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

JAGK - CM 317655

16 JAN 1947

UNITED STATES v. Captain GARRETT P. WARMENHOVEN (O-456401), Corps of Engineers.	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 2 and 3 October 1946. Dismissal and forfeiture of all pay and allowances due and to become due except one month's pay.

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 94th Article of War.

Specification 1: In that Captain Garrett P. Warmenhoven, Headquarters and Service Company, 349th Engineer Construction Battalion, Engineer Training Center, Fort Lewis, Washington, being at the time Commanding Officer of Headquarters and Service Company, 349th Engineer Construction Battalion, and further being the Class "A" Agent Officer for Captain B. Dick, FD, the accountable disbursing officer at Fort Lewis, Washington, did, on or about 20 June 1946 feloniously embezzle by fraudulently converting to his own use $40.13, public moneys of the United States, intrusted to him by the said disbursing officer for the purpose of paying Private First Class Don M. Bostwick, a member of his command.

NOTE: Specifications 2, 3 and 4 of Charge I allege embezzlements of the same nature as alleged in Specification 1, the only difference being the dates, amounts of money and the names of the enlisted men that should have been paid as indicated below:

Spec.	Date	Names of men and amounts	
2	3 July 1946	Technical Sergeant Arthur Eiseman	$118.40
		Technician Fourth Grade Walter H. Townsend	78.65
		Private First Class Homer F. Marchant, Jr.	25.40
		Master Sergeant William C. Hagen	118.86
		Master Sergeant Armand Saltman	88.35

Spec.	Date	Names of men and amounts	
3	18 July 1946	Technical Sergeant Alexander R. McPherson	$142.40
4	31 July 1946	Sergeant Attilio Rossi	101.50

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

Specification 1: In that Captain Garrett P. Warmenhoven, ***, being at the time Commanding Officer of Headquarters and Service Company, 349th Engineer Construction Battalion, and further being the Class "A" Agent Officer for Captain B. Dick, FD, the accountable disbursing officer at Fort Lewis, Washington, and having been intrusted with public moneys of the United States by said disbursing officer for the payment of soldiers in his command, did on or about 9 July 1946, with intent to deceive said accountable disbursing officer, officially report to said accountable disbursing officer that the total amount paid enlisted men of his command on the May Supplementary payroll was $4617.92, which report was false and untrue, and was known by said Captain Warmenhoven to be false and untrue, he well knowing that the total amount paid such enlisted men of his command was only $4577.79, and that the difference, to wit, the sum of $40.13, payable by said supplementary payroll to Private First Class Don M. Bostwick, was not in truth and fact so paid to said soldier, but was fraudulently retained by said Captain Garrett P. Warmenhoven.

NOTE: Specifications 2, 3 and 4 of Charge II allege false official statements made in connection with the return of pay rolls and differ from Specification 1 only in the dates, amounts received, amounts paid to enlisted men, the names of the men not paid and the amount due each of them, as indicated below:

Spec.	Date	Amount received	Amount paid to enlisted men	Amount retained	Names of men not paid and amounts due	
	13 July 46	$10,180.13	$ 9750.47	$429.66	Tech Sgt Arthur Eiseman	$118.40
					T/4 Walter H. Townsend -	78.65
					Pfc Homer F. Marchant, Jr.	25.40
					M/S Wm C Hagen	118.86
					M/S Armand Saltman	88.35
	29 July 46	3121.16	2978.76	142.40	T/S Alexander R. McPherson	142.40
	5 Aug 46	13649.22	13547.72	101.50	Sgt Attilio Rossi	101.50

He pleaded not guilty to and was found guilty of all charges and 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 at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and then provided, "but so much thereof as relates to confinement at hard labor for five years is remitted, and so much thereof as relates to forfeiture of pay and allowances is remitted as pertains to the pay and allowances for the period of one month only," and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

The accused was the commanding officer of Headquarters and Service Company, 349th Engineer Construction Battalion, Fort Lewis, Washington (R. 100). On 1 March 1946 he was appointed Class "A" Agent Finance Officer of the Disbursing Officer, Fort Lewis, Washington, for the purpose of paying enlisted personnel of Headquarters and Service Company, 349th Engineer Construction Battalion (R. 11,13; Pros. Ex. 1). Captain Benjamin Dick, Finance Department, was the finance officer for Fort Lewis, Washington, and as such was charged with the disbursing of all public money (R. 38). On 20 June 1946 a supplemental pay roll of Headquarters and Service Company, 349th Engineer Construction Battalion, for the month of May 1946, and $4810.46 was delivered to the accused as Class "A" Agent Finance Officer. On 9 July 1946 the accused returned this pay roll to the finance office together with $192.54 as money not paid to enlisted men. At the time the pay roll was returned to the finance office the accused signed a "payroll correction and turnback sheet." This turnback sheet shows, among other things:

Amount of money received from the Finance Office -	$4810.46
Returned to Finance Officer pay of men listed below -	192.54
Total amount paid enlisted men on attached pay roll -	4617.92

and concludes,

"I certify that the foregoing statement is correct.

Garrett P. Warmenhoven
Capt CE"

This pay roll shows that Private First Class Don M. Bostwick was paid $40.13. Private Bostwick's name does not appear on the turnback sheet as a man not paid (R. 14,21,22,38,39,40; Pros. Ex. 2). Private First Class Don M. Bostwick testified that he was a member of Headquarters and Service Company, 349th Engineer Construction Battalion, and that the accused was his commanding officer. On 9 June 1946 he left Fort Lewis to go to Fort Belvoir. He returned to Fort Lewis on 21 July 1946. He did not receive pay for the month of May 1946 from the accused at Fort Lewis. He signed a pay roll at Fort

Belvoir and was paid for May and June 1946. He did not know how the finance office determined the amount due (R. 51-54).

On 3 July 1946 the June pay roll of Headquarters and Service Company, 349th Engineer Construction Battalion, and $11822.91 was delivered to the accused as Class "A" Agent Finance Officer. On 13 July 1946 the accused returned this pay roll to the finance office together with $1742.72 as money not paid to enlisted men. He also signed and delivered a pay roll correction and turnback sheet containing a certification that the statement was correct (R. 16,24,25,40,41; Pros. Ex. 3). The pay roll shows, among others, the following payments:

Name	Amount
Technical Sergeant Arthur Eiseman	$118.40
Technician Fourth Grade Walter H. Townsend	78.65
Private First Class Homer F. Marchant, Jr.	25.40
Master Sergeant William C. Hagen	118.86
Technical Sergeant Armand Saltman	88.35

The names of these five men do not appear on the turnback sheet as men not paid (R. 41, Pros. Ex. 3).

Technical Sergeant Arthur Eiseman testified that the accused was his company commander. He (Eiseman) went on furlough on 29 June 1946 and returned on 21 July 1946. While on furlough he was at Portland, Oregon, and was never in the vicinity of Fort Lewis. On 25 July 1946 he asked the accused for his pay. Captain Warmenhoven showed him a telegram relative to family trouble and told him that he (Warmenhoven) had borrowed the money and that he would pay it back on pay day. He received his money, $118.40, from the accused through Major Koch about 25 August 1946 (R. 65,66,67). Technician Fourth Grade Walter H. Townsend testified that he was a member of accused's organization. He was at Shinglehouse, Pennsylvania, on furlough between 20 June 1946 and 21 September 1946. During the last part of August 1946 he received his pay in a money order from the accused in the amount of $78.65 (R. 75-78). Private First Class Homer F. Marchant, Jr., testified that the accused was his company commander. He did not receive any pay from the accused between 3 July 1946 and 18 July 1946. He was paid about $28.00 by the finance office for the months of May, June and July. It was money left over from his furlough (R. 81,82). Master Sergeant William C. Hagen testified that the accused was his company commander. He returned from furlough on 17 July 1946 and reported to Captain Warmenhoven and requested his pay for the month of June 1946. Captain Warmenhoven told him that he had used the money "and showed me a wire from home stating that he had to have the money in an emergency case." Captain Warmenhoven then told the witness to see him after the first of August. On the first of August the accused told Sergeant Hagen to see him about the 8th of the month. He received his June pay from the accused about 25 August

1946 (R. 56-60). Master Sergeant Armand Saltman testified that the accused was his company commander. He further testified:

> "On or about the 29th of June, 1946, I went on my furlough, and wasn't present to receive my pay for the month of June. I returned approximately the 26th of July at which time Captain Warmenhoven called me into the Orderly Room, and told me that he had received my money, my pay, and for the month of June, and inasmuch as I was not there, and he was faced with an emergency during my absence, he took my pay envelope.
>
> "Q Did you tell Captain Warmenhoven that was all right, or did you consider that as a loan at that time?
>
> "A I told him that it was perfectly all right, because if I was present I would have loaned it to him anyway, if he would have asked me for it." (R. 61)

He received his June pay amounting to $88.35 about 5 September 1946 from Captain Hayman (R. 60-64).

On 18 July 1946 a supplemental pay roll of Headquarters and Service Company, 349th Engineer Construction Battalion, for the month of July 1946, and $3238.71 was delivered to the accused as Class "A" Agent Finance Officer. On 29 July 1946 the accused returned this pay roll to the finance officer together with $117.55 as money not paid to the enlisted men. He also signed and delivered a pay roll correction and turnback sheet containing a certificate that the statement was correct. The pay roll shows that Technical Sergeant Alexander R. McPherson was paid $142.40. Sergeant McPherson's name does not appear on the turnback sheet as an enlisted man who was not paid (R. 16,27, 42; Pros. Ex. 4). Technical Sergeant Alexander McPherson testified that the accused was his commanding officer. He further testified that he was in the hospital when the June pay roll was paid. He returned to the company about 20 July 1946. Captain Warmenhoven told him that he (Warmenhoven) had borrowed his June pay. His pay amounted to about $142.20 and about 20 July 1946 he received this money from Major Koch as coming from the accused (R. 68-70). On 31 July 1946 the July pay roll of Headquarters and Service Company, 349th Engineer Construction Battalion, and $14,964.62 was delivered to the accused as Class "A" Agent Finance Officer. On 5 August 1946 the accused returned this pay roll to the finance office together with $1315.40 as money not paid to enlisted men. He also signed and delivered a pay roll correction and turnback sheet containing a certificate that the statement was correct. The pay roll shows that Sergeant Attilio Rossi was paid $101.50. Sergeant Rossi testified that the accused was his commanding officer. He received his July 1946 pay, amounting to 101 dollars and some cents, about the 19th or 20th of August 1946. He was paid by the accused in the presence of a major. He was on furlough from about 20 July 1946 to 9 August 1946 (R. 72,73,74).

4. <u>For the defense</u>

Captain Benjamin Dick, Finance Department, testified that he had checked

the records of the accused and that the records do not show any discrepancy in the accounts which has not been satisfied. In the accounts concerning Private First Class Homer F. Marchant it appears that he had received duplicate payments, but the accused had made payment to the Finance Department and the account is now correct (R. 88,89).

Second Lieutenant John A. Hawley, Corps of Engineers, testified that he was administrative assistant and assistant company commander to the accused and that he lived in the same quarters with the accused. He assisted the accused with some of the pay rolls. He knew of no errors in the pay rolls except some men's pay was withheld until such time as they returned to the company. The accused has a rather nervous disposition. He knew that the accused had a few personal problems which were rather disquieting to him (R. 96-98).

Lieutenant Colonel James D. Smillie testified that he was the commanding officer of the 349th Engineer Construction Battalion. The accused is one of his company commanders and he has observed his performance of duty for the past eight months. He rates the accused as a low superior or high excellent in performance of duty. He works very hard. While off duty he conducts himself in a gentlemanly manner. He knew that the accused was having some kind of family trouble. In May 1946 the accused asked for leave, stating that he was "pinched" for money, but he wanted to visit his children and straighten out some of his troubles. He was granted leave but returned to the post before his leave expired. Upon his return he stated that the trip had been a complete failure (R. 99-103).

Major LeRoy W. Koch testified that he was the executive officer of the 349th Engineer Construction Battalion. He has known the accused intimately since April 1946. His performance of duty is superior. In May he noticed that the accused was overworking himself. He called the accused into his office and talked to him. After considerable conversation the accused stated that he was having difficulty at home. He made arrangements so that the accused could have leave. The accused went on leave 8 May 1946 and returned to work on 10 May 1946. He questioned the accused as to why he returned to the post and the accused stated that his wife would not see him. He also stated that his wife was going to have a baby and that she was going to give it up for adoption. The next he knew about the accused's troubles was when the accused came to him with a telegram stating that the baby had died. Late in July 1946 it came to his attention that some enlisted men were complaining about not getting their money. He inquired of the accused concerning the money due the men and later advised the accused to clean up the situation. He personally handled the transactions whereby all discrepancies in pay were settled (R. 103-108).

Captain Arley Hayman, Jr. testified that he was adjutant of the 349th Engineer Battalion. He identified the accused's 66-1 Form which was introduced into evidence as Defense Exhibit "A". He further testified that he

reported to Fort Lewis at about the same time as the accused and that they were quartered in the same building and ate at the same mess. He had become quite intimate with the accused and talked about the accused's personal affairs. The accused's troubles were domestic. On various occasions he saw letters the accused had received from his wife. Some letters would lead the accused to believe that a reconciliation could be effected and others would cause the accused to be quite despondent. The accused would not go to the club as he did not want to be financially embarrassed. The accused told him that he had used all of his money to pay off bills that his wife had incurred during his absence. The accused was very devoted to his children and would go to any ends to support his children (R. 109-117).

The rights of the accused as a witness were explained to him and he elected to be sworn and testify in his own behalf. He testified that he graduated from high school and St. Johns Military Academy, Washington, D.C. His religion is Catholic. He attended Sulpician Seminary, Subiago, Arkansas, for one and a half years, after which he joined the Army. His religion teaches him to uphold the family at all times. The obligation to the wife, children and household must be met at all times. He does not believe in divorce. He enlisted in the Army in 1931 and after attending various service schools he became a first cook, then a mess sergeant, a platoon sergeant, supply sergeant, and first sergeant, which grade he held for three years, 1938 to 1941. His commissioned service is from 1942 to the present time. After his graduation from officer candidate school he remained at Fort Belvoir for nine months, after which he was assigned to Camp McCoy, Wisconsin. In February 1944 he was assigned to the Navy Department with the amphibious forces, Pacific Fleet, and he remained with them until November 1945. While serving with the Navy his duties consisted of underwater demolition, removing mines and channel obstructions before an assault. He participated in the operations against Palmyra, Guam, Okinawa, and Saipan. He was married on 6 January 1942 and of this marriage he has three children. Prior to his going overseas his home life was excellent. Upon his return from overseas he found that his wife was not living at home and his children were being cared for by neighbors. He tried to reestablish his home life but his wife would go out at night and stay out very late. When he asked where she had been he received the reply that "it was none of my business." He was informed by his sister that his wife had been going with men while he was overseas. Because of the children he wanted to establish a home and his wife sent him a telegram stating that she was willing to start over again. In attempting to reestablish his home he arranged for quarters at Fort Lewis and told his wife to join him. She then refused to move to Fort Lewis. He received a letter from his wife wherein she stated that she had received two offers of marriage even though she was pregnant and that their unborn child was to be given to a good family. He did not believe his wife's statement that the child would be given away. He arranged for leave and went to see his wife. His wife would not talk to him alone. One evening he talked to his wife and her attorney, at which time he was informed that a reconciliation was impossible. He then returned to Fort Lewis. While overseas his allotment to his wife was

$275.00 per month. At the time he went overseas his wife had their savings of $600.00 in cash and $1100.00 in bonds. When he returned from overseas he found that his wife had spent all of their money and was approximately $2600.00 in debt. With the exception of about $90.00 per month, his salary has gone to the support of the family and the reduction of this indebtedness. He received a telegram dated 9 July 1946, stating, "Jackie lost premature daughter in childbirth ***." Upon receipt of the telegram he called his wife by long distance. His wife wanted some money. About the 16th of July he called his wife again, at which time she told him she needed $400.00 immediately. On 16 July 1946 he took from the money entrusted to him as Class "A" Finance Officer $475.00. He paid telephone bills amounting to about $58.00 and sent $400.00 to his wife. When the men of his unit returned from furlough and asked for their pay he told them that he had borrowed and if they would bear with him he would pay them in a few days.

In regard to Specification 1, Charge I, he denied using the money which should have been paid to Private First Class Don M. Bostwick. He further testified that when Bostwick returned from Fort Belvoir he told Bostwick that he had his money. Bostwick replied that he had been paid at Fort Belvoir. He then returned this money ($40.13) to the finance office.

The accused also denied using the money which should have been paid to Technician Fourth Grade Walter H. Townsend and to Private First Class Homer F. Marchant. The money due Private Marchant ($25.40) was turned in to the finance office as a miscellaneous collection. The accused admitted using the money that should have been paid to the following men:

Technical Sergeant Arthur Eiseman	$118.40
Master Sergeant William C. Hagen	118.86
Master Sergeant Armand Saltman	88.35
Sergeant Alexander McPherson	142.40

The accused also testified that he had signed the pay roll correction and turnback sheets appearing in Prosecution Exhibits 2,3,4, and 5 (R. 119-148).

5. The accused was the duly designated Class "A" Agent Finance Officer to make payments to the enlisted personnel of Headquarters and Service Company, 349th Engineer Construction Battalion. During the months of June and July 1946 he received money from the finance office operated by Captain Benjamin Dick, the disbursing officer at Fort Lewis, Washington, to pay a supplementary pay roll to his company for the month of June 1946 and a regular pay roll to his company for the month of July 1946. On 9 July 1946 the accused returned the May pay roll to the finance office showing that he had paid Private First Class Don M. Bostwick the sum of $40.13. On 13 July 1946 he returned the regular June pay roll showing that he had made the following payments:

Technical Sergeant Arthur Eiseman	$118.40
Technician Fourth Grade Walter H. Townsend	78.65
Private First Class Homer F. Marchant, Jr.	25.40
Master Sergeant William C. Hagen	118.86
Master Sergeant Armand Saltman	88.35

On 29 July 1946 he returned the supplementary June pay roll to the finance office showing that he had paid Technical Sergeant Alexander R. McPherson $142.40. On 5 August 1946 he returned the July 1946 pay roll to the finance office showing that he had paid Sergeant Attilio Rossi $101.50. In truth and fact none of these men had been paid as shown on the pay roll. The accused had retained money in the amount of $713.69 in his possession.

Moneys received by a Class "A" Agent Finance Officer for the payment of troops are property of the United States and remain the property of the United States until disbursed to the proper parties in accordance with existing regulations. Moneys not paid to the troops must be returned to the proper disbursing office (CM 269707, Wolfsie, 45 BR 94). In retaining money entrusted to him for payment of enlisted men the accused exercised a wrongful dominion over it and he thereby committed a wrongful conversion of the money (CM 271265, Weed, 46 BR 86). On 16 July 1946 the accused expended approximately $475.00 of this money. He sent $400.00 of this money to his wife and used another $58.00 to make telephone calls. In his testimony the accused did not state what he did with the balance of this sum.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (MCM,1928, par. 149h). The fraudulent intent necessary to be proven in an embezzlement case must be determined by a person's actions. In this case the accused retained money and made a false return of the pay rolls to the finance office, and made false certificates concerning the return of the pay rolls. He used a portion of the money for his own personal affairs. It also appears from the accused's testimony that he used $475.00 of this money on 16 July 1946, which sum included the $142.40 which should have been paid to Sergeant Alexander R. McPherson. The proof shows however that this $142.40 did not come into his hands until 18 July 1946. The accused told Sergeants Hagen, Saltman, Eiseman and McPherson that he had borrowed the money which should have been paid to them. Subsequently the accused made restitution of all of the money retained by him. The foregoing facts constitute ample evidence upon which the court could properly find that the accused did fraudulently embezzle all of the money retained by him. The restitution of embezzled property is not a defense to a prosecution for embezzlement and does not diminish the offense, but it is an admission by the accused that he was responsible for the property (CM 253054, Howard, 34 BR 250).

The evidence is clear, convincing and uncontradicted that the accused signed and delivered four pay roll correction and turnback sheets to the finance office operated by Captain B. Dick and that these turnback sheets contained the false statements alleged in Specifications 1 through 4 of Charge II.

The proof shows that these turnback sheets were presented to Second Lieutenant Donald Reynolds, a deputy finance officer working for Captain B. Dick. The turnback sheets became a part of the official records of the

finance office and the accused knew and intended that the finance officer would rely upon them. These false official statements were therefore made to Captain B. Dick, the disbursing officer in charge of the finance office, to the same extent as if the accused had presented them to him in person (CM 270661, Sheridan, 45 BR 190; CM 315736, Risoli).

The defense contended that at the time the offenses were committed the accused was suffering from unusual nervous strain, that great pressure had been exerted upon him due to his family difficulties, and that he knew the difference between right and wrong, but life and circumstances had dealt him such a blow that when this situation arose the accused was unable to adhere to the right. The foregoing contention was not, apparently, intended as a plea of insanity. The contention was in effect an explanation of the acts of the accused and a request for leniency by the court. If this contention was intended as a plea of insanity the court by its findings of guilty resolved such question against the accused.

6. War Department records show that the accused is 33-2/12 years of age and married. He graduated from high school and attended college for one year before joining the Army. In July 1931 he enlisted in the Army and completed six years continuous service. In March 1938 he again enlisted in the Army and attained the grade of first sergeant prior to his being selected to attend officer candidate school. On 15 April 1942 he was appointed and commissioned a temporary second lieutenant, Engineers, Army of the United States. He received a temporary promotion to first lieutenant on 8 August 1942, and a temporary promotion to captain 1 March 1943. He has had almost ten years service as an enlisted man and 4-9/12 years of commissioned service. He served overseas with the Navy in the amphibious fleet where his performance of duty was superior.

7. The court was legally constituted and had jurisdiction over the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 94 and 96.

Christy T. Silva, Judge Advocate

Carlos E. McGee, Judge Advocate

Elbert E. Throop, Judge Advocate

JAGK - CM 317655 1st Ind

WD, JAGO, Washington 25, D. C. FEB 6 1947

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 Garrett P. Warmenhoven (O-456401), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of four specifications of embezzlement, in violation of Article of War 94; and of making four false official statements with intent to deceive, 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 (5) years. The reviewing authority approved the sentence, remitted the confinement and also "remitted the forfeiture of pay and allowances for the period of one month only," 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 of the sentence. The accused was a Class "A" Agent Finance Officer. He received four pay rolls from the finance office for the purpose of paying troops. He returned the pay rolls to the finance office indicating that he had made payments to certain enlisted men. He also prepared and filed the required pay roll correction and turnback sheets wherein he certified that he had made the payments to the men indicated on the pay roll. The accused had, however, retained in his possession the pay due eight of the enlisted men thus certified to have been paid by him. These eight men were on furlough at the time they were supposed to have been paid. The accused used about $58.00 of this money to pay telephone bills and sent $400.00 to his wife who was sick and in need of funds. The accused has repaid all of the money so embezzled.

4. Consideration has been given to the recommendation for clemency attached to the record of trial and signed by the defense counsel, a copy of which was also forwarded to this office by the Honorable Claude Pepper, Senator from Florida.

5. The accused by his conduct has made it impossible for his military superiors to rely upon his official statements and has demonstrated that he is unworthy to be an officer. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

(12)

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

CM 317655

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 36, February 17, 1947)

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

JAGN-CM 317671

UNITED STATES	)	FIFTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Salina, Kansas, 27 September 1946. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private First Class LOUIS E. PELLETIER (12236304), 42nd Reconnaissance Squadron, 485th Bombardment Group.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Nolle prosequi).

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that Private First Class Louis E. Pelletier, 42 Reconnaissance Squadron, 485 Bombardment Group, did, at Smoky Hill Army Air Field, Salina, Kansas, on or about 8 June 1946, feloniously take, steal, and carry away a leather wallet, value of about Three ($3.00) dollars, containing about Ninety-one ($91.00) Dollars, lawful money of the United States, property of Corporal Joseph J. Pollock, 506 Bombardment Squadron, 485 Bombardment Group; a leather wallet, value of about three ($3.00) dollars, containing about Thirty-four ($34.00) Dollars, lawful money of the United States, property of Master Sergeant George Moen, 506 Bombardment Squadron, 485 Bombardment Group; a leather wallet, value of about Three ($3.00) Dollars, containing about

Forty-three ($43.00) Dollars in lawful money of the United States, property of Private Kenneth R. Wolf, Squadron "A" 247 Army Air Forces Base Unit; a leather wallet, value of about Three ($3.00) Dollars, containing about Eight ($8.00) Dollars in lawful money of the United States, property of Private First Class Julian Braiman, 945 Air Engineering Squadron, 519 Air Service Group; a leather wallet, value of about Three ($3.00) Dollars, containing One Dollar and seventy-five cents ($1.75) lawful money of the United States, property of Private Calvin F. Lusk, Squadron "A", 247 Army Air Forces Base Unit; a leather wallet, value of about Three ($3.00) Dollars, containing about Eight ($8.00) Dollars, lawful money of the United States, property of Robert C. Gall, Private, Squadron "A" 247 Army Air Forces Base Unit; a leather wallet, value of about Three ($3.00) Dollars, containing about Thirty-five ($35.00) Dollars, lawful money of the United States, property of Private Stanley V. Martin, Squadron "A", 247 Army Air Forces Base Unit; a leather wallet, value of about Three ($3.00) Dollars, containing about Six ($6.00) Dollars, lawful money of the United States, property of Private Arthur C. Wells, Squadron "A", 247 Army Air Forces Base Unit; a leather wallet, value of about Three ($3.00) Dollars, containing about Twelve ($12.00) Dollars, lawful money of the United States, property of Sergeant Herbert H. Dietz, Squadron "A", 247 Army Air Forces Base Unit; a leather wallet, value of about Three ($3.00) Dollars, property of Staff Sergeant Walter C. Doyle, Headquarters Squadron 519th Air Service Group; a leather wallet, value of about Three ($3.00) Dollars, property of Corporal Donald R. Enlow, 506 Bombardment Squadron, 485 Bombardment Group; a leather wallet, value of about Three ($3.00) Dollars, containing about twenty-seven ($27.00) Dollars, lawful money of the United States, property of Private John A. Copland, Squadron "D", 247 Army Air Forces Base Unit.

He pleaded not guilty to the Charge and all Specifications thereunder. He was found guilty of Specification 2, of Specification 3 "except the words a leather wallet, value of about three ($3.00) dollars, containing about thirty-four ($34.00) dollars, lawful money of the United States, property of Master Sergeant George Moen, 506th Bombardment Squadron, 485th Bombardment Group; a leather wallet, value of about three ($3.00) dollars, containing about thirteen ($13.00) dollars in lawful money of the United States, property of Private Kenneth R. Wolf, Squadron A, 247th Army Air Forces Base Unit; a leather wallet value of about three ($3.00) dollars, containing about eight ($8.00) dollars in lawful money of the United

States, property of Private First Class Julian Braiman, 945th Air Engineering Squadron, 519th Air Service Group; a leather wallet, value of about three ($3.00) dollars, containing one dollar and seventy-five cents ($1.75) lawful money of the United States, property of Private Calvin F. Lusk, Squadron A, 247th Army Air Forces Base Unit; a leather wallet, value of about three ($3.00) dollars, containing about twelve ($12.00) dollars, lawful money of the United States, property of Sergeant Herbert H. Dietz, Squadron A, 247th Army Air Forces Base Unit; a leather wallet, value of about three ($3.00) dollars, property of Staff Sergeant Walter C. Doyle, Headquarters Squadron, 519th Air Service Group; a leather wallet, value of about three ($3.00) dollars, a leather wallet, value of about three ($3.00) dollars, property of Corporal Donald R. Enlow, 506th Bombardment Squadron, 485th Bombardment Group; a leather wallet, value of about three ($3.00) dollars, containing about twenty-seven ($27.00) dollars, lawful money of the United States, property of Private John A. Copland, Squadron D, 247th Army Air Forces Base Unit" and of the Charge, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority disapproved the finding of guilty of Specification 2, approved "only so much of the finding of Guilty of Specification 3 and of the Charge as involves a finding of guilty of larceny of a wallet containing about Eight Dollars ($8.00), lawful money of the United States, property of Private Robert C. Gall, a wallet containing about Thirty Five Dollars ($35.00), lawful money of the United States, property of Private Stanley V. Martin, and larceny of a wallet containing about Six Dollars ($6.00), lawful money of the United States, property of Private Arthur C. Wells," approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, designated the Branch United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, 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 or about 8 June 1946 wallets, with contents as alleged, belonging respectively to Privates Gall, Martin, and Wells, were stolen from their common barracks in the "Squadron A area." Gall's wallet was returned to him by Master Sergeant Watkins 14 June 1946. Thereafter Watkins returned Martin's wallet and Wells was called to the "Base Intelligence office" and identified his (R. 25-33). On or about 3 July 1946 the accused led Captain Broomhall and Private Coteau to a latrine (Building 106) in the Squadron D area where he stated he had thrown wallets in the stove (R. 49, 51). A wallet [not one of those in question] had been previously found there by Private Coteau (R. 51). The stipulated testimony of Master Sergeant Watkins stated he found wallets, including the three in question, "on or about 10 June 1946" in the stove in a latrine building (Number 158) in the Squadron D area (R. 57).

Two confessions of the accused were introduced in evidence over objection wherein accused stated: "I then admitted to Capt. Preston that

I have stolen twenty or thirty wallets * * * from various enlisted mens barracks in the 42nd Recon. area. I disposed of the wallets by throwing them in stoves and under barracks * * *" (Pros. Ex. 6) and: "I stole approximately two or three wallets from barracks occupied by enlisted men of Sq. D, 247 B.U., and disposed of them by placing them in a stove in one of the latrines in the Sq. D area * * *" (Pros. Ex. 7). Captain Broomhall, before whom these confessions were taken, testified he had explained the accused's rights to him as to such confessions and that they were voluntarily given thereafter.

4. Evidence for the defense:

The accused, having been duly warned of his rights, testified under oath, as to the voluntary nature of his "confessions," in substance as follows: He partially contradicted the testimony of Captain Broomhall respecting advices given him at the time his statements were executed. He further stated that he was originally questioned by the Provost Marshal, Captain Preston, who told him "* * * if I signed a confession I would get a year and if I didn't sign a confession I would get five years" (R. 39); that he thereupon signed a statement for Captain Preston and that he gave the subsequent statements to Captain Broomhall in continued reliance on this statement by Captain Preston (R. 41).

The accused did not testify generally and no other evidence was introduced on his behalf.

5. The fact that the accused was initially questioned respecting these offenses by Captain Preston is borne out by the testimony of both the accused (R. 39) and Captain Broomhall (R. 37). The testimony of the accused as to statements made to him at that time by Captain Preston is uncontroverted in any manner. It is the opinion of the Board that the confessions of the accused (Pros. Exs. 6 and 7) were improperly admitted in evidence since the record contains uncontradicted testimony that they were not voluntarily made (MCM, 1928, par. 114a; III Bull JAG, Sec. 395(10), page 227; CM 316223, Evans, (1946)). The remaining evidence is not "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (III Bull JAG, Sec. 395(2), page 185; CM 316223, Evans, (1946)).

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

Edward T. Vinson, Judge Advocate.

Joseph C. Brack, Judge Advocate.

Edward R Taylor, Judge Advocate.

FEB 1947

JAGN-CM 317671 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Fifteenth Air Force, Colorado Springs, Colorado.

1. In the case of Private First Class Louis E. Pelletier (12236304), 42nd Reconnaissance Squadron, 485th Bombardment Group, 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 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 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 317671).

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.

JAGH - CM 317673

6 FEB 1947

UNITED STATES	)	EIGHTH ARMY
v.	)	Trial by G.C.M., convened at Headquarters Eighth Army, 5, 6, and 8 July 1946. Dismissal, total forfeitures, and confinement for eight (8) months
First Lieutenant WILLIAM E. WING (O-1591539), Finance Department	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 William E. Wing, Headquarters 7th Air Service Group, in conjunction with First Lieutenant Robert Louis Johns, Headquarters 3rd Military Railway Service, and Flight Officer Raymond F. Belanger, Headquarters and Headquarters Squadron, 7th Air Service Group, did, at Tachikawa, Japan, on or about 30 January 1946, knowingly and willfully apply to his own benefit fifty thousand six hundred dollars ($50,600) lawful money of the United States, 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 Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service of the United States, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eight (8) months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused was identified as being in the military service (R 10, 40, 76). Accused was a finance officer and disbursing officer in the Tachikawa Finance Office and in command of that office in January 1946 (R 62).

First Lieutenant Robert Louis Johns testified to negotiations which he had with certain Japanese in January 1946 for the exchange of Japanese yen for American dollars. He intended to obtain about 50 to 55 thousand dollars for 750,000 yen at the established rate of 15 yen per dollar, and to allow the Japanese a rate of 33 to 1, thus giving them $23,000 for the yen and keeping the balance. He testified that he had 50 to 55 thousand dollars in mind because Flight Officer Belanger, a friend of his, had told him that $51,000 might be obtained (R 14-17).

As a result of these negotiations the Japanese delivered to Lieutenant Johns 750,000 yen (R 18). After evening mess the same day, Lieutenant Johns and Belanger, with the money in a bag on the floor of a jeep, drove it across the Tachikawa Air Base and parked near the officers' quarters. Lieutenant Johns got out of the jeep and went inside the quarters, leaving Belanger, with the bag of money in the jeep. In about twenty minutes Belanger came into the quarters. He had the equivalent of $43,000 in American dollars and Philippine pesos which he gave to Lieutenant Johns (R 18). On cross-examination Lieutenant Johns stated that he did not know the source of the money Belanger had obtained (R 20), and on redirect that he did not see Belanger get out of the jeep, nor did he see the bag taken out (R 21-22). Lieutenant Johns testified that when he came to the quarters with the money, Belanger stated, "This is the money that I have exchanged, and the difference between this amount and the sum that you were supposed to get was taken by myself and Lieutenant Wing." (R 19, 22).

He further testified that he kept $20,000 of the money he received from Belanger and gave $6,000 and 34,000 pesos ($17,000) to the Japanese, Mr. Matsui (R 19).

First Lieutenant Henry A. Clayton testified that he worked in the Class A Agent Section of the Tachikawa Finance Office; that the accused was his immediate superior, being superseded at the end of January by Captain Krocker (R 22-23). Lieutenant Clayton kept his payroll funds in a field safe which he locked with a key. For awhile, there was only one key to this safe and he had custody of it (R 23). One day Lieutenant Wing borrowed his key and returned it in about ten minutes. (R 23). Four days later he found an envelope in the safe that had not been there before. Lieutenant Clayton thought it was sealed, but could not recall any markings on it. He found American money in the envelope in fifty and ten dollar bills, but only counted it "roughly" (R 24, 27). He removed it from the safe to another place in the same building (R 27, 29) and later turned it over to Lieutenant Stahl, Provost Marshal at Tachikawa Air Base

and Agent Tauson, CID. The three together counted the money and found the amount to be $9,340.00 (R 25). He found this envelope in the early part of March (R 26) and at the trial identified it as Prosecution's Exhibit 1 (R 25). He testified that he did not know the purpose for which Lieutenant Wing borrowed the key (R 29). He was not sure that the amount of money which he gave the Provost Marshal (R 30) was the same amount as he took from the safe. He then testified that while "originally" he had the only key to the field safe, there were others later, that both Captain Krocker and the cashier used the safe and that he left his key in the office on occasions when he was not there. He further stated that he did not examine bags and envelopes put in the safe by others who used it. So far as he knew, only yen were in the safe (R 32). Payrolls were placed in the safe, but at this time, all payrolls were in yen (R 33) and payroll envelopes placed in the safe for his use were marked for the proper unit (R 34). Lieutenant Clayton did not pay troops leaving for the United States and did not know whether payrolls for them were kept in his safe (R 33).

At the end of Lieutenant Clayton's testimony an envelope containing $9,340.00 in four $10 bills and the rest in $50 bills was admitted as Prosecution's Exhibit 1 (R 35).

Master Sergeant Mark R. Tauson, Criminal Investigation Department, Provost Marshal's Office, Tokyo, testified that he went to Tachikawa about 6-7 March 1946 to "pick up" some money left with Lieutenant Clayton (R 36). Upon being further questioned he tesified as follows:

> "Q. Now, before going up to Tachikawa, did you interview the accused, Lt. Wing?
>
> "A. No sir, I did not.
>
> "Q. You have testified that he said something.
>
> "A. Told me about the money, yes. After he and Captain Frisch had interviewed him, and he had already made his statement, I took Lt. Wing over to our office, to have his statement typed up. At that time Lt. Wing told me that Lt. Clayton had the money.
>
> "Q. Did he tell you how much money he had?
>
> "A. Yes sir; he told me $5000." (R 37).

Tauson took the money obtained from Lieutenant Clayton and turned it over to Captain Frisch, in Tokyo (R 37). He also testified that he obtained Lieutenant Johns' footlocker and locked it up in the "confiscation room" (R 38).

Captain Michael G. Frisch, CMP, Provost Marshal's Office, Tokyo, testified that he opened Lieutenant Johns' footlocker, which was in the confiscation room, in the presence of Lieutenant Johns and Lieutenant Norwood and found in it $20,700 in bundles of 50, 10, and 20 dollar bills and one bundle of 50 peso notes, all wrapped in a pink cloth. He identified some money wrapped in a pink cloth and shown to him by the prosecution as the same as that found in the footlocker (R 55-57). This money was then admitted as Prosecution's Exhibit 3, over objection by the defense that proper foundation had not been laid for its introduction (R 57). The witness also identified the envelope (Pros Ex 1) which Master Sergeant Tauson had delivered to him (R 57-58). He further stated that the accused told him "that Lt. Clayton at Tachikawa had custody of the money that had been mentioned in the conversation" (R 57).

