accused in the fraudulent scheme constituted him an accessory before the fact in the actual sale of the property by Meyer. As has been seen, the very definition of an accessory before the fact excludes his actual presence at the time and place of the crime. The fact, therefore, that accused was not present at the time of the unlawful sale affords him no refuge; and he is, under the statute, liable as a principal and guilty of Specification 2 of Charge II.

One further point requiring discussion is the legal effect of the conviction under Specification 2 of Charge II of wrongfully selling Government property. As approved by the convening authority, accused stands convicted of selling Government property of some value for which the maximum term of confinement for an enlisted man is six months. The offense is, therefore, a misdemeanor only under the United States Code definition of a felony, 18 U.S.C. 541. At common law there could be no accessory before the fact to a misdemeanor because the definition of the offense requires that the principal offense be a felony.

> "An accessory before the fact is one who procures, commands, or counsels the commission of a felony by another, but who is not present, either actually or constructively, when the felony is committed." (Emphasis supplied.) (Clark and Marshall Crimes, 4th Ed., Sec. 169.)

However, since the enactment of 18 U.S.C. 550 abolishing the common law distinction between degrees of principals and accessories before the fact, it has been held that an accessory before the fact may be charged directly with the offense as a principal even though the offense be a misdemeanor. Rutherberg v. United States, 245 U.S. 480.

7. Accused's testimony shows that he is 29 years old, married and has one child. He enlisted 27 October 1942, was commissioned a temporary second lieutenant in the Quartermaster Corps, on 30 April 1943, transferred at his own request to the Corps of Engineers, reached France on 9 August 1944 with the 249th Engineer Combat Bn., was injured by a booby trap on 20 August 1944, returned to his unit in November 1944 and was again injured while removing a mine field at Marwick, Luxemburg, and was promoted to temporary first lieutenant on 1 May 1945. Accused has four battle stars, signed up to stay in the service until 30 June 1947, and of his last four efficiency ratings two were Excellent and the last two Superior (R 78, 79, 80). A recommendation for clemency in behalf of the accused was made by the law member, the trial judge advocate and both defense counsel. The other six members of the court and the assistant trial judge advocate did not join in this recommendation. In a letter dated 10 May 1946, recommending clemency for the accused, the commanding officer of the Wurzburg Disciplinary Training Center states that he paroled accused and assigned him to duty as assistant to the Post Engineer, and that his services in the Utilities Section in repair and maintenance work are superior.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of

Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction under Articles of War 61 and 94.

Seymour W. Wurfel, Judge Advocate

N. Wayne Clutz, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 313453 1st Ind

WD JAGO, Washington 25, D. C. AUG 30 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 First Lieutenant Edward C. Hughes (O-1591216), C. E., Town Major Team #21, Company B, 3rd Military Government Regiment.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from his station at Bamberg, Germany, from 23 November 1945 to 25 November 1945, in violation of Article of War 61; of knowingly and willfully applying to his own use on 23 November 1945 a one-quarter ton truck, property of the United States, furnished and intended for the military service, in violation of Article of War 94; and of, in conjunction with a German civilian, on 25 November 1945, wrongfully and knowingly selling certain food rations, property of the United States, furnished and intended for the military service, in violation of Article of War 94. He was sentenced to be dismissed the service, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the findings and 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 as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that while accused was assigned to Town Major Team No. 21, Company B, 3rd Military Government Regiment, at Bamberg, Germany, he discussed with Izaak J. Meyer, a German civilian employee of the Team, the high prices to be obtained on the black market in Berlin. A woman who cooked for the Team told them that her uncle, Fritz Zimmerman, operated a restaurant in Berlin and to go and see him. Accused and Meyer then agreed to go to Berlin together, take some of their personal property along, and also to take some United States Army rations, sell them on the black market, and divide the proceeds fifty-fifty. Pursuant to this agreement, on 23 November 1945, accused, without authority, took a one-quarter ton United States Army truck, directed Meyer to load it with United States Army rations taken from the basement of the house used as a headquarters by the Town Major Team, and after it was so loaded accused and Meyer proceeded to Berlin. Once there, the accused spent the weekend in the apartment of a German woman. In the

meantime, Meyer sold the rations to Zimmerman for 16,000 reichsmarks. Accused and Meyer were apprehended by C.I.D. authorities before accused had received his share of the proceeds. However, accused elected to give sworn testimony at his trial and positively stated that at no time up to his apprehension had he ever abandoned his intention to complete the black market sale.

5. Accused is 29 years old, married and has one child. He enlisted 27 October 1942, was commissioned a temporary second lieutenant in the Quartermaster Corps, on 30 April 1943, transferred at his own request to the Corps of Engineers, reached France on 9 August 1944 with the 249th Engineer Combat Battalion, was injured by a booby trap on 20 August 1944, returned to his unit in November 1944 and was again injured while removing a mine field at Marwick, Luxemburg, and was promoted to temporary first lieutenant on 1 May 1945. Accused has four battle stars, signed up to stay in the service until 30 June 1947, and of his last four efficiency ratings two were "Excellent" and the last two "Superior". A recommendation for clemency in behalf of the accused was made by the law member, the trial judge advocate and both defense counsel. The other six members of the court and the assistant trial judge advocate did not join in this recommendation. In a letter dated 10 May 1946, recommending clemency for the accused, the commanding officer of the Wurzburg Disciplinary Training Center states that he paroled accused and assigned him to duty as assistant to the Post Engineer, and that his services in the Utilities Section in repair and maintenance work are superior.

6. I recommend that the sentence be confirmed and 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Record of trial
2. Form of action
3. Ltr fr Morris W. Kolander, Esq., 13 Aug 46, w/incls

(G.C.M.O. 268, 9 September 1946).

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

JAGQ - CM 313466

JUN 13 1946

UNITED STATES v. Private WILLIE DANIELS (38426267), and Private First Class THOMAS SELLERS (20621285), both Casuals, Block "D", Camp Top Hat.	WESTERN BASE SECTION Trial by G.C.M., convened at Antwerp, Belgium, 8 March 1946. Sentence as to each accused: Dishonorable discharge and confinement for five (5) years. Eastern Branch, Disciplinary Barracks.

HOLDING 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 soldiers named above and submits this, its holding, to The Judge Advocate General.

2. The accused were tried in a common trial upon the following Charges and Specifications:

Willie Daniels

CHARGE: Violation of the 89th Article of War.

Specification: In that Private Willie Daniels, Casual, Block D, Camp Top Hat, in conjunction with Private First Class Thomas Sellers, Casual, Block D, Camp Top Hat, did, at Camp Top Hat, Antwerp, Belgium, on or about 16 January 1946, commit a riot, in that they, together with certain other soldiers to the number of approximately fifteen, whose names are unknown did, with force and arms, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of Camp Top Hat, and having so assembled did, unlawfully and riotously assault Private Paul G. Saddler, and Private Carlton D. Lewis, Jr. by shooting them with pistols, to the terror and disturbance of the said Private Paul G. Saddler and Private Carlton D. Lewis, Jr., and of the peaceful soldiery of the military community of Camp Top Hat.

Thomas Sellers

CHARGE: Violation of the 89th Article of War.

Specification: In that Private First Class Thomas Sellers, Casual, Block D, Camp Top Hat, in conjunction with Private Willie Daniels, Casual, Block D, Camp Top Hat, did, at Camp Top Hat, Antwerp, Belgium, on or about 16 January 1946, commit a riot, in that they, together with certain other soldiers to the number of approximately fifteen, whose names are unknown did, with force and arms, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of Camp Top Hat, and having so assembled did, unlawfully and riotously assault Private Paul G. Saddler, and Private Carlton D. Lewis, Jr. by shooting them with pistols, to the terror and disturbance of the said Private Paul G. Saddler and Private Carlton D. Lewis, Jr., and of the peaceful soldiery of the military community of Camp Top Hat.

Both accused pleaded not guilty to, and were found guilty of, their respective Charges and Specifications. Evidence of three previous convictions was introduced as to each accused. 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 five years. The reviewing authority, in the case of each accused, approved the sentence, 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, and forwarded the record of trial for action under Article of War 50½.

3. About 2100 hours, 16 January 1946, Private First Class Paul G. Saddler, who was charge of quarters in the area orderly room, heard a lot of commotion, went outside and saw two groups of colored soldiers standing at the beginning of the street in D block. One group consisted of approximately three and the other of approximately fifteen soldiers (R 7, 8). The two groups were arguing (R 7, 17, 18). Other witnesses indicated that it was a racial disturbance. "The same old story - negroes and paddies." The colored boys were telling others to shoot the white boys (R 22, 42, 43). Saddler told the soldiers to "break it up", they closed around him and knocked a flashlight out of his hand. Someone started firing a gun about 55 to 60 feet away, Saddler pulled out his .45 caliber pistol and a colored soldier wrenched it from his hand. He heard: "Kill the white boy - kill the white boy" from the group and he fled. As he ran he was hit in the foot by what turned out to be a .45 caliber slug (R 8, 10, 11). He did not see either of the accused that evening; he doesn't believe they were there but he is not sure (R 12, 15). Private Carlton D. Lewis, Jr., went outside his tent about 2100 hours on 16 January 1946, saw the two groups and in curiosity started toward them. All at once shooting started, he turned and headed toward the latrine and a slug struck him in the "left butt". He turned around again and headed for the dispensary, running past the same men and was hit again in the right shoulder (R 17). Both accused

were living in tent D-2 with several other soldiers (R 29). The commotion was in front of D-2, about 20 or 25 feet away (R 22, 46).

The accused Sellers had a pistol belonging to Private Whitehead on the afternoon of 16 January (R 24). About 2000 hours on that date Sellers pulled back blankets on Whitehead's bed and took out a pistol. He pulled it back, put it in his pocket and walked out of the tent (R 29). After the shooting Sellers had Whitehead's pistol and was standing before the front door of the tent (R 24). In the course of an investigation of the disturbance, Lieutenant Shold went to tent D-2 on the same night and found Whitehead's pistol behind a bed. It was unloaded and there was no clip in it. The pistol smelled of fresh gun powder and the barrel showed evidence of having recently been fired (R 32, 34). A box containing ammunition of the same caliber as Whitehead's pistol was found in the tent. A few rounds were missing from the box (R 34). A clip containing one round of ammunition was found between the winterizing and the canvas of the tent (R 50). A voluntary extra-judicial statement of accused Seller's reads in part as follows (R 53; Pros. Ex. C):

> "* * * A short while later we heard very loud talking coming from the company street across on a diagonal from our tent. I reached over & again took Pfc Whitehead's 7.65 pistol, put it in my pocket & rushed to the front door with the rest of the boys. As we reached the door I heard three pistol shots, that is, two in rapid order & one separate shot. I pulled back the slide of Whitehead's 7.65 pistol placed a round into the chamber, opened the door & fired one shot into the air, above my head. I intended to fire more rounds but the pistol had a stoppage so I walked back into the tent, shut the door & when I turned around I saw Pfc Whitehead standing on the other end of the tent. I pulled back the slide of his pistol, ejected the bad round & placed it into the clip. I placed his pistol back into my pocket. At this time several of the boys walked into the tent & said the Military Police were coming so I took Whitehead's pistol & placed it behind the canvas & boarding of the tent in the vicinity of the rear door. The clip was inside the pistol."

A few minutes after the shots were heard accused Daniels came in the back door with a weapon. Two minutes later he went out and came back with a bucket of coal; a .45 caliber pistol was inside his belt with the handle sticking out (R 21, 23). In the stockade Daniels told the witness he shouldn't have made a statement that it was a gun - he said it was a flashlight (R 25). It could have been a flashlight, but the witness thinks it was a .45 (R 26, 27, 28). When tent D-2 was searched after the shooting a .45 caliber automatic pistol was found behind Seller's bed. From the odor and the condition of the barrel it appeared that the pistol had been fired (R 37, 38). No other weapons were found in the tent (R 39).

4. Motions for findings of not guilty, made on behalf of both accused, were denied (R 56, 57). Each accused, after explanation of his rights as a witness, elected to remain silent (R 58). No evidence was introduced by the defense.

5. "A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful." (MCM, 1928, par. 147c, p. 162.)

"In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and when it tends to the encouragement of the rioters, be prima facie inferred to be participants; and the obligation is cast upon a person so circumstanced, in his defense, to prove his actual non-interference." (Wharton's Criminal Law, 12th Edition, Vol. II, Sec. 1865, quoted in CM 267878, Lumpkins et al., 44 B R 149 at page 163.)

The evidence adduced by the prosecution sufficiently established the existence of a riot and consequently all participants therein, the absence of other proof, are to be held responsible for the actions of any members of the group. The question raised by this particular record is whether the prosecution sufficiently established participation by the accused in the riot.

No testimony or evidence in the record established the presence of either of the accused in the riotous group. No witness called by the prosecution saw them in the group. There was no direct proof whatever. Thus, all the evidence for the prosecution was circumstantial (MCM, 1928, par. 112b, p. 111). The rule applicable in such a case is well stated in CM 238485, Rideau, 24 B R 263, on page 272:

"Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt. Where the evidence is entirely circumstantial the circumstances must not only be consistent with guilt, but inconsistent with innocence. Mere probabilities do not suffice. Proof of mere opportunity to commit a crime is not sufficient to establish guilt (Dig. Op. JAG, 1912-40, sec. 395 (9); CM 120937, CM 153330, CM 169811, CM 196691, CM 195705). To warrant conviction, circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (Bull. JAG, June 1943, p. 238; CM 233766).

"The question on appellate review is not one of weighing conflicting evidence or passing upon the credibility of witnesses or determing whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justify the conclusion of guilt as a logical inference from such circumstantial facts (CM 195705, Tyson). Where a conviction is based on inferences, the Board of Review will determine whether there is a reasonable basis for the inference (CM 212505, Tipton."

The evidence established that a riot occurred within the immediate vicinity of the tent in which the accused lived. During the course of the riot shooting occurred, at least one weapon being a .45 caliber pistol. A few minutes after the shooting accused Daniels was seen in the tent with a .45 caliber pistol; such a pistol was found in the tent about an hour later and it had been fired. Accused Sellers was in possession of a pistol before and after the shooting. The pistol was found in the tent and it had been recently fired. He admitted going to the door of the tent and firing one shot in the air when he heard the noise of the rioters. In the opinion of the Board of Review, under the law set forth above, no reasonable inference of guilt can be drawn from the above facts; they are not inconsistent with innocence; they do not exclude every reasonable hypothesis except guilt; they do not justify the conclusion of guilt.

6. The charge sheet shows accused Daniels to be 39 years of age and that he was inducted on 1 January 1943 at Dallas, Texas. He had no prior service. The charge sheet shows accused Sellers to be 35 years of age and that he enlisted on 1 March 1941 at Chicago, Illinois. He had one year and two months prior service.

7. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as above noted, 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 and the sentence.

H. Wayne Olivier, Judge Advocate

Robert C. Trevethan, Judge Advocate

Walter W. Davis, Judge Advocate

JAGQ - CM 313466 1st Ind JUN 20 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Western Base Section, United States Forces, European Theater, APO 513, c/o Postmaster, New York, New York

1. In the case of Private Willie Daniels (38426267), and Private First Class Thomas Sellers (20621285), both Casuals, Block "D", Camp Top Hat, 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 sentences, 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 sentences be vacated.

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 in brackets at the end of the published order, as follows:

(CM 313466)

21 22 23 24 1 2 3
20 4
19 5
18 6
17 7
- IN -
26 JUL. 1946
Western Base Section

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 313469

AUG 6 1946

UNITED STATES v. First Lieutenant JAMES E. LISTER (0-814712), Squadron A, 4136th AAF Base Unit (Area Command), Tinker Field, Oklahoma City, Oklahoma.	OKLAHOMA CITY AIR TECHNICAL SERVICE COMMAND Trial by G.C.M., convened at Tinker Field, Oklahoma City, Oklahoma, 17 April 1946. Dismissal and confinement for (5) years.

OPINION by 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 First Lieutenant James E. Lister, Air Corps, Squadron A, 4136th Army Air Force Base Unit (Area Command), Tinker Field, Oklahoma City, Oklahoma, did, at Tinker Field, Oklahoma City, Oklahoma, on or about 8 March 1946, make and utter to Cash, a certain check in words and figures as follows, to wit:

CUSTOMER'S DRAFT

AMERICAN STATE BANK
(In Midwest City) 39-65

Oklahoma City, Okla., Feb. 8, 1946 No.

Pay to the Order of Cash $25.00

Twenty-five & 00/100 DOLLARS

For Value Received and Charge the Same to Account of With Exchange

To The National Bank of Savanna (861816)
Savanna
Illinois

/s/ James E. Lister, 1st Lt.
0-814712

Wesbance Okla. City--45483

and by means thereof did obtain from Captain James P. Norwood, Twenty-five Dollars ($25.00), lawful currency of the United States, and did knowingly, wrongfully and unlawfully fail to maintain sufficient balance in The National Bank of Savanna, Savanna, Illinois, to meet payment of said check when presented for payment through the normal banking process for checks.

Since Specifications 2 to 13, inclusive, are couched in language identical to that used in Specification 1, except as to the differences tabulated below, they are not here repeated in full.

Specification	Date of Check	Made to and money obtained from	Amount
2	12 March 1946	Tinker Field Officers' Mess	$25.00
3	13 March 1946	Cash - Lieutenant Lester P. Osborne	25.00
4	14 March 1946	Tinker Field Officers' Mess	25.00
5	15 March 1946	Tinker Field Officers' Mess	5.00
6	16 March 1946	Tinker Field Officers' Mess	25.00
7	16 March 1946	Cash - Tinker Field Officers' Mess	25.00
8	17 March 1946	Cash - Captain James P. Norwood	10.00
9	17 March 1946	Cash - Tinker Field Officers' Mess	15.00
10	16 March 1946	Cash - Captain Norman L. Tyler	20.00
11	17 March 1946	Cash - Lieutenant Paul D. Chaiken	25.00
12	18 March 1946	Cash - Lieutenant Paul D. Chaiken	20.00
13	17 March 1946	Cash - Lieutenant Paul D. Chaiken	20.00

Accused pleaded not guilty to, and was found guilty of, the Charge and all Specifications. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for seven and one-half years. The reviewing authority approved the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution. Accused stipulated into evidence photostatic copies of the thirteen checks in question (R 13, Pros. Exs. A to M, inclusive) and concerning these checks stipulated (R 14, Pros. Ex. N):

"* * * that the accused, First Lieutenant James E. Lister, made and uttered certain checks, thirteen (13) in number, and marked Prosecution's Exhibits A to M, both inclusive, and more particularly described in the several specifications of the Charge in the above-entitled case, and delivered each and all of aforesaid checks to the first endorser of each and all of said checks; that said checks, and each of them, were made, uttered and delivered for a good and valuable consideration.

"It is further stipulated that checks marked Prosecution's Exhibits A, B and C show same to have been made and uttered 8 February 1946, 12 February 1946 and 13 February 1946, respectively, when, in truth and in fact, said checks were actually made, uttered and delivered 8 March 1946, 12 March 1946 and 13 March 1946, respectively."

Accused further stipulated (R 14, Pros. Ex. O) that Clifford Ryan if present in court and sworn would testify:

"* * * I am now, and for eight years continuously last past, have been cashier of The National Bank of Savanna, Savanna, Illinois and in such capacity I have access to the official records and accounts of all depositors in said bank. I am acquainted with the accused, First Lieutenant James E. Lister, and have known him for eight years. I have made a recent examination of the bank account of accused and such examination reveals that on 2 February 1946 the accused made a deposit in The National Bank of Savanna, Savanna, Illinois in the sum of $75.00 and subsequently thereto issued checks against his account thereby reducing his said account to the extent that on 7 February 1946 the bank balance of accused was $2.00. No deposit has been made to the credit of accused by anyone subsequent to the said deposit of $75.00 on 2 February 1946. I have made an examination of Prosecution's Exhibits A to M for identification, both inclusive, same being checks signed by First Lieutenant James E. Lister, 0814712 and drawn on The National Bank of Savanna, Savanna, Illinois and being dated, made payable to the following named payees and in the amount as hereinafter respectively shown as follows, to wit:

"Prosecution's Exhibit A, check, dated 8 February 1946, made payable to cash in the amount of $25.00;

"Prosecution's Exhibit B, check, dated 12 February 1946, made payable to Tinker Field Officers' Mess in the amount of $25.00;

"Prosecution's Exhibit C, check, dated 13 February 1946, made payable to cash in the amount of $25.00;

"Prosecution's Exhibit D, check, dated 14 March 1946, made payable to Tinker Field Officers' Mess in the amount of $25.00;

"Prosecution's Exhibit E, check, dated 15 March 1946, made payable to Tinker Field Officers' Mess in the amount of $5.00;

"Prosecution's Exhibit F, check, dated 16 March 1946, made payable to Tinker Field Officers' Mess in the amount of $25.00;

"Prosecution's Exhibit G, check, dated 16 March 1946, made payable to cash in the amount of $25.00;

"Prosecution's Exhibit H, check, dated 17 March 1946, made payable to cash in the amount of $10.00;

"Prosecution's Exhibit I, check, dated 17 March 1946, made payable to cash in the amount of $15.00;

"Prosecution's Exhibit J, check, dated 16 March 1946, made payable to cash in the amount of $20.00;

"Prosecution's Exhibit K, check, dated 17 March 1946, made payable to cash in the amount of $25.00;

" Prosecution's Exhibit L, check, dated 18 March 1946, made payable to cash in the amount of $20.00; and

"Prosecution's Exhibit M, check, dated 17 March 1946, made payable to cash in the amount of $20.00.

"In referring to the bank records to determine whether aforesaid checks were ever presented to said bank for payment, I find that said records reveal that each and all of said checks were presented to The National Bank of Savanna, Savanna, Illinois for payment through normal banking channels and that each and all of said checks were dishonored and were not paid for the reason that there were insufficient funds maintained in the account of said accused to pay said checks and each of them at the time said checks were presented to said bank for payment. I am acquainted with the signature of the accused and after examining the signature

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

of the payor on each and all of aforesaid checks, I will state that the signature which appears as payor on each and all of said checks is that of the accused, First Lieutenant James E. Lister. I further state that neither the accused nor any other individual at any time made any arrangements of any kind or nature whatsoever with said bank for the payment of aforesaid checks or any one of same."

Doris Lucas testified that in March 1946 she was the bookkeeper of the Tinker Field Officers' Mess, handled all cash and checks and knew the accused (R 6). She identified Prosecution's Exhibits A to K, inclusive, and testified that cash was paid out to the accused or the payee for each check for its face amount (R 6-9). All eleven of these checks were deposited and were returned marked "insufficient funds" (R 10). None of the checks were made good by accused (R 11), and only $40 was repaid by endorsers (R 9).

Barbara Pitts testified she was the cashier at the Tinker Field Post Exchange and that she cashed Prosecution's Exhibits L and M for Lieutenant Chaiken who indorsed them and that the checks were returned marked "insufficient funds" (R 12, 13).

A voluntary extra-judicial statement made by accused was placed in evidence without objection as Prosecution's Exhibit P (R 14). In it accused states:

"I went overseas in 1944 and was with the 8th Air Force; and soon after arriving I commenced to gamble to a point where it was a losing proposition, and eventually it was 'borrow from Peter to pay Paul', and as a result when I returned to the states after 10 months overseas duty, I had very little cash. I was first assigned to Napier Field, Dothan, Alabama; then Craig Field, Selma, Alabama, and while at both fields I maintained a checking account with the National Bank of Savanna, Savanna, Illinois, my home town. While at both fields, I continued my gambling activities, and as a result I did write several 'insufficient fund' checks but managed to care for them through my father who at the time had a small amount of ready cash. I was transferred to Tinker Field, Oklahoma, on or about 24 February 1946, and since that time have had no 'job', but was assigned to Base Services.

"I have put as much as $40 a day in the slot machines at the club; have gambled and lost; and as a result my funds played entirely out, and I have written checks on my personal account at Savanna and cashed all through the Officers Club, Tinker Field. I have also drawn partial pay during the month of March 1946 in the amount of $245.00. It has been brought to my attention

00605

that the following checks cashed by me either directly at the club, or through an endorser, have been returned marked insufficient funds. At the time I commenced /writing/ these particular checks I wrote my father to put some money in the account but never heard from him, and thinking he would care for them continued writing them feeling or rather knowing that while my account would not stand them, they would be cared for.

Date	Amount	Payee
8 February 1946	$ 25.00	Cash--Vames P. Norwood
12 "	25.00	Tinker Fld Officers Mess
13 "	25.00	Cash--Lester Osborne

Above checks dated in February should be MARCH.

Statement of 1st Lt James E. Lister, AC, 814712, Sqdn A, 4136th AAFBU

Date	Amount	Payee
14 March 1946	$ 25.00	Tinker Fld Officers Mess
15 March	5.00	" " " "
16 March	25.00	" " " "
16 March	25.00	Cash
17 March	10.00	Cash--James P. Norwood
17 March	25.00	Cash--Paul W. Chaiken
17 March	15.00	Cash
16 March	20.00	Cash-Norman L. Tyler

"I acknowledge being the issuer of the above described checks and am fully responsible for their payment; and as stated they were issued knowing I had insufficient funds, but thinking a deposit would be made by my father. I telephoned him on 28 March 1946 and he stated that he was unable to help me at this time and it is my intention to make the checks good and I have a relative in Oklahoma City working toward that end at this time.

"These derelictions are due, as stated before, mainly to my gambling proclivities, the fact that I would be short payday by owing an amount, and instead of repaying that, would endeavor to recoup my shortage by gambling with the above result."

4. Evidence for the accused. Accused elected not to testify.

5. The evidence of accused's guilt of the Charge and all Specifications is clear and conclusive. 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.

The exact language used in the Specifications herein was approved in CM 249232, Norren, 32 B.R. 95, 102).

6. Accused is 24 years of age, the eldest son of a family of four boys. He is married, has no children and his wife resides with her parents. From September 1940 to December 1941 accused was a carpenter's helper at a salary of $128 monthly. He enlisted 7 August 1942, was commissioned a temporary second lieutenant in the Air Corps on 3 November 1943, and promoted to temporary first lieutenant on 1 October 1944. He holds the Air Medal with seven oak leaf clusters. Most of his efficiency reports are rated as "unknown". The five rated are "Satisfactory", "Very Satisfactory", "Excellent", "Excellent" and "4.1". Accused has no previous convictions either civil or military. However, prior to the checks here involved, accused issued several worthless checks which were redeemed by his father. On 1 March 1946 accused made good worthless checks amounting to $200 previously issued by him.

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 Article of War 96.

Seymour W. Wurfel, Judge Advocate

N. Hazard Olivey, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ-CM 313469 1st Ind

WD, JAGO, Washington 25, D. C. SEP 6 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 First Lieutenant James E. Lister (0-814712), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of thirteen specifications alleging that by means of thirteen checks he did obtain from certain persons a total of $265, lawful currency of the United States, and did knowingly, wrongfully and unlawfully fail to maintain sufficient balance in The National Bank of Savanna, Savanna, Illinois, to meet payment of said checks when presented for payment through the normal banking process for checks, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for seven and one-half years. The reviewing authority approved the sentence but reduced the period of confinement to five 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 as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that while accused was stationed at Tinker Field, Oklahoma City, Oklahoma, he cashed thirteen different checks in the total amount of $265, all drawn upon The National Bank of Savanna, Savanna, Illinois, and that during the entire period of these activities the bank balance of accused was $2 and that no deposits were made therein by the accused or anyone else. All of these checks were returned marked "insufficient funds" and had not been made good at the time of trial. Accused admitted extensive gambling and stated that he thought his father might make the checks good.

5. Accused is 24 years of age, the eldest son of a family of four boys. He is married, has no children and his wife resides with her parents. From September 1940 to December 1941 accused was a carpenter's helper at a salary of $128 monthly. He enlisted 7 August 1942, was commissioned a temporary second lieutenant in the Air Corps on 3 November 1943, and promoted to temporary first lieutenant on 1 October 1944. He holds the Air Medal with seven oak leaf clusters. Most of his efficiency reports are rated as "unknown". The five rated are "Satisfactory", "Very Satisfactory", "Excellent", "Excellent" and "4.1". Accused has no previous convictions

either civil or military. However, prior to the checks here involved, accused issued several worthless checks which were redeemed by his father, On 1 March 1946 accused made good worthless checks amounting to $200 previously issued by him. The review of the Staff Judge Advocate in this case indicates that after his trial the accused informed the Trial Judge Advocate that if it were possible for him to get off with a reprimand, he would produce the money and take care of his unpaid checks, indicating that otherwise he would not attempt to redeem the worthless checks. 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.

6. 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

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Sen Lucas dtd Sept 3, 1946

(G.C.M.O. 299, 7 Oct 1946).

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

JAGQ-CM 313497

SEP 5 1946

UNITED STATES	)	HEADQUARTERS 8TH ARMY
	)	
v.	)	Trial by G.C.M., convened at Nagoya, Japan, 5 February 1946. To be hanged by the neck until dead.
	)	
Sergeant AUGUSTUS J. GREEN (33542160), 369th Quartermaster Laundry Company.	)	

OPINION by the BOARD OF REVIEW
WURFEL, OLIVER and MCDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Augustus J. Green, 369th Quartermaster Laundry Company, did, at Nagoya, Honshu, Japan, on or about 6 January 1946, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Alvin C. Pace, a human being by shooting him with a carbine.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. Accused was sentenced, by unanimous vote of all members of the court present, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the Prosecution: An autopsy performed on 6 January 1946, upon the body of Private Alvin C. Pace, disclosed that his death was caused by brain damage and hemorrhage following two bullet wounds through the skull. One bullet entered above the right eye and the other below the left eye. There were no other wounds on the body (R 7).

A carbine issued to Sergeant Clarence L. Washington, 3rd Platoon, 369th Quartermaster Laundry Company, was in his room before noon on 6 January 1946, and he next saw it in the recreation hall about 1130 that night. He gave no one permission to take the weapon. He identified Prosecution Exhibit A as the gun (R 8). The ammunition was kept in his footlocker, which was not locked (R 9).

About 1130 o'clock on the night of 6 January 1946 the accused entered the quarters of his commanding officer, First Lieutenant Willard C. Shelton (R 13, 14). The commanding officer had heard about the shooting and was getting out of bed; he had not sent for the accused (R 16). Accused said, "I came to you Lieutenant because I know that was the thing I was supposed to do" (R 15). Accused appeared hazy and frightened, "a combination of nervous, frightened and keyed up and really hurt at that time. He came in and was holding on to his throat and as he started to tell his story I said, 'Speak up', and he said, 'I can't talk any better'. He spoke in a whisper and coughed"; accused said that was the result of a blow deceased had struck him (R 14). Accused further told his commanding officer at that time that he had shot deceased; he and deceased and Private Dougherty, had been in a poker game; Dougherty quit, and then accused quit because he wasn't going to play with deceased inasmuch as he (accused) was already the loser; deceased said he didn't want accused to quit and they had a few words; deceased said, "The next son of a bitch that wins my money and quits, I'm going to kill him"; accused replied he had not won but was loser; deceased then knocked accused down; the fellows separated them and grabbed deceased; deceased broke loose, grabbed a brick and attempted to hit accused with it; accused ran out of the room, stayed out a while and slipped back in to get his shoes; accused then went back outside, watched through a window until he saw deceased leaving the room, and then retreated into a wrecked building; after deceased left, accused went into the building and someone he didn't know who, told him deceased had gone to get a gun from a friend in the 3244th Service Company; accused was afraid and went into Sergeant Washington's room and got his carbine; Washington was asleep, he "took particular care" not to awaken him, and after finding the gun accused searched for and found ammunition in Washington's footlocker; accused went outside and loaded the gun (R 12); he then went to a washroom and stayed a while, after which he "eventually" came back to his quarters, looked through the window and saw deceased standing in front of the stove; accused entered the room to try to make up with deceased if possible; he entered with the carbine held behind him and called deceased's name; deceased made some move, whether toward him or away from him accused didn't know, and accused brought the carbine from behind him and fired (R 13).

The commanding officer turned accused over to the military police (R 14). The shooting occurred in the quarters occupied by and assigned

to the accused and the deceased; they lived in the same room (R 15, 44). Deceased was a big man, between six feet two inches and six feet three inches tall and weighed about 190 pounds (R 15).

Sergeant Jonathan Beard, 3rd Platoon, 369th Quartermaster Laundry Company, was also quartered in the same room as the deceased and accused. He had been in the poker game for only fifteen or twenty minutes and had quit and laid down across his bunk (R 17). About nine o'clock he heard deceased say, "I'm tired of you fellows winning my money and quitting" (R 18), and "I'm tired of you fellows interfering with me. I have been putting up with your foolishness for fourteen months" (R 27). The witness heard accused say, "I haven't won my money back yet", then heard a lick passed, looked over and saw accused lying across a footlocker; the other boys got between them and tried to hold deceased, who got loose and grabbed a stone (or a brick, R 22) and chased accused out of the room, barefooted. Sergeant Beard also testified that at the time deceased struck accused, the latter was sitting at the poker table, and that after he was struck he was five feet from the table, trying to get away, and that deceased was trying to get after him (R 21); fifteen minutes later (R 18, 24) accused came back into the room and got his shoes, staying only three or four minutes; deceased was still in the room, but accused said nothing and went out (R 18). Deceased left the room once after accused got his shoes (R 22). Sergeant Beard asked "who was hungry" and deceased said he was. Beard and deceased then went to the ration dump "instead of the mess hall", and were gone fifteen or twenty minutes during all of which time Beard was with deceased (R 19), and they did not see the accused (R 24). When Beard and deceased started out they were going to the mess hall; "He (deceased) told me he was going to a buddy of his in the 3224th Service Company, because he was tired of putting up with the foolishness of the guys in the 369th. We went to the ration dump and begged the MP for a can of rations" (R 22).

> "Q. What did you have in mind?
> "A. If we went to the mess hall the mess hall was very close to the 3224th and he was going over there with the intention of getting a pistol" (R 22).

During all the time they were out together Beard saw no weapon on deceased, and didn't see him take any pistol or weapon (R 23). Beard did not communicate to accused nor to anyone else that "Accused" [sic - evidently he intended to say Private Pace the deceased] had talked about getting a pistol (R 24). When Beard and deceased returned to their quarters from the ration dump, Beard laid down on his bunk. About ten o'clock accused entered the door; a shot was fired (R 19). A voice, which the witness did not recognize, said "I got you now" (R 19, 23). Then

several more shots were fired; accused had a carbine and deceased's body was on the floor. Accused said to Beard "Go get the CO and stop by the dispensary and see if the ambulance driver is there and have him come over" (R 20). Beard did that (R 25). Accused had advanced about eight feet and was still holding the carbine in ready position (R 23). When accused entered the room the deceased was twelve or fourteen feet from the door, talking and laughing with T/5 Washington, T/5 Taylor and Private Waterman (R 24, 25). The witness stated the shooting occurred about one hour and ten minutes after accused had left the room with his shoes, and that he didn't hear a voice from the time accused entered the room until after the first shot was fired (R 25).

T/5 Cleo Greathouse also lived in the same room with accused and deceased (R 23). He heard deceased make a remark that evening that he was tired of the boys winning his money and quitting (R 28). This witness saw no fight and didn't call it an argument when deceased made that remark (R 30). He had won about 1100 to 1200 yen and had loaned accused some money before leaving the game, which accused repaid just before Greathouse quit (R 31). He was lying down when he heard some shots, raised up to see what was going on, saw accused pointing a gun at deceased's body and saw two shots fired in the direction of the body (R 28, 29). There was one shot, then two more "not rapid, just ordinary ". The witness thinks there were five shots altogether; the last were in the direction of deceased's body. When he saw accused the latter was half way between the door and the body - fifteen feet from the body (R 31). Greathouse heard no words spoken by accused, and didn't get out of bed till accused had left the room (R 32).

Private Robert B. Singletary was another soldier quartered in the same room (R 23). He returned to the room about nine o'clock, saw the card game in progress, and went to bed. He was awakened about eleven o'clock by scuffling and loud talk; deceased had a brick and was chasing the accused (R 33). Accused ran out of the room; deceased went out the back door and came back ten minutes later. The witness didn't see accused come back in. Later he heard shots, looked up and saw accused standing in the door with a rifle and "I ran out the door" (R 34); he left after hearing the first shot. Accused was about eight feet from deceased, pointing rifle toward the floor (R 34).

T/5 Aron Moore, another occupant of the same room (R 23), watched all the card game (R 37). Then he went out and walked around and came back in about ten o'clock, talked a bit and went to bed. Later he was sitting by the stove talking when he heard a shot, looked toward the door and saw accused, carbine in hand, about a yard inside the door (R 38, 40). He didn't see accused fire or pointing rifle at anybody, and he didn't see

deceased at the time, was not looking at deceased or talking to him at the time accused entered (R 39, 61). He didn't hear anybody say anything when the shooting started or before; he heard the shot and got under the bed; he didn't count the shots - "It was pretty rapid" (R 40, 41). When the shooting was over he saw deceased's body on the floor "after I came out from under the bed" (R 38, 39).

4. Evidence for the Defense: Sergeant Thomas J. Brown, 3rd Platoon, 369th Quartermaster Laundry Company, was in the supply room on the night of 6 January. About ten o'clock accused came in the supply room to repay some money to Sergeant Stoner; while accused was there the deceased came in (R 44, 45); accused had on shower slippers and was not dressed for outdoors; deceased said nothing to accused (R 45) and when deceased entered the accused "left by going around a display case we have in the supply room and I don't believe Pace saw him, because Green was standing behind me. In fact, I didn't know Green had left, because I turned around to say something to him and he was gone" (R 46). Earlier in the afternoon deceased came into the supply room to borrow some money from the witness; deceased said he had been losing heavily and, when the witness refused to make the loan, deceased "said he had to get some money somewhere because he was tired of thos [sic] SOBs winning his money and leaving the game" (R 45). Deceased also said, "I have a few yen left and the next son-of-a-bitch who wins money and leaves I'm going to kill him"; this was about 1630 hours. Brown did not tell accused nor anybody what deceased had said (R 46).

Private Robert B. Singletary was recalled as a defense witness and again testified deceased tried to hit accused with the brick and chased him around the stove; that this was about eleven o'clock, and that the shooting was about ten minutes thereafter; but he could be mistaken about the time because he had no watch (R 47, 48).

Recalled by the defense, Sergeant Jonathan Beard testified, with reference to the fight, "When I looked over Private Pace had gone around the table and Sergeant Green was lying across the footlocker"; that Corporal Taylor got between them and deceased pushed them back and grabbed the brick and started toward accused, and accused ran barefooted out of the room (R 49); he doesn't remember if accused had on the shower slippers he had been wearing during the game; that Corporal Taylor was trying to hold deceased; that this was about 9:15 or 9:20 and the shooting took place around eleven o'clock or shortly thereafter; that the witness was afraid of deceased who was a big man (R 50); and that he saw Corporal Jackson leave the room after accused came back to get his shoes (R 51).

T/5 Henry J. Washington, of the same organization, lived in the same room with deceased and accused (R 23). On the night in question "around 8,

I guess" this witness was "coming in the door of our barracks between the barracks and the showers", saw accused and asked him what was the matter with him; accused didn't answer; it might have been later than eight o'clock - the witness had no watch (R 58, 59). After speaking to accused the witness went into the barracks and was told about the fight; "I asked them what was the matter, they said Pace had hit Sergeant Green and I figured that was what the trouble was with him out there with his throat". Deceased was putting on his shoes "figuring to go somewhere". The witness left and went outside, again saw accused and again asked him what was the matter; accused did not answer. The witness returned to the barracks when he heard the shots. He had no conversation with the accused other than to ask him what was the matter (R 59, 60).

Lieutenant Willard C. Shelton, the commanding officer of accused and deceased, was recalled as a defense witness. He testified that accused had been in the organization sixteen months; his efficiency as a soldier was between excellent and superior; his character was good, "one of those unusual personalities"; he had a "perfect" reputation with respect to temperament and veracity (R 42); accused's character is one of the best in the platoon; he has the best general reputation of any man in the organization, the most congenial personality not only in the platoon but in the entire company; he never had a fight nor an argument (R 43). The company commander further testified that the deceased was a bully, "a fellow-who-knew-all-the-answers type"; he had had one or two fights and had received extra duty therefor; he had a reputation for temper and violent action (R 43). Deceased had also been in the organization sixteen months. In civilian life deceased was a boxer, sparring partner and trainer of fighters; he had been reduced from the grade of corporal by the witness (R 44). The witness reiterated in part his former testimony regarding the condition of the accused when he arrived at the witness' quarters; "... he seemed like he was a combination of suffering from shock, tense, scared and hurt. Just which was which at the time I do not know. At the time Green seemed to have pretty good control over his faculties and I didn't want to get him more panicy than he was. I just said, ' Sit down'"; that "Green doesn't have a strong voice but that night he was talking in a sort of whisper ... he was coughing and whispering". The witness affirmed his earlier testimony that accused told him that someone had told accused that deceased had a pistol (R 43).

The accused elected to testify under oath in his own behalf. In an earlier poker game in the afternoon, in which accused lost some money, deceased told accused that he was going to kill the next man that won his money and quit (R 52).

"A. About 6 o'clock we started playing poker. At the start of the game there was three or four of us. Later Greathouse joined the game and so did Sergeant Beard. We played until about 9 o'clock and I had 1700 yen when I came in the game and I got broke. I borrowed some money from Sergeant Beard, the Supply Sergeant and a Tec Sergeant in the company. Later on during the game Sergeant Beard quit. That left four of us in the game. Later on Corporal Dougherty quit. He had won about 1500 or 1700 yen. Dougherty came back in but he didn't put what he had won on the table. He just put part of it on the table and played for table stakes. We played a little while longer and Corporal Greathouse quit. I had won some money. That left three of us in the game, Corporal Dougherty, Private Pace and myself. I had about 300 yen in front of me at that time of the money I had lost and borrowed. Private Pace, I guess, had 250. Private Dougherty put about 200 on the table as table stakes. I won the last pot which made me winners in front of me close to 600 yen. Private Pace lost about 600 yen on that same pot. Corporal Dougherty quit and said he wasn't going to play any more. I had lost about 400 or so yen so I said I was going to quit. He said 'You quit?' I said 'No sense my playing, I can't get my money back.' He said I bet you this 50 yen I can beat your ass. I said 'I don't want to fight.' He said 'Didn't I tell you I was going to kill the next one of you boys that quit.' He came around the table and hit me alongside of the throat and knocked me across the bed on a footlocker. For a minute I was stunned and didn't know what to do. The boys tried to hold him and he was by the stove and had the stove between me. He broke lose from the boys and grabbed this brick from the oil heater. He followed me and I went around and out the door. I didn't have no shoes on and my feet were cold. I slipped in and went into the supply room. When I went into the supply room, there is a large rack and they have these shelves of clothes. I was standing directly behind the rack. I just paid Sergeant Stoner his 200 yens that I borrowed from him. There was a steel door and when you open it squeeks. I heard the door squeek and looked through the crack and so Private Pace come in. I passed through the quarters and got my shoes, jacket and hat. I didn't know if he was going to follow me or not. I looked and saw he was putting his coat and hat on. I didn't know where he was going so I went inside this old building. Pretty soon I heard this front door open and I jumped behind the door out of sight. I heard footsteps so I went into the shower room. In the meantime I had vomited because he had hit my throat. I went into the showerroom and stayed about 15 minutes or a half hour. Three or four of

the boys were in the showerroom. I decided I couldn't stay there all night. I thought maybe Pace would have cooled off by the time I went into the billet. Just as I came out from the door one of the boys said what was the matter because I was coughing. I told him it was where Pace had hit me. He said 'What you going to do?' I think it was Henry Washington. I said I'm going to talk to him and he said you better be careful because he got a gun. I looked into the windo and saw Pace standing by the stove and motioning with his hands. He wasn't smiling or anything. I went into the room and got the rifle. I wanted to talk to him but I was afraid to go near him. I had the rifle behind me just as I opend the door private Pace was standing about half way as from here to the board (approximately 10 feet). When he saw me he made this break and it seemed like he was going for a pistol. I felt sure he was going to kill me because he said he was going to kill me. I snapped the rifle around and started shooting. I don't know how many times I shot but I shot until somebody said 'Don't shoot any more.' I told someone, I don't know who, to get the ambulance. I laid the rifle somewhere in the rec hall and told Sergeant .... I was going to Lt Shelton's quarters. He told me to sit down and tell him what had happened and where I got the gun. I sat down and tried to tell him the best I could what had happened.

"Q. At the time of the fight in the room did Pace threaten to kill you then?

"A. Yes, sir, he said 'I told you I was going to kill the next son of a bitch that won my money and quit.' He said, 'I'm going to kill you.', before he picked the brick up. Before he picked the brick up he pointed and said, 'I was going to kill you.'

"Q. Were you afraid of him?

"A. Yes, sir.

"Q. Did you think he was big enough and strong enough to carry out his threat?

"A. Yes, sir.

"Q. Did he hit you with the brick?

"A. No, sir, I kept walking around the stove and as he moved to hit me, he had the brick in both his hands over his head. I kept dodging and ducking. I dropped the shower shoes off.

"Q. What did you think after you saw him come into the supply room?

"A. I thought he was after me.

"Q. Then what did you do?

"A. I went out and got my shoes and coat.

"Q. Then what did you do?

"A. I went into this building.

"Q. You went into the abandoned building?

"A. Yes, sir.

"Q. Did you think he followed you into the supply room?

"A. Yes, sir.

"Q. Then what did you do?

"A. I peeked in the window and saw him get his hat and coat.

"Q. Did you think he was coming after you?

"A. Yes, sir.

"Q. Did you think he was going to beat you up and kill you?

"A. Yes, sir.

"Q. Then you ran into the shower room?

"A. Yes, sir.

"Q. After you came out of the shower room someone told you that Pace had a pistol and was going to kill you?

"A. Yes, sir.

"Q. What did you do after someone told you Pace had a gun?

"A. I was sure he was going to kill me so I figured I better have some protection.

"Q. When you came through the door did you think Pace had a gun?

"A. Yes, sir.

"Q. Did you think he was going to kill you?

"A. Yes, sir.

"Q. Will you describe what happened again at the time you entered the door?

"A. I opened the door and before I could say anything he saw me and I could tell by looking at him that he was till mad and when he made the break it seemed like he was going after the pistol. I thought the same thing would happen here but this time he had a pistol. I was afraid and all I could think of was to snap the carbine around and start shooting" (R 52-54).

Accused thinks it was about a half hour from the time deceased struck him until the shooting (R 55).

"Q. When did you take this carbine?

"A. After the fellow told me ' Be careful, because he's going after a pistol', I went and got the carbine.

"Q. Did you go to your CO, Lt Shelton, during that time and tell him that Pace threatened to kill you?

"A. No, sir, I was so frightened.

"Q. You were frightened but you went and got the carbine and ammunition?

"A. Yes, sir, but I knew that Pace was in so much trouble that he might have decided to finsih the job. I didn't report to anyone in the company because the sergeants and everyone was afraid of him" (R 55, 56).

Accused did not see deceased actually have a pistol. He believes that Henry Washington told him about the pistol, either while he was in the shower room or as he was coming out (R 56).

"Q. What did you say the name of the man was that told you about the pistol?

"A. Sir, I was excited at the time but I think it was Henry Washington.

"Q. Where were you when you were told about the pistol?

"A. Sir, I'm not quite sure whether it was coming out of the shower room or while I was standing in it.

"Q. You say the deceased threatened in the afternoon to kill anybody who took his money in the game?

"A. Yes, sir.

"Q. That game stopped didn't it?

"A. Yes, sir.

"Q. And you went on and played on again?

"A. Yes, sir.

"Q. Were you afraid of him then?

"A. Yes, sir.

"Q. Yet you played again with him?

"A. Sir, some of us boys started a game and Pace wanted to play and we couldn't stop him from playing" (R 56).

Accused was fifteen to eighteen feet away from deceased when he fired. Deceased made a break, using his right hand "something like that" (demonstrating); accused did not see deceased take anything from his pocket; "I didn't have a chance to look around when he made a break". He did not tell anyone that deceased had threatened his life - "Sir, the boys heard him, they heard the argument" (R 57).

5. All the evidence, in the chronological sequence of the events, may be summarized as follows: During the afternoon preceding the night of the homicide the accused and the deceased and others had engaged in a poker game, during which deceased lost some money and there told the accused that he was going to kill the next man who won his money and quit. In the supply room thereafter, deceased stated he had been losing, tried to borrow some money, and said "he was tired of those SOBs winning his money and leaving the game" and that "the next son-of-a-bitch who wins money and leaves I'm going to kill him". That evening the accused and other soldiers were playing poker in the room in which the accused, the deceased and several others were billeted. Accused and some of the others started the game and deceased wanted to play and entered the game. One by

one the players dropped out of the game until only the accused and the deceased remained. Accused had lost money in the game, and announced that he too was going to quit. At this point, which was about 9:00 p.m., while accused was still sitting at the poker table and after he had told deceased that he (accused) had lost money in the game, the deceased reminded accused of and repeated his threat to "kill the next son-of-a-bitch that wins my money and quits"; deceased then struck accused on the face or neck with his fist and knocked accused about five feet and accused fell across a footlocker. Accused then endeavored to get away. Deceased reiterated his statements about being tired of "you fellows winning my money and quitting" and being "tired of you fellows interfering with me"; some of the other soldiers present tried to hold deceased but he broke away from them, grabbed a brick and started toward accused, who then fled barefooted from the room. About fifteen minutes later the accused went back into the room to get his shoes because his feet were cold. Accused then went into the supply room to repay some money borrowed from a Sergeant Stoner; accused had on shower slippers and was not dressed for outdoors; while there the deceased entered the supply room and accused left and went outside by going unnoticed around a display case or large clothes shelves. On the outside again, accused looked through the window of their room and saw deceased putting on his hat and coat. Accused then went into a wrecked building, and, upon hearing a door open and footsteps, then left that building and went to the latrine or shower room, where he remained between fifteen minutes and half an hour.

A short time after accused went into the room to get his shoes and left, Sergeant Beard inquired whether anyone was hungry. Deceased stated that he was, and Beard and deceased left the room and went to the ration dump "instead of the mess hall", and returned after fifteen or twenty minutes. It is shown by Beard's testimony that when he and deceased started out they were going to go to the mess hall, because the 3224th Service Company was near the mess hall and the deceased was going over to that organization to get a pistol from a buddy who was a member thereof, "because he was tired of putting up with the foolishness of the guys in the 369th". Beard did not communicate to anyone that deceased had talked about getting a pistol.

As accused was leaving the shower room, or nearby, he met Technician Fifth Grade Henry Washington. Accused testified that one of the boys, "I think it was Henry Washington", asked him what was the matter "because I was coughing"; that he told Washington "it was where Pace had hit me"; that Washington then asked what he was going to do, to which accused replied that he was going to talk to deceased; and that Washington warned "you better be careful because he got a gun", or "be careful because he's

going after a pistol". The commanding officer of accused and deceased, testifying as a prosecution witness, stated that when accused came to his quarters immediately after the shooting accused said that he went into the building after deceased left and someone told him deceased had gone to get a gun from a friend "in the 3244th Service Company". Technician Fifth Grade Henry J. Washington, who lived in the same room, testified for the defense that he saw accused between the barracks and the showers, asked him what was the matter, and that accused didn't answer; that he went into the barracks and was told about deceased hitting accused, and "I figured that was what the trouble was with him out there with his throat"; that deceased was then putting on his shoes "figuring to go somewhere"; that he (Washington) went outside, again saw accused, again asked him what was the matter and accused did not answer; and that he had no other conversation with accused, and did not return to the barracks until he heard the shots.

After talking with Technician Fifth Grade Henry Washington, accused still wanted to talk to deceased but was afraid to go near him. He told his commanding officer immediately after the shooting that he had wanted to make up with deceased if possible. From the outside he looked through the window of his and deceased's room and saw deceased. Having been told that deceased had a gun, "I was sure he was going to kill me so I figured I better have some protection". Accused "knew that Pace was in so much trouble that he might have decided to finish the job". He went into Sergeant Clarence L. Washington's room and procured the latter's carbine and loaded it. He entered his and deceased's room, holding the carbine behind him. Deceased was standing in the room near the stove, some fifteen feet from the door. In his statement to his commanding officer accused said that when he entered he called deceased's name. No one present heard any statement either by accused or deceased at that time. No one present, except accused, was looking at deceased. At the trial accused testified "I opened the door and before I could say anything he saw me and I could tell by looking at him that he was (s)till mad and when he made the break it seemed like he was going after the pistol. I thought the same thing would happen here but this time he had a pistol. I was afraid and all I could think of was to snap the carbine around and start shooting". Deceased "made the break" with his right hand. In the statement which accused made to his commanding officer immediately after the shooting, related by the commanding officer as a prosecution witness, accused said that deceased "made some kind of break" and that accused "didn't know if the break was toward him or away from him but when that happened he brought the carbine from behind him and fired". Accused fired several shots, probably five, of which the last two were fired in the direction of deceased's body after he fell to the floor. Only two shots struck deceased, one above the right eye and the other below the left eye. At the time of the shooting accused was approximately half-way between the door and the deceased. After the

shooting accused asked Sergeant Beard to go after the commanding officer and see about an ambulance, laid the gun down in the recreation hall, and went to the commanding officer's quarters. The exact time of the shooting is not satisfactorily shown. Sergeant Beard testified that it occurred about ten o'clock and was about one hour and ten minutes after accused came into the room to get his shoes; however, he later testified that the shooting was about eleven o'clock or shortly thereafter. Beard also testified that the first altercation in which deceased struck accused was between 9:00 and 9:20 p.m. Another witness placed this occurrence at about 11:00 and the shooting at about 11:10. Accused went to his commanding officer's quarters about 11:30. Accused's testimony was that he believed it was about a half hour from the time he was hit by deceased until the shooting. All of the evidence indicates that approximately one hour elapsed between the altercation and the homicide.

6. Murder is the unlawful 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, 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.

We are not met here with any question as to whether accused killed the deceased. That fact is admitted. Our concern is with the element of malice aforethought, essential to the offense of murder. "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).

There is no reasonable doubt in our minds, nor do we believe the court entertained any, that the accused did acquire information that the deceased had announced or stated, before leaving the room following his assault upon accused, that he was going to the 3224th Service Company to procure a pistol from a friend. The evidence clearly establishes the use of such talk by the deceased. Technician Fifth Grade Henry J. Washington talked to accused near the showers after going into the room of deceased and accused and learning there of the earlier encounter and after there hearing the deceased "figuring to go somewhere". Washington testified that when he saw accused outside the first time accused made no response to his inquiry as to what was the matter; but he also testified that after going inside and learning that deceased had hit accused, "I figured that was what the trouble was out there with his throat", which is not consistent with silence by the accused during that first meeting. And Washington testified that when he went back outside and saw accused after deceased was "figuring to go somewhere", he did not say more than to ask accused again what was the matter, notwithstanding, by his own testimony, he then knew what was the matter with accused. It is significant upon this point also that Washington stayed away from the barracks until he heard the shooting. Immediately after the shooting accused, in the first statement he made to anyone, told his commanding officer that someone told him deceased had gone to get a gun from a friend in the 3244th Service Company; and in his own testimony accused said he believed it was Henry Washington who told him so. But even though accused did know of this action and that statement of purpose by the deceased, that fact is not one which can be urged to support accused's contention that he acted in self-defense, in view of the other circumstances disclosed by the record.

When and how did accused procure and load the carbine? After the shooting accused told his commanding officer that when someone told him deceased had gone for a gun, he went into Sergeant Washington's (Clarence L.) room while the latter was asleep, took "particular care" not to awaken him, got Washington's carbine, searched till he found ammunition in Washington's footlocker, went outside and loaded the gun, then went to the washroom and stayed a while, and "eventually" came back and looked in the window and saw deceased standing in front of the stove. At the trial however accused testified that after he was told that deceased had gone to get a gun, he went back and through the window saw deceased standing by the stove, and then went and got the rifle. He also testified that "after the fellow told me 'be careful, because he's going after a pistol', I went and got the carbine", omitting that in the meantime he had

looked through the window and seen deceased.

What of the manner in which accused re-entered the room and the events which transpired there? His own testimony is that he entered holding the carbine behind him. He told his commanding officer that he called deceased by name. No other witness present heard that. In his testimony on the stand, accused stated that when he opened the door "before I could say anything he saw me ... and when he made the break ... all I could think of was to snap the carbine around and start shooting". He told his commanding officer after the shooting that he "didn't know if the break was toward him or away from him". On the stand he testified that deceased "made this break and it seemed like he was going for a pistol", using his right hand "something like that" (demonstrating).

Accused's contention that he killed deceased in his own self-defense must be viewed in the light of the background and immediate events disclosed by the evidence. According to the evidence the deceased had violently assaulted accused with his fist and had tried to strike him with a brick and chased him from the room, and several times threatened to kill accused. Accused believed that deceased had thereafter armed himself with a pistol. By his own testimony accused was afraid of deceased; "I was sure he was going to kill me ..."; he "knew that Pace was in so much trouble that he might have decided to finish the job". Knowing all this, accused contends that, after secretly arming himself by stealth and concealing the weapon behind him, he re-entered his and deceased's room as a peacemaker; that his mission was the peaceful one of undertaking a reconciliation. He himself obscures in doubt the question of whether deceased's "break" constituted a beginning of renewed violence upon him, and no witness present saw deceased make any "break". The alleged amiable intentions of the accused and whether in killing the deceased he acted reasonably in his own proper self-defense were matters for the determination of the court within its province as the arbiter of the facts. The Board of Review is of the opinion that upon all the evidence the court was warranted in resolving these questions adversely to the accused.

7. A letter and brief addressed to the Secretary of War by civilian counsel retained by accused's family, as well as the able argument presented to the Board by such counsel, have been carefully considered. Particular thought has been given to the argument to the effect that "accused's right of self-defense is not forfeited by his seeking a meeting with deceased in a lawful manner, not with the intention of provoking a difficulty but for a peaceable adjustment of the trouble - even though he goes armed" (citing Vincent v. State, 112 S.E.120 (Ga.), and Gray v. State, 55 Tex. Crim. App. 90, 114 S.W. 635, 22 LRA (NS) 513). With this we agree; but, as already stated, this record cannot be said

to be without proof to support the evident finding of the court that accused's mission in re-entering the room was not a peaceable adjustment of the trouble.

Another point made in counsel's brief and oral argument concerns the failure of accused to report the trouble to his commanding officer. It is argued: "He was on the spot. If he had to go to his commanding officer to settle a barracks dispute, he branded himself a poor noncommissioned officer; he would have lost the confidence of his lieutenant and the respect of the men. The logical thing for him to do was exactly what he did: to go in and talk with Pace to try to settle the difficulty". Again, it is well to remember that accused said he was sure deceased was going to kill him and knew that he might have decided to finish the job. The law is well settled:

> "A man who believes his life is in danger, but whose rights are not as yet attacked, ought, if he have access to a tribunal clothed with the ordinary powers of a justice of the peace, to apply to such tribunal to interpose. If he have ground enough to excuse him in killing the person from whom he believes himself in danger, he has ground enough to have that person bound over to keep the peace, or committed in default of bail. And whenever this process can be applied, the endangered party is not excused in taking the law into his own hands and proceeding to attack his expected assailant. He cannot himself seize on his antagonist in advance of the attack he fears; and if he wishes thus to anticipate the attack, he must resort to the law. Where the conflict can be avoided, the law must be relied on for redress" (Wharton's Criminal Law, 12th Ed., Sec. 618 and cases cited).

Here, accused's company commander had authority as such to arrest and confine the deceased for the prior assault and battery upon the accused, and to initiate court-martial proceedings against him for that offense, had accused reported the matter to him. Also, the accused himself, being a person subject to military law, could have preferred charges against the deceased for the assault and battery. Either course, promptly taken, obviously would have averted the fatal encounter. As between "losing face" and homicide, a person in the military service cannot lightly or with impunity elect the latter alternative.

8. The charge sheet shows that the accused is twenty-two years old, and was inducted at Richmond, Virginia, on 13 October 1943. According to his commanding officer he has been an exemplary and outstanding soldier in every way.

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 sustain the findings of guilty and the sentence, and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of violation of Article of War 92.

Seymour W. Wurfel, Judge Advocate

N. Wayne Clive, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 313497 1st Ind

WD JAGO, Washington 25, D. C. SEP 2 3 1946

TO: The Under 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 Sergeant Augustus J. Green (33542160), 369th Quartermaster Laundry Company, Nagoya, Honshu, Japan.

2. Accused was found guilty of murder in violation of Article of War 92 and was sentenced to be hanged by the neck until dead. 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.

In this case the accused killed another soldier. Deceased was a large man who had been a professional boxing trainer. He was quarrelsome and had the reputation of being a bully. During the afternoon preceding the night of the homicide the accused and the deceased and others had engaged in a poker game, during which deceased lost some money and there told the accused that he was going to kill the next man who won his money and quit. That evening the accused and other soldiers were playing poker in the room in which the accused, the deceased and several others were billeted. Accused and some of the others started the game and deceased wanted to play and entered the game. One by one the players dropped out of the game until only the accused and the deceased remained. Accused had lost money in the game, and announced that he too was going to quit. At this point, which was about 9:00 p.m., while accused was still sitting at the poker table and after he had told deceased that he (accused) had lost money in the game, the deceased reminded accused of and repeated his threat to "kill the next son-of-a-bitch that wins my money and quits"; deceased then struck accused on the face or neck with his fist and knocked accused about five feet and accused fell across a footlocker. Accused then endeavored to get away. Deceased reiterated his statements about being tired of "you fellows winning my money and quitting" and being "tired of you fellows interfering with me"; some of the other soldiers present tried to hold deceased but he broke away from them, grabbed a brick and started toward accused, who then fled barefooted from the room. About fifteen minutes later the accused went back into the room to get his shoes. Accused then went into the supply room to repay some money borrowed from a Sergeant Stoner; accused had on shower slippers and was not dressed for outdoors; while there the deceased entered the supply room and accused left and went outside by going unnoticed around a display case or large clothes shelves. On the outside again, accused looked through the window of their room and saw deceased putting on his hat and coat. Accused then went into a wrecked

building, and, upon hearing a door open and footsteps, left that building and went to the latrine or shower room, where he remained for fifteen minutes or half an hour.

A short time after accused went into the room to get his shoes and left, a Sergeant Beard inquired whether anyone was hungry. Deceased stated that he was, and Beard and deceased left the room and went to the ration dump "instead of the mess hall," and returned after fifteen or twenty minutes. It is shown by Beard's testimony that when he and deceased started out they were going to go to the mess hall, because the 3224th Service Company was near the mess hall and the deceased was going over to that organization to get a pistol from a buddy who was a member thereof, "because he was tired of putting up with the foolishness of the guys in the 369th." Beard did not communicate to anyone that deceased had talked about getting a pistol.

As accused was leaving the shower room, or nearby, he met Technician Fifth Grade Henry Washington. Accused testified that one of the boys "I think it was Henry Washington," asked him what was the matter "because I was coughing"; that he told Washington "it was where Pace (deceased) had hit me"; that Washington then asked what he was going to do, to which accused replied that he was going to talk to deceased; and that Washington warned "you better be careful because he got a gun," or "be careful because he's going after a pistol." The commanding officer of accused and deceased, testifying as a prosecution witness, stated that when accused came to his quarters immediately after the shooting accused said that he went into the building after deceased left and someone told him deceased had gone to get a gun from a friend "in the 3244th Service Company." Technician Fifth Grade Henry J. Washington, who lived in the same room, testified for the defense that he saw accused between the barracks and the showers, asked him what was the matter, and that accused did not answer; that he went into the barracks and was told about deceased hitting accused, and "I figured that was what the trouble was with him out there with his throat"; that deceased was then putting on his shoes "figuring to go somewhere"; that he (Washington) went outside, again saw accused, again asked him what was the matter and accused did not answer; and that he had no other conversation with accused, and did not return to the barracks until he heard the shots.

After talking with Technician Fifth Grade Henry Washington, accused still wanted to talk to deceased but was afraid to go near him. He told his commanding officer immediately after the shooting that he had wanted to make up with deceased if possible. From the outside he looked through the window of his and deceased's room and saw deceased. Having been told that deceased had a gun, "I was sure he was going to kill me so I figured I better have some protection." Accused "knew that Pace (deceased) was in so

much trouble that he might have decided to finish the job." He went into Sergeant Clarence L. Washington's room, taking particular care not to awaken him, and procured the latter's carbine and loaded it. He entered his and deceased's room, holding the carbine behind him. Deceased was standing in the room near the stove, some fifteen feet from the door. In his statement to his commanding officer accused said that when he entered he called deceased's name. No one present heard any statement either by accused or deceased at that time. No one present, except accused, was looking at deceased. At the trial accused testified, "I opened the door and before I could say anything he saw me and I could tell by looking at him that he was (s)till mad and when he made the break it seemed like he was going after the pistol. I thought the same thing would happen here but this time he had a pistol. I was afraid and all I could think of was to snap the carbine around and start shooting." In the statement which accused made to his commanding officer immediately after the shooting, related by the commanding officer as a prosecution witness, accused said that deceased "made some kind of break" and that accused "didn't know if the break was toward him or away from him but when that happened he brought the carbine from behind him and fired." Accused fired several shots, probably five, of which the last two were fired in the direction of deceased's body after he fell to the floor. Only two shots struck deceased, one above the right eye and the other below the left eye. At the time of the shooting accused was approximately half-way between the door and the deceased. After the shooting accused asked Sergeant Beard to go after the commanding officer and see about an ambulance, laid the gun down in the recreation hall, and went to the commanding officer's quarters. The exact time of the shooting is not satisfactorily shown. All of the evidence indicates that approximately one hour elapsed between the altercation and the homicide.

3. The accused is a young colored soldier, 22 years of age, inducted at Richmond, Virginia, on 13 October 1943. According to his commanding officer he has been an exemplary and outstanding soldier in every way. The commanding officer testified that accused's efficiency as a soldier was between excellent and superior; that his character was good, "one of those unusual personalities"; that he had a "perfect" reputation with respect to temperament and veracity; that he has the best general reputation of any man in the organization, the most congenial personality not only in the platoon but in the entire company, and that he never had a fight nor an argument. The commanding officer also testified that the deceased was a bully, "a fellow-who-knew-all-the-answers type," who had had one or two fights and had a reputation for temper and violent action. Testimonials to accused's splendid character were submitted by five fellow soldiers of his organization and were forwarded with the record of trial.

4. Mr. Charles H. Houston, Washington attorney retained by accused's family, has submitted a brief for the accused and appeared personally before

the Board of Review. Accused's brother and Mr. James C. Evans, Assistant Civilian Aid to the Secretary of War, also appeared before the Board. The accused's commanding officer, now separated from the service, has addressed a "Letter of Clemency" to the President. I recommend that the sentence be confirmed but in view of all the circumstances and the previous exceptionally good conduct and record of the accused, recommend it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty-five (25) years, and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

5. 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1 - Record of Trial
2 - Ltr to Pres for sig USW
3 - Form of Action
4 - Brief submitted by Atty Houston

(G.C.M.O. 322, 28 October 1946).

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

AUG 13 1946

JAGQ - CM 313541

UNITED STATES v. Captain CHARLES F. BAER (0-303586), QMC, SCU 1111, Prisoner of War Camp, Fort Devens, Massachusetts.	FIRST SERVICE COMMAND Trial by G.C.M., convened at Fort Devens, Massachusetts, 26 April 1946. Dismissal and confinement for one (1) year.

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 Charges and Specifications:

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

Specification: In that Captain Charles F. Baer, Prisoner of War Camp, SCU 1111, Fort Devens, Massachusetts did, without proper leave, absent himself from his organization at said Fort Devens, from about 26 March 1946, until apprehended and returned to the control of the military authorities in Boston, Massachusetts, on or about 6 April 1946.

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

Specification 1: In that Captain Charles F. Baer, Prisoner of War Camp, SCU 1111, Fort Devens, Massachusetts, having become indebted to various creditors in the amounts listed below, and having failed without due cause to liquidate said indebtedness, and having about 18 December 1945 promised in writing said creditors that he would pay said debts in certain installments payable on or about the first day of each month, of which installments the amounts below listed after the names of said creditors were payable on or about 1 April 1946, did, without due cause, on or about said 1 April 1946, dishonorably fail to keep said promise.

Name and Address of Creditor	Total Amount of Debt	Amount Due 1 April 46
Installment Loan & Finance Co., Boston, Mass.	$ 991.44	$ 88.46
Bank of Commerce & Savings, Washington, D. C.	105.00	30.00
Lenders, Inc., Arlington, Va.	105.00	29.59
Worcester County Trust Co., Fitchburg, Mass.	150.00	35.00
W. H.Hofheimer,Inc., Norfolk, Va.	157.50	35.00
	$1508.94	$218.05

Specification 2: In that Captain Charles F. Baer, Prisoner of War Camp, SCU 1111, Fort Devens, Massachusetts, did, at Leominster, Massachusetts, on or about 20 March 1946, with intent to defraud, wrongfully and unlawfully make and utter to Wonder Bar Cafe, Inc., a certain check in words and figures as follows, to wit:

The Liberty National Bank, Washington, D.C. - 20 March 1946
Pay to the Order of Cash $ 25.00
Twenty-five----------oo/100 Dollars
/s/ Charles F. Baer, Capt., QMC
0-303586

and by means thereof, did fraudulently obtain from said Wonder Bar Cafe, Inc. $25.00, he, the said Captain Charles F. Baer, then well knowing that he did not have and not intending that he should have any account in The Liberty National Bank for the payment of said check.

Since Specifications 3 to 11, inclusive, to Charge II are couched in identical language to that of Specification 2, except as to the differences tabulated below, they are not here repeated in full.

Specification	Date of Check	Uttered to and Money Obtained from	Amount
3	21 March 1946	Wonder Bar Cafe, Inc.	$25.00
3	21 March 1946	Wonder Bar Cafe, Inc.	25.00
4	26 Nov. 1945	Lincoln Hotel, Inc.	30.00
5	26 March 1946	Greater Boston Soldiers & Sailors Committee	25.00
6	27 March 1946	" " "	50.00
7	28 March 1946	" " "	50.00
8	29 March 1946	" " "	50.00
9	30 March 1946	" " "	25.00
10	30 March 1946	" " "	50.00
11	1 April 1946	" " "	50.00

accused pleaded guilty to Charge I and its Specification, not guilty to Charge II and to Specifications 2 to 11, inclusive, thereof, and guilty to Specification 1 of Charge II except the words "without due cause" and "dishonorably", and as to the excepted words not guilty, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. Accused 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.

3. Evidence for the Prosecution. Charge I: Accused pleaded guilty to Charge I and its Specification (R 15). The record shows accused was transferred by First Service Command official orders from duty at the Separation Center to duty at the Prisoner of War Camp both located at Fort Devens, Massachusetts, on 26 March 1946 (R 18, Pros. Ex. 1). That accused went AWOL on 26 March 1946 and that this absence was terminated by his apprehension in Boston, Massachusetts, on 6 April 1946, is established by accused's stipulations (R 18, 19).

Charge II, Specification 1: Accused pleaded guilty to this Specification except for the words "without due cause" and "dishonorably" (R 15). In December 1945 accused worked out a detailed schedule for payment to his various creditors (R 20) of the sum of $1,901.90 to be completed by 1 October 1946 (R 21, Pros. Ex. 3), and arranged with Major Hoar, his then commanding officer, to supervise his finances and the payment each month of the creditors as provided by the schedule. Al the payments pursuant to this agreement were actually made by accused personally (R 22). It is stipulated this was done through 1 March 1946 and the total adjusted indebtedness of $1,508.94 reduced to $1,047.13 but that the installments due 1 April 1946 were not paid (R 39). After accused was transferred from the Separation Center and went AWOL on 26 March 1946, Major Hoar notified the creditors that accused was no longer a member of his organization and he could not handle his commitments any longer (R 20).

Charge II, Specifications 2 and 3: Bartenders at the Wonder Bar, Leominster, Massachusetts, identified Prosecution's Exhibit 4, a check for $25 dated 20 March 1946 (R 25), and Prosecution's Exhibits 5 and 6, two checks for $25 each, both dated 21 March 1946 (R 29), and stated that they cashed them in the bar for the accused, who was sober (R 26). Accused stipulated, that his account in the Liberty National Bank, Washington, D. C., was closed out before 26 November 1945 and was not reopened and that all checks set forth in Specifications 2 through 11 of Charge II were drawn on the Liberty National Bank, Washington, D. C., and were returned for the reason that the account was closed (R 38). Back in 1945 accused knew the account was closed (R 63).

Charge II, Specification 4: Accused stipulated that if the owner of the Lincoln Hotel, Inc., Ayer, Massachusetts, were present he would testify that Prosecution's Exhibit 7 (R 31), a check for $30 dated 26 November 1945, was cashed by him for accused, returned marked "account closed" and that the same was made good through accused's commanding officer about 1 January 1946 (R 30, 31).

Charge II, Specifications 5 to 11, inclusive: Accused stipulated that if present the proper tellers of the First National Bank of Boston would testify that as part-time employees of the U.S.O. and the Greater Boston Soldiers and Sailors Committee, Inc., they cashed for accused a $25 check dated 26 March 1946, a $50 check dated 27 March 1946, a $50 check dated 28 March 1946, and a $50 check dated 29 March 1946 (R 37). Photostatic copies of these four checks were introduced into evidence as Prosecution's Exhibits 8, 9, 10 and 11, respectively, without objection by the accused (R 37). A part-time teller who was present testified that he cashed two checks for accused, both dated 30 March 1946, one for $25, the other for $50. These he identified by his initials "FWH" on the indorsement stamp (R 32) and they were admitted in evidence as Prosecution's Exhibits 12 and 13, respectively (R 37). This teller stated accused was not drunk when he cashed the checks (R 33). Accused stipulated that W. E. Kleen, if present, would testify that as a teller for the Greater Boston Soldiers and Sailors Committee, Inc., on 1 April 1946, he cashed a check for the accused in the sum of $50 and that Prosecution's Exhibit 14 is a photostatic copy of that check (R 38).

4. Evidence for the defense. Much of accused's testimony concerned his fifteen years' service as an enlisted man (R 45) and four years' service as an officer. Regarding the charges, accused stated that after working hours he had nothing to do but walk the streets and he began to drink and gamble (R 50). In November 1945 because of his indebtedness to creditors he was relieved from duty and informed he would be reclassified. He tendered his resignation and did no duty for two months but the resignation was not accepted. In March 1946 he began to worry about his work and in his mind everything was going wrong (R 53). He was drinking heavily at this time to ease his mind (R 54) and settle his nerves (R 59). When he reported to his new assignment he thought the quarters assigned to him were not adequate. About 22 March 1946 he left the post, went to Boston, continued drinking heavily and wrote checks so that he could keep on going (R 55). Accused admitted cashing all the checks in question (R 56, 58) and that he knew in 1945 the account was closed (R 63). Accused has made all the checks good except those to the Wonder Bar and $50 of those cashed at the Greater Boston Soldiers and Sailors Committee (R 56). To the best of accused's knowledge at the time of trial his total indebtedness was $1,942 (R 56). The apparent discrepancy between the stipulated indebtedness of $1,508.94 and the amount of $1,901.90 as shown in Prosecution's Exhibit 3 (R 21) is explained by

accused's testimony that he owed "some more" which his commanding officer did not "put down" in the composition (R 67). Accused testified as to Specification 1 of Charge II, " I didn't pay on April 1, 1946, as I didn't draw my March pay check as I was absent from the Post" (R 53).

5. Accused's guilt of Charge I and its Specification requires no discussion. As to Specification 1 of Charge II, the court properly found that accused, by going absent without leave, getting drunk and thus not meeting his 1 April 1946 promised debt payments, did so dishonorably and without due cause. Under the circumstances this conduct by an officer was clearly of a nature to bring discredit upon the military service in violation of Article of War 96. In CM 256115, Krouse, 36 BR 229, 233, the rule is stated:

> "'Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit, or specific promises of payment, it may properly be deemed to constitute an offense': Dig. Ops. JAG. 1912-1940, sec. 453 (14). The evidence for the prosecution supplements the accused's plea of guilty and tends to show that the accused's failure to pay falls within the latter category. His numerous and consistently broken promises and his issuance of a worthless check, when viewed in the light of his plea of guilty, provide an adequate foundation for the court's findings of guilty."

Accused's guilt of Specifications 2 to 11, inclusive, of Charge II is amply established by the evidence. Accused's admission that at the time he cashed all of these checks he knew that the account on which they were drawn was closed sustains the court's finding of an intent to defraud (CM 240347, Beserosky, 26 BR 33, 39).

Subsequent restitution of the sums involved, even if completed, is no defense (CM 275648, Creighton, 48 BR 123).

6. Accused is 43 years old, a high school graduate, and had two years of college. He is married and has five children ranging in age from one to seventeen. His wife works and lives in Baltimore, Maryland. He was a bookkeeper and cashier for Swift and Company for three years and a salesman for Armour and Company for one year. He enlisted in the regular Army on 9 March 1927, continued to reenlist, was appointed staff sergeant on 1 August 1933, technical sergeant 1 May 1937, master sergeant 10 February 1941, accepted active duty as a second lieutenant, Quartermaster Corps Reserve, 19 April 1942, was promoted to temporary first lieutenant on

2 November 1942 and to temporary captain on 17 December 1943. His efficiency reports as an officer, in chronological order, are "Excellent", "Superior", "Very Satisfactory", "Satisfactory", three "Very Satisfactory," "Satisfactory", two "Excellent", 3.7 and 2.9. On 25 September 1944 accused was reprimanded under Article of War 104 for being absent without leave for three days. Accused is the subject of several letters from civilians to The Adjutant General seeking collection of indebtedness. On 14 January 1946 accused's tendered resignation was not favorably considered because court-martial charges against him were then under investigation. Accused would like to resign his commission and reenlist as a master sergeant in permanent grade.

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. 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 is authorized upon conviction under Article of War 61 and under Article of War 96.

Seymour W. Wurfel, Judge Advocate.

Thayse Olivier, Judge Advocate.

Harold F. McDonnell, Judge Advocate.

JAGQ - CM 313541 1st Ind

WD JAGO, Washington 25, D. C. AUG 30 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 Captain Charles F. Baer (0-303586), QMC, SCU 1111, Prisoner of War Camp, Fort Devens, Massachusetts.

2. Upon trial by general court-martial this officer pleaded guilty to being absent without leave for a period of eleven days in violation of Article of War 61 and also, except for the words "without due cause" and "dishonorably", to failing to keep his written promise to make installment payments to creditors due on 1 April 1946, in violation of Article of War 96 (Specification 1, Charge II). He pleaded not guilty to ten separate Specifications of uttering eleven different checks against a closed bank account in the total sum of $405 (Specifications 2-11, Charge II), in violation of Article of War 96. He was found guilty of all Charges and Specifications. 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.

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.

The evidence shows that accused while stationed at Fort Devens, Massachusetts, absented himself without leave from his station at the Prisoner of War Camp from 26 March 1946 until his apprehension in Boston, Massachusetts on 6 April 1946. At that time accused was indebted in a sum in excess of $1500 which indebtedness he had in December 1945 promised in writing to pay to his creditors according to a detailed schedule on a monthly basis. The payments due on 1 April 1946 amounted to $218.05 and were not made by the accused, his explanation being that "I didn't pay on April 1, 1946, as I didn't draw my March check as I was absent from the Post." In fact on 1 April 1946 the accused was absent without leave. The accused cashed a series of 11 checks all drawn on the Liberty National Bank of Washington, D. C., upon an account which had been closed at a date prior to that of uttering

the earliest of these eleven checks, the accused knowing that the account had been so closed. The first of these checks was cashed 26 November 1945 and all of the others during the period from 20 March to 1 April 1946, inclusive. The total of these eleven checks amounted to $405 and all were returned unpaid by reason of the fact that the account was closed. At the time of trial $125 worth of the checks had not yet been made good.

4. Accused is 43 years old, a high school graduate, and had two years of college. He is married and has five children ranging in age from one to seventeen. His wife works and lives in Baltimore, Maryland. He was a bookkeeper and cashier for Swift and Company for three years and a salesman for Armour and Company for one year. He enlisted in the regular Army on 9 March 1927, continued to reenlist, was appointed staff sergeant on 1 August 1933, technical sergeant 1 May 1937, master sergeant 10 February 1941, accepted active duty as a second lieutenant, Quartermaster Corps Reserve, 19 April 1942, was promoted to temporary first lieutenant on 2 November 1942 and to temporary captain on 17 December 1943. His efficiency reports as an officer, in chronological order, are "Excellent", "Superior", "Very Satisfactory", "Satisfactory", three "Very Satisfactory," "Satisfactory", two "Excellent", 3.7 and 2.9. On 25 September 1944 accused was reprimanded under Article of War 104 for being absent without leave for three days. Accused is the subject of several letters from civilians to The Adjutant General seeking collection of indebtedness. On 14 January 1946 accused's tendered resignation was not favorably considered because court-martial charges against him were then under investigation. Accused would like to resign his commission and reenlist as a master sergeant in permanent grade.

5. A letter on behalf of this accused and his family from his wife, Irene Baer, has been given consideration, also, a letter from accused dated 12 June 1946.

6. I recommend that the sentence be confirmed and 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 the above recommendation into effect, should such recommendation 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 Irene Baer
4. Ltr fr accused, 12 June 46

(G.C.M.O. 270 , 9 September 1946).

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

JAGQ - CM 313544

JUN 28 1946

UNITED STATES v. Private WILLIE B. CARSON (37248241), attached unassigned 442nd Replacement Company.	HEADQUARTERS BASE SECTION INDIA-BURMA THEATER Trial by G.C.M., convened at APO 465, 16 April 1946. Dishonorable discharge and confinement for seventeen (17) months. Disciplinary Barracks.

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

1. The Board of Review has examined the record of trial of the soldier named above and holds it legally sufficient to support the findings of guilty.

2. Accused was convicted, upon pleas of not guilty, of breach of restriction, carrying a concealed weapon, escape from confinement, and absence without leave. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for seventeen (17) months. The reviewing authority approved the sentence, withheld the order directing its execution, and forwarded the record of trial pursuant to Article of War 50½.

3. The only question requiring consideration here is the legality of the sentence to confinement at hard labor. The Table of Maximum Punishments (par. 104c, MCM, 1928) is applicable to the offenses of breach of restriction, carrying a concealed weapon, and escape from confinement, and authorizes a total maximum confinement at hard labor for sixteen months for these three offenses; that is, one month for breach of restriction, three months for carrying a concealed weapon, and twelve months for escape. Inasmuch as the absence without leave was committed on 4 March 1946, and was not in occupied enemy territory, the Table of Maximum Punishments is likewise applicable to this offense (Executive Order 9883, 19 January 1946); but in the view we take of the matter, that fact has bearing upon the legality of the sentence adjudged in this case only insofar as it illustrates the legal principle involved.

4. The record establishes that the absence without leave was concurrent with the escape from confinement. The accused escaped on 4 March 1946 and was absent without leave until 13 March 1946. The two offenses were but different aspects of the same act. This principle was long ago firmly established as the law (CM 188706, Buller (1929); CM 188765, Southard (1929); CM 188862,

Nelson (1929); CM 192390, Crapo (1930);CM 212634, Bergdoll (1940). In such circumstances the escape is but the means to an end, and that end is absence without leave or desertion.

This requires us, however, to direct attention to another aspect of the problem. In the cases above cited the Military Justice Section held the record of trial legally sufficient to support the sentence, and then expressed the opinion that the accused should not be given the maximum punishment for both offenses but only for the act in its most important aspect, cited paragraph 80a, MCM, 1928, and recommended appropriate partial remissions. In another such case (CM 185873, McGee (1929)) The Judge Advocate General on 23 March 1929 addressed a memorandum to The Adjutant General in which it was stated that the record of trial was legally sufficient to support the sentence.

An exhaustive search discloses only two instances in which a Board of Review, in its capacity as such, has considered the question whether a sentence imposing punishment for both the offense of escape and the concurrent offense of absence without leave or desertion is a legal sentence. In one case, CM 172681, Frith (1926), the accused was convicted of escape on 8 July 1926 and desertion from that date until surrender on 13 July 1926. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half years. The maximum confinement for each offense, separately considered, was one year for escape and nine months for desertion. The Board of Review, in a holding without opinion, held the record legally sufficient to support the sentence. In the other case, CM 215729, Lamons, et al., 11 BR 29 (1941), the accused Lamons was convicted of escape from confinement on 3 December 1940 and of desertion beginning concurrently and terminated the same day in a manner not shown. The Board of Review in a holding mentioning only the manner of termination of the desertion as affecting the sentence therefor, held that the manner of termination was not shown, that the punishment therefor could not exceed that fixed for desertion terminated by surrender, and said:

> "The sentence adjudged and approved as to accused Lamons included confinement for three and one-half years. The maximum confinement authorized for desertion terminated by surrender after absence of not more than sixty days is one year, and also one year for escape from confinement (par. 104c, MCM, 1928), making a total authorized confinement of two years in his case."

Two other cases present near-approaches to Board of Review consideration or ruling upon the matter. In one of those cases (CM 216361, Weber, 11 BR 133 (1941), the accused was convicted of desertion from 30 January 1941 to 8 February 1941, from 17 February 1941 to 9 March 1941, and of breach of arrest on 17 February 1941 concurrently with the desertion of the same

date. As to the two desertions the Board of Review held the record legally sufficient to sustain findings of absences without leave only for a total of twenty-nine days, for which the maximum punishment was confinement at hard labor for eighty-seven days and forfeiture of two-thirds pay per month for a like period; pointed out that the maximum for the breach of arrest was confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period; and accordingly held that the record was legally sufficient to sustain only so much of the sentence as involved confinement at hard labor for five months and twenty-seven days and forfeiture of two-thirds pay per month for a like period. The Board made no reference to the breach of arrest and the concurrent absence being different aspects of the same act. In the other case (CM 192147, Gallagher (1930)), the accused was convicted of absence without leave for thirty-nine days and breach of arrest, both committed concurrently on 11 March 1930. The sentence as approved by the reviewing authority was dishonorable discharge, total forfeitures and confinement at hard labor for four months. The separate maximum confinement for the breach of arrest was three months and for absence without leave it was three months and twenty-seven days. The Board of Review held, without opinion, that the record was legally sufficient to support the sentence, and The Judge Advocate General approved the holding. Attached to the record of trial of that case are two penciled memoranda. In one the following statements appear:

> "This case brings up a conflict in rulings between the Board of Review and the Military Justice Section. The Board of Review has consistently held for many years that par. 80a does not prohibit punishment for two offenses arising out of the same act if one offense is not a lesser included offense of the other. Thus the B/R has held that an accused may be punished for both desertion and escape from confinement; which is analagous to this case. This holding of the B/R is consistent with the decision of the U. S. Supreme Court in analagous cases. See Albrecht vs. U. S., 273 U.S. 1, 11, and cases cited. On the other hand the Military Justice Section has held that par. 80a does apply...."

The other memorandum, initialed by two members of the Board of Review, states:

> "I find no inconsistency. The Board has never held, and neither has the Section, that 80a is a legal limitation. It expresses a policy which the Section has tried to get the field to follow. The Board approves such procedure; and raises a question for the J.A.G. as to whether the policy applies here."

In the case of Albrecht et al. v. U.S., 273 U.S. 1, cited in the first above-quoted penciled memorandum, the defendants were sentenced to either fine or imprisonment upon each of nine counts of an information charging violations of the National Prohibition Act. The court, speaking through

Mr. Justice Brandeis, said:

> "There is a claim of violation of the Fifth Amendment by the imposition of double punishment. This contention rests upon the following facts. Of the nine counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act; but the general principle is well established." (Citing Burton v. U. S., 202 U. S. 344, 377; Gavieres v. U. S., 220 U. S. 338; Morgan v. Devine, 237 U. S. 632) (Emphasis supplied.)

Morgan v. Devine, 237 U. S. 632, cited by the court in the Albrecht case, supra, was an appeal by the Government from the decision of a United States District Court releasing the defendant from confinement upon a habeas corpus petition. Reversing the judgment below, the court held that the defendant who broke into a post office and also committed larceny therein, and who was convicted under separate counts of the same indictment for violation of sections 190 and 192 of the Penal Code, and sentenced separately under each, was not, after having served the sentence under one count, entitled to be released on the ground of double jeopardy just because the several things charged were done at the same time and as a part of one transaction. The court said:

> "But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress. * * * As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges

relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to Carter v. McClaughry, 183 U.S. 365; Burton v. United States, 202 U. S. 344, 377, and the recent case of Gavieres v. United States, 220 U. S. 338."

In Carter v. McClaughry, cited by the court in the above case, Carter filed a petition for the writ of habeas corpus in a lower Federal court, and alleged that he was imprisoned and restrained of his liberty by virtue of a sentence of a general court-martial. He was an officer. His conviction, as finally approved and confirmed, was upon four charges, to wit:

Charge I. "Conspiring to defraud the United States, in violation of the 60th Article of War." The specification alleged that Carter so conspired with certain contractors as to enable them to secure the contract for certain work, accepted materials inferior to those specified in the contract, and caused the contractors to be paid two sums of money therefor at the same rate and price as if the materials had been such as were stipulated for in the contract.

Charge II. "Causing false and fraudulent claims to be made against the United States, in violation of the 60th Article of War." The specification alleged that Carter certified to and submitted vouchers in favor of the same contractors covering the same materials, that he caused these false and fraudulent claims to be made by knowingly permitting the contractors to furnish the inferior materials and by certifying to the correctness of the vouchers well knowing that the materials charged for therein as having been furnished had not in fact been furnished.

Charge III. "Conduct unbecoming an officer and a gentleman, in violation of the 61st Article of War." The specification alleged that Carter willfully and knowingly caused the same vouchers to be paid out of the moneys of the United States subject to his order and control, by drawing and delivering two checks to the contractors directing payment out of said moneys.

Charge IV. "Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62nd Article of War." The specification alleged that Carter, being a disbursing officer and having entrusted to him money of the United States, willfully and knowingly applied to an unauthorized purpose the portion of said United States money claimed by the same vouchers and represented by the same two checks.

Carter's sentence as confirmed was dismissal from the service, a fine of five thousand dollars, confinement at hard labor for five years, and publication of the crime and sentence in specified newspapers. His contentions, so far as pertinent to the present question, and as relating to Charges I, II and III, were that the imprisonment and detention were illegal

and contrary to the then existing Article of War 102 prohibiting a second trial for the same offense, and contrary to the Fifth Amendment to the Constitution in that it appeared from the charges and specifications as well as the evidence that the payment of the two checks described in each of the specifications was the only basis of each of the charges and that the single act of drawing the two checks had been carved up into distinct and different crimes and a punishment assessed on each.

Captain Carter was tried under the American Articles of War of 1874. Article 60 provided that one convicted thereof should "be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge". Article 61 prescribed "shall be dismissed the service", and Article 62 placed the punishment at the discretion of the court.

Delivering the opinion of the court, Mr. Chief Justice Fuller said, inter alia:

> "Was then the sentence void for want of power to pronounce and enforce it?
>
> "The particular ground on which the appeal directly to this court may be rested is that the case involved the construction or application of the Constitution in the contention that by the sentence petitioner was twice punished for the same offence.
>
> * * *
>
> "We are dealing here with no matter of insufficient counts or of conviction of two offences, sustainable only as to one, but the analogies of the criminal law bear out the procedure under the military law, the rules of which determine the present contention. (Emphasis supplied)
>
> "That contention, after all, amounts to no more than to say that if the court-martial had acquitted on the disapproved findings, it must be assumed that the sentence would have been less severe, and therefore that the President should have sent the case back or mitigated the punishment, and that because he did not, the punishment must be conclusively regarded as increased. This is wholly inadmissible when the powers vested in the ultimate tribunal are considered.
>
> * * *
>
> "The contention [with particular reference to Charges I and II] is that Captain Carter was twice put in jeopardy because the sentence was greater than the court-martial had jurisdiction to inflict on conviction of any one of the offences charged, taken

singly, and because the offences charged were the same within the meaning of the constitutional provision.

* * *

"It is said that the punishment must be imposed under either the 60th or the 61st Articles, or under both; that the only penalty under the 61st article is dismissal; that the punishment under the 60th article may be fine or imprisonment, or such other punishment as a court-martial may adjudge; and that this is in the alternative and cannot be cumulative.

* * *

"The penalty denounced by Article 60 that the accused, on conviction, may be punished by fine or imprisonment or such other punishment as a court martial may adjudge, is plainly to be taken distributively, and is applicable on conviction of either of the offences enumerated.

"We understand the rule established by military usage to be 'that the sentence of a court-martial shall be, in every case, an entirety; that is to say, that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences.' 1 Winthrop (2d ed.) 614.

"Where then there is conviction of several offences, the sentence is warranted to the extent that such offences are punishable.

* * *

"Cumulative sentences are not cumulative punishments, and a single sentence for several offences, in excess of that prescribed for one offence, may be authorized by statute. (Citing cases.)

"The offences charged under this article [Article 60, Charges I and II] were not one and the same offence. This is apparent if the test of the identity of offences that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud', and the second charge alleged 'causing false and fraudulent claims to be made', which were separate and distinct offences, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference.

"The sentence, then, of fine and imprisonment was justified by the convictions of the first and second charges.

"Finally, it is contended on this branch of the case that the offence under Charge III is the same offence as those under Charges I and II, called by a different name, and hence that the punishment of dismissal was illegal because a third punishment where but two offences were committed.

"As heretofore said, dismissal might have been added to fine and imprisonment as part of the punishment, for either or both of the offences, under the first and second charges.

"But the offence of conduct unbecoming an officer and a gentleman is not the same offence as conspiracy to defraud, or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former.

* * *

"The result is that we are of opinion that the sentence cannot be invalidated on any of the grounds so far considered."

What, then, is the meaning and proper construction of paragraph 80a, MCM, 1928? In CM 232656, Brinkerhoff (1943), 19 BR 151, the Specification, Charge II, alleged that the accused forcibly arrested Mrs. B by touching her and threatening to cut her throat; and the Specification, Charge I, alleged that at the same time and in the same manner the accused assaulted the woman with intent to rob her. The Board of Review said:

"* * * the second offense is only a different aspect of one transaction. In view of this fact, and the basic principle that an accused may not lawfully be punished for two separate offenses when each is an integral part of the other and form only one single transaction, the imposition of a sentence in excess of the sentence prescribed for the major offense must be disapproved (par. 27, MCM, 1928; CM 156134, sec. 402(2) Dig. Ops. JAG 1912-1940)." (Emphasis supplied.)

In CM 240227, Holland (1943), 26 BR 1, the Specification, Charge I, alleged that the accused did unlawfully enter the dwelling of "I", with intent "to wrongfully, unlawfully and without the consent of Nancy Helen Irwin, open his trousers, expose his penis, and get into bed with her, the said Nancy Helen Irwin, a female child eight years of age". The Specification, Charge II, alleged that accused, at the same time and place, did wrongfully and

unlawfully and without the consent of "I" enter his dwelling "and did then and there wrongfully and unlawfully and without the consent of Nancy Helen Irwin, open his trousers, expose his penis and get into bed with her, the said Nancy Helen Irwin, a female child eight years of age". Discussing the maximum legal punishment, the Board of Review used the following language.

> "Conviction of unlawful entry under the Specification, Charge II, was of a minor aspect of the offense charged in the Specification, Charge I. Where two or more offenses of which an accused is found guilty are different aspects of the same act, punishment should be imposed only with reference to the most important aspect (Dig. Ops. JAG, 1912-1940, sec. 402(2)). Therefore, the element of unlawful entry cannot be considered in determining the maximum limit of punishment applicable to the Specification, Charge II, * * *." (Emphasis supplied.)

The Board of Review in CM 246523, Cardella (1944), 30 BR 59, said that

> "* * * where the two offenses charged are integral parts of only one transaction, the sentence may not exceed the maximum authorized punishment for the major offense * * *." (Emphasis supplied.)

CM 251370, Blanton (1944), 33 BR 221, was a case in which the accused was charged in one specification with being drunk and disorderly in uniform in a public place, and in another specification with conducting himself in an obscene, indecent and disorderly manner with a female at the same time and place. Commenting upon the correctness of the court's action in overruling a defense motion to dismiss the second specification upon the ground that it was "merely cumulative" and "fully covered by Specification 1", the Board stated:

> "It is true that, in general, one transaction should not be made the basis for an unreasonable multiplication of charges (MCM, 1928, p. 17). But the 1928 Manual does not attempt to explain the legal consequences of duplicitous charging. However, resort to the 1921 Manual makes it clear that where the same act in its different aspects is charged as constituting two or more offenses, it is not error for the court to find the accused guilty of all the specifications, but punishment may be imposed with reference to the act in its most important aspect only (MCM, 1921, par. 66). This limitation on punishment is carried into the 1928 Manual (MCM, 1928, par. 80a)." (Emphasis supplied.)

Paragraph 66 of the 1921 Manual for Courts-Martial provides, in pertinent part:

> "The duplication of charges for the same act or omission will be avoided except when by reason of lack of definite information as

to available evidence it may be necessary to charge the same act or omission as constituting two or more distinct offenses. When the same act or omission in its different aspects is charged as constituting two or more offenses, the court, even though it arrives at a finding of guilty in respect to two or more specifications, should impose punishment only with reference to the act or omission in its most important aspect, and if this rule be not observed by the court the reviewing authority should take the necessary action." (Emphasis supplied.)

Paragraph 80a, MCM, 1928, provides:

"If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect."

Our somewhat extended analysis of the United States Supreme Court decision (Albrecht et al. v. U.S.) cited as authority in the first penciled memorandum quoted on page 3, ante, and of other Supreme Court decisions cited by the Court in the Albrecht and other cases, particularly Carter v. McClaughry, has been prompted by the necessity of determining whether the law laid down in those cases in reality has any guiding or controlling significance in the question confronting us here, and by the desire to explore every suggestion bearing on the disposal of this question. Only Carter v. McClaughry involved a court-martial sentence. The other cases discussed, construing and applying Federal penal statutes, obviously have no application to construction of the provisions of the Manual for Courts-Martial here involved. The Carter case was tried under the American Articles of War of 1874, as heretofore stated. Those Articles contained no provision such as or similar to those above quoted from paragraphs 27 and 80a of the Manual for Courts-Martial. At that time the President had not set himself against punishment for all of two or more offenses constituting but different aspects of the same act or omission. In 1917, pursuant to the authority vested in him by Congress, he did so (Par. 66, MCM, 1917). Manifestly, therefore, Carter v. McClaughry, decided in 1901, is no precedent or authority for the imposition of punishment for each of such offenses.

Paragraph 66 in both the 1917 Manual and the 1921 Manual treated duplication of charges for the same act or omission, and punishment of two or more offenses constituting different aspects of the same act or omission, together. The language of the 1917 Manual is identical with that of the 1921 Manual quoted on page 9, ante. Both provisions are treated together also in paragraph 24b, War Department Technical Manual TM 27-255, Military Justice Procedure, February 1945, wherein it is said:

"Moreover, the amount of punishment is not increased by charging several different offenses arising out of a single act, since punishment may be imposed with respect to the act in its most serious aspect only. (See par. 80a, MCM)." (Emphasis supplied.)

After prolonged consideration and study, the Board of Review is of opinion and holds that the provision of paragraph 27 of the Manual against unreasonable multiplication of charges upon one transaction, and the provision of paragraph 80a with respect to punishment for two or more offenses constituting different aspects of the same act or omission, must be construed together; that paragraph 80a was intended as a positive and mandatory rule of limitation; that it was never conceived or designed as a mere statement of policy for discretionary use in the administration of military justice; and that where a sentence is imposed with reference to two or more offenses constituting but different aspects of the same act or omission, so much thereof as exceeds the maximum authorized penalty for the most important aspect of the act or omission is illegal. In this we find ourselves in complete accord with the decisions of the Boards of Review which have so held. In addition to the cases previously discussed herein, see also II BULL. JAG 187 (CM 231710); III BULL. JAG 10 (CM 241597); III BULL. JAG 418 (CM 261341); IV BULL. JAG 177 (CM MTO 6166). Every tenet of reason supports this construction. To hold otherwise would be to sanction dual punishment for substantially the same act, out of all reasonable proportion to the full demands of justice, through the simple expedient of splitting it into its different aspects and charging each as a separate offense; this would be a violent perversion of the spirit of the prohibition against unreasonable multiplication of charges contained in paragraph 27 of the Manual for Courts-Martial and would convert it into a mere device to promote injustice and wrong. "The term 'unreasonable' as here used connotes unreasonableness from the viewpoint of both the legality and the appropriateness of the punishment involved." (CM 196619, Goyette, et al., (1931) 3 BR 27, Sect. 428 (5) Dig. Op. JAG., 1912-1940). Previous expressions by The Judge Advocate General's Office and holdings of Boards of Review stating or implying that a sentence imposing more than the maximum punishment authorized for the most serious of two or more offenses constituting but different aspects of the same act or omission, including such expressions and holdings with respect to the offense of escape from confinement and the concurrent and simultaneous offense of absence without leave or desertion, is a legal sentence, are unsupportable and untenable in law and should not be followed.

The most important aspect of a criminal act or omission is that for which the most severe punishment is authorized. The maximum confinement authorized by the Table of Maximum Punishments (where dishonorable discharge

is imposed as here) for nine days absence without leave (4 March 1946 to 13 March 1946) is twenty-seven days. Therefore, as between the offenses of escape from confinement and absence without leave in this case, the former constitutes the most important aspect of the act of the accused and, with reference to these two offenses, punishment can be imposed only as to the escape.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and four months.

T. Wayne Olivier, Judge Advocate

Robert C. Trevethan, Judge Advocate

(DISSENT), Judge Advocate

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

JAGQ - CM 313544

UNITED STATES)	HEADQUARTERS BASE SECTION INDIA-BURMA THEATER
)	Trial by G.C.M., convened at
v.)	APO 465, 16 April 1946. Dis-
)	honorable discharge and con-
Private WILLIE B. CARSON)	finement for seventeen (17)
(37248241), attached un-)	months. Disciplinary Barracks.
assigned 442nd Replace-)	
ment Company.)	

DISSENT by DAVIS, Judge Advocate

The holding of the majority of the Board of Review is based upon the premise that absence without leave and a concurrent escape from confinement are but different aspects of the same act. If this premise is correct, I share their opinion that paragraph 80a, MCM, 1928, limits the legal punishment to the maximum punishment for the act considered in its most important aspect. However, I question the validity of this premise.

The authorities cited by the majority establish the proposition, concerning double jeopardy, that

> "* * * the test of identity of offenses is whether the same evidence is required to sustain them, if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense when two are defined by the statutes." (Morgan v. Devine, 237 U.S. 632.)

I submit that this rule may be applied in the present case to determine whether the two offenses are but different aspects of the same act. Applying the rule, it is apparent that they are not, for different evidence is required to sustain them. Accused was charged with escape from confinement on or about 4 March 1946 and also with absence without leave "from about 4 March 1946 to about 13 March 1946". The elements of proof for absence without leave are

> "(a) That the accused absented himself from his command * * * for a certain period, as alleged; and (b) that such absence was without authority * * *" (MCM, 1928, par. 132, p. 146).

The proof offered by the prosecution to show the escape and the initial absence without leave, consisting of documentary evidence showing accused's status on 4 March 1946 as "broke jail" and "conf to AWOL", for all practical purposes, were the same. However, with respect to the absence without leave the prosecution went further and showed by documentary evidence that accused

was confined 13-14 March 1946. The court properly presumed that accused continued to be absent without leave during the interim. Thus, two additional elements of proof, the return to military control and the presumption of continuance, were required to prove the absence without leave and neither was required to prove the escape. This additional proof is necessary in every case to support a finding that the absence without leave continues for a definite period of time (CM 313595, Thomas; CM 313669, Santo).

It is said that absence without leave is not a continuing offense and is committed on the date the person so absents himself. This appears in paragraph 67, MCM, 1928, page 52, which is concerned with the date of the offense for the period of limitations. See CM 274482, Talbott, 47 BR 185, 189. We should not blindly use a concept formed for a particular purpose to solve a wholly unrelated problem. That absence without leave is not a continuing offense for the purposes of the period of limitations has no relevancy whatsoever to the present problem. I have shown that proof is required to show the duration of the absence and it is evident that the duration is most material for other purposes: punishment is directly related thereto and an inference of intention to remain permanently absent may be made from an extended period.

The premise that escape from confinement and a concurrent absence without leave are but different aspects of the same act wholly ignores the fact that where the absence is alleged to cover a certain period of time, additional proof of duration is required and important consequences arise from the duration. The two offenses may arise from the same act but the escape terminates immediately, the absence continues and every day thereof must be proved.

The holding of the majority is that the most important aspect of a criminal act or omission is that for which the most severe punishment is authorized. In this case, inasmuch as the escape from confinement carries the more severe punishment, that constitutes the most important aspect of the act of the accused. By like reasoning, if the absence without leave was of sufficient duration to authorize the more severe punishment, this offense would be considered the most important aspect. This shifting of conclusions on the basis of the further action of the accused in remaining absent demonstrates the fallacy of the premise.

The conclusions I have reached are in accordance with existing precedents. In CM 215729, Lamons et al, 11 BR 29, accused was charged with escape from confinement on 3 December 1940 and with desertion beginning and ending also on 3 December 1940. The Board of Review held (page 32):

> "The sentence adjudged and approved as to accused Lamons included confinement for three and one-half years. The maximum

confinement authorized for desertion terminated by surrender after absence of not more than sixty days is one year, and also one year for escape from confinement (par. 104 c, M.C.M., 1928), making a total authorized confinement of two years in his case."

In CM 216361, Weber, 11 BR 133, the accused was charged with two specifications for desertion in violation of Article of War 58 and one specification alleging breach of arrest in violation of Article of War 69 occurring on the same date as the second desertion. The Board of Review held that the record of trial was legally sufficient to support findings of guilty of two absences without leave aggregating 29 days for which the maximum punishment was confinement at hard labor for 87 days and forfeiture of two-thirds pay per month for a like period, and legally sufficient to support the findings of guilty of breach of arrest for which the maximum punishment was confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period. The record as a whole was held legally sufficient to support only so much of the sentence as involved confinement at hard labor for five months and twenty-seven days, and forfeiture of two-thirds pay per month for a like period. The proof showed that the breach of arrest and the absence occurred at the same time.

For the reasons stated, I am of the opinion that the accused may be legally sentenced for both his absence without leave for a period of nine days and for his escape from confinement. I hold therefore that the record of trial is legally sufficient to support a sentence to confinement of one year, four months and 27 days.

Walter W. Davis, Judge Advocate

JAGQ - CM 313544 1st Ind

WD JAGO, Washington 25, D. C. JUL 15 1946

TO: The Adjutant General

1. In the case of Private Willie B. Carson (37248241), attached unassigned 442nd Replacement Company, 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 legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and four months, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentence.

2. This office has been informed by letter from Headquarters Base Section, India-Burma Theater, dated 30 April 1946, that this theater is scheduled to be inactivated. In view of this letter, it is recommended that War Department general court-martial orders be published in this case. A draft of such general court-martial order is inclosed.

3. The return to this office of this holding together with five copies of the published War Department general court-martial order is requested.

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Draft GCMO

(G.C.M.O. 236, 23 July 1946).

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

AUG 1 5 1946

JAGQ - CM 313545

UNITED STATES v. Privates First Class DANIEL W. HOGUE (34757802) and ARTHUR L. ALLEN (38226254), both of 591st Ordnance Ammunition Depot, APO 494.	HEADQUARTERS BASE SECTION INDIA-BURMA THEATER Trial by G.C.M., convened at Calcutta, India, 8-9 April 1946. Sentence as to accused Allen: Dishonorable discharge and confinement for life. Penitentiary. Sentence as to accused Hogue: Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.

REVIEW by 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 soldiers named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Arthur L. Allen, 591st Ordnance Ammunition Depot, APO 494, and Private First Class Daniel W. Hogue, 591st Ordnance Ammunition Depot, APO 494, acting jointly and in pursuance of a common intent, did, at Calcutta, India, on or about 6 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Clifford W. Reed, a human being, by stabbing him with a knife.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by summary court-martial was introduced as to each accused. With three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence as to each accused but reduced the period of confinement in the case of Hogue to twenty years, designated a United States Penitentiary as the place of confinement of accused Allen and a United States Disciplinary Barracks as the place of confinement of accused Hogue, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution: During the summer of 1945, in Calcutta, India, accused Allen first met Cynthia Reed, the wife of deceased (R 28). Mrs. Reed and Allen fell in love with one another and Allen and deceased became involved in two fist fights over Mrs. Reed, the first on 25 December 1945 and again on 2 January 1946 (R 29, 33, 40). On 20 January 1946 Mrs. Reed told Allen that she could not see him any more. At the same time she informed Allen as to her husband's hours of work (R 30). Deceased complained to the military police about Allen's altercations with him and about Allen's relationship with Mrs. Reed. Deceased and Mrs. Reed as well as her two sisters who were involved in this affair were all Anglo-Indians.