Lieutenant Archibald P. Young, testified that he was deputy finance officer, 179th Finance Office Disbursing Section, that the only authorized purpose for which dollar instruments were used in Japan was to exchange yen into dollars for personnel leaving the theater or returning to the United States, and that such exchanges were authorized only on presentation of orders directing return or travel from the theater (R 62, 69). The amount of such an exchange is limited to $150.00 (R 72). He testified the United States' currency was received and issued in denominations of 50, 20, 10, 5, and 1 dollar bills. Dollars are received from Manila, from the United States Treasury and from personnel coming into the theater who change dollars for yen (R 59). His office issued currency to the Tachikawa office (R 60, 62).

A handwritten signed confession by the accused, together with a typed copy thereof, sworn to and signed by him, was admitted in evidence (R 94; Pros Exs 2, 2a), despite objection by defense that this confession was obtained under circumstances rendering it involuntary, and that there was no proof of the corpus delicti. In his confession the accused stated the following:

> "On approximately 20 September 1945, I was transfered from the 514th ASGp to the 375th TC Gp, then located on Okinawa. This assignment did not have a Finance Office and hence upon arrival in Japan was transfered to 5th Air Force Hqs. for duty. For approximately ten (10) days I served in a finance capacity at the 11th Repl. Bn. making partial and full payments to personnel departing for the United States. With the impending return to the States of Major Gardes, Finance Officer of the 7th AS Gp., I was assigned the burdensome task of replacing said officer with the promise I would have a replacement in the near future or some assistance. Hence, on 1 November 1945, I assumed the capacity of Finance Officer with a rapidly dwindling group of experienced enlisted men with which to make payments to all 5th Air Force

personnel located on Honshu, Japan and comprising some twenty-two thousand (22,000) payments monthly. In addition receipts from APO's 704, 710 and 612; Post Exchanges located within the area were processed for exchange to checks. The receipts alone exceeded a million dollars ($1,000,000) monthly and an exceedingly burdensome task accounting for same. Upon assuming this task I spent long hours at night helping the various pay sections to compete with the unending flow of vouchers. The entire office worked every night for more than two (2) months attempting to reduce the work load in face of large reductions in experienced personnel. I experienced many a sleepless night due to shortages or failure to balance in certain sections, such as Cashiers or Class "A" Agent Section. Despite continual pleas for some assistance there was none forthcoming. No one seemed to be able to help until my nerves were frayed to the breaking point, after more than two and one half (2½) months of a backbreaking and thankless task being done to the utmost of my ability. Payments were beginning to be computed incorrectly which could not be helped by the newly acquired personnel which all helped to keep everything in a turmoil. At last I was trying to keep my own cash in balance, approximating two million (2,000,000) dollars, handle both the Class "A" Agent and Class "B" Agent Sections due to no available experienced help; plus the many other details involved in trying to keep the office open. I had no one to relieve me of any so-called "leg work" and ultimately it was to wear me down to the breaking point. I had made certain that the untiring efforts of my enlisted men were recognized to the point that I had promoted men to one (1) M/Sgt., four T/Sgts., six (6) S/Sgts. and two (2) Sgts. This I knew was only fair recompense for the many long hours both night and day they had given me their utmost energies. However, I had no one interested enough in my efforts to even give me the slightest consideration for what I had tried to do for the 5th Air Force. During all of the three (3) months about the nicest thing said to me was a "bawling out" for not being able to give an officer a partial payment in approximately fifteen (15) minutes. As time went on and no assistance appeared on the horizon and seeing others promoted not carrying nearly as great a personal load, my faith and viewpoint broke down completely in all that can be considered right. Finally after an exceedingly hectic several day period I was approached by F/O Belanger requesting an exchange of Japanese Imperial yen for American currency. The total yen amounted to seven hundred sixty thousand (760,000) yen for fifty-one thousand (51,000)

dollars of which I kept five thousand (5,000) dollars. This took place during the latter days of January when shortages were occuring in my Class "A" Agent Section and which after it was muddled to the point I could make neither head nor tail even after countless hours of checking. Also, inadvertently I had made an exchange of Philippine Pesos for yen of which said pesos were to be used for purchasing officers' club supplies in Manila and had supposedly given someone ten (10) peso notes instead of two (2) peso notes. This resulted in a shortage of four hundred (400) dollars to me personally. And since in Finance we are required to balance out to the penny it caused me tremenduous mental anxiety. These things were coupled with several shortages in the Cashiers account running as high as four thousand seven hundred (4,700) yen. Above all else I wanted to keep my account balanced and without so much as considering right from wrong I did allow myself to enter into this situation, only to later realize how terribly wrong I was. There could be and since has been no peace of mind wishing many times I could make recoupment of the funds. I do know that had I been provided with an assistant to help me with a task calling for a Major and Captain that the mental torment brought about by this unending job would never have clouded my sense of right and wrong. I hereby pray that the above picture may help to somewhat alleviate a wrong I now realize at this late date."

The prosecution then introduced into evidence, by oral stipulation with the defense, the testimony of Atsuo Kimizuka from the record of trial of First Lieutenant Robert Louis Johns (R 95), the testimony of Miss Reiko Asaoka from the record of trial of Flight Officer Raymond F. Belanger (R 103) and the testimony of Kenji Uchisugawa, from the record of one of these trials (R 125).

The testimony of these three Japanese concerned their negotiations with Lieutenant Johns. Kimizuka's testimony related to his arranging for Lieutenant Johns to meet a Mr. Matsui. Miss Asaoka acted as interpreter for Lieutenant Johns and Mr. Matsui and described the negotiations. She testified in detail with respect to the meetings and corroborates Lieutenant Johns' testimony. She testified that after preliminary meetings, she, Mr. Matsui and Uchisugawa brought the Japanese money to Lieutenant Johns' office in Tachikawa about 30 or 31 January 1946, and left it with him as he did not then have the dollars he was to give them (R 108-111). The next day they all returned and Lieutenant Johns delivered American dollars and pesos to them. Mr. Matsui took the money (R 115). She further testified, despite objection by the defense, that at the first meeting with Lieutenant Johns he said the money was to come from the finance office (R 116). She did not, however, know what "finance office" meant until Lieutenant Johns showed her the meaning in a dictionary (R 120).

It was stipulated by the prosecution and the defense that if Miss Asaoka were present she would further testify that she had never seen accused and had no contact with him (R 24).

Mr. Uchisugawa testified that he withdraw yen from a bank for Mr. Sato, his employer, and that he went with Mr. Matsui and Miss Asaoka to see Lieutenant Johns. Mr. Sato's money amounted to 700,000 yen and this money together with additional yen belonging to Mr. Matsui was left with Lieutenant Johns. The next day, 31 January 1946, the three returned to see Lieutenant Johns and he delivered to them $6,000 and "35,000 pesos." The United States currency consisted of 200 ten dollar bills and 200 twenty dollar bills, all apparently new money (R 125-131).

At this point the prosecution asked the court to take judicial notice of certain circulars (R 132); as follows:

Circular Number 268, Headquarters Eighth Army, APO 343, 11 October 1945, which provides in pertinent part:

"Section V - Exchange of American and Allied Currency.

"Exchange or conversion of American or Allied currency or coin for yen (military types B or A or Bank of Japan notes) may be made only with United States Army disbursing officers or United States Navy paymasters. Exchanges of currency with any institutions or persons other than the above is prohibited. (AG 123.7) (U)."

Circular Number 67, General Headquarters, United States Army Forces, Pacific, APO 500, 10 September 1945, Currency to be Used in the Main Islands of Japan which provides:

"1. Supplemental Military Yen Type 'B', Bank of Japan Notes, and Japanese State Notes and Coins will be the only types of currencies used in the main islands of Japan, which consist of the islands of Honshu, Hokkaido, Shikoku, and Kyushu.

"2. The use of United States currency, currencies of the Allied Powers, or any other currency except those mentioned above is prohibited."

Circular Number 262, Headquarters Eighth Army, APO 343, 6 October 1945, which provides in pertinent part:

"Section I - Exchange of United States Currency in Japan.

"The circulation of United States currency in Japan must be eliminated. If permitted to continue, this practice will result in establishment of black market exchanges which will have serious

adverse effects on United States troops and the Japanese economy. In order to prevent such conditions, the following action will be taken:

"a. Immediately upon arrival of units in Japan, commanding officers will inform troops that the circulation of United States currency is unauthorized, and that all dollar currency in their possession must be exchanged for yen.

"b. Enlisted personnel will exchange currency through unit personnel officers. The latter will be appointed Class "A" Agent Finance Officers to the nearest disbursing officer without delay, and will draw from the disbursing officer such amounts of yen currency as will be required to exchange yen for all United States currency held by troops in their organizations. Upon completion of currency exchange, personnel officers will settle accounts with disbursing officers, returning United States and any remaining currency. (AG 123.7) (U)."

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

The accused, during presentation of the prosecution's case, after being warned of his rights, took the stand for the limited purpose of testifying with respect to the circumstances under which his confession was obtained. (R 76-90).

After it was ascertained that the accused understood his rights as a witness, he elected to remain silent as to the general issue (R 166).

Lieutenant Archibald Young, during cross-examination by defense, was permitted to be made a witness for the defense. He testified that the money described in Prosecution's Exhibit 1 was no different from any other United States currency, that a finance officer is responsible for shortages, but an overage does not become his property. He further stated that sums of money are sometimes received in a finance office for safekeeping, but only funds of the United States; that money taken in through the window, in exchange for money paid out becomes the property of the United States but title to money paid out passes to the person receiving it (R 67-69). In response to questions by the court he stated that there was no limit to the amount of currency his office might supply to other finance offices; that yen taken in at finance offices were brought to his office, but they did not check these yen against dollars issued to the office. However, this check could be made through certificates of exchange kept in each finance office (R 69-70). These certificates state that the person requesting dollars for yen received the yen legitimately (R 71). Yen equivalent to $150.00 was the maximum amount which could be exchanged for one returning to the United States (R 72).

The defense then introduced the testimony of Captain Edward Krocker, given during the trial of Flight Officer Belanger, after stipulating with the prosecution that if he were present he would so testify (R 139).

Captain Krocker's testimony showed that he took charge of the finance office at Tachikawa Army Air Base on 1 February 1946 as successor to the accused. He first came to the office about 18 January 1946. There were no discrepancies or shortages, and the accounts balanced, so far as he knew. Since he has been in the office, he has issued a large amount of American money, approximately $180,000 to $200,00. He has issued as much as $60,000 at one time depending upon the number of men going home. Also, he has issued as much as $2500 to officers for the purpose of buying supplies outside of Japan. On cross-examination he testified that he never issued money to Lieutenant Johns. The largest sum issued in exchange for yen to men leaving to go home is $150.00 (R 142), and a like sum in pesos to men going to the Philippines (R 144). An exchange of dollars for yen at the official rate of exchange would not cause a shortage in the accounts of the finance office (R 145).

By a similar stipulation with the prosecution, the defense read into evidence the testimony of Major Earl H. Butler, from the record of trial of Flight Officer Belanger (R 145).

Major Butler testified that he was staff assistant finance officer, Headquarters, Fifth Air Force, that the Tachikawa Finance Office was under his jurisdiction, and that he was assigned there from 12 January to 2 February 1946, on temporary duty. The officer in charge was the accused. There were no discrepancies or shortages in the funds and the books balanced. It is possible that there is a large amount of American money in circulation among the occupation troops. Money issued to troops returning to the United States is issued in all denominations. In reference to Prosecution's Exhibit 3 (Pros Ex 2 in the Belanger case) he testified that money could circulate in a bundle of 100 twenty dollar bills with consecutive serial numbers, but this was not probable unless same was issued by a bank or finance office (R 145-149).

5. In rebuttal, the prosecution called Major Gordon D. Osborn, executive officer at the Office of the Fiscal Director, GHQ, AFPAC. He testified as an expert and stated, that an exchange of dollars for yen received from a Japanese would cause a loss to the United States. After such an exchange the books balance, but if 750,000 yen were received from a Japanese national, and in exchange if 50 to 51 thousand dollars were paid out, the loss to the United States would be 50 to 51 thousand dollars (R 154-155). He considered the yen worthless (R 162). He also testified that troops in Japan were not paid in dollars, but in yen, and that a person going home may exchange yen into dollars, if he presents a certificate that the yen were received as pay and allowances or were received by him as a result of cash in dollars paid to the finance office, together with

the orders sending him home (R 153-154). He further testified that money in dollars was brought into the theater by individuals, and he had reason to believe that not all of it was exchanged for yen. Possession of dollars would not be evidence that it came from a finance office (R 156). The only way an officer or enlisted man can legally acquire United States dollar currency in Japan is by an authorized exchange transaction (R 161). He also testified that while possession of United States currency contrary to regulations would not be evidence that it came from a finance office (R 156), if the serial numbers were all consecutive, he would suspect that it did (R 160).

6. The first question to be considered is whether there is sufficient evidence in the record, outside accused's confession, to establish the corpus delicti. With respect to his confession, not only the written statement, but also the oral statements accused made to Captain Frisch and Master Sergeant Tauson must be considered together, since the oral statements were made during the course of making his written statement.

With reference to proof of the corpus delicti, the Manual for Courts-Martial states:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. * * *"

In CM 202213, Mallon, 6 BR 1, it was stated:

> "The general rule, laid down with the greatest clearness in the Daeche case, is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of evidence or at all, but that some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti."

In the Mallon case, however, where accused was charged with the larceny of a riding crop, the property of a Post Exchange, after stating the above rule, the Board stated that the evidence "touches the corpus delicti since it tends to show, though it does not absolutely prove, that

the crop had been a part of the stock of the Post Exchange and had been wrongfully taken thence." This does not merely "touch" the corpus delicti of larceny, it is the corpus delicti. The Board distinguished CM 193828, Morande and Mingo, 2 BR 95. In that case accused was charged with the unlawful sale of blankets, but it was held that the mere fact there was evidence that the blankets were missing, without evidence that they were probably sold was insufficient to support the finding of guilty where the missing elements were supplied by a confession. Both cases cite many of the same Federal cases, and principally Daeche v. U. S., 250 Fed. 566. This case stated the general rule as follows:

> "But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of the proof."

Preceding this quotation, the court had stated:

> "The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed" (Underscoring supplied).

In the first quotation it will be noted that the court did not say that evidence aliunde the confession need not prove the corpus delicti at all, as implied in the rule as stated in the Mallon case, but that it need not establish the truth at all either beyond a reasonable doubt or by a preponderance of proof.

In Forte v. U. S., 94 F2 236, 68 App. D.C. 111, 1938, the court stated at page 240:

> "We do not rule that such corroborating evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being independent of the confession, substantial evidence of the corpus delicti, and the whole of it, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and the defendant's connection therewith."

The court cited and approved the Daeche case, but said it had often been misconstrued.

In proof of the corpus delicti in the present case there is in the record, excluding the confession, evidence of the following facts. In January 1946 Lieutenant Johns negotiated, with certain Japanese nationals,

the sale or exchange of dollars for yen at a rate of 33 yen to 1 dollar. He thought he could get about 50 to 55 thousand dollars for about 750,000 yen since his friend Belanger had told him he could obtain $51,000. Though he did not specifically say so, it is apparent that Lieutenant Johns contemplated making such an exchange at a finance office at the official rate of exchange of 15 to 1. As agreed, the Japanese turned over to Lieutenant Johns 750,000 yen, which he inturn delivered to Belanger sometime during the evening of the same day. Thereafter they drove a jeep, in which the yen had been placed, to the officers' quarters at Tachikawa Air Field and parked it there near the finance office. Lieutenant Johns left Belanger and went inside the quarters. Within about twenty minutes Belanger came in and gave Lieutenant Johns the equivalent of $43,000, in American dollars and Philippine pesos. Lieutenant Johns took the money and the next day gave the Japanese the equivalent of $23,000, in dollars and pesos, keeping the balance. The testimony of the Japanese who dealt with Lieutenant Johns corroborates his testimony with regard to the negotiations and the receipt by them of dollars and pesos equivalent to $23,000. In addition, they established the approximate date they received the money as the 30th or 31st of January 1946.

On or about 1 March the accused borrowed a key to Lieutenant Clayton's field safe. Four days later Lieutenant Clayton found an envelope in this safe, which was in the finance office, containing American currency, in the amount of $9,340, consisting of 10 and 50 dollar bills. Lieutenant Johns' footlocker was seized and opened. It contained $20,700 in bundles of 50, 10, and 20 dollar bills and one bundle of 50 peso notes.

By regulations, all personnel coming to Japan were required to exchange American currency for yen and personnel leaving the theater were authorized to exchange yen for dollars, but limited to $150 for any one individual. The use of American currency in Japan was forbidden except for the purpose of exchanging currency for those under orders to leave Japan or for certain official purposes.

The Board of Review has considered the following pertinent directives, in addition to the directives which the prosecution introduced into evidence:

Circular Number 280, Headquarters Eighth Army, APO 343, 22 October 1945 which provides in pertinent part:

"Section II: Prevention of Illegal Currency Transactions

"1. Radio CINCAFPAC, 18 October 1945 is quoted for the information and compliance of all concerned.

'a. In order to prevent military personnel in possession of yen currency obtained from sales of property, black market currency transactions and other illicit sources

from utilizing such currency to their own advantage, it is directed that every instrument which transmits a dollar credit to the United States (except as pay voucher or payroll deductions) such as PTA list or which effects a dollar credit through Soldiers' Deposits or effects the purchase of a war bond or postal money order for cash will be accompanied by a signed certificate from the appropriate personnel officer that: "I certify that I have personally inquired into and examined the sources of the funds herewith transmitted, deposited or used for purchases of war bonds and postal money orders and have determined that these funds were legitimately obtained as payment of pay and allowances from a finance officer of the United States Army and were not obtained from sale of property, black market currency operations or other illicit sources." * * *

* * *

'c. Postal officers in Japan will cash incoming postal money orders in yen only. Finance officers will not exchange United States currency for yen unless the individual desiring exchange is under orders to return to the United States and presents appropriately modified certificate as shown above from the unit personnel officer that the funds were legitimately acquired as pay and allowances from an army finance officer. Officer personnel will execute a similar certificate. You will take measures to insure that United States currency is withdrawn from personnel arriving from the United States within 72 hours from date of debarkation (Underscoring supplied).

* * *'

"3. These instructions will be observed by personnel officers and officers certifying to their own transactions immediately upon receipt of this circular, and disbursing officers and postal officers will accept and exchange currency only in compliance therewith.

* * *"

Circular Number 287, Headquarters Eighth Army, 30 October 1945:

"* * *

"1. All personnel will be advised at a time sufficiently in advance of departure, that the return of yen currency to the United States is strictly prohibited, except nominal amounts

which are carried as souvenirs, and not as currency to be subsequently exchanged for dollars.

"2. Commanding officers will insure that adequate facilities are available for withdrawal of all yen currency from troops through the following transactions:

"a. Exchange of yen for dollar currency, up to a maximum of one hundred and fifty dollars ($150.00).

* * *"

Circular Number 3, Headquarters, Eighth Army, 3 January 1946:

"Section V - Prevention of Illegal Currency Transactions.

'"* * * Authority is granted to convert into dollars or dollar instruments the yen currency representing official funds of governmental agencies or authorized non-appropriated funds such as funds of army exchanges, Red Cross, hospitals, or units, provided such yen were acquired from previous conversions of dollar instruments through army disbursing officers or from yen disbursed to authorized personnel as cash pay and allowances, or exchanged for other currencies received as cash pay and allowances. When request is made of disbursing officers to exchange yen currency representing part or the entire amount of such funds, the custodian of fund will execute certificate stating name of fund and unit; amount of foreign currency for which exchange is requested; type of currency desired; approximate percentage that the amount represents of current balance of fund; reason for requesting exchange; that no personal funds are included. Your exchange controls must be adequate to prevent increases in such funds from unauthorized sources." (AG 123.7) (U).'"

It is reasonable to infer from all the circumstances that the large sum of money which Lieutenant Johns had was obtained at a finance office, particularly since the evidence indicates that an exchange transaction was contemplated, and that the finance office it came from was the Tachikawa office. Because of the regulations, it is also reasonable to infer that neither Belanger nor Lieutenant Johns could have obtained the sum lawfully. The evidence justifies the conclusion, therefore, that there was a misappropriation of money from the Tachikawa Finance Office, and that the money was the property of the United States furnished and intended for the military service.

If the accused were charged with misappropriation, evidence of any misappropriation of funds from the finance office would be evidence of the corpus delicti. Misappropriation means devoting to an unauthorized purpose.

The devotion need not be for the benefit of the accused (MCM, 1928, par 150i, p 184). In fact, benefit to anyone, or devotion to anyone's use, is not an element of that offense. Misapplication, as stated in the same section of the Manual, "is where such purpose is for the party's own use or benefit." In other words, misapplication is also a devotion to an unauthorized purpose, with the added element that the purpose be for the use or benefit of the person making the misappropriation.

Since misapplication is a specific kind of misappropriation, then some evidence of a benefit to the person making the misappropriation is necessary. For it is this benefit that, in the words of the Daeche case quoted above, is "the injury against whose occurrence the law is directed."

In the instant case, there is some evidence, that there was a misappropriation of finance office funds. The evidence also shows that 750,000 yen would, on exchange, yield about $51,000 at the official rate of 15 to 1, that Lieutenant Johns received the equivalent of $43,000 and that 750,000 yen were used to obtain it. There is then some evidence that someone received a benefit from the difference, and it is a reasonable inference that this benefit was received by whoever made the misappropriation. It is clear from the Manual and the cases cited above that the necessary evidence of the corpus delicti need not connect the accused with the crime. Therefore, the Board is of the opinion that there was sufficient evidence of the corpus delicti for the court to admit the confession into evidence.

7. The second question presented is whether the confession was, in fact, voluntarily made and, therefore, properly admitted into evidence. The confession was admitted over objection by the defense, on the ground that it was made under circumstances rendering it involuntary.

The testimony for the prosecution, offered as a foundation for the admission of the confession, is summarized as follows.

Captain Michael G. Frisch, CMP, Provost Marshal's Office, Tokyo, testified that at the end of February he was informed of a transaction involving the sale of yen for dollars, which he investigated. He questioned some Japanese who implicated Lieutenant Johns. The latter implicated Flight Officer Belanger and the accused (R 41). The accused was brought to Captain Frisch's office in Tokyo by Lieutenant Stahl, Provost Marshal at Tachikawa, on or about 4 March. The accused was not questioned at that time so far as he could recall. Witness did not tell the accused that he was under suspicion, at this time. In fact, he said nothing except that he was investigating the case involving the sale of currency (R 43-44). Accused was removed to the Metropolitan Police jail and confined in the military section there (R 41). On the morning of 5 March, Captain Frisch went to the jail and saw the accused. He stated that he warned the accused of his rights and asked him if he wanted to make a statement. Accused stated that he had nothing to say (R 42). Witness "believes" that he returned on the morning of the 6th at about nine o'clock and took the accused out to his (Frisch's)

quarters where he offered him the use of a shower and shaving facilities, and where they were alone (R 42, 46). Witness gave the accused coffee and sandwiches (R 45-46). After this they talked about many things -- "I can't remember what, exactly, and he said he thought he would like to write a statement, make a statement" (R 42). He warned the accused of his rights and then took him to his office where the accused wrote out a statement in longhand. When finished, the accused signed the statement in Captain Frisch's presence. This statement, marked Prosecution's Exhibit 2 for identification, was identified by witness (R 42-43). The defense then questioned the witness relative to what he had said to the accused when they were in Captain Frisch's quarters as follows (R 45-46):

"Q. And do you recall as you were sitting in that room, making a statement to the accused to the effect that if he did not cooperate pretty soon that it would look bad in your report?

"A. No sir, I do not recall.

"Q. But you may have done so?

"A. I do not recall any statement.

"Q. Answer my question, please; you may have done so?

"A. I do not recall, is all I can say.

"Q. You don't remember?

"A. I don't remember.

"Q. But it's possible that you did?

"A. I don't remember if I did or not.

"Q. You may have, in other words?

"A. It's hard for me to answer. I say I don't remember that question."

Captain Frisch was then asked, "Did you make the statement in your room that 'anything I say in my report may be able to influence your case?'" He replied, "No, I did not." The defense asked, "Now, do you recall making a statement to the accused that if he didn't come out with a statement you would have to cable the FBI and check up on him in the states?"

"A. I may have said that, because that resulted from questioning Lt. Wing as to what procedures were followed to get information on people when they were involved in such things."

Witness repeated his answer that his statement was in answer to Lieutenant Wing's trend of questioning as to what procedures were followed (R 46).

He stated that the accused appeared very nervous at times (R 51).

Captain Frisch testified that he did not, prior to the time accused wrote his statement, tell accused he would be released from jail if he made a statement, that he did not urge him to make a statement, and that he did warn him of his rights (R 53). When asked why accused was not placed in arrest in quarters, Captain Frisch stated, "It was on orders of the Provost Marshal that they were locked up" (R 54). He stated several times that he did not know what the conditions were in the jail, nor anything about the food and water given to accused; and that he had no jurisdiction over the jail. (R 48, 54). He knew that Japanese were in the jail, but thought the military cells were separate from cells used for Japanese prisoners (R 52). Captain Frisch previously stated that military personnel could be held in the jail 48 hours by regulations of the Provost Marshal (R 42, 48).

After accused had written his longhand statement in Captain Frisch's office it was then typed in another office (R 51).

First Lieutenant Harold Norwood testified that on 6 March accused's longhand statement was typed in his office and that accused swore to and signed the typed statement in the presence of Sergeant Gilmeyer and himself. He identified both the longhand statement, offered as Exhibit 2, and the typed statement, offered as Exhibit 2a. Before accused signed the typed copy, witness warned him of his rights under the 24th Article of War (R 73). He did not witness the execution of the longhand statement taken in Captain Frisch's office (R 74-75).

The accused, who took the stand for the limited purpose of showing that his confession was not voluntary, testified that he entered the Metropolitan jail on 2 March about 2000 hours and left on 4 March about 1400 hours. He was confined by directions of Captain Frisch (R 79). He did not know who brought him to the jail, but said, "I believe Captain Frisch asked, ordered, two MPs" (R 80). He was confined in the so-called military section of the jail. The cells were in two tiers, one above the other, in a semi-circle. He was in a cell on the top tier. Italians were also in the top tier and Japanese filled the bottom tier, about 150 in 8 cells. He was alone, but there were three or four prisoners in each of the cells on his tier. Occupants of the cells below could not all lie down at one time and a Japanese woman, apparently mentally deranged, screamed constantly (R 77). There was one American soldier guard on duty and accused was the only military person confined in that portion of the jail (R 81). The toilet was broken and as a result of not having been flushed for several days there was a strong stench in the cell. There was no cot in his cell, only a moth eaten Japanese comforter and rice mats (R 78).

His food consisted of C or K rations and he was given no water (R 78). He was permitted to shave at a fountain in the middle of the semi-circle of cells on the afternoon of the day after he was confined, but was afraid this water, like other water in Tokyo, was not fit to drink (R 79).

About noon on the first day he was in jail, Captain Frisch visited him and asked accused to make a statement, but did not warn him of his rights. Accused declined to make a statement but pointed out the condition of the toilet to Captain Frisch and also complained to the guard about it (R 81-82). He did not sleep while in the jail because of these conditions (R 83).

Captain Frisch visited him a second time, on the morning of 4 March, when he told him it might be necessary to investigate accused's family and "everything all the way back to the states". Accused was apprehensive of his father's condition since he had recently suffered a stroke and it was for this reason that he agreed to go to Captain Frisch's apartment on the afternoon of 4 March (R 79). While at the apartment, Captain Frisch allowed him to take a shower and shave, and gave him coffee and sandwiches (R 79). Thereafter, they talked of various things and then the conversation drifted back to the case. At this time Captain Frisch said it would be necessary for him to take some action one way or another, and that he had to close the case and make his report (R 85). He did not promise anything but implied by what he said that anything he might say in the report could be helpful or harmful (R 85-86, 90). Captain Frisch did not say that if accused made a statement he would not wire the FBI, but said or implied that if accused did not make a statement he would contact the FBI (R 87-88). Accused talked to no one but Captain Frisch prior to making his statement, since his request for counsel had been denied (R 90). He also testified that Captain Frisch said it would no longer be necessary to keep him in the Metropolitan prison if he made a statement, but he does not remember just when Captain Frisch made the statement (R 80). Captain Frisch did not tell him he would be released from confinement if he made the statement. Accused stated that if he were not apprehensive about his father's condition, and conditions in the Metropolitan jail, he would not have made the statement. When accused was asked if unhealthy conditions in the jail influenced him, he said, "Nothing in comparison to investigation of my family, etc." (R 80).

In considering all the circumstances surrounding the making of these statements by the accused, it is the opinion of the Board that the law member was not unreasonable in placing greater credence upon the testimony of Captain Frisch than upon that of the accused and that the ruling admitting the confession should not be disturbed. There is no doubt that accused was worried and that being placed in a filthy jail, and then being removed to Captain Frisch's quarters and allowed to shave, take a shower, and thereafter being given coffee and sandwiches, exercised considerable psychological influence on the accused. While the accused may have feared that he might be returned to the jail if he did not make a statement, the

court could reasonably conclude from the evidence that he was neither so threatened nor was he promised that he would be released if he did not make a statement. The court could also reasonably conclude that, while accused was influenced by fear of news of his situation coming to the attention of his sick father, or to his home town if the FBI should make an investigation, Captain Frisch did not use this as a threat, but that accused himself asked whether such investigations were to be made. The period of confinement was actually less than the authorized period of forty-eight hours for which all military personnel might be detained in the jail. Considering all the circumstances, together with the fact that the accused is a well educated officer, it cannot be said that he was forced to confess.

8. The accused stands convicted of knowingly and wilfully applying to his own benefit, in conjunction with Lieutenant Johns and Flight Officer Belanger, $50,600, lawful money of the United States furnished and intended for the military service thereof.

The elements of proof for the offense alleged, as stated in the Manual are as follows:

> "* * * 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 specificed" (MCM, 1928, par 150i, p 185).

The evidence shows that money from the finance office was misappropriated through the unlawful exchange of Japanese yen for United States currency. In the absence of evidence to the contrary, it may be presumed that such money in a finance office of the army was money of the United States intended for the military service thereof. Pertinent currency regulations forbade such an exchange as took place and since such regulations have the effect of law, accused is charged with notice thereof (CM 291176, Besdine; CM 307097, Mellinger). Accused's confession shows that the misapplication was knowingly and wilfully done. Accused in his confession states that he exchanged $51,000 of which he kept $5,000, but he derived a benefit from the entire amount, inasmuch as it was the exchange of the entire amount which enabled him to get the $5,000 he admits receiving.

The evidence, however, shows that a part of the money paid out by the accused, stated by him to amount to $51,000, actually was in the form of pesos, and not in "lawful money of the United States" as alleged. The total amount actually shown to be in dollars is the $5,000 kept by the accused, the $6,000 delivered to the Japanese and the $20,000 kept by Lieutenant Johns and found in his footlocker. How much of the money, if any,

was kept by Belanger is not in evidence. Since Philippine pesos are not lawful money of the United States, the record of trial is legally sufficient to support only so much of the finding of guilty as involves a finding that the accused misapplied $31,000, lawful money of the United States furnished and intended for the military service thereof.

9. The accused is 36 years of age and married. He attended Ohio State University for four years and was a member of the ROTC. He also attended the Eastman School of Music, University of Rochester, for two years. Prior to his service in the Army he was engaged in the investment banking business as a vice president of George T. Lennon & Co., Columbus, Ohio. He was inducted 11 March 1942 at Fort Hayes, Ohio, attended the Quartermaster School, Camp Lee, Virginia, and was commissioned second lieutenant on 30 August 1943. He was promoted to first lieutenant, 8 August 1944. War Department records show that he served with the Quartermaster Corps until August 1943 and has since served in the Finance Department. He is authorized to wear the Asiatic-Pacific Theater Ribbon, with one bronze battle star for the Ryukus Isles Campaign. The accused received seven days restriction under Article of War 104 at Norfolk Army Air Field on 27 February 1944, for deliberate disobedience of orders and for use of privately owned conveyance in transaction of official business.

10. The Board of Review has given consideration to a letter written by the accused to Major General W. H. Kasten, Chief of Finance, dated 27 November 1946, and forwarded to The Judge Advocate General for such consideration as deemed proper. Mrs. Audrey McC. Wing, wife of the accused, appeared before the Board and urged clemency in his behalf.

11. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and only so much of the finding of guilty of the Specification as involves a finding that the accused did, at the time and place alleged, in conjunction with the persons alleged, knowingly and wilfully apply to his own benefit $31,000, lawful money of the United States, property of the United States furnished and intended for the military service thereof, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence to dismissal, total forfeitures, and confinement at hard labor for eight months is authorized upon a conviction of a violation of Article of War 94.

D. Goldstein, Judge Advocate

Wallace A. Loff, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 317673 1st Ind

WD, JAGO, Washington 25, D. C. FEB 24 1947

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 E. Wing (0-1591539), Finance Department.

2. Upon trial by general court-martial this officer was found guilty of misapplying, to his own benefit, in conjunction with two other named persons, $50,600, lawful money of the United States, property of the United States, furnished and intended for the military service thereof. 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 eight (8) 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 of the Charge and only so much of the finding of guilty of the Specification as finds the accused guilty of misapplication of $31,000, lawful money of the United States, property of the United States, furnished and intended for the military service thereof, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

The accused was assigned to Headquarters 7th Air Service Group and was disbursing officer at the finance office, United States Army, at Tachikawa Air Base in Japan. First Lieutenant Johns, one of the two persons named in the specification in conjunction with whom accused is alleged to have acted, had arranged with certain Japanese to exchange yen for dollars at a rate of 33 yen for one dollar. Lieutenant Johns had learned from Flight Officer Belanger that $51,000 could be obtained. Knowing that the official rate of exchange at a finance office was 15 to 1, Lieutenant Johns accepted 750,000 yen from the Japanese intending to reimburse them at the rate of 33 to 1. Belanger took the yen to the accused at the finance office, on or about 30 January 1946 after business hours, and the accused withdrew United States and Philippine currency of a total value of $51,000 in exchange therefor. The accused kept $5,000 of this money and gave the balance to Belanger. Belanger, in turn, gave Lieutenant Johns $43,000 in United States and Philippine currency and kept the balance. Lieutenant Johns turned over to the Japanese $6,000

and 34,000 pesos ($17,000), which was the amount called for by the 33 to 1 agreement with the Japanese, and retained the difference. By this transaction, which was clearly unlawful under existing currency control regulations, the accused made $5,000 and in fact applied to his benefit the entire amount. Since the specification alleges misapplication of $50,600, lawful money of the United States, and a part of the money actually misapplied was shown by the evidence to be Philippine pesos, the Board of Review held the record legally sufficient to support only so much of the finding of guilty as involves misapplication of $31,000, the amount clearly shown by the record to have been in dollars, lawful money of the United States.

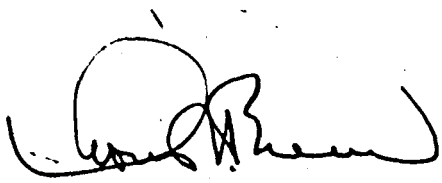
4. A letter from the accused addressed to Major General W. H. Kasten, Chief of Finance, dated 27 November 1946, forwarded to me for such consideration as deemed proper, is attached to the file.

The wife of the accused, Mrs. Audrey McC. Wing, appeared on behalf of the accused and requested remission of that portion of the sentence adjudging dismissal.

5. I recommend that only so much of the findings of guilty of the specification as involves a finding that the accused did, at the time and place alleged, in conjunction with the persons alleged, knowingly and wilfully apply to his own benefit $31,000 lawful money of the United States, property of the United States, furnished and intended for the military service thereof be approved and that the sentence be confirmed and carried into execution. Inasmuch as the accused's period of confinement (considering allowable good conduct time) was concluded on 27 January 1947, it is not necessary to designate a place of confinement.

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

CM 317673



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 46, February 24, 1947).

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

JAGN-CM 317691

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Camp Kilmer, New Jersey, 23 October 1946. Dishonorable discharge and confinement for four (4) years. Federal Reformatory.
Private JAMES W. PLUMMER (35240576), 9225 Technical Service Unit-TC, Company O, 8th Regiment, Overseas Replacement Depot.	)	

HOLDING by the BOARD OF REVIEW
HARDY, JOHNSON and TAYLOR, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private James W. Plummer, 9225 Technical Service Unit-Transportation Corps, Company O, 8th Regiment, Overseas Replacement Depot, did, at Camp Kilmer, New Jersey on or about 17 July 1946, feloniously take, steal and carry away one wallet, value about $5.00, and about $83.00, lawful money of the United States, of a total value of $88.00, the property of Private George A. Bakos.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for four years. The reviewing authority approved "only so much of the findings of guilty as finds the accused guilty of feloniously

taking, stealing and carrying away about $83.00, lawful money of the United States, the property of Private George A. Bakos," approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution.