On 5 February 1946 Allen and Hogue, together with T/5 Alford B. Johnson, who was driving a ¼-ton government vehicle, picked up Mrs. Reed's two sisters in the vicinity of Mrs. Reed's home at about 1800 hours (R 34). The three soldiers and two girls went to a dance in Calcutta and then returned to the vicinity of the Reed home about 2300 hours (R 45). One sister, Mrs. Rita Avetoon, went to the Reed home to spend the night; the other sister, Miss Lorna Mylan went to her own home nearby. Allen instructed Johnson to drive off and come back to the same neighborhood at 0200 hours to pick up Hogue and himself (R 45). Allen then went to the Reed home and asked to see Mrs. Reed. Mrs. Reed and her sister Rita told Allen that Mrs. Reed did not want to see him. Allen then asked Rita as to when deceased was due to come home from work, the route he would take and whether he came home alone (R 35). Allen then rejoined Hogue who was waiting nearby.

An extra-judicial affidavit made by Hogue on 22 February 1946 was offered in evidence for consideration against Hogue alone and was received in evidence after the voluntary nature of the affidavit had been established (Pros. Ex. 6; R 54). In this statement Hogue recited the events of 5 February 1946 up to 2300 hours. He stated that after Allen rejoined him at that hour the pair walked around in the immediate vicinity for about two hours. After about two hours Allen informed Hogue that Allen and an unidentified person had had an argument and that he was going to settle it. The unidentified person was due in the vicinity at about 0200 hours. Allen requested Hogue to help him out if the antagonist should get the best of Allen. Hogue neither agreed or refused. At about 0215 Allen exclaimed "there he goes" and ran after a man in a white suit. Hogue followed at a distance of 15-20 feet. The civilian ran about 150 yards toward the Reed home. Allen caught up with the civilian, knocked him down and stabbed him repeatedly with a knife which had about a six-inch blade. The victim let out an exclamation and Hogue said to Allen "let's go". Hogue ran on down the street to where he saw Johnson waiting with their motor vehicle. Allen caught up to him, put away his knife, and Hogue, Allen and Johnson returned to their camp. No mention was made of the incident on the way to camp.

At about 0200 a neighbor of the Reed family was awakened by a cry "I am being killed", looked out the window and saw a man in a white suit holding his chest and swaying about (R 56).

Reed arrived at his home at about 0215 and exclaimed to his wife and to his sister-in-law, Rita, that he had been stabbed by Allen (R 32, 36). He was covered with blood from head to waist. Mrs. Reed and a neighbor went at once to a police station about a block away and asked for an ambulance. Two police inspectors promptly went to the Reed home with Mrs. Reed. The inspectors found Reed lying on the floor, bleeding profusely and shouting with pain (R 21). Reed stated to his wife "Oh, darling, I am going to die--give me a last kiss" (R 21), and said he was going to die and his wife would not see him again (R 10, 12). He then told the inspectors of the manner in which he was assaulted. The inspectors reduced Reed's statement to writing and read it back to him but Reed was too weak to sign the statement. The inspectors then affixed Reed's left thumb print to the statement (R 10-13). The statement, which was received in evidence (Pros. Ex. 1, R 28) as a dying declaration, is as follows:

"Statement of C. W. Reed

My name is C. W. Reed. I am a truck driver of Camp Hooghly (Calcutta). Tonight at about 2 a.m., I was returning home from my work via Pipe Rd. I took a turn on Ibrahim Rd from Pipe Rd and walked about 100 yds south from the crossings, when two colored American soldiers who were hiding somewhere on Ibrahim Rd, rushed toward me and stabbed me with a knife. Allen was one of them. I fully recognized Arthur Allen of 591 Ordnance Company of Kanchrapara. Allen stabbed me & the other man who was also colored American assisted Allen. I could not recognize the other man. Allen gave four or five blows with his knife on the left side of my chest. I don't know why Allen stabbed me. I had no enemity with him. He was a friend of my wife and also my friend.

I cannot talk more.

Recorded by me. read out and admitted to be correctly recorded.

M. Ahmed, 6/2/46."

On the morning of 6 February 1946, Mrs. Reed, her sisters, Rita and Lorna, and Rita's husband visited the hospital where they found that Reed was dying. On the way home they encountered Allen. Allen inquired where Reed was and on being informed that Reed was in the hospital, replied that he didn't know what he had done but thought he had finished Reed (R 36, 40).

The police inspector who wrote down Reed's dying declaration saw Reed's dead body at the hospital late on the morning of 6 February 1946. A post-mortem report of examination of the corpse on 7 February 1946 showed death due to approximately 15 knife wounds which were "antemortem and homicidal" (Pros. Ex. 4, R 19).

4. Evidence for the defense. Mrs. Reed was recalled as a witness for the defense and testified that during the fight between Allen and Reed on 2 January 1946, and afterward, Reed threatened Allen's life (R 65). In connection with the competency of her husband's dying declaration, she testified that she kissed her husband goodbye just before he was taken away in the ambulance (R 69) and that he said "I'm not going to die. You stick by me, and I'll stick by you". (R 66).

Mrs. Gardner, the neighbor who accompanied Mrs. Reed to the police station to report the stabbing of Reed, testified that a few minutes after returning from the police station she heard Reed ask his wife to kiss him as she would not see him again (R 73).

Hogue's company commander testified that Hogue's character was good and efficiency as a soldier excellent (R 70).

Each accused elected to remain silent (R 73).

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. 148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and so as to 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 as to accused Allen shows that for many months prior to the homicide he had carried on an affair with the wife of deceased which resulted in at least two fistic encounters with deceased and culminated in Allen's deliberate killing of the deceased. Allen's entire course of conduct indicates a specific intent and purpose to do away with the victim whom he hated as the possessor of the woman he wanted. Through his inquiries concerning his victim's route of return from work, his laying in wait for his victim, and his vicious attack upon him, Allen demonstrated an intent to kill with express malice. Express malice means simply an actual intent to kill the person who is killed (Commonwealth v. Webster, 5 Cush. (Mass) 295). All elements of proof of the crime of murder are found in the testimony recorded against Allen.

As to Hogue, the reason for his participation in the unlawful homicide is more obscure. He was a member of the same organization with Allen,

had spent the evening sociably with Allen and others who became involved in this affair and, judging by his own affidavit and particularly by his actions, agreed to assist Allen in settling Allen's grievance with the victim. He thereby became an aider and abettor in the offense and responsible as a principal in the murder which ensued (18 USC 550). Section 332 of the Criminal Code of the United States (18 USC 550) reads as follows:

> "Principals" defined. "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."

To be found guilty as an aider and abettor under the circumstances of this case, it was necessary for the prosecution to prove as to Hogue:

(1). A guilty principal who actually committed the murder.
(2). That the aider and abettor was actually or constructively present when the offense was committed.
(3). That the aider and abettor took some part, not necessarily active, in the commission of the offense. Being present in concert with the actual perpetrator for the purpose of assisting, if necessary, is sufficient.

The record shows:

(1). That Allen committed the murder as the principal.
(2). That Hogue was actually present when the murder was committed.
(3). That Hogue remained in ambush with Allen for at least one hour while waiting for the victim to appear, that he joined in the pursuit of the victim for about 150 yards, that he was only 20 feet away when the first blows were struck by Allen, that he was in the immediate vicinity while Allen repeatedly stabbed the victim, and was ready, able and willing to lend Allen any necessary assistance in the event that the affray went against Allen, that deceased's dying declaration charges that Hogue assisted Allen in the assault, and that he and Allen fled from the scene together and that Hogue failed to notify the proper authorities of the commission of the felony.

Although a specific intent to murder must have been entertained by Hogue as well as by Allen this intent may be inferred from the conduct of Hogue, both before and at the time of the commission of the offense. The question of Hogue's intent and consent to the murder was for the court and has been resolved against him (People v. Ciane, 127 N.E. 646, cited in CM 268994, Fowler, III Bull. JAG 284). In the Fowler case it was held:

"Where one's presence is by preconcert, he may be guilty as an aider or abettor, even though he does not encourage or discourage the commission of the offense by word or act. If the proof shows that a person was present at the commission of a crime without disapproving or opposing it, a jury may consider this conduct in connection with other circumstances, and thereby conclude that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting the same."

It therefore appears that Hogue was properly charged and convicted as a principal in the murder of deceased (CM 267067, Fields, III Bull. JAG 235).

The dying declaration of the victim was properly received in evidence. The record leaves no doubt that, at the time the victim stated the circumstances of the offense to the police inspector and charged that Allen was his assailant, he was under a sense of impending death and the circumstance that he did not in fact die for several hours thereafter is immaterial (par. 148a, MCM).

The testimony of Mrs. Reed and of her sister, Rita, to the effect that deceased claimed he had been stabbed by Allen and that he made this charge as soon as he reached his home very shortly after the assault was admissible as substantial testimony in proof of Allen's guilt, as an utterance constituting a part of the res gestae (par. 115b, MCM).

The testimony for the defense by Mrs. Reed to the effect that Reed had forced her into a life of prostitution and that he was cruel and beat her was properly stricken from the record. Such evidence is inadmissible when the evidence shows no basis for a claim of self-defense (CM 237145, Phillips, 23 BR 288). In the instant case all the evidence negatived the idea of self-defense.

We are of the opinion that the evidence is sufficient to sustain the conviction of Allen as the guilty principal to the murder, and to sustain the conviction of Hogue as an aider and abettor to the murder and under the statute as a principal.

6. The charge sheet shows that accused Allen is 27 years of age and was inducted on 23 September 1942, without prior service. The charge sheet shows that accused Hogue is 29-9/12 years of age and was inducted 6 August 1943 and has had no prior service.

7. The court was legally constituted and had jurisdiction of the persons 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 sentences. 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.

Seymour W. Wurfel, Judge Advocate.

William Clive, Judge Advocate.

Harold F. McDonnell, Judge Advocate.

---

9 G.C.M.O. 282, 13 Sept 1946).

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

JAGH - CM 313548

12 SEP 1946

UNITED STATES	)	EIGHTH ARMY
v.	)	Trial by G.C.M., convened at Nagoya, Honshu, Japan, 26 February 1946. Each: Confinement for five (5) years. Federal Reformatory
WILLIAM D. STOVER AND ROBERT J. FEE, persons serving with the Army of the United States in the field aboard the SS Calvin Victory	)	

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates

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

2. Both accused were tried upon the following Charge and Specification

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that William D. Stover and Robert J. Fee, persons serving with the Army of the United States in the field aboard the SS Calvin Victory, said vessel carrying cargo in connection with military operations of the United States, acting jointly and in pursuance of a common intent, did, at Nagoya, Honshu, Japan, on or about 24 December 1945, unlawfully enter the dwelling of Torazo Asanuma, with intent to commit the following criminal offense, to wit larceny, therein.

Specification 2: In that William D. Stover and Robert J. Fee, persons serving with the Army of the United States in the field aboard the SS Calvin Victory, said vessel carrying cargo in connection with military operations of the United States, acting jointly and pursuance of a common intent, did, at Nagoya, Honshu, Japan, on or about 24 December 1945, feloniously take, steal and carry away seven hundred (¥ 700.00) yen, value about forty six ($46.00) dollars,

one handkerchief, value about one ($1,00) dollar, and one kimono, value about thirty-three ($33.00) dollars, of a total value of about eighty ($80.00) dollars, property of Torazo Asanuma.

Each accused pleaded not guilty to the Charge and the Specifications thereunder. The court found them guilty of Specification 1, guilty of Specification 2 except the words "and one kimono value about $33.00 of a total value of about $80.00" substituting therefor the words "of a total value of about $47.00", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced. Each accused was sentenced to be confined at hard labor for five years. The reviewing authority approved and ordered the sentences executed. Inasmuch as a penitentiary (Federal reformatory) was designated as the place of confinement, the reviewing authority could not order the execution of the sentences in the absence of a prior holding of the Board of Review, with the concurrence of The Judge Advocate General, that the record of trial was legally sufficient to support the sentences (see third paragraph of Article of War 50½).

3. The record shows that the court convened at Nagoya, Japan on 26 February 1946 for the purpose of trying the accused. At the opening of the trial and prior to arraignment, defense counsel requested a continuance in order to secure the testimony or depositions of four material witnesses. The portion of the record dealing with this motion, including the ruling of the court denying the motion, is set out on page 3 et seq as follows:

"DEFENSE: Sir, at this time the defense would like to state its position concerning the procedure relative to the taking of testimony in a case involving the two accused merchant seamen crew members of the SS CALVIN VICTORY. On Wednesday, 20 February 1946, the defense asked for a continuance to this date, Tuesday, 26 February 1946, for the purpose of securing information concerning the whereabouts of the ship which these men were assigned to and also the availability of witnesses desired by the accused. Such continuance was granted and the defense counsel went to Yokohama, conferred with the authorities of the War Shipping Administration, and one Lt. Comdr. J. O. Thompson, Commanding Officer of Merchant Marine Personnel in Japan. Information secured in Yokohama on Thursday, 21 February 1946, by the defense counsel from the abovementioned authorities indicated that no knowledge was immediately available concerning the whereabouts of the ship. It was agreed between the authorities and the defense counsel, Captain Martin, that they would endeavor to contact the Manila headquarters and find information concerning the whereabouts of that ship. This much was known indirectly but not official-

ly: that the ship might probably be enroute to Calcutta. It was known that the ship left Nagoya port 6 January bound for Manila. The exact arrival date in Manila was 10 January 1946. Beyond that no exact information was available. To date, this date, Tuesday, 26 February 1946, we still have received no information concerning the ship beyond the fact that the CALVIN VICTORY sailed from Manila 11 January 1946 enroute to Calcutta via Singapore.

The defense desires to state its position concerning the availability of witnesses on behalf of the accused for the information of the court in order that it may properly effect the procedure at this time. The accused desire statements secured from two fellow merchant seamen aboard the CALVIN VICTORY, namely Robert Adams and Charles Stone. The defense would also desire to examine under oath two other crew members, one a Mr. Bexwinkel and another one, Mr. Moulkey. The proper defense of the accused depends on statements from those four witnesses and at this time the defense desires the court to take cognizance of this fact and to grant a continuance.

PRESIDENT: Do you mean an indefinite continuance or a continuance until some given time?

DEFENSE: An indefinite continuance.

PROSECUTION: May the trial judge advocate say something in respect to that? We, the prosecution, have objection to any indefinite continuance, in fact to any continuance on these grounds: first, there are witnesses for the prosecution who are in the process of going home. As the court and readily understand if we have an indefinite continuance in this case it necessarily follows that these witnesses are going to be compelled to stay over which, in due deference to them, would certainly be unreasonable. Secondly, I should say mainly, the accused here were apprehended on the 24th of December, 1945. By defense counsel's own statement about the ship, the CALVIN VICTORY did not leave the habor till January 6th. During that period of time the accused certainly had ample opportunity to obtain depositions or have interrogatories prepared for these witnesses that they have mentioned. They have been dilatory by their own action and delayed as a result of their own action rather than by anybody else and for that reason I think it would be unreasonable at this time for the court to grant any continuance."

There follows a lengthy discussion by the court, prosecution and defense on a point not relevant to the issues here. The record then resumes on page 5 as follows:

"PRESIDENT: Captain Martin, can the defense counsel without quoting or reading give us in his own words the general idea of what you expect to prove by these witnesses. I don't think that requires the reading of anything said to the investigating officer. In other words, are you going to try to prove character, are you going to try to prove they weren't there, or what?

DEFENSE: The defense desires to state that by the testimony of the four witnesses we desire to examine that we hope to prove that the accused could not possibly have been present at the scene of this crime as charged.

PRESIDENT: Has the defense made any effort with the trial judge advocate to stipulate the testimony of these four witnesses?

DEFENSE: No, sir, such will be impossible.

PRESIDENT: The court will be closed.

The court was closed and upon being opened the president made the following announcement:

PRESIDENT: The court is going to deny the motion of the defense counsel for an indeterminate continuance. The court desires to continue with the case. The court will, however, keep the request of the defense in mind and if at some time during the testimony it appears that key witnesses are missing, the court will at that time take the necessary action to obtain those witnesses. The case will proceed."

At the close of prosecution's case, defense counsel stated:

"* * * so far as proceeding with the testimony in the case for the defense, the only thing we can do is to take the statements of those people who are present here in Nagoya. After we have done that the defense will have to state that it desires to present other evidence but such evidence is not available at the present time." (R 31).

The defense then put in all its available evidence. Each accused took the stand as a witness in his own behalf and testified under oath that he was not present at the scene of the alleged offenses. Further, each testified that he was in the company of the absent witnesses during the period in question. After concluding presentation of the case for de-

fense, defense counsel reiterated his request for a continuance and the following colloquy ensued:

"DEFENSE: At this time the defense would like to ask the court to entertain a motion for continuance pending the securing of testimony by deposition if necessary or by any other means practicable from the witnesses Charles Stone, Robert Adams, Mr. Rexwinkel and Mr. Moulkey, an indefinite continuance.

LAW MEMBER: Subject to objection on the part of any member of the court, the motion is overruled and denied, continuance to be denied.

PRESIDENT: Any member of the court object to that ruling?

LT COL CANTRELL (Member): I object.

PRESIDENT: The court will be closed.

The court was closed and upon being opened, the following announcement was made.

PRESIDENT: The ruling of the Law Member in refusing a continuance for the time being at least, is sustained by the court. The case will continue right now, at once." (R 83).

Defense rested and rebuttal testimony was presented by prosecution. In conclusion, a Japanese civilian was called and testified as a witness for the court. Defense counsel then made a last futile effort to secure a continuance as follows:

"DEFENSE: The defense would like to enter a motion again for continuance for an indefinite period of time pending the securing of depositions from the witnesses already named.

PRESIDENT: The court will be closed.

The court was closed and upon being opened, the following announcement was made:

PRESIDENT: The court will come to order. The law member will render the ruling on the motion.

LAW MEMBER: Subject to objection of any member of the court the motion is denied.

PRESIDENT: There appears to be no objections on the part of the court." (R 103).

4. Both accused were taken into custody on 24 December 1945 (the day the offenses were committed) but released the following day. On the evening of 29 December 1945, CID Agents Tauber and Scholz escorted the accused to the home of Asanuma, scene of the crime, for the purpose of identification. The next morning, accused were questioned by the CID at headquarters after which they were again returned to their ship. On 4 January 1946, accused were once more taken ashore and confined in the stockade where they remained until the date of trial. Charges were prepared on 12 January 1946 and investigated pursuant to Article of War 70. Investigation was completed on 15 January 1946, and the case was forwarded to the appointing authority. The case was returned for correction of the Charges, re-forwarded on 21 January 1946, and referred for trial on 1 February 1946. Charges were served on both accused on 15 February 1946, at which time defense counsel first had notice of the nature of the alleged offenses.

5. At the trial, each accused testified that, while they were being interrogated by the CID, they requested the agents to question Stone and Adams, two seamen serving on the SS Calvin Victory, who could corroborate the fact that they had been aboard ship when the alleged offenses were committed (R 39, 64-65). CID Agent Tauber denied that such requests had been made (R 95). Further, both accused testified that, during the course of investigation on 15 January 1946, they requested the investigating officer to secure the statements of Stone and Adams to confirm their alibi. This fact is borne out by the report of investigation, included as an allied paper to the record, which contains the following statement over the signature of the investigating officer:

> "The only statement that the accused desired to make <u>was, in substance</u>, as follows: they did not leave their ship until about 2000 hours on 24 December 1945, but the witnesses that could support this statement have sailed with their ship and are not available at present for a statement." (Underscoring supplied.)

6. Article of War 20 provides that "A Courts-Martial may for reasonable cause grant a continuance to either party for such time and as often as may appear to be just". Absence of a material witness is considered to be a reasonable ground for such application. In fact, the Manual for Courts-Martial sets forth that an application for a continuance based upon the absence of a material witness should show that:

a. the witness is material
b. due diligence has been used to procure his testimony or attendance

c. that party applying for the continuance has reasonable ground to believe that he will be able to procure such testimony or attendance within the period stated

d. the facts which he expects to be able to prove by such witness, and

e. he cannot safely proceed with the trial without such witness. (par 52c, MCM, 1928, p 41).

Based upon the record, it is clear that the defense counsel conformed substantially with the last four requirements outlined above. The sole remaining question is whether these witnesses were material. It has been stated that:

> "The defense of an alibi not only goes to the essence of guilt, but it traverses one of the material averments of the indictment, namely, that the defendant did then and there, the particular act charged." (Vol 1, Wharton's Criminal Evidence, Sec 215, p 244).

It follows, then, that a witness to an alibi is a material witness. Certainly, if the court had not been aware of the materiality of the expected testimony of the absent witnesses at the outset of this case, the need for confirming the alibis of both accused became acute at the close of the case for defense when their counsel again urged a continuance to secure such testimony or depositions in lieu thereof.

7. Ordinarily, the granting or refusal of a request for a continuance is a matter resting in the sound judicial discretion of the court. Obviously, the discretion here involved must be judicial and not arbitrary. There must be the exercise of a reasonable degree of impartial fairness and judicial acumen. It is only where the discretion of the court is abused that it should be interfered with and corrected on appeal.

In CM 245664, Schuman, 29 BR 225, 232, the Board of Review declared:

> "The right to prepare for trial is fundamental. To deny this right is to deny a fair trial. Article of War 70 provides 'In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.' This does not mean that during war an accused may be deprived of the right to prepare his defense. It means rather that, during war, he may be tried as soon, after service of charges, as he has had a reasonable time to advise with counsel and prepare his defense. Such period will of course, vary with the facts and circumstances involved in each particular case. In some, a matter of hours will suffice; in other - even in time of war - the peacetime minimum of five days may be less than reasonable. The suspension, during war, of this peacetime

limitation for which the statute, by implication, provides, was not designed to deprive accused persons subject to military law, of the fundamental right to prepare and present a defense in good faith, even in time of war." (Underscoring supplied.)

To the same effect were the decisions of the Board of Review in CM 231119, Lockwood, 18 BR 139 and CM 236323, McClain, 22 BR 379.

It is a fundamental principle of law that equal opportunity should be given to defense to secure counsel and prepare for trial as is given to the prosecution to present its case on behalf of the government. This is especially true in criminal cases where an accused is charged with a serious crime.

In Powell v. Alabama (287 US 45) known as "The Scottsboro Case", the Supreme Court reviewing the conviction in the State court said, at page 56 et seq:

> "* * * The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." (Underscoring supplied.)

In this same connection, the Supreme Court, in Avery v. Alabama (308 US 444) said at page 446:

> "But the denial of opportunity for appointed counsel to confer with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel can not be satisfied by mere formal appointment." (Underscoring supplied.)

In CM 252835, Milleisen, 34 BR 205, the Board of Review, after citing CM 231119, Lockwood and Avery v. Alabama, supra, stated:

> "This same principle is applicable in general court-martial cases where counsel is appointed to defend an accused, but in effect denied the opportunity to properly consider or prepare accused's defense. The question of a continuance is one for the sound discretion of the court, but when it is apparent upon the record that the court has abused its discretion or acted in an arbitrary way, the conviction should be held illegal."

Part and parcel with preparation of a defense is the right to secure witnesses on its behalf or depositions in lieu thereof. The general rule is set forth in Volume 3, Wharton's Criminal Evidence, Section 1105, on page 1936 et seq, as follows:

> "Although the right may be waived, the accused is entitled to a reasonable opportunity to procure witnesses for his defense, and this right is usually guaranteed by the Constitution. The constitutional guaranty of a fair and impartial trial contemplates the right of the accused to the compulsory attendance of witnesses. It is not, therefore, a matter of discretion for the trial court, and the court cannot deprive the accused of his right to have compulsory process.
>
> The constitutional right obtains at all times to the end of the trial and gives the accused the right, at any time during the trial, to procure compulsory process for the attendance of witnesses whom he learns are important to his defense. * * *."

This rule has been followed in most jurisdictions. Prima facie, a seasonable motion for a continuance to secure the testimony or depositions of material witnesses in order to present a proper defense must be granted. To justify a denial of such motion, there must be a showing of facts or circumstances tending to establish that the motion was not reasonably made. Here, one of the prime considerations offered by the prosecution in opposition to the motion was the fact that both accused were aboard the same ship with all requested witnesses for almost two weeks after the alleged offenses had been committed, yet did nothing to secure their testimony or depositions. That fact standing alone is not sufficient in the face of the further information that charges were not preferred until one week <u>after</u> the ship had sailed from the port. Dilatory conduct may not be attributed to these accused for not requesting the presence of the witnesses before the vessel departed. There is no burden placed upon an accused to secure witnesses or prepare his defense prior to the date charges are preferred and served upon him.

8. The Board has noted the contents of the affidavits of Robert F. Adams and Charles E. Stone, prepared by civilian counsel for one of the accused, but cannot consider them in determining the questions of law or fact herein since no opportunity was given to the prosecution to cross-examine the witnesses. Further, it is unnecessary to speculate upon the effect such statements would have had upon the decision of the trial court, assuming the facts therein to be admissible, since to do so would be to enter the field of conjecture. The Board of Review is of the opinion that, under the circumstances of this case, the failure of the court to grant the requested continuance was an abuse of its discretion which injuriously affected the substantial rights of the accused.

9. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentences as to both accused.

A. Hottenstein, Judge Advocate
Waldemar U. Solf, Judge Advocate
Harry A. Flannery, Judge Advocate

JAGH - CM 313548 1st Ind

OCT 1 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Eighth Army, APO 343, c/o Postmaster, San Francisco, California

1. In the case of William D. Stover and Robert J. Fee, persons serving with the Army of the United States in the field aboard the SS Calvin Victory, 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 sentences, 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 each accused be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentences 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 313548).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

Rec'd Judge Advocate Army OCT 25 1946

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

AUG 19 1946

JAGQ - CM 313553

U N I T E D S T A T E S	)	FIFTEENTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Smoky Hill Army Air Field,
Second Lieutenant EDWARD	)	Salina, Kansas, 27 March, 5 and
N. HODGDON (0-1013145),	)	8 April 1946. Dismissal and
Air Corps.	)	total forfeitures.

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 Edward N. Hodgdon, Squadron A, 247th Army Air Forces Base Unit, did, at Salina, Kansas on or about 21 October 1945, with intent to defraud, wrongfully and unlawfully make and utter to Officers' Mess, Smoky Hill Army Air Field, Salina, Kansas, a certain check, in words and figures as follows, to wit:

No. 23 Universal Check Date 21 October 19 45

1st National Bank of Montgomery, Alabama
Write name of Bank or Trust Company on above line — Town and State

Pay to the Order of Officers Mess $ 10 00/100

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

I hereby certify that sufficient funds are on deposit in above bank in my name to cover amount of this check.

Indorsement on reverse side
Officers Mess

/s/ Lt. Edward N. Hodgdon
0-1013145, 247th BU

and by means thereof, did fraudulently obtain from the said Officers Mess about ten dollars ($10.00), lawful money of the United States, he, the said Second Lieutenant Edward N. Hodgdon, then well knowing that he did not have and not intending that he should have sufficient funds in the 1st National Bank of Montgomery, Alabama, for the payment of said check.

Since Specifications 2 to 6, inclusive, are couched in language identical to that used in Specification 1, except as to differences in date and amount tabulated below, they are not here repeated in full.

Specification	Date of Check	Amount
2	6 November 1945	$25.00
3	6 " "	25.00
4	7 " "	25.00
5	7 " "	25.00
6	14 " "	15.00

Accused pleaded not guilty to, and was found guilty of, the Charge and all Specifications. No evidence of previous convictions was introduced. Accused 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. Evidence for the Prosecution. The six checks in question were admitted in evidence without objection (R 10) as Prosecution Exhibits 1 to 6 inclusive, the exhibit number coinciding with the Specification number to which each check individually pertains. The cashier at the Officers' Club testified that she deposited each of the six checks in the National Bank of America in Salina, Kansas, on the next day after they were written and that they all were returned for insufficient funds (R 9, 10). The first check written 21 October 1945 was returned 7 November 1945 (R 10). The manager of office girls at the Club wrote accused a letter about the first check on 8 November 1945, called his quarters three times and left a message for him to call her at the Club and got no response from accused (R 14). The Officers' Club Officer wrote accused about the first check through headquarters on 13 November 1946, and again on 28 November 1946 about the later checks, and, still receiving no response from accused, followed up with a call to headquarters (R 18). "Sometime" in November accused came in and said to the manager of office girls that he would be in about the first of the month. After this the check written by accused on 14 November 1945 came through for deposit (R 15, 16). It was stipulated that the Assistant Officers' Club Officer if present would testify that the checks, Prosecution Exhibits 1 to 6, inclusive, cashed by accused at the Club were returned marked "Insufficient Funds", that the Mess had not been reimbursed for these checks,

that accused was notified of the return of the first check on or about 13 November 1945, that all six checks were drawn on the First National Bank of Montgomery, Alabama, and are in the amounts and dated as follows:

21 October 1945 - $10.00
6 November 1945- $25.00
6 November 1945- $25.00
7 November 1945- $25.00
7 November 1945- $25.00
14 November 1945- $15.00

Warren F. Dent, Cashier, First National Bank of Montgomery, Montgomery, Alabama, testified by deposition (R 18, Pros. Ex. 7) he is familiar with the accused's account, that when accused opened the account on 9 February 1944 he did not request that statements be sent to him and therefore none were sent, that accused had an allotment of $50.00 per month coming to the bank from February 1945 through November 1945. The statement of accused's account as identified by this witness and placed in evidence as part of his deposition (R 18, Pros. Ex. 7) for the pertinent dates shows:

Checks		Deposits	Date	Balance
$18.00	15.00		Oct 20 '45	3.09
20.00				
20.00			Oct 22 '45	3.09
.50			Nov 1 '45	2.59
		50.00	Nov 6 '45	52.59
10.00			Nov 7 '45	42.59
20.00			Nov 9 '45	22.59
.80			Nov 13 '45	21.79
.50			Nov 16 '45	21.29
.50	.50		Nov 18 '45	20.29
10.00			Nov 20 '45	10.29
5.00	.50		Nov 26 '45	4.79
1.00			Dec 10 '45	3.79

The following voluntary extra-judicial statement made by accused was introduced by the prosecution without objection (R 21; Pros. Ex. 8):

"1. I acknowledge that the checks mentioned in the affidavit of Flight Officer Franck were made by me, and the signatures contained thereon are mine.

"2. That through error and poor business judgment, I made these checks on an Alabama bank, not knowing at the time there were insufficient funds to cover these checks.

"3. That I have another bank account in the Farmers and Merchants National Bank of Los Angeles, California.

"4. When originally notified of the return of the first check when I had drawn on the Alabama Bank, I intended to pay same immediately but it slipped my mind and shortly thereafter I left for Washington, D. C. on temporary duty and did not return until 8 December 1945. At that time I had forgotten completely about this matter until notified by Captain Wallace who is now investigating."

4. Evidence for the Defense. Accused elected to testify under oath. All six of these checks were identified by the accused (R 25) as having been signed by him (R 27) and he acknowledged that he received the money for each of them from the Officers' Club (R 25) at the Smoky Hill Army Air Field (R 23). Before writing the checks accused believed he had around $100 in the bank, that he had a $50.00 allotment going to the Montgomery bank November first, that the first notice he received that the checks were outstanding was from Captain Ziegmont sometime in November and that after that he wrote no more checks (R 24). At the time Captain Ziegmont notified accused about the first check accused was aware that he had written five others but then he went to Washington, it completely slipped his mind and he did not take care of it or take any steps to get in touch with the bank (R 25). The manager of office girls at the Club did not talk to accused at any time. Accused lost his Montgomery check book before he arrived at Smoky Hill and that is why he used the blank check forms. Accused read in full what was on the counter-check form before making the checks and was aware that he was certifying "... that sufficient funds are on deposit in above bank in my name to cover amount of this check" (R 26). The Montgomery account was in accused's name alone, he was the only one to make deposits to or write checks on the account, he kept no record at all of the account (R 27). Accused was familiar with clearing house procedure (R 32). When notified of the insufficiency of his account accused tried to borrow money from two or three friends. He was in financial straits because he had spent a lot of money for Christmas presents and while in Washington (R 31). Accused has an allotment of $125.00 a month to his father (R 24).

It was stipulated that if present accused's father would testify that accused has an account in the Farmers and Merchants National Bank of Los Angeles, California, that it was his practice to deposit some of the money in that bank, that from 21 September to 14 November 1945 the account was very low, but that this fact was unknown to accused because he did not notify accused about it (R 22). Captain Raymond Ziegmont testified that as Assistant Adjutant of the base he notified accused on or about 8 December 1945 that his checks were outstanding (R 33, 34). It

was stipulated, Lieutenant Robert Parker if present would testify, that about 15 December 1946 (R 36), accused tried to borrow from him (R 34) an amount in excess of $50 which Parker would have let accused have if he could have afforded it (R 35). It was stipulated, Captain Ernest Murray if present would testify that accused was efficient, has done his work as an officer and a gentlemen, that he had no occasion to question accused's word and would have loaned accused money if he had it and if accused had come to him (R 36, 37).

5. The evidence of accused's guilt of all Specifications and of the Charge is clear and conclusive. The six checks were cashed by accused, were returned unpaid because of insufficient funds in the bank account and no restitution has been made. At no time while the $125.00 worth of checks were being issued by accused was there more than $52.59 in the account and as each check was presented to the bank there were insufficient funds on deposit to pay that check. The court found that the accused had an intent to defraud, and knew there was not, and intended that there should not be, sufficient funds in the account. This intent was properly inferable from the evidence. On the face of each of the checks there was the unusual language, "I hereby certify that sufficient funds are on deposit in above bank in my name to cover amount of this check." Accused read this language and was aware that he was making an affirmative certificate as to the sufficiency of the account when at best "he believed he had around $100 in the bank." Accused was the only one who made deposits to or withdrawals from this account. He did not ask for and never received statements, lost his check book, and kept no record of the account. Where, as here, the status of the accused's account results from his own acts he is properly chargeable with knowledge of it (CM 245908, Riley,29 BR 325, 332).

Accused issued the sixth check for $15.00 on 14 November 1946 after he had been notified that the first check for $10.00 dated 21 October 1945 had been returned for insufficient funds. This clear evidence of guilty knowledge at the time of committing one of this series of related offenses may properly be considered in determining the intent and knowledge of accused at the time of the commission of the other offenses. Finally the fact that accused uttered six dishonored checks in less than a month, had spent a lot of money for Christmas presents, spent a lot of money in Washington, was under the necessity of trying to borrow from friends and did not make the checks good all support the finding of accused's knowledge of the condition of his account and his fraudulent intent (CM 221992, Moore, 49 BR 153, 163).

6. Accused is 27 years old, unmarried and a high school graduate. In civil life he was a service station attendant and a dental laboratory

technician apprentice. He served with the California National Guard from 6 February 1936 until it was inducted into active service in 1941. He was appointed Corporal 12 April 1941, commissioned a temporary second lieutenant 3 October 1942 upon graduation from the Armored Force Officers' Candidate School. Accused was rated as a bombardier on 2 September 1944, has no foreign service, elected to remain on active duty indefinitely, and requested relief from active duty on 8 May 1946. Accused received three excellent and three very satisfactory efficiency reports, the others being rated as unknown.

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, and to warrant confirmation thereof. Dismissal is authorized upon conviction under Article of War 96.

Seymour W. Wurfel, Judge Advocate

T. Hayne Ollive, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 313553 1st Ind

WD, JAGO, Washington 25, D. C. SEP 6 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 Edward N. Hodgdon (O-1013154), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of making and uttering six checks aggregating $125 with insufficient funds in the bank for payment thereof, in violation of Article of War 96. 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 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.

The evidence shows that during the period from 6 November to 14 November 1946, both dates inclusive, the accused made and uttered to the Officers Mess six checks aggregating $125, with intent to defraud, without having or intending to have sufficient funds in the bank for payment thereof. Accused cashed the last of the six checks after he had been notified the first one was returned. Accused was the only one with access to this account, never asked for statements, had lost his check book and kept no record of the amount in the account. In a voluntary statement accused stated that upon being notified of the return of the first check he had intended to pay same immediately but it slipped his mind and shortly thereafter he left town on temporary duty and did not return until sometime later and that he had forgotten completely about the matter until notified by the investigating officer. Up to the time of trial none of the $125 had been repaid.

4. Accused is 27 years old, unmarried and a high school graduate. In civil life he was a service station attendant and a dental laboratory technician apprentice. He served with the California National Guard from 6 February 1936 until it was inducted into active service in 1941. He was appointed Corporal 12 April 1941 and commissioned a temporary second lieutenant 3 October 1942 upon graduation from the Armored Force Officers' Candidate School. Accused was rated as a bombardier on 2 September 1944,

has no foreign service, elected to remain on active duty indefinitely, and requested relief from active duty on 8 May 1946. Accused received three excellent and three very satisfactory efficiency reports, the others being rated as unknown.

5. Deliberate fraud appears. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as modified be carried into execution.

6. Consideration has been given to a letter from Senator Saltonstall, dated 22 May 1946, with a copy of letter from accused requesting clemency.

7. 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

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Sen Saltonstall w/cy of incl.

(G.C.M.O. 277, 12 September 1946).

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

JAGH - CM 313562

17 OCT 1946

UNITED STATES	)	UNITED STATES ARMY FORCES WESTERN PACIFIC
v.	)	Trial by G.C.M., convened at Headquarters Base X, AFWESPAC, APO 358, 25 March 1946. Dismissal
First Lieutenant ARTHUR C. GROVE (0-1056107), Coast Artillery Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant ARTHUR C. GROVE, Battery B, 389th AAA Battalion, did, at Headquarters, Cavite Province Military Police Command, Luzon, P.I., on or about 2 January 1946, with intent to deceive First Lieutenant VIRGIL W. GREEN, Adjutant, Headquarters, Cavite Province Military Police Command, officially report to the said First Lieutenant VIRGIL W. GREEN that two ¾ Ton, 4x4, Government vehicles Serial Numbers 20560844 and 20730591 had been cannibalized and dismantled, which report was known by the said First Lieutenant ARTHUR C. GROVE to be untrue.

Specification 2: In that First Lieutenant ARTHUR C. GROVE, Battery B, 389th AAA Battalion, did, at Cavite City, Luzon, P.I., on or about 4 January 1946, wrongfully permit a Government Motor Vehicle, ¾ Ton, 4x4, to remain without the Motor Park of Headquarters, Cavite Province Military Police Command, and be operated by enlisted men of his organization without the proper dispatch in violation of published orders of Headquarters, Cavite Province Military Police Command.

He pleaded not guilty to the Charge and the Specifications thereof. The court found him guilty of Specification 1 except the words and figures "two", "vehicles", "numbers" and "and 20730591" substituting therefor the words "a", "vehicle" and "number", of the excepted words not guilty, of the substituted words guilty, guilty of Specification 2 and guilty of the Charge. There was no evidence of previous convictions. The 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, with the recommendation that the sentence be commuted.

3. The evidence for the prosecution shows that the accused was a member of Battery B, 389th Antiaircraft Artillery (AW) Battalion, which organization was attached to the Cavite Province Military Police Command for operational purposes. During December 1945 and until 5 January 1946, accused was Motor Officer for Headquarters Cavite Province Military Police Command as well as for his own battery. On 31 December 1945, accused was ordered to account for eight vehicles impounded at the Cavite Province Military Police Headquarters (R 7; Pros Ex A). In compliance with that directive, accused submitted a report by certificate to the adjutant that certain vehicles had been dismantled and "cannibalized", including therein two ¼ ton trucks numbers 20730591 and 20560844 (R 8; Pros Ex B). However, after the report had been made, these two vehicles were found in running condition (R 8). A sworn statement made by the accused to the investigating officer was introduced into evidence as Prosecution's Exhibit F, in which the accused admitted that, when he prepared the report, he knew that jeep number 20560844 had not been "cannibalized" but was in serviceable condition. It had been included in the list of dismantled jeeps so it could be used by the men in the motor pool, during the last week of their stay there. With regard to jeep number 20730591, that number had been erroneously listed on the certificate instead of NB 2705, the number of the jeep which had been cut up (R 16).

On 21 December 1945, Lieutenant Colonel Willis, the Commanding Officer of Cavite Province Military Police Command, issued an order that no jeep of that command would be dispatched for recreational purposes without his authorization (Pros Ex D). The accused knew of this order for he discussed it with Lieutenant Colonel Willis in the latter part of December 1945. In fact, on that same occasion, Lieutenant Colonel Willis approved the use of a jeep by the accused himself (R 12). The order applied to the enlisted men of accused's organization. Lieutenant Colonel Willis did not recall authorizing the enlisted men of accused's organization to use a vehicle for recreation on 4 January 1946, but he was quite sure that no request for such authorization had been made. There is no record of jeep number 20560844 being dispatched on 4 January 1946 (Pros Ex C). However, the accused had given the enlisted men permission to repair the vehicle for use by his motor pool personnel while they were there and it was used on 4 January 1946 to transport them to a party (Pros Ex E).

4. Evidence for the defense: After the accused was advised of his rights as a witness, he elected to be sworn and testify as to Specification 2 only. He identified an extract copy of an order relieving his organization from attachment to Cavite Province Military Police Command effective 1 January 1946. Accused was informed of this order by his battery commander and was never told that it had been extended, modified or changed (R 18).

5. Specification 1 (Making a false official report) - The accused is charged with making an official report that two vehicles had been cannibalized and dismantled, which report was false and known by accused to be false, and that it was made with intent to deceive. The evidence presented to the court through the testimony of the witnesses and the admissions of the accused made to the investigating officer conclusively shows that the accused received an order to account for the vehicles, that he made a false report by certificate that jeep number 20560844 had been cannibalized and dismantled, that he knew this was false and it was made in order to permit the enlisted men of his organization to use the vehicle for recreational purposes. Since there is no doubt as to the official nature of this report, a prima facie case was established.

Specification 2 (Violation of standing orders) - It was proved that the accused permitted a vehicle in his charge to be operated under conditions which were in violation of standing orders from higher authority. His only defense was that the offense occurred after the effective date of the order relieving his unit from assignment to that command. There was no denial that the vehicle belonged to that command. In fact, accused had instructed his men to leave the vehicle there when they left and it was not to be taken by the battery (Pros Ex F). Since the vehicle was chargeable to the Military Police Command even though under the control of the accused, all orders issued by this command pertaining to the use of the vehicle would be binding on him. To hold otherwise would in effect vitiate all powers of restraint by superior commands and create an unnatural and inconceivable situation. Further, accused's organization did not actually leave the Military Police Command until after the offense. Hence, the accused was subject to its administrative regulations and orders and wilfully violated the order in question.

6. Accused is 30 years of age and single. After graduating from high school, he attended college for one and a half years. He has had enlisted service from 15 July 1942 to 19 May 1943 when he was commissioned a second lieutenant upon graduation from Antiaircraft Artillery Officer Candidate School and entered on active duty as an officer. He was promoted to first lieutenant on 30 May 1945.

7. 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. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

A. Lottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Henry A. Clevenger, Judge Advocate

JAGH - CM 313562 1st Ind 31 October 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 Arthur C. Grove (0-1056107), Coast Artillery Corps.

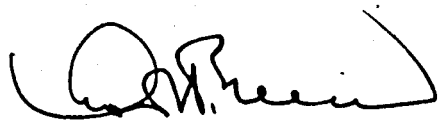
2. Upon trial by general court-martial this officer was found guilty of making a false official report and of violating standing orders, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commuted.

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. I concur in that opinion.

On 2 January 1946, the accused, as motor officer of Cavite Province Military Police Command, submitted a report by certificate showing that certain vehicles had been cannibalized and dismantled. At the time this report was made, accused knew it to be false with regard to one of the vehicles listed since he had given the enlisted men of his unit permission to repair that vehicle so it could be used by them on recreational runs. A standing order of the command required authorization from the commanding officer before any vehicle was dispatched for recreational purposes. Despite this order, of which accused had full knowledge, he permitted his men to use the repaired vehicle for recreation without such authorization.

4. Accused deliberately made a false statement and dismissal is an appropriate punishment. I recommend that the sentence be confirmed, but in view of all the circumstances and the reviewing authority's recommendation for commutation, I recommend that the execution of the sentence be suspended during good behavior.

5. 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. 340, 12 Nov 1946).

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

JAGN-CM 313593

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Mitchel Field, New York, 24 April 1946. Dishonorable discharge and confinement for three (3) years. Midwestern Branch, Disciplinary Barracks.
Private ALBERT F. SAWYER (32543063), Squadron C Aviation, 110th Army Air Forces Base Unit (OTU & SRDH).	)	

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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Albert F. Sawyer, Squadron C Aviation, 110th Army Air Forces Base Unit (OTU & SRDH), then assigned 261st Signal Heavy Construction Company, did, at Base General Depot, San Bernardino, California, on or about 24 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, New York, on or about 6 March 1946.

He pleaded not guilty to the Charge and Specification, and, by exceptions and substitutions, was found guilty of, absence without leave, in violation of Article of War 61. No evidence of any 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 might direct, for three years. The reviewing authority

approved the sentence, designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, or elsewhere as the Secretary of War might direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Accused was tried on 24 April 1946 for desertion alleged to have begun on 24 March 1944 and to have been terminated by apprehension on 6 March 1946. He was found guilty of the lesser included offense of absence without leave for the same period. There is no doubt that the evidence sustains the court's finding that accused was absent without leave for the period alleged.

Article of War 39 provides in part that:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person:"

The question raised by this case is whether, when an accused is charged with an offense against which the Statute of Limitations has not run, and is found guilty of an offense against which it has run, the court is obliged to advise him of his right to plead the statute as a bar where there is no indication in the record that he was aware of this right.

The leading opinion by the Board of Review on the effect of a failure to plead the Statute of Limitations is CM 201537, Fouts, 5 BR 157. Accused in that case was tried and convicted of receiving certain sums of money as a Disbursing Officer and failing to account for the same from 27 February 1931 to 19 December 1932. The Board held that each failure of accused to account monthly for moneys received during the preceding month constituted an offense and as some of the accounts had been submitted more than two years before arraignment, 4 December 1933, the Statute of Limitations could have been successfully interposed as a defense to those offenses. However, not only was the statute not pleaded but, in addition, there was nothing in the record to show that accused was advised by the court or his counsel that this defense was available to him. The Board stated that the question for decision was whether the failure of the record to show affirmatively that accused was so advised nullified the findings of guilty.

It was pointed out that both in the Federal courts and in military law the bar of the statute was a matter of defense which could be raised by a special plea or under the general issue, but in the latter case only if evidence was introduced as to its applicability. The

provision of both the 1917 and 1921 Manuals for Courts-Martial requiring an explanation in open court in appropriate cases, was referred to, together with decisions to the effect that a failure to comply with that provision prejudiced the substantial rights of an accused. The Board stressed the fact that the 1928 Manual stated merely that the court may advise the accused of his right to plead the statute both where the original specification (MCM, 1928, par. 67) or that remaining after exceptions and substitutions had been made, (MCM, 1928, par. 78a), appear to be barred by lapse of time and they cited another provision of the Manual which requires defense counsel to explain to accused his rights in the premises "before the trial" (id. par. 45b). They concluded, (p. 251) as follows:

> "* * * The Board of Review is of the opinion that the statute of limitations may be set up by an accused as a bar to his trial or punishment either by a special plea, or by evidence of the statute and its applicability introduced under a plea to the general issue, but that without such evidence a plea of not guilty, as in the instant case, does not assert the bar of the statute. Under the present Manual for Courts-Martial it is no longer mandatory, as it was under the Manuals of 1917 and 1921; that it appear of record that the president of the court (1917 and 1921) or the law member (1921) advised the accused of his legal rights as to the statute of limitations in each case tried by general court-martial in which, upon the face of the record it appeared that he might successfully plead the statute, but had not done so. The present requirement for the protection of the rights of the accused under such circumstances is merely the directory one that the military counsel of his own selection, or the defense counsel, will, before the trial, explain to the accused in an appropriate case his right to plead the statute of limitations, and that such explanation will be made regardless of the intentions of the accused as to how he will plead. There is no requirement that it appear of record that such a duty was properly performed by military counsel for the defense, and, in the absence of such a requirement, the prescription that it be performed "before the trial" removes it entirely from the record. In the absence of an affirmative showing to the contrary, it may be presumed that such military counsel performed not only this duty but the other general duties of his office prescribed by paragraphs 43b and 45b, Manual for Courts-Martial, since the law presumes that public officers duly perform their official functions, and this presumption continues until the contrary is shown. Dig. Ops. JAG, 1912, p. 529, XI A 2." (Emphasis in original)

The Fouts case was followed in CM 231504, Santo, 18 BR 235. There the accused was charged with desertion and, by exceptions and substitutions was found guilty of absence without leave commencing

at a period more than two years before arraignment. Accused's right to plead the statute was not brought to his attention in open court. The Board quoted the above cited portion of the opinion in the Fouts case and held the record of trial legally sufficient to support the findings.

From the foregoing it can be seen that in the case where the statute has run against an included offense, though not against the offense originally charged, as well as in the case where it has run against the offense originally charged, the record need not contain any explanation of accused's right to raise the statute as a bar because it is the duty of the defense counsel to make such explanation before trial and it is presumed that he performed such duty in the absence of a showing to the contrary. This doctrine which means, in effect, that an accused would subject himself to dishonorable discharge, total forfeitures, and confinement at hard labor for years although knowing he could invoke immunity to such punishment, is so unrealistic that we think it needs to be re-examined despite the fact that, concededly, the Santo case, supra, in all respects governs the case at hand.

This rule rests not only on the presumption that defense counsel did his duty, but also on the premise that he was familiar with his duty. Military law, like all law, has its technicalities which only training and practice can thoroughly master. As applied to the facts in the case the assumption is made that defense counsel not only anticipated that the court might find accused guilty of absence without leave, an unusual result since accused was gone just 18 days short of two years, but also that he was aware that the period of limitations for this offense was different than that with which accused was originally charged.

It is interesting to note that the paragraph of the Manual describing defense counsel's duties (par. 45) states that he shall advise accused of his right to remain silent or testify and yet it is almost the universal practice for the court to instruct an accused as to these rights. If the court feels it necessary to give this instruction relative to a situation which is elementary and which occurs in every trial, what is left of the presumption that defense counsel performed his duty in explaining the rare and recondite point which is involved in this case?

To be sure the attention of accused and his counsel was directed toward the fact that he had been found guilty of absence without leave but this was done under such circumstances that there was little real opportunity to plead the bar of the statute. Where an accused is found guilty the prescribed procedure is to open the court for evidence of previous convictions and personal data, close the court, vote on the sentence, open the court, and announce the findings and sentence (MCM, 1928, App. 6, pp. 267, 268). That procedure was

followed in this case and immediately thereafter the court adjourned. All that defense counsel knew when the court opened after closing for a vote on the findings was that his client had been found guilty of some offense and, as we have said, he might not unreasonably assume that it was desertion. After the court had fixed the punishment it reopened and then for the first time accused and his counsel learned that he had been found guilty of absence without leave. Immediately after that announcement, however, the court pronounced sentence and adjourned. Neither accused nor his counsel had any genuine opportunity to ponder the effect of these findings or to reflect upon the legal principles which might govern the changed situation. In our opinion, it would be grossly unfair to penalize accused on the basis of an assumption that his failure to plead the statute at that point in the trial was the result of a conscious choice made with full knowledge of his rights.

It may be argued that the Manual, in stating that in the situation here involved the "court may advise the accused in open court of his right to plead the statute" (MCM, 1928, par. 78a), has laid down the applicable rule and we are bound to follow it. This argument gains force from the fact that in the 1917 and 1921 Manuals it was mandatory upon the court to make such an explanation if the facts in the particular case warranted it. We do not believe, however, that the permissive character of the present rule is a bar to our holding in the present case that the court was bound to advise the accused of his rights. There are situations where the giving of such advice would be an idle gesture. It may appear that the accused is cognizant of his rights. It may be plain that the statute has been tolled. In these circumstances to require that the court give an explanation would only serve to create confusion. In brief, we think that the Manual, in failing to require such advice by the court in all circumstances, does not preclude us from requiring it in those cases where consideration of justice and fairness demand it.

Doubtless some of the arguments adduced above would have equal application in the case where it appears that the statute has outlawed the original specification brought against accused. On the other hand, there are considerations, to which we have had reference, applicable here that are inapplicable in that situation. That case is not before the Board, however, and does not have to be decided. What the Board does decide is that where, as here, an accused is found guilty by exceptions and substitutions of an offense against which the statute has apparently run, although it had not run against the offense with which he was originally charged, and the record fails to disclose that he was cognizant of his rights to plead the statute, and there is no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of that specification.

4. The charge sheet shows that accused is 24 years of age and

was inducted on 13 November 1942 at Camp Upton, New York.

5. For the foregoing reasons the Board of Review holds that the record of trial is legally insufficient to sustain the findings and legally insufficient to sustain the sentence.

Wilmer T. Baughn, Judge Advocate.

Robert J. Clemmer, Judge Advocate.

Gerald D. Orton, Judge Advocate.

2- AUG 46 AM

DISPATCHED
WAR DEPARTMENT
A.A.G.O.

AUG 2 1946

JAGN-CM 313593 1st Ind
WD, JAGO, Washington, D. C.
TO: Commanding General, First Air Force, Mitchel Field, New York.

1. In the case of Private Albert F. Sawyer (32543063), Squadron C Aviation, 110th Army Air Forces Base Unit (OTU & SRDH), I concur in the foregoing holding by 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 313593).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 313595

JUN 20 1946

UNITED STATES v. Private J. W. THOMAS (18022784), Squadron B, 4121st Army Air Forces Base Unit (Area Command), Kelly Field, Texas.	SAN ANTONIO AIR TECHNICAL SERVICE COMMAND Trial by G.C.M., convened at Kelly Field, Texas, 22 April 1946. Dishonorable discharge and confinement for seven (7) years. Penitentiary.

HOLDING 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 58th Article of War.

Specification: In that Private J. W. Thomas, Squadron B, 4121st Army Air Forces Base Unit (Area Command), Kelly Field, Texas, then of 6th Engine Overhaul Squadron, Kelly Field, Texas, did, at Kelly Field, Texas, on or about 1 June 1944, desert the Service of the United States and did remain Absent in desertion until he was Apprehended at Hobbs, New Mexico, on or about 4 March 1946.

Accused pleaded not guilty to and was found guilty of the Charge and the Specification, except that the court substituted the words "his absence was terminated in a manner not shown" for the words "he was apprehended at Hobbs, New Mexico" which appeared in the Specification. 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 seven (7) years. The reviewing authority approved the sentence and designated the United States Penitentiary, Leavenworth, Kansas, 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 50½.

3. Evidence for the Prosecution. An extract copy of a morning report of 1 June 1944 showing accused as "dy to AWOL" was introduced into evidence as Prosecution's Exhibit 1 (R 6). Special Orders Number 54, Headquarters San Antonio Air Technical Service Command, 18 March 1946, was admitted into evidence as Prosecution's Exhibit 2 (R 6). Paragraph 19 thereof describes accused as "(now in confinement, this sta)" and transfers him to Squadron B, 4121st AAF Base Unit (Area Comd) Kelly Field, Texas. An extract copy of the morning report of the latter unit, dated 19 March 1946, refers to accused as "(EM in conf Post Gd House)" (R 7; Pros. Ex. 3).

4. Evidence for the Defense. The unit personnel officer of accused's present organization examined his service record and his pay data book, WD AGO Form No. 28, and they indicated that the pay data book was received on 18 or 19 June 1944.

After his rights as a witness had been explained, accused elected to make an unsworn statement (R 26). He stated that he received the pay data book from his first sergeant on 19 June 1944 and that he was present for duty at that time (R 27). He identified the pay data book and defense counsel offered it in evidence. The trial judge advocate objected to the offer of evidence on an unsworn statement and the objection was sustained.

5. The extract copy of the morning report for 1 June 1944 properly showed that accused was absent without leave on that date. The objection of the defense, that the genuineness of the signature on the authentication had not been shown, was properly overruled (MCM, 1928, par. 116a, pp. 119, 120). This absence without leave is 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). Return to military control was shown to have been at some time prior to 18 March 1946. The defense, however, introduced proof to show that accused was under military control on 19 June 1944. The testimony of the personnel officer as to the results of his examination of accused's service record was hearsay and incompetent. The testimony of the accused was unsworn and was not evidence. The law member might well have allowed the pay data card of the accused to be filed with the record, but his ruling that it could not be admitted into evidence on the basis of unsworn testimony was correct. The court, in its findings, apparently put no credence in the testimony offered by the defense and, inasmuch as it did not constitute competent evidence, this was justified. Is the record sufficient to show that accused was absent without leave from 1 June 1944 until 4 March 1946, the termination date alleged in the Specification, and that he intended to desert? Desertion is absence without leave accompanied by the intention not to return (MCM, 1928, par. 130a, p. 142). The Manual further provides (par. 130a, p. 143):

> "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent."

Was the court warranted in inferring from this record an intent to remain permanently absent? In approaching this question it must be borne in mind that the only evidence presented by the prosecution in this case is an extract copy of a morning report showing accused to have been absent without leave on 1 June 1944, plus evidence of return to military control at some unknown time.

The Manual for Courts-Martial itself prohibits findings of desertion from mere proof of initial absence without leave only.

Among the elements of proof of desertion is:

> "...(c) that his absence was of a duration and was terminated as alleged;..." (MCM, 1938, par. 130a, p. 143; underscoring supplied)

And in the next paragraph of the Manual it is stated:

> "But the morning report, even though it refers to the accused as a 'deserter', is not complete evidence of desertion; it is evidence only of absence without leave, and it is still necessary for the trial judge advocate to prove an intent to remain permanently absent, ... The condition of absence without leave with respect to an enlistment having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until the accused's return to military control under such enlistment." (Underscoring supplied.)

The 1921 Manual for Courts-Martial, in the discussion of evidence of desertion, elaborated to a greater extent on the presumption of continuance of an absence without leave. It states:

> "The condition of absence without leave having once been shown to exist will be presumed to continue in the absence of evidence to the contrary until the accused came again under military control. It is therefore necessary to prove only that the accused went absent without leave a certain date and came under military control a certain date. During the intermediate time it is presumed he was absent without leave." (MCM, 1921, par. 284, p. 226. Underscoring supplied.)

The morning report of 1 June 1944 established only that accused absented himself without leave on that date. There is no evidence as to when accused returned to military control. Where, as here, the prosecution relies substantially upon the duration of an unauthorized absence to supply an inference of intent to desert, such duration must be shown affirmatively. Duration might have been proved in

this case by merely showing the date on or about which accused returned to military control, and, since the initial absence was proved, the condition would have been presumed to have continued until such return. The accused could be presumed to have continued absent without leave only "until his return", as to which time the only indication in this record is that it was sometime prior to confinement on 18 March 1946 - fourteen days after the alleged termination date of 4 March 1946. Proof merely that he was in confinement on 18 March 1946 does not establish that his return to military control occurred on that date, on the date alleged, nor indeed on any other specific date. For all that such evidence shows, accused's absence could have been terminated within an hour, or the same day or the next day.

A finding of an unauthorized absence on a specified date, commenced by an escape from confinement, has been held insufficient, nothing else being shown, to warrant an inference of intent to desert (CM 261112, Allen, 40 BR 145). A fortiari, proof of an unauthorized absence for an undetermined period, commenced under the circumstances appearing here, does not sustain an inference of intent to remain absent permanently. In the absence of any proof of the duration of the absence, we must conclude that the evidence shows no more than that the accused absented himself without leave on 1 June 1944 and remained absent without leave until his return to military control at a time not shown. (CM 296292, Clark; CM 303905, Leone.)

The offense of absense without leave is not one authorizing confinement in a penitentiary, federal reformatory or correctional institution.

6. The charge sheet shows accused is 28½ years of age and enlisted 15 August 1940 at Fort Brown, Texas. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and the Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization and did remain absent without leave until returned to military control at a time and in a manner not shown, in violation of Article of War 61, and legally sufficient to support the sentence and confinement in a place other than a penitentiary, Federal reformatory or correctional institution.

W. Wayne Olivey, Judge Advocate
Robert C. Trevethan, Judge Advocate
Walter W. Davis, Judge Advocate

JAGF CM 313595 1st Ind

WD, JAGO, Washington 25, D. C. JUL 25 1946

TO: The Under Secretary of War

1. In the case of Private J. W. Thomas, 18022784, Squadron B, 4121st Army Air Forces Base Unit (Area Command), Kelly Field, Texas, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involve findings of guilty of absence without leave for an undetermined period, in violation of Article of War 61, and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement as adjudged in a place other than a penitentiary, Federal reformatory or correctional institution. I do not concur in the holding and transmit this my dissent for your action under Article of War 50½.

2. As stated in the holding, the evidence shows that accused absented himself without leave from his station at Kelly Field, Texas, on 1 June 1944. It is also proved that he was in confinement at Kelly Field on 18 March 1946. There is no evidence that he was under military control in the interim. The status of absence without leave having been shown to exist it must be presumed, subject to rebuttal, that this condition continued until the contrary condition, confinement, appeared. The universally accepted presumption of continuance of a state of affairs once shown to exist is stated, generally, in the Manual for Courts-Martial, 1928, as follows:

> "A condition having been shown to have existed at one time, the general presumption arises, in the absence of any indication to the contrary, that such condition continues." (par. 112a).

With special application to absence without leave this rule is stated in the current Manual in these terms:

> "The condition of absence without leave with respect to an enlistment having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until the accused's return to military control under such enlistment." (par. 130a).

Absence without leave on 1 June 1944 having been established, and it being presumed that it continued until 18 March 1946, there was ample basis for an inference of intent not to return to the military service. The proof is therefore legally sufficient to support the findings of guilty of desertion.

3. The Board of Review takes the position that proof of the manner and circumstances of return to military control on a specific date was essential and that it was not enough to prove that accused was in fact in military control on 18 March 1946. It contends that the fact of confinement on 18 March 1946 is consistent with an inference that accused returned to military control at some time prior to that date. But this contention erroneously limits the long-established presumption of continuance of a state of affairs once shown to exist and, in legal effect, raises a theory that a condition once shown to exist, such as the confinement, will be presumed to have existed previously. There is no such presumption in the law and the theory is unfounded.

4. In view of all the circumstances of the case and in order that the sentence may be brought within the standards of the postwar clemency program, it is recommended that so much of the sentence to confinement as is in excess of confinement at hard labor for five years be remitted and that a United States Disciplinary Barracks be designated as the place of confinement.

5. Drafts of action for your signature are inclosed, Form A for use in the event you concur in the holding by the Board of Review, and Form B in the event you concur in my views. Both forms contain modifications of the sentence as recommended above.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. R/T, Thomas
2. Form of action - Form A
3. Form of action - Form B

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

JAGH - CM 313617

24 OCT 1946

UNITED STATES	)	WESTERN BASE SECTION
v.	)	Trial by G.C.M., convened at Antwerp, Belgium, 15 and 19 March 1946. Dishonorable discharge and confinement for life. United States Penitentiary
Private CLEOPHIS WILLIAMS (34677308), 657th Ordnance Ammunition Company	)	

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 above-named soldier.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Cleophis Williams, 657th Ordnance Ammunition Company did, at Lobberich, Germany, on or about 7 June 1945, with malice a forethought, willfully, deliberately feloniously, unlawfully, and with premeditation kill one August Kamphuis, a Human being by shooting him with a carbine.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 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, with the following exceptions.

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 33-35; Pros Ex 1). The accused had been in restraint and confinement for more than eight months before the confession was taken by a civilian Criminal Investigation Division agent employed by the Army. The agent before taking the statement warned the accused of his rights under the 24th Article of War (R 32). The agent testified on direct examination that no threats of any reprisals were made in the event accused refused to make a statement, nor was any reward promised in obtaining the statement.

On cross-examination the agent further testified (R 33-34) as follows:

"Q * * * Before you took the statement, did Williams tell you he had been in confinement?
A He told me nothing before I took the statement because when I first started I warned him of his rights and started taking the statement.

Q Then you did tell Williams if he made a statement to you his trial would come up quicker and he would have a better chance of getting out?
A I think, to the best of my memory, I told him if he told the truth and told it now the trial would come up quicker, which he seemed to indicate he wanted. He was tired waiting around.

Q And did you not say to the accused at that time that if he then would make a statement to you, his trial would come up quicker and he would have a better chance —
A No, I made him no promises whatsoever.

Q But you did tell him if he made a statement his trial would come up quicker, did you not?
A Yes, I believe I did.

Q Wasn't that a promise?
A As far as having the trial come up.

Q Did he not complain to you that he had been in confinement for a long time and you said to him, 'Well, if you will make a statement your chance of getting out of confinement will be better'?
A No, I didn't say anything about getting out of confinement. I said the trial might come up sooner.

Q Was he complaining because the trial had not come up or because of being in confinement so long?
A Not exactly complaining. Wondering why there was no action since the incident occurred."

It will be noted that although the agent denied having a conversation with accused prior to taking his statement (R 33), he later stated, "I told him if he told the truth and told it now the trial would come up quicker, which he seemed to indicate he wanted. He was tired of waiting around".

It is clear that a conversation had taken place between the agent and the accused before the statement was taken. The question then before the Board is whether the agent's statement that "if he told the truth and told it now, the trial would come up quicker" is sufficient to change the nature of the confession from voluntary to involuntary.

The general rule as to the effect on confessions of statements that it would be better to tell the truth and similar exhortations is stated in American Jurisprudence (20 Am. Jur. 438, Sec 508) as follows:

> "* * * 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 Criminal Investigation Division agent in warning accused, is of the opinion that the statement made by accused was not induced by hope of benefit or by fear. The allied papers accompanying the record indicate that the accused within three days after the crime made two other statements admitting his guilt. While the procedure used by the Criminal Investigation Division agent in questioning the accused 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 and the sentence.

6. 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. 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).

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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

JAGK - CM 313619

2 JUL 1946

UNITED STATES v. Private ARZO COPPOCK (34288294), 107th Field Artillery Battalion, 28th Division, US Forces, European Theater.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 12 March 1946. Dishonorable discharge (suspended) and confinement for two(2) years. Wurzburg Disciplinary Training Center, Wurzburg, Germany.

HOLDING by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, 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 been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

2. The morning report in question was properly admitted in evidence under the principles enunciated in CM 312023, Schirmer. The regular course of business is established by the provisions of paragraph 23d, AR 345-400, 3 January 1945, which read as follows:

> "When an individual in confinement is taken into a hospital or escapes from confinement, the officer of the day will notify the individual's company commander of the exact status, so that the change may be entered on the morning report of the organization to which he is assigned, attached unassigned, or attached from another organization."

The usual presumption of regularity would indicate that this procedure was followed in this case. Also, according to paragraph 43 of the cited regulation, morning reports will be signed by the commanding officer of the reporting unit, "or by an officer designated by the commanding officer." There is no requirement that the officer so designated be a commissioned officer and there seems to be no valid objection to designating a warrant officer to perform this purely administrative task.

William P. Kuder, Judge Advocate
Gilbert B. Ackroyd, Judge Advocate
Earl W. Wingo, Judge Advocate

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

AUG 15 1946

JAGQ - CM 313648

UNITED STATES v. First Lieutenant HUGH P. SHAW (0-1289154), Infantry, Parachute Officers Replacement Pool, The Airborne School, Fort Benning, Georgia.	HEADQUARTERS THE INFANTRY SCHOOL FORT BENNING, GEORGIA Trial by G.C.M., convened at Fort Benning, Georgia, 2 May 1946. Dismissal.

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 Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Hugh P. Shaw, Parachute Officers Replacement Pool, The Airborne School, Fort Benning, Georgia, did without proper leave, while enroute from Fort Lewis, Washington to Fort Benning, Georgia, absent himself from his organization and station at Fort Benning, Georgia from about 20 January 1946 to about 7 March 1946.

He 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 be dismissed from the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: A duly authenticated extract copy of special orders No. 234 issued by the War Department Personnel Center at

Fort Lewis, Washington, on 30 November 1945, was introduced as Prosecution's Exhibit No. 1 (R 6). Under the terms of the order accused was relieved from attached-unassigned to the Fort Lewis Personnel Center and was transferred to the Officers Replacement Pool, Parachute School, Fort Benning, Georgia. He was authorized 45 days temporary duty for recuperation, plus 6 days travel time, and the special order directed that he report to his new station at Fort Benning, Georgia, on 20 January 1946. It was stipulated that accused received a copy of his transfer order and departed from Fort Lewis, Washington, for the purpose of transfer on 30 November 1945 (R 6). It was further stipulated that the Officers Replacement Pool, The Parachute School, Fort Benning, Georgia, was redesignated the Parachute Officers Replacement Pool, The Airborne School, Fort Benning, Georgia. Initial unauthorized absence was shown by properly certified extract copy of the morning report of the Parachute Officers Replacement Pool, The Airborne School, Fort Benning, Georgia (Pros. Ex. 4, R 7), which was received in evidence without objection. This extract recites:

> "Shaw Hugh P (Inf) 01 289 154 1st Lt TDY at 910 SE 37th Ave Portland Ore DS enroute to Join AWOL as of 0001 20 Jan 46."

Return of accused to military control was shown by duly certified extract copy of the morning report of the Parachute Officers Replacement Pool, The Airborne School, Fort Benning, Georgia, introduced without objection (Pros. Ex. 5, R 7) and reciting:

> (8 March 1946)
> "Shaw Hugh P 01 289 154 1st Lt AWOL to Arrest in Quarters, 1500 hours"

4. Evidence for the defense: Three depositions were introduced by the defense. The first (Def. Ex. A, R 7) was the deposition of Miss Gloria Bolton, 334 Main Street, Port Washington, New York. Miss Bolton deposed that she was a model and had known accused since November 1945. Accused remained at her home throughout the period 20 January to 4 March 1946. Accused was sick during much of this period and was sick in bed more than two weeks of this time. She is a "very, very good friend" of accused. Accused was so sick that a doctor had to be called several times. Accused told her that he was on terminal leave but mentioned a week prior to his departure that he had overstayed his leave. She stated that accused made no effort to get in touch with military authorities.

The defense also introduced (Def. Ex. B, R 7), the depositions of Miss Bolton's brother, George A. Bolton, also residing at 334 Main Street,

Port Washington, New York, and his answers were substantially the same as those of Miss Bolton.

The defense further introduced (Def. Ex. C, R 8), the deposition of Dr. Albert H. Stevenson, Port Washington, New York, who stated that his only knowledge of accused was based on several telephone calls which he received from the Bolton family in February 1946. Deponent never visited accused but, based on telephone conversations with the Bolton family, he assumed that accused had recurring malaria.

Two officers who served with accused in combat in Italy, Southern France, and in the Ardennes testified that accused was an outstanding combat officer and a superior demolitions officer (R 8-11).

Accused elected to remain silent.

5. The evidence is compelling that accused did not join the organization to which he had been transferred upon the expiration of his recuperation leave, plus time allowed for travel from the West coast to Fort Benning, Georgia. It appears from the prosecution's evidence, as well as by the depositions introduced by the defense, that on 20 January 1946, the date accused was due to report for duty at Fort Benning, Georgia, he was visiting in Port Washington, New York. It further appears that he remained at this civilian residence from 20 January 1946 until about 4 March 1946. The defense depositions state that accused was sick in bed during part of this period and infer that he was unable to report for duty. It is common knowledge that there would be no difficulty in obtaining access to military authority on Long Island, New York, with its numerous military installations. The evidence produced in the depositions is not worthy of credence, fails to establish a defense to the charge and was properly discounted by the court. Even if it were granted that accused was sick as claimed his status of absence without leave was not changed by inability to return through sickness, par. 132, MCM (CM 262294, Fisher, 41 BR 31). The proof to the effect that accused returned to military control on 8 March 1946 rather than on 7 March 1946 as specified was an immaterial variance and in no manner prejudicial to the substantial rights of accused (CM 258372, Holmes, 38 BR 1; CM 270541, Lapiska, 3 Bull. JAG 9, 143). The findings of the court are amply and legally supported by the evidence introduced at the trial.

6. War Department records show that accused was born 17 October 1921, is now 24-10/12 years of age and is single. He completed grade school and three years of high school in Portland, Oregon. He enlisted in the Regular Army on 14 May 1940 and served a tour of duty as an enlisted man in Hawaii and was on duty there when Pearl Harbor was bombed and is entitled to the Asiatic-Pacific Campaign Ribbon. He was commissioned a second lieutenant of Infantry at Fort Benning, Georgia, on 1 August 1942.

From 2 August 1942 to 4 May 1943 accused was a platoon leader with the 104th Infantry Division at Camp Adair, Oregon. Following parachute training at Fort Benning, Georgia, accused was sent overseas in December 1943, where he participated in combat with the 509th Parachute Infantry Battalion and the 504th Parachute Infantry Regiment. He is entitled to six battle participation stars for combat in Italy, France and Germany. He is entitled to wear a Unit Citation, with cluster, the Belgian Fourraguerre and the Order of William (Holland). He was awarded the Combat Infantryman's Badge on 10 April 1944. He was promoted to first lieutenant on 5 April 1944 and returned to the United States from foreign service in November 1945.

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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Lyman W. Wenzel, Judge Advocate.

W. Wayne Olivier, Judge Advocate.

Harold F. McDonnell, Judge Advocate.

JAGQ - CM 313648 1st Ind

WD, JAGO, Washington 25, D.C. SEP 6 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 First Lieutenant Hugh P. Shaw (0-1289154), Infantry, Parachute Officers Replacement Pool, The Airborne School, Fort Benning, Georgia.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from about 20 January 1946 to about 7 March 1946, in violation of the 61st Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provided for dismissal 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 failed to join his organization to which he had been transferred upon the expiration of his recuperation leave, plus time allowed for travel from the West Coast to Fort Benning, Georgia. It appears from depositions introduced by the defense, that on 20 January 1946, the date accused was due to report for duty at Fort Benning, Georgia, he was visiting in Port Washington, New York, and that he remained there in a civilian residence with a Miss Bolton from 20 January 1946 until about 4 March 1946 without making any effort to get in touch with military authorities.

Accused enlisted in the Regular Army on 14 May 1940 and served a tour of duty as an enlisted man in Hawaii and was on duty there when Pearl Harbor was bombed and is entitled to the Asiatic-Pacific Campaign Ribbon. He was commissioned a second lieutenant of Infantry at Fort Benning, Georgia, on 1 August 1942. From 2 August 1942 to 4 May 1943 accused was a platoon leader with the 104th Infantry Division at Camp Adair, Oregon. Following parachute training at Fort Benning, Georgia, accused was sent overseas in December 1943, where he participated in combat with the 509th

Parachute Infantry Battalion and the 504th Parachute Infantry Regiment. He is entitled to six battle participation stars for combat in Italy, France and Germany. He is entitled to wear a Unit Citation, with cluster, the Belgian Fourraguerre and the Order of William (Holland). He was awarded the Combat Infantryman's Badge on 10 April 1944. He was promoted to first lieutenant on 5 April 1944 and returned to the United States from foreign service in November 1945.

In view of the excellent combat record of accused I recommend that the sentence as modified by the reviewing authority be confirmed but that the execution thereof be suspended during good behavior.

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

CM313648

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 281, 12 September 1946).

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

(211)

JAGK - CM 313651

21 OCT 1946

UNITED STATES v. Second Lieutenant ROBERT A. GRAVELLE (0-2020544), Infantry	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, 2 and 4 April 1946. Dismissal, total forfeitures and confinement for three (3) years.

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 upon the following charges and specifications:

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

Specification: In that Robert A. Gravelle, 2d Lieutenant, Infantry, Company "C", 131st Infantry Training Battalion, 82d Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did, at Camp Joseph T. Robinson, Arkansas, on or about 13 March 1946, feloniously take, steal, and carry away a sum of money, lawful currency of the United States, consisting of bills and silver, value about One Hundred and Ninety-Four Dollars ($194.00), the property of the 82d Regiment Officers Club, and a wrist watch and metal band, value about Seventy-Eight Dollars ($78.00), the property of Private Orlando Solorzano.

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

Specification: In that Robert A. Gravelle, ***, did, at Camp Joseph T. Robinson, Arkansas, on or about 13 March 1946, feloniously take, steal, and carry away a sum of money, lawful currency of the United States, consisting of bills and silver, value about One Hundred and Ninety-Four Dollars ($194.00), the property of the 82d Regiment Officers Club, and a wrist watch and metal band, value about Seventy-Eight Dollars ($78.00), the property of Private Orlando Solorzano.

He pleaded not guilty to and was found guilty of all charges and specifications.

No evidence of any 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 three years. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 48.

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

4. War Department records show the accused to be 28-5/12 years of age and single. He completed three years of high school but did not graduate. From 1934 to 1941 he operated a radio repair shop, but during this period of time he also held several positions for short periods of time. His income was approximately $20.00 per week. He was inducted into the Army of the United States with the Minnesota National Guard. On 30 June 1945 he was appointed and commissioned a second lieutenant, Infantry, Army of the United States.

5. 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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction for violation of Article of War 93 and mandatory upon conviction for a violation of Article of War 95.

Charles E. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stafford, Judge Advocate

JAGK - CM 313651 1st Ind 31 October 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 Second Lieutenant Robert A. Gravelle (0-2020544), Infantry.

2. Upon trial by general court-martial this officer was found guilty of the larceny of $194.00 in money and a wrist watch, value $78.00, in violation of Articles of War 93 and 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the Staff Judge Advocate's review which was adopted by the Board of Review. I concur in the opinion of the Board that the record is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

On the night of 12-13 March 1946 the accused and four other officers remained in the Officers' Club of the 82d Infantry Training Regiment, Camp Joseph T. Robinson, after the club was officially closed for the night. These officers and the club steward then consumed two bottles of whiskey. The officers decided to leave the club shortly before 4 a.m., at which time the club steward requested the accused to remain and help close the club. The accused remained in the club and the other officers left. The accused then left the club by the back door. The club steward locked the door and placed a long distance telephone call. His telephone conversation started at 4:25 a.m. While talking over the telephone the steward heard the bell on the cash register ring and he then turned and saw the accused behind the register with his hand outstretched. The steward opened the door of the telephone booth and told the accused not to touch the cash register, then turned around and finished his conversation. After the steward completed his call he discovered that the cash register was open and that the ten and twenty dollar bills were missing from the register. A wrist watch, value of more than $50.00, belonging to the steward, was missing, as well as a cigar box filled with nickels. Investigation disclosed that one pane of glass in the back door of the club was broken, blood was on the door and several paper towels covered with blood were found near the cash register. $194.00 was missing from the club. At 4 a.m. the accused arrived at the dispensary and requested that cuts on his hands be dressed and then at 5 a.m. returned to the dispensary to have his hands redressed. About 4 p.m. on 13 March 1946, bills amounting to

$162 and some nickels were found near a vacant hut in the area. The cigar box of nickels and the wrist watch belonging to the club steward were found on the center joist under the empty hut. The box of nickels was removed, a box substituted therefor and a guard was secretly posted to watch for and apprehend any one attempting to remove the substituted box. About 1:15 a.m. 18 March 1946 the accused was apprehended in attempting to remove this box from under the empty hut.

4. The actions of the accused demonstrate his moral unfitness to retain his commission in the Army. I recommend that the sentence be confirmed and carried into execution and that a United States disciplinary barracks be designated as the place of confinement.

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

CM313651

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 345, 14 November 1946).

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

MAR 12 1947

JAGQ - CM 313689

UNITED STATES v. Private First Class JAMES H. DAVIS (13178039), 536th Quartermaster Salvage Repair Company.	WESTERN PACIFIC BASE COMMAND Trial by G.C.M., convened at Saipan, Marianas Islands, 4-13 March 1946. Dishonorable discharge and confinement for life. Penitentiary, McNeil Island.

REVIEW by the BOARD OF REVIEW
SCHEID, BOYLES and PARSONS, 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 First Class JAMES H. DAVIS, 536th Quartermaster Salvage Repair Company, did, in conjunction with Private First Class OLIVER DISON, Company A, 1890th Engineer Aviation Battalion, at Tinian, Marianas Islands, on or about 1 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade JOSEPH A. HENDRICKS, JR., 536th Quartermaster Salvage Repair Company, a human being by shooting him with a pistol.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by summary court-martial for willful disobedience of the order of a noncommissioned officer was introduced. With three-fourths of the members of the court present at the time the vote was taken concurring the accused was sentenced to dishonorable discharge, total forfeitures and confinement 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 under Article of War 50½.

3. The Board of Review adopts the statement of the facts and the law contained in the Staff Judge Advocate's review, with the additional comment hereinafter set forth.

4. Murder is the unlawful 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 (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 of human life. The proof required in a murder case is defined in the Manual for Courts-Martial, Paragraph 148a:

> "(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that death took place within a year and a day of such act); and (b) that such killing was with malice aforethought".

The prosecution introduced in evidence a signed "duplicate original" copy of a report of an autopsy made upon the deceased. This report showed the fact of death and the opinion of the surgeon who performed the autopsy that the cause of death was two gunshot wounds. The signature upon the autopsy report was duly identified as that of the officer who performed the autopsy, and the evidence showed that the report was made in the regular course of business of the hospital. Paragraph 116a of the Manual provides that "In the case of a public record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without either first proving that the original has been lost or destroyed, or without otherwise accounting for the original"; and in Paragraph 117a, MCM, it is provided that "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated, and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it". Paragraph 8, AR 40-410 requires that the original protocol of all autopsies be forwarded to and permanently filed by the Army Institute of Pathology. Paragraph 19d, AR 40-590 provides that an autopsy will be performed upon the body of any person dying in the military service when the commanding officer of the hospital or the surgeon of a station or command deems such procedure necessary in order to determine the true cause of death, and to secure information for the completion of military records, and further requires that complete records be kept of all autopsies. In view of the

foregoing, the Board of Review is of opinion that the signed "duplicate original" copy of the autopsy report was admissible and competent to establish the fact and cause of deceased's death.

5. The legal sufficiency of this record hinges upon the answer to two vital and troublesome questions. First, was the second confession of the accused introduced in evidence voluntary? Second, were the oral and written statements of the deceased, introduced as dying declarations, admissible as such, and if so what probative strength did they possess? Considering these questions in order, let us first scrutinize the circumstances surrounding the making of the second confession.

a. Admissibility of Accused's Confession.

The evidence shows that two operatives of the CID secured a first confession from accused on or about 5 November 1945. This confession was not introduced in evidence inasmuch as it was considered by a Major Hustace (then acting as Staff Judge Advocate) as invalid because it was involuntary and the product of compulsion visited upon the accused prior to the giving of the confession. There is extensive evidence of the treatment of accused after his formal arrest on November 1st up to and including the 5th of November when he gave this first confession. It is not necessary for present purposes to repeat the details of the treatment received by accused prior to this first confession. There can be, however, no denial of the fact that accused had been kept in solitary confinement and received rigorous treatment during this period. Suffice is to say that the evidence on this issue is of such substantial character as to support a finding that the November 5th confession was involuntary and therefore was not admissible in evidence. Evidently this was the prosecution's theory. In present consideration the accused will be given the benefit of such assumption although, as the Staff Judge Advocate in his review suggests, an opposite finding would also have been justified.

After the accused gave this first confession he was removed to the stockade and thereafter received the same treatment as the other prisoners (R 190, 191). On 24 November 1945 (nineteen days later) accused was brought before Major Hustace and a certain Lieutenant Veatch for an interview. Major Hustace, who did not testify, advised accused (according to Veatch):

> "at that time he believed the prior confession would be void and asked him if he wanted to make another one. He explained that even though he had made one confession it wasn't necessary to make another one, and if he did not confess again in all probability the first one would not be held against him. He explained if he remained silent

> the fact would not be used against him, and then he went into asking him the treatment he was getting, and asked him if he was living with the other prisoners, getting the same food as the other prisoners. He asked him if he had any fear that he might be put into solitary confinement if he did confess, and Davis said he had no fear of that." (R 190, 191).

Accused was then interrogated by Major Hustace. The questions of Major Hustace and answers of Davis were evidently written in long hand because at the conclusion of the interrogation Davis was informed by Hustace that they would be typewritten and would be placed in form of a confession and would be presented to accused the next day, but that he need not sign it if he did not wish to do so. The next morning Hustace, Veatch, and a Lieutenant Wagner met Davis at the stockade. Hustace presented a typewritten copy of the proposed confession to accused and explained to him that he could read it, correct it, and sign it if he "wanted to." Veatch also held a copy of it. Davis read it to himself but as he read it Veatch "followed him" and explained words to him that Veatch thought he did not understand. Hustace had retired from the conference at this point. Davis finally signed this second confession and swore to it before Lieutenant Wagner. Veatch testified that Hustace explained to accused his rights under Article of War 24 "both times":

> "As Major Hustace explained it to Davis that morning he stated the fact that Davis had been in solitary and that his rights might not have been fully explained to him and the possible effects of the court considering solitary as coercion. He said they would not use the prior confession". (R 192, 193).

Upon cross-examination the following colloquy occurred between Veatch and defense counsel:

> "Q - You said previously in all probability you would not use the prior confession?
> A - Yes sir.
>
> Q - He did not state positively that he would not use the prior confession?
> A - No sir" (R 193).

Wagner testified that when he, Hustace and Veatch reached the stockade and accused was brought before them that his rights were not explained to him but they were contained in the confession which accused received and

read (R 194, 195). Wagner further testified that Veatch explained to accused in "common ordinary words" his rights as set forth in the "beginning of the purported confession" (R 197, 198).

Accused became a witness in his own behalf on this vel non procedure and testified at length concerning his treatment after arrest and prior to his first confession. He also gave his version of the interview with Hustace and Veatch on November 24, 1945, and his execution of the second confession on the following day. Construing the entire testimony submitted on the vel non hearing (evidence both favorable and unfavorable to accused) it is believed that its utmost thrust was to create a question of fact for resolution by the court as a fact finding tribunal. Neither the Board of Review nor The Judge Advocate General upon appellate review possesses the authority to weigh this evidence and substitute their conclusions for that of the court.

> "* * * Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide and each case must be determined on its own facts. The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. The determination of the extent of the influence persisting at the time the subsequent confession is made rests upon attendant circumstances, and the inquiry is whether, considering the degree of intelligence of the prisoner, the nature and degree of the influence, and the time intervening between the confessions, it can be said objectively that the confessor was not compelled to confess by reason of the pressure or inducement which motivated him to confess on the prior occasion. If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had been removed, the subsequent confession is admissible. It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to apprise the accused: (1) That anything that he may say after such warning can be used against him; and (2) that his

> previous confession, made under improper inducement, cannot be used against him, for it has been well said that 'for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate'"(Wharton's Criminal Evidence, Vol. 2, sec. 601, pp. 998-1002) (Underscoring supplied).

When Hustace interviewed Davis on 24 November 1945, he informed him that he (Hustace):

> "believed the prior confession would not be valid * * * and in all probabilities the first one would not be held against him".

Accused confirmed this evidence in his own testimony. While Hustace's statement to accused is to a certain extent equivocal, it at least informed Davis that there was something so radically wrong with the prior confession that the Government officials felt it necessary to secure a new confession from him if he were willing to give it. In any event it is manifest that its weight and sufficiency to meet the requirement that accused be forewarned as to the legal effect upon him of his prior confession was a question of fact for the court to answer.

The confession itself recites that Davis was informed that his prior confession and all prior confessions of guilty "<u>are inadmissible before courts-martial or other competent court</u>". This declaration is unequivocal, and undoubtedly possesses definite evidentiary value. Whether it should be accepted unconditionally and be held conclusively binding upon accused or whether its application to accused should be limited or qualified and what overall credibility should be attached to it are certainly questions of fact within the prerogative of the trial court to determine.

In CM 300744, <u>Dickerson</u>, 30 BR (ETO) 47, the Board of Review in discussing the problem, held:

> "* * * We believe that the facts of the instant case place it well within the ambit of those cases where the legal duty is upon the triers of fact (in this instance, the court) to determine whether the second confession was given under continuing duress, coercion or compulsion visited upon the accused which produced an invalid first confession and that the finding of the triers of fact should be accepted as final upon judicial appellate review. <u>There are no conceded facts in the instant case which are irreconcilable with accused's mental freedom when he gave the confession admitted in evidence.</u> The

evidence descriptive of Lieutenant O'Hara's attitude and conduct towards accused and the inferences to be drawn from the fact that he was removed from the direct control and influence of the police when he confessed to Lieutenant O'Hara are of such nature as to make it safer and better, both for the prosecution and the defense, that the court be the arbiter on this question rather than the Board of Review.

"The Staff Judge Advocate in his review suggested that the holding of the Board of Review in CM ETO 1486, MacDonald and MacCrimmon, III Bull. JAG 227 (1944) cannot be reconciled with the opinion of the Supreme Court in the Lyons case. An examination of the holding in extenso in the MacDonald and MacCrimmon case makes it apparent that it was a case where 'conceded facts exist which are irreconcilable' with the conclusion that the second confession was given after the accused had been freed from the effects of the coercive action which produced the invalid first confession. The evidence of the irregular practices surrounding MacDonald's first confession came from the prosecution's witnesses. The chief offender, a Captain Rasmussen, testified as to what he said and did on the occasion of obtaining the first confession. Another officer, A Captain Andrews, corroborated Captain Rasmussen's statements in part. There was, in a consequence no conflict in the evidence. Uncontradicted evidence of coercion visited upon MacDonald by Captain Rasmussen possessed such definite relationship and connection with his second confession as 'to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary.'

"It then became a matter of law for the court (and for the Board of Review on appellate review) to invalidate MacDonald's second confession. Not so in the instant case. Certain parts of the accused's testimony inherently were not such as to inspire unqualified belief in their verity. In other aspects it traversed the testimony of Lieutenants O'Hara and Carroll and produced an issue of fact. There resulted an ideal situation for the consideration and decision of a fact-finding agency within the purview of the Supreme Court's decision in the Lyons case. Herein, there is no such certainty as to 'forbid any other inference' than that the inquisitorial procedure of the police dominated Dickerson's mind when he gave his confession to Lieutenant O'Hara. Conversely, there is substantial evidence that he was free from the effects of the police action.

"The Board of Review concludes that its holding in the case of MacDonald and MacCrimmon is not only consistent with its

conclusions herein, but also that it in truth supports them. There was no error in admitting in evidence accused's confession to Lieutenant O'Hara." (30 BR (ETO) at pp. 50 and 51).

The United States Supreme Court has had an analogous problem in its consideration of judgments of conviction by state courts where the voluntariness of a confession has been determined by the trial court as jury. In Lyons v. Oklahoma, 322 U.S. 596; 64 Sup. Ct. 1208, the court, in part, held:

> "When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertion from the demeanor of the witnesses but the legal duty is upon them to make the decision. Lisenba v. California, supra, p. 238."

And in Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166, 180, cited in the Lyons case supra, the following pertinent comment appears:

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> "Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning the process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then is to

determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency. There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20 and 21. If, without more, eleven days later, confessions had been forthcoming, we should have no hesitation in overruling his contention respecting the admission of his confessions."

The facts and circumstances surrounding the making of the second confession when viewed in the light of the above authorities makes it apparent to the Board that, as stated in the Dickerson case, supra, "There are no conceded facts ... which are irreconcilable with the accused's mental freedom when he gave the confession admitted in evidence." On the contrary, as observed in the same case "Certain facts of the accused's testimony inherently were not such as to inspire unqualified belief in their verity". The maze of inconsistent testimony, at best, produces an issue of fact which was before the court and its determination as the triers of fact thereon is binding upon the Board of Review under the circumstances revealed by the record.

b. Dying Declaration of Deceased, Hendricks

The court admitted in evidence as dying declarations certain oral statements and also a written statement of the deceased, Hendricks, which identified his assailant and described the attack upon him. The court admitted these statements under the following well established exception to the hearsay evidence rule:

"The law recognizes an exception to the rule rejecting hearsay by allowing the dying declarations of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them. It is necessary, however, to the competency of testimony of this character— and it must be proved as preliminary to the proof of the declaration—that the person whose words are

repeated by the witness should have been in extremis and under a sense of impending death, i. e., in the belief that he was to die soon; though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown. And if this belief on this part sufficiently appears, it is not essential to the admissibility of his words that death should have immediately followed upon them. On the other hand if, in uttering the words, he was under the impression that he should recover, the same would be inadmissible even if in fact he presently died. But it is no objection to their admissibility that they were brought out in answer to leading questions, or upon urgent solicitations addressed to him by any person or persons; and if, instead of speaking, he answered the questions by intelligible signs, these signs may equally be testified to. But it is held that only such declarations are admissible as would be admitted if the party were himself a witness; so that where the language employed is irrelevant or consists in a statement of opinion instead of fact, it cannot be received. If it was put in writing at the time, the writing should be produced. Dying declarations are admissible as well in favor of the accused as against him.

"It is to be remarked that evidence of dying declarations is usually to be received with great caution, since such declarations are usually made under circumstances of mental and physical depreciation, and without being subjected to the ordinary legal tests." (Winthrop.) (MCM 1928, par. 148, pp. 164, 165)

The above quotation from the Manual elucidates in general terms the legal principles which support the practice of admitting in evidence proof of dying declarations in trial of homicide charges, but the particular problems presented for solution in the instant case require a more detailed consideration of the basic legal principles involved. Colonel Wigmore writes thus concerning dying declarations:

"Sec. 1438. All courts have agreed, with more or less difference of language, that the <u>approach of death</u> produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to misstate. * * *
Sec. 1439. As the probability consists in the subjective effect of the approach of death, the declarant should appear to have had a <u>consciousness</u> of the approach of death: * * *

This consciousness must of course have been at the time of making declaration. It follows on the one hand, that a subsequent change of this expectation of death, by the recurrence of a hope of life, does not render inadmissible a prior declaration made while the consciousness prevailed, although a repetition of the declaration during the subsequent inadequate state of mind would not be admissible; and, on the other hand, that a declaration made during an inadequate state of mind may become admissible by a subsequent affirmance of it made when the realization of impending death had supervolved.

Sec. 1440. It follows, from the general principle, that the belief must be, not merely of the possibility of death, but of its certainty * * * The tests have been variously phrased; there must be 'no hope of recovery;' 'a settled expectation of death;' 'an undoubting belief'. Their general effect is the same. The essential idea is that the belief should be a positive and absolute one, not limited by doubts or reserves; so that no room is left for the operation of worldly motives.

Sec. 1441. It follows, also, that the expectation must be of a speedy death. All men are mortal, and know it. An expectation of ultimate but distant death is obviously, in experience, not calculated to produce that sincerity of statement that is desired. Nevertheless, no definition of time can be fixed, the determination must vary with each case, after all of the circumstances are considered: * * * But the actual period of survival after making the declaration is immaterial. The necessary element is a subjective one. — the declarant's expectation; and the subsequent duration of life, whatever it may turn out to be, has no relation to his state of mind when speaking. * * * Accordingly, there seems to be no case in which the time of survival was deemed to exclude the declaration; and various periods have been passed upon as not too long.

Sec. 1442. In ascertaining this consciousness of approaching death, recourse should be had to all the attending circumstances. It has been contended that only the statements of the declarant himself should be considered for this purpose; or, less broadly, that the nature of the injury alone could not be sufficient, i. e., in effect, that the declarant must have shown in someway by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case, the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. * * * * No rule can here be laid down. The circumstances of each case

will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances." (V Wigmore on Evidence (3rd) Ed. Secs. 1438-1442)

"Where a written memorandum or report thus made is read over to the declarant and signed or assented to by him, the writing thus becomes a second and distinct declaration by him. The first oral statement is not merged in the latter written one, because, since the transaction is not a contract or other legal act between the two parties thereto, the rule of Integration or Parole Evidence rule * * * * has no application. The first and oral declaration is therefore provable without producing the latter written one * * *" (V Wigmore on Evidence, Sec. 1450, p. 253)

Further pertinent comments from American Jurisprudence are of value in present considerations:

"The law does not set any precise form in which dying declarations may be made. * * * It may be oral or written. * * * A declarant is not required to prepare his own written declarations in order to have them admissible in evidence. It is wholly immaterial who prepared them if they were read over to him and he understood them and assented to them (20 Am. Jur. Sec. 396, p. 433)

"A dying declaration may consist of answers to questions propounded to the declarant. * * * It is essential, of course, in all cases, that the person making the declaration shall have had sufficient consciousness to comprehend the meaning of the questions asked * * * (Am. Jur. Sec. 398, p. 434)

"An apprehension of death which has the effect of rendering a statement admissible as a dying declaration is a state of mind, a consciousness of impending and certain death, and despair of recovery on the part of the declarant, but not necessarily a belief or apprehension of immediate and instant dissolution. It is not essential to the admission of dying declarations that the declarant shall have indicated that he believed he would die within a definite time. It is sufficient that he was conscious of impending and certain death (20 Am. Jur. Sec. 406, pp. 437, 438)

"The rule * * * requires of the party who offers a statement in evidence as a dying declaration that he prove as a preliminary fact that the statement was made under sense of impending death. This may be done by any competent evidence which

shows the declarant's state of mind in reference to apprehension of death. Despair of recovery may be gathered from the circumstances, if the facts support the inference. It may be made to appear from the physical and mental condition of the decedent, from what he said, and from the fact that the nature and extent of the wounds inflicted were obviously such that he must have felt or known that he would not survive, as well as from his conduct at the time, and from the communications, if any, made to him by his medical advisers * * * (20 Am. Jur. Sec. 416, pp. 444, 445).

"The most common form of evidence of a sense of impending death consists in statements of the deceased. It is obvious that he alone can appreciate the condition of his own mind. The particular form of an expression by a declarant is not of great importance in determining its admissibility and effect as proof of his sense of impending death, but any statement of the declarant to the effect he believes he is about to die is admissible to prove and may constitute sufficient proof, that his purported dying declaration was made in apprehension of death, provided such statement of belief was made at or about the time of the dying declaration and is not inconsistent with the acts and other statements of the declarant. *** (20 Am. Jur. Sec. 417, pp. 445, 446)

"Some courts, however, take the view that where a dying declaration is taken down in writing and signed or otherwise approved by the declarant, the writing itself must be introduced in evidence to prove the declaration, oral testimony being deemed inadmissible for this purpose, unless, of course, a proper accounting is made for the absence of the writing. It is said that the signing of the dying declaration by the declarant makes the writing the best evidence of the subject matter of his statements and excludes oral testimony in regard thereto * * * The fact that there is a written declaration will not preclude the introduction in evidence of oral declarations made at other times. * * * Some authorities refuse to apply the best evidence rule to dying declarations and take the view that oral testimony is never rendered inadmissible to prove a dying declaration, by the fact that a written declaration was executed * * *" (20 Am. Jur. Sec. 423, pp. 448, 449).

Of immediate concern with respect to the written declaration of deceased (Pros. Ex. 25) is the following provision in the Manual for Courts-Martial, 1928, concerning the application of the "best evidence" rule:

> "A writing is the best evidence of its own contents, and must be introduced to prove its contents. Under this rule, if it is desired to prove the contents of a private letter or other unofficial paper, or of an official paper such as a pay voucher, a written claim against the Government, a pay roll or muster roll, a company morning report, an enlistment paper, etc., the strict and formal method of doing so is to call a witness who can authenticate it, and then to introduce in evidence the original.
>
> Exceptions. ——If a writing has been lost or destroyed or if it is otherwise satisfactorily shown that the writing cannot be produced, then the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing. (MCM, 1928, par. 116a, pp. 118, 119).

Pros. Ex. 25, consists of a written declaration of the deceased made by him to Major Manasses, approximately three hours before his death. Deceased was in great pain and Wangenstien Suction had been applied to him "with two tubes running down his nose". The statement was in form of questions and answers and commenced with the declaration: "Knowing that I am in critical condition and may die, I make the following statement:" Prior to propounding the questions to the deceased, Major Manasses informed him that "I came to get a statement from you." Deceased replied that he was dying and would be glad to make a statement. Manasses assured him that he was "going to be all right; you'll pull through" (R 175, 176). The statement names a "James Davis" as the soldier who shot deceased; declared there was another man with him who urged him "to make it snappy and lets get out of here" and asserted that robbery was the motive of the attack as deceased had $265.00 in his wallet.

It might be contended that it was error to admit said written dying declaration in evidence because: (a) the declaration in the statement that "I * * * may die" did not supply the required premise for admission of the statement; (b) that the written statement could not be supported by deceased's prior utterance to Manasses that he knew he was dying because such evidence varied the written instrument and (c) the statement itself contained inadmissible opinion evidence which deceased could not have given had he been on the witness stand.

There are holdings of the Boards of Review which have applied the "best evidence" rule as set forth in the Manual for Courts-Martial to confessions (CM 210955, Bonner et al, 9 BR 383, 387; CM 215351, Nadrowski,

10 BR 393, 387; CM 216397, Fleming, 11 BR 139, 141) but none have been discovered involving dying declarations (Cf: CM 228571, Dockery, 16 BR 249, 256). Likewise Boards of Review adhered to the "best evidence" rule with reference to confessions (CM (ETO 739, Maxwell, 2 BR (ETO) 251, 270; CM (ETO) 5584 Yancy, 15 BR (ETO) 207, 224). However, in each of the cited confession cases the present question was not involved inasmuch as there was an attempt to prove the confession as a whole by oral testimony when there was evidence that a written confession existed but there was no evidence to account for its non-production, or the issue had been waived by failure to make proper objection.

There appears to be a confusion in the operative effect of the "best evidence" rule and the so-called "parol evidence" rule. The former is stated in the following language:

> "Where written evidence of a fact exists, the writing as a general rule constitutes the best evidence of that fact; and where the writing is not produced parol evidence is inadmissible to prove the contents unless its absence is satisfactorily explained. In brief, parol evidence is not admissible in substitution for available written evidence and the contents of an accessible writing cannot be proved by parol" (32 C.J.S. Sec. 785, p. 710; See also 20 Am Jur. Sec. 406, p. 366)

The above is the rule contained in the Manual for Courts-Martial and quoted above. On the other hand the "parol evidence" rule is defined as follows:

> "It is a general rule that parol or extrinsic evidence is not admissible to add to, to subtract from, vary or contradict judicial or official records or documents, or written instruments which dispose of property, or are contractual in nature and which are valid, complete, unambiguous, and unaffected by accident or mistake. This rule, which is known as the parol evidence rule, is one of substantive law and not merely one of evidence; and it obtains in equity as well as at law" (32 C.J.S. Sec. 851, p. 784; See also 20 Am Jur. Secs. 1099 and 1100, pp. 958-963)

The reason for the "parol evidence" rule has been explained:

> "The reason of the rule is that as the parties have constituted the writing to be the only outward visible expression of their meaning, no other words are to be added to it or substituted in its stead" (20 Am. Jur. Sec. 1099, p. 963)

With respect to the proposition that the statement in Hendricks' written dying declaration — "I * * * may die" — destroys its admissibility because it is equivocal and indicates that deceased had not abandoned all hope of recovery, we think it pertinent to quote from the opinion of the Circuit Court of Appeals (9th Cir - Feb. 1, 1932) in Freihag v. United States, 56 Fed (2nd) 127 wherein the written dying declaration of the deceased contained this sentence: "That if I die it will be from the beating given me by Jack Freihag". Upon objection to its admission it was argued that the declaration on its face showed that the deceased had not abandoned all hope of recovery. The Court of Appeals said:

> "We think the court was correct in overruling the objection of the defendant to the reception of the writing in evidence and in permitting the jury to take it to the jury room upon retirement for deliberation. * * * It was for the jury to say, under the circumstances disclosed by the record in this case, whether the use of the word 'if' by the declarant manifested doubt or uncertainty in her mind as to he impending death, or whether the use of that word was tantamount to the statement 'when I die', etc, as one of the six witnesses had testified she had stated just prior to the preparation of the written declaration". (p. 131)

The Freihag opinion cites Cantrell v. State, 117 Ark. 233, 174 S.W. 521 and quotes the following from the opinion of the Supreme Court of Arkansas:

> "Proof of other statements made by deceased contemporaneously with the above tend to show that deceased did not entertain the hope of recovery. In passing upon this question it was proper for the court not to limit its consideration to the single sentence /'If I am going to die, I might as well die first as last.'/ but to take into account all of the circumstances, including everything that was said on the subject."

Regina v. Sparham et al, 25 C.C.P. 143, is another authority cited in the Freihag opinion. In that case the Canadian Court of Common Pleas approved a dying declaration which contained the phrase: 'If I die in this sickness'. The court wrote:

> "We think that the mere use of the words 'If I die', do not by themselves defeat and render nugatory all the emphatic declarations of abandonment of hope. * * * * The cardinal point is that the Court must be satisfied that whatever statement is admitted in evidence must be shown by credible testimony to have been made in full belief of approaching death, with an abandonment of all hope of life".

In the instant case the phrase "I * * * may die"is manifestly equivalent to the phrase "If I die". They both are subject to the dual interpretations as indicated in the above quoted excerpt from the Freihag opinion. Considering the face of Hendricks' written declaration above it is the opinion of the Board of Review that there was no error committed by its admission in evidence. The Freihag, Cantrell and Sparham decisions support this conclusion.

The holdings in the Freihag, Cantrell and Sparham cases largely answer the contention that the Hendricks oral statement to Manasses that he was dying was not admissible to contradict the statement in the written declaration - "I * * * may die". It is true (as the quotation from Wigmore indicates) that some of the state courts have held that where a dying declaration has been reduced to writing and signed by the deceased, a copy of the declaration or parol proof will not be received until the written declaration has been accounted for. (See annotation in 112 A.L.R. 43 with ancillary annotation on impeachment of dying declarations in 16 A.L.R. 411) The following is a fair statement of this rule:

> "But, when a statement is reduced to writing and signed by the declarant, or is read over to him and assented to by him, it is the best evidence of what was then said. Oral evidence to vary it is incompetent. Wharton's Criminal Evidence, Sec. 295; Underhill's Crim. Ev. Sec. 256; 1 Greenleaf on Ev. (16th Ed.) Sec. 161; 30 C.J. p. 258. Professor Wigmore is not in accord with this view (3 Wigmore on Ev. Sec. 1450) although he concedes that the weight of authority is against him." (Evans v. Commonwealth 161 Va. 992; 170 S.E. 756)

Wigmore, in the opinion of the Board of Review has properly pointed out that the "best evidence" rule has no application since the oral testimony is itself competent evidence of the oral dying declaration, whereas the written declaration subsequently signed is in substance a second dying declaration. In the Freihag case there was evidence of a prior oral statement of deceased wherein she used the expression "When I die etc" and six prior oral statements containing the phrase, "If I die etc". There was also abundant evidence of the woman's enfeebled condition and that she experienced great pain and suffering at the time of making the written declaration. It will therefore be noted that the Federal courts (the Freihag opinion appears to be the only Federal decision in point) have not alligned themselves with the doctrine opposed by Wigmore but have adopted his views on the subject. We conclude that the Freihag opinion should be followed and that both Hendricks' written declaration and his prior oral statement were admissible in evidence. Such conclusion is also supported by the following cases: State v. Whitson et al, 111 N.C. 695; 16 S.E. 332; Johnson v. State, 102 Alabama 1, 16 South, 99; Commonwealth v. Haney,

127 Mass. 455; People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49; State v. Carrington, 15 Utah 480, 50 Pac. 526.

There is another solution of this problem which finds support in the Evans case above cited (Supreme Court of Appeals of Virginia). In that case the antecedent oral statement of deceased to a witness named Johnson was to the effect that accused stated to him (deceased) "'You have imposed upon me long enough' or words similar to that". The written statement contained these words: "Evans McKinley said I had treated him wrong." The court commented:

> "They both tend to show some antecedent animosity, and are in substance the same. Nowhere does the evidence of Johnson [the witness to the oral declaration] differ materially from the written declaration" (170 S.E. at p. 762)

In the present case the court may well have concluded that the expression "I * * * may die" in the written declaration was in substance the same as deceased's prior oral statement to the effect that he was dying. There is in substance no contradiction between the two phrases which was not capable of being reconciled and resolved by the court as a fact finding agency. Manifestly under the Freihag holding consistent prior oral declarations are admissible in evidence. The Carrington case (Utah) cited above pointedly illustrates this same proposition. See also People v. Apicello, 275 N.Y. 222, 9 N.E. (2nd) 844, 112 A.L.R. 40, where the New York Court of Appeals concluded that the prior oral declaration of the deceased was fairly reconcilable with his written declaration and therefore the admission of both declarations in evidence was free from prejudicial error.