When George A. Bakos retired 2230 17 July 1946 in his barracks in the 240 block, Camp Kilmer, his billfold containing $83.00 in currency was in the pocket of his trousers which hung at the head of his bed. When he arose the next morning the billfold and contents were missing (Stipulation, Pros. Ex. 1). The billfold was later found, empty of currency, in a wooded area near the 240 block, and returned to Bakos (R. 5-7; Pros. Ex. 1).

An affidavit of Homer Pasley (Pros. Ex. 2) was acknowledged before First Lieutenant John A. Reyna as appears on its face (Oral Stipulation, R. 7). The body of such affidavit, then introduced without objection reads:

> "I witnessed the signing of James W. Plummer to his confession made in the Investigation Unit, Wright Field, Dayton, Ohio, on 26 July 1946, in the presence of James W. Plummer and Ray I. Turner, Agent, Military Investigation Unit.
>
> Further deponent sayeth not" (Pros. Ex. 2).

A written statement, dated 26 July 1946, purportedly signed by accused, was admitted in evidence without objection or further preliminary foundation, wherein accused stated, in substance: That on 17 July 1946 he "picked up about six or seven billfolds" in a barracks numbered in the 240's at Camp Kilmer; That he took such billfolds from the clothing of sleeping men, took the money from them, and discarded them in a patch of woods behind the barracks; That he then went absent without leave and was later detained by the civilian police (Pros. Ex. 3).

4. Evidence for the defense.

The accused, having been duly warned of his rights, elected to testify under oath on his own behalf. The initial question put him by his counsel was:

> "Tell the court why you signed this statement, the reasons why you did."

to which accused answered

> "I was picked up in Ohio on the 23d of July. I was promised if I came clean I would be tried for AWOL only and the rest would be forgotten about. They put me in solitary confinement for twenty six days in Wright Field."

He further testified in substance: That following his being "picked up" he was placed in solitary confinement; That he signed "a piede of paper" shown him by the Trial Judge Advocate; That he was in solitary confinement 19 days before he signed "the statement" and for 7 days thereafter; That "this statement" (a "piece of paper" handed witness by the Trial Judge Advocate) was dated 26 July, and that such date must have been wrong.

Respecting the alleged offense he further testified in substance: That on 16 July he went in town and "drank a lot of whiskey"; That when he got back to camp "about three o'clock" he did not know what he was doing; That "when morning came I discovered all of a sudden I had a lot of money in my pocket"; That he then "went AWOL" but spent none of the money he so found, which was in his possession when he was "picked up."

No other evidence was introduced in behalf of the accused.

5. It is obvious from the first question asked accused as a witness by his counsel that there was a serious question as to the voluntary nature of accused's confession (Pros. Ex. 3). Despite this fact defense counsel made no objection to its admission in evidence, nor to the improper manner in which a foundation for such admission was attempted by the prosecution which attempt he actually aided by stipulation. As a result of the manner in which this trial was conducted it would be impossible for the court, and certainly for this Board, to fairly determine whether such confession was voluntary and admissible.

While it might be said accused's testimony raises an implication of guilt his confession (Pros. Ex. 3) is the only direct evidence of such guilt and its admission in evidence without proper consideration by the court of the question, raised by the testimony of the accused, as to its voluntary character constituted fatal error. It plainly appears from the record of trial that defense counsel did not perform his duties properly and that accused's substantial rights were prejudiced so as to deprive him of liberty and property without due process of law (CM ETO 4756, Carmisciano, 13 BR (ETO 272).

6. The court was legally constituted and had jurisdiction of the person and offense but errors injuriously affecting the substantial rights of the accused were committed during the trial and for that reason the Board of Review holds that the record of trial is legally insufficient to support the findings and sentence.

Glenn W. Hardy, Judge Advocate.

Edward J. Johnson, Judge Advocate.

Edward R Taylor, Judge Advocate.

JAGF CM 317691 1st Ind

FEB 5 1947

WD, JAGO, Washington 25, D. C.

TO: The Under 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 USCA 1522), and Executive Order No. 9556, May 26, 1945, is the record of trial in the case of Private James W. Plummer (35240576), 9225 Technical Service Unit - TC, Company O, 8th Regiment, Overseas Replacement Depot.

2. The Board of Review has held the record of trial legally insufficient to support the sentence. I do not concur in the holding by the Board of Review and submit for your consideration and action my dissent therefrom.

3. Accused was found guilty of the larceny of a wallet and money contents. The proof consisted of evidence of the corpus delicti and a confession by accused. The confession was received in evidence without objection by the defense counsel. The accused subsequently testified that the confession was obtained through improper treatment and as the result of improper promises. The confession itself contained statements by accused that he was familiar with his right to remain silent, that no threats, promises or duress had been used against him, and that he made the confession of his own free will.

4. The Board of Review is of the opinion that the procedure with respect to the confession prevented a fair determination by the court with respect to its voluntariness; that the introduction of the confession was erroneous as was the failure of the defense counsel to object to it; and that the errors injuriously affected the substantial rights of the accused.

5. The confession was on its face voluntary and there was nothing in the circumstances of its introduction, its contents, or in the evidence previously received to indicate that it was not voluntary. This being so the confession was clearly admissible, in the discretion of the court, without further preliminary showing (MCM, 1928, par. 114a). I do not find any failure by the defense counsel to perform his duty. Although defense counsel might have raised the issue of voluntariness at this point the wisdom of doing so would have been debatable and I cannot say that he erred, in a legal sense, in allowing it to be introduced without objection. It is noteworthy in this connection that a part of the testimony of accused as to involuntariness was shown on cross-examination to be probably false.

6. I recommend that the findings and sentence be confirmed. I transmit herewith for your use two forms of action; Form A to be used if you agree with the holding of legal insufficiency; and Form B to be used in the event that you agree with my recommendation.

CM 317641

3 Incls
1. Record of trial
2. Form A
3. Form B

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 317730

3 JAN 1947

UNITED STATES	EUROPEAN AIR TRANSPORT SERVICE (PROV)
v.	
Second Lieutenant HARRISON J. BRITTON (0-2029048), Air Corps.	Trial by G.C.M., convened at Wiesbaden, Germany, 23 September 1946. Dismissal, total forfeitures and confinement for one (1) year.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 2nd Lieutenant Harrison J. Britton, Headquarters, Headquarters Squadron, 51st Troop Carrier Wing, Headquarters, European Air Transport Service, APO 633, US Army, did, on or about 9 August 1946, fail to repair at fixed time to the properly appointed place of duty, to wit: United States Air Force Station Tempelhof, Berlin, Germany, APO 755, US Army.

Specification 2: In that 2nd Lieutenant Harrison J. Britton, ***, did, without proper leave, absent himself from his station and duty at United States Air Force Station Tempelhof, Berlin, Germany, APO 755, US Army, from about 9 August 1946 to 7 September 1946.

He pleaded guilty to and was found guilty of the charge and all specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, recommended that the forfeitures and confinement adjudged be remitted and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

By paragraph 2, Special Orders 154, Headquarters European Air Transport Service, 5 August 1946, the accused was assigned to Headquarters and Base Squadron 473, Air Service Group, with the effective date of the change of

morning report 8 August 1946 (R. 7, Pros. Ex. 3). The morning report of Headquarters and Base Service Squadron 473,Air Service Group, for 9 August 1946 shows the accused assigned not joined (R. 7, Pros. Ex. 7). Morning report 9 September 1946 shows accused in confinement awaiting trial as of 7 September 1946 (R. 7, Pros. Ex. 8).

4. The accused offered no evidence and after an explanation of his rights as a witness he elected to remain silent.

5. The accused pleaded guilty to all specifications and the charge. The evidence shows that the accused was transferred to Headquarters and Base Squadron, European Air Transport Service. The date set for the change of the morning report was 9 August 1946. The accused did not report to his new assignment on 9 August 1946 and remained absent without leave until 7 September 1946.

The failure to repair to the properly appointed place of duty, for which the accused was convicted upon Specification 1 of the Charge occurred at the beginning of the period of absence without leave for which he was convicted upon Specification 2 of the same Charge. It does not serve to explain the greater offense, adds little to the case, and constitutes an unwarranted multiplication of charges in the circumstances of this case, contrary to paragraph 27, Manual for Courts-Martial, 1928, page 17. However, it did not injuriously affect the substantial rights of the accused (CM 267587, McCormick, 44 BR 23).

6. War Department records show the accused to be 22-7/12 years of age and single. He graduated from high school and attended college for one-half year. Prior to his entry into the Army he worked for an engineering and construction company doing mechanical drawing and clerical work. He entered the Army 1 December 1942 and attained the grade of sergeant. On 24 October 1944 he was appointed flight officer, Army of the United States. On 6 July 1945 he was appointed and commissioned a second lieutenant, Air Corps. He is a navigator and has flown fourteen (14) missions over Germany. He has been awarded the Air Medal with an Oak Leaf Cluster. He arrived in the European-African-Mediterranean Theater 8 February 1945. In August 1945 he was absent without leave for two days. As punishment under Article of War 104 his commanding officer directed that an entry of the facts be made on his (Lt. Britton's) WD AGO Form No. 66-2. His efficiency report for the period 1 July 1945 to 31 December 1945 is "Excellent."

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 violation of Article of War 61.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 317730 1st Ind

WD, JAGO, Washington 25, D. C. JAN 17 1947

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 Harrison J. Britton (0-2029048), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of failing to repair to his appointed place for duty and absence without leave for 29 days, both in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence, recommended that the forfeitures and confinement be remitted and forwarded the record of trial for action under Article of War 48.

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

The record shows that the accused was transferred from one unit to another unit. He did not report to his new assignment and went absent without leave for 29 days. The accused pleaded guilty to these offenses. The failure to report to the appointed place of duty occurred at the same time as the absence without leave and these offenses constitute different aspects of the same act. Therefore, punishment should be imposed only with reference to the act in its most serious aspect, the absence without leave.

4. The accused is 22-7/12 years of age and single. He entered the Army 1 December 1942 and became a sergeant before being appointed flight officer on 24 October 1944. On 6 July 1945 he was appointed and commissioned a second lieutenant, Air Corps. He is a navigator and has flown fourteen missions over Germany. He has been awarded the Air Medal with an Oak Leaf Cluster. He was absent without leave for two days in August 1945, for which he received an entry upon his WD AGO Form No. 66-2 as punishment under Article of War 104. His efficiency report is "Excellent."

5. The reviewing authority, the Commanding General, European Air Transport Service, recommends that the forfeitures and confinement at hard labor be remitted. In view of the age of the accused, his prior service as an enlisted man and flight officer, and all the circumstances of this case, I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be suspended during

good behavior.

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

CM 317730

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 35, February 17, 1947).

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

JAGH - CM 317776

12 FEB 1947

UNITED STATES	)	SECOND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 31 October 1946. Dismissal, total forfeitures and confinement for two (2) years
Captain GEORGE R. ASHCRAFT (0-1579341), Quartermaster Corps	)	

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

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

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

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

Specification 1: In that Captain George R. Ashcraft, Captain, QMC, AUS, Separation Center, WDPC, Ft Lewis, Washington, did, at Madigan General Hospital, Tacoma, Washington on or about 26 August 1946, with intent to defraud, wrongfully and unlawfully make and utter to Mr. M. E. Harris, Custodian Officer's Mess, Madigan General Hospital, Tocoma, Washington, a certain check in words and figures as follows, to wit:

Fort Lewis, Washington — 26 Aug. 1946
Valley National Bank — Phoenix, Ariz.
(Fill in name of bank) — (city)
PAY TO Cash or order $15.00
Fifteen and 00/100 DOLLARS
Ward 19-B — /s/ George R. Ashcraft
01579341 — Capt QMC

and by means thereof, did wrongfully obtain from Mr. M. E. Harris fifteen dollars ($15.00), he, the said Captain George R. Ashcraft, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Phoenix, Arizona, for the payment of said check.

Specifications 2 through 7 are identical with Specification 1, except as to the dates and amounts of the checks alleged to have been made and uttered, which are as follows:

Specification	Date of check	Amount of check
2	29 August 1946	$ 50.00
3	6 September 1946	50.00
4	22 August 1946	25.00
5	23 August 1946	30.00
6	24 August 1946	45.00
7	22 August 1946	25.00

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

Specification: In that Captain George R. Ashcraft, QMC, AUS, Separation Center, WDPC, Fort Lewis, Washington Attached Unassigned, did without proper leave absent himself from his Ward 19-B at Madigan General Hospital, Tacoma, Washington, from about 2 October 1946 to about 3 October 1946.

He pleaded not guilty to and was found guilty of both Charges and the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the checks described in the Specifications under Charge I (Pros Exs 1, 2, 3, 4, 5, 6, 7) were cashed by the accused at the Officers Club at Madigan General Hospital (R 15-16). The defense admitted that the checks in question were signed by the accused and cashed at the club by either Mr. Harris or Mr. Welch, and that the accused received the money for them (R 16). Mr. Welch, the Club Steward, testified that all of the checks were presented to him by the accused, that he saw the accused sign most of them, and that he cashed them (R 18). Mr. Harris, who kept the books of non-appropriated funds at Madigan General Hospital, testified that the checks were returned by the Fort Lewis bank, in which he deposited them (R 21). A deposition of the cashier of the Valley National Bank of Phoenix, Arizona, on which all the

checks were drawn (Pros Ex 8) showed that the account of the accused in that bank was closed on 22 June 1946, and that the checks were returned when received by that bank because the accused had no money on deposit therein (R 25).

As to Charge II and its Specification, the prosecution introduced in evidence the original morning report of Ward 19, Madigan General Hospital for 3 October 1946 (Pros Ex 9) showing the accused from present to absent without leave and the morning report for 4 October 1946 (Pros Ex 10) showing the accused readmitted from absent without leave (R 27). The Ward Officer testified that, on the morning of the 3rd of October 1946, the accused was not present, and had not obtained permission to leave the ward (R 7). Accused was present on the morning of 4 October 1946, and admitted to the Ward Officer that he had returned on the afternoon of 3 October (R 8, 13) after having been absent on the 2nd (R 13).

4. The accused, after having been apprised of his rights as a witness, elected to remain silent.

5. The uncontroverted evidence established beyond question that the accused signed the checks in question, presented them for payment and received the proceeds thereof. It also furnished ample proof that the checks were returned by the drawee bank without payment, for the reason that the accused had no account in the bank at the time of presentment of the checks. The only question remaining, and one on which there is no direct proof, is whether the accused knew that he had no funds on deposit in the bank with which to pay the checks. The burden of going forward in this respect, however, was on the accused. It was held in CM 249232, Norren, 32 BR 95, 102-103 (3 Bull, JAG 290):

> "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 service-discrediting conduct, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect."

The accused is, therefore, presumed to know the status of his bank account, and since he offered no explanation of his failure to maintain a balance sufficient to meet the checks, the court was justified in finding that he did not intend to maintain such a balance.

The offense of absence without leave alleged in the Specification of Charge II was established by the morning reports of the hospital in which the accused was undergoing treatment, and by the testimony of the Ward Officer.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty.

6. The accused is 39 years of age, married and a high school graduate. He attended the University of Arkansas for one semester, and, in 1930, completed a four months course in a commercial college. He was employed as a clerk, salesman, accountant and steno-typist until his enlistment in the Army on 30 December 1940. He was a technical sergeant when he was selected for Quartermaster Corps Officer Candidate School, which he completed 15 October 1942. He was discharged on that date, and on 16 October 1942 was commissioned a second lieutenant, Army of the United States. He was promoted to first lieutenant on 13 May 1943 and to captain on 11 August 1944. His efficiency index from date of original commission to 31 December 1945 was 50 (Superior).

On 30 April 1946, charges were preferred against the accused, under Article of War 95, alleging utterance of seven worthless checks. Those charges were withdrawn, however, when the accused made restitution and tendered his resignation for the good of the service. The Secretary of War's Personnel Board recommended that the resignation be accepted, and the accused was ordered to the Separation Center at Fort Lewis, Washington. His separation physical examination, however, disclosed a physical condition for which it was recommended that he be transferred to a general hospital for observation and treatment. It was during that period of hospitalization that the offenses covered by the instant case were committed.

On 5 October 1946 the accused was examined by Lieutenant Colonel Donald B. Peterson, Medical Corps, a neuropsychiatrist whose report in part was as follows:

> "DIAGNOSIS: No disease found. This officer does show mild psychopathic traits, but these are of insufficient severity to make a diagnosis. He should be able to adjust to most situations, despite his present maladjustment.
>
> "FINDINGS: In my opinion, the accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged, to distinguish right from wrong. In my opinion, the accused at the time of the alleged offense was so far free from mental defect, disease, or derangement as to be able conerning the particular acts charged to adhere to the right and refrain from the wrong. At the present time, the accused possesses sufficient mental capacity intelligently to conduct or cooperate in his defense.
>
> "RECOMMENDATION: Although the psychopathic traits are mild, it is well known that this condition is not amenable to disciplinary action and that the undesirable conduct will recur.

Punishment is therefor retaliatory and examplary rather than constructive in nature. Unless it is felt that trial is necessary for the good discipline of the command, it is my opinion that his discharge on resignation for the good of the service should be accomplished."

7. Attached to the record of trial is a recommendation, signed by the trial judge advocate and the defense counsel, that so much of the sentence as involves confinement and total forfeitures be remitted, for the following reasons:

"a. Before the trial the accused had agreed, after much coaxing, to take the stand and place some of the blame for a 'No Fund' condition of their bank account where it rightly belongs, on the shoulders of the accused's estranged wife. When the case came up for trial, the accused had reverted back to his original stand and steadfastly refused to involve his family affairs in court. I submit that it is a certainty that the extenuating circumstances of family trouble must certainly have been weighty on the shoulders of the accused that he failed to say one word about them in his own defense; this also is an indication of basic good character.

"b. The accused has had an unblemished military record of above excellent for six years.

"c. Before the trial, the accused stated to his defense counsel that he intends to pay back, or pick up the checks involved, no matter what the outcome of the trial might be. The accused has completed this obligation today. Two hundred and forty dollars were paid back into the Madigan General Hospital officers' fund today to Mr. Harris, the club manager, to cover the check involved in this case. This action indicates honesty and good faith still present after the case was closed. A receipt for the $240.00 concerned is attached to this letter as inclosure No. 1.

"d. This officer seems to be more emotionally affected than most accused manifest when under sentence of military court-martial.

"e. The above accounted facts attest to the fact that the accused is not of a criminal type or inclination.

"f. In addition, your attention is invited to the neuropsychiatric report with the remarks thereon, which are a part of the record of the case. The remarks are to the effect that nothing is to be gained in this individual by punishment for

the offense, in that the individual has a mild psychotic disorder not amenable through punishment. This indicates that no good will accrue to the individual, or to our society, by further incarceration of the accused."

8. The court was legally constituted and had jurisdiction of the person and offenses. 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 of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61 or 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH -CM 317776 1st Ind.

WD, JAGO, Washington 25, D.C. MAR 3 1947

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 George R. Ashcraft (0-1579341), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of making and uttering, with intent to defraud, seven worthless checks, in violation of the 96th Article of War, and of an absence without leave for one day, in violation of the 61st Article of War. He was sentenced to dismissal, total forfeitures and confinement 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.

Between 22 August 1946 and 6 September 1946, the accused wrote seven checks, payable to cash, in amounts varying from $15.00 to $50.00, and cashed all of them at the Officers Club at Madigan General Hospital, where he was a patient. All the checks were drawn on the Valley National Bank of Phoenix, Arizona. The accused had maintained an account in the bank, but the account had been closed on 22 June 1946, and at the time the checks were issued, he had no funds on deposit in that bank.

As to Charge II and its Specification, it was shown that the accused was absent without leave from Madigan General Hospital from 2 October 1946 to 3 October 1946.

4. The accused is 39 years of age, married and a high school graduate. He attended the University of Arkansas for one semester, and, in 1930, completed a four months course in a commercial college. He was employed as a clerk, salesman, accountant and steno-typist until his enlistment in the Army on 30 December 1940. He was a technical sergeant when he was selected for Quartermaster Corps Officer Candidate School, which he completed 15 October 1942. He was discharged on that date, and on 16 October 1942 was commissioned a second lieutenant, Army of the United States. He was promoted to first lieutenant on 13 May 1943 and to captain on 11 August 1944. His efficiency index from date of original commission to 31 December 1945 was 50 (Superior).

On 30 April 1946, charges were preferred against the accused, under Article of War 95, alleging utterance of seven worthless checks. Those charges were withdrawn, however, when the accused made restitution and tendered his resignation for the good of the service. The Secretary of War's Personnel Board recommended that the resignation be accepted, and the accused was ordered to the Separation Center at Fort Lewis, Washington. His separation physical examination, however, disclosed a physical condition for which it was recommended that he be transferred to a general hospital for observation and treatment. It was during that period of hospitalization that the offenses covered by the instant case were committed.

On 5 October 1946 the accused was examined by Lieutenant Colonel Donald B. Peterson, Medical Corps, a neuropsychiatrist whose report in part was as follows:

> "DIAGNOSIS: No disease found. This officer does show mild psychopathic traits, but these are of insufficient severity to make a diagnosis. He should be able to adjust to most situations, despite his present maladjustment.
>
> "FINDINGS: In my opinion, the accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged, to distinguish right from wrong. In my opinion, the accused at the time of the alleged offense was so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right and refrain from the wrong. At the present time, the accused posseses sufficient mental capacity intelligently to conduct or cooperate in his defense.
>
> "RECOMMENDATION: Although the psychopathic traits are mild, it is well known that this condition is not amenable to disciplinary action and that the undesirable conduct will recur. Punishment is therefor retaliatory and exemplary rather than constructive in nature. Unless it is felt that trial is necessary for the good discipline of the command, it is my opinion that his discharge on resignation for the good of the service should be accomplished."

Attached to the record of trial is a recommendation, signed by the trial judge advocate and the defense counsel, that so much of the sentence as involves confinement and total forfeitures be remitted, for the following reasons:

> "a. Before the trial the accused had agreed, after much coaxing, to take the stand and place some of the blame for a 'No Fund' condition to their bank account where it rightly belongs, on the shoulders of the accused's estranged wife.

When the case came up for trial, the accused had reverted back to his original stand and steadfastly refused to involve his family affairs in court. I submit that it is a certainty that the extenuating circumstances of family trouble must certainly have been weighty on the shoulders of the accused that he failed to say one word about them in his own defense; this also is an indication of basic good character.

"b. The accused has had an unblemished military record of above excellent for six years.

"c. Before the trial, the accused stated to his defense counsel that he intends to pay back, or pick up the checks involved, no matter what the outcome of the trial might be. The accused has completed this obligation today. Two hundred and forty dollars were paid back into the Madigan General Hospital officers' fund today to Mr. Harris, the club manager, to cover the check involved in this case. This action indicates honesty and good faith still present after the case was closed. A receipt for the $240.00 concerned is attached to this letter as inclosure No. 1.

"d. This officer seems to be more emotionally affected than most accused manifest when under sentence of military court-martial.

"e. The above accounted facts attest to the fact that the accused is not of a criminal type or inclination.

"f. In addition, your attention is invited to the neuropsychiatric report with the remarks thereon, which are a part of the record of the case. The remarks are to the effect that nothing is to be gained in this individual by punishment for the offense, in that the individual has a mild psychotic disorder not amenable through punishment. This indicates that no good will accrue to the individual, or to our society, by further incarceration of the accused."

5. I recommend that the sentence be confirmed, but that the confinement and forfeitures adjudged be remitted, and that the sentence, as thus modified, be carried into execution.

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

(GCMO. 69 , 10 Mar 1947)

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 317825

UNITED STATES	)	SPOKANE AIR MATERIEL AREA
	)	
v.	)	Trial by G.C.M., convened at Spokane Army Air Field, Spokane, Washington, 28 October and 8 November 1946. Dishonorable discharge (suspended) and confinement for eight (8) months. The Branch United States Disciplinary Barracks
Staff Sergeant LESLIE R. WALSHAW (RA 10601750), Squadron B, 4134th AAF Base Unit, Spokane Army Air Field	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Nolle Prosequi)

Specification 2: In that S/Sgt Leslie R. Walshaw, Squadron B, 4134th AAF Base Unit, Spokane Army Air Field, Spokane, Washington, did, at Spokane, Washington, on or about 29 July 1946, knowingly and wilfully, falsely, fraudulently and unlawfully represent to 1st Lt Frederick G. Prophett, Jr., Air Corps, Recruiting Officer, Headquarters, Spokane Air Materiel Area, that he had been discharged from the military service of the United States in the grade of Technical Sergeant on 29 October 1945, whereas, in truth and fact, he was then discharged in the grade of Private First Class, with intent to deceive the said 1st Lt Frederick G. Prophett Jr., and thereby to be accepted for reenlistment in the military service in a higher grade than that to which he was entitled, to wit, that of Staff Sergeant, on 29 July 1946 and to draw pay in that grade since the date of reenlistment.

A nolle prosequi was entered with respect to Specification 1 and accused then pleaded not guilty to Specification 2 and the Charge. He was found guilty of Specification 2 and of an "amended" charge described by the court as a violation of the 54th Article of War, which the court substituted for the 96th Article of War. 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 one year. Thereafter the reviewing authority returned the record of trial to the court for proceedings in revision and directed the court as follows:

> "You are hereby directed to reconvene the court that tried the case of S/Sgt Leslie R. Walshaw pursuant to the provisions of Para 83, MCM, 1928, for proceedings in revision of the record of trial wherein the court will make the finding of guilt or innocence of accused of the specification alleged in violation of the 96th Article of War and delete from its finding any reference to his guilt or innocence in violation of the 54th Article of War."

Thereupon, the court reconvened, revoked its former findings and sentence and found accused guilty of both the Charge and the Specification as alleged. 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 one (1) year. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge pending the soldier's release from confinement, remitted four (4) months of the sentence to confinement, and ordered execution of the sentence as thus modified. The Branch United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War may direct, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 11, Headquarters Spokane Air Materiel Area, 12 November 1946.

3. The evidence for the prosecution, relevant to our consideration of the record, is summarized as follows:

Prosecution Exhibit No. 1, an Honorable Discharge Certificate dated 29 October 1945, which was issued to accused, showing his grade on separation to be that of technical sergeant was admitted in evidence without objection (R 6a).

First Lieutenant Frederick C. Prophett, Jr., Recruiting Officer at the Spokane Army Air Field, Spokane, Washington, in July 1946, identified the accused and testified that accused came to the witness's office in June or July 1946 and discussed the matter of re-enlistment. After securing certain information, the accused returned in about two weeks, at

which time a discrepancy was noticed on his discharge certificate. An erasure was observed and it appeared that the words, "Private First Class" had been erased and "Technical Sergeant" was typewritten in. When asked about the erasure the accused stated that the separation center had made a mistake and that his correct grade had been substituted for that of Private First Class when the error was noticed (R 7). The witness identified a work sheet form Enlistement Record, Regular Army, pertaining to the accused, dated 29 July 1946, and stated that the accused signed the form in the presence of the witness (R 7) which form was introduced in evidence as Prosecution Exhibit 2 (R 8).

Prosecution Exhibit 2 shows the following relevant entries:

"* * * *

"7. Last Enlisted service in the Regular Army Regular Army Reserve, National Guard, Army of the U. S., or Enlisted Reserve Corps.

364th Airdrome Squadron (SP)	29 Oct. 45	T/Sgt., AUS
(Co., Reg., and army or service)	(Date of Discharge)	(In the grade of)

* * * *

"I declare that I am not now a member of the Army (Officers' Reserve Corps, Regular Army Reserve and Enlisted Reserve Corps excepted) Navy, Marine Corps, National Guard or Coast Guard in an active, inactive reserve, or retired status; that the foregoing questions and my answers thereto have been read to me; that my answers have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

s/ Frederick C. Prophett Jr., 1st Lt. A.C.	s/ Leslie R. Walshaw
(Signature of Recruiting Officer)	(Signature of Applicant)"

A certificate signed by the Adjutant General of the Records Administration Center, St. Louis, Missouri, stated that the records of accused in his custody show that he was enlisted 13 April 1944, promoted to Private First Class 1 March 1945 and was honorably discharged in that grade on 29 October 1945. The highest grade attained by this soldier was that of Private First Class. He attained the Army Speciality Rating of Draftsman, 070, on 20 April 1944. A search of the pertinent records has been made and no copy of Paragraph 2, Special Order No. 60, Headquarters AAF Station 590, has been found and a search of the pertinent records fails to reveal any record of his promotion to Technical Sergeant or rating as an Aerial Engineer. It was further certified that an attached photostatic copy of

Page 5 of the Service Record and copy of WD AGO Form 53-55 pertaining to Leslie R. Walshaw is a true photostatic copy of an original record in his custody. This was admitted in evidence and marked Prosecution Exhibit 3 (R 11).

The photostatic copy of Page 5 of accused's Service Record, bearing the official seal of The Adjutant General's Office was admitted in evidence as Prosecution Exhibit 4, without objection by the defense (R 11). Relevant portions of Prosecution Exhibit 4 show that the accused was enlisted as a private on 13 April 1944 and that he was promoted to the grade of private first class on 1 March 1945, pursuant to paragraph 2, Special Orders No. 60, Army Air Forces Station 590.

A certificate of authentication by The Adjutant General's Office of the Adjutant General's Records Administration Center, St. Louis, Missouri, in which it is certified that the attached fingerprint card "Walshaw, Incl #3" has been compared by a duly qualified fingerprint expert on duty in his office and has been found to be identical with the prints on accused's Enlistment Record. It was identified as Prosecution Exhibit 5 and was admitted in evidence (R 11). The fingerprint card referred to in the certificate ("Walshaw, Incl #3") was stated by the trial judge advocate to be accused's fingerprint record taken on the field and sent to St. Louis for authentication. It was examined by the defense and since no objection was made, the exhibit was offered and admitted in evidence. This fingerprint card bears what appears to be the signature of accused in ink and the signature of the person taking the impressions (No further identification of the exhibit was made) (R 11).

The trial judge advocate was asked by the law member whether the prosecution has any evidence to show that pay or allowances were received by the accused under his present enlistment. The trial judge advocate replied that the accused re-enlisted on 29 July 1946 and that charges were not preferred until 12 August 1946. The accused did not receive any pay but was under enlistment for a sufficient time to warrant the inference that he was clothed and fed on the post. He cited paragraph 129, Manual for Courts-Martial 1928, page 141 (R 12).

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

A photostatic copy of accused's "Enlisted Record and Report of Separation, Honorable Discharge" bearing the official seal of The Adjutant General's Office, was admitted in evidence and marked Defense Exhibit 1 (R 12). This exhibit which had been obtained from The Adjutant General's Depository of Records, St. Louis, Missouri, shows erasures and alterations identical to those appearing on Prosecution Exhibit 1 and show the accused's grade on separation to be "T Sgt."

The accused elected to remain silent after his rights as a witness were fully explained to him (R 12).

5. Because of the position which the Board of Review must take with respect to the jurisdiction of the court to try the accused for the offense alleged, no question other than that of jurisdiction will be considered.

6. For the purpose of this opinion, the Board assumes that it was established by competent evidence that the accused was honorably discharged in the grade of private first class on 29 October 1945, that he was not discharged as a technical sergeant on that date, and that on 29 July 1946, he made a false representation alleged in Specification 2 of the Charge and that he was re-enlisted on 29 July 1946. It is also assumed that the accused received allowances of clothing and rations between 29 July 1946 and that the date he was confined, 9 August 1946.

The offense charged is not that of fraudulent enlistment in violation of Article of War 54, but the making by accused of false and fraudulent representations to the recruiting officer in violation of Article of War 96, in order to induce the latter to accept him "for reenlistment in the military service in a higher grade than that to which he was entitled, to wit that of Staff Sergeant * * * and to draw pay in that grade since the date of reenlistment."

As stated in the Specification the alleged false representation was made <u>before</u> accused was re-enlisted.

There is nothing in the record to show that the accused was not eligible for re-enlistment in the Army within the provisions of Section III, Circular No. 110, War Department, 17 April 1946. His misrepresentation pertained to the grade he expected to receive <u>after</u> enlistment.

The above cited circular prescribes procedures to be followed in accepting enlistment and re-enlistment in the Regular Army, pursuant to the Act of 1 June 1945 (Public Law 72, 79th Congress) as amended by the Armed Forces Voluntary Recruiting Act of 1945 (Public Law 190, 79th Congress, approved 6 October 1945).

Paragraph 13, Circular 110, War Department, 17 April 1946, in relevant part provides:

> "<u>a</u>. <u>Grade in which enlisted</u>. Applicants for enlistment or reenlistment in the regular army will be enlisted in the grades specified below:
>
> * * * *
>
> "(2) Provided enlistment is accomplished on or after 1 July 1946 - -
>
> "(<u>a</u>) Men honorably discharged and enlisted within 20 days after the date of discharge from active service will be enlisted in the grade held at the time of discharge, permanent or temporary, whichever is higher."

"(b) Men honorably discharged from enlisted status in the grade of private, who have had satisfactory active service in the Army of at least 6 months, and who enlist within 20 days after the date of discharge from active service, will be enlisted in grade six (private first class).

"(3) Certain former enlisted men who have not enlisted in the Regular Army, and who are not eligible to enlist therein in a grade higher than the seventh grade under the provisions of (1) or (2) above, may be enlisted in grades commensurate with their prior training and experience, as specifically authorized in War Department Pamphlet 12-16, 11 February 1946.

"(4) All other applicants, except as indicated in paragraph 14, will be enlisted in grade seven (private)."

Paragraph 2b, War Department Pamphlet No. 12-16, Procedure for Enlistment of Personnel in Grades Appropriate to Training and Experience, provides:

"Effective 1 July 1946, men who enlist for 3 years within 3 months from date of last satisfactory active military service, may be enlisted in the grade for which qualified under the provisions of this pamphlet."

Paragraph 5 of War Department Pamphlet No. 12-16 in part provides that an aerial engineer, MOS 2750, with more than twelve months service but less than eighteen months service in that MOS may be enlisted as a staff sergeant.

Since the accused enlisted after 1 July 1946, and more than three months after his previous discharge, it is apparent that he was not eligible for enlistment in the grade of staff sergeant under the provisions of either War Department Circular 110, or War Department Pamphlet 12-16. Accordingly it is our opinion that the accused enlisted in the Army with the expectation that he would be promoted to the grade of staff sergeant administratively after enlistment.

In the instant case the accused enlisted lawfully and was qualified for enlistment under existing regulations. His offense consisted of making a false representation before enlistment for the purpose of obtaining a higher grade after his enlistment was accepted.

In our opinion alleged false representations made to a recruiting officer by an applicant for enlistment before his enlistment, and while he is in a civilian status, which fall short of constituting a violation

of Article of War 54, are not triable by courts-martial for the reason that courts-martial do not have jurisdiction to try offenses committed by persons who were civilians at the time of the commission of such offense, unless such persons are otherwise subject to military law under the provisions of Articles of War 2 or 12. A court-martial may take cognizance of false representations made prior to enlistment when fraudulent enlistment is involved because Article of War 54 is not limited to persons subject to military law insofar as the element of fraudulent misrepresentation is concerned.

The fraudulent enlistment contemplated by Article of War 28 involving the enlistment of soldiers who have not been discharged from a prior enlistment, may be tried as a violation of Article of War 96, because the accused in such a case is subject to military law by reason of his original enlistment, at the time he procures himself to be enlisted by means of a fraudulent misrepresentation or concealment (MCM 1928, par 129, p 140; par 152a, p 187).

In CM 155405, Lea, accused was charged with fraudulent enlistment under Article of War 54 in a specification which did not allege the receipt of pay or allowances under such fraudulent enlistment. The Board of Review, after concluding that an allegation of receipt of pay or allowances is a necessary element in a charge of fraudulent enlistment in violation of Article of War 54, considered whether the fact that accused had made a fraudulent misrepresentation to the recruiting officer might constitute a violation of Article of War 96. The Board stated:

> "In the instant case the accused, being a civilian at the time of the alleged fraudulent misrepresentation and concealment, he could not be lawfully tried or punished therefor by court-martial under the 96th Article of War."

It must, therefore, be concluded that as the offense herein alleged did not constitute fraudulent enlistment in violation of Article of War 54, the court had no jurisdiction to try the accused for such offense.

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

A. Gottenstein, Judge Advocate

Wallace A. Sol, Judge Advocate

Charles J. Smith, Judge Advocate

(68)

JAGH - CM 317825 1st Ind

WD, JAGO, Washington 25, D. C. MAR 7 1947

TO: The Under 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 Staff Sergeant Leslie R. Walshaw (RA 10601750), Squadron B, 4134th AAF Base Unit, Spokane Army Air Field, Spokane, Washington.

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 132, 15 April 1947).

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

JAGK - CM 317865

31 JAN 1947

UNITED STATES v. Privates NATHANIEL FLENNOY (45021065), GEORGE BOONE (RA 13226158) and WILLIAM A. ADAMS (44161892), all of the 589th Quartermaster Laundry Company (Sm), APO 181.	YOKOHAMA BASE Trial by G.C.M., convened at Yokohama District Court, 17 September 1946. Adams: Acquitted. Flennoy and Boone: Dishonorable discharge and confinement for one (1) year. Penitentiary.

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

2. The only question requiring consideration is the propriety of the designation of a U.S. Penitentiary as the place of confinement as to the accused Flennoy and Boone, each of whom was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one (1) year.

Article of War 42 provides that no person shall, under the sentence of a court-martial, be confined in a penitentiary unless "the period of confinement authorized and adjudged by such court-martial is more than one (1) year * * *".

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as to each accused as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution or reformatory.