The problem here considered has been seriously complicated and rendered difficult of solution by the confusing of the "best evidence" rule and the "parol evidence" rule in the civil court decisions. This complication has been confounded in Military Justice by the fact that the Manual for Courts-Martial, 1928, treats only of the "best evidence" rule. The former rule is strictly a rule governing the admissibility of evidence. The latter rule is one of substantive law and pertains to the proof and interpretation of contracts and documents of title. It is the opinion of the Board of Review that the Freihag case announces no rule in conflict with the Manual as it covers an area of the law of evidence exterior to the ambit of the Manual's pronouncement above quoted. Neither does it conflict with the application of the "best evidence" rule by the Boards of Review to confessions.

It is therefore concluded that the court committed no error in admitting in evidence Hendricks' written dying declaration.

Deceased's written declaration contains the following:

"Q - What was the motive for him to shoot you, did you ever have a fuss with him?

"A - Robbery, I never fussed with him, I had $265.00 in my wallet."

The quoted excerpt from the Manual for Courts-Martial contains the following pertinent direction:

> "But it is held that only such declarations are admissible as would be admitted if the party were himself a witness; so that where the language employed is irrelevant or consists in a statement of opinion instead of fact, it cannot be received." (MCM 1928 par. 148a, p. 164)

It is clear that the above quoted question propounded to the deceased by Manasses called for the statement of an opinion by the deceased.

> "The same rules apply respecting the admissibility of statements contained in dying declarations as apply to the statements of witnesses sworn in a cause, respecting admissibility of evidence. No witness can state with what purpose another person can perform an act. What the purpose of an act was is an inference to be drawn from facts, and the witness may state the facts, but must leave it to the jury to determine, from those facts, what the purpose was. Dying declarations, therefore, must state facts only, and not matters of opinion." (State v. Carrington, supra).

A dying declaration must be a statement of fact and not an opinion (State v. Meyer annotation in 86 Am. State Reps. at p. 649; Shepard v. United States, 290 U.S. 96, 100, 78 L. Ed. 196, 54 S. Ct. 22; Annotation in 56 L.R.A. at p. 375; United States v. Veitch, 1 Cranch CC 115, Fed. Cs. No. 16, 614; Feltner v. Commonwealth 23 Ky. L. Rep. 1110, 64 S.W. 959; State v. Donnelly, 69 Iowa 705, 27 N.W. 369).

It must be concluded that error was committed in admitting in evidence the part of the statement above quoted wherein deceased declared that robbery was the motive for the attack upon him. Was it prejudicial error that requires the conviction be set aside? Under certain conditions such error would be highly prejudicial but under the circumstances revealed by the evidence in this case we believe that Article of War 37 may be properly applied so as to render the error harmless. The situation is no different from that which would have arisen had the deceased been a witness on the stand and had been permitted to answer the question propounded to him as to the motive of his assailant. The court had before it the complete facts of the circumstances under which deceased received his mortal wounds and from them there is the irrefragable inference that the assailants of deceased intended to rob deceased. Under such circumstances the addition of deceased's opinion that robbery was the motive of the attack could not possibly have injured accused.

It clearly appears from the evidence that approximately four hours intervened between the time deceased was shot and the time he was discovered by certain of his fellow soldiers. These soldiers testified as to deceased's stricken condition upon discovery. He had suffered a severe hemorrhage as evidenced by the blood soaked bed clothing and blood spotted floor. He was in extreme pain. His condition as described by these witnesses supports the inference that he was then suffering from severe shock. He frequently proclaimed the fact that he was about to die. The prosecution was permitted to introduce in evidence separate oral statements of deceased to his fellow soldiers which in substance declared that he was robbed by two men; that one of them was Davis; that a James Davis shot him; that Davis had shot him and then the robbers had taken $200.00 from him. These declarations were made immediately upon discovery of deceased and also during the time he lay upon the floor while preparations were being made to carry him to the hospital and during the time he was being driven to a hospital in a weapons carrier.

Certain of them, it is conceded, were proved to be false or at least not consistent with facts otherwise revealed by the evidence. Deceased delivered a sheet of paper to one witness with the announcement that it contained the name of deceased's assailant (The paper contained no name). Deceased asserted the name of the man who shot him was written on the floor in blood (There was no such inscription on the floor). Deceased declared that two persons had robbed him of about $200.00 (Deceased was not robbed but $241.00 was found in the pocket of his field jacket). Allowing the accused the full benefit of this discrediting evidence it does not affect the admissibility of the oral declarations. Such conflict goes to the weight and credibility of the declarations. Dying declarations may be impeached and discredited the same as other testimony. Its ultimate weight and value is for the jury (the court in this instance). (20 Am. Jur. Sec. 427, p. 45; 1 R.C.L. secs 96, 97, pp. 547-550).

> "The falsity or inconsistency of dying declarations does not preclude their admission in evidence, but only affects their weight" (40 C.J.S. Sec. 302, p. 1281).

6. 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 and the sentence. A sentence of 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 for more than one year by sections 452 and 454, Title 18 of the Criminal Code of the United States.

Arthur M. Lockwood, Judge Advocate

Francis X. Dwyer, Judge Advocate

Thomas R. Parsons, Judge Advocate

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

JAGN-CM 313709

UNITED STATES	)	WESTERN BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Marseille, France, 12 March 1946. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private First Class MEDARDO VELARDE (38168627), 985th Ordnance Depot Company.	)	

HOLDING by the BOARD OF REVIEW
WHITE, HARDY and JOHNSON, Judge Advocates

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Medardo Velarde, 985th Ordnance Depot Company, did, at Kassel, Germany, on or about 30 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private First Class Ray F. Bruss, a human being, by stabbing him with a knife.

Accused pleaded not guilty to, and was found guilty of, the offense charged excepting from the Specification the words "with malice aforethought" and the words "with premeditation," in violation of Article of War 93. 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 might direct, for one year. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as

the place of confinement, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. In view of the conclusions hereinafter reached, the only question which need be considered at this time is whether the court was without authority to try the accused because of the fact that there was not at the time of trial a duly appointed defense counsel to the court before which the accused was tried.

4. It appears from the record of trial that by paragraph 22 of Special Orders No. 40, dated 23 February 1946, the Commanding General of the Western Base Section, Theater Service Forces, appointed a general court-martial to meet at Marseille and therein appointed Major Grant J. Williams as law member, First Lieutenant Frank C. Stetson as defense counsel, and First Lieutenant David A. Ostreicher as assistant defense counsel. By paragraph 34 of Special Orders No. 52, dated 7 March 1946, the Commanding General of the organization above described relieved Lieutenant Stetson as defense counsel, appointed him as law member, vice Major Grant J. Williams, relieved as law member, and relieved First Lieutenant David A. Ostreicher as assistant defense counsel and appointed him defense counsel of the general court-martial appointed by paragraph 22, Special Orders No. 40, above described. By paragraph 25 of Special Orders No. 57, 12 March 1946, the Commanding General of the organization above described, for the trial of Private First Class Medardo Velarde (the accused) only, relieved First Lieutenant David A. Ostreicher as defense counsel and appointed him as law member vice First Lieutenant Frank C. Stetson, relieved as law member and member of the general court-martial appointed by paragraph 22, Special Orders No. 49 above described. It is apparent that the effect of the foregoing orders was to leave the general court-martial appointed by paragraph 22, Special Orders No. 40, without a defense counsel or an assistant defense counsel.

5. The record of trial shows that the accused was brought to trial on 12 March 1946 before the general court-martial appointed by paragraph 22, Special Orders No. 40, and that no defense counsel or assistant defense counsel appears among the personnel of the court present or absent from the court-martial. It likewise shows that the accused introduced as his individual counsel First Lieutenant Frank C. Stetson, who is apparently the same officer who was relieved as defense counsel and appointed law member by paragraph 34, Special Orders No. 52, above described, and who was subsequently relieved as law member and member of the general court-martial by paragraph 25, Special Orders No. 57, above described. The record of trial is authenticated by First Lieutenant David A. Ostreicher as member of the court in lieu of the President because of the absence of the President, by Second Lieutenant Robert D. L'Heureux, Sr., as trial judge advocate, and by Captain Robert M. O'Dell, as "a member in lieu of defense counsel because of the absence of the defense counsel." The question is therefore presented whether or not the failure of the appointing authority to have appointed a defense counsel to this general

court-martial had the effect of depriving the court of the authority to act.

6. The 11th Article of War provides in part as follows:

"For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: * * *."

A search of the records of the Judge Advocate General's Department does not disclose that such a situation has arisen heretofore and we are therefore compelled to proceed without the benefit of precedent and we must look to the language of Article of War 11 and other applicable Articles of War and the Manual for Courts-Martial, 1928, for guidance.

7. Article of War 17 provides in part as follows:

"* * * The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article of War 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel."

By providing that the accused who provides counsel of his own selection might if he desired have the defense counsel or assistant defense counsel act as his associate counsel the Congress must be held to have had the intent that such defense counsel or assistant defense counsel should be available, otherwise the provision is meaningless. Turning to the Manual for Courts-Martial, 1928, section 6 provides:

"For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary. (A. W. 11).

"In general it is desirable that as many assistant defense counsel as assistant trial judge advocates be appointed.

"The power of appointment under A. W. 11 can not be delegated."

The first paragraph of this section is a repetition of the quoted portion of Article of War 11 and the rest does not modify the purpose or application of Article of War 11.

Section 43a of the Manual for Courts-Martial emphasizes the importance of defense counsel. It states "He will be carefully selected." It provides for action in the event of the unfitness of the defense counsel, it provides for the excuse from attendance during the trial of such personnel of the defense as will not be required "with the consent of the accused."

Section 43b of the Manual provides:

> "* * * When the defense is in charge of a counsel of the accused's own selection, civil or military, the duties of the defense counsel as associate counsel are such as the selected counsel may designate."

It further provides:

> "* * * Unless the accused otherwise desires the defense counsel will undertake the defense without waiting for the appointment or the retaining of any individual counsel."

It seems clear that the intent of the foregoing is that there shall be defense counsel available, that he may be excused only with the consent of the accused and unless halted by the accused he shall undertake the defense until relieved by the selection of individual counsel.

Looking to the language of Article of War 11 itself no difficulty is apparent in determining its purpose and intent. The phraseology is clear and in no way obscure. The direction that a defense counsel be appointed for each general and special court-martial by the appointing authority is plain and unequivocal. In Early v. Doe, 16 How. 610 at p. 617 the court said:

> "* * * Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning * * *."

In Avery v. Commissioner, 292 U.S. 210, at p. 214 the court held:

> "* * * And unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them according to their usual acceptation."

and in Old Colony Company v. Commissioner, 301 U.S. 379 at p. 383 the court stated:

"The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary. * * *."

Further examination of the second paragraph of the 8th Article of War discloses the language thereof to be in part as follows:

"The authority appointing a general court-martial shall detail as one of the members thereof a law member * * *."

Comparison of the language quoted from the 8th Article of War with that quoted from the 11th Article of War discloses them to be closely alike in phraseology and identical in expression of purpose and intent, that is in making a positive statement that a certain thing "shall" be done. That portion of the 8th Article of War which directs the detail of one of the members of a general court-martial as law member thereof has been held so many times to be mandatory in its provision and failure of compliance therewith to constitute fatal error and render the action of a general court-martial to which a law member has not been appointed to be void as not to require citation of such holdings. While it may be urged that the accused was represented by individual counsel and that his individual counsel had at one time been appointed defense counsel for this general court-martial, the fact remains that when the charges were served on the accused and thereafter throughout the course of the trial, the general court-martial before which he was tried was without a defense counsel through no act on his part. The conclusion is inescapable that the provision of the 11th Article of War directing the appointment of defense counsel for a general or special court-martial is mandatory and that failure to appoint a defense counsel for the general court-martial which tried the accused constituted fatal error, that the court was without jurisdiction and its action in trying the accused was void.

8. For the reasons herein stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

Thomas J. O'Neil, Judge Advocate.

Claire W. Hardy, Judge Advocate.

Edward J. Thomson, Judge Advocate.

DEC 4 1946

JAGN-CM 313709 1st Ind
WD, JAGO, Washington 25, D.C.
TO: Commanding General, Western Base Section, APO 513, c/o Postmaster, New York, N. Y.

1. In the foregoing case of Private First Class Medardo Velarde (38168627), 985th Ordnance Depot Company, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be disapproved.

2. It is my view that the pertinent provisions of Article of War 11 are mandatory and that failure to comply therewith deprived the court-martial of the power to try the case.

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 313709).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

AUG 21 1946

JAGQ CM 313721

UNITED STATES	)	EIGHTH ARMY
v.	)	Trial by G.C.M., convened at Nagoya, Honshu, Japan, 18 and 26 March 1946. To be hanged by the neck until dead.
Private First Class THOMAS R. ALSTON (33957455), 875th Port Company.	)	

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 soldier above named 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 92d Article of War.

Specification: In that Private First Class Thomas R. Alston, 875th Port Company, 469th Quartermaster Battalion (Mobile) did, in the neighborhood of Sakae Machi Street, Nagoya, Honshu, Japan, on or about 1830, 11 February 1946, with malice, aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Roosevelt McDaniel, a human being, by shooting him with a .45 Calibre, automatic pistol.

Accused pleaded not guilty to, and was found guilty of, the Specification and the Charge. No evidence of previous convictions was introduced. The accused was sentenced to be hanged by the neck until dead, all the members of the court present concurring therein. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Special Plea as to Sanity of Accused. When the court originally convened on 18 March 1946, defense counsel moved for a continuance on the ground that the accused should be transferred to a general hospital for detailed study and neuropsychiatric evaluation. In support of this motion the

defense produced the testimony of Captain William G. Carmen, the neuropsychiatrist of the 35th Station Hospital (R 5) and Lieutenant Colonel Victor T. Sullivan, commanding officer of the 35th Station Hospital (R 13), after which the court granted the motion (R 17). The court reconvened on 26 March 1946, at which time Captain Carmen testified that he had taken accused to the 13th General Hospital (R 19) and had him examined by the clinical psychologist (R 20). Based on these tests and on fifteen days of personal observation, the conclusion of this witness was that accused was so far free from mental defect, disease or derangement as to be able, concerning the act of murder, to distinguish at the time of the act right from wrong and to adhere to the right, that accused had sufficient mental capacity to cooperate in his own defense and trial by court-martial, that accused is feeble-minded and has a mild impairment of responsibility toward the commission of the act due to his low intelligence and mental age of ten years and that accused is sane (R 21, 22).

4. Evidence for the Prosecution. Yoshiko Yokoi, a 25 year old (R 55) Japanese woman testified that she had known accused for about a month and had slept with him almost every evening and that accused proposed to her. She had seen the deceased (Roosevelt) only once before (R 53) and had never slept with nor spent an afternoon or evening with him. The only time she had seen him was when deceased sold her cigarettes and candy (R 54) in November (R 55). On the afternoon of 11 February 1946, Yoshiko and her sister got off a streetcar at Takakura Station (R 51) and started into the hall. Deceased came up, took hold of her arm and pulled her into a room near the station. Three other girls came into the tearoom and deceased slapped their faces, so Yoshiko and her sister left the tearoom without deceased. Yoshiko's baby started to cry on the way home so she and her sister stopped in another restaurant or tearoom to get the baby something to eat. The sister left and took the baby home (R 52). Deceased then came into this tearoom and stood by Yoshiko for about ten minutes and warmed up by the fire (R 54). At that time deceased's breath smelled of wine but he was not drunk. Deceased grabbed her right hand, "but I told him 'No' because I was ready to go home." Yoshiko had not planned to meet accused in the tearoom but he came in (R 55) drunker than she had ever seen him before. Yoshiko "told Roosevelt that Thomas is my friend but Roosevelt still insisted me to be friends with Roosevelt but I told him that I can't be friends with him. Then he (Roosevelt) slapped me in the face." Accused saw this and said something to deceased which Yoshiko did not understand but she thought they were angry at each other. Accused always behaved himself and never bothered anyone (R 56). Yoshiko and accused started to leave the restaurant. Accused pulled a pistol with a barrel six or seven inches long out from under his belt (R 52). Yoshiko became scared, started to run and deceased followed her grabbing her wrist. She pulled loose and ran into a machine shop close by. While in the machine shop she heard the shooting but didn't see it and then ran back home (R 53). Yoshiko heard two shots about two or three minutes after she broke away and ran (R 57).

Sergeant Watts testified that on 11 February 1946 he was walking north on Sakae Machi Street with Technician Fifth Grade Scott shortly before seven o'clock in the evening and that they passed some men in the dark who were arguing. After walking about two hundred yards farther (R 40) he heard "about four" shots (R 42). The witness stopped and just then a man in uniform came running by. He then heard a yell for help and went back to where the MPs were (R 40) and saw a soldier lying on the street on his face and helped the MPs put this soldier in a weapons carrier (R 41). Technician Fifth Grade Scott testified he was with Sergeant Watts at this time, heard someone arguing on the other side of the street, heard someone start shooting over there and saw a man run from around the corner (R 42) coming from where he heard the shots. He could not identify the runner except that he was a colored man in uniform. The witness went back across the street where he heard the man hollering for help. The MPs were bent over this man who was lying face down on the ground with a bullet hole through his back through his field jacket about five inches above the belt in approximately the center of his back (R 43). It was pretty dark at that time (R 44).

Captain George Rumer, Medical Corps, testified that he was the surgeon on call at the 35th Station Hospital at Nagoya on 11 February 1946 (R 23, 25). Deceased Roosevelt McDaniel, who was in the military service (R 24), was brought into the hospital between 1900 and 1905 and the witness first saw him at 1910 (R 25). Upon examination of McDaniel the diagnosis was gunshot wound of the abdomen, wound of entrance in the left back, posterier about the level of the second or third vertebrae, with the bullet lying in the anterior abdominal wall, no wound of exit, pulse of 120 due to loss of blood and blood pressure just below 100 due to hemorrhage. When first examined McDaniel was conscious and in pain and moved around on the litter but about 1920 quieted down. Based on this examination the doctor then thought McDaniel would die within half an hour and that if surgery were attempted to remove the bullet he would die immediately. Plasma was administered (R 26).

Between 1920 and 1925 CID Agent Mechling came in and he and the doctor had a conversation with McDaniel (R 28). As to deceased's condition at that time the doctor testified "In my opinion death was imminent." "In my opinion at . . . about 1920, the patient realized that he was not in good condition because . . . he was becoming . . . semi-conscious. Before that he was conscious, moving around, but about 1920 he started to become semi-conscious and . . . it was definitely not easy to get a response from the patient by, for instance, . . . using the needle to inject plasma into him. ... I think the deceased knew that he wasn't doing too well, purely my own opinion" (R 30).

In the doctor's opinion there was then no chance that the patient might recover but "I can not state definitely that the patient knew absolutely that he was going to die" (R 32). The doctor repeated the CID agent's question to the patient because he was leaning over him attempting to keep the plasma going in (R 31). Over objection by the defense the doctor was then permitted to testify (R 33):

"Well, in response to any questions which may have been put, the deceased gave one word, the name 'Thomas,' period, and then after that repeated '875.' I personally wasn't sure whether I heard what the middle number was and I asked him to repeat it and he went, '875.' That is all the deceased said."

At about 1930 McDaniel passed from consciousness to unconsciousness and was given adrenalin to help the heart and from 1935 to 1955 was given pressure with an oxygen machine (R 34). At 1955 McDaniel died (R 27).

Captain Rumer further testified he was present at the autopsy of deceased on 12 February 1946, that the cause of death was gunshot wound of the abdomen, secondary cause hemorrhage (R 24). This was the only bullet hole in deceased. The wound of entrance was at the left back approximately at the belt. The shot ranged up and toward the right and the bullet was lying in the right upper abdominal wall about half way between the belt and the breast pocket. It did not come clear through (R 25). The bullet removed from deceased was approximately .45 caliber (R 24, 34) gave no evidence of having struck any hard object other than the body itself and made a round wound of entrance that would not have been made by a ricochet bullet (R 34). There was no evidence of any other injury to deceased other than that caused by the gunshot wound (R 35).

A sworn extra-judicial statement made by the accused was admitted in evidence (R 51, Pros. Ex. 1). It reads:

"I left my company area about 1800 hours, 11 February 1946, and walked across eastward to Sakae machi Street. When I reached Sakae-machi Street I saw my girl, Yoshiko, sitting in a little restaurant with Roosevelt McDaniel. I called to her and she came out. I said 'Let's go to the house.' She replied, 'Yes'

"Then Roosevelt McDaniel came out of the restaurant and said to me, 'I don't bother you when you're with her.'

"I replied, 'I'm not bothering you.'

"McDaniel was hanging on to my girl, Yoshiko, who was trying to get away. After a while I left and saw Roosevelt McDaniel and Yoshiko walk around the corner and up the little street by the restaurant. I walked across the street and two soldiers stopped me and asked where I was going. I told them I was going to my gals house. I walked across the bridge. When I was on the other side I heard a shot. I didn't know who was shooting. I then went down the right bank of the road, crossed the railroad tracks, went under the bridge and walked up the bank behind the restaurant. I had a .45 Cal. automatic pistol in the belt of my trousers. I had bought the .45 from one of the men in my company, I don't know his name but I would recognize him if I saw him again.

"As I walked up the bank I pulled the pistol out of my belt. When I got on top I saw Roosevelt McDaniel standing in the center of the road. I aimed at him and fired about four shots. Then I took off to my company area.

"When I got there I threw the pistol I'd fired at McDaniel into the canal from beside the latrine. Then I went in to my cot."

The accused is in the military service of the United States (R 44).

5. Evidence for the Defense. Other than the evidence as to sanity discussed in paragraph three, the only evidence offered by the defense was the following unsworn statement made by the accused through defense counsel (R 60):

"I was drunk at the time and had been drinking all afternoon and evening. I saw him, Roosevelt, push the girl and I thought he was trying to pull her into the hotel. At that time I thought he was going to try to rape her or hurt her in some other way. Then I fired the pistol to try and scare him away from her. I didn't try to hit him. I only tried to scare him away. After I saw him fall down, I became frightened at what happened and ran away. I fired only to try and scare him, to keep him from trying to rape her."

6. Murder is the killing of a human being with malice aforethought and 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 (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 (1 Wharton's Criminal Law (12th Ed., 1932), sec. 426, pp. 654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec. 44, p. 905, sec. 79b, pp. 943-944).

The proof required to support a finding of guilty is laid down in the Manual for Courts-Martial as follows:

"(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that death took place within a year and a day of such act); and (b) that such killing was with malice aforethought" (MCM, 1928, par. 148a, p. 164).

The evidence in this case is conclusive that accused shot Private First Class Roosevelt McDaniel with a .45 caliber automatic pistol and that McDaniel died about an hour later in consequence of this gunshot wound inflicted by the accused. That the accused acted with malice aforethought is established by the evidence that accused was the aggressor, that accused pulled the pistol from his belt and that it was at least two or three minutes later that the shots were fired. It is apparent that accused was motivated by a calculated intent to prevent the deceased from associating with the woman Yoshiko with whom accused was engaged in a meretricious relationship. The shooting was not to protect Yoshiko, for she was no longer present when the shots were fired. That the shooting was not the result of hot blood or a sudden afray is established by accused's own sworn statement that:

> "McDaniel was hanging on to my girl, Yoshiko, who was trying to get away. After a while I left and saw Roosevelt McDaniel and Yoshkio walk around the corner and up the little street by the restaurent. I walked across the street and two soldiers stopped me and asked where I was going. I told them I was going to my gals house. I walked across the bridge. When I was on the other side I heard a shot. I didn't know who was shooting. I then went down the right bank of the road, crossed the railroad tracks, went under the bridge and walked up the bank behind the restaurent. I had a .45 Cal. automatic pistol in the belt of my trousers.
>
> * * *
>
> "As I walked up the bank I pulled the pistol out of my belt. When I got on top I saw Roosevelt McDaniel standing in the center of the road. I aimed at him and fired about four shots. Then I took off to my company area."

From this statement it is clear that accused went looking for deceased and when he found him alone in the road shot at him four times. The fact that deceased was shot in the back negatives any element of self-defense, and accused makes no claim that he shot in self-defense. Accused's unsworn statement that he shot only to frighten the deceased and to prevent him from raping Yoshiko was properly disbelieved by the court. It is not only inconsistent with accused's own previous statement but is inconsistent with the established facts. When deceased was shot he was standing in the center of a public road alone with his back to the accused and Yoshiko was not present.

Consideration must be given to the propriety of the admission in evidence of the dying declaration in this case. A closely parallel case is (CM 228571, Dockery, 16 BR 249, 253, 256) in which the Board of Review considered the circumstances surrounding the dying declaration and held it property admissible in the following language:

"Burrell [the deceased] was taken to the infirmary and from there to the station hospital, reaching the latter place about 12:45 a.m., October 19. He was treated and operated upon promptly but died about 7:25 the same morning.

"Upon his admission to the hospital Burrell was in a 'critical' and 'very sericus condition'. A medical officer testified that,

> 'He was anxious, apprehensive and in very considerable pain. He was also in a mild state of shock; and he was in a very, very uncomfortable condition generally'.

He was not informed that he was about to die but was told that he had 'a very serious abdominal wound'. The medical officer testified that he believed a normal individual 'would have had cause to appreciate and realize impending death under such circumstances'. Within about five minutes after his admission, at about 12:47 or 12:50 a.m., he was questioned by the medical officer and made statements as to what had occurred. The medical officer, over objection by the defense, was permitted to testify to these statements, including a statement that following the obscene remarks exchanged in the latrine, accused,

> 'ran from the room, saying he was going to get a rifle and return to the barracks and chase Private Burrell and shoot him'

* * *

". . . To authorize the admission of a dying declaration the victim must have been,

> 'in extremis and under a sense of impending death, i.e., in the belief that he was to die soon; though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown' (par. 148a, MCM).

Whether a deceased person feared impending death ordinarily must be proved by circumstantial evidence. In the present case Burrell was in extremis and the circumstances under which the statement was made, as related above, clearly warranted the inference that he did in fact fear impending death. The declaration was properly admitted."

In this case the deceased did not say "I expect to die" or make any declaration at all on the subject. However, the dying declaration was made not more than one-half hour before death and at a time when the deceased was passing from consciousness to unconsciousness and the attending medical officer believed it was impossible for the patient to live more than a half hour. The Manual for Courts-Martial states that the fact that the person is under an impending sense of death may be shown otherwise than by a statement of the person himself that he speaks under this impression (Par. 148a, p. 164). This must mean that there are cases in which the surrounding circumstances alone are sufficient to establish that the victim spoke while under an impending sense of death. It is difficult to imagine a case in which there could be stronger surrounding evidence impelling the conclusion that the victim so spoke. That the victim here was in fact in extremis is beyond question. Accordingly, the Board of Review is of the opinion that the dying declaration was properly admitted in evidence. "Thomas, 875," being the first name of the accused and the number of his organization is sufficiently intelligible to be of evidentiary value. However, the guilt of the accused does not hang by this thin thread. Without the dying declaration the corpus delicti that there had been a homicide committed was amply established by other evidence. The corpus delicti having been established, even though the accused was not connected therewith, the sworn statement of the accused was then properly admitted in evidence (CM 266219, Mills, 43 BR 183, 186). In this sworn statement deceased admits that it was he who fired the fatal shot.

7. The charge sheet shows accused is 20 years old, was inducted 1 November 1944 at Baltimore, Maryland, and had no prior service. The character of accused's military service was stated by his immediate commanding officer to be "satisfactory."

8. 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 of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

Seymour G. Wenkel, Judge Advocate

T. Wayne Olver, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 313721 1st Ind

WD, JAGO, Washington 25, D. C. SEP

TO: The Under 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 First Class Thomas R. Alston (33957455), 875th Port Company.

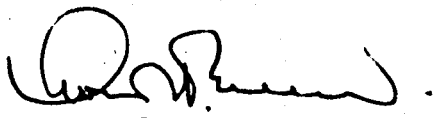
2. Accused was found guilty of murder, in violation of Article of War 92, and was sentenced to be hanged by the neck until dead. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

3. Accused found deceased, another soldier, in a tearoom with a Japanese woman with whom accused had been conducting a meretricious relationship. As the woman started to leave the tearoom with accused, the deceased tried to hold her by the arm. Accused, who was somewhat drunk, pulled a pistol. The woman broke away and ran to a machine shop nearby where, about two or three minutes later, she heard two shots fired. Accused stated that he left the tearoom alone and after a circuitous walk found the deceased standing alone in the middle of a street and shot at him to frighten him and to keep him from raping the woman. The deceased was shot in the back and the woman was not present at the time.

4. The accused is a colored soldier 20 years of age who was inducted 1 November 1944 at Baltimore, Maryland. He had no prior service. A Board of Medical Officers diagnosed the accused as feeble-minded with a mental age of ten years, with a mild impairment of responsibility toward the commission of the act due to his low mentality but that accused was sane and was so far free from mental defect, disease or derangement as to be able, concerning the act of murder, to distinguish at the time of the act right from wrong and to adhere to the right and had sufficient mental capacity to cooperate in his own defense.

5. In view of all the circumstances, the youth and previous good record of accused, I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, confinement at hard labor for the term of the natural life of accused, and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

6. 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.



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Dft ltr for sig USW
3. Form of Executive action

(G.C.M.O. 310, 18 October 1946).

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

JAGK - CM 313723

3 OCT 1946

UNITED STATES	)	CONTINENTAL DIVISION AIR TRANSPORT COMMAND
v.	)	
Captain E. M. BASSETT (0-671850), Air Corps	)	Trial by G.C.M., convened at Love Field, Dallas, Texas, 3 and 4 April 1946. Dismissal, total forfeitures and confinement for six (6) months.

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 upon the following Charges and Specifications:

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

Specification: In that Captain E. M. Bassett, Squadron B, 555th Army Air Forces Base Unit, (5th Ferrying Group), Ferrying Division, Air Transport Command, did, without proper leave absent himself from his station at Love Field, Dallas, Texas, from about 16 October 1945 to about 31 October 1945.

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

Specification 1: In that Captain E. M. Bassett, ***, did, at Dallas, Texas, on or about 13 July 1945, with intent to defraud, wrongfully and unlawfully make and utter to Major Samuel Curcio, a certain check, in words and figures as follows, to wit:

THE OFFICERS MESS
5th Ferrying Group F.D.A.T.C.
Love Field, Texas
July 13, 1945

Name of Bank Republic National Bank

City Dallas, Texas

PAY TO THE ORDER OF Major Samuel Curcio $ 50.00

Fifty and no/100 DOLLARS

For value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof.

Signature E. M. Bassett

Squadron B Serial No. 0-671850

and by means thereof, did fraudulently obtain from the said Major Samuel Curcio fifty dollars ($50.00), lawful money of the United States, he the said Captain E. M. Bassett, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check.

Specification 6: (Finding of not guilty).

Specification 7: (Finding of not guilty).

NOTE: Specifications 2,3,4,5,8,9,10, and 11 differ materially from Specification 1 only as to the date, amount of check, person receiving check, name of drawee bank (applies only to Specification 11), as indicated below:

Specification	Date	Amount of check	Person receiving check
2	13 July 45	$ 50.00	William Henry, Jr.
3	13 July 45	100.00	Nedry V. Burris
4	13 July 45	100.00	Nedry V. Burris
5	13 July 45	40.00	Nedry V. Burris
8	8 August 45	35.00	Reno Club
9	22 October 45	25.00	T. C. Calk
10	23 October 45	37.65	Mrs. W.J. Sullins
11	25 June 45	954.31	Lone Star Olds Cad Co. (Drawee Bank: Medina Valley State Bank, Devine, Texas)

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification, guilty of Charge II and Specifications 1,2,3,4,5,8,9, 10 and 11 thereunder, and not guilty of Specifications 6 and 7 of Charge II. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to six months and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the law and the evidence

contained in the Staff Judge Advocate's review except that portion of paragraph 4 which pertains to the maximum confinement which might be imposed in the case.

4. War Deparment records show the accused to be 28-3/12 years of age and married. He is a high school graduate and attended Southwestern Texas State Teachers College for one year. He enlisted in the Army 22 July 1940 and attained the rank of corporal before becoming a flying cadet. On 16 February 1943 he was appointed and commissioned a second lieutenant, Air Corps, Army of the United States, and entered upon active duty on the same day. On 1 April 1944 he received a temporary promotion to first lieutenant and on 1 February 1945 he received another temporary promotion to captain. On 23 September 1944 he was awarded the Air Medal for meritorious achievement by participating in more than one hundred fifty hours of operational flight as pilot of transport aircraft over Assam-China air routes from 31 October 1943 to 12 February 1944. His efficiency report from 1 July 1944 to 31 December 1944 is excellent and from 1 January 1945 to 30 June 1945 very satisfactory.

5. The court was legally constituted and had jurisdiction over the person 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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96.

Charles D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lebrecht, Judge Advocate

JAGK-CM 313723 1st Ind

WD, JAGO, Washington 25, D. C. OCT 1 0 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 Captain E. M. Bassett (O-671850), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 16 October 1945 to 31 October 1945, in violation of Article of War 61, and guilty of nine specifications alleging the making and uttering of nine checks, and fraudulently obtaining the proceeds, in the total sum of $1441.96, drawn on two different banks where he did not have and did not intend to have sufficient funds to meet them, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to six months and forwarded the record of trial for action under Article of War 48.

3. A summary of evidence may be found in the Staff Judge Advocate's review which was adopted by 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 sentence as approved by the reviewing authority and to warrant confirmation thereof.

The accused was absent without leave from his organization and station, Love Field, Texas, for the period 16 October 1945 to 31 October 1945. Between 25 June 1945 and 23 October 1945 the accused made and uttered nine separate checks raging from $25.00 to $954.31. The first check in the sum of $954.31 was for repairs to his automobile. Accused had no account in the drawee bank. Three checks on another bank totaling $140.00 were given to cover wagers made in a poker game. One check for $50.00 was given for cash while participating in a poker game. One check was given to pay a pre-existing debt and for cash. All other checks were given for cash. All the latter checks were returned by the drawee bank because of insufficient funds.

4. Accused has rendered himself unworthy of any trust and should be eliminated from the service. I recommend that the sentence as modified by the reviewing authority be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

5. Consideration has been given to letters addressed to the President on behalf of accused by Mrs. W. E. Bassett, mother of the accused, and by George Mitchell, MD., and to a letter from accused addressed to the President.

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

5 Incls
1. Record of trial
2. Form of action
3. Ltrs fr George W. Mitchell, dtd 25 Apr 46, w/incls and ltr dtd 29 Apr 46, w/incl
4. Ltr fr Mrs. Bassett to President
5. Ltr fr acc'd to President dtd 4 Apr 46

(G.C.M.O. 330 , 31 October 1946).

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

JAGN
CM 313737

U N I T E D S T A T E S	)	UNITED STATES ARMY FORCES WESTERN PACIFIC
v.	)	
Lieutenant Colonel RALPH W. DEMPSEY (0-1548041), Ordnance Department.	)	Trial by G.C.M., convened at Headquarters Base X, APO 358, c/o Postmaster, San Francisco, California, 17 April 1946. Dismissal, total forfeitures and confinement for three (3) years.

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 Charges and Specifications:

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

Specification: In that Lieutenant Colonel Ralph W. Dempsey (then Major), MPC, AFWESPAC, did, at Manila, P.I., on or about 11 January 1946, knowingly and willfully apply to his own use and benefit one (1) GMC Truck Engine Assembly of the value of about $282.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Lieutenant Colonel Ralph W. Dempsey (then Major), MPC, AFWESPAC, did, at Manila, P.I., on or about 29 December 1945, wrongfully and without proper authority have in his possession one (1) Caterpillar D7 Bulldozer of a value in excess of $50.00; one (1) Allis-Chalmers Generator of a value in excess of $50.00; one (1) ONAN Generator of a value in excess of $50.00; one (1) Kellogg Air Compressor of a value in excess of

$50.00; and (1) Lathe of a value of in excess of $50.00; one (1) portable Circular Saw Mill of a value in excess of $500.00; one (1) Air Compressor of a value of about $275.00; forty-seven (47) oxygen tanks of a value in excess of $50.00 and one (1) rectifier of a value of about $40.00; of a total value in excess of $115.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Lieutenant Colonel Ralph W. Dempsey (then Major), MPC, ASWESPAC, did, at Manila, P.I., on or about 29 December 1945, wrongfully and without proper authority have in his possession one (1) Waukesha generator of a value in excess of $50.00 and twelve (12) GMC Truck Engine Assemblies of a value of about $3384.00; of a total value in excess of $3434.00, property of the United States furnished and intended for the military service thereof.

He pleaded guilty to, and was found guilty of, all charges and specifications. No previous convictions were considered. 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 three (3) 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: The property described in the Specification of Charge I and Specifications 1 and 2 of Charge II, of the value alleged, was found on the premises of the Miles Timber and Transport Corporation, Manila, Philippine Islands, then under the control and in the possession of the accused, who was manager of the corporation. The property described was the property of the United States and had been taken to the premises by various persons, without legal authority (R. 8; Pros. Ex. A). The accused knew of the presence of the property before discovery by representatives of the Criminal Investigation Division (R. 8).

The truck engine assembly described in the Specification of Charge I, value about $282.00, was one of the twelve (12) engine assemblies described in Specification 2, Charge II, and was installed, with the accused's knowledge, in a truck purchased by the accused from the Foreign Liquidation Commission (R. 8; Pros. Ex. A). At the time of its installation, the accused knew that the truck engine assembly was property of the United States intended for the military service (R. 8).

4. Evidence for the defense: Mr. Stewart Tait, 88 Inverness Street, Sta. Ana., Manila, a merchant in the Philippines for over forty-two years, testified that he had known the accused for many months and had leased him the premises which were used as a depot by the Miles Timber and Transport Corporation (R. 10-12). Mr. Tait had many other opportunities to lease the premises to more substantial business concerns but accepted the accused's offer because he liked him personally. According to Mr. Tait: "My personal opinion as to his character is that he is one of the finest men I have met * * *. I admired his initiative and determination to make good * * *. I know him to be one of the hardest working men I have ever met in the Philippines" (R. 10, 11).

Colonel Harry Adamson, Headquarters, United States Army Forces, Western Pacific, testified that he had known the accused since October of 1944 when the two met on Bougainville Island and that the accused's character was, in his opinion, "above reproach" (R. 12, 13).

Mr. Prentice M. Miles, President, Miles Timber and Transport Corporation, apprized the court of his efforts in organizing the corporation bearing his name, following his liberation from Los Banos Internment Camp, where he was a prisoner during the Japanese occupation. A memorandum, dated September 11, 1945, from a Mr. Charles A. Gwin of the Foreign Economic Administration to a Mr. George L. Bell relative to Mr. Miles' assistance to the liberation forces and his efforts to furnish building materials, was identified by the witness and received in evidence by stipulation (R. 15, 16). The memorandum made reference to unfulfilled promises by the Foreign Economic Administration to furnish Mr. Miles "one truck and perhaps two," and expressed Mr. Gwin's" * * * hope that Mr. Miles will be given * * * consideration by this office and that representations will be made to the Army requesting whatever assistance they may be able to offer in the way of sawmill equipment, trucks, boats, etc. * * *" (R. 15, 16). Mr. Miles testified that early in December he had deposited P10,000 with the USCC, successor to the Foreign Economic Administration, for the immediate delivery of a sawmill but that he did not receive it until 26 March 1946. In November of 1945, Mr. Miles asked the accused to work with him, thinking that he could possibly "go thru the 'red tape,'" in procuring equipment. The accused thereafter purchased fifty inoperable trucks for P75,630.00. Mr. Miles testified further that the accused " * * * had complete charge of the running of this [Miles Timber and Transport Corporation] business."

After assurance by the defense counsel and a statement by the accused, that the latter had been apprized of his rights, he elected to testify in his own behalf (R. 19). He related that he was a logging engineer before entering the Army and had been asked by Mr. Miles in October or early November of 1945 if he wanted to "sign off," or be released from active duty in the Philippines, and pursue his civilian occupation. The accused accepted Mr. Miles' offer, starting his

terminal leave on 19 December 1945, and becoming general manager, second vice-president and stockholder in the Miles Timber and Transport Corporation. Extensive efforts were made to procure equipment from such federal agencies as the USCC and the FIC, but these proved futile-"it seemed impossible to get the equipment needed through regular channels." As a consequence, the necessary equipment "was contributed to me /the accused/ by my friends in the Army." He had been in Manila doing ordnance work for one year and with "the Forestry Battalion" for three or four months of this period. Nothing was paid for the equipment his friends contributed (R. 20, 21). The accused identified his Army 66-1 record, which was received in evidence by stipulation (R. 21, 22). It disclosed that the accused had all "excellent" or "superior" efficiency ratings and had served overseas since 23 January 1943. Also, that he had four battle stars /Guadalcanal, Northern Solomons, Bismarck Archipelago, and Luzon, Philippine Island/, and had been awarded the Bronze Star, and the Military Merit Medal of the Commonwealth of the Philippines (R. 21, 22).

During examination by the court, the accused testified that on or about 11 January 1946 he "took possession of a block of 50 GMC trucks in which /he/ had been a successful bidder with FIC." The motor on one such vehicle being "completely frozen," and inoperable, the accused replaced it with a new government motor, value about $282.00, which had been "donated" by one of his friends (R. 23). As to the "contributions" generally, according to the accused, "I encouraged to the point that I never rejected any equipment that I could possibly use if they were brought to my place * * *." He did not "* * * solicit contributions to the extent of going or visiting units under the charge of * * * friends and asking them for the equipment they were in charge of. It was more or less, informal, and it was brought up that I could use anything to repair GMC trucks." He did not pay for any of the equipment. The accused admitted while testifying that he did everything alleged in the Specification of Charge I and Specifications 1 and 2 of Charge II (R. 24, 25).

The testimony of Mr. C. A. DeWitt, Attorney, Manila, Philippine Islands, and Mr. W. C. Libby, United States Commercial Company in Manila (successor to the Foreign Economic Administration) was introduced by stipulation (R. 26, 27). That of the former related to Mr. Miles' part in the liberation of the Philippines, the incorporation of the Miles Timber and Transport Corporation, and the "great efforts" Mr. Miles had made to secure mill equipment from the United States Commercial Corporation (R. 26, 27). The testimony of Mr. Libby also indicated the steps taken by Mr. Miles, and the accused, who accompanied him on several occasions, to procure equipment through and from federal agencies (R. 27, 28).

5. The specification of Charge I, alleges that the accused knowingly and willfully applied to his own use and benefit one (1) GMC Truck Engine Assembly, of a value of about $282.00, property of the United States, furnished and intended for the military service.

Proof required to support a conviction for this offense is as follows:

> "(a) That the accused * * * applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or 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, p. 185.

The manner in which accused obtained possession of the motor assembly is not material to the question of its misapplication. CM 243287, Poole, 27 BR 321.

From the accused's plea of guilty, the stipulated testimony introduced by the prosecution and his admissions on the witness stand, it is evident that he is chargeable with the installation of an engine assembly belonging to the United States into a vehicle owned by a corporation of which he was manager, officer and a stockholder. Thus, it is clear that the legal requirements above set forth are fully satisfied and that the evidence of record supports the findings of guilty of this Charge and its Specification.

Specifications 1 and 2 of Charge II, alleging the wrongful and unauthorized possession of government property, are cognizable as offenses prejudicial to good order and military discipline, and violative of Article of War 96. As to these specifications, also, the accused's plea of guilty, supplemented by the stipulated testimony adduced by the prosecution and the accused's admission while a witness, establishes their commission beyond any reasonable doubt. The record is accordingly legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge II.

6. The accused is 30 years of age. War Department records show that he served as a private in the 3rd Ordnance Company (MM) before attending Officers' Candidate School and being commissioned as a Second Lieutenant in the Army of the United States on 23 May 1942. He was promoted to First Lieutenant on 17 September 1942, to Captain on 1 April 1943, to Major on 23 December 1943 and to Lieutenant Colonel (terminal leave promotion) on 26 January 1946. Prior to the expiration of the accused's terminal leave (14 April 1946), he was, on 4 March 1946, recalled to active duty.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal and confinement are authorized upon conviction of a violation of Articles of War 94 and 96.

Wilmot T. Baughn, Judge Advocate

Robert J. Clauer, Judge Advocate

Gerald Dotten, Judge Advocate

JAGN-CM 313737 1st Ind
WD, JAGO, Washington, D. C.
TO: The Secretary of War JUL 30 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 Lieutenant Colonel Ralph W. Dempsey (0-1548041), Ordnance Department.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, the misapplication of one motor engine assembly, value about $282.00, property of the United States furnished and intended for the military service, in violation of Article of War 94; and two specifications involving wrongful unauthorized possession of miscellaneous government property furnished and intended for the military service, including three generators, two air compressors, a lathe, a circular sawmill, oxygen tanks, a rectifier, one generator and twelve GMC truck engine assemblies, of a total value of $4,499.00, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused, as manager, officer and shareholder with the Miles Timber and Transport Corporation, leased premises in Manila. Thereafter he purchased fifty GMC trucks from a federal agency for approximately $37,000. Some of these vehicles were in a bad state of repair. Certain "friends" of the accused who were in the military service "left" generators, compressors, sawmill equipment, twelve new engine assemblies, and other miscellaneous equipment, all property of the United States, on the premises leased by the accused. While he denied soliciting the property, accused admitted he had mentioned his need for the equipment to his "friends" on occasions. The property was found in the possession of accused about 29 December 1945. One of the new truck motors "left" on the premises was installed, about 11 January 1946, in one of the fifty trucks purchased, and the remainder of the property above described was found on the premises by Criminal Investigation Division representatives. Accused went on terminal leave, preliminary to relief from active duty, on 19 December 1945. Accused testified that he had experienced great difficulty in obtaining needed surplus property from the government.

4. After serving as an enlisted man, accused completed Officer Candidate School and was commissioned a second lieutenant in the Army of the United States. Shortly thereafter, he went overseas and served as an Ordnance officer in the Guadalcanal, Northern Solomons, Bismarck

Archipelago, and Luzon, Philippine Islands, campaigns. For his outstanding service, he was awarded the Bronze Star Medal, and the Medal for Military Merit of the Commonwealth of the Philippine Islands. While on terminal leave, he received a final promotion to Lieutenant Colonel. Four of the ten members of the court recommended remission of the confinement adjudged.

5. I recommend that the sentence be confirmed and ordered executed, and that an appropriate place of confinement be designated.

6. Consideration has been given to correspondence submitted by Honorable Wayne Morse, United States Senate, on behalf of accused, and a letter and cablegram submitted by Mr. Finley Gibbs, accused's civilian defense counsel.

7. 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 - Ltr. w/incl fr. Hon. Morse
4 - Ltr. fr. Mr. Finley Gibbs
5 - Cablegram fr. Mr. Finley Gibbs

(G.C.M.O 258, 16 August 1946).

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

SPJGK - CM 313772

29 MAY 1946

UNITED STATES v. Second Lieutenant ALVA W. PAYNE (0-788589), Air Corps.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 1 May 1946. Dismissal, total forfeitures and confinement for three (3) years.

OPINION of 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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Second Lieutenant Alva W. Payne, Squadron "V" (Basic Student), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 1 March 1946, wrongfully take from Private Homer Monroe the sum of $80.00 as consideration to him, Second Lieutenant Alva W. Payne, for obtaining passes for certain enlisted men to the prejudice of good order and military discipline.

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

Specification: In that Second Lieutenant Alva W. Payne, ***, did, at Keesler Field, Mississippi, on or about 1 March 1946, wrongfully take from Private Homer Monroe the sum of $80.00 as consideration to him, Second Lieutenant Alva W. Payne, for obtaining passes for certain enlisted men to the prejudice of good order and military discipline.

The accused pleaded guilty to and was found guilty of both Charges and their Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved "only so much of the sentence as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three (3) years" and forwarded

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

3. Evidence for the Prosecution.

At 1030 hours on 28 February 1946, at Keesler Field, Mississippi, Private Homer Monroe, according to his testimony, overheard one Private Watts say, in the presence of the accused and other enlisted men of accused's squadron, "The Lieutenant's bought a new car and we will kind of pitch in a little bit for a donation and he'll see about getting us a 3-day pass" (R. 7). Monroe then made up a list of names of enlisted men of his squadron who desired passes, each of whom had given him $3.00 to be applied in payment for the passes. When Monroe approached the accused on the matter, the accused said, "No, I'd better not. I might get in trouble." (R. 8) Monroe then returned the money to the persons who had given it to him (R. 8).

The next evening at the same place accused asked Monroe to bring him the list of names and he would see what he could do about it. Monroe made out a second list of names of enlisted men who desired passes and collected $3.00 from each person thereon, and again approached the accused who said, "I'll tell you what I'll do. $3.00 apiece is hardly enough. If you can make it $5.00, I'll see about fixing it up" (R. 8). Monroe collected an additional $2.00 from each person on the list, sixteen in number, and gave the whole sum of $80.00 to the accused. The accused thereupon instructed a clerk to type out passes for each man on the list and to sign one "F/O Blair's" name to them. The completed passes were given to Monroe who distributed them to the men on his list (R. 8). The accused had written "16 x 5 is 80" on the list (R. 9; Pros. Ex. 1).

On 7 March 1946 the accused said to Monroe, "It looks like we are in a jam," and suggested that the only way they could get out of it was for him to "put the money back in the drawer" (R. 9).

4. The charges were signed by accused's commanding officer on 6 March 1946 and the accused was interrogated by the investigating officer in connection therewith on that day.

5. Evidence for the Defense.

The accused, after being warned of his rights, made an unsworn statement through counsel (R. 14). Some time prior to 28 February 1946 an enlisted man in accused's organization suggested that accused should let the men in his organization help pay for the car he was buying. Accused asked the enlisted man whether or not he meant taking up a collection at the pay line the next day. This was all said in a joking way. The next day accused and the enlisted man were still joking about taking up a collection. There were a lot of men asking for passes and the same enlisted man laughed and said, "That is how to pay for your car." Accused then told the men that he would give them passes if they had enough money. That put a stop to the begging for passes and accused had no intention at that time of selling passes. Later, Private

Monroe came to him with a handful of money and suggested that the accused take it and get passes for the men. Accused refused to take the money and laughed at Monroe. Later on, Monroe approached the accused again and the other men kept talking about it, until finally accused weakened and permitted Monroe to get the money from the enlisted men.

> "*** His [Monroe's] story that he handed me the money is also absolutely false. He laid the money on the table in the Squadron Adjutant's office and walked out, and even then I was hesitant about taking it, but I guess it just looked too good. I had no sooner taken the money and the enlisted men had their passes until I knew that I had made a bad mistake" (R. 15).

Accused did not spend the money for the car. After his wife and child who had been living with him had gone home, he obtained a list with the proper addresses of the men who had paid $5.00 each and bought money orders in that sum and either delivered or mailed them to the men. The money orders were purchased and delivered or mailed on 30 April 1946 (Def. Exs. A-B, incl.). Accused did not repay the money before this time because he "wanted to be sure" his wife and child "were not going to be destitute" (R. 15). The trial commenced on 1 May 1946 and accused's wife and child had gone home a few days before that.

Captain Harvey F. Coleman, Squadron SB-22, 3704th Army Air Forces Base Unit, Keesler Field, Mississippi, testified that from 14 December 1945 to 14 February 1946 he was assistant to the Adjutant and later Adjutant of accused's squadron and had opportunity to observe accused's conduct as an officer. Speaking of the accused, Captain Coleman said, "I would say his conduct and efficiency was excellent to superior up until that time. Unquestionably, his conduct was of the finest. He carried on his duties in a proper manner" (R. 16). He also said that accused's conduct was above reproach and that his conduct with enlisted men was "firm but fair" (R. 16).

6. The evidence together with the pleas of guilty establishes that at the time and place alleged the accused asked for and accepted a bribe of $80.00 as consideration for the issuance by him of passes to sixteen enlisted men. This act was an offense in violation of Articles of War 95 and 96, for it seriously compromised his position as an officer, exhibited him as morally unworthy to remain a member of the honorable profession of arms, and was highly prejudicial to good order and military discipline.

7. It is not legally objectionable to charge the identical act as a violation of both Article of War 95 and some other applicable Article of War, provided such act amounts to conduct unbecoming an officer and a gentleman. However, accused may be sentenced only with reference to the most important aspect of his act. Since the offense here charged under Articles of War 95 and 96 and the respective specifications thereunder is tainted with

corruptness and moral turpitude, the Specification under Article of War 96 represents the more important aspect of the offense. "Any other interpretation would limit punishment to dismissal in cases so serious as to call for or at least to justify forfeitures and confinement" (CM 248104, Porter, 31 BR 137,143; 3 Bull JAG 237). It is therefore unnecessary to determine whether or not the offense falls within the provisions of the Federal bribery statute (U.S.C.C. Sec. 117, 18 U.S.C. 207; CM 248104, Porter, supra).

8. War Department records disclose that this officer is 23-1/2 years of age, is a high school graduate and has had no civilian employment. According to his testimony he is married and has one child. He entered the service on 28 January 1941, attaining the grade of sergeant prior to appointment as an aviation cadet on 29 November 1943. Upon successful completion of the prescribed course of training he was appointed and commissioned a second lieutenant in the Army of the United States on 28 October 1944.

9. 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon a conviction of a violation of Article of War 96.

William P. Kuder, Judge Advocate

Gilbert E. Hedges, Judge Advocate

Earl W. Wingo, Judge Advocate

JAGK - CM 313772 1st Ind

WD, JAGO, Washington 25, D. C. JUN 15 1946

TO: 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 Alva W. Payne (0-788589), Air Corps.