On Leave, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

JAGK - CM 317865 1st Ind FEB 4 1947

WD, JAGO, Washington 25, D. C.

TO: The Adjutant General

1. In the case of Privates Nathaniel Flennoy (45021065), George Boone (RA 13226158) and William A. Adams (44161892), all of the 589th Quartermaster Laundry Company, APO 181, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. The accused Adams was acquitted. Upon approval of only so much of the sentences as to the accused Flennoy and Boone as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution or reformatory, you will have authority to order the execution of the sentences.

2. This office was advised that Yokohama Base was deactivated on 31 December 1946, in view of which 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

2 Incls.
1- Record of trial
2- Draft of GCMO

(GCMO. 29, 6 Feb. 1947).

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

JAGK - CM 317898

13 MAR 1947

UNITED STATES v. Private GEORGE CHABAREK (12191202), Third Reconnaissance Troop, Third Infantry Division.	THIRD UNITED STATES ARMY Trial by G.C.M., convened at Dusseldorf, Germany, 11 September 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

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

Specification: In that Private George (NMI) Chabarek, Third Reconnaissance Troop (mechanized) did, at Kalkum, Germany, on or about 24 December 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Erna Nieder, a human being, by shooting her with a pistol.

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

Specification 1: In that Private George (NMI) Chabarek, ***, did, at Kalkum, Germany, on or about 24 December 1945, by force and violence and by putting her in fear feloniously take, steal and carry away from the presence of Mrs Christine Schmitz, a quantity of butter, margarine, cheese, and ersatz coffee, the property of the said Mrs. Christine Schmitz, and of some value.

Specification 2: In that Private George (NMI) Chabarek, ***, did, at Kalkum, Germany, on or about 24 December 1945, unlawfully enter the store of Mrs. Christine Schmitz, with intent to commit a criminal offense, to wit, robbery therein.

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification of Charge I and of Charge I, guilty of Specification 2 of Charge II and of Charge II and guilty of Specification 1 of Charge II

except the words "Margarine," "and ersatz coffee," inserting the word "and" between "butter" and "cheese;" of the excepted words not guilty, and of the added word guilty. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. This is a trial upon rehearing. The Board of Review adopts the statement of evidence and the law contained in the Staff Judge Advocate's review upon rehearing.

4. Brigadier General Fred W. Llewellyn, U.S. Army, Retired, an attorney of Washington, D.C., filed a brief on behalf of accused. On 23 February 1947 he appeared before the Board and orally argued on behalf of the accused.

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. 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).

Christy D. Silvers, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert E. Lockwood, Judge Advocate

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

JAGQ - CM 317906

DEC 17 1946

UNITED STATES v. Private ARTHUR A. ZAKRZEWSKI (42022842), Detachment 69, Ground Forces Reinforcement Command, European Theater, APO 153.	WESTERN BASE SECTION UNITED STATES FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 1 and 21 October 1946. Dishonorable discharge and confinement for four (4) years. United States Disciplinary Barracks.

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 58th Article of War.

Specification: In that Private Arthur A. ZAKRZEWSKI, Detachment 69 Ground Forces Reinforcement Command, European Theater, did, at or near Huy, France on or about 19 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 27 June 1946.

Accused pleaded not guilty to the Specification and the Charge. He was found guilty of the Specification except as to the word "apprehended", the word "surrendered" being substituted in lieu thereof, and guilty of the Charge. Evidence of two previous convictions was introduced, one being by special court-martial for twenty-seven days' absence without leave and the other being by summary court-martial for failure to repair at the fixed time for assembly, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks at 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 pursuant to Article of War 50½.

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

4. By 1st Indorsement dated 26 August 1946 the charges were referred to trial before a general court-martial appointed by paragraph 11, Special Orders 191, 19 August 1946. On 3 September 1946, paragraph 2, Special Orders 202 was issued appointing another general court-martial and directing trial by that court of all unarraigned cases in the hands of the trial judge advocate of the court appointed by paragraph 11, Special Orders 191. On 16 September 1946, paragraph 13, Special Orders 213 was issued appointing another general court-martial and directing trial by that court of all unarraigned cases in the hands of the trial judge advocate of the court appointed by paragraph 2, Special Orders 202. Paragraph 13, Special Orders 213 was amended on 19 September 1946 by paragraph 35, Special Orders 216 which appointed Lieutenant Colonel Joseph L. Hardin as a member and relieved one member.

On 1 October 1946 the court appointed by paragraph 13, Special Orders 213, as amended, was regularly convened and sworn and began the trial of this case. The following members were present (R 1):

"Lieutenant Colonel DOUGLAS CAMERON, 014802, CAV
Lieutenant Colonel JOSEPH L. HARDIN, 015154, FA
Major GORDON C. LORD, 0251859, INF
Major GEORGE E. WOODS, 0252521, CE
Major EDWARD H. MARXEN, 0164883, CMP
Major RONALD I. PRIDE, 017002, FA, Law Member
Captain JOSEPH H. FENDRICK, 0493950

Captain JOHN M. EWEN, 0488138, AC, Assistant Trial Judge Advocate
Captain MARSH T. MC COY, 01778832, QMC, Assistant Defense Counsel"

Immediately following the above listing of the members present, this additional notation appears on page 1 of the record:

"(Additional members added pursuant to subsequent orders for later proceedings, see page 11.)"

The accused was arraigned. The prosecution presented to the defense the opportunity to make any special pleas or motions. Thereupon the defense moved the court to refer the case back to the appointing authority for further investigation, contending that the case had not been thoroughly and impartially investigated as required by the 70th Article of War in that certain witnesses requested by the accused had not been made available at the investigation. After hearing the testimony of the accused upon that matter and the arguments of counsel, the court granted the defense motion (R 5-10).

Thereafter, on 14 October 1946, paragraph 18, Special Orders 237 were issued appointing another general court-martial and directing trial by that court of all unarraigned cases in the hands of the trial judge advocate of the general court-martial appointed by paragraph 13, Special Orders 213, as amended. The court appointed by paragraph 18, Special Orders 237, included Lieutenant Colonel Joseph L. Hardin, Major Ronald I. Pride (law member), and Captain Joseph H. Fendrick; it also included Captain John M. Ewen, Assistant Trial Judge Advocate. On 21 October 1946 the trial of accused was resumed, at which time the following proceedings were had (R 11, 12, 14):

"The court met, pursuant to adjournment, at 0950 hours, all the personnel of the court, prosecution, and defense who were present at the close of the previous session in this case being present except:

Lieutenant Colonel DOUGLAS CAMERON, 014802, CAV (Out of city)
Major GORDON C. LORD, 0251859, INF (Transferred)
Major GEORGE E. WOODS, 0252521, CE (VOAA)
Major EDWARD H. MARXEN, 0164883, CMP (Relieved)

"The accused and the reporter were also present.

"Pursuant to Special Order No. 237, par. 18, dated 14 October 1946, the following officers were present:

Lieutenant Colonel OWEN R. RHOADS 05702, Inf
Major JOHN P. GRAEBENER 0346127, TC
Major VERNON T. CAIRNS 0362015, QM
Captain BENNIE J. KING 0531760, TC
Captain JAMES T. O'CONNOR 01037653, TC

and the following officers from that order were absent VOAA:

* * * *

"Prosecution: The general nature of the charges is desertion, under the 58th Article of War. The prosecution has no challenges, either peremptory or for cause. Does the defense have any challenges for cause?

"Defense: The defense has no challenge for cause.

"Prosecution: Does the defense desire to challenge any member of the court except the law member peremptorily?

"Defense: The defense desires to exercise one peremptory challenge against Major Graebener.

"Having been challenged peremptorily by the defense, Major Graebener left the court and took no further part in these proceedings.

"Prosecution: Does the accused object to any member of the court now present?

"Defense: The accused does not.

"(The new members of the court were sworn in.)

"Prosecution: Before asking the accused how he pleads to the specification and to the charge I should like to make a brief statement for the benefit particularly of the new members of the court, as to the status of this case. (Prosecution reads the original proceedings to the new court.) That is the record to date.....

* * * *

"PLEAS TO THE GENERAL ISSUE:

To the Specification and Charge: Not guilty."

It thus appears conclusively that when the trial of accused was resumed on 21 October 1946 it was proceeded with upon the theory that that session was simply a continuation of the previous one, by the same court with new members added thereto. The record of the proceedings on 21 October states "The court met pursuant to adjournment, at 0950 hours, all the personnel of the court, prosecution, and defense who were present at the close of the previous session in this case being present except" (four named members of the original court). By process of elimination it therefore is clear that Lieutenant Colonel Hardin, Major Pride and Captain Fendrick were present on 21 October as the residuum of the original court, and that their presence on 21 October was regarded as being by virtue of the order (as amended) appointing the original court. It is equally manifest that Captain Ewen's presence and functioning as assistant trial judge advocate was considered as being by authority of the order appointing the original court. And, that the session on 21 October was considered to be merely a continuation of the original session, is positively and definitely demonstrated by the record facts (1) that those four officers were not listed among those present pursuant to paragraph 18 Special Orders 237 albeit each of them was named in those orders, and (2) that only "the new members of

the court were sworn in". Captain Ewen was the only member of the prosecution staff present at both the first and second sessions of the trial, and conducted the prosecution's case.

The notion that the proceedings on 21 October were merely a continuation of those had on 1 October, by the same court with new members added, was a grossly mistaken conception. The court which convened on 21 October was an entirely different court from that which convened on 1 October. An order appointing a complete general court-martial de novo is not and cannot be considered as simply an amending order appointing additional members to a previously-appointed separate general court-martial, whether or not the order refers to the court it appoints the unarraigned cases theretofore referred to the prior court. Orders merely amending a previously-appointed court so as to effect changes in its personnel do not purport to create an entirely new and distinct court, and do not take that form; rather, such amending orders in terms qualify themselves as such by express reference to the orders so amended.

With the foregoing the crucial point confronting us in this case becomes apparent. Only "the new members of the court were sworn in" when the court met on 21 October. It therefore affirmatively appears that Lieutenant Colonel Hardin, Major Pride and Captain Fendrick were not sworn as members of the court appointed by paragraph 18, Special Orders 237, and that Captain Ewen was not sworn as assistant trial judge advocate of that court, upon the erroneous theory that this was only a continuation of the first session and that those four officers were sworn at the first session as members and assistant trial judge advocate, respectively, of the original court. In Article of War 19 the Congress provided that the members and prosecution counsel of a general court-martial shall be sworn "before they proceed upon any trial". And paragraph 95 of the Manual for Courts-Martial provides that "The prescribed oaths must be administered in and for each case and to each member, trial judge advocate, assistant trial judge advocate, ... before he functions in the case as such". The oath taken by the four officers in question at the first session was administered to them as members and assistant trial judge advocate, respectively, of the general court-martial appointed by paragraph 13, Special Orders 213, as amended. Neither of those three members nor the assistant trial judge advocate was sworn on 21 October. The requirement that the members and prosecution personnel of a general or special court-martial be sworn, before they proceed upon any trial and in and for each case, is mandatory and jurisdictional. If a member of the court or of the prosecution personnel who participates in a trial is not sworn, the court is not legally constituted and the entire proceedings are null and void ab initio (CM 145973, Sed. 376 (1) Dig. Op.JAG, 1912-1940; CM 135049, Secs. 395 (42) and 403 (6),

Dig. Op. JAG, 1912-1940; CM 218150, Hinman, 11 BR 377, and cases there cited). The fact that the three members, and the assistant trial judge advocate who tried the case, were sworn on 1 October when the court appointed by Special Orders 213, as amended, was convened, did not obviate the necessity for placing them under oath anew on 21 October when they participated in the trial as members and assistant trial judge advocate of the entirely different court appointed by Special Orders 237. When an officer is appointed and functions as a member or as prosecution counsel of a court-martial, the mere fact that in that capacity he takes the prescribed oath cannot dispense with the necessity that he likewise be sworn if later he functions as a member or prosecution counsel of a wholly distinct and separate court. Stated differently, the fact that an officer appointed as a member or prosecution counsel of a court-martial did at some prior time take the required oath while serving upon a different court-martial, does not permit him to function upon the later court without again being sworn in the same manner; the statutory mandate of Article of War 19 cannot be satisfied by such procedure.

5. Paragraph 18, Special Orders 237 directed trial by the court thereby appointed of all unarraigned cases in the hands of the trial judge advocate of the general court-martial appointed by paragraph 13, Special Orders 213, as amended. As pointed out hereinabove, the accused was arraigned by the latter court on 1 October 1946. However, in view of our conclusion that the court-martial which sat on 21 October 1946 was not legally constituted, we do not reach or find it necessary to consider the question of whether that court would have had jurisdiction of this case if it had been legally constituted as a court.

6. For the reasons stated, the Board of Review holds that the court was not legally constituted and that the record of trial is therefore legally insufficient to sustain the findings of guilty and the sentence.

Charles M. Dickson, Judge Advocate

Wayne Olivier, Judge Advocate

James S. Taylor, Judge Advocate

W. D., J. A. G. O. Form No. 84
(Revised July 1, 1940)

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Board of Review

CM 317906

UNITED STATES v. Private ARTHUR A. ZAKRZEWSKI (42022842), Detachment 69 Ground Forces Reinforcement Command.	WESTERN BASE SECTION Trial by G.C.M., convened at Paris, France, 17 February 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Edward J. Johnson, Judge Advocate.

(ABSENT TDY), Judge Advocate.

Judge Advocate.

1st Indorsement

War Department, J.A.G.O. JUN 12 1947 To the Adjutant General, Washington 25, D. C.

1. In the case of Private Arthur A. Zakrzewski (42022842), Detachment 69 Ground Forces Reinforcement Command,

Incl #1

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, and Executive Order No. 9363, dated 23 July 1943, you now have authority to order the execution of the sentence.

2. In view of the inactivation of the Western Base Section, 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 the holding together with five copies of the published War Department general court-martial order is requested.

(CM 317906).

1 Incl
Draft of GCMO

HUBERT D. HOOVER
Brigadier General, United States Army
Assistant Judge Advocate General
In Charge of Military Justice Matters

.C.M.O. 222, 16 June 1947)

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

JAGK - CM 317939

3 JAN 1947

UNITED STATES	FIFTEENTH AIR FORCE
v.	Trial by G.C.M., convened at Smoky Hill Army Air Field, Salina, Kansas, 21 October 1946. Dismissal.
First Lieutenant DAVID B. SHARP (O-779730), Air Corps.	

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

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

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

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

Specification: In that First Lieutenant David B. Sharp, Squadron A, 247th Army Air Forces Base Unit, did, at Smoky Hill Army Air Field, Salina, Kansas, on or about 10 September 1946, unlawfully enter the Commissary Sales Store with intent to commit a criminal offense, to wit, larceny of government property therein.

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

Specification: In that First Lieutenant David B. Sharp, ***, did, at Smoky Hill Army Air Field, Salina, Kansas, on or about 10 September 1946, feloniously take, steal and carry away certain articles of food, to wit, one 14 pound ham, value of $7.65; one pork roast, value of $0.84; one beef roast, value of $0.74; two pounds butter, value of $1.14; one pound coffee, value of $0.30; one and one-half dozen eggs, value of $0.68; three pounds of cheese, value of $1.42; one pound cottage cheese, value of $0.14; two boxes cookies, value of $0.18; of a total value of about $13.09, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all charges and specifications. The court sentenced accused to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the specification of Charge I and Charge I as involved a finding of guilty of housebreaking with intent to commit a criminal offense, to-wit, the wrongful taking and

carrying away of Government property. He approved only so much of the findings of guilty of the specification of Charge II and Charge II as involved a finding of guilty of the wrongful taking and carrying away of property of the United States of some value, in violation of Article of War 96. 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 uncontradicted evidence, including the sworn testimony of the accused, establish the facts hereinafter set forth: During the period 8 March 1946 until the latter part of August 1946 the accused was Assistant Commissary Sales Officer at the Smoky Hill Army Air Field, Salina, Kansas. Subsequent to August 1946 he was assigned duties as pilot of a C-47 on a shuttle run. The commissary observed the following business hours: "9:30 until 1:00 and 5:30 until 6:00." At about 2215 hours on the evening of 10 September 1946 the accused, by use of a key which he had acquired while he was detailed as assistant commissary officer, unlocked the door of the commissary and secured therefrom the items mentioned in the specification, Charge II. He placed these groceries in the trunk of his red Buick sedan which he had parked, in the dark, near the entrance of the building (R. 20,25, 35; Pros. Ex. 4).

Major Paul E. Bates, 97th Bomb Group, S-2, in company with Captain Ferren L. Kildow and a non-commissioned officer drove past the commissary in a car at about the time accused was engaged in removing the groceries to his car and observed him checking his tires. They considered this rather unusual behavior. After they had passed through the area the Major drove back to the commissary and followed accused, who had driven off toward the main gate. In the meantime, Captain Kildow, whose suspicions had also been aroused, overtook accused and stopped him at the main gate. Upon being interrogated by the officers the accused at first denied, but later admitted that he had entered the commissary and taken the groceries which he removed from the trunk of the car (R. 7,8,15, 16).

It was stipulated that the groceries were in the amount and of the values alleged in the specification, Charge II (R. 22).

The key which accused used to gain entrance to the commissary, the lock which the key opened, the bag of groceries and accused's statement to the investigating officer, admitting substantially all the foregoing facts, were introduced and made a part of the record as Prosecution's Exhibits 1, 2, 4 and 4, respectively.

Mrs. David B. Sharp, the wife of accused, testified that her husband had been drinking in the afternoon of 6 September 1946, and she was also permitted to state that he had told her that he had some groceries, including a ham, a couple of roasts and other items at the commissary (R. 26,29).

Corporal Allan Burris, butcher at the commissary, testified that on Friday, 6 September 1946, the accused gave him an order over the phone for a ham, butter, coffee and other items. He weighed the ham, listed the groceries, and put them in a box in the cooler. He could not remember if the accused ever called for these groceries (R. 32-34).

The accused, testifying in his own behalf stated that he arrived at the Smoky Hill Army Air Field at 1500 in the afternoon of 10 September 1946, that he could not locate the butcher with whom he had previously placed an order and that he took the key which he had inadvertently retained and entered the commissary removing the groceries therefrom, but that he intended to pay for them the following morning (R. 36-43).

4. Comment.

The gist of housebreaking is the unlawfully entering another's building with intent to commit a criminal offense. It is not essential that there be an actual breaking (MCM, 1928, par. 149e, p. 169).

There is no direct evidence in the record that accused's entry into the commissary was unauthorized. The commissary officer was on the witness stand but he never stated, nor was he asked whether the accused was authorized to enter the building and take the groceries. But the surreptitious conduct of accused in going into the darkened building at 2200 hours, the removal of the groceries to his trunk and his initial denial when apprehended at the main gate that he had a key to the commissary or any groceries in his car, together with his subsequent admissions, are such circumstances from which the court could reasonably presume that the entry into the building and taking of the groceries were without authority and therefore unlawful.

It was said by Chief Justice Shaw in the case of Commonwealth v. Webster (5 Cush. 295, 316; Am. Dec. 711):

> "But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge." (Graves v. U.S., 150 U.S. 118; 37 L. Ed. 1021, 14 S Ct. 40; Mammoth Oil Co. v. U.S., 275 U.S. 13; 72 L. Ed. 137, 48 S. Ct. 1.)

5. War Department records show that the accused is 26 years of age and married. He attended Utah State College for three years, majoring in physical education, and was a power tool operator for the Union Pacific Railroad when he was ordered to active duty as a second lieutenant, AUS, on 23 May 1944. On 31 July 1945 he was promoted to first lieutenant. The accused experienced

181 days of actual combat in the Burma-China Theater as pilot of a TE C-47 bomber and was awarded the Distinguished Flying Cross and Air Medal with clusters. His average numerical efficiency rating is shown to be 4.6 or "Excellent."

5. The court was legally constituted and had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 for a violation of Article of War 93 or 94.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

(On Leave), Judge Advocate

JAGK - CM 317939 1st Ind

WD, JAGO, Washington 25, D. C. JAN 15 1947

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 David B. Sharp (O-779730), Air Corps.

2. Upon trial by general court-martial the accused was found guilty of unlawfully entering the commissary sales store of the Smoky Hill Army Air Forces, Salina, Kansas, on 10 September 1946, with intent to commit larceny of Government property therein, in violation of Article of War 93, and of the larceny of various groceries of a total value of $13.09 therefrom, in violation of Article of War 94. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and Charge I as involved housebreaking with intent to commit a criminal offense, to-wit, the wrongful taking and carrying away of Government property, and approved only so much of the findings of guilty of the specification of Charge II and Charge II as involved wrongful taking and carrying away of property of the United States of some value in violation of Article of War 96. The reviewing authority approved the sentence, recommended commutation thereof, and forwarded the record of trial under the provisions of 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 of the sentence. The record shows that accused, a pilot at the Smoky Hill Army Air Forces, Salina, Kansas, at about 2200 hours on 10 September 1946, by using a key which he had acquired when he was assistant commissary officer, unlocked the door of the commissary, entered, and in the darkness removed therefrom a ham, roast, and other items of groceries of a total value of about $13.09. Several officers saw the accused leave the building and when they stopped his car at the main gate of the field he first denied that he had entered the commissary and also that he had any groceries in his car. Subsequently he admitted the entry and produced the groceries. At the trial the accused elected to be sworn as a witness and although admitting the acts alleged contended that he intended to pay for the groceries on the following day. He also asserted that he had previously ordered some groceries, had failed to call for them, and since he was short of food at his quarters he entered the building and took them. The butcher testified that on 6 September 1946 accused called by phone for groceries similar to those shown to have been taken, but he could not state whether that order was ever delivered.

4. On 21 November 1946, Major General Charles F. Born, Commanding General of the Fifteenth Air Force, the reviewing authority in accused's case, addressed a communication to The Judge Advocate General wherein he stated that, after personally interviewing the accused and considering all the facts and circumstances, he was of the opinion that, while accused's acts were unlawful, definite criminal intent was lacking. He further stated that the accused was a young, ambitious and satisfactory pilot with an excellent combat record. General Born's letter closes with the following sentence:

> "I am therefore recommending to you that inasmuch as it is within your power to do, you consider the facts which I have stated based on my personal interview of this officer in connection with any recommendation you may make as to the commutation of his sentence."

5. In view of the recommendation of the reviewing authority and all the circumstances, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr CG, 15th Air Force, 21 Nov 46

(GCMO 25, 3 Feb. 1947)

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

JAGH - CM 317940

17 FEB 1947

UNITED STATES	)	2D ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 24 October 1946. Dismissal
	)	
First Lieutenant MARTIN L. YUNDT (0-1030441), Cavalry	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Martin L. Yundt, Troop "D", 82D Mechanized Cavalry Reconnaissance Squadron was, at Camp Hood, Texas, on or about 3 October 1946, found drunk while on duty as Troop Commander.

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

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

The accused is in the military service of the United States and on 3 October 1946 was the Troop Commander of Troop D, 82d Mechanized Cavalry Reconnaissance Squadron at Camp Hood, Texas (R 6). On the morning of 3 October 1946, Major Hislop, the Executive Officer of the squadron went to

accused's orderly room and upon finding the door to accused's office closed, opened the door and went into the office. There he found the accused asleep with his head on his arms which were resting on his desk (R 7). Major Hislop did not awake the accused but reported the situation to Major Vaughan, the Squadron Commander. Later that day, at approximately 1245, Major Vaughan, together with the executive officer, went to the accused's office and found him still asleep across his desk with his head on his arms. Major Vaughan shook the accused to arouse him. Upon awakening accused "smelled strong of alcohol and his speech was thick" (R 9). Accused was placed in arrest in quarters. Both Major Hislop and Major Vaughan testified that in their opinion the accused was drunk while on duty on 3 October 1946 (R 7, 9).

A medical officer went to accused's quarters at approximately 1330 on 3 October 1946. He could smell the odor of liquor on accused's breath, and, based upon his total observations, he "felt" that the accused was intoxicated (R 10). Accused was then taken to the station hospital where he was given a blood alcohol test (R 11). The test showed "Volatile reducing substances equivalent to 3.0 MGM ethyl alcohol CC blood" (R 14; Pros Ex A). Such a test indicates that a person with such a blood alcohol count is intoxicated (R 15).

4. Testimony for the accused:

Several witnesses, including the range officer, the officer in charge of accused's troop on the firing line, and two non-commissioned officers from the troop, were called by the defense. They testified that they had seen the accused between 0800 and 0900 on the morning of 3 October 1946 on the Sugar Loaf Gas Car Range at Camp Hood where his troop was firing the 37mm gun, that his speech and actions were then normal (R 19, 21), and that he fired five rounds from the armored car, making a good score (R 21).

The first sergeant of accused's troop, testified that on the morning of 3 October the accused signed several papers for the supply sergeant but that when the first sergeant went to get instructions regarding the feeding of the men on the range the accused was asleep with his head on his desk. The troop typist testified that the accused speech and actions in the orderly room that morning were normal.

After his rights as a witness had been explained to him, the accused elected to remain silent.

5. The Specification of the Charge alleges that the accused was found drunk on duty as Troop Commander on 3 October 1946. The elements of proof as stated in the Manual for Courts-Martial are:

"(a) That the accused was on a certain duty, as alleged,

"(b) That he was found drunk on such duty" (MCM, 1928, par 145, p 160).

The evidence clearly shows that the accused was on duty as Troop Commander on the date alleged, that he inspected his troop on the firing line at the Sugar Loaf Gas Car Range between 0800 and 0900 on 3 October 1946, after which he went to his office and went to sleep. The unqualified statements of the Squadron Commander and his Executive Officer that the accused was drunk when seen by them in his office at about 1245 on 3 October 1946, and the statement of the Medical Office that accused was intoxicated when observed by him at about 1330 on the same date, are amply corroborated by the results of the blood alcohol test given him.

In the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty of the offense as charged in the Specification.

6. Although the language of the Specification alleges an offense which should have been charged under the 85th Article of War, the fact that it was laid under the 96th Article of War does not affect the legal sufficiency of the findings or the sentence and cannot be said to affect the substantial rights of accused (CM 227863, Kiplinger, 15 BR 388; par 28, MCM, 1928; par 394 (2), Dig Op JAG 1912-40).

7. War Department records show that accused is 29 years old, single, and gives his home address as Lyford, Texas. He enlisted in the 12th Cavalry on 29 October 1936 and served in that organization until 7 August 1942 when he was commissioned a second lieutenant, Army of the United States, after attending Cavalry Officer Candidate School. He was promoted to first lieutenant, Army of the United States, on 14 September 1942. He was awarded the Purple Heart Medal for wounds received in action in Italy on 4 June 1944 and an Oak Leaf Cluster to the Purple Heart for wounds received in action on 11 July 1944.

Four members of the court and the defense counsel joined in a recommendation for clemency. In making this recommendation they stated that they considered the sentence to be too harsh and also that they considered the following record of accused's service:

"1. Ten years honorable service in the Army of the United States.

"a. 5 10/12 years service as an enlisted man. No time lost under AW 107. Character: Excellent. Proficiency as a soldier: Excellent. Highest rating Sergeant in the 12th Cavalry.

"b. 4 3/12 years service as an officer in the Army of the United States. His efficiency rating has been preponderately superior and excellent.

"2. Thirty-two months service overseas.

"3. Participated with the 1st Armored Division in six campaigns.

"4. Purple Heart with Oak Leaf Cluster."

The president of the court in commenting on the plea for clemency stated that he did not believe the sentence to be excessive but felt that the accused would be of future value to the Army as an enlisted man. There is also attached to the file a statement by the accused's Squadron Commander that the accused performed his duties in an excellent manner as a platoon leader and that if the accused were given a chance to re-enlist as a non-commissioned officer he would be an asset to the Army.

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

A. Hettenstein, Judge Advocate

William A. Sol, Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 317940 1st Ind

WD, JAGO, Washington 25, D.C. MAR 3 1947

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 Martin L. Yundt (0-1030441), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of being found drunk while on duty 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. 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 accused, on 3 October 1946, was Troop Commander of Troop "D", 82nd Mechanized Cavalry Reconnaissance Squadron at Camp Hood, Texas. On the morning of 3 October 1946, the Executive Officer of the Squadron went to the Troop D orderly room and found accused in his office with the door closed, asleep with his head resting on his arms which were resting on his desk. The Executive Officer reported the situation to the Commanding Officer of the Squadron, who, on accompanying the Executive Officer to the orderly room at about 1245 hours, found accused still asleep in the same position and woke him up. Both officers testified accused smelled strongly of alcohol, and his speech was thick, and that he was drunk. This conclusion was supported by testimony of a medical officer who observed accused in his quarters at about 1330 hours the same day. A blood alcohol test was made on accused thereafter and substantiated the opinion of the witnesses that accused was intoxicated. While there was evidence that earlier in the morning of 3 October 1946, accused had appeared normal to several witnesses when he was on the firing range, the evidence is clear that accused was drunk when found by the Executive Officer, and was still drunk at the time the blood test was made. The evidence also clearly shows that the accused was "on duty as Troop Commander" as alleged, at the time he was found drunk.

4. Accused is 29 years old, unmarried, and gives his home address as Lyford, Texas. He enlisted in the 12th Cavalry on 29 October 1936 and served in that organization until 7 August 1942 when he was commissioned a second lieutenant, after attending Cavalry Officer Candidate School.

He was promoted to first lieutenant on 14 September 1942. He was awarded the Purple Heart Medal for wounds received in action in Italy on 4 June 1944 and an Oak Leaf Cluster to the Purple Heart for wounds received in action on 11 July 1944. Four members of the court, and the defense counsel joined in a recommendation of clemency in a letter dated 13 November 1946, to the Commanding General, 2nd Armored Division, Camp Hood, Texas, which is attached to the file. Their recommendation was based upon accused's past record of military service and upon their opinion that the sentence was too harsh.

The president of the court appended a comment to the letter of the other members in which he stated that he did not believe the sentence excessive but that he felt that accused would be of future value to the Army as an enlisted man. There is also attached to the file a statement by accused's Commanding Officer that accused performed his duties as a platoon leader in an excellent manner and that if accused were given a chance to re-enlist as a non-commissioned officer he would be an asset to the Army.

5. I recommend that the sentence be confirmed, but that, in view of the prior excellent military service of the accused and of the recommendations of the four members of the court, the defense counsel and the statements of the president of the court and the accused's Commanding Officer, the execution of the sentence be suspended during good behavior.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 74, 10 March 1947).

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

JAGK - CM 317948

20 FEB 1947

UNITED STATES	IX AIR FORCE SERVICE COMMAND
v.	Trial by G.C.M., convened at Erlangen, Germany, 12 and 13 September 1946. EACH: To be hanged by the neck until dead.
Corporal ASBURY L. WELLS (34128966) and Private First Class GONZALO SALINAS (18022563), both 42nd Repair Squadron, Ansbach Air Depot, Ansbach, Germany.	

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

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

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

CHARGE I: Violation of the 92nd Article of War

Specification: In that Corporal Asbury L. Wells, 42nd Air Repair Squadron, Ansbach Air Depot, did, at Ansbach, Germany, on or about 6 August 1946, forcibly and feloniously, against her will, have carnal knowledge of Walburga Reissinger, a German civilian.

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

Specification: In that Corporal Asbury L. Wells, ***, did, at Ansbach, Germany, on or about 6 August 1946, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per OS with Walburga Reissinger, a German civilian.

NOTE: The charges and specifications against accused Salinas are identical with the above, accused Salinas' name being substituted for that of accused Wells.

Each accused pleaded not guilty to and was found guilty of all charges and specifications against him. No evidence of any previous conviction was introduced. They were each sentenced to be hanged by the neck until dead. The reviewing authority approved the sentences and recommended that in case the sentences were approved that they be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

On 6 August 1946 Miss Walburga Reissinger, a German civilian, accompanied Private William R. Stewart to the Enlisted Men's Club, Ansbach, Germany. They left the club between 10:30 and 11:00 o'clock p.m. and went to the bus stop where Private Stewart boarded a bus for the air depot. The bus left sometime between 11:00 and 11:30 p.m. (R. 9,32). Walburga Reissinger then started home and after walking about five minutes she was accosted by the two accused, one of whom grabbed her by the hand. By indicating she identified the accused Wells as the one who grabbed her hand (R. 9,10). At this time she "told them to please leave me alone as I have got my boy friend." Wells then told her to "shut up" and struck her. She lost consciousness and did not know how many times she was struck. This assault occurred on a sidewalk and within 15 meters of some houses. The moon was shining and the night was light. When Walburga Reissinger regained consciousness she was across the street, behind a hedgerow in a meadow. The accused Salinas held her by the shoulders and the accused Wells had sexual intercourse with her. Salinas prevented her from shouting for help by placing his hands over her mouth and eyes. She resisted them by fighting back and holding her legs together. They were stronger than she was and she could not stop them. Wells finished his act of intercourse and then forced her to commit sodomy per os, after which he went about five feet to one side and went to sleep (R. 11,12,13,16). Salinas also attempted to commit sodomy with her, but was unsuccessful. Salinas then had sexual intercourse with her, during which time she was "fighting back and asked him to let me go home." Salinas told her, "If you don't go to the Military Police, I will let you go," and then said, "In case you are going to the M.P's, I will kill you." Miss Reissinger and Salinas searched for her handbag but were unable to find it. Miss Reissinger then went home, arriving there between 1:30 and 2 o'clock. When she arrived home she told her sister "that two Americans had beaten me up." At the time she was permitted to leave the scene of this incident her face was bruised, her lips cut and swollen, and an eye was blue (R. 13,14,15). On 7 August 1946 she told Private Stewart of the events of the evening before and they reported them to the Military Police (R. 16). On cross-examination Miss Reissinger testified that she did not dare to strike either of the accused and did not attempt to bite them because one tooth was missing and her mouth was sore (R. 21-25).

Berta Rouse testified that Walburga Reissinger was her sister. On 7 August 1946 between 4 and 5 a.m. she saw her sister at their mother's home. At this time "her face was all swollen up, her eye was blue, she had one tooth missing, she was covered with blood and her dress was tore." Miss Reissinger told her at that time about the raping (R. 29).

Adam Kolis, Assistant of the Security Police of the town of Ansbach, saw Miss Reissinger about 11:00 a.m., 7 August 1946, at which time she told him she had been attacked by two Americans. She had a black and blue spot around her left eye, her lips were swollen and her right leg was scratched (R. 31).

Corporal Clyde F. Wilson, photographer of the 10th Repair Squadron, identified three photographs of Walburga Reissinger taken by him on 8 August 1946. These photographs showing the condition of her mouth, face and right knee were received in evidence as Prosecution Exhibits 3,4, and 5 (R. 47,48,49).

Lieutenant James R. McMahon identified both of the accused as being in the military service of the United States. He also identified a statement taken by him from the accused Salinas, which statement was made after he had warned Salinas of his rights under Article of War 24 (R. 34-36). Corporal James E. Place also identified the statement made by the accused Salinas, and detailed the circumstances under which the statement was taken (R. 36-39). The accused Salinas then testified concerning the taking of his statement and admitted that he had made the statement after he had been warned of his rights. He was not promised immunity and he was not afraid (R. 40,41). This statement was received in evidence against Salinas as Prosecution Exhibit 1. In this statement Salinas said that about 10:20 p.m., 6 August 1946, he and Wells left the Enlisted Men's Club to go to the bus station. They caught up with a girl walking in the same direction. He said, "Hello Honey", and she answered in German. Wells hit her, at which time Wells and the girl fell down. The girl was almost unconscious. They took her by the arms and dragged her across a ditch and behind a hedge. Her shoes came off while crossing the ditch. Wells attempted to have intercourse with this girl but did not succeed. Salinas told her they were leaving and she asked him to get her shoes. He went for her shoes and when he returned with them Wells was having intercourse with her. Salinas also had intercourse with her and she then committed sodomy per os with him. The three of them smoked a cigarette and Salinas again had intercourse with her. The girl wanted to leave and asked about her pocket book. Salinas asked her if she was going to tell the military police and she said, "No, I'm going to tell the civilian police to look for my pocketbook." He grabbed her hand to say goodbye and she leaned down and kissed him. About that time a car came along and she motioned for him to hide (R. 43; Pros. Ex. 1).

Lieutenant McMahon also identified a statement taken by him from the accused Wells after he had warned Wells of his rights under Article of War 24. This statement was received by the court as evidence against the accused Wells and marked Prosecution Exhibit 2. In his statement the accused Wells said that about 10:00 a.m., 6 August 1946, he left the Enlisted Men's Club at Ansbach, Germany, with Salinas. On the way to the bus stop they passed a girl and stopped to talk to her. They talked a while and the girl became angry and called him some bad names. He slapped her and as she called for the military police he hit her again. They went to the side of the road and started talking again. He apologized for losing his temper and slapping her. Shortly thereafter he propositioned her and she agreed. Salinas went for a walk and he then had intercourse with her. Salinas came back and he walked off a ways and went to sleep (R. 46, Pros. Ex. 2).

4. <u>For the defense</u>

Lisa Gluczky, a German civilian, testified that she was at the Enlisted Men's Club, Ansbach, Germany, 6 August 1946. She left the club about 10:30 p.m. to go home. About 11:00 p.m. she found a handbag belonging to Miss Reissinger. The handbag was on the sidewalk about four meters from the houses along the street. Several windows in the houses along the street were lighted. There was a park across the street from where she found the handbag. After she found the bag she walked to the corner of the street where she passed a man standing on the corner. There was a festival in Ansbach that evening and at the time she found the bag she could hear the music from the festival and could see the reflection of its lights (R. 49-55).