2. Upon trial by general court-martial the accused was found guilty of wrongfully taking from an enlisted man the sum of $80 as consideration to him for obtaining passes for certain enlisted men in violation of Article of War 95 (Charge I and Spec.) and of the same offense under Article of War 96 (Charge II and Spec.). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved "only so much of the sentence as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three (3) 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. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

The accused, on February 28, 1946, at Keesler Field, Mississippi, was approached by an enlisted man of his organization with the proposition that the accused should sell passes to help pay for the car he was buying. Accused acquiesced in this plan at this time but later that day refused to go through with it because he "might get into trouble." However, the accused, on the evening of 29 February 1946, at the same place, asked for and received a bribe of $80.00 as consideration for obtaining passes for sixteen enlisted men in his organization at a price of $5.00 each. The charges were signed by accused's commanding officer on 6 March 1946 and accused was interrogated by the investigating officer in connection therewith on that date. On 30 April 1946 accused bought money orders in the sum of $5.00 in favor of each of the sixteen enlisted men to whom he had sold passes and either delivered or mailed them to the men on that date. In an unsworn statement at the trial the accused declared that he had taken the money because "it just looked too good" and that he had not repaid the money until 30 April 1946 because he did not want his wife and child to become destitute. The trial was held on 1 May 1946.

4. The accused is 23-1/2 years of age, is a high school graduate and has had no civilian employment. He is married and has one child. He entered the service on 28 January 1941, attaining the grade of sergeant prior to his

appointment as aviation cadet on 29 November 1943. Upon successful completion of the prescribed course of training, he was appointed and commissioned a second lieutenant in the Army of the United States on 28 October 1944. While the offense of the accused is one involving moral turpitude and renders him particularly unfit to perform his duties as an officer in the Army, in view of his previous good reputation and honorable service, I recommend that the sentence be confirmed but that the period of confinement be reduced to one year. I also recommend that a United States disciplinary barracks be designated as the place of confinement.

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

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

(G.C.M.O. 202, 28 June 1946).

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

7 AUG 1946

JAGK - CM 313786

UNITED STATES v. Private First Class HARRY H. HOWARD (33794469) and Private ROSS WALKER, JR. (33750794), both 3109 Quartermaster Service Company.	4TH ARMORED DIVISION Trial by G.C.M., convened at Regensburg, Germany, 8, 9 and 16 February 1946. EACH: To be hanged by the neck until dead.

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

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

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

Specification: In that Private First Class Harry H. Howard, 3109th Quartermaster Service Company, did, at Neumarkt Germany, on or about 2230 hours, 5 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Clifford Poldo, 3109th Quartermaster Service Company, by shooting him with a rifle.

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

Specification: In that Private First Class Harry H. Howard, ***, did, at Neumarkt, Germany, on or about 2230 hours, 5 January 1946, with intent to do him bodily harm, commit an assault upon Private Roosevelt Cole Jr, 3109th Quartermaster Service Company, by shooting him in the leg with a dangerous weapon to wit, a rifle.

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

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

Specification: In that Private Ross Walker Jr, 3109th Quartermaster Service Company, did, at Neumarkt Germany, on or about

2230 hours, 5 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Clifford Poldo, 3109th Quartermaster Service Company, by shooting him with a rifle.

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

Specification: In that Private Ross Walker, Jr, 3109th Quartermaster Service Company, did, at Neumarkt Germany, on or about 2230 hours, 5 January 1946, with intent to do him bodily harm, commit an assault upon Private Roosevelt Cole Jr, 3109th Quartermaster Service Company, by shooting him in the leg with a dangerous weapon to wit, a rifle.

Each accused pleaded not guilty to but were found guilty of both Charges and their Specifications. No evidence of previous convictions was introduced as to Walker. Evidence was introduced of one previous conviction as to accused Howard by special court-martial for absence without leave for a period of less than one day in violation of Article of War 61. In the instant case each of the accused was sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved each of the sentences and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

At about 2100 on 5 January 1946, Private First Class Clifford Poldo and Private First Class Roosevelt Cole, Jr., both of 3109 Quartermaster Service Company, then on duty as Security Police, visited the Enlisted Men's Club of the 3109 Quartermaster Truck Company, located at Neumarkt, Germany, during a routine check of their area and in line of duty. While in the club Private First Class Poldo engaged in an altercation with an intoxicated soldier named Bennie Chapman and ordered Chapman to go to his quarters. In his intoxicated condition, Chapman did not "appreciate" the order and disputed with Poldo. A struggle ensued and Poldo struck Chapman one or more times on the head with the butt of his pistol, and from which blows Chapman fell to the floor. There were about ten other soldiers in the room who witnessed the incident and Poldo announced that someone should take Chapman to his quarters. One of the bystanders lifted Chapman from the floor and carried him out. Poldo told Corporal Foster, "if you need anybody to help you out of trouble at the Recreation Hall, just let me know," and then at about 2200 he and Private Cole left the hall to complete the patrol (R. 25,29). The accused, Private First Class Harry H. Howard and Private Ross Walker, were in the recreation hall at the time of the aforementioned incident (R. 29), although Private Walker was supposed to have been performing guard duty elsewhere (R. 10). There was considerable

resentment among the soldiers toward the Security Policeman, Private First Class Poldo, for the manner in which he had handled Chapman and "the fellows started talking among themselves" (R. 26-27). Shortly after 2200, as Sergeant William Harris proceeded to his quarters he met two soldiers, one of whom he identified as the accused Howard. They were carrying carbines. Sergeant Harris asked them where they were going and Howard stated, "We are going to tear this place down" (R. 21). Another soldier, Private Alfred Carr, testified that at 2215 hours, as he was leaving the "Rec' Hall" both of the accused entered the building carrying carbines (R. 28). They made a search of the building, fired one shot in the "beer house" and then one of the accused was heard to say, "he is not here but we'll find him" (R. 26).

At approximately 2300 hours, while Private First Class Poldo and Private Cole were sitting in their patrol car, a 1/4 ton 4x4 C&R car which they had parked on a street in Neumarkt, they were fired upon from the rear. "It sounded like two carbines firing at the same time" and Private Cole thought about 15 rounds were fired (R. 38-43). Private First Class Urbain R. Brunelle, 3109 Quartermaster Service Company, a witness for the prosecution, who was standing on the street near the "peep" when the firing occurred testified that two clips of ammunition were fired very rapidly and sounded like the shots were from carbines (R. 32). Immediately prior to the shooting this witness passed two GIs "back of the peep" some 35 yards and in the direction from which the firing came, but it was dark and he could not identify them except to the extent that they were American soldiers (R. 34). One of the bullets entered Poldo's head at the left side of the occipital, two inches from the midpoint and came out above the right eye, and he died almost instantly (R. 43,46, 52). Private Cole was wounded by a bullet piercing his left leg (R. 38). Cole testified that he was driving the "peep" and that a few minutes before he and Poldo were fired upon they passed two colored soldiers but the lights just flashed "on and off" and he could not further identify the men (R. 39-40). A few hours later a search was made of the area and 12 expended carbine shell casings were picked up near a corner in the street and to the rear of the place where the jeep had been fired upon. Examination of the shells revealed that they had recently been fired (R. 44). Sometime during the next day (6 January 1946) Major Robert J. Inness, 4th Armored Division Artillery, who was commander of the Security Police, conducted a search of the entire area and found two carbines among some bushes near the second platoon barracks and also two empty clips or magazines for the same type of guns in a vacant lot a short distance therefrom (R. 48,55). The two U.S. carbines were identified by serial numbers as being organizational property of the 3109 Quartermaster Service Company (R. 7) and were received in evidence as Prosecution's Exhibits 1 and 2 (R. 48). It was shown that soldiers in the area were not authorized to carry carbines unless they were on guard (R. 8-9).

A short time after the shooting occurred an investigation was made by officers of the 3109 Quartermaster Truck Company and the accused Howard and Walker, together with Bennie Chapman and three other soldiers

were confined in the Neumarkt city jail (R. 73). The following night, 6 January 1946, Major Robert Inness, together with officers of the 3109 Quartermaster Service Company, and three members of the Criminal Investigation Division questioned the soldiers for about two hours concerning their activities on 5 January 1946, and obtained written confessions from accused Howard and Walker (R. 87-91; Pros. Exs. 30,31). Accused Howard stated that he was in the Enlisted Men's Club on the evening of 5 January 1946 when Private First Class Poldo came in and struck Bennie Chapman with his gun; that Walker came to him and said it was bad about Bennie (Chapman) getting hit and that another soldier suggested that they go get their guns and "see what we can do about this thing." He and Walker went to the guardhouse and took two carbines together with two clips of ammunition for each gun. They then went back to the barracks to meet others who were supposed to go along with them but the other soldiers got scared and failed to join them. They then went to the Enlisted Men's Club searching for the Security Police but "he" was not there and as they walked down a street and reached a corner a jeep passed which they recognized as belonging to the Security Police. The jeep stopped and the occupants conversed with a soldier whom they had overtaken along the street. When the soldier stepped away from the jeep he and Walker opened fire on the vehicle. Howard stated that he fired one full clip of fifteen, then put another clip in his gun and after firing four shells the gun jammed. Howard further stated that he and Walker then returned to the company area and when they got inside a little ways they threw the clips away and left the guns in a clump of bushes (Pros. Ex. 30). In his confession Walker gave a more detailed account of the incident at the Enlisted Men's Club and stated that he was the soldier who carried Bennie Chapman out of the room after he had been struck by the security police. Walker then related his and Howard's activities subsequent to the incident and stated that he fired one full clip of ammunition into the back of the security jeep (R. 31). There is no material variance in the confessions of either accused and the preamble to each recites that it is voluntarily made and that the 24th Article of War had been read and explained.

The confessions were obtained in the following manner: Howard was brought before the officers conducting the investigation and

> "He accounted for his actions up to the time of the shooting. Sgt. Ellis asked him if he carried a carbine that night. He said yes. He asked where he got it. He had taken it from the company guard room. He asked what he did. He went with the carbine to the Rec' Hall. I'm not sure but I believe he said he left the Rec' Hall in the company of the accused Walker. Ellis asked him if he shot at the SP. He didn't say anything. Then Sgt. Ellis said 'Hold out your hands, look at your hands'. I noticed at that time he moved his hands in a way which indicated that possibly he was guilty. Then Ellis said 'That is the one thing that gave you away. We have your fingerprints on the gun.' That statement was not true because we didn't actually have them. Then

Ellis asked 'How many shots did you fire?'. He said 'One shot'. Then I asked him how many shots he fired before his gun jamped. I believe he said 4 shots. I said 'That was your second clip'. I believe he said yes." (R. 90)

Walker was then brought before the officers and the same procedure was used and in addition thereto Walker was told that Howard had already confessed and stated that he (Walker) was with him (R. 74,85,90).

No force was used and no threats or promises were made to either of the accused in obtaining the confessions (R. 85-89). The rights of each as set forth in the 24th Article of War were explained after they had been questioned but before they signed the typed statements (R. 75, 91-92). The defense objected to the introductions of each confession on the ground that each was involuntary, having been obtained through coercion and subterfuge (R. 86,91). While the accused were in confinement and before trial of the case, Lieutenant Arthur D. Williams, Commanding Officer of 3109 Quartermaster Service Company, received a letter postmarked 17 January 1946 and purporting to be from Private Ross Walker (33750794), 3109 Quartermaster Service Company. The letter states in part, "Since that I have already confessed and said that I am guilty and sorry too its no more for me to say." The letter further states that at the time of the offense "we had all been drinking" and a plea is made for mercy for Walker and Howard (R. 56; Pros. Exs. 6,7). The evidence shows conclusively that the letter was in the handwriting of Howard (R. 57,60,62,64; Pros. Exs. 8-15).

No witnesses were presented by the defense and each accused, after due explanation of his testimonial rights, elected to remain silent (R.94).

4. This record contains considerable evidence independent of the signed confessions of the accused, which tends to incriminate them, but aside from the confessions there is no direct evidence showing that accused fired the shots which penetrated the bodies of Private Poldo and Private Cole. It is true that the letter of 17 January 1946, written by Howard and signed "Walker" is an admission of guilt shown to have been written at Walker's request and being in the nature of a joint act, and thus admissible against both accused. Without the confessions there is shown motive, viz, resentment toward the Security Police regarding Poldo's treatment of Bennie Chapman in the club room. Then it is proven that the accused armed themselves, went forth in search of Poldo and not finding him in the vicinity of the club exclaimed, "we will get him." All this occurred within about an hour of the fatal shooting. But the defense contends that the confessions were inadmissible being involuntary and procured by coercion and subterfuge.

As has been stated the accused did not testify and there is no evidence that they confessed because Sergeant Ellis told them that they had

already found their fingerprints on the carbine.

A confession of guilt is one of the strongest forms of proof known to the law(MCM, 1928, par. 114, p. 114). In order to make it admissible in evidence it must appear that the confession was voluntary on the part of accused. The voluntary or involuntary character of a confession is a question of law to be determined from the facts adduced in each particular case (Vol. 2, Wharton's Criminal Evidence, par. 594, p. 982). It was therefore necessary for the court-martial in this case, acting through the law member, to ascertain the facts and determine as a question of law, whether the confession was voluntary and its decision should not be disturbed on appellate review unless there be reasonable basis in the evidence for such action. The court inquired at length into the manner in which the confessions were obtained and there is no evidence of compulsion, duress, threats or force having been practiced upon the accused. The contention of counsel that accused were in fact deceived by Sergeant Ellis' statement that their fingerprints had already been found on the carbines and that such deceptive statement caused each to confess is not supported by any direct evidence. If it be conceded that the erroneous statement of the sergeant was made for the sole purpose to deceive and did thereby influence accused in making their confession the Board is of the opinion that such deception would not operate to vitiate the confession. The authorities, both military and civil, appear to have recognized, from ancient times, that the use of deception is a legitimate device in procuring a confession so long as it otherwise appears that the confession was voluntarily made (Winthrop's Mil. Law and Precedents, 2d Ed., pp. 328, 329). In Wharton's Criminal Evidence, 11th Edition, Volume 2, page 1043, it is stated -

> "*** the following general subterfuges have not vitiated the confession obtained thereby. Stating to the accused that an accomplice or another has made a statement implicating and incriminating him; assuring the accused that his confession will not be disclosed; misinforming the accused as to the quantum and character of the state's evidence; engineering a conversation before a concealed witness; and placing an agent of the prosecution disguised as a fellow prisoner in the cell with the accused."

In Lewis v. United States (74 Fed (2d) 173) , the police officers obtained a confession from accused by pretending that they had found his fingerprints on a shoe of the victim he was alleged to have murdered. A fake photograph showing fingerprints on the shoe was exhibited to him and he was also told that he was seen near the scene of the crime. The Circuit Court of Appeals for the Ninth Circuit, after observing that the conviction therein could not be sustained on the evidence apart from the confession set forth the applicable rule of law as follows:

> "With reference to the false statements and representations to the accused concerning the evidence against him it has been held that to obtain confessions by direct statements of this sort

does not render it involuntary. 1 R.C.L. sec. 107, p. 560; 15 Ann. Cas. 274; People v. Buffom, 214 N.Y. 53, 108 N.E. 184; Ann. Cas. 1916D, 966; 18 L.R.A. (N.S.) 840, note; 50 L.R.A. (N.S.) 1088, note; Jackson v. U.S. (C.C.A.) 102 F. 483. We see no reason for questioning the soundness of these decisions. False statements as to the amount of incriminating evidence against the defendant might tend to make a guilty man confess, but would not have that tendency if the man were not guilty unless the statement as to the evidence was coupled with some promise or representation in regard to the advantage to be gained by a confession, or plea of guilty." (See also Young v. U.S. (C.C.A.) 107 Fed. (2d) 490.)

Consideration has been given to the holding of the Board of Review in CM 230377, Wilson, 2 Bull, JAG 95, wherein a confession was rejected because a first sergeant stated to the confessor, "If you have taken money from anyone else you might as well admit it. The penalty will not be any more severe." This statement was shown to have been false. The Board of Review held that "Any act or practice therefore, such as the procuring of a confession by trick, promise, or false statement, which would tend to destroy the confidence of the soldier in his superior officer, would be detrimental to the basic purpose which military justice is designed to serve." The fundamental reason for the exclusion of a confession not voluntarily made is because there is reasonable probability that the accused would make a confession that may not be true (Winthrop, Military Law and Precedents, 1920 Reprint, page 328; Vol. 2, Wharton's Criminal Evidence, par. 603, p. 1007). It is therefore seen that the truthfulness of the confession is the real test and the truth or falsity of any statements made to the confessor, prior to obtaining the confession, and not amounting to threats or promise of immunity or reward, are important only insofar as they tend to render the confession involuntary and thereby possibly false. So much of the holding in the Wilson case, supra, as is inconsistent with the views expressed herein should no longer be adhered to as a rule of law regarding the admissibility of confessions.

5. The accused Howard is 21 years of age and was inducted into the Army at Philadelphia, Pennsylvania, on 9 August 1943. The accused Walker is 22 years of age and was inducted at Fort Myer, Virginia, on 22 November 1943.

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 and the sentence as to each accused and to warrant confirmation of the sentence as to each. A sentence of either death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ashford, Judge Advocate

JAGK - CM 313786 1st Ind

WD, JAGO, Washington 25, D. C. AUG 27 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 First Class Harry H. Howard (33794469) and Private Ross Walker, Jr. (33750794), both of 3109 Quartermaster Service Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused and to warrant confirmation of the sentence as to each. I recommend that the sentence as to each accused be confirmed. The homicide was without legal justification or excuse but was committed following an altercation and apparent abusive treatment of a soldier by the military policeman victim. There was some degree of provocation, and in view of all the circumstances I recommend that the sentences be commuted to dishonorable discharge, total forfeiture and confinement at hard labor for the term of the natural life of each accused, and that the U. S. Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

3. The accused Howard is 21 years of age and was inducted into the Army on 9 August 1943. He has no record of previous convictions. The accused Walker is 22 years of age and was inducted on 22 November 1943. There is evidence of one previous conviction as to Walker for absence without leave for a period of less than one day. Walker is reported to have a reputation in his company of being a good soldier prior to the offense herein, but Howard is alleged to have been a trouble-maker and untrustworthy.

4. Consideration has been given to the following communications on behalf of accused Howard: Letter from Mr. Franklin H. Williams, N.A.A.C.P. Legal Defense & Educational Fund, Inc., addressed to The Judge Advocate General, dated 13 March 1946; letter from accused to the President; letter from accused to Honorable Clare Boothe Luce, House of Representatives; letter from Mrs. Eleanor Roosevelt, dated 3 April 1946, addressed to the Secretary of War forwarding letter from accused; letter from Senator Francis J. Myers to The Judge Advocate General, dated 23 April 1946; letter from Mr. Raymond Pace Alexander, dated 22 April 1946, inclosing letter from accused, forwarded by Captain Robert L. McCarty, AC; letter from The Reverend Henry H. Cooper, Jr., addressed to the President; letter from accused to The Judge Advocate General; letter from Senator Joseph F. Guffey, dated 30 April 1946, addressed to The Judge Advocate General; letter from

Honorable Adam Clayton Powell, Jr., House of Representatives, dated 29 April 1946, addressed to The Adjutant General; memorandum from Honorable Clare Boothe Luce, House of Representatives, dated 12 July 1946, addressed to the Under Secretary of War, inclosing copy of letter to her from accused; and letter from accused addressed to the Under Secretary of War. Consideration has also been given to a letter from accused Walker addressed to the President.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

16 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form Ex action
Communications in re Howard:
4. Ltr fr Mr. Williams to TJAG
5. Ltr fr acc'd to Pres.
6. Ltr fr acc'd to Hon. Clare Boothe Luce
7. Ltr fr Mrs. Roosevelt
8. Ltr fr Sen. Francis J. Myers
9. Ltr fr Mr. Raymond Pace Alexander
10. Ltr fr Rev Henry H. Cooper, Jr.
11. Ltr fr acc'd to TJAG
12. Ltr fr Sen Guffey
13. Ltr fr Hon. A.C. Powell, Jr.
14. Memo fr Hon. Clare Boothe Luce
15. Ltr fr acc'd to USW
16. Ltr fr acc'd Walker to Pres.

(G.C.M.O. 293, 3 October 1946).

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

AUG 21 1946

JAGQ CM 313788

UNITED STATES	)	1ST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Drake, Tokyo, Japan, 5
Private First Class KENT B.	)	April 1946. Dishonorable dis-
WOLFE (33533296), Company H,	)	charge (suspended), and confine-
2nd Battalion, Headquarters	)	ment for two (2) years. Philippine
and Service Group, GHQ, USAFPAC.	)	Detention and Rehabilitation 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 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Kent B. Wolfe did, at Tokyo, Japan, on or about 8 January 1946, with intent to do him bodily harm, commit an assault upon Akira Minami by shooting him in the abdomen with a dangerous weapon, to wit, a pistol.

N.B. At the trial the court with the consent of the defense counsel substituted the name "Kozo Sasamoto" for "Akira Minami" (R 12).

He pleaded not guilty to, and was found guilty of, the Charge and Specification as thus amended. 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 five (5) years. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, reduced the period of confinement to two years, ordered execution of the sentence as thus modified, and designated the Philippine Detention and Rehabilitation Center, APO 75, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 28, Headquarters 1st Cavalry Division, Camp Drake (Tokyo) Japan, 30 April 1946.

3. The evidence shows that Kozo Sasamoto, and not Akira Minami as alleged, was the person who was shot by the accused. While Kozo Sasamoto was on the witness stand, and after he had testified that he was the one whom accused shot at the time and place alleged, the law member asked the prosecution the object of introducing him as a witness. Thereupon the following proceedings were had (R 10-12):

"PROS: He is the person who was shot, sir, and he was to identify this soldier as the man who shot him.

"LM: He was shot? On the charge here, the paper I have says an assault was committed upon Akira Minami.

"DEF: That is what I thought, sir; but I thought the other one was shot too.

"LM: That is what I want to find out before I go any further.

"PROS: I am sorry, sir; the fault is entirely ours.

"LM: What is the answer?

"PROS: It is incorrect, sir.

"DEF: Sir, I'd like to make a motion that the case be dismissed on the ground there is a vital defect in the complaint.

"PRES: The court will be closed.

"PRES: The court will come to order.

The members of the court, personnel of the prosecution and the defense, the accused, the interpreter and the reporter resumed their seats.

"LM: I am going to read from paragraph 73, Courts-Martial Manual. (Reading) 'Courts-Martial — Procedure — Action on Defective Specification . — If a specification, while defective, is nevertheless sufficient fairly to apprise the accused of the offense intended to be charged, the court upon the defect being brought to its attention will, according to circumstances, direct the specification to be stricken out and disregarded, or continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case, or permit the specification to be so amended as to cure such defect, and continue the case for such time as in the opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment. The court may proceed immediately with the trial upon such amendment being made, if it clearly appears from all the circumstances before the court that the accused has not in fact been misled in the preparation of his defense and that a continuance is not necessary for the protection of his substantial rights.'

"LM: The court in closed session considers that the specification is defective. Apparently the assault was not committed upon Akira Minami, but was committed upon this Kozo Sasamoto. The court believes that the specification should be amended to read, substituting the name Kozo Sasamoto for Akira Minami. Now, based upon the opinion of the court, we leave it entirely up to the defense counsel as to what you wish to do.

"DEF: Continue the trial, sir?

"LM: Right now?

"DEF: Is that what you have in mind?

"LM: I have nothing in mind; I am leaving it up to you.

"DEF: I should like to say this; this case has been pending since January 8. This accused has been in jail out here in the stockade. From the charge sheet itself, the witnesses upon whom this accused would rely have been redeployed to the States; it so states in the charge sheet. I was told that there was one witness left by the name of Taylor. I went down to his headquarters, and I have seen a copy of the orders that put him also in the Fourth Replacement Depot as of the 31st of March, the effective date. That leaves the accused with absolutely no witness other than these two Japanese at that time. Considering the undue

delay in bringing this defendant to trial, and considering the additional fact that all of his witnesses have been redeployed to the States -- considering the additional fact that the investigation made of this case was very sporadic and did not contain all of the essential matters, did not contain anything that may be used to advantage to the accused -- and due to the defect in the present specification, I think that this case should be dismissed, not only now, to be brought in later, but with the recommendation to this court that it will not be resubmitted by the Judge Advocate.

"PROS: If I may say, this is an improper time to make that motion right in the middle of the presentation of the prosecution.

"DEF: Sir, I do not think it is improper because this defect is vital.

"LM: The case will not be dismissed.

"DEF: I am not asking for dismissal....

"LM: If you wish, the court will be closed and you can consult with the accused, decide what you wish to do; and when you have decided, let the trial judge advocate know and the court will be opened.

"PRES: The court will be closed.

"PRES: The court will be opened.

The members of the court, personnel of the prosecution and the defense, the accused, the interpreter and the reporter resumed their seats.

"DEF: Defense is ready to proceed with the trial, with the substitution of the name, Kozo Sasamoto, for Akira Minami.

"LM: The specification will be amended as stipulated by the defense."

4. The question presented is whether the court may after arraignment and entry of pleas and after reception of evidence which indicates that there is a substantial variance between the offense charged and the evidence produced, then

proceed to amend the specification so that as amended it will be established by the evidence presented.

The power of a court-martial to amend a defect in a specification when the defect is brought to its attention is prescribed in paragraph 73, Manual for Courts-Martial, 1928, which appears in the above-quoted excerpt from the record of trial.

Neither the trial judge advocate nor the court has the power to make substantial amendments to specifications without the approval of the convening authority (CM 129525, Kendrick, Dig. Ops. JAG, 1912-40, Sec. 428(9); Winthrop, Mil. Law & Precedents, reprint p. 155).

The most casual reading of paragraph 73 of the Manual for Courts-Martial shows that it only authorizes a court to act on defects in specifications which pertain to matters of form only. Specifically this paragraph authorizes a court to:

a. Direct that the specification be stricken out and disregarded or,

b. Continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case, or

c. Permit the specification to be so amended as to cure such defect, and further to either grant a continuance or proceed immediately with the trial depending on the view taken by the court as to whether or not accused needs further time to prepare his defense in view of the amendment.

Did the amendment in the instant case relate to a substantive matter, or was it merely a defect of form on which the court had power to act under authority of paragraph 73 of the Manual?

This precise question was decided in CM 124780 (1919), Dig. Ops. JAG, 1912-1940, Sec. 428(9), in which it was said:

> "Where an accused was charged with an assault upon A, the specification may not be amended upon the trial to allege an assault upon B. So to amend a specification would be to allege a wholly different and not included offense."

CM 260141, Pierson, 1944, 3 Bull. JAG 286-287, held that an amendment to a specification alleging a series of embezzlements totalling $226.50 was appropriate where the only change made was to change one of the sums, included in the total of $226.50, from $18.75 to $29.25. In this case it was held that such an amendment neither altered the nature nor increased the grade of the offense. The opinion further held, however:

"Had the amendment affected the corpus of the embezzlement, substituting bonds for money, for example, it would have been unauthorized as changing the quality of the original offense by alleging a separate and distinct offense in lieu thereof."

We are, therefore, of the opinion that the court in this case made an unauthorized substantive amendment, and that the nature of the offense was illegally changed by substituting a new and distinct offense therefor.

It remains to be determined whether the court's action was permissible under paragraph 74 of the Manual for Courts-Martial, which provides:

"If at any time during the trial it becomes manifest to the court that the available evidence as to any specification is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove the guilt of the accused of some other offense not alleged in any specification before the court, the court may, in its discretion, either suspend trial pending action on any application by the trial judge advocate to the appointing authority for directions in the matter or proceed with the trial. In the latter event a report of the matter may properly be made to the appointing authority after the conclusion of the trial.

"Instances of occasions for applying this rule would be where in a trial for the larceny of a watch the proof shows that the article taken was a compass; and where in a trial for the wrongful sale of property (AW 84) the proof shows that the accused negligently lost the property."

This paragraph is designed to cover situations in which, during trial, there appears a substantial variance between the offense alleged and the evidence adduced and in which the evidence adduced is legally insufficient to warrant a conviction of the offense charged or of any lesser included offense thereunder, but does nevertheless tend to prove accused's guilt of some other offense not before the court. In such situations the court has the alternative under paragraph 74 of the Manual for Courts-Martial to suspend trial pending action on application by the trial judge advocate to the appointing authority for directions in the matter, or to proceed with the trial.

In the case before us the court did not adopt either of those alternatives. It is true that the court proceeded with the trial, but it proceeded on a specification altered to charge a wholly different offense. The language of the second alternative merely permits a going forward; it in no way authorizes

an amendment of the specification. In such a situation the authority of the court to "proceed with the trial" should be exercised only when there are one or more other specifications susceptible of proof in addition to the specification which has been found to be at variance with the proof. For a court to "proceed" in a case where, as here, there is only one specification which is wholly at variance with and actually disproved by the testimony can result only in acquittal or eventual disapproval. In the instant case the court properly had open to it only the alternative to adjourn pending directions in the matter from the appointing authority.

One further point deserves notice. The defense counsel consented to the amendment after the court had denied defense motions that the case be dismissed, and had informed defense counsel that it was for defense counsel to decide what he wished to do. It is obvious that the consent was given improvidently. On this question CM 211377, Short, 10 BR 59, 60 held:

> "It is the holding of the Board of Review that the apparent inartificial effort of the court to amend Specification 3 [amending a larceny specification to an embezzlement specification], with the consent thereto of counsel for the accused, was violative of paragraphs 66 and 73, Manual for Courts-Martial, 1928, which authorize an amendment to the pleadings as to matters of form only, and that, therefore, the purported amendment, being a substantial change in the specification, was a nullity."

We are, therefore, of the opinion that the court erroneously assumed non-existent power in attempting to amend where the specification and evidence were in material variance and where the amendment resulted in alleging a wholly different and not included offense. The amendatory action of the court was illegal and prejudicial to the substantial rights of the accused.

5. The charge sheet shows that accused is about 22 years of age and that he was inducted at Roanoke, Virginia, on 22 February 1943 to serve for the duration of the war plus six months. He had no prior service.

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

Seymour W. Wenfil, Judge Advocate

T. Wayne Olney, Judge Advocate

Harold F. McDonnell, Judge Advocate

(290)

JAGQ-CM 313788 1st Ind

WD, JAGO, Washington, D. C. SEP 6 1946

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private First Class Kent B. Wolfe (33533296), Company H, 2nd Battalion, Headquarters and Service Group, General Headquarters, United States Army Forces, Pacific.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 292, 3 October 1946).

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

AUG 21 1946

JAGQ - CM 313820

UNITED STATES	)	ANTILLES DEPARTMENT
v.	)	Trial by G.C.M., convened at APO #851, c/o Postmaster, Miami, Florida, 29 March 1946. Dismissal and total forfeitures.
First Lieutenant HARMAN VANDEWATER (O-1642676), Signal Corps.	)	

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 Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that 1st Lieutenant Harman Vandewater, Signal Corps, Henry Barracks, Puerto Rico was, at Henry Barracks, Puerto Rico, on or about 7 March 1946, found drunk while on duty as Officer of the Day.

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 dismissed the service and to forfeit all pay and allowances due or to become due. All members of the court recommended clemency and the staff judge advocate recommended that the sentence be commuted to a reprimand and forfeiture of one hundred dollars pay per month for six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution. Colonel Rodriguez, the commanding officer of Headquarters APO 847 Henry Barracks, Puerto Rico (R 8; Pros. Ex. C) testified that the accused was the post Signal Officer and under the authority of the witness and by detail published in the Daily Bulletin of 6 March 1946 (R 8; Pros. Ex. C) was the Officer of the Day at Henry Barracks for the period from 1130 6 March to 1130 7 March 1946 (R 7). At about 0930 7 March 1946, Colonel Rodriguez and Captain Arnold, the

Adjutant and Post Inspector, went to quarters thirty-one which were occupied by accused (R 8). The door was locked but from outside the witness noticed that the quarters were dirty and untidy and sent Captain Arnold to have accused report to the witness. When accused reported he "almost fell on" the colonel's face two or three times and was obviously under the influence of liquor, and answered questions unintelligibly (R 9). As accused was questioned he swayed on his feet unsteadily and could not answer questions in a logical manner. The colonel ordered the Adjutant to relieve accused from duty as Officer of the Day (R 10) and took out accused's belt (R 46) and told accused he was ashamed to see an officer under his command in that condition and that he would prefer charges against him. At first, being a young officer the colonel tried to give accused a chance (R 11). The colonel ordered accused to move from his quarters (R 12) to BOQ 74 and told the Adjutant to help accused move and gave him some men because accused was so drunk he could not move himself (R 46). At that time accused was not responsible for his acts because he could not answer questions intelligibly, answering only "yes" or "no" in a swinging manner (R 45).

Captain Arnold, the Adjutant and Post Inspector testified that accused is in the military service of the United States. At 0930 7 March 1946, Captain Arnold at the direction of Colonel Rodriguez went to Post Headquarters and got accused who was at that time under the influence of alcohol (R 14). This was evidenced by the way accused walked and talked. He answered all questions "yes" or "no" and there was a very strong smell of liquor on his breath. The colonel ordered accused to move (R 17) and told the Adjutant to go back at 1230 to see if accused had moved. At 0930 the colonel relieved accused from his duties (R 18).

Captain Busquets, MC, testified that on 7 March 1946 at 1400 as medical officer he went to accused's quarters, took accused to the witness' office, took a blood specimen from the accused and sent it to the Medical Laboratory at San Juan for a Nicloux method alcohol test (R 20). This witness testified that from the time a man starts drinking it takes a half hour for the alcohol to show in the blood. When he stops drinking it takes three or four hours for the alcohol to get out of the blood and that it will remain as long as there is not complete excretion of the alcohol, the time depending on the amount of alcohol drunk and present in the blood (R 21). Alcohol could stay in the blood from nine o'clock to two o'clock (R 48). In the type of test given accused a finding of four milligrams of alcohol per cc. of blood is fatal and 3.5 milligrams indicates serious intoxication (R 47).

Lieutenant Advocate testified he is the chemist at the Medical Laboratory, San Juan, Puerto Rico (R 23), that he received a blood specimen

from Captain Busquets by a messenger who waited for the results. This blood specimen taken from accused was tested by a civilian laboratory technician with five years' experience under the direct supervision of the witness. The result of the test was read by Lieutenant Advocate and showed 3.5 milligrams of alcohol present per cc. of blood, which was a great amount (R 24, 25).

4. Evidence for the Defense.

Technician Fifth Grade Becker, official cashier, testified that he saw the accused who was his commanding officer at 0800 on 7 March 1946 at accused's office, which was next door to the witness' office in the back of Headquarters building and is not very well lighted, that he spoke to accused who answered clearly and coherently, that accused was no different that particular morning than other days, that there was no strong smell of alcohol on accused's breath, that accused was walking straight and was sober. About an hour later the witness went to the accused's office and saw accused sitting straight at his desk (R 28, 29, 30).

Consuelo Mongeon, a civilian signal clerk (R 32), testified that she saw accused on the morning of 7 March 1946 (R 33) at eight o'clock at the office, that his conduct was good, that he appeared to be acting the same way as he had two or three days before. Witness gave accused the morning report which he signed. At that time his acts were coherent (R 34). Accused walked in front of the witness and was walking straight. There was no strong smell of alcohol on accused's breath (R 35). This witness identified the signatures of accused on morning reports for 1, 2, 5, 6 and 7 March (R 36) which were collectively admitted in evidence (R 37) as Exhibit "D". On cross-examination this witness testified that she saw accused continuously all day on 7 March (R 37, 38) which she later modified to "He stood the whole morning in his office" and then again modified to "He left the office with Colonel Rodriguez." While in the office, accused was sitting at his desk (R 38). What he did other than sign the morning report at about eight-thirty the witness did not know (R 39, 40). The witness did not remember whether she saw accused after he went out with Colonel Rodriquez (R 41).

Lieutenant Tanner, whose branch of service is not indicated, testified he was assigned to the 352d Station Hospital at Henry Barracks and that he knew accused. He was asked the following question and gave the following answer (R 42):

"Q. I ask you this question. If a man is drinking from nine-thirty and a test is made at two o'clock, can you say that

the amount of alcohol that appear in the blood will be the same amount that he had at nine-thirty?

A. No. sir."

The accused elected to make an unsworn statement which does not touch upon the events of 7 March 1946. His statement is (R 44):

"I am 1st. Lieutenant Harman Vandewater, Signal Corps, Henry Barracks, Puerto Rico. I entered the Army in the year 1942, on March, and I was commissioned 2nd. Lieutenant on January 14, 1943 and to First Lieutenant on November 19, 1943. I worked for some time in installations for telephone and tele-type and other equipment. I was relieved from that duty and I was sent to school for six months. After that I was sent to Puerto Rico; I left on December 10, 1945. I stayed at Buchanan for about one month and then I was assigned to Henry Barracks where I have been for only two months. While I was a student I went to school, to College for three years and failed to continue because of financial reasons. Now I am married and I have a child. That's all."

5. The Commanding Officer of Henry Barracks and the Post Inspector unqualifiedly testified that the accused was drunk at the time and place alleged and while on duty as Officer of the Day. The Manual for Courts-Martial, paragraph 145, page 160 provides,

"On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion."

The medical testimony that accused's blood test showed 3.5 milligrams of alcohol per cc. of blood, which indicated serious intoxication, affords the most objective evidence of accused's drunken condition. The court apparently discounted the testimony of the two subordinates of the accused that he was not drunk on the morning of 7 March 1946. It is perhaps significant that they both testified in substance that there was no strong smell of alcohol on accused's breath. It is the opinion of the Board of Review that the evidence is legally sufficient to establish the offense of being drunk while on duty as Officer of the Day, in violation of Article of War 85.

6. War Department records show the accused is 35 years old, married and has one child. Accused graduated from high school in 1930, attended St. Laurence University for three years and then left school because of lack of funds. From 1933 to 1937 accused did odd jobs. From 1938 to 1940 he was an assistant estimator for the Central Hudson Gas and Electric Company. In 1941 accused became a draftsman for the Dutch Tool Company of Beacon, New York, and remained there until he was inducted into the Army on 13 March 1942. Accused graduated from the Signal Corps

Officer Candidate School and was commissioned a temporary second lieutenant on 14 January 1943, and was promoted to temporary grade of first lieutenant on 19 November 1943. In 1945 he completed a course at Fort Monmouth in Electricity and Heavy Construction. He volunteered for continued army service and arrived in Puerto Rico on 10 December 1945. His efficiency reports in chronological order are: "Excellent", "Very Satisfactory", "Excellent", "Very Satisfactory", "Not Rated", "Excellent", "Excellent", "Very Satisfactory", "Satisfactory", "Excellent", "Not Rated", "Not Rated", "Unsatisfactory". He has no previous convictions, either civil or by court-martial.

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. 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. Where, as here, the offense is committed in time of war, dismissal is mandatory upon conviction under Article of War 85.

Seymour W. Wenfil, Judge Advocate

N. Hayne Oliver, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 313820 1st Ind

WD, JAGO, Washington, D. C. SEP [illegible] 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 First Lieutenant Harman Vandewater (O-1642676), Signal Corps, assigned to Headquarters, Henry Barracks, Puerto Rico.

2. Upon trial by general court-martial this officer was found guilty of being drunk while on duty as Officer of the Day, in violation of Article of War 85. He was sentenced to dismissal and total forfeitures. All members of the court recommended clemency and the staff judge advocate recommended that the sentence be commuted to a reprimand and forfeiture of one hundred dollars pay per month for six months. 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 thereof. I concur in that opinion.

4. The evidence shows that accused was assigned as post signal officer at Henry Barracks, Puerto Rico and that on 7 March 1946 he was officially on duty as Officer of the Day, having gone on this duty at 1130 6 March. At 0930, accused was very drunk and the Post Commander relieved him from duty. A blood test given accused showed 3.5 milligrams of alcohol per cc. of blood, indicating serious intoxication.

5. War Department records show the accused is 35 years old, married and has one child. Accused graduated from high school in 1930, attended St. Laurence University for three years and then left school because of lack of funds. From 1933 to 1937 accused did odd jobs. From 1938 to 1940 he was an assistant estimator for the Central Hudson Gas and Electric Company. In 1941 accused became a draftsman for the Dutch Tool Company of Beacon, New York, and remained there until he was inducted into the Army on 13 March 1942. Accused graduated from the Signal Corps Officer Candidate School and was commissioned a temporary second lieutenant on 14 January 1943, and was promoted to temporary grade of first lieutenant on 19 November 1943. In 1945 he completed a course at Fort Monmouth in Electricity and Heavy Construction. He volunteered for continued army service and arrived in Puerto Rico on 10 December 1945. His efficiency reports in chronological order are: "Excellent", "Very Satisfactory", "Excellent",

"Very Satisfactory", "Not Rated", " Excellent", "Excellent", "Very Satisfactory", "Satisfactory", "Excellent", "Not Rated", "Not Rated", "Unsatisfactory". He has no previous convictions, either civil or by court-martial. On 22 March 1946 accused was given a pre-trial psychiatric interview in which he stated to the psychiatrist that he had been drinking since he was 23 and had been indulging excessively for the last three months since his arrival in Puerto Rico because of boredom. He admitted the offense with which he was charged. Accused was found to be sane at the time of the offense and at the time of the interview and to be mentally competent to cooperate in his defense.

6. I recommend that the sentence be confirmed but in view of the circumstances and the recommendations for clemency that it be suspended during good behavior.

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

CM 313820

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 284, 16 September 1946).

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

JAGH - CM 313830

9 OCT 1946

UNITED STATES	)	HEADQUARTERS AFWESPAC
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters Base X AFWESPAC,
First Lieutenant NUGENT	)	3 April 1946. Dismissal, to-
B. FRIEDMAN (0-1062361),	)	tal forfeitures and confine-
Ordnance	)	ment for two years (2)

OPINION of 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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that First Lieutenant Nugent B. Friedman, 3144th Ordnance Maintenance Company, did, at APO 358, on or about 5 January 1946, agree and conspire with Master Sergeant Leonard O. Larsen to defraud the United States by preparing and presenting a false and fraudulent requisition, which said requisition was known by the said First Lieutenant Nugent B. Friedman to be false and fraudulent and thereby obtaining twelve (12) truck Engine Assemblies, of the value of about eighteen hundred dollars ($1800), property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of 96th Article of War.

Specification: In that First Lieutenant Nugent B. Friedman, 3144 Ordnance Maintenance Company, did, at APO 358, on or about 5 January 1946, wrongfully accept one thousand

pesos (₱ 1,000), Philippine money, value about five hundred dollars ($500.00) from Master Sergeant Leonard O. Larsen, paid to the said First Lieutenant Nugent B. Friedman as consideration for knowingly and with intent to defraud the United States making and signing a false requisition, which said requisition was in words and figures as follows:

Jan 5

UNIT #680

PROPERTY ISSUE SLIP

Voucher No.

TO: ORDNANCE GENERAL SUPPLY DEPOT Supply Officer Re

Types of Issue: Debit Memo, Credit Memo, Issue Slip

FOR: BASE MOTOR COMMAND

Initial place - ment Receipt

Issue Slip No. 1621

Stock No.	Nomenclature	Unit	Auth. or Max Level	On Hand	Due In	Quantity Desired	Action
	Bldg 09						
	GMOC						
G 508-70006555 GMM-SNN-3431	Engine Assey Complete	ea				12 - 12 - 12	

X X X X X X X X X X X X X X LAST ITEM X.X. X X X X X X X X X X X X X X

BASIS: For use in 3rd. Echelon Shops on Deadlined vehicles.
I certify that M/Sgt Leonard O. Larson, 6857623, whose signature appears below is authorized to sign for property receipts for property issued to my organization for which I accept responsibility.

/s/ Leonard O Larson
/t/ LEONARD O LARSEN, 6857623

/s/ Nugent B. Friedman
1st Lieu. Ord Dept
Supply Officer

Whse Control Reg'd
1-5-46 /s/ A Castro ORIGINAL

Issuance or acceptance of quantitied shown in "Action" column is authorized. Items marked "EXIT" will be ordered. Zeroed items will be available on the dated indicated hereon. When received, items will be issued on presentation of this slip. Inquiries must refer to No. _____ /s/ A. S.

FOR THE COMMANDING OFFICER:
/s/ Nugent B. Friedman
5 Jan 1946 /t/ NUGENT B. FRIEDMAN
1st Lt., Ord Dept
SUPPLY OFFICER

Quantities shown in "Action column have been received.

1 - 5 /s/ Leonard O Larsen
C-600443

5 Jan 1946. /s/ Lt. A (Illegible)

W.D. AGO FORM 446-6 August 1943

A CERTIFIED TRUE COPY:

/s/ ROBERT G. JOHNSTON
Lt Colonel, Infantry

The accused pleaded guilty to, and was found guilty of, both Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three (3) years. The reviewing authority approved the sentence but reduced the period of confinement to two (2) years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused is in the military service of the United States (R 8) and was a member of the 3144th Ordnance Maintenance Company (R 14). He was the supply officer of the Base Motor Command, Base X, APO 358, from 21 September 1945 to about 15 January 1946 (R 13-19), working in the Base Motor Command Echelon Shop 3144 (R 14). On or about 5 January 1946 a Property Issue Slip was signed by accused as supply officer. The issue slip was directed to the Ordnance General Supply Depot and requisitioned "12 Engine Asseys Complete" for the Base Motor Command. The issue slip contained a certificate that Master Sergeant Leonard O. Larsen was authorized to sign for property receipts for property issued to accused's organization (R 7; Pros Ex A). On 5 January 1946 twelve complete engine assemblies were issued to Sergeant Larsen by the Ordnance Supply Depot (R 7; Pros Ex A). No engine assemblies were received by the Base Motor Command Ordnance Supply Officer on 5 January 1946, but twenty-four (24) elements oil filters were received by the organization on an issue slip which was processed on 28 December 1945 and bore the same issue slip number as Prosecution Exhibit A (R 8, 9).

It was stipulated that the value of twelve (12) truck engine assemblies is about eighteen-hundred dollars ($1800.00) (R 10; Pros Ex B). On or about 14 January 1946, Chief Warrant Officer Frank J. Schratz deposited 1400 pesos to his (Schratz's) account in the National City Bank. Of this sum, 1000 pesos had been given Warrant Officer Schratz by the accused, who subsequently told Schratz that he had obtained the money by signing an illegal requisition (R 12, 13).

4. Evidence for the defense: After due warning as to his rights, the accused took the stand and testified under oath that his wife was ill and that he needed money to take care of expenses at home. He was approached by Sergeant Larsen, who offered him one thousand pesos to sign an illegal

requisition. After first declining, he then agreed to sign the requisition and did sign the illegal requisition marked Prosecution Exhibit "A". He received one thousand pesos for so doing, but after receiving the money he could not get himself to touch it or to send it home, so he gave the money to Mr. Schratz. Thereafter he tried to figure some way of giving himself up or of returning the money but could not do so without involving other people. The accused signed a confession when approached by the Criminal Investigation Division on 14 February. (R 16, 17).

Major Eison testified that the accused worked under his supervision when the accused was Ordnance Supply Officer, Base Motor Command from 21 September 1945 to 15 January 1946. The accused was a very capable and energetic officer and that he would rate the accused as superior (R 14).

First Lieutenant Russell M. Willis, 3144th Ordnance MAM Co., the accused company commander, read part of accused's Officer's Qualification Card, WD AGO Form 66-1 (Def Ex 1), relating to his efficiency ratings, which were excellent from 4 March 1944 to 31 December 1944 and subsequent thereto were: 6.0 - 5.6 - 5.3 - no rating - 5.3. The entries relating to foreign service showed that the accused had served in France prior to his service in the Pacific (R 14, 15). Lieutenant Willis further testified that in addition to being supply officer, accused was company PX officer and Class "A" Finance Officer and that he had regarded the accused as a perfectly reliable and honest man (R 15).

5. The accused's plea of guilty warranted the court in finding him guilty of all Specifications and of Charge II. The only substantial question presented by the record is whether the Specification of Charge I is properly laid under Article of War 94.

6. The Specification of Charge I alleges that accused:

> "* * * did * * * agree and conspire with Master Sergeant Leonard O. Larsen to defraud the United States by preparing and presenting a false and fraudulent <u>requisition</u>, which said <u>requisition</u> was known by the said First Lieutenant Nugent B. Friedman to be false and fraudulent and <u>thereby obtaining twelve (12) truck Engine Assemblies</u> * * *, property of the United States, * * *." (Underscoring supplied).

The only conspiracy denounced as an offense under Article of War 94 is stated in the third paragraph of the Article which reads in pertinent part:

> "Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, <u>the allowance or payment of any * * * fraudulent claim</u>; * * *."

The elements of proof of a conspiracy in violation of Article of War 94 as discussed in the Manual for Courts-Martial are:

"(a) That the accused and one or more other persons named or described entered into an agreement; (b) that the object of the agreement was to defraud the United States; (c) that the means by which the fraud was to be effected were to obtain or assist certain other persons to obtain the allowance or payment of a certain false or fraudulent claim, as specified; and (d) the amount involved, as alleged" (MCM, 1928, Corr 4-20-43, Par 150 c, p 182) (Underscoring supplied).

The question for consideration is whether a conspiracy to obtain certain truck engine assemblies by means of a fraudulent requisition is equivalent to a conspiracy to obtain the allowance of any false or fraudulent claim.

The word requisition is defined as "a formal application made by one officer or department to another for things needed in the service"(Webster's New International Dictionary, 2nd Ed, 1942). The word claim within the meaning of the United States Criminal Code provision denouncing the presentation of false claims against the Government (18 USC 80) has been judicially defined as "the asking or demanding * * * from the government of payment for services" (or property) (U.S v. Bettinger, 21 Int Rev Rec 342, 24 Fed Cas No 14,599; Winthrop, Military Law and Precedents, 2nd Ed, 1920 Reprint pp 700, 701).

In the opinion of the Board of Review, a claim, within the meaning of Article of War 94, is a demand on the Government, for payment of money or the delivery of property, the allowance and payment or delivery of which will effect a legal transfer of title to such money or property from the Government to the Claimant.

In the case of a requisition, however, there is no intention on the part of the issuing authority to divest the Government of title to the property. A requisition merely involves the transfer of the right to possession or use of such property from a supplying agency or service of the Government to a using agency of the Government. It is clear that the issue of Government property to a Government agency or a military unit on the basis of a requisition, does not amount to the allowance or payment of a claim. Nordoes a conspiracy to obtain Government property by means of a fraudulent requisition with the intent to defraud the Government thereby, by misappropriating the property, amount to a conspiracy to obtain the payment of a false and fraudulent claim in violation of Article of War 94.

Nevertheless a conspiracy to defraud the United States of money or property, by some means other than that specified in the third paragraph of Article of War 94 is an offense within the scope of Article of War 96. For the reasons stated above, the Board of Review is of the opinion that the Specification of Charge I was erroneously laid under Article of War 94, but that the offense alleged, to which the accused pleaded guilty, was a violation of Article of War 96. However, the error in laying the Charge

under the wrong Article does not injuriously affect the substantial rights of the accused (Dig Op, JAG 1912-40, Sec 394 (2)).

Accordingly the record of trial is not legally sufficient to sustain the finding of guilty of Charge I, but is legally sufficient to sustain the findings of guilty of the Specification of Charge I and of a violation of Article of War 96.

7. Six of the seven members of the court, the Assistant Trial Judge Advocate and the Assistant Defense Counsel recommended clemency on the basis of accused's previous exceptionally fine record, his superior performance of duty and the mitigating circumstances brought out at his trial.

The Board has carefully considered the following communications pertaining to clemency on behalf of the accused: Letter dated 18 July 1946 to the Secretary of War from Mrs. Nugent B. Friedman, wife of the accused; Memorandum from the Chief, Legislative and Liaison Division WDSLL/997-1642, dated 24 July 1946 and inclosure thereto from Mr. Sylvan Agatstein, Attorney, St. Louis, Missouri, which was received by United States Senator Frank P. Briggs; and letter dated 4 September 1946 from Robert E. Hannegan, Chairman, Democratic National Committee.

8. The accused is 23 years old and is married. War Department records show that he is a native of Missouri. He was graduated from high school and attended college for two years. He was employed four months as a furnace operator in 1942 and left to enter school. He was inducted into the Army on 25 November 1942. He attended the Antiaircraft Artillery Officers Candidate School and was commissioned a second lieutenant, Army of the United States on 11 November 1943. He was promoted to first lieutenant on 16 June 1945. All of his service as an officer prior to the offense for which he was tried has been rated "Excellent" or "Superior".

9. 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 only so much of the findings of guilty of the Specification of Charge I as involves a finding of guilty of this Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of the Specification and Charge II; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 313830 1st Ind 31 October 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 Nugent B. Friedman (O-1062361), Ordnance Department.

2. Upon trial by general court-martial accused pleaded guilty to and was found guilty of conspiring to defraud the United States by preparing and presenting a false and fraudulent requisition for twelve engine assemblies in violation of Article of War 94 (Chg I, Spec) and of wrongfully accepting 1,000 pesos, Philippine money, in consideration for preparing a false requisition in violation of Article of War 96 (Chg II, Spec). He was sentenced to dismissal, total forfeiture and confinement at hard labor for three (3) years. The reviewing authority approved the sentence, but 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 only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused was the supply officer of the Base Motor Command, Base X, APO 358 and a member of the 3144th Ordnance Maintenance Company. On or about 5 January 1946, accused, as supply officer, executed a Property Issue Slip directed to the Ordnance General Supply Depot, wherein he requisitioned twelve complete engine assemblies. On the issue slip accused certified that one Master Sergeant Leonard O. Larsen was authorized to receive property and execute receipts for the accused. Twelve engine assemblies were issued to Sergeant Larsen by the Ordnance General Supply Depot, but were never received by accused's organization. However, twenty-four elements oil filter were received by the Base Motor Command on an issue slip bearing the same number as the one signed by accused for the engine assemblies. Sergeant Larsen gave accused 1,000 pesos ($500) in consideration for his signing the requisition. Accused gave the 1,000 pesos to Chief Warrant Officer Frank Schratz, who deposited the money to Schratz's account in a bank. Subsequently accused told Schratz that he had obtained the money in consideration for signing an illegal requisition.

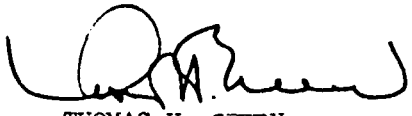
After being properly warned of his rights as a witness, accused elected to make a sworn statement wherein he testified that he was approached by Sergeant Larsen, who offered him 1,000 pesos for signing an illegal requisition. After first declining, he then agreed to and did sign the requisition in question. He received 1,000 pesos for doing so, but could not bring himself to keep it or send it home. Consequently, he gave it to Schratz. In mitigation accused stated that his wife was ill and he needed money to take care of expenses at home. Several officers testified that the character of accused's service was superior. All of his efficiency ratings since he was commissioned were either excellent or superior.