Private William Stewart testified that he had known Walburga Reissinger for about six weeks on 6 August 1946. He was shown Prosecution Exhibit 3, a photograph of the mouth of Walburga Reissinger, and testified that the tooth shown in the picture to be missing from her mouth was missing prior to 6 August 1946 (R. 57).

Private First Class Clem T. White testified that he had dates with Walburga Reissinger in May and June 1946 and at that time she had about three teeth missing. When she smiled you could see that she did not have all of her teeth (R. 58,59).

Private Camillio C. Garza saw both of the accused at the Enlisted Men's Club at Ansbach, Germany, on 6 August 1946. They were drinking beer. He left the club with them at about 9:45 p.m., at which time both of the accused were drunk (R. 60,61).

Private First Class Maxsimino Guzman saw both of the accused about 8:00 p.m. at the Enlisted Men's Club. In his opinion both of the accused were drunk (R. 63,64).

Lieutenant Benjamin S. Greenwood, Medical Corps, examined Walburga Reissinger on 8 August 1946. The examination showed that she had previously borne a child. There was no internal damage to the genital parts. Laboratory tests were negative for gonorrhea but the Kahn test was positive for syphilis. He also observed her "to have two black eyes, in as simple language as possible, a bruise on the back of her head, tenderness about the forehead, both eyes swollen, lips swollen, right jaw with tenderness about those areas, bruises on both knees" (R. 66,67,68).

The rights of the accused were explained to them and they elected to remain silent (R. 69).

5. Rebuttal evidence

Walburga Reissinger was recalled to the stand and testified that prior to 6 August 1946 she had two teeth missing from her mouth. She exhibited her mouth to the court and the president of the court named as missing the upper left bicuspid, upper left first cuspid and upper left second cuspid. One of these teeth was lost as a result of this incident and another broken.

Further examination disclosed that her central upper right incisor, lateral incisor and cuspid were also missing (R. 69,70).

6.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b, p. 165).

"Likewise, violence inflicted by the man on the woman, producing unconsciousness, or overcoming her mind by fright or brutal conduct, will render his carnal act rape, though she makes no resistance" (Roberson's Ky. Crim. Law and Procedure, 2d Ed., sec. 548, p. 752; 2 Bishop Crim. Law, Sec. 1125(2); CM 315024, Mickles).

"Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals." (MCM, 1928, par. 149k, p. 177.)

The evidence discloses that the two accused met Miss Reissinger on the night of 6 August 1946 and at that time the accused Wells hit her several times causing her to lose consciousness. Her eyes were blackened, her face and lip bruised and one tooth was knocked out of her mouth. Thereafter she was dragged across the road and both accused had intercourse with her. The accused Wells also committed sodomy per os with her, thereafter the accused Salinas attempted to commit sodomy per os but was not successful in completing the act.

In their pre-trial statements each accused admitted sexual intercourse with Miss Reissinger but claimed that she consented. Consent is always a defense against rape. Consent is not a defense to the crime of sodomy. The court had before it evidence that the victim of the rape, an unmarried woman, had previously borne a child and that the Kahn test was positive for syphilis. This evidence was proper as tending to show that she might have in fact consented to the acts of intercourse and to impeach her testimony concerning the rape (CM 318548, Hernandez). The court also had photographs, taken of Miss Reissinger shortly after the alleged rape showing her physical condition. After hearing all of the evidence the court found the accused guilty of rape and sodomy, thus holding that Miss Reissinger did not in fact consent to this intercourse. The Board of Review is of the opinion that the evidence sustains the findings of the court. The evidence discloses that the accused Salinas did not complete his attempted act of sodomy per os, but the evidence does disclose that Salinas was present assisting Wells in the rape and sodomy per os committed by Wells.

The distinction between aiders and abettors has been abolished and all persons joining together to do an unlawful act or criminal offense are guilty of the offense committed, as principals. It therefore follows that Salinas is guilty of the crime of sodomy the same as if he had actually committed the act himself (CM 287910, Nory, 2 BR (CBI-IBT) 351,355; CM 303373, Caldwell, 17 BR (ETO) 69,73; CM 268724, McDonald, 43 BR 291; CM 314939, Greene, 5 Bull. JAG 281; CM 316752, Horne).

There is evidence in the record that the accused were drunk at the time of this offense. It is a general rule of law that voluntary drunkenness is not an excuse for a crime committed while in that condition. It may be considered as affecting mental capacity to entertain a specific intent where such intent is a necessary element of the offense (MCM, 1928, par. 126a, p. 136). However, in the crimes of rape and sodomy it is not necessary to allege or prove any specific intent.

7. The charge sheet shows the accused Wells to be 25-11/12 years of age. He reenlisted at Titaghur, India, for three years. The Staff Judge Advocate states that he joined the Army in 1942. He is married. He reached the seventh grade in school and worked in textile mills prior to his entry into the Army.

The charge sheet shows the accused Salinas to be 23-1/12 years of age. He enlisted 24 July 1942 at Fort McIntosh, Laredo, Texas, and reenlisted 17 December 1945 at Camp Fanning, Texas, for a period of three years. The Staff Judge Advocate states that he is married. Prior to his entry into the Army he engaged in truck farming. He also spent 18 months in the Civilian Conservation Corps.

8. 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 sentences and to warrant confirmation of the sentences. Death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92.

Christy T. Silva, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Eckbright, Judge Advocate

JAGK - CM 317948 1st Ind

WD, JAGO, Washington 25, D.C. MAR 1947

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 Corporal Asbury L. Wells (34128966) and Private First Class Gonzalo Salinas (18022563), both of 42d Repair Squadron, Ansbach Air Depot, Ansbach, Germany.

2. At a common trial each of the accused was found guilty of rape and sodomy per os on a German civilian, and sentenced to be hanged by the neck until dead. The reviewing authority approved the sentences but recommended that if confirmed they be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. 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 sentences and to warrant confirmation of the sentences.

Considerable force was used upon the victim but apparently no permanent injury occurred. The morals of the victim were not of the highest character. In view of the recommendation of the reviewing authority and all the circumstances of the case, I am of the opinion that the death sentence is not required. I recommend that the sentences be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, that the sentences as thus commuted be carried into execution, and that a U. S. penitentiary be designated as the place of confinement.

3. Consideration has been given to communications from the following: Members of the United States Senate: Honorable Burnett R. Maybank, Honorable Carl A. Hatch, Honorable Dennis Chavez, Honorable Olin D. Johnston, Honorable Milton H. West; Honorable Joseph R. Bryson, House of Representatives; citizens and organizations from various parts of the United States: Laredo Veterans Association, Laredo, Texas; Veterans of Foreign Wars of the United States, Washington, D.C; Mr. George W. Murphy, Washington, D.C.; Norton-Pepper Post No. 7688, Veterans of Foreign Wars, Capitan, New Mexico; the accused, Private First Class Gonzalo Salinas; Enedina G. Linares, mother of the accused Salinas; Delfina and Concepcion Salinas, sisters of the accused Salinas; petition signed by 484 residents of Laredo, Texas; Calhoun A. Mays, State Senator of South Carolina; Ester Cabler, Brooklyn, New York; Norman Sanders, New York City, Mrs. Nellie Kelly Kienhofer, Cumberland, Maryland; Manley B. Timmons, Troy, South Carolina; J. Strom Thurmond, Edgefield, South Carolina; Inez S. McFarland, Arlington, Virginia; the following residents of Ware Shoals, South Carolina, the home of the accused Wells: M. B. Camak,

Carrie Darby, William E. Davis, Sam T. Snoddy, A. D. Strawhorne, Owen Mullinax, R. L. Ramey, Ware Shoals Post No. 100 American Legion, the accused Corporal A. L. Wells; Mrs. Asbury L. Wells, wife of the accused Wells; H. G. Wheeler, J. Cal White, W. J. Bryan Dorn, Robert L. Stevens; and Watts Post No. 6383, Veterans of Foreign Wars.

Calhoun A. Mays, an attorney of Greenwood, South Carolina, Harlan Wood and George W. Murphy, attorneys of Washington, D.C. filed briefs on behalf of the accused Wells. On 24 January 1947 Mr. Mays and Mr. Wood appeared before the Board of Review and presented oral arguments on behalf of the accused.

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

CM 317 948

4 Incls
1. Record of trial
2. Dft ltr sig USW
3. Form of action
4. Ltrs mentioned in par 3 above

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO. 112, March 31, 1947).

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JAGN-CM 317960

7 - JAN 1947

UNITED STATES	)	FIFTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Grand Island, Nebraska, 30 October 1946. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private First Class DARRELL K. ETTLEMAN (6933754), Squadron A, 485th Army Air Forces Base Unit (Sp).	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

---

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

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

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

Specification: In that Private First Class Darrell K. Ettleman, Squadron A, 485th Army Air Forces Base Unit, did, without proper leave absent himself from his organization and station at Kearney Army Air Field, Kearney, Nebraska, from about 17 June 1946 to about 17 September 1946.

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

Specification: In that Private First Class Darrell K. Ettleman, Squadron A, 485th Army Air Forces Base Unit, did, at Omaha, Nebraska, from on or about 17 June 1946 to on or about 17 September 1946, without consent, wrongfully withhold and use a car of the value in excess of $50.00 (Fifty dollars), the property of another.

Accused pleaded not guilty to all Charges and Specifications, was found guilty of the Specification of Charge I and Charge I, and Charge II and of the Specification of Charge II guilty, with exceptions and substitutions, and was

sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and designated the Branch United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and its Specification. The only question requiring consideration here is whether or not the record of trial is legally sufficient to sustain the sentence.

4. The Specification of Charge II as drawn alleges a disorder under Article of War 96. Such disorder under the table of maximum punishment is punishable by confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and its Specification and to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period not to exceed ten months.

Edward Robinson, Judge Advocate.

Joseph L. Brick, Judge Advocate.

Edward R Taylor, Judge Advocate.

MAY 16 1947

JAGN-CM 317960 1st Ind.
WD, JAGO, Washington, D. C.
TO: Commanding General, Fifteenth Air Force, Colorado Springs, Colorado.

1. In the case of Private First Class Darrell K. Ettleman (6933754), Squadron A, 485th Army Air Forces Base Unit (Sp), I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten months. Upon disapproval of so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten months you will have authority to order the execution of the sentence.

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

(CM 317960).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

WAR DEPARTMENT
~~HEADQUARTERS, ARMY SERVICE FORCES~~
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAGK - CM 318045

27 JAN 1947

UNITED STATES)	OKLAHOMA CITY AIR MATERIEL AREA
)	
v.)	Trial by G.C.M., convened at Tinker Field, Oklahoma City, Oklahoma, 23 October 1946. Dismissal and total forfeitures.
)	
First Lieutenant JOHN M. HENDERSON (0-2070509), 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 charges and specifications:

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

Specification: In that First Lieutenant John M. Henderson, Air Corps, 4132d Army Air Forces Base Unit (Air Base), Garden City Army Air Field, Garden City, Kansas, did, in the vicinity of Waynoka, Oklahoma, on or about 10 August 1946, through neglect, suffer an AT-11BH, serial number 42-37472, airplane, property of the United States, to be damaged in the approximate amount of ten thousand dollars ($10,000) by wrongfully and negligently flying said airplane at such a dangerously low altitude, while not in the process of take-off or landing, as to cause same to strike the ground.

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

Specification 1: In that First Lieutenant John M. Henderson, Air Corps, 4132d Army Air Forces Base Unit (Air Base), Garden City Army Air Field, Garden City, Kansas, did, in the vicinity of Garden City, Kansas, on or about 10 August 1946, wrongfully and unlawfully operate an automobile on and over Highway #50, a public highway between Garden City Army Air Field, Garden City, Kansas, and the City of Garden City, Kansas, in a reckless and dangerous manner, while under the influence of intoxicating liquor.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: In that First Lieutenant John M. Henderson, Air Corps, 4132d Army Air Forces Base Unit (Air Base), Garden City Army Air Field, Garden City, Kansas, did, in the vicinity of Waynoka, Oklahoma, on or about 10 August 1946, wrongfully and unlawfully operate an AT-11BH military aircraft in such a reckless and careless manner as to collide with the ground, while not in the process of take-off or landing, thus endangering the lives of passengers of said aircraft and persons and property on the ground, in violation of paragraph 1a, Army Air Force Regulation 60-16D, dated 20 September 1944.

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and its specification, Charge II and Specifications 1 and 4 thereof, but not guilty of Specifications 2 and 3 of Charge II. 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 evidence relating to the specifications of the charges will be summarized in chronological order of events.

Specification 1 of Charge II

It was stipulated by and between the accused, his counsel and the prosecution that if Mr. Dewey West were present in court he would testify that "on the night of 9 August 1946, at about 12:30 or 12:45 a.m.," he was driving a bus from about 1/4 mile north of the Garden City Army Air Base toward Garden City, Kansas, and that he was following a sedan which he discovered was being driven by the accused. Mr. West tried to pass the sedan three or four times but on each occasion the accused cut in front of him and blocked his passage. The car which accused was driving varied in speed from about 25 to 75 miles per hour, traveled from one side of the road to the other, and crowded six cars off the highway. Upon approaching a car which was parked on the right side of the highway, accused took the extreme left side and continued on that side for some distance. Mr. West passed accused's car on the wrong side and when he arrived at Garden City he made report of the incident together with the registration number of accused's car to the city police. Sometime later the accused and two soldiers who were with him in his car were arrested by the police and taken to the police station. Mr. West talked to the accused after the arrest and was positive that

he was intoxicated and "very insufficient to be operating a vehicle." Accused was "very wabbly when he came out of the car, his eyes were glassy and his speech indicated that he had been drinking." Mr. West was a bus driver of over five years' experience and an ex-soldier (R. 6, Pros. Ex. A).

By further stipulation it was agreed that if Mr. Jack Craig, Police Officer, Garden City, Kansas, were present he would testify that at approximately 2:00 a.m. on the night of 9 August 1946 he received a report and later stopped the car driven by the accused as it proceeded from the northwest down Stevens Avenue, that "by observing Lieutenant Henderson I would say he was not capable of driving a car in a proper manner due to his physical and mental condition as a result of his drinking." The officer also stated that after the soldiers had been taken to police headquarters and ordered to go into the back office they argued and "still wanted to say they were not drunk." Officer Craig searched the car driven by accused and found an unopened quart of liquor therein. He identified the soldiers as Lieutenant Henderson, Sergeant Pitchford and Sergeant Walker (R. 6, Pros. Ex. B).

It was further stipulated that if Sergeant R. E. Doss were present in court he would testify that when he arrived at the police station on the evening of 9 August 1946 the city police gave him a "full report on what they had on their arrest report," and that in response to orders he arranged for Lieutenant Henderson, Sergeant Pitchford and Sergeant Walker to be returned to the base. He further stated that Lieutenant Henderson had been arrested for drunken driving so he had Sergeant Pitchford drive the car back. Sergeant Doss talked to the accused and knew he had been drinking quite a bit because he could smell liquor on his breath and he talked "a little looser" (R. 6, Pros. Ex. C).

The Specification, Charge I and Specification 4, Charge II

The prosecution evidence relating to the offenses alleged in the foregoing specifications may be considered together.

Master Sergeant Jack L. Pruden, 27th Fighter Squadron, met the accused at the Noncommissioned Officers' Club at about 1030 hours on the morning of 10 August 1946 and the accused told Sergeant Pruden that he was planning to fly to Oklahoma City. Pruden requested and received permission to accompany the accused on the trip. At about 1330, after fueling and clearing with operations, the accused, Master Sergeant Pruden, Technical Sergeant J. L. Walker and Technical Sergeant L. R. Butler boarded a plane shown to be an AT-11 Aircraft, AAF Serial No. 42-37472, and proceeded toward Oklahoma City (R. 7-12, Pros. Ex. J). The accused was pilot and Master Sergeant Pruden sat in the co-pilot's seat. The plane climbed to an altitude of around 4,000 feet and maintained that altitude until all the gasoline in the small tanks was consumed. The accused then changed to the fuel line of the main tank and while doing this the plane lost altitude to about 500

or 1,000 feet. The accused then "reached over and punched" Master Sergeant Pruden and asked him to find their location on a map which he (Pruden) had spread over his lap. Suddenly Pruden noticed the accused to slump forward with his head resting on the control column and the plane nosed down into a shallow dive. Pruden tried to revive the accused, shook his shoulder violently, and then struck him in the face with his fist trying to get him off the controls. It then became apparent that a crash landing was inevitable. The plane "mushed" into the ground and "bounced" back into the air some 50 or 60 feet. The pilot (accused) then gained control, cut all switches, and the plane, which was "wobbling" came to land and slid into a bank (R. 7-13, Pros. Ex. D, E, F, G, H, K, L.).

It was stipulated that the plane, Model AT-11, serial No. 42-37472, was damaged in the approximate amount of $10,000 (R. 12, Pros. Ex. I).

On motion of the prosecution there was received in evidence AAF Regulations Nos. 60-16 and 60-16D, both of which are entitled "Flying" "Air Traffic Rules" and contain the following provision:

> "1. General
> (a) Reckless operation. No aircraft will be operated in a reckless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground." (R. 13, Pros. Ex. K and L)

First Lieutenant Lawrance A. Truelove, M.C., Enid Army Air Field, testified that he saw the accused at the Enid Air Field Hospital shortly after the crash of his plane, that from interviewing the accused and observing his condition he made the following report:

> "First Lieutenant John M. Henderson, O-2070509, who was in an aircraft accident at 1430 cst, 10 August 1946, near Waynoka, Oklahoma, was a patient inthis hospital from 10 August 1946, to 22 August 1946. His injuries included (1) Laceration, mid-forehead, (2) Ecchymosis of both eyes and subconjunctival hemorrhage of left eye, (3) Laceration, bridge of nose, (4) Fracture, nasal septum. Upon questioning Lt. Henderson as to the probable cause of the aircraft accident, he stated that the night before the accident he drank to the point of intoxication and that he had nothing to eat since the night before at which time he had only a sandwich. It is felt that a probable cause of the syncope which he apparently suffered is a combination of the drinking the night before and inadequate nutrition." (R. 15)

In a prior report made by Lieutenant Truelove and which was not produced in evidence the medical officer made the same general diagnosis of accused as is shown above except that the original report of examination, made in fact from accused's statements, recited that accused had had nothing to eat since the day before the crash and that he had become extremely intoxicated (R. 15).

For the Defense

Technical Sergeant Billy Pitchford testified that he went to a softball game with the accused on the evening of 9 August 1946, and that after the game they went to the NCO club where "only beer was served." After the dance, at about 1315 he, Sergeant Walker and the accused drove into Garden City on U. S. Highway 50. On the way to the town, a vehicle followed them and blinked its lights and he thought it was someone playing a practical joke on them. As they were going around a curve, in about the middle of the road, a bus driver passed them on the wrong side. After they arrived in Garden City, and had proceeded to an eating place which they found closed they were arrested and taken to the police station. Later, at the request of military authorities they were released and he, Sergeant Pitchford, was permitted to drive accused's car back to the air field (R. 18-20). The reason Sergeant Pitchford drove the car back was "they didn't think Lieutenant Henderson was capable of driving" (R. 21).

After being duly advised of his rights the accused elected to take the stand and testify in his behalf. He attended the NCO club on the evening of 9 August 1946 where he had a sandwich, three or four beers and one or two drinks of whiskey. After the dance he, Sergeants Pitchford and Walker started to Garden City. He (accused) was driving. When they had proceeded about five or six miles from the field a car blinked its lights a couple of times and followed them for several miles. Accused testified that he was on his side of the road "at the time." As they went around a curve before entering Garden City, and while travelling in the center of the road, a bus passed on the wrong side of the road. He drove on into Garden City and to a tourist camp with a cafe which was found to be closed. As they returned from this camp they were arrested by the police, who found a sealed fifth of whiskey in the car (R. 23, 24). Accused stated further that he went to bed at approximately 0400 hours on the morning of 10 August 1946 and at 1000 hours he decided to fly to Oklahoma City. He had previously decided to make the trip the following day, Sunday. His last meal was on Friday noon (9 August 1946) but he had eaten a sandwich on Friday night. Accused stated that he felt all right and did not think anything was wrong with him. At about 1330 hours he took the ship up to 5,000 feet and trimmed her. He nosed down to gain speed. Sergeant Pruden wanted to fly and he tried to hook up the controls on the right seat but he could not get the knob in place. After passing over Freedom, Oklahoma, everything "went black" and he did not remember anything until the plane hit the ground with great force. Accused thought that one of the props touched the ground but the other occupants were of the opinion that the fuselage "hit" (R. 24-26). On cross-examination the accused denied that his senses were impaired and stated that he did not consider himself intoxicated on the evening before the plane crash. He defined intoxication as meaning that "a man's senses are not working properly and maybe doesn't have physical control of himself" (R. 27). He admitted that Sergeant Pitchford had driven

the automobile back to the field because of a law which prohibited one arrested for drunken driving from operating a motor vehicle for 24 hours thereafter (R. 28). When asked by a member of the court to give his idea of what caused his "blackout" he replied,

> "Well, I don't know, sir, maybe it was undernourishment or I had had some trouble with my stomach before that. Had been to the medical officer Lieutenant Connar. I had been having pains in my stomach and they had recurred for about four or five days and he gave me some medicine to take when it hurt. That morning on the flight after I took off my stomach did hurt me some. I asked for my stomach to be X-Rayed at Enid but it was never done." (R. 30)

Master Sergeant Pruden was recalled to the witness stand by the defense and there was incorporated into the record the statement he had made to the investigating officer, Captain Glover. The facts set forth in this statement were substantially as testified to by Sergeant Pruden and shown heretofore except, however, more details were given concerning the crash of the plane and the events leading up to and succeeding the crash (R. 32).

The accused was recalled to the stand, stated that he had 560 hours flying time and about 20 hours in an AT-11 aircraft. After he trimmed the ship he built the speed up to the maximum of about 180 - 185 with a power sitting of 27-28 inches of mercury. His "RMP" setting was 1900. The only mechanical defect noticed in the plane was the inability to engage the right hand controls (R. 33-34).

At the close of the testimony for the defense the prosecution announced that it desired to call as its next witness the Assistant Trial Judge Advocate, Captain Raymond Pittman. The record does not show that the defense objected; however, the court was closed and upon being opened the prosecution announced that the request of the prosecution to put the Assistant Trial Judge Advocate on the stand was denied. The prosecution thereupon asked for a recess of 15 minutes, which was granted, and when the court reconvened the Trial Judge Advocate made further argument requesting permission to call the Assistant Trial Judge Advocate as a witness. The court was closed and upon being reopened the president announced that the "objection of the defense to the Assistant Trial Judge Advocate being placed on the witness stand is sustained" (R. 36).

4. Comment.

The testimony of the bus driver who followed accused on Highway 50 in the early morning of 10 August 1946, concerning the manner in which he was driving his car, the subsequent arrest for drunken driving, together with the admissions of accused, leave no doubt but that he was severely intoxicated on the evening in question. In cases involving an allegation of intoxication the degree of such intoxication is usually, as here, sharply disputed. But the weaving of the accused's car from one side of the highway

to the other, the odor of his breath and his unsteady manner upon being arrested indicate that his intoxication was acute. Therefore we conclude that the court was fully justified in finding the accused guilty of wrongfully and unlawfully operating the motor vehicle on a public highway in a reckless and careless manner while intoxicated, in which finding we concur.

Although accused was not permitted to operate the automobile upon his return trip to the Garden City Air Field, accused having been told that the law prohibited one arrested for drunken driving from operating a motor vehicle for a period of 24 hours, yet within about 11 hours from the time of his arrest for this offense and without having taken any substantial nourishment, he proceeded to fly an airplane.

It was proven that the sudden descent and crash of the airplane was caused directly by accused's suffering a "blackout" or syncope. The expert evidence shows that the syncope was caused by the excessive drinking of accused shortly prior to the flight coupled with his failure to supply adequate nourishment to his body. Although it might be contended that accused's conduct as shown here did not necessarily amount to willful or wanton recklessness and that the word "reckless" may mean desperately heedless, wanton and willful when used in conjunction with other words in a given allegation, we are of the opinion that the word "reckless" as used in the specification under question may be taken as charging only careless, inattentive or negligent misconduct (Black's Law Dictionary, 3rd Ed., p. 1503; 53 C.J. 553-554).

In CM 293509, Coats (8 BR (ETO) 39), the Board of Review held that simple negligence in the operation of an automobile in violation of Article of War 96 was lesser included in manslaughter denounced under Article of War 93. It was said in that case:

> "However, an offender may be found guilty under Article of War 96 for operating a motor vehicle negligently, that is, where he fails to use the care which an ordinarily prudent driver would have used under the circumstances. The basis of such a charge is not the resulting death or injury to another person or to his property, but the failure to use due care in the operation of the vehicle. If a driver, while operating a motor vehicle negligently, runs into and injures or kills another, or damages another's property, and the evidence shows that the degree of his negligence was such as to render him liable for civil damages only, and that he was not criminally, grossly or culpably negligent, he may be found guilty of a violation of Article of War 96, based upon his negligent act rather than upon the resulting death or injury of another or injury to another's property. Evidence as to any resulting injury or death is admissible, however, as an aid in determining an adequate penalty. Such conduct by accused is 'of a nature to

bring discredit upon the military service', denounced by Article of War 96. ***"

Assuming then, as the record discloses, that accused, by his indiscretion, disabled himself, in some degree, to properly and safely fly the plane, we conclude that it was "reckless and careless," that is negligent, for the accused to operate the plane at all. His "manner" of flying or "act" of flying was therefore reckless in the sense that it was negligent for him to assume control over the operation of the plane under the conditions known by him to exist. We need not look, then, to the manner in which he consciously manipulated the plane in flight before the syncope. It has been shown that the syncope was the immediate cause of the crash and that the indiscretions of accused caused the syncope. It is pertinent therefore to consider whether accused's misconduct was the direct and proximate cause of the crash. Causal relation is discussed by Professor Beale in XXXIII Harvard Law Review, page 633, as follows:

"The connection of the defendant with the final active force may be sought in two ways. His connection with it may have been an active one; either by himself bringing it into existence, or by causing another person to do so. On the other hand, the defendant may have acted, and the force thereby loosed may have spent itself, coming to equilibrium in the form of a condition of forces which may or not be stable. If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the latter force, though the relation is worked out through the passive line. The same thing may be said if the defendant whose duty it was to change a condition which was in danger of such an oncoming force failed to remove the condition; in that case also he comes into a causal relation with the new force.

* * *

"To sum up the requirements of proximity of result:

"1. The defendant must have acted (or failed to act in violation of a duty).

"2. The force thus created must (a) have remained active itself or created another force which remained active until it directly caused the result; or (b) have created a new active risk of being acted upon by the active force that caused the result." (Underscoring supplied.)

It is seen therefore that if accused, by his indiscretions, set the stage, that is, created a condition conducive to injurious consequences of some nature, and the condition remained active or created another condition that caused the result, a direct causal relation exists as between his original acts and the ultimate result. (See also CM 300339, Pritchard, 5 BR (ETO) 25,49.)

It has been held that one is not liable for injuries caused by his

operation of an automobile while asleep, if he was not negligent in permitting himself to fall asleep (Bushnell v. Bushnell (1925), 103 Conn. 583, 131 Atl. 437, 44 A.L.R. 785; underscoring supplied). In the Bushnell case the court, after observing that the driving of a car required very great care, said,

> "And the mere fact that one driving a car permits himself to go to sleep justifies an inference of negligence sufficient to make a prima facie case in favor of one injured by the car while he is in that condition if no other circumstances tending to excuse or justify his conduct are proven."

(See also Blood v. Adams, 269 Mass. 480, 169 N.E. 412.)

It has been held that one who is suddenly stricken by an illness which he has no reason to anticipate while driving an automobile which renders it impossible for him to control the car is not chargeable with negligence (Cohen v. Petty (1933), 65 Fed. (2d) 820). However, it has also been generally held that the true test of negligence in cases involving disability is whether the disability was brought on by the accused's own voluntary acts. In Devlin v. Morse (254 Mich. 113, 235 N.W. 812-813) it was held that when the defendant had been up all night and had taxed his powers of endurance with drink and loss of sleep, it was actionable negligence for him to continue driving (an automobile) until overcome by drowsiness. In Steele v. Lackey (107 Vt. 192, 177 A 309), an action by a guest to recover against the owner of an automobile for injuries resulting from an accident, the question whether the defendant was guilty of "gross negligence" was held for the jury where there was evidence that he fell asleep suddenly and the car left the road and collided with a tree; that before starting to drive the defendant had been to a dance and had drunk intoxicating liquors. The court defined "gross negligence" as that degree of fault which lies between ordinary negligence and reckless or wanton misconduct amounting to willful negligence, and said, "The question is, was he negligent in permitting himself to fall asleep, or in operating the car when he knew, or ought to have known that sleep might come upon him."

In Diamond State Telegraph Company v. Hunter (1941) Del. 21 A(2d) 286, wherein the liability of a driver who had fallen asleep was considered, the court gave the following instructions to the jury:

> "If you should conclude that the defendant did not have sufficient sleep prior to the time of the accident or that he had taken alcoholic liquors or drugs or that he was not mentally alert and physically fit immediately prior to his falling asleep or that his act in falling asleep was accompanied by some notice to him, then the presumption of negligence on the part of defendant would not be rebutted and your verdict would be for plaintiff."

We believe the foregoing cases correctly set forth the law of negligence

where physical disability is interposed as a defense. (See authorities cited in 138 A.L.R., pp 1388-1397.)

Although the cases discussed herein involve civil liability for negligence we repeat what was said in the Coats case, supra, that such negligence is a violation of Article of War 96 being "conduct of a nature to bring discredit upon the military service." In Tift v. State (17 Ga. App. 633; 88 S.E. 41), a criminal prosecution for assault and battery, the defendant, who had been subject to recurrent attacks of vertigo, was held criminally liable for injuring another by striking him with an automobile, the collision being caused by defendant having suffered one of these attacks while driving such automobile. The Board of Review is therefore of the opinion that the evidence amply supports the finding that accused did wrongfully and unlawfully operate the aircraft in such reckless and careless manner as to collide with the ground while not in the process of take-off or landing as alleged in Specification 4 of Charge II. (See CM 292271, Bentley, 4 BR (ETO) 217.)

The foregoing principles of law based on the facts herein apply with equal force to the Specification, Charge I, alleging that through neglect the accused suffered the plane to be damaged in the amount of $10,000, for such neglect as has been heretofore set forth was the direct and proximate cause of the wrecking of the plane.

The court refused to allow the assistant trial judge advocate to testify in the case. In view of the fact that the prosecution requested permission to call the assistant trial judge advocate as a witness no error prejudicial to accused's rights resulted thereby. The Board of Review has held in several opinions, however, that it is not error to permit the assistant trial judge advocate to testify (see CM 224549, Sykes, 14 BR 159; CM 228507, Noon, 16 BR 193). He is a competent witness (par. 120, MCM; sec. 1459, Wharton's Criminal Evidence, 11th Ed.). We do not know what evidence the prosecution sought to adduce by introducing the assistant trial judge advocate as a witness, nor do we know if such proffered testimony was material and competent. The situation often arises wherein the court refuses to permit a witness to testify or refuses to admit matters in evidence such as documents, papers, and the like. In such cases the following procedure should be followed in order that, upon examination of the record, it may be determined whether the court erred in refusing to admit such proffered evidence:

a. If the proffered evidence be a document, "The court, in its discretion, may direct that a document, although excluded as not admissible in evidence, be marked for identification and appended to the record for the consideration of the reviewing authority, and will so direct on request of the party offering the document." (Underscoring supplied, par. 75a, p. 59, M.C.M. 1928.)

b. If the court refuses to permit a witness to testify either generally or on a specific question, the party seeking to adduce such testimony should make an offer of proof as to the nature and substance of the evidence he would produce if the witness were permitted to testify. This offer of proof, whether oral or written, should appear in the record of trial.

For a parallel to the foregoing procedure, as followed in the state and Federal courts, see paragraph 17, Volume I, Wigmore on Evidence, Third Edition, entitled "Procedure in Questions of Admissibility"; also Rule 7, page 80, American Law Institute, Model Code of Evidence, adopted 15 May 1942.

5. War Department records show that the accused is 23 years of age and unmarried. He enlisted in the Army on 14 October 1942 and received basic training at Keesler Field, Mississippi. After pre-flight training he was on 8 September 1944 commissioned a second lieutenant, AUS, and promoted to first lieutenant on 12 July 1946. From 29 October 1945 to 9 January 1946 he served as pilot with various troop carrier squadrons in the China Theater. His average numerical efficiency rating is shown to be 4, or "Excellent."

6. The court was legally constituted and had jurisdiction over the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 83 or 96.

Christy D. Gilmer, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Asbroyl, Judge Advocate

JAGK
CM 318045

1st Ind

MAR 1 - 1947

WD, JAGO, Washington 25, D.C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John M. Henderson (0-2070509), Air Corps.

2. Upon trial by general court-martial accused was found guilty of wrongfully and unlawfully operating an automobile on a public highway in a reckless and dangerous manner while under the influence of intoxicating liquor, in violation of Article of War 96. He was also found guilty of through neglect suffering an airplane to be damaged by wrongfully and recklessly flying the airplane at such a dangerously low altitude as to cause it to strike the ground, in violation of Article of War 83, and of wrongfully and unlawfully operating the airplane in such a reckless and careless manner as to collide with the ground thus endangering life and property, in violation of Army regulations which forbid the reckless operation of an airplane, in violation of Article of War 96. He was sentenced to be dismissed and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in the opinion of the Board that the record is legally sufficient to support the findings of guilty of the Charge and Specification alleging operation of the automobile in a reckless and dangerous manner while under the influence of intoxicating liquor. These findings legally warrant confirmation of the sentence. I do not concur in the opinion of the Board that the record is legally sufficient to support the findings of guilty of the Specifications alleging that accused suffered the airplane to be damaged through neglect and that he recklessly operated the airplane in violation of Army regulations.

3. The evidence shows that on the evening of 9 August 1946 accused attended a party at the Garden City Air Field Noncommissioned Officers' Club and drank a quantity of liquor. At about 0130 hours he left the club and drove an automobile into Garden City, Kansas. Two enlisted men rode in the car with him. A bus driver following accused's car noticed it weaving from one side of the road to the other and six oncoming vehicles were forced off the highway. Finally, accused drove over on the left side of the highway, whereupon the bus driver passed him on accused's right side. The bus driver made report of the incident to the Garden City police who arrested accused for drunken driving and his companions for being drunk. They took a sealed

fifth of liquor out of the car. After holding the accused and his companions in custody for several hours the police turned the men over to military police who took them back to the Garden City Air Field and released them. The following day (Saturday) accused decided to fly an AT-11BH Government airplane, serial No. 42-37472, to Oklahoma City, Oklahoma. At 1330 hours, and with Master Sergeant Jack L. Pruden and Technical Sergeants J. L. Walker and L. R. Butler as passengers, he cleared the field and gained altitude to 4,000 or 5,000 feet, traveling in the direction of Oklahoma City. While attempting to connect his gas lines with the main tanks he lost altitude to around 500 or 1,000 feet. Suddenly and while in the vicinity of Waynoka, Oklahoma, accused suffered a syncope or fainting spell and fell forward on the control column causing the plane to make a shallow dive into the ground, damaging the plane in the approximate sum of $10,000. The evidence, including accused's testimony, shows that he had not eaten any food, save possibly a sandwich, since noon of the Friday preceding this occurrence. There is medical testimony that the syncope which accused suffered was probably the result of drinking and lack of nourishment.

4. There is no evidence whatever that in his operation of the airplane accused was careless or negligent in any respect. He operated the airplane skillfully and with due caution. He did not consciously operate it at a low altitude. The crash of the airplane and the resultant damage to it resulted from his lack of control incident to a syncope or fainting spell. A medical officer testified that this fainting spell may have been caused by previous indulgence in alcohol and lack of recent nourishment. There is no indication in the record that accused was, while operating the airplane, under the influence of liquor or that he had any reason to believe that he might be subject to a fainting spell.

The Board of Review takes the position that the operation of the airplane during the period in which the fainting spell was suffered was per se negligent. It may be conceded for the purpose of argument that negligence might be attributed to the pilot of an airplane who operated it at a time when he knew or had reason to know that he would suffer a fainting spell or some other physical or mental disability. But in the instant case there is no factual basis for a reasonable inference that accused knew or had any reason to believe that he would suffer a fainting spell while operating the airplane. It may be noted in this connection that a period of some 12 hours had elapsed between the time that he was seen in an intoxicated condition and the time at which he took the airplane aloft. There is no suggestion in the record that he had consumed intoxicants in the meantime. I find no direct or circumstantial evidence of negligence or recklessness and believe that the precedents cited by the Board of Review support this conclusion. The findings of guilty of Charge I and its Specification and of Specification 4, Charge II, relating to operation of the airplane, should be disapproved.

5. The Commanding General, Army Air Forces, has addressed to me a

communication dated 19 December 1946 recommending that the sentence be approved and carried into execution should the findings of guilty be sustained.

6. Accused is 23 years of age. He has served in the Army in an enlisted and commissioned status since 14 October 1942. He does not have combat service to his credit but in the latter part of 1945 served as a pilot with troop carrier squadrons in the China Theater. His average efficiency rating is excellent.

7. I recommend that the findings of guilty of Charge I and its Specification and of Specification 4, Charge II, be disapproved. I also recomment that the sentence be confirmed but in view of all the circumstances and the absence of proof of reckless or careless operation of the airplane recommend that the execution of the sentence be suspended during good behavior. I transmit herewith for your use two forms of action; Form A to be used if you agree with the opinion of the Board of Review and Form B to be used in the event that you agree with my recommendation.

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Ltr fr CG, AAF, 19 Dec 46
3. Form A action
4. Form B action

(GCMO. 99 , 18 March 1947).

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

JAGH - CM 318062

6 JAN 1947

U N I T E D S T A T E S v. Private First Class DANIEL R. GUEVARA (RA 39431958), Company I, First Infantry Regiment, APO 6	))))))))	6TH INFANTRY DIVISION Trial by G.C.M., convened at APO 6, 21 October 1946. Dishonorable discharge (suspended) and confinement for one (1) year. Pacific Coast Branch, United States Disciplinary Barracks, Camp McQuaide, California

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Daniel R. Guevara, Company "I", First Infantry, APO #6 did, at APO #6, on or about 20 June 1946, unlawfully sell to Sang Il Lee one pistol, automatic, Caliber 45, of the value of about $26.97 of a type and kind issued as property of the United States for use in the military service.

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

(1) year. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Pacific Coast Branch, United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War may direct, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 43, Headquarters 6th Infantry Division, APO #6, 13 November 1946.

3. It is to be noted that the Specification alleges the unlawful sale of an automatic pistol "of the type and kind issued as property of the United States for use in the military service." This allegation may be treated as tantamount to one in which the property alleged to have been unlawfully sold is described as "property of the United States furnished and intended for the military service thereof" (CM 143224, Hullman).

To prove the unlawful sale the prosecution called as its only witness on Lee, Hi Chu, who testified through an interpreter that he, the witness, purchased from accused a pistol without a serial number described by the witness as "not exactly MP gun but the gun seems like MP gun" (R 12), for which the witness paid the accused 1000 yen. At the time of this sale to witness a friend of witness who participated as a co-purchaser, was present. This friend is not identified in the record of trial but is presumably Sang Il Lee to whom accused is alleged to have made the unlawful sale. When questioned by a member of the court as to how he knew the pistol was of the type used by the military police, witness stated:

> "I did not say the gun same kind as MP gun but seems like the kind of gun you see carried by MP, and furthermore the gun was not officer's gun which has number but the gun was private gun which has no number on the gun" (R 12).

The pistol in question was not offered orreceived in evidence.

At this stage of the testimony the prosecution rested and the defense immediately moved for an acquittal on the following grounds:

> "* * * The specification specifies sale of one pistol, automatic, Caliber 45, of the value of about $26.97, of a type and kind issued as property of the United States for use in the military service. The type of pistol has not been established. A confused witness claims it was something like an MP gun. In the second place, the actual value of that pistol has not been established. The man testified what he paid for a pistol but nothing has been established as to the actual value of the pistol itself. Furthermore, the facts and circumstances of the case so far have not indicated that the act of the accused was wilfully

and knowingly done; and in the fourth place that property has not been proven or even indicated as being the property of the United States" (R 12).

In response to the law member's request that the prosecution produce the pistol, the prosecution stated:

"The prosecution is unable to produce the weapon but I have in my possession certified copy of the property turn in slip from Provost Court No. 1, Taegu, Korea, noting 'The above items were received by Provost #1 in the case of Lee Hi Ju and Lee San Il.' Subject to objection by the defense, I would like to offer this in evidence (Shows document to defense)" (R 12).

The defense objected to the offer of the document in evidence on the ground that it was not properly identified and on the further ground that it was not connected with the pistol alleged to have been sold by accused. The objection however was overruled by the law member and the document was received in evidence as Prosecution's Exhibit "A." The motion for a finding of not guilty was denied by the court.

4. The evidence of record therefore presents for consideration the following specific questions:

Was the testimony of Lee, Hi Chu that he purchased a pistol from accused, sufficient to establish the unlawful sale to Sang Il Lee as alleged?

Was the pistol sold by the accused identified as property of the United States furnished and intended for the military service thereof and of the value as alleged?

It is apparent that accused sold a pistol to one Hi Chu Lee and an unnamed friend for 1000 yen. The evidence further tends to show that the pistol in question, although it bore no serial number, was in some respects similar to pistols carried by American military police. In the opinion of the Board however, this evidence is not sufficient to establish the essential allegations of the offense namely, that the accused unlawfully sold to Sang Il Lee an automatic pistol, Caliber .45, of the value of $26.97, property of the United States furnished and intended for the military service thereof.

In CM 192952, Scolese (2 BR 51), and CM 215881, Madrid (11 BR 65), the Board of Review held that the mere fact that allegedly stolen articles of clothing were of a type used in the military service, does not, in the absence of other proved circumstances, justify an inference that they are government property. Similarly in CM 207591, Nash and Morris (8 BR 359), it was held that mere possession of gasoline under supicious circumstances does not warrant an inference that the gasoline was government property.

It is not improbable that the accused could have obtained a Calibre .45 pistol from some source other than the government.

The testimony of Hi Chu Lee that the sale was made to him and a friend would not justify a finding that an unlawful sale was made to Sang Il Lee as alleged in the Specification. Nor does the evidence, which shows that the pistol in question was similar to those carried by the military police, justify a finding that it was the property of the United States furnished and intended for the military service thereof.

As to the value, there is no evidence whatever that the pistol had a value of $26.97 as alleged, although there is sufficient evidence to warrant a finding that it had some value.

The contents of Prosecution's Exhibit "A," even if we assume that it was properly received in evidence, do not prove the essential allegation that the accused unlawfully sold to Sang Il Lee a pistol which was the property of the United States furnished and intended for the military service thereof. In short, there is no competent evidence of record to establish the essential allegations of the offense charged.

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

D. Lorenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip J. Smith, Judge Advocate

JAGH - CM 318062 1st Ind

WD, JAGO, Washington 25, D. C. JAN 30 1947

TO: The Under 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 First Class Daniel R. Guevara (RA 39231958), Company I, First Infantry Regiment, APO 6.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO. 55, 28 Feb 1947).

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

JAGK - CM 318085

16 JAN 1947

UNITED STATES v. Corporal WALTER B. CHANCE (RA 18103356), Detachment of Patients, 9955 Technical Service Unit, Surgeon General's Office, William Beaumont General Hospital, El Paso, Texas.	ANTIAIRCRAFT ARTILLERY SCHOOL Fort Bliss, Texas Trial by G.C.M., convened at Fort Bliss, Texas, 25 October 1946. Dishonorable discharge (suspended), total forfeitures and confinement for one (1) year. Disciplinary Barracks.

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

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

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Corporal Walter B. Chance, attached unassigned Detachment of Patients, 9955 Technical Service Unit, Surgeon General's Office, William Beaumont General Hospital, El Paso, Texas, did, at William Beaumont General Hospital, El Paso, Texas, on or about 29 August 1946, with intent to do bodily harm, commit an assault upon Technician Fifth Grade Ethel M. Phillips, WAC, by grabbing her by the throat with his hands and forcing her to the ground.

The defense offered a special plea in bar of trial on the grounds of insanity. Evidence was heard on this question and the plea was overruled. Accused then pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published in General Court-Martial

Orders No. 42, Headquarters Antiaircraft Artillery School, Fort Bliss, Texas, 28 October 1946.

3. The court denied accused's special plea in bar of trial on the ground of insanity and found accused guilty as charged, thus finding that he was sane. However, eleven days after the date of the reviewing authority's action approving the sentence but suspending the dishonorable discharge, six of the nine members who participated in the findings signed a Petition for Clemency addressed to the reviewing authority, which petition is attached to the record of trial and which we deem appropriate to consider in connection therewith. The following paragraphs of the petition are quoted:

> "Corporal Chance, by his counsel, pleaded insanity but in view of the psychiatrist's testimony that he was not psychotic, that he knew the difference between right and wrong and could adhere to the right even though his obsessive compulsion neurosis was of such a nature that he has considerable difficulty in adhering to the right, and, that he was able to intelligently cooperate in his own defense, this court had no choice but to find him legally sane.
>
> "This court feels, however, that Corporal Chance is not sane as that term is commonly understood and believes that Corporal Chance is, at present, a potential threat to society and to himself because of his homicidal tendencies.
>
> * * *
>
> "This court sentenced the accused to the maximum period of confinement because an investigation revealed that only prisoners seem to have available to them adequate psychiatric facilities such as St. Elizabeth's or the Medical Center in St Louis, Missouri, for the treatment of those afflicted with a neurosis of a homocidal character.
>
> "The sentence by the court was not imposed upon the accused as punishment as that term is commonly understood. It is the hope of this court that Corporal Chance will ultimately be cured and returned to society as an honorable citizen and that during his term of incarceration he will be regarded more as a patient to be helped than as a criminal whose crime is to be avenged.
>
> "Recommendations: That the sentence be approved with a recommendation to the Judge Advocate General that Corporal Chance be sent to a hospital for the criminally insane. ***"

Although the above petition does not indicate, in express terms, that the members signing it believed accused was legally insane but states merely that they thought he was "not sane as that term is commonly understood," it clearly appears therein that such members, at the time they voted upon the findings and sentence, were under the impression that they were bound by the testimony of the psychiatrists to the effect that accused was legally sane and that they were not free to consider the evidence on this point in the light of their own knowledge of human behavior. The petition also strongly

suggests that accused was given a sentence of confinement not for the purpose of punishment for the offense of which he was found guilty but primarily for the purpose of securing his admission to a Government mental hospital.

As stated in paragraph 78a of the Manual for Courts-Martial, 1928, the members of the court are to use their "knowledge of human nature and the ways of the world" in arriving at their findings. They are not bound to accept as proven fact the testimony of any witness, lay or expert (CM 298814, Prairiechief, 21 BR (ETO) 129,134; see CM 223448, Riesenman, 13 BR 389,402; CM 289727, Melonas, 1 BR (A-P) 247,252). If, in the instant case, the six members who signed the petition entertained a reasonable doubt, that is, an honest, substantial misgiving, as to the mental responsibility of accused, which doubt was based on the state of the evidence as a whole considered in the light of common experience, and yet proceeded to find accused guilty as charged because of a misunderstanding of their duties as members of a court-martial, such findings of guilt would be improper and should be set aside upon review. (Davis v. U.S., 160 U.S. 469.) Furthermore, paragraph 80a of the Manual provides that the members should bear in mind that "the punishment imposed must be justified by the necessities of justice and discipline." It is obvious, therefore, that the sentence of a court-martial is not to be used as a mere instrumentality for committing an accused to a mental institution.

Therefore, a perusal of the petition under discussion gives rise to a strong inference that the six members who signed it did, at the trial, abuse their judicial powers in such a way as to constitute fatal prejudice to the substantial rights of accused. Although such abuse appears to have been the result of an unawareness of the intricacies of military jurisprudence and although the errors here committed were occasioned by the best of intentions in an effort to be helpful to accused, we are nevertheless of the opinion that the findings and sentence should be vacated.

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

Charles T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Eichbergh, Judge Advocate

JAGK - CM 318065 1st Ind

JAN 2 1 1947

WD, JAGO, Washington 25, D. C.

TO: The Under 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 the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Corporal Walter B. Chance (RA18103356), Detachment of Patients, 9955 Technical Service Unit, Surgeon General's Office, William Beaumont General Hospital, El Paso, Texas.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which this accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO. 39, 11 Feb 1947).

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

27 December 1946

JAGN
CM 318089

UNITED STATES	)	FIFTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Colorado Springs, Colorado, 7, 8, 9, 10 and 28 October 1946. Dishonorable discharge
Flight Officer AUSTIN M. KNOTHE (T-192756), 202nd Army Air Forces Base Unit.	)	

HOLDING by the BOARD OF REVIEW
HARDY, JOHNSON and TAYLOR, Judge Advocates

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

2. The only question which will be considered is whether the participation of Captain Lukeman as "Special assistant to the prosecution" in this case was such an error as to require the vacation of the findings and sentence.

3. The following remarks of counsel appear in the record of trial:

"The members of the court and the personnel of the prosecution were then sworn.

DEFENSE: The defense has a question. This is my first case, of trying any case in a military court, and if any of my motions or questions are out of order, I will try to not make a repetition of them. But we question the legality of Captain Lukeman's presence in the court since he is not on orders as a member of the prosecution and has not been sworn in.

PRESIDENT TO CAPTAIN LUKEMAN: What is you function?

PROSECUTION: Captain Lukeman is serving as special assistant to the prosecution and as such is not sworn. However, I believe it is perfectly legal and right to have any special assistants we desire, the same as it is for the defense and accused to have whomever they desire.

DEFENSE: We still object.

CAPTAIN LUKEMAN: During the time of preparation of this case, I was on the General Court and was withdrawn on a later order. During all of the preparation, I worked closely with Captain Wilcox for the prosecution. Inasmuch as I was anticipating transfer, Captain Wilcox contacted the Staff Judge Advocate asking in what manner my presence could be obtained, iff VOCG was necessary, and the Staff Judge Advocate advised him that my presence could be secured as special assistant to the prosecution but I was not to be on orders or sworn.

* * *

PRESIDENT: I feel that Captain Lukeman's presence and acts for the prosecution has no prejudice. He would have been on the court and his function on the prosecution will not prejudice and probably be a help to the United States Government. Defense counsel's objection to Captain Lukeman is overruled." (R. 5-6).

The record further discloses that Captain Lukeman was actually present during a considerable portion, at least, of the trial and that he testified as a witness for the prosecution, giving his opinion that accused was sane in opposition to accused's plea of insanity. Otherwise the record does not show the full extent of Captain Lukeman's participation in the trial of the case.

4. Only the convening authority can relieve or detail a member, judge advocate, or assistant judge advocate of a general court-martial (A.W. 11; par. 368(1), Dig. Op. JAG, 1912-1940), and it has been held that activity in a trial by an assistant trial judge advocate otherwise appointed constituted fatal jurisdictional error (CM 113341 (1918), par. 368(1), Dig. Op. JAG, 1912-1940). It appears obvious that the same fatality must accompany activity on behalf of the prosecution, in a trial, by a volunteer assistant who has not even the color of an official appointment. Such activity is an invasion of the right of accused to be protected during his trial from the intrusion by one who is not properly a part of the court-martial duly convened to try him (CM 125676 (1919), par. 1417, Dig. op. JAG, 1912-1930; CM 200734, Burns, 5 BR 5, par. 368(1), Dig. Op. JAG, 1912-1940).

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

HARDY, Judge Advocate.

JOHNSON, Judge Advocate.

(On Leave), Judge Advocate.

JAGN-CM 318089 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Fifteenth Air Force, Colorado Springs, Colorado.

1. In the case of Flight Officer Austin M. Knothe (T-192756), 202nd Army Air Forces Base Unit, 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 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 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 318089).

1 Incl
Record of trial

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

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

JAGH - CM 318094

20 MAR 1947

UNITED STATES	)	UNITED STATES AIR FORCES IN EUROPE
	)	
v.	)	Trial by G.C.M., convened at Furstenfeldbruck, Germany, 18 October 1946. Dismissal, total forfeitures and confinement for two (2) years
	)	
First Lieutenant JAMES A. BOLTON (O-803539), Air Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 James A Bolton, Casual Pool, Army Air Force European Theater Replacement Depot (Provisional), attached 303rd Station Complement Squadron Army Post Office 208, did, without proper leave absent himself from his command, the 70th Reinforcement Depot, Stone, England, from about 18 May 1945 to about 30 March 1946.

The accused refused to plead to the Specification and the Charge and the court proceeded to trial as if the accused had pleaded not guilty thereto. He was found guilty of the Specification and the Charge. 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 four (4) years. The reviewing authority approved the sentence, reduced the period of confinement to two (2) years and forwarded the record of trial for action under Article of War 48.

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

The Commanding Officer, 303d Station Complement Squadron (Special), Army Air Forces Replacement Depot, Furstenfeldbruck, Germany, identified the accused and testified that the accused has been a member of his command since 11 April 1946 (R 8).

An extract copy of the morning report of Detachment of Patients, 4180 United States Army Hospital Plant, M.D. dated 18 May 1945, was admitted in evidence as Prosecution Exhibit 1, without objection by the defense (R 9). This extract copy, prepared on a WD AGO Form 0444, 1 February 1946, reads as follows:

"18 May 1945

X X X X X X

D 1 0 reld fr atchd unasgd and trfd
to 70th Reinf Depot (AAF) AAF Sta
594 (G)

X X X X X X

/s/ B. J. Jaffy
CWO, USA, Personnel O

Complete Designation of Command	Station	Date
Records Service Branch, AGO	St. Louis 20, Missouri	27 Aug 46

I certify that I am the official custodian of the morning reports of (Command) Det of Pnts 4180 USAHP MD original copies of which are presently maintained in storage by the Records Division, AGO, and that the foregoing is a true and complete copy (including signature or initials appearing thereon) of that part of the morning report of said command submitted at (Station) 2.5 Mi N VO-7376, Herefordshire for the date indicated in said copy which relates to the person referred to in extract copy.

Typed Name, Grade, and Arm or Service	Signature
B R SCOTT, 1st Lt, AGD	/s/ B R Scott"

Mrs. Elsie Matthews, Horsham, Sussex, England, testified by deposition that she and accused had been living together from November 1944 until 30 March 1946 (R 10-11; Pros Ex 2). Prior to the middle of May 1945, the accused stayed with her when off duty, but after that date he was with her twenty-four hours a day, except for short periods of time when he would go to

London (R 11; Pros Ex 2). During the entire time accused lived with Mrs. Matthews he wore a United States Army Officer's uniform. The witness stated that as far as she knew the accused is in the military service of the United States (R 11; Pros Ex 2). The accused had not discussed his relationship to the Army, except that he had stated he was attached to a hospital in London for treatment of spinal trouble, but had not spoken of being AWOL (R 11-12; Pros Ex 2).

On 30 March 1946, First Lieutenant George A. Dip, Lieutenant Yeager, and Sergeant Robert L. Eaton, all members of the 707th Military Police Battalion, acting on a letter written by accused to Military Police Headquarters, United States Army, London, England, attention: Lieutenant Yeager, arrested the accused at the home of Mrs. Matthews at Horsham, Sussex, England (R 13, 15-16; Pros Exs 2, 3, 4). As the military police approached him, the accused said, "I guess you come for me" (R 15; Pros Ex 3).

Lieutenant Dip identified a letter, bearing the accused's signature dated "London, March 29, 42" and an envelope addressed, "Military Police Headquarters, U. S. Army, London England, c/o Lt. Yeager" postmarked "APO 413, March 29, 1946," as a letter received at this headquarters on the morning of 30 March 1946 (R 16-17; Pros Ex 4). After the military police had arrived in Horsham, England, the accused asked Lieutenant Yeager "Did you receive my letter?" (R 15; Pros Ex 3). The accused stated at that time that he had written the letter to explain his position and that he had been absent without leave for about one year (R 17; Pros Ex 4).

The accused was taken to London by the military police. En route he said, "I wonder how long I will get for this." He also stated that he had been living with Mrs. Matthews "for quite a while" and had one child by her. He said that, in order not to arouse her suspicions, he would leave occasionally telling her that he was going to a hospital for treatment for his back. Instead of going to the hospital, however, he would go to London and stay at the American Red Cross Club for a few days (R 15; Pros Ex 3).

First Lieutenant William E. Cave, the investigating officer testified by deposition that on 18 or 19 May 1946 he told the accused that he was going to England to investigate the charges preferred against him and asked the accused for information concerning the case. The accused replied that he was "protected by the 24th Article of War" but told the witness that he had written a letter to Lieutenant Yeager "with the thought of turning himself in" and that the letter would supply all data necessary for the investigation. The accused stated that the address of the place where he lived during his absence was included in the letter. On or about 1 July 1946, the witness showed the accused the evidence he had collected in the case. At this time, the witness

showed the letter dated "London, March 29, 42" and signed by Lt. Bolton, Jr., to the accused and told him that it did not contain the address of the lodging. The accused replied that, when he wrote the letter he was so nervous and "out of his head" that he didn't know what he was saying (R 18; Pros Ex 5).

Mrs. Matthews testified by deposition that the letter dated March 29, 1942 was in a handwriting similar to that of accused (R 12; Pros Ex 2).

The letter and envelope referred to above was admitted into evidence over the objection of the defense as Prosecution Exhibit 6 (R 21). In this letter the accused wrote:

> "I thoroughly relize the trouble I have put you to, and the bad light I put my self into. First off, please hear my explanation. I did not take the Lts whiskey from the club, but I did not aquire my whiskey from a liquor ration, because I didn't have one. It was bought for three pounds 10 shillings from an enlisted man whoe's name I do not have thats why I formulated the story of the ration. You see Lt. I am AWOL as you probably already know, but my intentions were to turn my self in. My outfit returned home last year, but they wanted me to go back to the States to spend six months in a cast, after a spinal fusion operation. Well I was of no longer use to the Army and being in a hospital I couldn't help my fiance over here who was carying my child at the time. As a troop carrier pilot over here I saved about 375 pounds (sterling) on which I have sustained of course sending most to my Fiance; and when I did see her and stay there, I never told her about being loose as I thought when she did get straightened around, having the baby and all, I would voluntarily turn in. The strain was more than a human being could stand. I did buy a couple of bottles of whiskey to try and keep myself going. Day after day my back (spinal cord) has been given me hell. My logical sense has said turn in where my attitude towards my Fiance was more human. I couldn't let the person down who I loved so much. Well my money has just about reached the end, so I have been praying hard that things would smooth out this afternoon so I could turn in on my own. I was a member of the 436th T.C. and came overseas in 1943 against flights surgeons instructions, as they wanted to operate. I spent two months in hospital here in the U.K. but asked for release so I could go with my buddies on 'D day'. I saw all the invasions from Normandy to the Rhine crossing.

I hold four air medals and five battle stars.

"I don't tell you all this to make my story any more convincing, but to try and say as much as I can concerning the whole truth before I turn in. You put me on my honour and I will be there. I have never during this time disgraced my uniform or my country. I relize whats before me, but where I didn't do right in the first place by going loose I did it because my usefullness to the Army as a pilot was over, and my duty to the unborn child was greater. Pardon the writing but my nerves are just about through. Im sorry I said what I did but I needed time to see my fiance just once more, to tell her I'll always take care of her and our child. I'll be back."

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

Second Lieutenant Warren M. Briggs, the trial judge advocate, testified that he dispatched a radio message to The Adjutant General's Records Branch with reference to the accused and identified a radio message from Commanding Officer, Records Administration Center, AGO, St. Louis, Missouri, dated 15 May 1946 as being a message received by the witness in reply to his inquiry (R 24-25). The radio message which was received in evidence as Defense Exhibit A (R 24), over objection by the prosecution stated:

"REURAD A 794 G 24 APR 46 MORNING REPORTS OF DET OF PNTS 4180 HOSP PLANT FOR MAY AND JUNE 45 SHOW NO AWOL REMARKS ON JAMES BOLTON 0-803539 REMARK ON MORNING REPORT FOR 18 MAY 45 SHOWS O TRFD TO 70TH REINF DEPOT PD MORNING REPORTS OF 70TH REINF DEPOT FOR PERIOD 18 MAY THRU 31 AUG 45 DO NOT SHOW BOLTON AWOL"

After his rights as a witness were explained to him the accused elected to remain silent (R 26).

5. At the conclusion of the prosecution's case the defense moved for a finding of not guilty on the grounds that the prosecution failed to prove that the accused was the person named in the specification, and on the further grounds that the prosecution had produced insufficient evidence to establish a prima facie case (R 22).

The accused was sufficiently identified as the person named in the specification and as being in the military service of the United States by deposition of Mrs. Matthews, who stated that he lived with her from the middle of May 1945 until he was apprehended, that he wore a United States Army uniform during that time, and that he stated that he was

attached to an army hospital in London. In addition thereto accused's letter to "Military Police, Hq, U. S. Army, London, England" wherein he stated that he was a member of the 436th Troop Carrier Squadron and that he was absent without leave, his admission that he had written the letter and his statement to the apprehending military police, establish unmistakeably that the accused is subject to military law and the person described in the specification.

For the reasons stated below, we are of the opinion that the prosecution established a prima facie case. Accordingly we are of the opinion that the defense's motion for a finding of not guilty was properly overruled.

6. To establish the offense of which the accused stands convicted, it was necessary to prove by direct or circumstantial evidence that;

> "(1) Accused absented himself from * * * his * * * command for a certain period as alleged, and
>
> "(2) that such absence was without authority from anyone competent to give him leave" (MCM, 1928, par 132, p 146).

All of the elements of the offense may be proved by circumstantial evidence (Dig Op JAG 1912-40, Sec 419 (2); CM 291759, Astrella, 2 BR (ETO) 79; CM 284056, Magee, 13 BR (ETO) 357; CM 304414, Mitchell, 30 BR (ETO) 101; CM 295562, Cockerham, 1st Ind.).

The competent evidence adduced by the prosecution shows the accused had been living with Mrs. Elsie Matthews at Horsham, Sussex, England, from November 1944 until 30 March 1946. Prior to the middle of May 1945 the accused stayed with her when off duty, but thereafter he was with her for twenty-four hours a day until he w apprehended, except for brief periods when he went to London. On 29 March 1946, the accused mailed a letter to Military Police Headquarters, U. S. Army, London, England, c/o Lieutenant Yeager, wherein he stated that he was absent without leave, but that he intended to surrender. In his letter the accused stated that he absented himself without leave because the military authorities wanted to ship him to the United States to undergo a spinal fusion operation, that he considered himself of no further use to the army, and that he felt that he owed a greater duty to his fiance and unborn child to remain in England to take care of them.

When apprehended the accused asked if this letter had been received by the military police and stated that he had been absent without leave for approximately a year.

The character of the offense alleged presumes a duty to be at an appointed place (CM 292079, Murphy, 5 Bull JAG 93; CM 315687, Stanton).

In an effort to prove the accused's appointed place of duty the prosecution introduced without objection, a duly authenticated extract copy of the morning report of the Detachment of Patients, 4180 United States Army Hospital Plant, M.D. dated 18 May 1945 which shows the following entry:

"18 May 1945

X X X X X X

D 1 0 reld fr atchd unasgd and trfd
to 70th Reinf Depot (AAF) AAF Sta
594 (G)
X X X X X X
/s/ B. J. Jaffy
CWO, USA, Personnel O"

Since the entry on the extract copy of the morning report does not bear the accused's name, and does not relate to any named or described person, it is obviously meaningless and was incompetent evidence to show that the accused was transferred to the 70th Reinforcement Depot (CM 318685, Sustaite).

Thereafter the defense introduced a radio message from the Commanding Officer, Records Administration Center, Adjutant General's Office, St. Louis, Missouri, wherein it is stated:

"REURAD A 794 G 24 APR 46 MORNING REPORTS OF DET OF PNTS 4180 HOSP PLANT FOR MAY AND JUNE 45 SHOW NO AWOL REMARKS ON JAMES BOLTON 0-803539 REMARK ON MORNING REPORT FOR 18 MAY 45 SHOWS O TRFD TO 70TH REINF DEPOT PD MORNING REPORTS OF 70TH REINF DEPOR FOR PERIOD 18 MAY THRU 31 AUG 45 DO NOT SHOW BOLTON AWOL"

The reference to accused's transfer to the 70th Reinforcement Depot is obviously incompetent hearsay. Neither the extract copy of the morning report nor the radio message should have been considered by the court to establish the accused's place of duty.

The circumstantial evidence, however, shows that the accused was living with Mrs. Matthews twenty-four hours a day from about the time alleged as the beginning of the unauthorized absence until apprehended by the military police on the termination date. This evidence is inconsistent with a duty status or an authorized absence status (CM 295562, Cockerham, supra; CM 291759, Astrella, supra; CM 284056, Magee, supra). There was sufficient proof of the corpus delicti to admit evidence of the accused's confessions wherein he stated that he was absent without leave for substantially the period alleged.

In the circumstances the court was justified in inferring that the accused was absent without leave from his command, which is the gravamen of the offense alleged (CM 298424, Spinelli, 25 BR (ETO) 121; CM 315687, Stanton). The prosecution's failure to prove from which particular command the accused absented himself without authority, is, in our opinion, not a fatal defect under the circumstances of this case.

Accordingly we are of the opinion that the record of trial is legally sufficient to support the court's findings of guilty.

7. The accused is 28 years of age, unmarried, and supports his mother who resides in Los Angeles, California. War Department records show that he is a high school graduate and that he attended university evening classes in drama and anthropology for one and one-half years. Prior to entering the service he worked as a telegraphic message checker for the Union Pacific Railroad, as a recreational supervisor for the Los Angeles Department of Parks and Recreation, and as a truck driver for a construction company. He enlisted on 18 November 1940 and served in the Coast Artillery and Air Corps as an enlisted man. He became an aviation cadet on 27 August 1942 and was commissioned as a second lieutenant, Army of the United States and rated as a pilot on 28 May 1943. On 17 July 1944 he was promoted to first lieutenant, Army of the United States. He served as a troop carrier pilot in the European and Mediterranean Theaters of Operations and is authorized Bronze Service Stars for the Rome-Arno, Normandy, Northern France, Southern France, Rhineland, Ardennes, and Central Europe campaigns. He was awarded the air medal and three oak leaf clusters to the air medal for meritorious achievement. Information contained in the record of trial and allied papers indicates that the accused sustained a back injury while at Maxton Field, North Carolina, prior to his departure for the European Theater which resulted in considerable hospitalization.

8. Attached to the record of trial is a recommendation to the reviewing authority dated 16 November 1946, signed by five members of the court wherein it is recommended that the portion of the sentence involving confinement be remitted in view of the long period of restraint prior to trial; the accused's creditable combat record during a period when he could have been invalided to the United States because of a serious back injury; the fact that the initial absence without leave occurred after VE day; and the fact that Mrs. Matthews, her child, and the accused's mother are entirely dependent upon him for support and that accused's sister is partially dependent upon him. Also attached to the record is a plea for clemency signed by the accused.

In addition to the foregoing the Board of Review has considered the following communication pertaining to clemency on behalf of the accused: letter from the Honorable W. G. Andrews, Member of Congress to the Honorable W. Stuart Symington, Assistant Secretary of War, dated 30 November 1946, and letter from the Honorable Gordon L. McDonough, Member of Congress, dated 19 December 1946.

9. 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. 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, total forfeitures, and confinement at hard labor for two years are authorized upon a conviction of a violation of the 61st Article of War.

A. Goldstein, Judge Advocate

Wilhelmar A. Self, Judge Advocate

Philip A. Smith, Judge Advocate

JAGH - CM 318094 1st Ind

WD, JAGO, Washington 25, D. C. MAR 28 1947

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 A. Bolton (0-803539), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from 18 May 1945 to 30 March 1946, in violation of Article of War 61. 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 four (4) years. The reviewing authority approved the sentence, reduced the period of confinement to two (2) years, and forwarded the record of trial for action under Article of War 48.

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

The accused, a troop carrier pilot, lived with an English woman, Mrs. Elsie Matthews at Horsham, Sussex, England, from November 1944 to 30 March 1946. Prior to the middle of May 1945, the accused stayed with her when not on duty, but thereafter he was with her for twenty-four hours a day until he was apprehended, except for brief periods when he went to London. On 29 March 1946, the accused mailed a letter to Military Police Headquarters, United States Army, London, England, wherein he stated that he was absent without leave and stated that he intended to surrender. In this letter he stated that he absented himself without leave because the military authorities wanted to return him to the United States to undergo a spinal fusion operation, that he considered himself of no further use to the Army, and that he felt that he owed a greater duty to his fiance and his unborn child to remain in England to take care of them.

When military police officers, acting upon information contained in this letter, apprehended him at the home of Mrs. Matthews, the accused admitted writing the letter and stated that he had been absent without leave for approximately a year.

4. War Department records show that the accused is 28 years of age, unmarried, and that his mother is dependent upon him for support. He enlisted on 18 November 1940 and upon completing aviation cadet training, he was commissioned a second lieutenant, Army of the United States, and rated as a pilot on 28 May 1943. He served as a troop carrier pilot in the European and Mediterranean Theaters of Operations and is authorized Bronze Service Stars for the Rome-Arno, Normandy, Northern France, Southern France, Rhineland, Ardennes, and Central Europe Campaigns. He was awarded the Air Medal and three Oak Leaf Clusters to the Air Medal.

Information contained in the record of trial and allied papers indicates that the accused sustained a back injury while at Maxton Field, North Carolina, prior to his departure for the European Theater of Operations, which has resulted in considerable hospitalization. The accused stated in a petition for clemency, that on several occasions when he was about to be hospitalized for this injury, he secured a flight surgeon's permission to participate in combat operations despite the back injury.

Attached to the record of trial is a recommendation to the reviewing authority dated 16 November 1946, signed by five members of the court wherein they recommended that the portion of the sentence involving confinement be remitted in view of the long period of restraint prior to trial, the accused's creditable combat record during a period when he could have been returned to the United States because of a serious back injury, the fact that the initial absence without leave occurred after VE Day, and the fact that Mrs. Matthews, her child, and the accused's mother are entirely dependent upon him for support and that accused's sister is partially dependent upon him. Also attached to the record is a plea for clemency signed by the accused.

In addition to the foregoing the following communications pertaining to clemency on behalf of the accused have been considered: letter from the Honorable W. G. Andrews, Member of Congress, to the Honorable W. Stuart Symington, Assistant Secretary of War, dated 30 November 1946, and letter from the Honorable Gordon L. McDonough, Member of Congress, dated 19 December 1946.

5. 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.

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

Cm 318094

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO. 151, 2 May 1947).

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

JAGK - CM 318095

22 JAN 1947

UNITED STATES v. Private GOMER C. BLACKBURN (35649534) and Private JOHN LEE (33402974), both Paris Detention Barracks (formerly of Camp Pittsburg Stockade), US Forces, European Theater.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 24, 25 and 27 May 1946. EACH: Dishonorable discharge and confinement for thirty-five (35) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

2. The accused by exceptions and substitutions were found guilty of the following charges and specifications:

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

Specification 1: (Nolle Prosequi).

Specification 2: (Nolle Prosequi).

Specification 3: In that Private Gomer C. Blackburn, Camp Pittsburgh Stockade, United States Forces, European Theater, did, in conjunction with Private John Lee, and other persons at Paris, France, on or about 1 February 1946 by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Madeleine Chabrol, Guy Bourdet, Albert Renard, five thousand five hundred (5,500) francs, French currency, property of the said Madeleine Chabrol, three thousand four hundred (3400) francs, French currency, and one (1) wrist watch, property of the said Guy Bourdet, twenty four hundred (2400) francs, French currency, property of the said Albert Renard, total value of more than fifty dollars ($50.00).

Specification 4: In that Private Gomer C. Blackburn, ***, did, in conjunction with other persons, at Paris, France, on or about 1 February 1946 by force and violence and by putting them in fear,

feloniously take, steal and carry away from the persons of Jeanne Stora, Andre Meyer, Jacques Montet, one (1) wrist watch, and one (1) fur coat, property of the said Jeanne Stora, one (1) watch, and one (1) fountain pen, property of the said Andre Meyer, four thousand (4000) francs, French currency, one (1) gold watch and two (2) lighters, property of the said Jacques Montet, of the total value of more than fifty dollars ($50.00).

Specification 5: In that Private Gomer C. Blackburn, ***, did, in conjunction with other persons, at Paris, France, on or about 10 February 1946 by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Maurice Lamont, Raymond Gonthier, Adolphe Ville, George Pingard, and Maurice Vaignedroy, francs, French currency, property of the said Maurice Lamont, forty thousand (40,000) francs, French currency, property of the said Raymond Gonthier, two hundred thirty thousand (230,000) francs, French currency, property of the said Adolphe Ville, nineteen hundred (1900) francs, French currency, and one (1) gold wrist watch, property of the said George Pingard, francs, French currency, and property of the said Maurice Vaignedroy, of the total value of more than fifty dollars ($50.00).

Specification 6: (Nolle Prosequi).

Specification 7: In that Private Gomer C. Blackburn, ***, did, in conjunction with other persons, at Paris, France, on or about 15 February 1946 by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Vera Vallent, Mercedes Uriate and Daniel Hureau fourteen thousand (14000) francs, French currency, one (1) gold wrist watch, and one (1) lighter, property of the said Vera Vallent, nineteen thousand (19000) francs, French currency, and two (2) rings, property of the said Mercedes Uriate, fourteen thousand five hundred (14500) francs, French currency, one (1) gold wrist watch, and one (1) fountain pen, property of the said Daniel Hureau, total value of more than fifty dollars ($50.00).

Specification 8: (Nolle Prosequi).

CHARGE II: (Nolle Prosequi).

Specification: (Nolle Prosequi).

<u>Additional Charges:</u>

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

Specification: In that Private Gomer C. Blackburn, ***, having been

duly placed in confinement in the said Paris Detention Barracks on or about 8 March 1946 did at the aforesaid Paris Detention Barracks on or about 13 April 1946 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Gomer C. Blackburn, ***, in conjunction with Private Eddy Jones and Private John Lee, did, at or near Mons, Belgium on or about 21 April 1946 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private First Class Thomas Cestoro, a military policeman in line of duty, one (1) pistol with holster, MP helmet, brassard and white belt, Government issue, property of the said Private First Class Thomas Cestoro, total value of about fifty dollars ($50.00).