4. Six of the seven members of the court, the Assistant Trial Judge Advocate and the Assistant Defense Counsel recommended clemency on the basis of accused's previous exceptionally fine record, his superior performance of duty, and the mitigating circumstances brought out at the trial. Consideration has been given to the following communications requesting clemency on behalf of the accused: letter dated 18 July 1946 to the Secretary of War from Mrs. Nugent B. Friedman, wife of the accused; memorandum from the Chief, Legislative and Liaison Division WDSLL 997/1642, dated 24 July 1946 and inclosure thereto from Mr. Sylvan Agatstein, Attorney, St. Louis, Missouri, which was received by United States Senator Frank P. Briggs; and letter dated 4 September 1946 from Robert E. Hannegan, Chairman, Democratic National Committee.

In the case of the master sergeant who was involved in the transaction and other offenses, the sentence to dishonorable discharge was suspended and confinement reduced to three years. In the case of a lieutenant colonel who received the engine assemblies and who was found guilty of wrongful possession of a large amount of government property, the sentence to dismissal, total forfeitures and confinement for three (3) years was approved.

5. I recommend that only so much of the findings of guilty of Charge I and its Specification be approved as finds the accused guilty of the Specification in violation of Article of War 96. In view of the court's recommendation for clemency, the accused's prior excellent military record and all the circumstances, including the fact that accused has already been in confinement over eight (8) months, I recommend that the sentence be confirmed, but that the period of confinement be reduced to eighteen (18) months, that a United States Disciplinary Barracks be designated as the place of confinement and that the sentence as thus modified be carried into execution.

6. 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

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

(G.C.M.O. 343, 13 November 1946).

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

JAGH - CM 313847

12 DEC 1946

UNITED STATES	FIFTEENTH AIR FORCE
v.	Trial by G.C.M. convened at Second Air Force, Colorado Springs, Colorado, 29 March 1946. To be reprimanded, and to forfeit $50 per month for ten (10) months.
Second Lieutenant JACQUES G. BEEZLEY (027730), Air Corps, Squadron O, 249th Army Air Forces Base Unit, La Junta Army Air Field, La Junta, Colorado	

OPINION OF THE BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, Judge Advocates

1. The record of trial in the case of the above-named officer has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the findings and legally sufficient to support the sentence in part, but legally insufficient to support that part of the sentence as approved, relating to forfeiture. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. No question arises as to the sufficiency of the evidence to support the findings of guilty and therefore a discussion of the evidence is unnecessary and will be omitted.

3. The only question presented concerned the legality of the reviewing authority's action insofar as it proposes to mitigate the sentence by substituting a forfeiture of $50.00 per month for a period of 10 months in lieu of the fine of $500 adjudged by the court.

The sentence adjudged by the court reads as follows:

> "To be reprimanded, and to pay to the United States a fine of five hundred dollars ($500.00).

The action of the reviewing authority provides:

> "The sentence is approved and will be duly executed, but the execution thereof insofar as it relates to the imposition of a fine is mitigated to a forfeiture of Fifty Dollars ($50.00) per month for a period of ten (10) months. As thus modified, the sentence will be duly executed."

4. It is readily apparent that the action of the reviewing authority was designed to relieve accused of a possible hardship in making a lump sum payment of the large fine imposed by the sentence, but whether such action can be construed to be a mitigation of the sentence, as it is therein described, depends in large measure upon the applicable use of such power and its legal adaptation as contemplated by Article of War 50 and paragraph 87b, Manual for Courts-Martial, 1928.

In Bouvier's Law Dictionary, "mitigation" is thus defined:

> "Reduction; diminution; lessening of the amount of a penalty or punishment."

As thus defined, this action might be construed to affect a mitigation of the sentence only insofar as the term implies therein a reduction, diminution or lessening of the manner of performance or weight of the financial obligation imposed. However, it must be noted that the action does not thereby reduce the amount of the fine.

For a determination of the question presented herein, the Board turns to an analysis of Article of War 50, which confers the power of mitigation of sentences upon a reviewing authority and to paragraph 87b, Manual for Courts-Martial, 1928, which defines and prescribes the nature and use of said power. Article of War 50, so far as it is material to this issue reads, in part, as follows:

> "Art. 50. Mitigations or Remission of Sentences. - The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence * * * ".

The term "mitigation" as defined in the Manual for Courts-Martial is substantially the same as that in Bouvier's Law Dictionary but it is further qualified by strict rules of construction and application governing its use. Thus, paragraph 87b, Manual for Courts-Martial, 1928, provides:

> "The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case. * * * To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same."

These qualifications are further exemplified thereafter by certain restrictions which limit the extent of mitigation on various types of punishment and thereby serve as a guide for ascertaining the proper application of the mitigating power in a given case. The said restrictions are:

> "A sentence imposing dishonorable discharge only can not be mitigated. Forfeiture of pay may be mitigated to detention of pay for a like period, or less. Confinement at hard labor may be mitigated to hard labor without confinement for a like period, or less. A sentence of dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a definite period may be mitigated to a lesser punishment, for example, to confinement at hard labor and a forfeiture of a specified portion for example, two thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence, or to hard labor without confinement for a definite period not exceeding the period prescribed in the sentence, and forfeiture of any portion not exceeding two thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence."

According to the foregoing provisions of the Manual for Courts-Martial, a lawful action mitigating a sentence must therefore conform with the following basic requirements:

The punishment imposed by the sentence as mitigated must be included in the sentence as imposed by the court, i.e., the species of punishment imposed by the court cannot be substantively altered or changed by substitution such as a substitution of a fine for a forfeiture or vice versa.

The reduction in the quantity of the punishment must be a decrease in the sum or amount of the very same kind of punishment as imposed by the court.

The reduction in the quality of the punishment must only be a reduction in the degree or severity of the punishment imposed by the court, the general nature of which must remain the same.

The time element within which the punishment is to be executed, as imposed by the court, must not be extended.

Winthrop's Military Law and Precedents (2d Ed. 1920) pages 473 and 474 distinguishes the basic elements of mitigation as follows:

> "Mitigation. This which, as already observed, is distinct from and not included in the pardoning power, differs from com-

mutation in that it consists, not in changing the nature or quality of the punishment or in substituting a different punishment for it, but simply in reducing it in quantity. Thus an imprisonment or suspension adjudged for a certain term is mitigated by reducing it to one for a less term; a fine or forfeiture of a certain amount, by reducing it to one of less amount, a loss of a certain number of files, by reducing it to one of a less number. But dishonorable discharge, or forfeiture of pay, cannot, by mitigation, be substituted for confinement, or vice versa."

"The punishment as mitigated must be ejusdem generis with original; that is to say must be a part of the very same punishment imposed by the court. * * *

"As already noticed, the power conferred by Art. 112 (superceded by Art. 50) is to mitigate, etc, a punishment, not a sentence. So, where a sentence contains several punishments, action taken thereon which detracts from the severity of the sentence in the aggregate but does not specifically reduce any punishment as such, is not a legal exercise of the power of mitigation. * * *"

In CM 210256, Delph, 9 B.R. 235, the Board of Review wrote a detailed opinion on the subject of mitigation and referred to numerous American textbooks on military law from which extracts are quoted, all of which define and interpret mitigation in the same terms expressed herein. The following are illustrative of the generally accepted concept:

"b. Lieutenant John O'Brien, American Military Laws (1846), page 280:

'Although it is lawful for the authority which orders the court to suspend, mitigate, or remit the sentence of a court-martial, he is not authorized to commute the punishment, that is, to alter its nature. This rule also applies to officers confirming the sentence of inferior courts martial. To mitigate is to lessen or reduce in amount or severity. * * *'

'* * * remission is not followed by any punishment; and in cases of mitigation the punishment is authorized, as far as it goes, by the sentence of a court-martial. A mitigation is in fact a partial pardon. But power to commute is in fact power to carry into effect an arbitrary punishment, which has not previously received the sanction of any judicial tribunal; and such power cannot be exercised, even by the highest authority in the land, except in cases provided for by the Legislature,

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

JAGN-CM 313891

AUG 22 1946

UNITED STATES	)	SECOND SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Fort Jay, New York, 28 March, 4, 5, and 8 April 1946. Dismissal, total forfeitures, and confinement for six (6) years.
	)	
First Lieutenant PHILIP R. WEINTRAUB (O-1799554), Corps of Military Police.	)	

OPINION of the BOARD OF REVIEW
SCHINDLER, HOTTENSTEIN 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that First Lieutenant Philip R. Weintraub, CMP, Company A, 786th Military Police Battalion, Fort Jay, N.Y., being the Trial Judge Advocate of a General Court-Martial to which had been referred for trial a Charge and Specification alleging desertion against Private Mark Green, did, at Fort Jay, N.Y., on or about 22 February 1946, wrongfully, unlawfully, and feloniously ask from said Private Mark Green, the sum of Fifteen Hundred ($1500.00) Dollars, United States Currency, with the intent to have his actions as Trial Judge Advocate of said General Court-Martial influenced thereby in favor of said Private Mark Green by making recommendations for clemency for him.

Specification 2: In that * * *, being the Trial Judge Advocate of a General Court-Martial to which had been referred for trial a Charge and Specification alleging desertion

against Private Mark Green, did, at New York City, N.Y., on or about 2 March 1946, wrongfully, unlawfully and feloniously ask, accept and receive from Chelly Kurland, the sum of Five Hundred ($500.00) Dollars, United States Currency, with the intent to have his actions, as Trial Judge Advocate of said General Court-Martial in the case of Private Mark Green, influenced thereby in favor of said Private Mark Green by withholding evidence detrimental to him and by making recommendations for clemency for him.

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

Specification 1: In that * * *, being the Trial Judge Advocate of a General Court-Martial to which had been referred for trial a Charge and Specification alleging desertion against Private Mark Green, did, at Fort Jay, N. Y., on or about 22 February 1946, wrongfully and dishonorably solicit from said Private Mark Green, the sum of Fifteen Hundred ($1500.00) Dollars, United States Currency, upon the representation that he, the said First Lieutenant Philip R. Weintraub, would use his official position and influence as Trial Judge Advocate of said General Court-Martial as a means of obtaining clemency for said Private Mark Green.

Specification 2: In that * * *, being the Trial Judge Advocate of a General Court-Martial to which had been referred for trial a Charge and Specification alleging desertion against Private Mark Green, did, at New York City, N. Y., on or about 2 March 1946, wrongfully and dishonorably solicit and obtain from Chelly Kurland, the sum of Five Hundred ($500.00) Dollars, United States Currency, in return for a promise to the said Chelly Kurland, that he, the said First Lieutenant Philip R. Weintraub would suppress evidence for the prosecution, and would use his official position and influence as Trial Judge Advocate of said General Court-Martial as a means of obtaining clemency for said Private Mark Green.

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

Specification: In that * * *, being the regularly appointed assistant Defense Counsel of a General Court-Martial to which had been referred for trial a Charge and Specification alleging desertion against Corporal John F. Roberts, did, at Astoria, Queens, New York, on or about 17 January

or in some cases indirectly by means of a conditional pardon, which is only valid when the prisoner actually conforms to the conditions."

c. Captain William C. DeHart, Observations on Military Law (1862), page 213:

'The duty of every officer having authority to review the proceedings of courts-martial, is limited; and he has power only to suspend the execution of the sentence, "pardon or mitigate any punishment ordered by such court. He cannot alter, or commute the punishment, even with the consent of the party sentenced."

'The law has clearly given the power to the officer who orders a court-martial, except in cases of capital punishment, or the cashiering or dismissing a commissioned officer, to pardon, or to mitigate any punishment ordered by such court-martial. To pardon is to absolve from punishment: to mitigate the punishment is to make it less in degree, but of the same species. Beyond this the reviewing officer cannot go. Any attempt to change the punishment in kind would be illegal, and such an exercise of authority would be the assumption of exclusive judicial, as well as to a certain degree, of legislative power. To commute punishment, is to substitute for the one ordered, another of a different kind, - to change the species by the mere will of the individual, without any reference to judicial sanction.'

d. Brevet Lieutenant Colonel S. V. Benet, Treatise on Military Law (5th ed. 1866), pages 179, 180:

'To mitigate a punishment, is to make it less in degree, preserving the same species. To commute, is to substitute a punishment of a different species. There are only two kinds of punishments recognized and authorized by our military laws, which admit of no degrees of severity: - they are, death and cashiering, or dismission, but when such a sentence is adjudged by a court-martial, its pardon or mitigation is placed, exclusively, in the hands of the President. All other sentences can be pardoned or mitigated by the officer ordering the court, but admitting as they do of different degrees of severity there arises no difficulty in regard to their mitigation, as this power can be exercised by lessening the quantity without changing the species.'

* * * * *

f. Colonel Edgar S. Dudley, Military Law (2d ed. 1908), paragraph 450:

'Mitigation is the reduction by the reviewing authority of the punishment adjudged by the court, by reducing it in quantity or quality, or both, without changing its species. Imprisonment, fine, forfeiture of pay, and suspension, are punishments capable of mitigation. * * *.'

g. Major General George B. Davis, Treatise on Military Law (3d ed. 1915), page 209:

'The reviewing authority, in approving the punishment adjudged by the court and ordering its enforcement, is authorized, if he deems it too severe, to graduate it to the proper measure by reducing it in quantity or quality without changing its species: this is mitigation. Imprisonment, fine, forfeiture of pay, and suspension are punishments capable of mitigation. As an instance of a mitigation both in quantity and quality, it has been held that a sentence of imprisonment for three years in a penitentiary was mitigable to an imprisonment for two years in a military prison.'

* * * * *."

5. The reviewing authority's action in the case under consideration does not appear to conform with the legal concept of mitigation. To reach this conclusion we need only to refer to the definition of the term mitigation contained in paragraph 87b, Manual for Courts-Martial, 1928, quoted above, the very essence of which is, that

"The punishment imposed by the sentence as mitigated * * * must be included in the sentence as imposed by the court * * *" and

"To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same."

In the light of the foregoing authorities, the question for determination is whether the punishment which the reviewing authority approved and mitigated in his action is a part of that which the court imposed. Unless forfeiture of pay can be said to be of the same species as a fine, the question must be answered in the negative.

Authorized pecuniary penalties are of three kinds: forfeitures of pay, fines, and detentions of pay (MCM 1928, par 103g).

Winthrop distinguishes a forfeiture of pay from fine in the following manner:

"Forfeiture is to be distinguished from fine, a punishment which imposes a pecuniary liability in general, not necessarily affecting pay * * *" (Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p 427).

War Department Technical Manual 27-255, paragraph 125, defines fines and distinguishes them from forfeitures, as follows:

"Whereas a forfeiture deprives the accused of all or part of his pay, a fine makes him pecuniarily liable in general to the United States for the amount of money specified in the sentence. He owes the United States that amount whether or not he gets any pay. The United States may collect that debt in the way in which it collects other debts due it, by suit if necessary. * * *"

The Judge Advocate General has held that a forfeiture does not constitute a general liability on the part of the accused; but rather deprives him of his right to receive an amount of pay to which he would otherwise be entitled by virtue of his particular military status (SPJGA 1943/16000). The approval of a sentence of a forfeiture relieves the Government, to the extent therein provided, of its obligation to pay the amount and the soldier or officer has no legal right to the amount so forfeited (1 Comp Gen 291; MS Comp Gen AD 7348, 4 Jan 1923).

Since there is a substantial difference in the pecuniary liability attached to a fine as contrasted with a forfeiture, the principal dissimilarity being reflected in the nature of the obligation imposed and the type of property affected from which the debt can be satisfied, it must be concluded that these forms of punishment are not of the same species and to substitute one in lieu of the other is an unauthorized exercise of the mitigating power. The action taken was purportedly a mitigation under the provisions of Article of War 50. The fact that the reviewing authority used the term "mitigated" when he in fact "commuted" the punishment is immaterial. A sentence cannot be commuted except by the President or by a commanding general empowered by the President under Article of War 50 (Par. 87b, p. 77, MCM 1928).

6. For the reasons stated, the Board of Review is of the opinion that so much of the sentence as provides for forfeiture of $50.00 per month for a period of ten months is illegal and should be disapproved.

_____, Judge Advocate

_____, Judge Advocate

(Dissent) _____, Judge Advocate

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

JAGH - CM 313847

12 DEC 1946

UNITED STATES	)	FIFTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Second Air Force, Colorado Springs, Colorado, 29 March 1946. To be reprimanded and to forfeit $50 per month for ten (10) months.
Second Lieutenant JACQUES G. BEEZLEY (0-27730), Air Corps, Squardon O, 249th Army Air Forces Base Unit, La Junta Army Air Field, La Junta, Colorado	)	

Dissenting Opinion by FLANAGAN, Judge Advocate.

1. I do not concur with the opinion and conclusion of the majority.

2. It is my opinion that a forfeiture may be included in a fine.

a. A forfeiture relieves the Government of its obligation to pay the accused the amount of the forfeiture.

b. A fine is a debt to the Government. It may be paid out of pay, personal funds or property.

3. Winthrop in distinguishing a fine from a forfeiture describes a fine as "punishment which imposes a pecuniary liability in general not necessarily affecting pay" (underscoring supplied). It would therefore appear that pay may be considered to be included in a fine. Since forfeitures are limited to pay and pay may be included in fines, it would appear that both forfeitures and fines are of the same species.

4. Paragraph 87b, Manual for Courts-Martial, 1928 provides:

"* * * To mitigate a punishment is to reduce it in quantity or quality, the general nature remaining the same."

In the instant case it is felt that the quality of the fine was reduced by mitigating such fine to a forfeiture of $50.00 per month for ten (10) months. The mitigation relieved the accused of paying the fine

immediately. It limited the source of satisfying the forfeitures, to the accruing pay of the accused.

No authorities or precedents to support the above position could be found.

Peter J. Hamago, Judge Advocate.

JACH - CM 313847 1st Ind

WD, JAGO, Washington 25, D. C. 7 January 1947

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by Act of August 20, 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Second Lieutenant Jacques G. Beezley (0-27730), Air Corps, Squadron O, 249th Army Air Forces Base Unit.

2. A majority of the Board of Review is of the opinion that the record of trial is legally insufficient to support that part of the sentence as modified by the reviewing authority as relates to a forfeiture of fifty dollars ($50) per month for a period of ten (10) months, for the reason that in changing a monetary penalty from a fine to a forfeiture, the reviewing authority in effect attempted to commute the sentence. One member of the Board of Review has dissented, stating that in his opinion, a forfeiture is included in the court's sentence to pay a fine of five hundred dollars ($500) and that the reviewing authority's action was a proper mitigation. I concur in the opinion of the majority, and for the reasons stated in that opinion, recommend that so much of the sentence as modified by the reviewing authority as involves a forfeiture of fifty dollars ($50) per month for ten (10) months be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect the above 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. 4, Jan 15, 1947.)

1946, wrongfully, dishonorably, and to the discredit of the military service, ask, accept and receive from one Marie Mason, the sum of Six Hundred ($600.00) Dollars, United States Currency, in consideration for which the said First Lieutenant Philip R. Weintraub promised to obtain for the said Corporal John F. Roberts a lenient sentence from the court.

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

Specification: In that * * *, being the regularly appointed assistant Defense Counsel of a General Court-Martial to which had been referred for trial a Charge and Specification alleging desertion against Corporal John F. Roberts, did, at Astoria, Queens, New York, on or about 17 January 1946, wrongfully, dishonorably, and to the discredit of the military service, ask, accept and receive from one Marie Mason, the sum of Six Hundred ($600.00) Dollars, United States Currency, in consideration for which the said First Lieutenant Philip R. Weintraub promised to obtain for the said Corporal John F. Roberts a lenient sentence from the court.

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

3. On 10 January 1946, by paragraph 30, Special Orders No. 8, Headquarters, Second Service Command, accused was appointed Assistant Defense Counsel of a General Court-Martial which was to convene at Fort Jay, New York (R. 24; Pros. Ex. 1). All unarraigned cases were, by the terms of this order, withdrawn from the Trial Judge Advocate of the General Court-Martial appointed by paragraph 25, Special Orders No. 292, same Headquarters, 22 October 1945, and assigned for trial to the court it constituted. At this time there was pending a desertion charge against Corporal John F. Roberts which on 3 January 1946 had been referred to the Trial Judge Advocate of the court appointed by paragraph 25, Special Orders No. 292.

On 14 or 15 January 1946, accused visited the home of Miss Marie Mason who described Corporal Roberts as her "boy friend" (R. 285, 286). Accused introduced himself as "lawyer for Johnny Roberts" and told Miss Mason that Roberts claimed to have $1400 in the bank and that he, accused, "had to see" about it. He told her he wanted her to be a witness in Roberts' case and after they discussed her proposed

testimony he left, promising to return before the trial (R. 286, 287).

He called again on 17 January and talked about the trial, stating that a sentence of fifteen to twenty years was usual in the case of wartime desertion. Miss Mason began to cry and asked him if anything could be done. Accused said that he "preferred getting a civilian lawyer" because "it would help" (R. 289). When she agreed to this he stated that it would cost $250 for the lawyer's fee and that "Altogether, the case would come around a Thousand Dollars." She replied that she had only $600 in the house and they reached an understanding that she was to pay $600 then and $50 at the time of the trial. Accordingly, she gave him $600. He stated that he would "see that Johnny got a light sentence, five years the most" and that $250 was to be paid to the civilian lawyer and $400 was to be used "where it was good" (R. 290, 291). In the event that Roberts was tried for desertion accused was to return the money (R. 302). Miss Mason asked him for a receipt but he refused to give her one, stating that she would "have to have confidence in him" (R. 292).

On the day of the trial Miss Mason talked with accused outside the courtroom and asked him if he had told Roberts "about the money." Accused said that he had not but when she suggested that he should, he called Roberts over and, pointing to an "old man" who was sitting in the waiting room, informed him that he was an attorney who had been engaged by Miss Mason (R. 292, 293). Neither she nor Roberts talked to this man and he was not present in the court room until the court opened to announce the sentence imposed on accused (R. 293, 294). At the conclusion of the trial accused asked Miss Mason for "the rest of the money" stating that it was to pay the lawyer his fee. Thereupon she gave him $50 although indicating dissatisfaction with the result of the trial. The man to whom accused referred as Roberts' lawyer was present (R. 294, 295).

At the beginning of the following week accused telephoned Miss Mason and told her that for $200 "this man" could help Roberts. When she replied that she could not pay $200 he suggested that she might be able to afford $100, a suggestion which she refused to consider (R. 295, 296).

On cross-examination Miss Mason admitted that she had testified falsely at Roberts' trial but claimed that she had been "coached" by accused to do so (R. 322-343).

On 14 February 1946 by paragraph 20, Special Orders No. 38, Headquarters, Second Service Command, accused was relieved as Assistant Defense Counsel and appointed Trial Judge Advocate of the General Court-Martial constituted by paragraph 30, Special Orders No. 8 (R. 24; Pros. Ex. 1-A). On 20 February 1946 there was referred to accused for trial a charge of desertion against one Private Mark Green (R. 25; Pros. Ex. 2). Green was a patient at the Regional Hospital, Fort Jay, New

York, where he was visited by accused and served with the charge sheet on 22 February 1946 (R. 25, 27; Pros. Ex. 2). Accused informed Green that he was the prosecutor in his case and read him the 58th Article of War. He then suggested that they go over to the corner and talk. Green told him that he was contemplating engaging Lieutenant Cohen as his assistant defense counsel. Accused advised against this because of Lieutenant Cohen's unpopularity. He then remarked, "I'd like to help you out." Green thanked him and suggested that he examine his statement which he claimed he could substantiate. Accused left to procure this statement saying, "Mark, I will have to stick my neck out for you, and I will see what I can do for you" (R. 28, 29). He returned in about one-half hour and told Green that the statement was insufficient and that Green should write out a complete statement. Accused then gave Green a piece of paper and requested him to get "those certificates" (R. 29). This paper contained in substance the following notations: (1) doctors who treated wife and child - with date of treatment; (2) doctors who treated accused before and after induction with dates; (3) dates confined at various Army hospitals; (4) dates and places where application was made to Red Cross for relief or aid; (5) names of doctors who treated wife and child during accused's absence; (6) death certificate of mother (R. 31; Pros. Ex. 3). He told Green that this information would help to build up a substantial case for Green. He contemplated having Green undergo another physical examination and would also try to get a Major Schonfield to give him a psychiatric examination. If the physical examination showed that Green was physically unfit to stand trial and the mental examination revealed he was unbalanced then accused would try to get him a "blue-2" discharge on the grounds that he was "mentally or physically incapable" (R. 31, 32). In the event that they were forced to go to trial accused stated that he would tell the court that all Green's statements were supported by certificates, and that he would recommend clemency (R. 32). Accused repeatedly stated that he was "sticking my neck out for you." When Green asked what he meant by that accused countered by asking him where he lived. Green gave him his address and telephone number. Accused replied:

> "Mark I will be coming up to your house to read the charges to your wife, with papers and all, and among the papers there will be an envelope, and while I am there I will go away to the bathroom, and when I return I expect a substantial sum of money to be in there."

The money was to be paid in three installments, $500 initially, $500 before trial, and $500 when Green reached "Greenhaven," the latter to insure accused's appearance before a clemency board (R. 33). On the other hand if Green did not stand trial but received a "blue-2" discharge accused was to get the same sum Green promised "a certain Judge Goldstein." When Green asked how much that was accused replied, "$5,000" (R. 33, 34). He added that although Judge Goldstein could not help

Green he, accused, was in a position to do so (R. 35). Green told him that he would consider the matter and accused departed leaving a slip of paper with his name, unit and telephone extension written thereon in his own handwriting (R. 37, 38; Pros. Ex. 4). Green was admonished, however, that if he was questioned when he tried to call accused that he was to say that he wanted to submit evidence in connection with his trial (R. 34).

Accused visited Green again on Sunday, 24 February. He asked Green if he had considered the matter and the latter stated that he expected his sister to come from Boston and he also expected to see his wife (R. 35). By "his wife" he meant Miss Chelly Kurland with whom he had been living for a number of years. Green had been ceremonially married to a woman who was still living and from whom he had not been divorced at the time of the trial (R. 42, 43, 59). When he told accused that his sister would be unable to see him because he was a prisoner, accused procured him a pass signed by a Captain Emerson permitting Green's sister to visit him on the following Tuesday (R. 35). Accused then made an appointment to see Green's wife and sister at the latter's home (R. 36).

On Monday, 25 February, accused called on Green again and requested information as to how he could communicate with the latter's legal wife (R. 53).

The next meeting between the two was on Wednesday, 27 February, about 1300 hours. Accused asked Green to go into a nearby office and had him sign a paper authorizing the former to examine his draft board records. He then told Green that he was going to visit Green's home that evening but the latter replied that his sister would not be there "and I am not ready for you neither." When accused asked him what he meant by that Green replied that all that he wanted was a fair trial. Accused again stated that "he was sticking his neck out" and that he had spent $70 entertaining people in connection with the case (R. 40-42). He told Green that he, Green, was facing a sentence of from fifteen to twenty years at hard labor and demanded an explanation of the cancellation of the appointment with Green's sister. Green then admitted that his sister was at his home but said that she had no money and asked accused if he would take a check. Accused said, "You know damn well that I can't take a check" and urged Green to make arrangements for her to cash it. Green suggested that accused go to Boston at his, Green's expense, but accused said he did not have time (R. 43, 44). Accused then remarked that he was "involving himself" and that "I don't want this to become another 'Mitchel Field affair.'" He became angry, walked away, returned a few minutes later, and gave Green "that paper" back, saying, "Here, I am through with you" (R. 44, 45). About fifteen or twenty minutes later he telephoned Green and told him that he was appointing Captain Bailey to defend him and "that's all there is to it" (R. 45).

About 1500 hours the same day Miss Chelly Kurland received

a telephone call from accused who told her he was prosecuting "her husband" and that he would have to "give him all I have." Pursuant to Miss Kurland's suggestion accused called on her at about 1800 hours that evening (R. 116). He told her that Green had deserted because he knew his outfit was going overseas, that he could present very damaging evidence against him in the form of testimony of his legal wife, Miss Kurland herself, and agents of the Federal Bureau of Investigation, and that he could "send him up" for fifteen or twenty years hard labor (R. 116, 117, 176). He said that he had entertained some people at a night club with a view to acquainting them with Green's case at a cost of $70 and that "you people don't expect me to work for nothing" (R. 117). When Miss Kurland indicated that she had nothing to give him, accused asked her when he could expect an answer. She replied she would have to communicate with Green's family and they made arrangements for him to telephone her about eight o'clock that night (R. 119). After he left, Miss Kurland telephoned Green at the hospital (R. 119). As a result of the conversation he had with her Green talked about accused with a Colonel Fritch and Colonel Bisbee (R. 112, 113). He was subsequently visited by a Lieutenant Cohen and, following his advice, called Miss Kurland and talked with her about accused (R. 50, 51, 112, 113). About eight o'clock the same night accused telephoned Miss Kurland who told him that she would have the money for him on Saturday night and that he could get it anytime after seven o'clock (R. 121, 122).

On Friday morning, 1 March, as the result of a telephone call she received from Lieutenant Cohen, Miss Kurland went to the Federal Building. At the time she had in her possession fifty $10 bills. The serial numbers of these bills were listed (R. 123, 125). The same day accused telephoned Green and told him "I am handling your papers for trial." Green then informed him that he could come to his house on Saturday evening (R. 92).

Late Saturday afternoon Captain Arthur K. Peters, Executive Officer of the Security and Investigations Branch, Second Service Command, Staff Sergeant Allen E. May, and Sergeant Kenneth T. Birch installed a microphone in the dining room of the Green home, connected it with a recording device located in the bedroom, and awaited accused's appearance (R. 131, 204, 230, 232, 233). Shortly after seven o'clock he arrived. He told Miss Kurland that he had communicated with the hospitals where Green allegedly had been treated; that he had notified the attorney for Green's wife "to produce her or else he would have the FBI after her;" and that Miss Kurland should pose as Green's legal wife. He represented that the most Green would receive as punishment was a dishonorable discharge and six months confinement and "if he sticks to me" he would get a Presidential pardon within a year or two (R. 132-134). After some further conversation accused arose and started to put on his coat while he looked at a bookcase. He left a brown envelope lying on the table and Miss Kurland took the money which she had in a white envelope and spread it out on the table saying, "Well, here's the money."

Accused turned around quickly and with a gesture said "Oh, put it inside," and turned back to looking at the bookcase. Miss Kurland replied, "Well I thought you would want to count it" or "see what you are getting." Accused just motioned with his hand, whereupon she put the money back in the white envelope and then placed it in his brown envelope. Accused then picked up his gloves and the brown envelope and departed (R. 131, 135, 279). Sergeant May, who was listening to the conversation with earphones testified, as follows:

> "A At about the point that this statement occurred, there was a pause of a few seconds when it was very quiet. This pause was ended with quite a loud knocking or rapping noise, after which Miss Kurland said, 'I have got something for you,' or, 'I have got what you came for,' or words to that effect, 'Don't you want to count it?' I am quite sure of the latter part of that sentence, 'Don't you want to count it?'
>
> Q Did you hear any reply to that?
>
> A I think before there was a reply she also added, 'Don't you want to see what you're getting?' At which time Lieutenant, or this person we identified as Lieutenant Weintraub said, 'Don't say anything. Don't say anything.'" (R. 278, 279).

As soon as he left the apartment accused was apprehended by Captain William J. Huber, who was soon joined by Captain Peters. The former asked accused for his A.G.O. card and while he was searching for it he handed the brown envelope to Captain Peters. The latter opened it and took out the white envelope which contained fifty $10 bills. Accused then remarked "She must have put it in there while my back was turned. They are trying to frame me" and added that he had suspected that there might be a bribe offered and that this was the night it might be offered (R. 202, 220, 222). Captain Huber tendered him a receipt for the money but he refused to sign it (R. 222). Accused was then taken to Fort Jay (R. 225).

It was stipulated by and between the defense, the prosecution, and the accused that the serial numbers of the bills which were listed in the Federal Building coincided with the serial numbers of the bills Miss Kurland put in a white envelope and placed in accused's brown envelope (R. 137, 139). This same money was taken from accused on his apprehension and introduced into evidence (R. 128, 139, 225; Pros. Ex. 5). The brown envelope taken from accused was also introduced into evidence (R. 199, 220; Pros. Ex. 6). This envelope contained a copy of a sworn statement of Green; a copy of a letter to the Commanding Officer of Fort Slocum, dated 2 March 1946, requesting a copy of Green's hospital record and containing the typed signature of accused; a substantially

identical letter addressed to the Commanding Officer, Military Police Detachment, Chicago, Illinois; an authorization permitting accused to review Green's file at Local Board 215, Brooklyn, New York, dated 27 February 1946 and containing the typed signature of Green; a pad of paper containing notes relative to Green's case; and a statement in the first person, apparently written by Green, dealing chiefly with the illness of the writer when he was in the Army (Pros. Ex.6).

Sometime between the 3rd and 5th of March accused made an appointment by telephone with Miss Mason to meet him on Governors Island (R. 298, 299). She met him there and he asked her whether, if questioned, she would say that she had given him money. She refused to commit herself one way or the other. He finally promised to try to repay her (R. 301-304). The next day he telephoned her but she still remained non-committal (R. 306). There were several telephone calls to the same effect until about the middle of March when she again, at his instance, met him on Governors Island (R. 307, 308). This time there were the same solicitations not to disclose anything and the same representations of inability to return the money (R. 308-310). On Friday, 29 March, she saw him again, pursuant to his request. At first he offered to repay her by check in three installments but she refused, insisting on cash. Finally, on her agreement to "see nobody" he gave her $50 with a promise to pay the rest later (R.315, 316). He tried unsuccessfully to get her to write a letter stating that the money he had given her was "on business" and that he had defended Roberts "legally and faithfully" (R. 318). Two of the meetings between accused and Miss Mason were witnessed by Staff Sergeant Thomas F. Bivens, one at the end of February and the other in the middle of March (R. 356, 357).

4. Evidence for the defense: It was stipulated by and between the prosecution, defense, and accused that eleven named persons, relatives of enlisted men who were charged with offenses before a general court-martial sitting at Fort Jay, Governors Island, New York, would testify, if called as witnesses, that accused did not solicit, nor did they offer to pay him, any money in connection with the defense of their relatives (R. 369).

In addition, it was stipulated by and between the prosecution, defense, and accused that fourteen general prisoners (among whom was one John F. Roberts) would, if called as witnesses, testify that accused who acted as their defense counsel did not solicit nor demand, nor did they pay or promise to pay, any money for his services as such (R. 371).

It was further stipulated by and between the prosecution, defense, and accused that fifteen enlisted men would testify, if called as witnesses, that they were then facing trial before a general court-martial sitting at Fort Jay, Governors Island; that accused had been the Trial Judge Advocate of the court; that he did not solicit, demand, or receive any money from them, nor did they pay or promise to pay him any money or thing of value for any services to be rendered in their favor as Trial Judge Advocate (R. 372).

Joseph Goldstein, an attorney, testified that Green engaged him in connection with his (Green's) plan to surrender to the military authorities and that acting for Green he filed a petition for a writ of habeas corpus in the Federal District Court for the Southern District of New York. On cross-examination he denied knowing accused at that time or having mentioned his name to Green (R. 245, 249, 250). He denied asking Lieutenant Cohen on a visit to Governors Island for assistance in locating accused and he denied offering Lieutenant Cohen a sum of money if he would attempt to get Green to retain him, Goldstein, as his attorney (R. 257,258).

Accused, after an explanation of his rights, elected to be sworn and testify (R. 373). He stated that he was 38 years 10 months of age, a member of the Bar of the State of New York, and that he had been inducted into the Army on 15 May 1943. He came to Fort Jay, New York, on 11 August 1945 and represented some forty accused before courts-martial (R. 374). He received the charges against Green on 22 February 1946 and served them on him at the hospital that afternoon. When Green requested information he told him who was his defense counsel but he agreed "in accordance with the policy we had established" to investigate his statement and the fact that he had been inducted when he was 38 years of age. At Green's request he procured written authorization for the latter's sister to see him in the hospital and also gave him a piece of paper with the Defense Counsel's name and telephone extension and his own name and telephone extension written thereon. On Green's representation that he was suffering from bilateral hernia he agreed to check the medical records when they were available (R. 375-379).

In response to a telephone call from Green he visited him again on Monday 25 February. First, however, he learned by telephoning Green's draft board that Green had been inducted as he approached his 38th birthday when the board discovered that he had not been supporting his wife. When he saw Green he wrote down a list of items for Green to investigate telling him that if he found anything untrue he was going to use it against him. He also asked and received some information about Green's wife so he could investigate his story about his induction. Green told him that Miss Kurland could get certificates showing the medical treatment he had received and he asked accused to see her, giving him her address and telephone number (R. 379-383).

On Wednesday, 27 February, he called Miss Kurland and on being informed that she had certain certificates agreed to call on her that evening. He then visited accused and told him that he did not believe his story about his induction and that the medical records indicated that he did not have a hernia, nor that he was ever treated for one. Green said "I am a business man. I like to do business. * * * If it can be worked out for me to get a physical discharge, I will pay you $2500. * * * My sister came in from Boston. She's got a Thousand

Dollars. She'll pay it to you if you want to drop the case." Accused became angry, returned to him an authorization to inspect the records of the draft board and left saying, "I don't want any part of you, and don't you call me again." He denied telephoning Green fifteen minutes later and telling him that he had assigned Captain Bailey to defend him (R. 383, 387-389).

Accused went to Miss Kurland's apartment that evening. She did not have any certificates but he consented to talk with her when she asked him. He told her that Green was charged with desertion and that he was faced with a severe sentence but that the court might consider his age if he were telling the truth, which he doubted (R. 391).

The next day he telephoned Green and told him that he would be tried as soon as the doctors would say he was ready to stand trial. Green replied, "Don't do something you'll be sorry for." The same day or the next day he received a telephone message from Miss Kurland asking him to call her Saturday, 2 March (R. 392). That morning he telephoned Green and the latter assured him that Miss Kurland had obtained the medical certificates. About 5:00 p.m. he telephoned Miss Kurland and received the same assurance, although she requested him not to come to her apartment until after dark (R. 393, 398).

Accordingly, he called on Miss Kurland at about 7:00 p.m., carrying with him the brown envelope which is Prosecution's Exhibit 6. He again discovered that she did not have any certificates but acceded to her request to talk about the case. Miss Kurland's mother was present at the conversation. The former asked accused why Green would be punished so severely. He replied that Green was charged with a serious offense and that in his experience the courts so regarded it. He added, however, when she began to cry, that consideration might be given his age and stated that if he uncovered nothing to refute Green's statement he would so inform the court. He then arose to go and as he was putting on his hat and coat he turned around and noticed some Hebraic books on shelves (R. 394-400).

> "At that time I was looking at those. I turned — it didn't take more than a few seconds, I judge no more than ten or fifteen seconds, I heard her make some remark to me to the effect that, 'Did you say anything?' or, 'Are you counting them?'
>
> "I said, 'I didn't say anything. I am just looking at them.' With that, I turned around. If I may demonstrate, sir, my folder was lying on the table, my pad was here, I had already tucked in my letters after speaking with her, I turned about, said, 'I'll put this in there,' or 'I'll put this away,' picked up my folder, stuck it under my arm, and started to put my gloves on, then walked to the doorway." (R. 400).

He specifically denied the allegations of Specifications 1 and 2 of Charge I and Specifications 1 and 2 of Charge II (R. 401, 402).

With respect to the Roberts incident, accused testified that he was assigned to defend Roberts and, at his instance, visited Miss Mason on 15 January for the purpose of locating witnesses to testify for Roberts. He specifically denied suborning her to commit perjury. He denied that at the trial he had pointed out a civilian lawyer he had engaged but admitted that there was a civilian present in the court room for whom, at the latter's request, he had obtained permission from the President of the Court to attend the trial (R. 403-407). At the conclusion of the trial he talked with Miss Mason and she asked him to telephone her sometime (R. 408). Accordingly, between the 23rd and 25th of January he escorted her to a "bar and grill." When he apologized for not taking her to a better place, stating that the Christmas and New Year holidays had left him in debt, she told him she could probably arrange a loan for him. She first suggested that he borrow $200 and pay $250 in return, but when he objected they agreed that he should get $185 and pay back $200 in monthly installments. Accordingly, on the 29th or 30th of January he received $185 from her and gave in return a check for $200 (R. 409-411). The check was dated 31 January 1946 made payable to "M. Mason" in the sum indicated and contained the notation "Not for deposit - Evidence of loan in sum of $200.00 plus six per cent payable monthly, to commence March 10th, 1946 and monthly thereafter" (R. 411; Def. Ex. B). The following week he and Miss Mason had another social engagement during the course of which she suggested that he ought to give her four checks instead of one because she might have some difficulty with a $200 check in the event he was transferred. He gave her four checks in the sum of $51 each - "she reminded me of the interest" - apparently dated the 10th of four successive months and numbered one through four. One of these checks, number one, dated 10 March 1946, payable to M. Mason in the sum indicated was introduced into evidence (R. 411-413; Def. Ex. C). The check bore an odor of perfume (R. 413).

On 12 March at his request he met her on Governors Island and paid her $51 (R. 415). He specifically denied the allegations of the Specifications of Additional Charge I and Additional Charge II.

On cross-examination he admitted that he had practiced law since 1931 and that five per cent of his practice was concerned with criminal cases (R. 417). On the occasion of his first visit to Green on 22 February he did not warn him of his rights under Article of War 24 (R. 422). On that date he gave Green a list of items to check (Pros. Ex. 3) and also his name, unit, and telephone number (Pros. Ex. 4) although he claimed that it also contained similar information about defense counsel but that that had been torn off (R. 419, 420). He never reported Green's attempt to bribe him to anyone (R. 475). He visited Miss Kurland after he had told Green that he was "through with him" because he was trying to get material to refute his statements. Green's

suggestion not to tell Miss Kurland that he faced a sentence of from ten to twenty years was not followed by him although he did "tone it down" when she began to cry. It never occurred to him that Miss Kurland could mail the "certificates" to him (R. 424-427).

With respect to the loan from Miss Mason he told her that he was indebted to some of his brother officers - "a gentlemen's agreement" - although he conceded that they were not pressing him for repayment at the time. He merely wanted to "consolidate" his debts (R. 464, 465). She returned the $200 check to him when he gave her the four $51 checks and returned the first of these on 12 March when he paid her $51. Between 12 March and 29 March he saw Miss Mason twice for the purpose of requesting her to be a witness for him, a request which she denied because "it is going to hurt Johnny's case" (R. 471, 472).

5. Evidence for the prosecution in rebuttal: It was stipulated by and between the defense, the prosecution, and the accused that if Miss Marie Mason were recalled as a witness she would testify that she never went out with accused socially and never lent him money (R. 489).

First Lieutenant Abraham Cohen testified that he met "Judge" Joseph Goldstein at Fort Jay on 18 January 1946 and that at the latter's request he attempted to communicate with accused, failing which he gave Mr. Goldstein accused's name, organization, and telephone number. The next day the witness was approached by Mr. Goldstein who offered him some money if he could persuade Green to increase the fee he was to pay him (R. 491-493).

The entire conversation at Miss Kurland's apartment on the evening of 2 March was recorded and the records were introduced into evidence and played before the court although a large portion of them were apparently inaudible (R. 230, 479; Pros. Ex. 8-A, 8-B, 8-C).

6. The Specifications of Additional Charge I and Additional Charge II. It is here alleged that on 17 January 1946 accused as the regularly appointed Assistant Defense Counsel of a General Court-Martial directed to meet at Fort Jay, New York, wrongfully, dishonorably, and to the discredit of the service asked, accepted, and received $600 from Miss Marie Mason, in consideration for which he promised to obtain for one Corporal John F. Roberts, whom he had been assigned to defend against a charge of desertion, a lenient sentence, in violation of Article of War 95 (Additional Charge II) and in violation of Article of War 96 (Additional Charge I).

Two questions are presented by this aspect of the case, one of fact and one of law. First, whether accused asked and received the money, as alleged. Secondly, whether, if he did, his conduct violated either or both Articles of War 95 and 96. We turn our attention to the question of fact first.

It is undisputed that accused was the regularly appointed Assistant Defense Counsel and, as such, was assigned to defend one Corporal John F. Roberts who faced a charge of desertion. As counsel for Roberts accused called on Miss Marie Mason, Roberts' girl friend. An unknown civilian was present at Roberts' trial and accused sought and obtained permission for him to sit in the court room and hear the proceedings. There were financial dealings between Miss Mason and accused. By prearrangement he met her several times after Roberts' trial and on one occasion paid her, according to her, $50 and, according to him, $51.

The evidence from that point on is in conflict, however. Accused contends that after the trial he borrowed $185 from Miss Mason with an agreement to pay her $204 in return, of which $51 had already been paid at the time of the trial. The prosecution contends that accused asked Miss Mason for $650 before the trial, representing that $250 was to be used to engage a civilian lawyer and $400 was to be distributed "where it was good," the net result being that Roberts would receive a lenient sentence.

Since this case is before us under Article of War 48 we have the power, in resolving these conflicting contentions, to weigh the evidence and judge of the credibility of witnesses, although the findings of the court which saw and heard the witnesses are entitled to considerable weight. CM 243466, Calder, 27 BR 365, 382; CM 302846, Dayton. That court by its findings of guilty accepted Miss Mason's version of the transaction between her and accused and we are not inclined to disturb their conclusions.

The basic weakness of accused's contention is that he could assign no reason why Miss Mason who, according to him, was on amicable terms with him and who had social as well as business relations with him, should deliberately invent a tale that accused suborned her to commit perjury, solicited $250 as a fee for an imaginary civilian lawyer, and $400 for graft to insure Roberts a lenient sentence. These were serious allegations, not lightly to be made even by the most irresponsible people, and accused's failure to account for a motive on Miss Mason's part to make them if they were not true goes far to discredit his story and support hers.

There are other circumstances which lead us to conclude that accused's testimony is implausible. The necessity for borrowing money from Miss Mason is not at all apparent. While accused testified that he was indebted to his brother officers he admitted that they were not pressing him for payment. Moreover, it is difficult to see why accused should, a day or two before the time when he would normally be paid, contract a usurious loan with a relatively casual acquaintance as a substitute for his debts to his brother officers who were not pressing him for payment and who treated such obligations as "gentlemen's agreements." We find accused's explanations of his admitted association

and financial dealings with Miss Mason unconvincing.

On the other hand, her testimony, despite the fact that she was an admitted perjurer and an accomplice in what she must have realized was a corrupt practice, is on the whole persuasive. Indeed, the very fact that she committed perjury at Roberts' trial tends to establish accused's guilt. At accused's instance she testified for Roberts and he visited her twice at her home to discuss her testimony. It is difficult to believe that he did not know she was committing perjury when she testified as she did. It is equally difficult to believe that he permitted, if not encouraged, her so to testify for any other reason than that he wanted to earn, so to speak, the $600 he had already received. In addition, there was present at the trial an unknown civilian, as testified to by her, with whom accused had some conversations and for whom he obtained permission from the President of the court to attend the proceedings. This tends to corroborate her testimony that accused pointed out a civilian as the lawyer he had engaged but who did not participate, openly at least, in Robert's defense.

The Manual states 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" (par. 124a, MCM, 1928).

Miss Mason is of course an accomplice to the corrupt transaction for which accused was tried. Her testimony as to the nature of the financial transaction between her and accused and the amount involved is uncorroborated and that is, of course, the heart of the prosecution's case. She was subjected, however, to a long and able cross-examination by competent counsel. The court was afforded every opportunity to judge of her credence and doubtless, in so judging, took into consideration her position as an accomplice. The Board of Review giving due weight to the quoted admonition of the Manual cannot say that the court erred in believing her.

We conclude after examining the entire testimony on this aspect of the case that accused, being a regularly appointed Assistant Defense Counsel of a General Court-Martial to which had been referred a desertion charge against one Corporal John F. Roberts, did, on 17 January 1946, ask and receive $600 from Miss Marie Mason in consideration for which he promised to obtain a lenient sentence for Roberts and the question that now must be answered is whether such conduct violates either Article of War 95 or 96, or both.

Accused in acting as Assistant Defense Counsel was unlike a private attorney in that he was carrying out the orders of superior military authority. His duty with respect to that order, as with any lawful order, was to execute it as faithfully and efficiently as he

could. More specifically it was to "guard the interests of the accused by all honorable and legitimate means known to the law" and to represent him "with undivided fidelity." MCM, 1928, pars. 43b, 44a, and 45b. This includes not only defending the case on the merits but also presenting matters in extenuation (id. par. 45b) and a plea for clemency if reasons exist for its exercise (id. par. 81). This duty was to be performed not for his own private advantage, financial or otherwise, but simply because he was an officer of the United States Army.

That is the standard he was required and, in our opinion, failed to meet. On the promise of getting Roberts a lenient sentence he solicited and received $650. The military duty which he was required to perform was turned by him into an occasion of personal profit. His conduct was in every way comparable to that of a medical officer of the Army who conditioned his treatment of a soldier on the payment of a fee, and just as reprehensible. The fairness and efficiency of the court-martial system is dependent to a large extent on the competency and integrity of the counsel appointed to defend persons accused of violations of the Articles of War. While the latter have the right to retain military or civilian counsel (par. 45, MCM, 1928), in the great majority of cases the counsel appointed by the convening authority is the counsel whose services are utilized. Nothing could dissipate confidence in the impartiality of the system more than a belief among accused that the vigor of their defense was proportionate to the amount of money they could pay their counsel.

Moreover, as defense counsel, accused could not by any upright means exercise any real control over the sentence to be imposed on an accused. That was in control of the court and the reviewing authority. In accepting money in exchange for what was almost a guarantee of a lenient sentence, accused was taking a shameful advantage of the predicament in which these people found themselves. We have no hesitancy in saying that not only did he by his actions bring discredit upon the military service but that he also dishonored and disgraced himself to an extent that demonstrates that he is "morally unworthy to remain a member of the honorable profession of arms (Winthrop)." Par. 151, MCM, 1928. The record is legally sufficient to sustain the findings of guilty of the Specification of Additional Charge I, the Specification of Additional Charge II, and Additional Charge I and Additional Charge II.

7. Specifications 1 and 2 of Charge I and Specifications 1 and 2 of Charge II. These Specifications contain the common allegation that accused was the Trial Judge Advocate of a General Court-Martial to which had been referred for trial a desertion charge brought against Private Mark Green. Specification 1 of Charge I alleges that accused on 22 February 1946 wrongfully, unlawfully and feloniously asked Green for $1500 with the intention of having his actions as Trial Judge Advocate influenced in favor of Green by making recommendations for clemency. Specification 2 of Charge I alleges that accused on 2 March 1946

wrongfully, unlawfully, and feloniously, asked, accepted, and received from Chelly Kurland $500 with intent to have his actions as Trial Judge Advocate influenced in favor of Green by withholding evidence detrimental to him and making recommendations for clemency on his behalf. Both of these Specifications are laid under Article of War 96. Of the remaining two Specifications, both laid under Article of War 95, Specification 1 alleges that on 22 February 1946 accused wrongfully and dishonorably solicited from Green the sum of $1500 upon the representation that he would use his official position and influence as Trial Judge Advocate as a means of obtaining clemency for Green, and Specification 2 alleges that on 2 March 1946 he wrongfully and dishonorably solicited and obtained from Chelly Kurland $500 in return for a promise that he would use his official position and influence as Trial Judge Advocate to obtain clemency for Green.

No serious question is involved as to whether the acts charged, if committed, constitute violations of both Articles of War 95 and 96. The allegations of Specifications 1 and 2 of Charge I state a violation of 18 U.S.C., sec. 207 and, accordingly of Article of War 96. CM 235382, Singletary, 21 BR 389; CM 253900, Kent, 35 BR 131; CM 267967, Wright, 44 BR 183. That statute provides:

> "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States. (Mar. 4, 1909, ch. 321, sec. 117, 35 Stat. 1109).

Accused was an officer of the United States (Ritzman v. United States, 3 F 2nd 718; App. D. C. 1925) as well as a person acting for or on behalf of the United States (McGrath v. United States, 275 F 294 (CCA 2nd 1921)). Article of War 17 provides that "The trial judge advocate * * * shall prosecute in the name of the United States * * *" and at the trial he takes an oath that he "will faithfully and impartially

perform the duties of trial judge advocate." AW 19. Obviously suppression of evidence is inconsistent with his duty to prosecute faithfully and impartially and asking or accepting money to suppress it is prohibited by the statute. Similarly, recommendations for clemency, conditioned on the payment of a price violate the statute (United States v. Birdsall, 233 US 223; 34 Sup. Ct. 512; 58 L. Ed. 930) even though in a proper case the Trial Judge Advocate may be permitted, or even bound, to make such recommendations, it being no defense under the statute that the recipient of a bribe did only what he was supposed to do. Whitney v. United States 99 F 2nd 327 (CCA 10th, 1938). Nor is it material that accused could only recommend clemency and did not have the power to grant it. United States v. Birdsall, supra; Sears v. United States, 264 F 257 (CCA 1st 1920).

So far as Charge II and its Specifications are conserned it is not necessary for us to decide whether the allegations thereunder sufficiently state a violation of the statute (CM 234644, Cayouette, 21 BR 97; CM 248104, Porter, 31 BR 137). As was said in Porter:

> "It is unnecessary to determine whether or not the offenses fall within the provisions of the Federal bribery statute (18 U.S.C. 207), for even if they do not, they are tainted with corruptness and moral turpitude" (p. 143).

Turning to the evidence in the case certain facts are not in controversy. Accused was appointed the Trial Judge Advocate of a General Court-Martial directed to meet at Fort Jay, New York, and in that capacity there was referred to him for trial a charge of desertion pending against Private Mark Green. He served the charge on Green in the hospital on 22 February 1946 and had some conversation about Green's physical condition as a result of which he agreed to check Green's medical records. He also procured written authorization for Green's sister to visit Green in the hospital. Either then or on 25 February he gave Green a written list of items which should be investigated and which bore on matters connected with Green's defense. He also gave him his name and telephone number, although he claimed that the paper in question also contained similar information about the defense counsel, but that this portion of the paper had been torn off. He called on Green on 25 February after first telephoning the latter's draft board for information about his induction. Again on Wednesday, 27 February, he saw Green and that evening visited Green's "common-law" wife, Miss Chelly Kurland, at her apartment. At that time he pointed out to her that Green might receive a severe sentence. On Friday, 1 March, Miss Kurland had the numbers of fifty $10 bills listed at the Federal Building in New York and when on Saturday 2 March, accused called on her she put the $500 in an envelope he had brought with him. When he left the apartment this money was found in the envelope.