Specification 2: In that Private Gomer C. Blackburn, ***, in conjunction with Private Eddy Jones and Private John Lee, did, at or near Soissons, France on or about 21 April 1946 by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Technician Fourth Grade Sidney C. Gleber fifteen thousand (15,000) francs, French currency, and two (2) wrist watches, property of the said Technician Fourth Grade Sidney C. Gleber; total value of more than fifty dollars ($50.00).

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

Specification: In that Private Gomer C. Blackburn, ***, in conjunction with Private Eddy Jones and Private John Lee, did, at or near Soissons, France, on or about 21 April 1946 feloniously take, steal and drive away a 3/4 ton truck, value of about seven hundred fifty dollars ($750.00), the property of the United States furnished and intended for the military service thereof.

<u>Lee</u>

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

Specification 1: In that Private John Lee, Camp Pittsburgh Stockade, United States Forces, European Theater, did, in conjunction with other persons and Private Gomer C. Blackburn, at Paris, France, on or about 1 February 1946 by force and violence and by putting them in fear feloniously take, steal and carry away from the persons of Madeleine Chabrol, Guy Bourdet, and Albert Renard, five thousand five hundred (5,500) francs, French currency, property of the said Madeleine Chabrol, three thousand four hundred (3,400)

francs French currency and one (1) wrist watch, value of about two thousand (2,000) francs, French currency, the property of the said Guy Bourdet, twenty four hundred (2400) francs, French currency, property of the said Albert Renard, of the total value of more than fifty dollars ($50.00).

Specification 2: In that Private John Lee, ***, did, in conjunction with other persons, at Paris, France, on or about 1 February 1946 by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Marguerite Duard and Achille Bianche, forty thousand (40,000) francs French currency and one (1) gold ring, property of the said Marguerite Duard, sixteen thousand (16,000) francs, French currency and one (1) Omega wrist watch, property of the said Achille Bianche, of the total value of more than fifty dollars ($50.00).

Specification 3: (Finding of not guilty).

Specification 4: (Nolle Prosequi).

Specification 5: In that Private John Lee, ***, did, at Paris, France on or about 28 March 1946 with intent to do him bodily harm, commit an assault upon Private Robert J. Simmons a guard acting in line of duty, by willfully and feloniously attempting to strike the said Private Robert J. Simmons with a dangerous weapon, to wit, a club.

Specification 6: (Nolle Prosequi).

Additional Charges:

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

Specification: In that Private John Lee, ***, having been duly placed in confinement in the said Paris Detention Barracks on or about 8 March 1946 did at the said Paris Detention Barracks on or about 13 April 1946 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private John Lee, ***, in conjunction with Private Eddy Jones and Private Gomer C. Blackburn, did, at or near Mons, Belgium on or about 21 April 1946 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private First Class Thomas Cestoro, a Military Policeman acting in line of duty, one (1) pistol with holster, MP helmet, brassard and white belt Government issue, property of the said Private First Class Thomas Cestoro, total value of about fifty dollars ($50.00).

Specification 2: In that Private John Lee, ***, in conjunction with Private Eddy Jones and Private Gomer C. Blackburn, did, at or near Soissons, France, on or about 21 April 1946, by force and violence and by putting them in fear, feloniously take, steal and carry away from the person of Technician Fourth Grade Sidney C. Gleber, fifteen thousand (15,000) francs, French currency, and two (2) wrist watches, property of the said Technician Fourth Grade Sidney C. Gleber, total value of more than fifty dollars ($50.00).

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

Specification: In that Private John Lee, ***, in conjunction with Private Eddy Jones and Private Gomer C. Blackburn, did, at or near Soissons, France on or about 21 April 1946, feloniously take, steal and drive away a 3/4 ton truck, value of about seven hundred fifty dollars ($750.00), property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to all charges and specifications. No evidence of previous convictions was introduced. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for thirty-five years. As to the accused Blackburn the reviewing authority approved the finding of guilty of Specification 3 of Charge I after substituting the words and figures "one thousand five hundred (1,500)" for the words and figures "five thousand five hundred (5,500)" and the words and figures "three thousand (3,000)" for the words and figures "three thousand four hundred (3,400)," and the finding of guilty of the specification of Additional Charge III after substituting the words "some value" for the words and figures "about seven hundred fifty dollars ($750.00)". As to the accused Lee he approved the finding of guilty of Specification 1 of Charge I after substituting the words and figures "one thousand five hundred (1,500)" for the words and figures "five thousand five hundred (5,500)" and the words and figures "three thousand (3,000)" for the words and figures "three thousand four hundred (3,400)", and the finding of guilty of the specification of Additional Charge III after substituting the words "some value" for the words and figures "about seven hundred fifty dollars ($750.00)". He approved the sentence as to each accused, designated the U. S. 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.

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 sentences. Confinement in a penitentiary is authorized upon a conviction of robbery in violation of Article of War 93.

Robert E. Gilbert, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. de Kergat, Judge Advocate

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

JAGK - CM 318130

18 APR 1947

UNITED STATES v. First Lieutenant CHARLES F. SCOTT (0-1300719), Infantry.	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at Camp Kilmer, New Jersey, 24 October 1946. Dismissal, total forfeitures and confinement for two (2) years. United States Disciplinary Barracks.

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 Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant Charles F. Scott, Infantry, then in 9223 Technical Service Unit-Transportation Corps, Embarkee Transient Detachment 1C, Camp Kilmer, New Jersey, now in 9232 Technical Service Unit-Transportation Corps, Embarkee Transient Detachment 1A, Camp Kilmer, New Jersey, did, while en route from Fort Devens, Massachusetts to Camp Kilmer, New Jersey, on or about 6 May 1946 desert the service of the United States and did remain absent in desertion until he surrendered himself at Camp Kilmer, New Jersey, on or about 26 September 1946.

He pleaded guilty to the Specification, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty, and not guilty to the charge but guilty of a violation of Article of War 61. He was found guilty of the Charge and specification. No evidence of previous convictions was submitted. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence but reduced the period of confinement to two years, designated the Branch, United

States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 48.

3. By the provisions of paragraph 98, S.O. 14, Headquarters Western Base Section, Theater Service Forces, APO 513, dated 28 January 1946, the accused was directed to return to the United States for further temporary duty to Reception Station No. 1, Fort Devens, Massachusetts, for a period of 45 days rest and recuperation at his home, 219 Dewey Street, Bennington, Vermont. The orders provided that "officers and EM have accepted the privilege of return to the US with the definite understanding that they will return to the same overseas command upon completion of their temporary duty in the US". (R 8; Pros. Ex. 1). Paragraph 20, S.O. 101, Army Service Forces, First Service Command, Reception Station #1, Ft. Devens, Mass., dated 16 April 1946, provided that the accused, having reported to "this" reception station, would proceed on or about 16 April 1946 to Camp Kilmer, New Jersey (Embarkee Transient Detachment 1-C, Bldg. 303, Attn: Adj) reporting thereat not later than 17 April 1946 for return to proper overseas unit (R 8; Pros. Ex. 2). On 17 April 1946, the accused was relieved from duty with Reception Station No. 1, SCU 1160 (Casual), Ft. Devens, Massachusetts, and transferred to Camp Kilmer, New Jersey, pursuant to the last mentioned special order (R 11; Pros. Ex. 3). On 25 April 1946, the accused sent a telegram from his home at Bennington, Vermont, to the Commanding Officer, Camp Kilmer, New Jersey, requesting that he be granted emergency leave due to the fact that his wife had been injured in an automobile accident. On the following day, 26 April, by telegram signed F. C. Irving, Capt., T.C., accused was notified that emergency leave of 10 days had been granted requiring him to report at Camp Kilmer not later than 6 May 1946. (R. 10). Accused did not report as ordered, but remained absent without authority until 25 September 1946 when he returned to duty at Camp Kilmer, New Jersey (R 10-12; Pros. Ex. 4).

It was stipulated that if Major Walter A. Laurence, the investigating officer, were present he would testify that in the course of his investigation he interviewed the accused, advising him of his rights under Article of War 24, and that accused stated to him that his wife was in an automobile accident just prior to the time that he was to report for duty at Camp Kilmer, New Jersey, 17 April 1946, that he received an extension of his leave until 6 May 1946 but did not report back because he was concerned about the health of his mother who was not expected to "live out the year". Accused stated that he realized that he was AWOL but that he was performing duties of a personal family nature which could be performed by him better than any other member of the family and thus relieve his mother of mental anguish and nervous strain. Accused stated further that he was in Bennington, Vermont, during

the entire time from 6 May 1946 to 25 September 1946 and that he wore his uniform at all times during this period (R 13, 14).

4. For the defense.

The following stipulations offered by the defense were received in evidence:

(a) That if Mr. Alan J. Woodward were present he would state that he saw the accused on three occasions in September 1946; that accused was dressed in full Army uniform, talked of military life and stated that he intended to make it his career (R 15).

(b) That if Mrs. Charles Scott were present she would state that she knew that after her husband's return from overseas in February he had a 45-day leave; that at the end of this leave he reported to Fort Devens after which he returned to Bennington; that a few days after his return she had an automobile accident and that because of her condition he was given a 10-day extension and that he did not leave after the extension was "up" but remained in Bennington with her, wearing the uniform until he left on 25 September 1946 to report to Camp Kilmer (R 16).

(c) That if Dr. Frank J. Hurley M.D. were present he would state that on 16 April 1946, Mrs. Charles F. Scott, wife of the accused, was injured in an automobile accident and that he treated her for resultant back injuries (R 17).

The accused, after having his rights explained to him by the law member, elected to be sworn and testify in his behalf. He stated that he had been in the Army seven years, including two years in the National Guard. He was an enlisted man until 20 November 1942 when he was commissioned a second lieutenant, Infantry. He volunteered for combat and on 8 August 1944 arrived in France as a platoon leader in Company A, 134th Infantry, 35th Division. He was later assigned to a military labor company as company commander. He had been awarded the combat infantry badge, five battle stars and the purple heart. Accused averred that his mother suffered from a malignant condition of hypertension. He has two brothers and sisters, one brother having recently returned from service with the Fifth Army in Austria. The telegram extending his "leave" to 6 May 1946 stated that "copies of orders will be airmailed". He expected orders directing his return to Camp Kilmer but did not receive copies of such orders and remained with his family (R 21-24). The court questioned accused concerning his interpretation of the telegram extending a ten-day emergency leave. This telegram was not introduced in evidence. The following questions and the answers thereto are revealing in this regard:

"Q. Well, that's right; but all those orders would be to extend your reporting date from whatever it was originally when you left Fort Devens until the expiration of this emergency leave which was 6 May 1946. They wouldn't be any other kind, would they?

"A. Well, I thought that they would airmail orders for me to report.

"Q. I know. But when you didn't receive your orders in a reasonable length of time, if you were going to wait for them, didn't you think it was incumbent upon you to wire for additional instructions?

"A. Yes, sir, I should have wired.

"Q. See, whether those orders reached you or not you were required under the language of the telegram to be here on the 6th of May.

"A. Yes, sir; that wasn't the principle of the thing. What I mean, if the orders had come, due to the circumstances I probably would have done the same thing.

"Q. So the orders as such didn't mean anything.

"A. No, sir."

The accused stated further that he had applied for a commission in the Regular Army and desired to stay in the Army. He realized that his conduct would jeopardize his chances for a regular army commission (R 28).

5. Inasmuch as the accused pleaded guilty of AWOL for the period alleged, and testified concerning such unauthorized absence, the only legal question requiring consideration is whether, under all the proven facts and circumstances, the court could reasonably presume that his unauthorized absence was, at the inception of, or at some time during the absence, accompanied by an intention not to return to the military service (Par. 130, p. 142, MCM, 1928). This is the shibboleth of desertion. The accused was admittedly absent without authority four months and 19 days. Unauthorized absences of much less duration have repeatedly been held to justify the inference of an intent not to return (See CM 211585, Gerber, 10 BR 107). On the other hand, it is quite universally held that AWOL for a relatively short period does not establish desertion (CM 213817, Fairchild, 10 BR 287, 289-290, citing numerous cases

involving periods of AWOL varying from 11 to 36 days).

In determining the question of accused's intent, the members of the court-martial, under their oath to administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the Government of the armies of the United States, were enjoined by the following provision of the Manual for Courts-Martial, 1928:

> "Intent.— 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." (Par. 130a, MCM 1928).

It is conceded that a plea of guilty of absence without leave does not justify the inference of an intent to desert. It is also conceded that in this case there is evidence that accused wore his uniform while absent, that in September he stated to a friend that he intended to remain in the Army, that his wife was seriously injured during his authorized stay at home and that his mother was very ill. All of these conditions were thoroughly considered by the court, however, it found that such circumstances, or all of them, constituted "no satisfactory explanation" of his prolonged unauthorized absence. There was substantial evidence upon which the court could base its finding. Admitting that the evidence supporting the findings of guilty must be not only consistent with guilt but inconsistent with innocence, the Board of Review is of the opinion that the findings of guilty of desertion are sufficiently sustained by the evidence and should not be disturbed on appellate review.

6. War Department records show that the accused is 25 years of age and married. He graduated from high school in 1939, was employed as a football coach and YMCA instructor prior to his induction in the Army on 24 February 1941. He was promoted to sergeant on or about 11 July 1941. Accused was commissioned a second lieutenant in the Army of the United States at the Infantry School, Fort Benning, Georgia, on 20 November 1942 and promoted to first lieutenant on 27 November 1944. Three efficiency reports covering the year 1945 show an average numerical rating of 4.3 or excellent.

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

rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 58.

Chester D. Silvers, Judge Advocate

(Sick in Quarters), Judge Advocate

Gilbert E. Jeffrey, Judge Advocate

JAGK - CM 318130 1st Ind

WD, JAGO, Washington 25, D. C. MAY 2 1947

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 Charles F. Scott (0-1300719), Infantry.

2. Upon trial by general court-martial this officer was found guilty of desertion for the period 6 May 1946 to 26 September 1946. No evidence of previous convictions was submitted. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence but reduced the period of confinement to two years, designated the Branch United States Disciplinary Barracks, New Cumberland, Maryland, as the place of confinement and forwarded the record of trial pursuant to 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 of the sentence.

The evidence shows that on 28 January 1946 the accused was placed on temporary duty by S.O. No. 14, WEB TSF APO No. 513, and directed to return to a reception station in the United States for 45 days recuperation and rest at his home in Bennington, Vermont. The order provided that officers and enlisted men listed thereon had agreed, upon expiration of such temporary duty, to return to their proper overseas station. The accused proceeded to his home and at the expiration of his 45 days temporary duty he reported to Reception Station No. 1, Fort Devens, Massachusetts, where orders were issued directing that he proceed on or about 16 April 1946 to Camp Kilmer, New Jersey (Embarkee Transient Detachment) reporting thereat not later than 17 April 1946 for proper return to his overseas unit. The accused did not comply with this order but returned to his home and wired for an emergency leave stating that his wife had been seriously injured in an automobile accident. A telegram was sent to him by the authorities at Camp Kilmer granting a ten days emergency leave but directing that he report at such station not later than 6 May 1946. The telegram also stated that orders would follow by air mail.

The accused remained at his home until 26 September 1946 when he voluntarily returned to duty at Camp Kilmer, after having been absent without leave for a period of four months and 19 days. He testified at the trial

that the reason he absented himself without authority for such period due to the injuries sustained by his wife and the serious illness of his mother who was suffering from chronic hypertension. No deaths occurred in his family. The accused pleaded guilty to absence without leave but denied an intention to desert the service. He averred that he wore his uniform for the entire period of his unauthorized absence, made application for a regular Army commission and believed that further orders, which he did not receive, would be mailed to him. He admitted, however, that had he received further orders his conduct would probably have been the same.

4. At my request the Commanding General, New York Port of Embarkation, on 23 December 1946 appointed a Board of Medical Officers under the provisions of AR 600-500 and AR 615-361 to determine the mental condition of accused. On 15 January 1947 the Board reported that in the unanimous opinion of the members thereof the accused was so far free from mental disease at the time of the offense as to be able concerning the offense charged to distinguish right from wrong and to adhere to the right, and that at the time of the trial he understood the nature of the proceedings and was able to conduct or cooperate in his defense.

The accused officer entered combat in Normandy on or about 8 August 1944 as platoon leader with the 35th Infantry Division. He has been awarded the Purple Heart for a wound in the leg, the Combat Infantryman's Badge and five campaign stars. It appears that a considerable portion of his overseas duty has been spent as an officer in labor supervision companies. His efficiency reports average excellent. Accused comes from a highly respected family and enjoys a good reputation in his community.

It is my view that the future of this young officer can be safeguarded and the requirements of military justice satisfied by the extension of clemency in this case. I recommend that the sentence be confirmed but that the confinement be remitted and that the forfeitures be commuted to a reprimand and forfeiture of $100 per month of accused's pay per month for six months and that the dismissal be suspended during good behavior.

5. Consideration has been given to communications in behalf of the accused from Honorable George D. Aiken, U.S. Senator from Vermont; Mr. A. Luke Crispe, an attorney of Brattleboro, Vermont; Mr. John P. Proud and Mrs. John C. Scott, Sr., of Bennington, Vermont. Consideration has also been given to communications forwarded by Honorable George D. Aiken in his letter to the Secretary of War dated 15 March 1947, from the following: Mr. John H. Haman, Bennington, Vermont; Mr. Ward L. Lyons, Postmaster, Bennington, Vermont; Reverend Norman P. Dare, Rector Christ Church, Guilford, Connecticut; Mr. Francis J. Cone, Chief of Police, Bennington, Vermont; Mr. Francis E. Morrissey, Bennington, Vermont; Mr. Edward J. Minogue, Bennington, Vermont; Mr. Wayland H. Loyd, Bennington, Vermont; Mr. Leonard W. Morrison, Bennington, Vermont; Mr. Verder Elwell, South Shaftsbury, Vermont; Mr. Wallace E. Sabotkee, Rutland, Vermont; Mrs. Verder Elwell, South Shaftsbury,

Vermont, and Mr. James J. Scullary, Boston, Massachusetts. On 11 April 1947, Mr. James S. Holden, Esq., of Bennington, Vermont, appeared before the Board of Review on behalf of accused, made oral argument and filed brief, all of which have been considered.

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

CM 318130

6 Incls
1. Record of trial
2. Form of action
3. Ltr fr Sen Aiken to SW dtd 15 Mar 47, w/incls
4. Ltr fr Mr. Crispe
5. Ltr fr Mr. Jno P Proud
6. Ltr fr Mrs. Jno C Scott, Sr.

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 175, 20 May 1947).

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

JAGH - CM 318134

6 MAR 1947

UNITED STATES v. Second Lieutenant GEORGE P. MOLLOY (0-1326420), Infantry	HEADQUARTERS COMMAND UNITED STATES FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 18 September 1946. Dismissal and total forfeitures

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

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

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

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

Specification 1: In that Second Lieutenant George P. Molloy, Headquarters Company, First Battalion, 508th. Parachute Infantry Regiment was, at or near Frankfurt-am-Main, Germany, on or about 1 August 1946, drunk and disorderly in uniform in a public place, to wit, a bus transporting civilians.

Specification 2: (Finding of not guilty).

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

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

Specification 2: In that Second Lieutenant George P. Molloy, Headquarters Company, First Battalion, 508th. Parachute Infantry Regiment did, at or near, Frankfurt-am-Main, Germany, on or about 1 August 1946, drunk and disorderly in uniform in a public place, to wit, a bus transporting civilians.

Specification 3: (Finding of not guilty).

He pleaded not guilty to both Charges and all Specifications thereunder, and was found guilty of Specification 1 of Charge I, and Charge I, Specifications 1 and 2 of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertinent to the approved findings of guilty is summarized as follows:

At about 0045 hours, 1 August 1946 (R 15) the accused and First Lieutenant James W. Russell, 508th Parachute Infantry left the Junior Officers Club, at Frankfurt-am-Main and rode to downtown Frankfurt on a bus which was used for the purpose of transporting civilian employees of the Junior Officers Club and a civilian club to the residence areas of such civilian employees (R 9, 36).

Rose Feigenspan, a German waitress employed at the Junior Officers Club, Frankfurt-am-Main, testified that at about 0045, 1 August 1946, she entered the bus at the Junior Officers Club on her way home. She identified the accused as one of the two officers who entered the bus (R 9). All other passengers on the bus were civilians. The witness stated that as female civilian employees entered the bus the accused, who was standing near the door, put his hand under their skirts and also reached under their coats and touched their breasts (R 10). In her opinion the accused was intoxicated (R 10), by which she means drunk (R 16). The witness further testified that some of the girls who were touched by the accused reacted by screaming and making angry remarks about his conduct (R 18).

Engelbert Luy, a German bartender at the Junior Officers Club, testified that he entered the bus in question shortly after midnight on 1 August 1946. He stated that two officers, neither of whom he could identify as it was too dark (R 23), entered the bus at that time (R 19). The smaller of the two officers touched the girls on their breasts as they entered the bus and used vulgar language (R 20). The girls reacted differently to this conduct; some cried, but some sat down calmly (R 20).

Lieutenant Russell was three or four inches taller than the accused (R 8).

Heinrich Pauly, a German piano player at the Junior Officers Club, another passenger on the bus in question, testified that two officers were on the bus but the witness was not able to identify them because of the darkness. As he entered the bus he heard the officers utter vulgar words "like shit and such form" (R 24).

Elfriede Schalk, a German civilian waitress at the Junior Officers Club, testified that she was a passenger on the bus in question. She corroborated the preceding testimony that two officers boarded the bus. She identified the accused as the shorter of the two officer and testified that he put his hand under the skirts of the girls as they boarded the bus and placed his hand on their breasts (R 28). The accused put his hand under the witness's skirt and touched her as she left the bus (R 31). The two officers were cursing on the bus, and the witness stated that some of the words used were "Son of a bitch, and goddam German, common german people" (R 29). In the opinion of the witness both officers were drunk, because "sober officers would not behave that way", but the witness stated that she could not smell liquor on them because "When I turned around I was so excited that I did not find any time to notice any little details like smelling, besides, we were working in the Club the whole day and we smell the liquor all day long, and we are rather used to this smell" (R 31).

Another waitress, Else Hildebrand, identified the accused as being one of the two officers on the bus, and substantially corroborated the testimony of the preceding witnesses (R 32-34).

4. The testimony for the defense is summarized as follows:

Renata Schnieder testified that she is a waitress and resides at Frankfurt-am-Main, Germany (R 36). She rode on the same bus mentioned and saw the two officers on it but did not see or hear either of them commit any of the acts related by the other witnesses, except that one of the two officers did put his hand under her dress as she entered the bus (R 37).

First Lieutenant Francis T. Hill of accused's organization testified that he has known the accused since their training at Parachute School (Date not known), went to the Pacific Theater with accused in May 1945 and served through one campaign with him (R 39), and that he has served with accused since. He has never known accused to be in trouble before and rates him "to be highly expert" (R 40).

Lieutenant Colonel Jack T. Shannon of accused's organization testified that he has known accused since about May 1946. During most of that time accused had served as an officer of his battalion, where he performed his duties in an excellent manner, and was rated by the witness as an excellent officer (R 41).

Having been properly advised of his rights as a witness, the accused elected to remain silent (R 42).

5. Specification 1, Charge I and Specification 2, Charge II aver that the accused was drunk and disorderly in uniform in a public place in violation of Articles of War 95 and 96. Being grossly drunk and conspicuously disorderly in a public place is a violation of Article of War 95 (MCM, 1928, par 151, p 186), and being drunk and disorderly while in uniform in a public place is a violation of Article of War 96 (MCM, par 152a and b; CM 273696, Lewis, 47 BR 25).

The testimony for the prosecution sufficiently establishes that the accused was drunk and conspicuously disorderly in a public place (a bus used for the transportation of German civilians). It may be inferred from the testimony of the civilian witnesses that the accused was in uniform since he was recognized as an officer.

While it may be said that the evidence does not show that he was grossly drunk, his conduct, in taking indecent liberties with defenseless German women, was a disgraceful abuse of his position of power as an officer of an army of occupation. His conduct in repeatedly putting his hands under the skirts of female passengers on the bus and touching their breasts constitutes a series of indecent assaults. Such behavior and his use of vulgar language in the presence of women clearly constitutes conduct unbecoming an officer and a gentleman, cognizable under Article of War 95 as well as service discrediting conduct in violation of Article of War 96. (CM 197011, Kearney, 3 BR 67; CM 226357, Betette, 15 BR 92; CM 230222, Daly, 17 BR 334; CM 234558, Field, 21 BR 51).

The findings of guilty of identical specification laid under both Articles of War 95 and 96 are supported by the evidence and are not improper as a multiplicity of charges or as constituting double jeopardy (McRae v Henkes, 273 Fed 108 cert. den. 258 U.S. 624, cited in MCM 1928, p 224; CM 230222, Daly op cit; CM 248104, Porter, 31 BR 137).

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge I, Specification 2, Charge II and of the Charges.

6. The accused is 27 years of age, married, and a high school graduate. War Department records show his civilian occupation to be that of an assistant foreman in a soap manufacturing concern. He was inducted on 3 January 1941, and assigned to an Antiaircraft Artillery unit. He advanced to the grade of first sergeant as an enlisted man. On 29 August 1944, he was graduated from the Infantry Officers Candidate School and commissioned as a second lieutenant, Army of the United States. He successfully completed the Parachute course at the Parachute School and was assigned as an

instructor at that school. He left the United States on 8 July 1945 and arrived in Manila, Philippine Islands on 2 August 1945. He was returned to the United States and was later ordered to the European Theater where he was assigned to the 508th Parachute Infantry Regiment.

7. Attached to the record of trial is a recommendation for clemency signed by five members of the court wherein it is recommended that the sentence be commuted to a reprimand, suspension from promotion for ten years, and a $1000 fine. An assistant defense counsel recommended that the sentence be commuted to a forfeiture of $500 "on the grounds that the accused has an excellent record as a combat soldier and officer."

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and dismissal and total forfeitures are authorized upon a conviction of a violation of Article of War 96.

A. Hartenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 318134 1st Ind

WD, JAGO, Washington 25, D. C. MAR 1 , 1947

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 George P. Molloy (O-1326420), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place in Frankfurt-am-Main, Germany, in violation of Articles of War 95 and 96 (Chg I, Spec. 1; Chg II, Spec. 2) and guilty of assault and battery upon a German civilian in violation of Article of War 96 (Chg II, Spec. 1). No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specification 1, Charge II, involving the assault and battery, approved the sentence and forwarded the record 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.

At about 0045 on 1 August 1946 the accused and another officer boarded a bus which was used to transport German civilian employees of the Junior Officers Club, Frankfurt-am-Main, Germany, to their residence areas after the closing hour of the club. Several witnesses stated that the accused appeared to be drunk. He repeatedly reached under the skirts of the female employees as they boarded the bus or dismounted therefrom and also attempted to touch their breasts. On several occasions he was heard to use vulgar language in the presence of the German women passengers.

4. Attached to the record of trial is a recommendation for clemency signed by five members of the court wherein it is recommended that the sentence be commuted to a reprimand, suspension from promotion for ten years, and a $1000 fine. An assistant defense counsel recommended that the sentence be commuted to a forfeiture of $500 "on the grounds that the accused has an excellent record as a combat soldier and officer."

5. In view of accused's previous creditable service and all the circumstances of the case, I recommend that the sentence be confirmed, but commuted to dismissal and a reprimand and that the sentence as thus commuted

be carried into execution but that the portion thereof adjudging dismissal be suspended during good behavior.

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

Cm 318134

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. R/T
2. Form of Action

(GCMO. 118, 18 March 1947)

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

JAGH - CM 318149

14 FEB 1947

UNITED STATES	9TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Augsburg, Germany, 9 July 1946. Dishonorable discharge and confinement for life. The United States Penitentiary
Private CECIL M. KAVANAUGH (35870123), 4016th Quartermaster Truck Company	

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Cecil M. Kavanaugh, 4016th Quartermaster Trucking Company, did, at Munich, Germany, on or about 30 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private David L. Lawton, a human being by shooting him with a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of 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 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 withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Ninth Infantry Division 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).

D. Lottenstein, Judge Advocate

William A. Golf, Judge Advocate

Philip L. Smith, Judge Advocate

W. D., J. A. G. O. Form No. 84
(Revised July 1, 1940)

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Board of Review

CM 318149

17 FEB 1947

UNITED STATES v. Private CECIL M. KAVANAUGH (35870123), 4016th Quartermaster Truck Company	9TH INFANTRY DIVISION Trial by G.C.M., convened at Augsburg, Germany, 9 July 1946. Dishonorable discharge and confinement for life. The United States Penitentiary

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HOLDING by the BOARD OF REVIEW

HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence .

H. Hottenstein, Judge Advocate.
Weldemar A. Solf, Judge Advocate.
Philip H. Smith, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. MAR 10 1947 To the Adjutant General, Washington 25, D. C.

1. In the case of Private Cecil M. Kavanaugh (35870123), 4016th Quartermaster Truck Company,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, you now have authority to order the execution of the sentence.

2. The murder of which accused was found guilty was committed while he was drunk to some extent and resulted from a dispute at a bar in the course of which a weapon was displayed and then placed on the bar by one of the soldiers involved. The shot was apparently fired at a soldier other than the one killed. In view of the circumstances it is recommended that the term of confinement be reduced to fifteen (15) years.

3. This office has been advised that the 9th Infantry Division has been inactivated, in view of which it is recommended that War Department General Court-Martial Orders be published in this case. A draft of such general court-martial orders is inclosed.

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

(CM 318149).

2 Incls
1. Record of trial
2. Draft of GCMO

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO, 85, 13 March 1947).

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

JAGH - CM 318167

27 FEB 1947

UNITED STATES	)	UNITED STATES FORCES IN AUSTRIA
v.	)	Trial by G.C.M. convened at Vienna, Austria, 3 October 1946. Dismissal
Second Lieutenant SAMUEL W. GREEN, JR. (0-1339353), Infantry	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 Samuel W Green, Jr., Headquarters and Headquarters Detachment, Special Troops, United States Forces, in Austria, did, at Vienna, Austria, on or about 26 June 1946, wrongfully procure Post Exchange rations for the week 24-30 June 1946, by fraudulently presenting as evidence of his entitlement thereto a Post Exchange Ration Card other than, and in addition to the one regularly issued to him.

Specification 2: In that Second Lieutenant Samuel W. Green, Jr., Headquarters and Headquarters Detachment, Special Troops, United States Forces in Austria, did, at Vienna, Austria, on or about 10 July 1946, wrongfully procure Post Exchange rations for the weeks 1-7 July 1946 and 8-14 July 1946, by fraudulently presenting as evidence of his entitlement thereto a Post Exchange Ration Card other than, and in addition to the one regularly issued to him.

Specification 3: In that Second Lieutenant Samuel W. Green, Jr., Headquarters and Headquarters Detachment, Special Troops, United States Forces in Austria, did, at Vienna, Austria, on or about 16 July 1946, with intent to deceive Colonel C. Coburn Smith, Jr., officially state to the said Colonel C. Coburn Smith, Jr., that he had only used an unauthorized Post Exchange Ration Card to obtain Post Exchange rations on one occasion, which statement was known by the said Second Lieutenant Samuel W. Green, Jr. to be untrue in that he had used said unauthorized Post Exchange ration card to obtain Post Exchange rations on not less than two occasions.

Specification 4: In that Second Lieutenant Samuel W. Green, Jr., Headquarters and Headquarters Detachment, Special Troops, United States Forces in Austria, did, at Vienna, Austria, on or about 16 July 1946, with intent to deceive Colonel Benjamin B. Lattimor, officially state to the said Colonel Benjamin B. Lattimor, that he had not used an unauthorized Post Exchange ration card to obtain Post Exchange rations on any occasion and denied knowledge of a Post Exchange Ration Card No. 018427, which statement was known by the said Second Lieutenant Samuel W. Green, Jr. to be untrue in that he had used said unauthorized Post Exchange ration card to obtain Post Exchange rations on not less than two occasions.

He pleaded not guilty to the Charge and its Specifications and was found guilty of the Charge, guilty of Specifications 1, 2, and 3, and guilty of Specification 4, except the words "he had not used an unauthorized Post Exchange ration card to obtain Post Exchange rations on any occasion and denied," substituting therefor the words "he had no" of the excepted words not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

It was stipulated by the prosecution, the defense, and the accused that, pursuant to existing War Department directives, each individual authorized to purchase at Post Exchanges was entitled to one ration allowance per week, and that during the weeks of 24-30 June 1946, 1-7 July 1946, and 8-14 July 1946, that ration allowance included twelve packages of cigarettes. It was also stipulated that the "Army Exchange Ration Card, European Theater" was the recognized and established method of controlling sale of rationed items at Army Post Exchanges in that theater (Pros Ex 1).

Ration book number 017415 was issued to accused on 1 June 1946 (R 9; Pros Exs 2, 3), covering the period 3 June to 28 July 1946 (R 10). No other book was issued to the accused for that period (R 10). On 26 June 1946 and 10 July 1946, the accused presented ration book number 018427 to the sales clerk in the Officers' Post Exchange (R 12). On 26 June, he was issued on that book one week's ration of cigarettes, and on 10 July, he was issued two weekly rations of cigarettes (R 14). The sales clerk made a notation of the card number and the rations issued on those occasions, because it appeared to her that he was making purchases more than once a week (R 15).

Colonel Lattimor testified that, on 16 July 1946, he called the accused to his office on an investigation he was making (R 16), warned the accused of his rights, and asked him whether he had any knowledge of ration card number 017415 or 018427. The accused replied that card number 017415 was his, but that he had no knowledge of number 018427 (R 17). Colonel Lattimor received the impression that the accused claimed he had not used any card other than the one issued to him, but could not recall the accused saying that (R 17-18). Colonel Lattimor further stated that he could not recall the number of his own ration card, that he did not observe any marked degree of anxiety in the accused at the time of the investigation and that he did not think the accused had looked at his ration card before answering the question, but could not remember (R 18-20).

Colonel Smith testified that, in early August, he called accused into his office to find out about the alleged irregularity in accused's ration card, warned him of his rights, and the accused admitted to him that he had obtained a blank ration card and had used it. He asked accused how many times the unauthorized card had been used and accused stated he had used it once and then realizing he had been foolish in using it, had destroyed it (R 21). He testified that accused had not done anything previous to that time to bring discredit on himself as an officer, and that he thought very highly of the accused, who was always present when he should have been and seemed conscientious in his work. Accused did not seem agitated or confused at the time of the questioning (R 22). Accused said he had taken the extra card from a place where unused cards were kept (R 23).

4. For the defense:

The company commander, in whose organization accused served from 1 August 1946 to the date of the trial, testified that the accused performed his duties with the troops with excellent results, and his character had been excellent. He gave the age of the accused as 21 (R 25).

The accused, having been apprised of his rights to testify, elected to remain silent.

5. Specifications 1 and 2 (Use of an unauthorized ration card). The gist of the offense alleged in these Specifications is disobedience of standing orders. It was stipulated that each individual authorized to purchase at Army Post Exchanges was entitled, under existing directives, to one ration allowance per week, and that the ration card represented the authorized and established means of controlling such purchases. It was satisfactorily proved, by the testimony of the clerk responsible for issuing ration cards, that card number 017415 was issued to the accused and covered the period during which the purchases alleged in Specifications 1 and 2 were made. The sales clerk in the Post Exchange testified that, on the dates alleged in the Specifications, accused made purchases on ration card number 018427.

The control of scarce items of Post Exchange supplies is vitally necessary to troops in the field. Not only is it essential to good morale that each individual be accorded equal opportunity to acquire those items, but it is a matter of common knowledge that such supplies have been the basis of much black market activity in those countries, such as Austria, where the instant case arose, whose citizens have far less opportunity to acquire those supplies legally than do the holders of Post Exchange ration cards. The issuance of the orders stipulated in the record was, therefore, well within the province of the theater and local commanders. While it was not shown that the accused had ever seen those orders, the acceptance by him of his ration card is indicative of his knowledge thereof. It is therefore the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2.

Specification 3 (False official statement to Colonel Smith). In order to support the findings of guilty of this Specification, it must appear from the record that the accused made the false statement, knowing it was false, and with the intent to deceive the person to whom it was made (CM 262366, Campbell, 41 BR 58). That the statement was made and was false is uncontroverted. The proof that accused knew it was false, and that he intended thereby to deceive Colonel Smith is, however, far from satisfactory. True, the evidence shows that accused presented the unauthorized card on two separate occasions, however, an examination of the card issued to him (Pros Ex 3), reveals that no cigarettes were drawn thereon for the week of 24-30 June. It was during that week that the accused first used the unauthorized card, and his statement that he had used that card only once might conceivably indicate that he believed he had presented his proper card on 26 June. This, of course, is mere conjecture, and would not in itself fatally affect the findings of guilty. However, in his statement to Colonel Smith, the accused admitted having taken the card from the place where unused cards were kept and admitted that he had used it to obtain rations to which he was not entitled. Although he told Colonel Smith he had used the card but once, he had admitted every element of an offense. It does not appear that he was under the impression that its commission on one occasion would have been treated more leniently than the duplicated offense with which he was charged. Nor is there such a variance

in the number of times the offense was committed as would have lead him to believe that if he stated the true facts, he would be treated as a habitual offender. It does not, therefore, appear that there was any motive for deceit, nor any advantage to be gained from it. Under such circumstances, we are of the opinion that the intent to deceive cannot be inferred, and the record of trial is legally insufficient to support the findings of guilty of Specification 3.