The defense's contention was that accused's activities were at first directed toward finding the truth about Green and later, after

he disbelieved Green's story, toward obtaining evidence against him and that after he spurned Green's offer of a bribe the latter's "common-law" wife, without his, accused's, knowledge, contrived to place $500 in an envelope he was carrying with the apparent purpose of discrediting him. On the other hand, the prosecution contends that accused from the outset bent his efforts toward building up a case in favor of Green because he expected to be paid $1500 and with that expectation in mind he went to Miss Kurland's apartment on 2 March and permitted her to place $500, the first installment, in an envelope he had brought with him.

We have already referred to the principles that govern us in resolving these conflicting contentions and need not discuss them again. The court found against the defense's contentions and in favor of the prosecution's and we think that these findings are supported by the weight of the evidence.

From the very beginning accused acted like a defense counsel, although he was the Trial Judge Advocate. He furnished Green for investigation a list of items which might prove favorable to the latter's defense and also with his telephone number. Within a period of less than a week he visited him three, and according to Green, four times at the hospital where he was confined. He telephoned the draft board from which Green was inducted and inquired into the reason for his induction. He made efforts to locate Green's legal wife. Twice he visited Green's "common-law" wife at her apartment, after the normal working day was finished, ostensibly for the purpose of obtaining "certificates" of Green's medical treatment, it not occurring to him that she could mail them to him. On neither occasion did he get these certificates, but, changing his role, he remained to talk with her and described Green's plight in such terms that she broke into tears. His zeal in Green's behalf certainly forms the basis for an inference that he was expecting payment for his work and it can be concluded from his talk with Miss Kurland that he was trying to impress her with the necessity of hiring him. Moreover, accused was a lawyer of some experience, both in civilian practice and before military courts. He must have been aware of the impropriety of talking with Green while the latter's counsel was not present, from which we can infer that he thought it would be inconvenient for his purposes to have him present.

Another phase of accused's conduct does not comport with that which we might expect of a man innocent of any evil design. According to him Green openly offered him a bribe at the hospital on Wednesday, 27 February, and he angrily rejected it telling Green that he was through with him. Yet at no time did he, a lawyer and an officer of the United States Army, report this to the proper authorities. Not only that, but subsequently he called on Miss Kurland twice.

Nor is the theory that accused was the victim of a plot tenable. At the time Miss Kurland went to the Federal Building she had no assurance

that accused would call at her home on Saturday night unless it was an assurance that he would come because he knew he was going to get $500. She had no assurance, if he did come, that she could foist the money on him without his knowledge. She had no reason to believe he would carry a large envelope and leave it conveniently on the table to facilitate her trickery. Her conduct is explicable only on the assumption that she had been assured by accused that he would come to her house on Saturday evening 2 March to receive $500 as a bribe.

The consideration for this bribe, as alleged in the Specification, is that accused would suppress evidence and make recommendations for clemency. The evidence fully sustains the court's findings in this respect. So far as the allegation that accused agreed to obtain clemency is concerned the record is clear and convincing and we need not discuss it further. Proof of the allegation that accused agreed to suppress evidence is found in his statement to Miss Kurland on the night she paid him $500 that he would have her pose as Green's real wife although he knew that at most she was only Green's "common-law" wife and that Green had been ceremonially married to another woman who was still alive and from whom he had not been divorced.

The rule that the uncorroborated testimony of accomplices is to be scrutinized with care has been considered by the Board. Miss Kurland and Green are accomplices. Egan v. United States, 287 F 958 (App. D.C. 1923). However, their testimony is not uncorroborated. There is the evidence of accused's furnishing suggestions to Green as to how to perfect his defense. There is the testimony of Sergeant May as to the conversation between accused and Miss Kurland, and there is the fact that accused when apprehended had $500 in his possession together with carbon copies of letters which requested information about accused's hospitalization. This evidence, in our opinion, sufficiently corroborates the testimony of Miss Kurland and Green.

Counsel for accused contended in arguing to the Board both orally and by brief that two errors, one committed at the trial and one committed after the trial, require reversal of this conviction.

The first error assigned deals with a transcription of the recordings which was made by Sergeant May on 7 May 1946. This transcription was not introduced in evidence or referred to in any way at the trial. It was, however, included in the allied papers and forwarded with the record. Accused's military defense counsel objected to the inclusion of this transcription in the allied papers stating that it was "highly prejudicial, not being a true and faithful transcription, as may be ascertained by comparison with the actual transcription made by the court reporter from the recording itself." There was submitted to the Board an affidavit of the military defense counsel in which he states that the Trial Judge Advocate informed him that the Staff Judge Advocate considered it "part of the record and should be included in the papers sent to the Reviewing Authority for his consideration."

In substance accused's counsel argued that the reviewing authority must have availed himself of this transcript because, according to the affidavit of military defense counsel, the Staff Judge Advocate so indicated to the Trial Judge Advocate; that this violated the Articles of War and accused's constitutional right to be confronted with the witnesses against him; and that the evidence submitted was highly prejudicial in character, not only because it was inaccurate but because it indicated in several places that accused was whispering.

We find it unnecessary to pass on these contentions because the Staff Judge Advocate in his review states:

> "The transcript was not attempted to be admitted into evidence and has not been considered in reviewing the case."

He then quoted from United States v. Schanerman, 150 F 2nd 941 (CCA 3d, 1945) where the courts said:

> "Transcribed notes, made by a stenotype operator from hearing the records repeatedly 'played', were properly excluded * * *."

Assuming then that the affidavit referred to which contained a hearsay statement as to the Staff Judge Advocate's position is true, it is clear that he reversed his position and regarded the transcript as incompetent evidence, even if introduced at the trial. We must conclude, then, that neither the Staff Judge Advocate nor the Reviewing Authority in passing upon the case considered the document to which objection was made.

The second ground for reversal urged before the Board was that the court erred in overruling Defense Counsel's objection to the playing of the records in court. The defense had objected to the court hearing them on two grounds: (1) that they were not proper rebuttal evidence; (2) that they were fragmentary.

We think the court's ruling was correct. The accused had testified at length as to the substance of the critical conversation he had with Miss Kurland on 2 March. The prosecution was plainly entitled to attempt to prove by a recording what the actual conversation was and that it differed from accused's version. So far as the question of the fragmentary nature of the recording is concerned it was considered in United States v. Schanerman, supra, where the court said:

> "No error is found, as charged by appellant, in the refusal of the district court to instruct the jurors to disregard what they had heard when records of conversations between appellant and Finneran were 'played' in the hearing of the jury during the trial. This type of evidence was admissible upon the authority of Goldman v. United States, 36 U.S. 1929, 62 S. Ct. 993, 86 L. Ed. 1322. Transcribed notes, made by a

stenotype operator from hearing the records repeatedly 'played', were properly excluded; but the mere fact that certain portions of the mechanically recorded conversations were less audible than others did not call for exclusion of what the jurors personally heard from the 'playing' of the records. There would be no more valid reason for exclusion of the mechanically recorded conversations than there would be for excluding competent conversations, overheard in part, by human witnesses."

As stated above there was no unreasonable multiplication of charges in alleging that the same acts constituted violations of both Articles of War 95 and 96. Nor was there anything improper in alleging in one Specification that accused solicited a bribe and that in another he solicited and received a bribe since it is settled that they are separate offenses under the Statute. Egan v. United States, supra. To be sure accused could only be punished for his offense under its most important aspect (par. 80a, MCM, 1928) but it is settled that where bribery is charged both under Article of War 95 and 96 the most important aspect of the offense is that laid under Article of War 96. Accordingly the sentence to confinement was warranted. CM 248104, Porter; 31 BR 137.

For the foregoing reasons the Board is of the opinion that the record is legally sufficient to sustain the findings of guilty of Specifications 1 and 2 of Charge I, and Charge I, and Specifications 1 and 2 of Charge II, and Charge II.

8. War Department records show that accused is approximately 39 years and 3 months of age. He is divorced. He has been engaged in the general practice of law in New York City since 1929 when he was awarded his LL.B. degree from St. John's College. On 29 May 1943 he was inducted into the Army and on 22 February 1945 was commissioned a second lieutenant in the Corps of Military Police. He was promoted to first lieutenant on 24 January 1946.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of Article of War 95 and dismissal, total forfeitures, and confinement at hard labor for life are authorized upon conviction of a violation of Article of War 96.

Irwin Schindler, Judge Advocate.

A. J. Fortenstein, Judge Advocate.

Gerald J. Hanna, Judge Advocate.

JAGN-CM 313891 1st Ind
WD, JAGO, Washington 25, D. C.
TO: The Under Secretary of War SEP 1 1 1946

1. Pursuant to Executive Order 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 Philip R. Weintraub (O-1799554), Corps of Military Police.

2. Upon trial by general court-martial this officer, who was the Trial Judge Advocate of a General Court-Martial, before which a charge of desertion was pending against one Private Mark Green, was found guilty of soliciting a $1500 bribe from Green with the intention that his actions as such Trial Judge Advocate should thereby be influenced, in violation of Articles of War 96 and 95 (Spec. 1, Chg. I, and Spec. 1, Chg. II, respectively); and guilty of taking a $500 bribe in the Green case with a similar intention, in violation of Articles of War 96 and 95 (Spec. 2, Chg. I, and Spec. 2, Chg. II, respectively). He was also found guilty, in violation of Articles of War 96 and 95, of asking and receiving $600 as a regularly appointed Assistant Defense Counsel in consideration of his promise to obtain a lenient sentence for one Corporal John F. Roberts who was charged with desertion and whose case had been referred to the General Court-Martial on which accused was the Assistant Defense Counsel (Spec. of Add. Chg. I and Spec. of Add. Chg. II). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, for six 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 sentence and to warrant confirmation thereof.

The accused, as Assistant Defense Counsel of a general court-martial to which a charge of desertion against Corporal Roberts had been referred visited Roberts' lady friend, Miss Marie Mason, at her apartment and represented to her that if Roberts was to obtain a lenient sentence she would have to engage a civilian lawyer to represent him at a fee of $250 and furnish an additional $400 apparently for corruption. Miss Mason paid accused $600 then and $50 after the trial. No civilian lawyer represented Roberts at his trial and accused appropriated the entire sum.

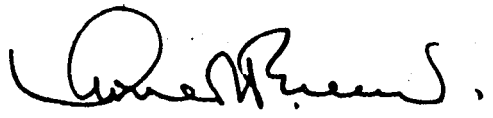
Subsequently, accused was appointed Trial Judge Advocate of a general court-martial and in such capacity there was referred to him for trial a desertion charge against one Private Mark Green. Accused solicited a $1500 bribe from Green upon the representation that he would make a recommendation for clemency in his case and made suggestions to

Green as to how to prepare his defense. Of the $1500, $500 was to be paid immediately, $500 at the time of trial, and $500 when Green started to serve his sentence. Green notified the Army authorities and when accused went to the apartment of Chelly Kurland, Green's common-law wife, to collect the first payment, a recording device had been installed, and Miss Kurland had $500 in bills, the numbers of which had been listed. Accused then made the additional representation that he would suppress certain evidence that was detrimental to Green and the $500 was put in an envelope he had brought with him. He was apprehended leaving the apartment with the money in this envelope.

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

4. Consideration has been given to a brief submitted on behalf of accused by Samuel T. Ansell, Esq. and Roger Robb, Esq. Mr. Robb also presented an oral argument before the Board of Review. Consideration has also been given to a memorandum, submitted to the reviewing authority, by William B. Moore, Esq. and to a statement, with exhibits, prepared by accused which was forwarded with the record of trial. Letters from Mrs. Jerry Goldberg, accused's sister, Mr. Sol Weintraub, accused's cousin, and Mr. Joseph Koppel, have also been given consideration.

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

8 Incls.
1 - Record of trial
2 - Form of action
3 - Brief submitted by Ansell and Robb
4 - Memo fr. William B. Moore, Esq.
5 - Statement and exhibits submitted by accused
6 - Ltr. fr. Mrs. Jerry Goldberg
7 - Ltr. fr. Mr. Sol Weintraub
8 - Ltr. fr. Mr. Joseph Koppel

(G.C.M.O. 288, 27 September 1946).

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

JAGH - CM 313896

21 OCT 1946

UNITED STATES	IX AIR FORCE SERVICE COMMAND
v.	Trial by G.C.M., convened at Erlangen, Germany, APO 66, 12-13 April 1946. Dishonorable discharge and confinement for life. United States Penitentiary
Sergeant WALTER TAYLOR (33228840), Company B, 449th Signal Heavy Construction Battalion	

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 above-named soldier.

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

CHARGE: Violation of the 92nd Article of War.

Specificiation: In that Sergeant Walter Taylor, Company "B", 449th Signal Heavy Construction Battalion, did at Stein, Germany, on or about 17 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Monroe Melton, a human being by shooting him in the chest with a pistol.

He 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 be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, 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 evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and 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 life imprisonment 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).

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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

JAGK - CM 313956

30 OCT 1946

UNITED STATES	)	XXIV CORPS
v.	)	Trial by G.C.M., convened at APO 901, 22 and 23 April 1946. DURAN AND MEDINA: To be hanged by the neck until dead. RAINEY: Dishonorable discharge and confinement for life. Penitentiary.
General Prisoners ROBERT V. MEDINA, NORMAN DURAN and LEONARD V. RAINEY	)	

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

---

1. The record of trial in the case of the general prisoners 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 were jointly tried upon the following Charges and Specifications:

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

Specification: In that General Prisoner Robert V. Medina, General Prisoner Norman Duran, and General Prisoner Leonard V. Rainey, having been duly placed in confinement in Pungsong Stockade, APO 901, respectively, on (1) 25 January 1946, (2) 4 March 1946, (3) 4 March 1946, acting jointly, and in pursuance of a common intent, did, at APO 901, on or about 11 March 1946, escape from said confinement before they were set at liberty by proper authority.

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

Specification: In that General Prisoner Robert V. Medina, General Prisoner Norman Duran, and General Prisoner Leonard V. Rainey, acting jointly, and in pursuance of a common intent, did, at APO 901, on or about 13 March 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation, kill one, James L. Murray, a human being, by stabbing him with a knife.

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

Specification: In that General Prisoner Robert V. Medina, General Prisoner Norman Duran, and General Prisoner Leonard

V. Rainey, acting jointly, and in pursuance of a common intent, did, at APO 901, on or about 13 March 1946, with intent to do him bodily harm, commit an assault upon Anton F. Otlo, by stabbing and cutting him in and about his body with a dangerous weapon, to-wit, a knife.

Each accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. All the members present at the time the vote was taken concurring, the accused General Prisoner Leonard V. Rainey 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." All the members present at the time the vote was taken concurring therein, the accused General Prisoners Norman Duran and Robert Medina were each sentenced to be hanged by the neck until dead.

The reviewing authority approved the sentence as to each accused, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement as to Rainey, withheld execution of his sentence pursuant to Article of War 50½ and forwarded the record pursuant to Article of War 48 as to Duran and Medina.

3. For the Prosecution.

The record shows that prior to the time of the alleged offenses herein the accused were general prisoners confined in the Pungsong (Korea) Stockade, APO 901 (R. 7; Pros. Exs. 1,2,3). At breakfast formation on the morning of 12 March 1946 all three were found to be missing. They had not been released by competent or any authority (R. 7,9).

Mr. Pak Chun Ha, a Korean civilian residing at No. 83-13 Chuk Chong Chong, Seoul, Korea, testified under oath that he was a Christian and knew the meaning of the oath; that he was acquainted with an American soldier known as "Apachi" and whom he identified as the accused Medina; that between 4 and 5 o'clock in the afternoon of 13 March 1946 the three accused, Medina, Duran and Rainey, came to his home and asked for food. "Apachi" also secured a U.S. Army M1 carbine and a knife with a five-inch blade which he had hid in the Korean's house on a previous visit. The witness identified Prosecution's Exhibits 4 and 5 as being the carbine and knife which "Apachi" had left at his house. At about 1900 hours that evening the three accused left the home of the witness Pak Chun Ha, taking with them the weapons mentioned (R. 10-11). The next day, 14 March 1946, the accused again appeared at the witness' home for breakfast and remained all day, leaving at about 8 o'clock P.M. that night (R. 12).

Private First Class Anton F. Otlo, 31st Field Artillery Military

Police Battalion, testified that at about 10 P.M. on the night of 13 March 1946 he and Private First Class James Murray were walking patrol on Bar Hill, District 2, East End of Seoul, Korea, and as they walked through an alley, with Murray about one step to his rear, they were stopped by three men who commanded them to drop their guns (R. 16). Otlo positively identified the accused Medina whom he said stood before him at a distance of two or three feet pointing a carbine at his stomach (R. 16). There was another man two or three feet behind Medina and a third man off to Otlo's right front side. The alley was rather dark and Otlo could not recognize either of these two men. Suddenly Murray screamed and ran toward the Military Police station which was located about 300 yards away. Otlo was stabbed on the left side of his chest by the man who stood to his right front and as he turned to follow Murray out of the alley he was again stabbed in the back (R. 17-19). When Otlo arrived at the Military Police station he saw that Murray's jacket was full of blood (R. 18).

At about 2245 on 13 March 1946 Murray was examined at the 6th Station Hospital, Seoul, Korea, by Captain James A. Helmsworth, who found him to be suffering from shock and a laceration "below the level of the second rib below the breastbone." He was bleeding internally and had a profound disturbance of the respiratory organs. An operation was performed in an effort to save his life but Murray died as a result of the stab wounds at about 0030 the following morning. Captain Helmsworth also examined Private First Class Otlo at about the same time and found that he had received only superficial lacerations of no serious consequence (R. 23-24). On the morning of 15 March 1946 Captain George Cosson, Jr., 40th Military Government Headquarters and Securities Company, received word that three soldiers were hiding in a house about five miles northwest of the City of Seoul. The officer took a detail of military police and went to the house where he found the three accused. Medina had on his person a sheath containing a trench knife which was introduced in evidence as Prosecution's Exhibit 4. Captain Cosson identified the knife in court by his initials inscribed by him on the handle when he took it from Medina (R. 21). In a corner of the room where the three accused were found there was a U.S. carbine cal. .30 rifle with 14 rounds of ammunition in the clip and one round in the chamber. The carbine was identified as Prosecution's Exhibit 5 and admitted in evidence without objection (R. 22). The three accused were confined in the 31st Field Artillery Stockade at Seoul, Korea, and upon examination of their clothing it was observed that a field jacket worn by Duran had on it spots of some substance resembling blood. This jacket was tagged by Marvin J. Jones of the Criminal Investigation Division and sent to the 29th General Hospital for chemical analysis (R. 30,37). Captain James B. Roberts, MC, a qualified pathologist and bacteriologist, testified that sometime during March he made a laboratory test to determine the nature of the substance on this jacket. He applied the benzidine test and the result was positive. He next applied the acid-hemiton test for iron pigment in the blood and such pigment was found. The third test was a precipitation test using anti-union serum. Precipitation occurred and from these tests

Captain Roberts concluded that the stains on the jacket were positively human blood or monkey blood (R. 39-40).

During the afternoon and evening of 15 March 1946, Marvin J. Jones and Raymond De Wolfe questioned each accused separately at 36th Criminal Investigation Division Office. Agent Jones testified that he removed the handcuffs from Rainey, advised him of his rights under Article of War 24, told him that he need not make any statement of a self-incriminating or degrading nature and that if he did so it could be used against him. Rainey replied that he had "that" read to him before and understood it (R. 26,29). Duran and Medina were in turn brought into the office and Agent Jones testified that he advised each of his rights under Article of War 24, and that no threats or promises were made to either accused (R. 28). Typewritten statements signed by all three accused were offered in evidence as Prosecution's Exhibits 6, 7, 8 (R. 32). The defense offered no objection to the introduction of Medina's statement but did object vigorously to the admission in evidence of the statements taken from Rainey and Duran (R. 32). The grounds for such objection are discussed in the following paragraphs. There is no material variance in the statements or confessions of the accused, each stating that they left the stockade at about 2000 hours on the evening of 11 March 1946, that they went into the hills on the outskirts of Seoul, obtained uniforms from the 31st Infantry, and the following night all three went to the home of the Korean where Medina secured the carbine and knife which he had left on a previous occasion. The night of 12 March was spent at the home of the Korean. Rainey stated that in the evening of 13 March 1946 they planned to hold up military police and get their guns, they having previously decided to cross the Russian border, and that they would need the weapons to effect their escape. He denied taking part in the holdup and asserted that he told the others that he was sick. He did admit however that he accompanied the other accused at all times and when they went to Bon Jung Street he saw two military police "wrestling around" in the alley, heard one "holler for help and run." Rainey stated that he did not know who did the stabbing but that Duran had the knife (Pros. Ex. 7).

In his confession, Duran recited the activities of himself and the other accused from the time they left the stockade and stated that when they went to the prostitution district and asked the military policemen for their guns he "stabbed one of the guys." He did not know why he stabbed him, but guessed it was because he refused to give up his gun. He further stated that he stabbed the second military police because he "tried to grab his gun." After the stabbing Duran stated that "We went to the farmhouse where they found us" (Pros. Ex. 6).

Medina confessed that he made the ladder by which the accused escaped from the division stockade, reiterated substantially the same story as the other accused concerning the events leading up to the night of 13 March 1946 and added:

"*** We then went around the town the three of us. We were up in the Off Limits district after curfew. We were looking for a place to shack up with some girls. While we were walking around that night I had a carbine and Duran had a knife. About 10 o'clock we were walking around the corner. Duran was in front, I was next and Rainey was behind. We walked right into two M.P.s and then all hell broke loose. I shoved the carbine into the one MP's guts. He said 'what's up', and I said put your hands up. The M.P. started after Duran and I jumped back." (Pros. Ex. 8)

Prior to the admission of the confessions in evidence, the trial judge advocate suggested that the statements of each accused be considered by the court solely as evidence against the party confessing (R. 27,36).

4. For the Defense.

The accused Duran and Rainey elected to take the stand and testify for the limited purpose of showing the manner in which their confessions were obtained by the investigators. Duran testified as follows:

"Duran, tell the court what happened the night you were taken to Agent Jones's room and questioned.

"A. I was taken there about ten o'clock in the evening, and I was taken in the room where Jones was and Agent DeWolfe, and they asked me if I wanted to make a statement. I told them I didn't have to make a statement. DeWolfe told me it didn't make any difference at that time. Then I sat down and they took the handcuffs off my hands, and they asked me questions. I answered the questions and then they took me to another little office. After the statement was typed, they asked me to read it and sign it. I told them I didn't have to sign it. DeWolfe told me it didn't make any difference if I signed it or not. Captain Sagar asked me if I was advised under the Manual of War. DeWolfe said it didn't make any difference as I was court-martialed before.

"Q. Did you sign the statement then?

"A. Yes.

"Q. They had already questioned you?

"A. Yes.

"Q. You thought it didn't make any difference?

"A. That is right.

"Q. Do you recall if the 24th Article of War was read to you prior to the time they questioned you?

"A. No, sir.

"Q. Did they say they had the goods on you and it didn't make any difference if you signed or not?

"A. Yes, DeWolfe told me it didn't make any difference whether I signed or not.

"Q. Did you understand the importance of signing that statement or making those statements?

"A. At that time I did not.
"Q. Do you know it now?
"A. Yes." (R. 33).

In response to a question by the defense as to whether he realized the importance of signing the paper Duran replied that he did not realize its importance when he signed it but did realize same at the time of his trial (R. 33).

Rainey testified concerning his signed confession as follows:

"Q. Did they advise you of your rights before they questioned you?
"A. No, sir. This DeWolfe got mad with me because I didn't talk. He told me he had ways of handling guys that didn't talk. They took me back about five-thirty to the 7th Division Stockade and got me again some time that night. Jones told me, 'If you make a statement it will go a lot easier on you, and if you don't you are going to swing with the other two.' They gave me a book of the 24th Article of War and had me read it and then he told me that 'whatever you do, don't change that statement.'
"Q. After those inducements you made that statement?
"A. Yes." (R.34)

and again

"Q. Why did you sign the statement?
"A. He told me that if I signed the statement it would go a lot easier on me." (R. 35)

T/4 Larry D. Berkard, 207 Military Police Company, a witness for the defense, testified that he was present in the Provost Marshal's Office in the Hanto Hotel when accused Duran signed his confession, and that the following occurred:

"Captain Sagar came in with the papers and asked him to read them. He read the papers, and Captain Sagar asked him if he would sign them. He asked what if he didn't sign them. Captain Sagar told him it would be to his own good if he did sign them, and that he already had the information given to him, and then he signed the papers." (R. 42)

Private Richard D. Baker, 207 Military Police Company, another witness who was present when Duran signed the confession, stated that he heard Captain Sagar explaining that it would be best for Duran to sign (R. 44).

Major Raymond A. Dreselly, Headquarters Korean Base Command, the investigating officer appointed under the provisions of Article of War 70, testified that he advised the accused of their rights under Article of War

24 and that the accused Duran stated that he did not desire to make a statement (R. 46).

After being duly advised as to their testimonial rights, each accused elected to make an unsworn statement. Rainey stated that he was 21 years of age, born in Tennessee where he lived until he was two years old, and then his parents had moved to Alabama. He never had much chance to go to school, his father having been sent to prison on three occasions, leaving him to work on the farm. When he was 16 he joined the CCC and later enlisted in the Army. He joined the 184th Infantry, 7th Division, in March or April. On 20 October he "hit" Leyte. Later he went to Okinawa where on 18 June he was wounded and evacuated to the 204th General Hospital on Guam. Rainey stated that on the night of the crime for which he stood charged "we went into a dark alley to go across to the next alley and get into one of the geisha houses. *** We met two soldiers in the alley *** At that time they started scuffling and then one man ran and the other ran, and then I ran" (R. 48).

In his unsworn statement Duran asserted that he was 21 years of age, born in Colorado where he finished the 9th grade in school. In February 1944 he went overseas to Hawaii and later joined the 184th Infantry. In September 1944 he went to Leyte as a "flame thrower man," later becoming a "BAR" man. He claimed to have killed seven or eight "Japs." In March he went with his unit to Okinawa, landing and while in this island he and another "BAR" man encountered about fifteen "Japs" in a cave and "we killed them all." He had been awarded the "Bronze Star Medal, Good Conduct Ribbon, Asiatic Pacific with two bronze stars, Philippine Liberation, with two bronze stars, two arrowheads for the emergency beachhead landings and the Victory Ribbon" (R. 50).

Accused Medina recited his life history from his birth in Sonora, Mexico, to his escape from the stockade. His tribal name was "War Eagle" and his father was named "Painted Horse." His father and mother had moved to Arizona in his youth, died and left him the horses, guns and bows and arrows. He had made several trips to Mexico, engaging in fights and revolutions. At Okinawa he "was acting like a Tech Sergeant but not getting the rating." At night he would go out with a knife and come back in the morning with news of the next banzai attack, and with souvenirs and weapons. "Then the battle was over and I caught a boat to Korea. No more fighting here and I like a fight, and that is all there is to it" (R. 52). Medina was asked by defense counsel to state his intentions in escaping and he replied that he intended going back to Singapore (R. 53, 54).

Staff Sergeant Donald C. Vann testified that he had served with Medina in Company L, 32nd Infantry, 7th Division, and that Medina had a good reputation among the men of the company. Witness did not, however, know Medina's reputation for truth and veracity (R. 54).

5. Rebuttal.

Agent Merwyn Jones was recalled to the stand in rebuttal and asked by a member of the court if he had said to Rainey, "If you make a statement it will go a lot easier on you and if you don't you will swing with the other two," Jones denied emphatically that he made such a statement or any similar statement (R. 36).

6. No objection was raised to the admissibility of Medina's confession and the witness, Private First Class Otlo, positively identified Medina as the person who held the carbine to his stomach. Rainey and Duran were not identified by Otlo and the defense objected strenuously to the admission in evidence of their confessions on the ground that the same were involuntary and procured under promise of reward. Agent DeWolfe did not appear as a witness in the case and, as heretofore stated, accused Duran testified that before he signed his confession DeWolfe told him that it did not make any difference whether he signed or not. No citation of authorities would appear necessary to establish that such statement by DeWolfe amounted to no more than a mere expression of opinion and is neither a threat nor a promise of reward. The only reasonable inference to be drawn from such statement is that DeWolfe wanted Duran to believe that he (DeWolfe) already had a case against him and could convict him without the confession. It may have been a false statement concerning the quantum of admissible evidence that the officers had procured but such deception alone, if it worked, would not tend to render the confession involuntary. In CM 313786, Howard, the Board of Review discussed at length the use of subterfuges in procuring confessions. It was held that misinforming the accused of the character and quantum of the prosecution's evidence would not, of itself, vitiate the confession thereby obtained. The investigators have a right, after proper admonition in accordance with the mandates contained in Article of War 24, to question an accused and while there are limits beyond which they cannot go expressions of opinion or even willful misstatements of facts unaccompanied by threats of violence or promise of reward would not tend to make an innocent person confess to a crime he did not commit. On the contrary, it might be an effective inducement to cause a guilty person to confess (see Lewis v. U.S., 74 Fed. (2d) 173). Confessions constitute one of the most important forms of criminal evidence, and courts-martial, like our state and Federal courts, must not be compelled to reject a confession on frivolous or unrealistic grounds.

The Court-Martial Manual states that "It must appear that the confession was voluntary on the part of the accused. In the discretion of the court a prima facie showing to this effect may be required before evidence of the confession itself is received" (par. 114b, p. 116, MCM 1928). The court, acting through the law member obviously rejected as being false, Rainey's testimony that he was told that he would swing with

the other two if he did not confess. This was within the sound discretion of the court and we do not consider that there was an abuse of such discretion. After considerable argument by the defense in urging a rejection of the confessions of Rainey and Duran, and in which counsel stated that the confessions showed they were secured by a "master hand" the law member summed up the position of the court in the following language:

> "LAW MEMBER: The charges against the accused in this case are so serious and the statements made by the accused in the statements are so serious and damaging that there is no doubt that all of the protection accorded by the Manual relative to confessions should be given to the accused in this case whether we regard them as confessions or admissions against interest. The accused have every right which could be given to them. However, the facts, in so far as they are undisputed to be, that the accused was advised of his rights at the time the facts which are the basis of these statements were obtained from him, and the testimony introduced by the witnesses this morning bears only as to the actual signing by him of the statement in relation to the statements made by him orally which appear to have been identical in that no question as to a difference between what he had said and what he wrote appears. The only thing which we can consider as having been in the nature of a promise because there is no evidence of any threat is this statement: 'If you make a statement it will go a lot easier on you, if you don't, etc.,'. That was made after the facts had been given by the accused. If there had not been a signature, then there doubtless would have been testimony by the same witness that identified the statement and also additional testimony as to after having made the statement the accused had refused to sign it. It might be better for him as he had fixed the signature to the statement. In the determining of a serious question at this time, it is the duty of the court to determine whether or not the accused unfairly taken advantage of, particularly that such statements as were made by him were taken under suspicious circumstances as to their genuineness or validity. In regard to the circumstances under which this statement was taken it does not appear that the accused was taken unfair advantage of or that there are facts which would cause one to believe that the statements might be subject to doubt as to the validity on account of promises. Unless there is an objection of some member of the court, motion is over-ruled." (R. 46-47)

The evidence in this case is clear and convincing. Irrespective of the confessions, the evidence establishing accused's escape, their being at the home of the Korean together, the securing of the weapons by Medina, "Apachi," the identification of Medina by Private First Class Otlo, all constitute such a chain of circumstances as to raise a forceful presumption that Rainey and Duran were the parties with Medina in the alley and that Duran, by virtue of his relative position, his possession of the knife, and blood on his jacket, was the person who stabbed Murray and Otlo. We agree with defense

counsel that those charged with apprehending the accused and procuring evidence in this case were in no sense novices. On the other hand, the accused, by their own admissions, sworn and unsworn, are neither novices nor amateurs in the field of crime.

Although accused Rainey appears to have been unarmed when the alleged crimes were committed, he conspired with Medina and Duran to escape, to procure weapons from the military police, and he was present aiding and abetting or ready to render aid should it have been needed when Medina held the drawn weapon on the military policemen while Duran stabbed them. The evidence therefore established conclusively that regardless of whether Duran or Medina ever formed any specific intent to kill Murray or Otlo, both military policemen were stabbed, and Murray to his death by the concerted action of Duran, Medina and Rainey in the execution of a plan to hold up and disarm the military policemen. The doctrine which imposes responsibility on all of the conspirators for the concerted acts of each is said to be of ancient origin and firmly fixed in Anglo-Saxon jurisprudence. Mr. Justice Story restated this principle in United States v. Ross (Fed. Cases No. 16,196), as follows:

> "If a number of persons conspire together to do an unlawful act, and death happens from anything done in the prosecution of the design, it is murder in all, who take part in the same transaction. *** More especially will the death be murder if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life; and, a fortiori, if death be one of the events within the obvious expectation of the conspirators. Fost. Crown Law, 261, 351-353."

We know of no more lucid expression of the law applicable to this case than that above quoted.

> "Murder is the unlawful killing of a human being with malice aforethought. *** Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony." (Underscoring supplied; par. 148a, pp 163,164, MCM 1928.)

Robbery is universally held to be a felony so if the accused, as their statements indicate, intended only to hold up and rob the military policemen, such intent adequately supplies the malice requisite to murder where death resulted thereby.

6. The accused Rainey is 22 years of age and was inducted into the Army on 23 August 1943 at Fort McClellan, Alabama. On 17 December 1945 he was found guilty by general court-martial appointed by the Commanding General, 7th Infantry Division, of rape and sentenced to be dishonorably discharged, total forfeitures and confinement at hard labor for life. The result of trial was published in General Court-Martial Orders No. 21, Headquarters 7th Infantry Division, 10 January 1946, wherein the sentence, pursuant to Article of War 50½, was ordered executed and the U.S. Penitentiary, McNeil Island, Washington, was designated as the place of confinement.

Accused Duran is 22 years of age and was inducted into the Army on 8 August 1943 at Fort Logan, Colorado. On 17 December 1945 he was found guilty by general court-martial appointed by the Commanding General, 7th Infantry Division, of rape and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The result of trial was published in General Court-Martial Orders No. 20, Headquarters 7th Infantry Division, 10 January 1946, wherein the sentence, pursuant to Article of War 50½, was ordered executed and the U. S. Penitentiary, McNeil Island, Washington, was designated as the place of confinement.

Accused Medina is 20 years of age and was inducted into the Army on 11 October 1944 at Fort MacArthur, California. On 8 January 1946 he was found guilty by general court-martial appointed by the Commanding General, 7th Infantry Division, of drawing a weapon, to wit, pistol, against his superior officer, in violation of Article of War 64, two offenses of escape in violation of Article of War 69, and absence without leave of one day in violation of Article of War 61. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for a period of seven years. The result of trial was published in General Court-Martial Orders No. 9, Headquarters 7th Infantry Division, 22 January 1946, wherein the dishonorable discharge was suspended and the Philippine Rehabilitation and Detention Center, APO 75, was designated as the place of confinement.

7. The court was legally constituted and had jurisdiction over the person of each accused and of the offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence

as to each accused and to warrant confirmation of the sentence as to Medina and Duran. Death or life imprisonment is mandatory upon a conviction for a violation of Article of War 92.

Chester D. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Schwartz, Judge Advocate

JAGK - CM 313956 1st Ind

WD, JAGO, Washington 25, D. C. NOV 6 1946

TO: The Under 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 General Prisoners Norman Duran and Robert V. Medina.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence as to each accused. I recommend that the sentence as to each accused be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of the natural life of accused, and that a U.S. penitentiary be designated as the place of confinement for each accused.

3. Consideration has been given to a request for clemency in behalf of accused Duran by Honorable Eugene D. Millikan, United States Senator from Colorado. Senator Millikin expresses the view that Duran's excellent combat record merits clemency in this case.

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

3 Incls
1. Record of trial
2. Drft ltr sig USW
3. Form of Ex action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 375, 19 December 1946).

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

JAGQ - CM 313965

JUN 20 1946

UNITED STATES v. Private LEONARD G. HOLLEY (34731348), (Casual) Block "E", Shipment Number 3382-31, Camp Top Hat, Belgium.	WESTERN BASE SECTION Trial by G.C.M., convened at Antwerp, Belgium, 26 April 1946. Dishonorable discharge and confinement for three (3) years. Federal Reformatory.

HOLDING 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 93rd Article of War.

Specification: In that Private Leonard G. Holley, Casual, Camp Top Hat, did, at Melsele, Belgium, on or about 18 March 1946, feloniously and unlawfully kill Eveline Vinck, by striking her with a motor vehicle.

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

Specification: In that Private Leonard G. Holley, Casual, Camp Top Hat, did, at Melsele, Belgium, on or about 18 March 1946, knowingly and willfully misappropriate a 6x6 truck, of the value of more than $50.00 property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction for using a truck without permission was introduced. The accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The reviewing authority

approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. On 18 March 1946, around 5 or 5:30 p.m., Technician Fourth Grade Edgar P. Giles, 556th Anti Aircraft Artillery, returned from Valencien, France, to his organization at some undisclosed location and parked a two and a half ton truck he was driving outside the kitchen of the mess hall where he spent less than half an hour eating. When he finished dining he discovered that his truck had vanished. He had given no one permission to use it (R 6, 7). He next saw the truck that same night at an undisclosed place about 8 or 8:30 p.m. The following morning a close scrutiny of the truck, still at some place not stated, revealed that the front bumper was bent, the right front tire was punctured and the wheel housing was "knocked back" (R 7). Giles had observed nothing mechanically wrong with the truck when last he operated it (R 12).

On 18 March 1946, about 6 p.m., Helena Van Hal was in her home at Dorpstraat, #39, Melsele, Belgium. Her seven year old sister, Eveline, was seated in a chair on the sidewalk in front of the house. She saw an American truck run up on the pavement, strike "the wall" and then continue on "for ten meters and my little sister was under the truck" (R 13, 15). She saw accused step from the truck, look around and then start to run away, but civilians caught him (R 17). Accused staggered and "wasn't even able to walk alone", although she was not near enough to him to smell any odor about him (R 15).

About "ten after six" that same day, Private First Class Joseph Hutson saw accused "on the fender" of a two and a half ton truck in Melsele, Belgium, and saw a child lying on the sidewalk in front of the truck (R 7, 8). Hutson observed that "one side" of the truck was "on the sidewalk close to the building" (R 9). Private First Class Mannie Moses of the military police who arrived at the scene between 6:30 and 7 o'clock saw a two and a half ton truck "from the 556th"half on the sidewalk and half on the street with the right front fender bent, the "wheel...blown out" and the front bumper bent on the right side (R 9, 10). He also saw the body of a little girl lying near by. Moses found the accused confined in the civilian police station and inquired of him where the trip ticket for the truck was and accused replied he had no such ticket. Accused did not appear to know what Moses was talking about (R 10). Private First Class Donald Lewis Williams of the military police also arrived at the scene and saw the truck half on the sidewalk, half in the street, and observed that the right front fender and bumper were smashed and that a "tire was flat on the right hand side, and the wheel was bent". He also saw the body of a small girl lying on the sidewalk about four feet in front of the truck. When he saw accused at the civilian jail and asked him for the trip ticket accused denied he had been driving the truck. About fifty feet to the rear of the truck there was a curve in the highway and the shutters had been torn off a house situated on that curve (R 11, 12).

It was stipulated by the prosecution, defense and the accused that if Dr. Delacave were present he would testify that on 18 March 1946, Eveline Vinck died as a result of injuries sustained when struck by a motor vehicle (R 16).

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

5.a. Charge I and Specification. Accused is charged with manslaughter (MCM, 1928, app. 4, P. 249) in causing the death of Eveline Vinck. Manslaughter may be either voluntary or involuntary; the former encompasses a killing committed in the heat of sudden passion caused by provocation, while the latter is a killing "in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act" (MCM, 1928, par. 149a). From all the circumstances, it is clear that the only type of manslaughter concerning us here is involuntary manslaughter. Accused's conviction of that offense can be sustained only if the proof shows that the death of the little girl resulted from gross and palpable negligence on his part in the operation of the truck; it cannot be sustained, however, if he was guilty only of simple negligence (MCM, 1928, par. 149a; CM 233196, Bell, 19 BR 365; CM 296061, Keech).

Examining the evidence offered by the prosecution, there is not a scintilla of direct proof that accused was grossly negligent in his operation of the truck. There is no direct proof that he was driving at an excessive rate of speed or that he was drunk. One witness testified that after the accident accused staggered and could not stand up without assistance, but that did not reasonably warrant the inference he was drunk. Physical injuries or illness can be and are evidenced by these same symptoms. It was just as reasonable, if not more so, to conclude that accused's peculiar behavior was occasioned by injuries or shock suffered in the accident, particularly since there is no proof that he was not injured. The only evidence from which the court could have inferred gross negligence was that accused failed to negotiate a curve, ran upon the sidewalk and struck a little girl. Any number of factors could have caused that accident: a blowout of a tire, a mechanical failure of the steering mechanism or even temporary inattentiveness while operating the truck which might well constitute nothing more than simple negligence. The proof shows that one of the right tires on the truck was blown and one of the wheels damaged, and there is no evidence to show whether it occurred before or after the accident. The record is barren of any evidence to establish beyond a reasonable doubt that accused was guilty of that gross negligence from which the law presumes criminal intent; it contains no evidence from which such negligence could reasonably have been inferred; it is patently insufficient to sustain the findings of guilty of Charge I and its Specification.

b. Charge II and its Specification. All of the evidence to establish that accused misappropriated a six by six truck, property of the United States, was circumstantial. There was no direct proof establishing that the truck taken

from an undisclosed location near a mess hall was the same truck as the one involved in accused's accident. Accordingly, in finding accused guilty of this offense the court must have inferred that the truck taken and the truck involved in the accident were one and the same. Such an inference can be sustained only if it could reasonably be drawn from all the circumstantial evidence (MCM, 1928, par. 112b).

The law applicable to convictions based upon circumstantial evidence is well stated in CM 238485, Rideau, 24 BR 263, 272:

> "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt. Where the evidence is entirely circumstantial the circumstances must not only be consistent with guilt, but inconsistent with innocence. Mere probabilities do not suffice. Proof of mere opportunity to commit a crime is not sufficient to establish guilt (Dig. Ops. JAG, 1912-40, sec. 395 (9); CM 120937, CM 153330, CM 169811, CM 196691, CM 195705). To warrant conviction, circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (Bull. JAG, June 1943, p. 238; CM 233766).
>
> "The question on appellate review is not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justify the conclusion of guilt as a logical inference from such circumstantial facts (CM 195705, Tyson). Where a conviction is based on inferences the Board of Review will determine whether there is a reasonable basis for the inference (CM 212505, Tipton)."

Examining the evidence we find that the truck in Giles custody was removed from alongside a mess hall at some undisclosed location about 5:30 p.m., 18 March 1946, that it was seen again by Giles about 8:30 p.m. that same night and the following morning at an undisclosed location, and he observed it had suffered damage generally similar to that sustained by the truck driven by accused. The accident involving the truck driven by accused occurred between 30 minutes and an hour after Giles' truck was taken and, according to one witness, it was a truck from the same organization as that of which Giles was a member. But again, there is no evidence as to where that organization was located at the time. Moreover, another witness said the truck accused was driving had "letters from Top Hat on the front" (R 15). Camp Top Hat was accused's station, but there is no evidence that it was also Giles' station at that time. Finally, accused had no trip ticket for the truck.

There is no evidence to indicate that the distance from the place where Giles' truck was taken to the scene of the accident was such as could be travelled within the time here involved. For aught the record reveals, the mess hall might have been located at such distance from the scene of the accident that it would have been impossible for the Giles' truck to have been the one operated by accused. In other words, the evidence fails utterly to establish any geographical proximity between the location of the mess hall and the scene of the accident. Furthermore, proof that the truck driven by accused was damaged about 6 p.m. and that the Giles' truck was damaged generally in similar respects sometime between 5:30 and 8:30 p.m. does not establish such similarity as to time reasonably to warrant the inference that it was the same truck, particularly where there is no evidence whatsoever placing the Giles' truck near the scene of the accident at substantially the time the accident occurred. Lastly, although there is testimony that accused stated he had no trip ticket for the truck when asked for one after the accident, such proof induces only a suspicion that he had no authority to drive the truck and does not reasonably warrant an inference that such was the fact. There are a legion of reasons why he may have had no trip ticket for the truck although authorized to drive it; the ticket might have been stolen or lost, just to mention two obvious ones.

Totaling the circumstantial evidence analyzed above, we are compelled to conclude that it falls far short of possessing such strength as reasonably to warrant the conclusion reached by the court (MCM, 1928, par. 78a). Although the evidence may suggest the probability that it was Giles' truck which accused was driving, findings of guilty of criminal offenses cannot be bottomed upon mere probability (CM 233543, McFarland, 20 BR 15), but rather must rest upon proof of such virility as to exclude every reasonable hypothosis except that of guilt (CM 216004, Roberts and Miller, 11 BR 69).

6. For the reasons enunciated above, the Board of Review holds that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

9 JUL 46 AM

DISPATCHED
WAR DEPARTMENT
J.A.G.O.

W. Wayne Olivey, Judge Advocate

Robert E. Trentham, Judge Advocate

Walter N. Davis, Judge Advocate

JUL 9 - 1946

JAGQ - CM 313965 1st Ind

WD JAGO, Washington 25, D. C.

TO: Commanding General, Western Base Section, United States Forces, European Theater, APO 513, c/o Postmaster, New York, New York

1. In the case of Private Leonard G. Holley (34731348), (Casual) Block "E", Shipment Number 3382-31, Camp Top Hat, Belgium, 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, 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. 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 [illegible])

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 313980

AUG 7 1946

UNITED STATES v. First Lieutenant WILBURN T. ALLBRIGHT (O-778686), Squadron A, 3502d Army Air Forces Base Unit, Technical School, Chanute Field, Illinois.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Chanute Field, Illinois, 9 May 1946. To be dismissed the service.

OPINION by the BOARD OF REVIEW
WURFEL, OLIVER and MCDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Wilburn T. Allbright, Squadron A, 3502d AAF Base Unit, TS, did, at Rantoul, Illinois, on or about 17 April 1946, wrongfully strike Private First Class George L. Arrowood in the mouth with his fist.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of 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 pursuant to Article of War 48.

3. Evidence for the prosecution. On the night of 17 April 1946 the accused, another officer and two enlisted men were at Fiedler's Tavern, Rantoul, Illinois, drinking beer (R 18). Private First Class George L. Arrowood and Private First Class Sidney L. Cain were also at the tavern (R 9, 11). Arrowood had consumed between four and six beers during the evening (R 9). When the establishment was being closed for the night, Arrowood and Cain started to

leave. Arrowood had not spoken to the accused that night and had not known him previously (R 9, 14). The events which occurred after Arrowood and his companion, Cain, went outside the tavern are described by Arrowood as follows (R 9, 10):

> "I walked outside the tavern, and I heard something about Texas, and I was stationed down there. It was Lt. Allbright that was speaking, and I was telling him that I was stationed in the Rio Grande Valley and liked it down there and wish I was back down there. For no reason at all that I could see, Lt. Allbright got mad and started taking his blouse off. That's all there was to it. He grabbed me by the tie and hit me, and the next thing I knew I was on the ground."

Accused's blow landed on Arrowood's mouth, cutting his lip and knocking out one tooth (R 10, 12). Arrowood told accused not to take off his blouse. Preceding the actual encounter, someone made a statement that the accused was hiding behind his bars or to take off his bars (R 10, 15, 16). Arrowood testified he did not make that statement to accused (R 10), but another witness thought it might have been Arrowood who said it, although the witness could not be positive (R 16, 17, 18). Pfc. Cain gave the following account of the encounter (R 12):

> "Well, when we came outside from the tavern we were standing out there talking, and Lt. Allbright mentioned something about being from Texas, and this buddy of mine, George Arrowood, said he was stationed down there and liked the state very much. About that time Lt. Allbright grabbed him by the collar and pushed him up against the building and hit him and knocked him down on the ground and jumped on him."

Arrowood did not strike the accused (R 10). Two enlisted men, besides Arrowood, were involved in the scuffle and "piled on top" when accused and Arrowood were on the ground (R 11, 12, 13); it appeared these two enlisted men were with the accused (R 13). Between three and six men were on the ground (R 19, 20).

Two policemen intervened, separated accused and Arrowood, "and sent them on their way" (R 6). Accused was not intoxicated (R 6, 15, 17). He spoke clearly and answered questions intelligently (R 7). He told the policemen his name was Lieutenant Simpson or Simmons (R 6, 19). Accused was on top of the enlisted man, on the sidewalk (R 7, 8). Eight or ten people were present (R 8). Accused had lost his bridgework, which the policemen searched for and found for him (R 7), and had some blood on his shirt (R 19).

An extra-judicial statement made voluntarily by the accused was introduced in evidence without objection (R 22, Pros. Ex. 1). In that statement accused said in part:

"I left Bill's Place with two enlisted men and one officer about 10:30 p.m. (2230) Wednesday, 17 April 1946. We went down to Fieldler's Tavern, and I remember seeing Private Arrowood. I was pretty drunk and do not remember too well what happened. He and I were arguing about Texas. The next thing I knew, I pulled off my blouse, and I understand that he told me that if I took off my blouse he would stomp hell out of me. I know I took it off, and my hat off too. Then the fight started. Civilian cops stopped it and I also got my bridge work knocked out in the upper front. I don't know who did it. He was the only one I was fighting with, so I guess he did it. I had it put back in yesterday morning.

"The civilian cop stopped the fight, and Sgt. Fox got hold of me. I found my false teeth lying there on the pavement beside me. I started off down the highway. About that time the civilian cops drove up and asked me what my name was. I told him Simmons. Then we left."

4. Evidence for the defense. At his own request the accused was sworn and testified as follows (R 23):

"I left the tavern, and Corporal Mathis and I were standing outside on the sidewalk. There were three enlisted men, and one of them popped off about Texas, and I told him if he didn't like it he didn't have to be down there. So, at that time, there were two or three other fellows came up, and one officer, and probably another one. I couldn't see the other one because he was behind me, and, I can't swear that this Private said this, but I know some enlisted man of those three said if I'd take my rank off he'd beat Hell out of me. I vaguely remember telling him to go ahead, and then he said, 'What are you doing--hiding behind your bars?', so I pulled this jacket here off and my hat and then someone grabbed me and at that time I got hit in the mouth by the heavy-set fellow in front of me. I broke loose, and the officer on my right was holding onto me, and I hit him, and we started swinging, and about that time the fight ceased. I got my teeth knocked out and got hit in the mouth, and I got blood on the back of my shirt."

He further testified that two persons were holding him; that he had struck no blows before being hit in the mouth; that he is not sure who hit him, nor whom he hit; that he was fighting with three people; that he remembers fighting with a lieutenant and thinks he knocked him down; that "I sure have" had trouble before, and has been involved in eight or ten fights since he was commissioned on

23 May 1944; that he had had a few beers, eight or ten, but was not drunk; that he had no thought of fighting until someone said he was hiding behind his bars -- "That's when I took my jacket off"; that "-------I walked out and I heard them talking about the place [Texas] and they were running it down, and I just told them if they didn't want to be down there they didn't have to"; that they were talking about Texas and he went over and talked to them. He enlisted in the "inactive reserve" in May 1942, entered upon active duty 19 February 1943, and was commissioned 23 May 1944. He served overseas with the 43rd Bomb Group.

5. War Department records show that accused served as an enlisted man and aviation cadet from 19 February 1943 until commissioned a temporary second lieutenant on 23 May 1944. He was promoted to temporary first lieutenant on 23 May 1945. On 22 May 1945 he was awarded the Air Medal for operational flight missions from 23 December 1944 to 3 April 1945. On 6 July 1945 and again on 29 August 1945 he was awarded Oak Leaf Clusters to the Air Medal for operational flight missions in the Southwest Pacific.

6. 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 sustain the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Seymour W. Wurfel, Judge Advocate

H. Wayne Olivier, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ-CM 313980 1st Ind

WD, JAGO, Washington 25, D. C. SEP 6 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 First Lieutenant Wilburn T. Allbright (0-778686), Squadron A, 3502d Army Air Forces Base Unit, Technical School, Chanute Field, Illinois.

2. Upon trial by general court-martial this officer was found guilty of wrongfully striking an enlisted man in the mouth with his fist, in violation of Article of War 95. He was sentenced to be dismissed the service. 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 accused, another officer and two enlisted men were at a tavern drinking beer. The victim of the assault, Private First Class Arrowood, and another enlisted man were also there drinking beer. Neither accused nor Arrowood was drunk. When the establishment was being closed for the night all the parties mentioned above left and went outside. There Arrowood heard accused talking about Texas and interjected himself to remark that he had been stationed in Texas. Accused testified that one of the enlisted men "popped off about Texas, and I told him if he didn't like it he didn't have to be down there." Someone made a statement that accused was hiding behind his bars or to take his bars off. Arrowood told accused not to take his blouse off. Accused knocked Arrowood down and jumped on him, cutting his lip and knocking out one tooth. Accused received a blow in the mouth and lost his bridgework, although the evidence does not show who struck him. Several were involved before the police intervened and pulled accused off of Arrowood. Arrowood had not previously spoken to accused and had not known him before this incident.

5. Accused entered the service as an enlisted man on 19 February 1943, was commissioned a second lieutenant on 23 May 1944 and was promoted to first lieutenant on 23 May 1945. He was awarded the Air Medal and two oak leaf clusters for operational flight missions in the Southwest Pacific. Available War Department records do not show his efficiency ratings.

6. Accused assaulted an enlisted man unnecessarily without adequate provocation. In the course of a fight both men were injured. Accused

had been drinking. I recommend that the sentence be confirmed but in view of the circumstances and the creditable combat record of accused recommend that it be suspended.

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. 274, 12 September 1946).

(G.C.M.O. 1107, 26 March 1947.)

vol 63 Army JAG Bd. Rev.

vol 63 Army JAG Bd. Rev.

TITLE

DATE	BORROWER'S NAME	EXT.