Specification 4 (False official statement to Colonel Lattimor). The only statement by accused to which Colonel Lattimor could positively testify was to the effect that the accused had no knowledge of a ration card bearing number 018427. The only proof that such statement was false, and that accused knew it to be such, was the testimony of the sales clerk to the effect that accused presented that card on two occasions. At the same time, accused told Colonel Lattimor that 017415, the other number about which he was asked, was the number of accused's ration card. Colonel Lattimor thought, but could not remember positively, that accused had identified that number without referring to the ration card which bore it. The wording of Colonel Lattimor's question to the accused, "Do you have any knowledge of ration cards number 017415 or 018427?" imposed upon the prosecution the burden of proving, not only that accused had once possessed those cards, but that accused recognized the numbers and, when he answered the question, knew that card number 018427 was the unauthorized card he had once held but had since destroyed. That burden was not met. The card was issued for a period of eight weeks, and it is unlikely that many holders of such cards would know the numbers appearing thereon. It will be noted that Colonel Lattimor did not recall the number of his own card. Since the accused's statement involved only his knowledge of the card in question, and since it was not satisfactorily proved that he possessed the knowledge he denied, it has not been shown that the statement was false, and it is therefore our opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 4.

6. The accused is 21 years of age, single and a high school graduate. He attended the University of Illinois for two years before his induction in the Army in February, 1945. He attended Infantry Officer Candidate School, graduating on 1 November 1945, on which date he was commissioned a second lieutenant, Army of the United States and entered active duty.

7. The Board of Review has considered the following testimony and communications pertaining to clemency: Captain Guy L. Tucker, 5th Infantry, accused's immediate commanding officer from about 1 August 1946 to the date of trial testified to the excellent performance of duties by accused and to his excellent character. Attached to the record of trial is a letter dated 7 October 1946 from Lieutenant Colonel John C. F. Tillson III, Executive Officer, First Battalion, 5th Infantry, and another letter dated 5 October 1946 from Lieutenant Colonel Harold V. Maixner, S-3 of First Battalion, 5th

Infantry, both addressed to the Commanding General, United States Forces in Austria, in which each officer states that he has known the accused from about 29 July 1946, that he is conscientious and energetic in the performance of his duties and that they rated him in the upper half of the officers assigned to the battalion. Also attached to the record is a letter recommending clemency dated 10 October 1946 from Colonel C. Coburn Smith, Jr., Field Artillery, Commanding Officer, Headquarters Special Troops, United States Forces in Austria to the Commanding General, United States Forces in Austria. Colonel Smith was the accuser in this case.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge and the Charge, legally insufficient to support the findings of guilty of Specifications 3 and 4 of the Charge, legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

D. Lottenstein, Judge Advocate

Wilhelmar A. Self, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 318167 1st Ind

WD, JAGO, Washington, D. C. MAR 21 1947

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 Samuel W. Green, Jr. (O-1339353), Infantry.

2. Upon trial by general court-martial, this officer was found guilty of "fraudulently" using an unauthorized ration card to obtain Post Exchange rations to which he was not entitled on two occasions, and of making two false official statements, all 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.

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 of the Charge and Specifications 1 and 2 alleging the fraudulent use of a ration card, legally insufficient to support the findings of guilty of Specifications 3 and 4, alleging false official statements, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

The established method of controlling the sale of scarce items of Post Exchange supplies in Austria was by ration cards. Such a card was issued to the accused. He, however, obtained an extra, unauthorized card, and on two occasions used that card to purchase cigarettes at the post exchange. An Inspector General, investigating the matter, asked the accused if he had any knowledge of ration card number 017415 or 018427. He replied that card number 017415 was his but that he had no knowledge of number 018427 (the unauthorized card used by the accused). Later when his commanding officer questioned him about the alleged irregularity in accused's ration card, after proper warning, he stated that he had obtained the unauthorized card, but that after using it once he realized he had been foolish and had destroyed it. Deliberate falsity and intent to deceive does not convincingly appear.

While it was alleged in Specifications 1 and 2 of the Charge that accused wrongfully procured Post Exchange rations by "fraudulently" presenting a Post Exchange Ration Card other than, and in addition to, the one

regularly issued to him, it is to be noted that the term "fraudulently" is here used in the sense of "with intent to deceive", and as a result thereof accused was allowed to make an unauthorized purchase, rather than in its usual meaning of "cheating" another. The essence of the offenses lay in the violation of the standing orders regulating the use of the cards.

4. Attached to the record of trial is a letter, signed by the officer who preferred the charges, recommending commutation of the sentence, stating that the short period of service of the accused, most of which was spent in processing camps, may not have been sufficient to inculcate in the accused the absolute honesty required of an officer. He also suggests that the youth of the accused be taken into consideration. Also attached to the record are two letters, one from Lieutenant Colonel John Tillson III, Executive Officer, First Battalion, 5th Infantry, and the other from Lieutenant Colonel Harold V. Maixner, S-3 of First Battalion, 5th Infantry, in which each officer states he has known accused from about 29 July 1946 and that he was conscientious and energetic in the performance of his duties and each rated him in the upper half of officers assigned to the battalion. Accused's immediate commanding officer also testified at the trial to accused's excellent performance of duties and to his excellent character.

5. In view of all the circumstances of the case, the youth and excellent previous record of the accused and the recommendation of his former commanding officer, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of one hundred dollars of his pay per month for a period of three months, and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Rec of Trial
2. Form of Action

(GCMO 117, 31 March 1947).

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

JAGN-CM 318238

U N I T E D S T A T E S v. DAVID RUELAS, a person serving with the Armies of the United States without the territorial jurisdiction of the United States.	))))))))	UNITED STATES FORCES IN AUSTRIA Trial by G.C.M. convened at Vienna, Austria, 23 September 1946. Total forfeitures and confinement for five (5) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

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

Specification 1: In that David Ruelas, a person serving with the Army of the United States without the territorial jurisdiction of the United States, employed by the Economics Division, United States Element Allied Commission, Austria, United States Forces in Austria, did, at Vienna, Austria, on or about 30 July 1946, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the presence of Wilhelm Reichsfeld about 25,000 Schillings, lawful money of Austria, property of the said Wilhelm Reichsfeld value about $2,500.

Specification 2: In that David Ruelas, * * * did, at the French Security Police Station, XV Bezirk, Vienna, Austria, on or about 30 July 1946, with intent to do them bodily harm, assault Lieutenant Aldo Limousen, Noncommissioned Officer Roger Augris, Noncommissioned Officer Emile Huard

and Security Agent Johann Havel by threatening them with a dangerous weapon, to wit, a pistol.

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

Specification: In that David Ruelas, * * * did, in Vienna, Austria, on or about 30 July 1946, knowingly, willfully, and wrongfully, apply to his own use, a truck, one-quarter ton, four by four, of the value in excess of fifty dollars, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that David Ruelas, * * * did, at Vienna, Austria, on or about 30 July 1946, violate Circular Number 10, Headquarters, United States Forces in Austria, dated 12 February 1946, by wrongfully having in his possession an unregistered pistol and ammunition.

Specification 2: In that David Ruelas, * * * having been duly placed in arrest at Vienna, Austria, on or about 30 July 1946, did, at the French Security Police Station, XV Bezirk, on or about 30 July 1946, break said arrest before he was set at liberty by proper authority.

Accused pleaded not guilty to all Charges and Specifications, was found guilty of all Charges and Specifications, and was sentenced to total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications except Specification 1 of Charge I, and to support the sentence. The only question for consideration here is the legal sufficiency of the record of trial to support the finding of guilty of Specification 1 of Charge I, and only evidence pertaining thereto will be summarized.

4. Evidence for the prosecution:

Franz Netzl, an Austrian policeman, received a report that Wilhelm Reichsfeld had 40 kilograms of saccharine in his apartment (R. 18). He did not advise his superiors, and had no authority to personally act officially (R. 21) but agreed with Franz Wudernitz, a civilian, and the accused that the three would go to Reichsfeld's home "where there was a box of saccharine and some money * * * take the saccharine, sell it, and divide the money

equally" (R. 47; Pros. Ex. G). The trio, in a jeep furnished by accused, went to Reichsfeld's apartment where "allegedly * * * saccharine and money" were to be found (Pros. Ex. G), and learned he was away. They searched for and found Reichsfeld, and Netzel, after preliminary conversation with Reichsfeld, identified himself as a policeman and advised him his home was to be searched (R. 11). Accused then displayed a pistol and ordered Reichsfeld into the jeep (R. 11). The party returned to Reichsfeld's apartment and purporting to act under authority of a fictitious search order (R. 23, 35) the three searched it but found no saccharine (R. 11). During the search accused displayed his pistol on several occasions (R. 36). Before the search was completed Reichsfeld produced a suitcase containing 26,000 schillings which he stated was his own money obtained from his bank but was unable to substantiate since his wife had his pass book (R. 27). Netzl thereupon "confiscated" the money, put it in a brief case, and wrote out a receipt which accused signed with a fictitious name. Reichsfeld, believing he was dealing with a bona fide policeman, released the money on the basis of the receipt (R. 36-37; Pros. Ex. G) but insisted on accompanying the trio to the police station where Netzl announced he intended to take the money (R. 12, 38). He gave the money "willingly" (R. 37). All four left the apartment only to be arrested as they were leaving the building (R. 13). When asked as a witness, "What were your true intentions to this money?" Netzl testified, "My first thought was that if the money would belong to us * * * Wudernitz, Ruelas [accused], and myself" (R. 12). The trio, under arrest, were taken to the French commandantura's after being disarmed. Shortly after arrival at that place two pistols were laid on a desk while the arresting officer made a telephone call. Accused "jumped to the table, took the two pistols, and said 'Hands up!'" whereupon he escaped (R. 15-16; Pros. Ex. G).

5. Evidence for the defense:

The accused, having been duly warned of his rights, testified under oath substantially as follows:

Wudernitz approached accused and advised him "an agent" was to search a house for saccharine by authority of a search warrant, and asked him to go along on the raid (R. 53). When he started on the raid accused thought Netzl was a policeman acting with full authority in his official capacity. Netzl gave accused a pistol which he placed in his pocket and which he did not remove or use until after his arrest upon leaving the Reichsfeld home (R. 54, 58-59, 62). In carrying out the raid Netzl, Wudernitz and accused went to the Reichsfeld home, learned of his absence, and searched for and found him. Netzl then showed Reichsfeld his credentials, accused ordered him into the jeep in which the raiding party were traveling, and all returned to Reichsfeld's home. There an unsuccessful search was made for saccharine, during which Reichsfeld produced a suitcase with money in it and said "Here is my money." He voluntarily offered the money to Netzl who "opened the suitcase and

counted the money. He [Netzl] told him he was from the Vienna police. Reichsfeld said he was going to the police station with him. Netzl said all right, he could go with him. So all of us left accompanied by Reichsfeld" (R. 56). Accused at that time believed they were taking the money to the police station because it appeared Reichsfeld "was involved in black marketing" (R. 59). The accused said of his subsequent escape, "I was just excited and quick tempered about it" (R. 60). He denied ever making the assertion, contained in his pre-trial statement (Pros. Ex. G), that the party went to Reichsfeld's for anything other than saccharine (R. 57).

6. The essential elements of robbery are:

> "* * * (a) The larceny of the property (see proof under 149g-Larceny); (b) that such larceny was from the person or in the presence of the person alleged to have been robbed; and (c) that the taking was by force and violence or putting in fear, as alleged" (par. 149f, MCM, 1928).

The essential elements of the lesser included offense of larceny are:

> "* * * (a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value" (par. 149g, MCM, 1928).

The actions of the accused appear clearly in the record of trial. He and his party went to Reichsfeld's home, were shown money by Reichsfeld, its owner, took such money, and carried it away. The manner in which the money was taken, i. e. purportedly as an official seizure assented to as such by the owner, cannot be said to have constituted a robbery, irrespective of the intent of the takers, since the essential elements of force and violence or putting in fear are missing from the transaction. Whether the record is sufficient to sustain a finding of guilty of the lesser included offense of larceny must depend upon such inferences as to the accused's intent as may reasonably be drawn from the facts appearing therein.

During the trial the accused sought to establish that such acts were, so far as he then knew, with full legal authority vested in Netzl, and in furtherance of the detection of Reichsfeld's asserted black market activities. The following facts appear in the record which, if taken

alone, might be said to support such a contention. Netzl was a policeman and, on their face, his actions might well have appeared to be official. The conversation between Netzl and Reichsfeld about the seizure of money by the former was held in German and it does not appear that accused understood that language. Other circumstances shown by the record however, not only tend to negative such a contention but unerringly point to the guilty knowledge and felonious intent of the accused from the inception of the expedition. Before starting on this venture accused knew he was to personally profit in event it was successful, which fact alone would negative any claim that he deemed the contemplated action official in all respects. In executing a receipt for Reichsfeld's money the accused signed a fictitious name in place of his own to such instrument, which can hardly be said to be the act of a man who then believed himself to be doing a lawful and official act in a lawful and official manner. After the arrest of the trio, the accused, instead of explaining his assertedly honest position in the matter, made what amounts to a clear and final declaration of his continued felonious intent by staging his spectacular escape from the office of the French Commandatura.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 1 of Charge I except the words "by force and violence and by putting him in fear", legally sufficient to support the findings of guilty of all other Specifications and Charges and the sentence.

Edward L. Dawson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Edward R Taylor, Judge Advocate.

(186)

JAGN-CM 318238 1st Ind FEB 24 1947
WD, JAGO, Washington 25, D. C.
TO: Commanding General, United States Forces in Austria, APO 777, c/o Postmaster, New York, N. Y.

1. In the case of David Ruelas, a person serving with the Armies of the United States without the territorial jurisdiction of the United States, I concur in the foregoing holding of the Board of Review and for the reasons stated recommend that only so much of the finding of guilty of Specification 1 of Charge I be approved as finds the accused guilty of that Specification excepting the words "by force and violence and by putting him in fear." Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 318238).

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.

APR 24 1947

JAGQ - CM 318258

UNITED STATES v. Privates First Class WALTER L. LAWHON (RA-39435134) and HERBERT C. BAUM (33984915), both of 333d Engineer SS Regiment.	CONTINENTAL BASE SECTION U.S. FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Bad Nauheim, Germany, 12-13 September 1946. Lawhon: Dishonorable discharge and confinement for life. Baum: Dishonorable discharge and confinement for ten (10) years. Lawhon: Penitentiary. Baum: Federal Reformatory.

REVIEW by the BOARD OF REVIEW
STERN, SCHENKEN and PARSONS, 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 at a common trial.

a. The accused Walter L. Lawhon was tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class Walter L. Lawhon, Company "D", 333 Engineer SS Regiment, did, at or near Dutenhofen, Germany, on or about 17 June 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one private Eartis Mapp, a human being, by shooting him with a pistol.

Accused Lawhon pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

b. The accused Herbert C. Baum was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Herbert C. Baum, Company "D", 333 Engineer SS Regiment did at Dutenhofen, Germany on or about 17 June 1946 with intent to commit a felony, viz, murder, commit an assault upon Hildegard Rzypovski, by willfully and feloniously shooting the said Hildegard Rzypovski with a pistol.

N.B. At the trial the court with the consent of defense counsel for accused Baum amended this specification by changing the spelling of Rzypovski to Rzypovsky, and inserting thereafter the words "also known as Hildegard Paul." (R. 52).

Accused Baum pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. The court sentenced the accused 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 but reduced the period of confinement to ten (10) years, designated the Federal Reformatory, Chillicothe, Ohio, 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. In June 1946 Company "D" 333rd SS Regiment was located at Wetzlar, Germany (R. 8). About a mile and one-half to two miles from camp was an enlisted men's club in a town named Muncholzhausen (R. 13). A short distance beyond Muncholzhausen and farther away from the camp there was a little village named Dutenhofen where colored troops were stationed (R. 17, 19).

On Saturday evening, 15 June 1946, accused Lawhon, accused Baum, and Private William Morris, all members of Company "D", went to the club (R. 17). Later, according to the testimony of Private Morris, the three of them walked toward Dutenhofen and met two colored boys, apparently drunk, coming up the road. One negro had a long knife and the other said he had a gun (R. 17). The negro said that if any of the three men was from the south they would kill them or cut them up (R. 17). The two accused and Morris then made arrangements to come back and meet the negroes on Monday night (R. 17).

On Sunday, 16 June 1946, accused Lawhon told Private First-Class Brooks McDaniel, another member of Company "D", that he (Lawhon) had some trouble with two or three colored troops and he told them to meet accused Baum and him back there Monday night (R. 12, 13).

At 6:30 p.m. on 17 June 1946 accused Lawhon came to the room of T/5 Clifford H. Case in the company barracks and asked him for a .45 caliber automatic pistol which had been previously issued to Case and which bore serial number 993299 (R. 10, 13). When Case didn't answer, accused Lawhon then asked him if it was loaded and the witness replied "No." (R. 9, 10). Case left the gun lying on the table (R. 12) and the next time Case saw the gun was at about 10:00 a.m. on 18 June 1946. At that time there were no rounds in the chamber but the magazine had six rounds in it. Case cleaned the pistol (R. 10). He had no knowledge of the whereabouts of the pistol from the time he saw it in the evening until the next morning (R. 11). Over the objection of defense counsel for accused Lawhon that no basis for connecting the gun with accused Lawhon had been established, the gun was received in evidence as Prosecution's Exhibit "1" (R. 10).

Private First Class McDaniel testified that about 7:00 on the evening of 17 June 1946 accused Lawhon, accused Baum, Private Morris and he, together with three girls, went to the club (R. 13, 14). Accused Lawhon had an Army .45 caliber automatic similar to Prosecution's Exhibit "1" in his pocket. They were all drinking and Lawhon gave McDaniel a long three-bladed pocket knife and said "Come on and go with us, * * * Kill a few negroes and cut their heads off. * * * Come go with us. * * * We'll kill the negroes if you will cut their heads off." (R. 14). The witness stated that he was not quite sure whether accused Lawhon was serious or joking, or whether "it was the whiskey talking" when he made the above statement (R. 15, 16). Lawhon was "half to three-quarters drunk" at the club. The witness kept the knife for about thirty minutes, then returned it to accused Lawhon and went back to his company (R. 15). When McDaniel saw accused Lawhon on his post walking guard at 3:00 a.m. the next morning he "acted like he was pretty sober." (R. 16).

Witness Private William J. Morris was with accused Lawhon and accused Baum, at the club on the night of 17 June. Morris was carrying a .38 gun in his boot; accused Lawhon told him he had a .45 gun and accused Baum told him he had a .32 gun (R. 18). At 10:15 p.m. Morris, accused Lawhon and accused Baum left the club and walked toward the place they had met the colored soldiers on the previous Saturday night (R. 19). The three of them stood under a tree at the side of the road (R. 23). A colored boy and a girl came along. Accused Lawhon walked out on the road and stopped the boy. Morris was two or three steps behind accused Lawhon and accused Baum was a couple steps to the left of Morris. Accused

Lawhon asked the colored soldier where he was going and the latter replied that he was walking his girl home (R. 19, 23, 24). It was misty and raining and the witness could not see the negro but he saw "some kind of white dress or something white" about a step to the right of the place where the man's voice came from (R. 23, 25). Witness then heard a "crack fire" from where Lawhon was standing in front of him, heard a groan or two and then something fall (R. 20, 23, 24). After this shot was fired the girl started to run and Morris heard a "crack fire" off to his left within a couple steps (R. 21, 22). Accused Baum was standing to his left (R. 20, 22). After that Morris and the two accused went back to camp and while in route accused Lawhon said something like "what did the negro say after I shot him?" (R. 20, 21). They arrived at camp about 12:00 midnight and thereafter Morris saw Lawhon clean a .45 caliber Army automatic similar to Prosecution's Exhibit "1" (R. 22). Morris admitted on cross-examination that he had been drinking beer, was probably drunk, and was so excited he didn't know exactly what did take place (R. 24, 25).

Hildegard Paul, whose single name is Hildegard Rzypovsky, testified that on the night of 17 June 1946 she went to a dance at Dutenhofen with a colored soldier named Mapp (R. 26). At about quarter past or half past 10:00 she and Mapp left the dance and on the way home met three soldiers on the street between Dutenhofen and Muncholzhausen whom she couldn't recognize because it was dark and misty (R. 26, 28). One of the three white soldiers talked to Mapp and Mapp answered but she couldn't understand what was said (R. 27). Then the soldier who was in front of Mapp fired a shot and Mapp fell to the ground (R. 27). Immediately after Mapp fell down (R.30) the witness was shot in the right thigh (R. 27). After she was shot she ran to the motor pool at Dutenhofen to call the guard (R. 27). At Giessen she received medical treatment (R. 28). On cross-examination she testified that she didn't know whether Mapp had in his possession that night a knife or gun, but that he didn't place his right hand on his hip pocket immediately prior to the time the shot was fired because he had her pocketbook in one of his hands (R. 29, 30). Her injuries weren't very severe and she left the hospital without authority after three days (R. 30).

Lieutenant Ronald Middleton was the commanding officer of the 3420th Quartermaster Truck Company at Dutenhofen, of which the deceased Mapp was a member (R. 31, 32). On the evening of 17 June 1946 he heard about a shooting after meeting a girl in the motor pool who had been shot and he went down the road approximately 150 yards toward Muncholzhausen and at about 10:45 p.m. (R. 32) found Eartis Mapp lying on his back on the side of the road (R. 31). He was moaning and had a bloody wound on the left center of his lower abdomen (R. 31, 32). Witness put him and the girl in a jeep, sent them to the 388th Station Hospital at Giessen and notified the CID (R. 32). The next morning on 18 June 1946 near the spot where Private Mapp had been picked up the witness found a .45 cartridge case empty and a smaller case which he put in his safe and later turned over to a CID agent (R. 34, 35).

It was stipulated between the prosecution and defense counsel and accused Lawhon that if Captain Edwin G. Bovil, MC, were present he would testify under oath that:

"That he was on duty at the 388th Station Hospital, Geissen, Germany on 17 June 1946 and he saw and examined Pvt. Eartis (NMI) Mapp 44067307, 3420 QM Truck Company when Mapp was brought to that hospital at 2340 hours on 17 June 1946. At that time Mapp was suffering from a bullet wound in the left upper abdomen and Mapp died at 2400 hours 17 June, 1946 as a direct result of that bullet wound.

* * * *

"The bullet was located subcutaneously in the region described above. He removed the bullet and gave same to CID Agents Meredith H. Baker and Hurford R. Rowe." (R. 33; Pros.Ex. "2").

It was further stipulated between the prosecution and defense counsel and accused Baum that if Dr. Nusselt, a German doctor of medicine, were present in court he would testify under oath that "Mrs. Hildegard Rzypovsky of Muncholzhausen, suffered from a gunshot wound which perforated the rump without injuring bones, nerves or blood vessels. On leaving the hospital the wounds looked all right. Treatment in the hospital from 17 June 1946 to 20 June 1946, and patient left the hospital without authorization." (R. 34).

CID agent Rowe made an official investigation of the matter commencing 17 June 1946 (R. 36). After fully explaining his rights under the 24th Article of War he and agent Baker obtained a statement from accused Baum, in which the witness testified that accused Baum said:

"He, Lawhon and Morris had been in the town of Muncholzhausen on the Saturday night preceding this shooting incident in Dutenhofen. After their club had closed, they were on the street with their German girls. Two negro soldiers, who apparently were drunk, came along, one of them armed with a knife, the other said he had a pistol. Then these negroes told these three men if any of them were from the south they were going to cut them up or kill them. I am not sure of the definite words. On Monday night, 17 June, these three men, Lawhon, Baum and Morris, went to their club in Muncholzhausen. Shortly after 10:00 o'clock, the three of them started walking down the road toward the next town. While they were walking along this road, they met a negro soldier and his girl. Lawhon approached the man, asked him a question which I don't believe was included in the statement, and the negro

answered. Lawhon pulled his gun and fired at the negro. The German girl turned around and Baum fired at her with a .32 automatic he was carrying at the time. (R 40) * * * That it was not until he became excited that he pulled the trigger of the pistol * * *" (R. 46).

Rowe received from Lieutenant Middleton a .45 cartridge case and a 7.65 cartridge case, both empty, which he turned over to the 27th CID Laboratory at Frankfurt (R. 41). He received from Dr. Bovil of the 388th Hospital a .45 caliber slug which was placed in a round pill box, identified by noting the name of the victim and put in a large crate with forty-one (41) .45 pistols, locked and turned over to CID agents Longley, Fliris and one other agent for delivery to the 27th CID Laboratory for testing (R. 41, 47).

Over the objection of defense counsel for accused Lawhon, Armand Fliris, an agent of 27th CID, who had been sitting in the court room during the trial under no expectation that he would be called (R. 48) testified that in company with agents Longley and Schreibman, he was at headquarters of the 333rd Engineer Regiment at Dutenhofen and said agents received a large locked box which the witness presumed contained pistols and which the agents turned over to Captain Bird, Commanding Officer, CID Laboratory, Frankfurt (R. 48, 49).

Captain George R. Bird, Commanding Officer, 27th CID Laboratory, Frankfurt, an experienced ballistics man, received from agents Longley, Fliris and Schreibman on 19 June 1946 a box containing 41 pistols caliber .45 and an envelope with a bullet and cartridge case (R. 44, 45, 50). Microscopic comparison test made by the witness between the bullet and cartridge case above mentioned, admitted in evidence as Prosecution's Exhibit "3" (R. 44, 50, 51), and a test bullet and cartridge, admitted in evidence as Prosecution's Exhibit "4" (R. 45, 51), fired by the witness from U. S. pistol 993299 (Pros. Ex. "1") disclosed from the identical barrel signatures, striations and breach signatures that the former bullet and cartridge case (Pros. Ex. "3") could not have been fired from any other weapon than U.S. pistol 993299 (R. 46).

4. Evidence for the Defense. After the law member had fully explained their rights as witnesses, including an explanation that any allegations of either of the accused made in an unsworn statement cannot be considered against the other accused, each of the accused elected to make an unsworn statement (R. 56).

Accused Lawhon made the following oral unsworn statement:

"Q. Will you tell the court in your own words just what happened on the night of 15 June.
A. We went down the road to a little town where the club was, went down the road and two negroes stopped us and one of them grabbed me by the collar. He had a big long knife about that long in his hand. Told me he was going to cut my guts out if I was from the south and anybody else. I finally talked him out of it. He pulled out a big knife, told me he was going to jab me with it, and I talked him out of it. Finally went on down the road. We went on back to our club, to camp.

"Q. Tell the court what happened on Monday night, 17 June.
A. Me and Morris and Baum went to the club and we went from there, went down the road where we met...

"Q. What did you do in the club?
A. Drank some beer.

"Q. Do you know how much?
A. No, I don't exactly know how much I drank.

"Q. Were you and the other people armed when you left the club?
A. Yes, sir.

"Q. Why were you carrying weapons?
A. We were afraid they might jump us like they did the night before.

"Q. Tell the court what happened when you ran into the deceased Mapp?
A. I walked up to him and asked him was he one of the guys that jumped us the other night. He said, ''No, it wasn't me.' He jumped back and made a quick move with his right arm like he was going to draw a weapon. I pulled my gun and shot him.

"Q. At the time you were talking to Mapp and you said he made this movement which you took to be a threatening gesture, were you drunk at that time?
A. I was feeling pretty good.

"Q. You remember what happened?
A. Yes.

"Q. You had some beers?
A. Yes, sir.

"Q. But you were in control of your faculties so that you recall what you are relating to the court?
A. Yes, sir, I recall.

"Q. How many times did you fire your pistol?
A. Once, sir.

"Q. Tell the court whether or not you went over to Mapp after you shot him.
A. No, sir, I did not go over." (R. 57, 58).

Accused Baum made an unsworn oral statement, the pertinent portions of which are substantially as follows: That on Saturday night, 15 June 1946, he, Private Morris and accused Lawhon went to the club where, between 7:30 and 10:30 p.m., they had "quite a few beers." (R. 60). They left the club and walked down the road with some girls, meeting two colored soldiers dressed in OD's who without any threat from accused Baum's group said to the whole group that "they would cut our guts out if we was from the south" (R. 60); that one of the negroes who had a long knife about the size of a bayonet grabbed accused Lawhon by the collar of his shirt, held the knife pointed at him and threatened to kill him (R. 61); that the negro who had the knife said he also had a .32 caliber revolver and the other negro had a .32 revolver (R. 61); that on the evening of Monday, 17 June 1946, accused Baum, Private Morris and accused Lawhon went to the club again from 7:30 to 10:30 with their girls; that they were armed that night because "we wanted to take these girls home, and we had to go past the colored troops. We figured they would give us some trouble and we would use the weapons to protect ourselves." (R. 61, 62). They intended to take the girls home but the girls went back to the company; they (accused Baum, Private Morris and accused Lawhon) then walked down the road and came across a colored soldier and his girl; it was dark; Lawhon walked over to the colored soldier and asked him if he was the same soldier who stopped him on Saturday night and give him trouble; accused Baum was three paces from accused Lawhon during the conversation; accused Baum had never seen the girl before (R. 62, 63); all of a sudden accused Baum heard a shot between accused Lawhon and the colored soldier but did not know who had shot whom (R. 63); he heard no outcry or scream, or saw or heard a body fall; after the shot he heard a noise and took out his pistol because he didn't know "who was shooting at who" and thereupon shot in the direction of the noise; he shot in that direction because he "was frightened for one thing, and when the shot was fired (he) figured it might scare the (colored) guy away." (R. 63, 64); that he had no intention to kill anyone but fired his pistol to scare the colored soldier away rather than have him shoot again "if it was Lawhon was shot at;" he had seven shells in his pistol but fired only one (R. 64).

5. a. Accused Lawhon.

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 the 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 and undisputed that the accused Lawhon shot Private Eartis Mapp in the abdomen with a .45 caliber Army automatic pistol and that Mapp died about two hours later as a direct result of this gunshot wound inflicted by accused Lawhon. That accused Lawhon acted with malice aforethought is established by evidence that Lawhon on the evening of the shooting procured a gun and invited other soldiers to go along and "kill a few negroes"; after drinking enough to "feel pretty good" and in company with two other armed soldier companions, he thereafter proceeded down a road which was in the opposite direction from his camp, lay in wait behind a tree, accosted the first negro who came along, and upon being assured by the negro that the latter was only taking his girl home and was not one of the negroes who had given accused Lawhon trouble the previous Saturday night, deliberately shot him. In his unsworn statement accused Lawhon asserts in effect that he shot in self-defense when deceased moved his right arm like he was going to draw a weapon. The record is devoid of any other suggestion that deceased Mapp was in any way an aggressor. The proof leads to a reasonable conclusion that he was a stranger to accused Lawhon and was peaceably walking down a public road with a German girl. There is no evidence that deceased had a gun or other weapon on his person and the witness Hildegard Paul stated that deceased had her pocketbook in his hand at the time.

Under such circumstances the court was justified in lending little credence to the implication from the testimony of accused Lawhon that he acted in self-defense. Nor would any asserted provocation from the encounter of the previous Saturday night furnish cause for self-defense, as by accused Lawhon's own statement the deceased disclaimed any connection with the previous episode and there had been more than ample "cooling off" time between the two occurrences.

b. Accused Baum.

An assault with intent to murder is:

> "* * * an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. * * * Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from being guilty of an assault with intent to commit murder where the means are apparently adapted to the end in view. * * * where a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group." (MCM 1928, Par. 149l, p. 178, 179).

The proof required to support a finding of guilty is laid down in the Manual for Courts-Martial as follows:

> "(a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to murder * * *" (MCM 1928, Par. 149l, p. 180).

There is ample evidence in this case from which the court might find that accused Baum committed an assault upon the person of Hildegard Paul by firing a .32 caliber pistol in her direction and that the bullet struck and injured her. At the conclusion of prosecution's case the defense moved for a verdict of not guilty on behalf of Baum on the theory that no intent to murder was shown. The only question requiring close examination, therefore, is whether at the time of assault accused Baum entertained specific intent to commit murder. Malice aforethought may exist when there is an intention to cause the death of or grievous bodily harm to any person whether such person is the person actually killed or not; or when there is knowledge that the act which causes death will probably cause the death of or grievous harm to any person (MCM 1928, par. 148, p. 163, 164). It is undisputed that accused Baum was present on

the Saturday night of 15 June 1946 when the two negroes assertedly threatened accused Lawhon, accused Baum and Private Morris and was a party to the joint plan to return to the place on Monday, 17 June for the apparent purpose of revenge. It is admitted that accused Baum armed himself with a .32 caliber pistol and was present at the club drinking with the others shortly before the shooting when accused Lawhon asked Private McDaniel to join them to "kill a few negroes." There is no evidence that accused Baum protested to this objective. His subsequent conduct in joining accused Lawhon and Morris and firing at a range of four or five paces in the direction of what he must have known was a human being, whether negro or white, indicates that he continued as a co-partner in the enterprise to the final overt act of attempting to complete the design. That his aim was faulty resulting in injury rather than death is a circumstance fortunate for the German girl but not one from which accused Baum may negative intent to kill. Accused Baum was not threatened or provoked by anyone. The assault was unwarranted. The court might have given more weight to his unsworn statement that he shot to "scare the guy away" had his pistol been fired in the air rather than at body level. While it is true that acting on an impulsive moment does not show deliberation and premeditation sufficient to warrant conviction of the crime of murder (1 Wharton's Law, p. 632), yet where, as here, the circumstances show that accused Baum armed himself and accompanied accused Lawhon with the purpose of killing someone, or some one of a class of people, we feel a sufficient showing of intent is spelled out.

6. a. The record indicates that accused Lawhon is 20 years old, was born in Missouri, and is the youngest of five children. After his mother's death in 1936 and his father's in 1938 the family seems to have grown apart. Accused Lawhon completed the second grade in school. Prior to joining the Army he worked as a farm laborer. He has never been married. The only time he was arrested in civilian life was for fighting, for which offense he spent four days in jail. He was inducted into the Army on 31 March 1945 and was sent overseas on 20 April 1946. He has been assigned as a guard during most of his term. The highest rating he achieved was a Private First Class.

b. The accused Baum is 19 years old, was born in Pennsylvania, and is the next to the youngest of 10 children. He completed the seventh grade and left school because he did not like it. Prior to joining the Army he worked for a paper mill for two years. He left this position for Army service. He was never arrested in civilian life. Accused Baum was inducted into the Army on 14 May 1945 and sent overseas in March 1946. His Army assignment has been as kitchen police. The highest rating he achieved was a Private First Class. He has never been court-martialed before.

7. The court was legally constituted and had jurisdiction of the persons and subject matters. No errors injuriously affecting the rights of either 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 sentences. A sentence of death or life imprisonment 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 by sections 273 and 275, Criminal Code of the United States (18 USC 452, 454). The offense of assault with intent to commit murder is punishable under the Table of Maximum Punishments by dishonorable discharge, total forfeitures and confinement at hard labor for not more than twenty years.

Joseph J. Stern, Judge Advocate

Carlton E. Schuman, Judge Advocate

Thomas R. Parsons, Judge Advocate

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

JAGN-CM 318264

UNITED STATES v. Technician Fourth Grade THOMAS M. BROWN (33819381), 532nd Port Company, USFET, and Private HARRY TAYLOR, JR. (34135161), 525th Port Company, 397th Port Battalion, USFET.	)	WESTERN BASE SECTION Trial by G.C.M., convened at Paris, France, 10 and 11 October 1946. Brown: Dishonorable discharge and confinement for twelve (12) years. Penitentiary. Taylor: Dishonorable discharge and confinement for five (5) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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1. The record of common trial in the case of the soldiers named above has been examined by the Board of Review and as to the accused Brown is held to be legally sufficient to support the sentence. The remainder of this holding refers only to the accused Taylor.

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

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

Specification 1: In that Private Harry Taylor, Junior, 525th Port Company, United States Forces, European Theater, in conjunction with Technician Fourth Grade Thomas M. Brown, did, at Marseille, France, on or about 6 July 1946, by force and violence and by putting them in fear, feloniously take, steal, and drive away from the presence of Private First Class Harry J. Authement, and Private First Class Benny Schyll, a 2½ ton 6x6 truck, 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).

CHARGE II: Violation of the 94th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1 of Charge I, and Charge I, not guilty of all other Specifications and Charges, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. 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. Evidence for the prosecution:

On the evening of 6 July 1946 accused Taylor and Brown, accompanied by Miles Mionnet and Bidondo, were going to a festival. At a point near the "Old Port" of Marseille the two women "flagged" a truck to ask a ride for the party. As the truck stopped accused Brown jumped on the running board, presented a pistol and ordered the driver and his companion off. They got out and Brown drove off in the truck leaving Taylor, the two women, the truck driver and his companion in the street. The driver and his companion went to find a policeman and Taylor and the two women departed for St. Antoine by tram (R. 52-53; Pros. Exs. A and B). When Taylor arrived at St. Antoine Brown appeared there with the truck (R. 53; Pros. Ex. B) whereupon, as stated by Taylor:

"* * * I tried to get him [Brown] to place the trk. Sat. Night so he told me No I have a good place so we goes to Blvd Villa and he parks the trk. and an old Broken gate with the factory all Bombed down so we gets out and goes to get a Jack when we came back the m.p.'s were there. So we did not go to the trk * * *" (Pros. Ex. B).

Accused Taylor, in a pre-trial statement which was admitted in evidence as Prosecution's Exhibit B, stated that he met Thomas Brown about 10 June 1946 at which meeting the following conversation took place between them:

"* * * He passed and said, 'Hello man, what do you know, What are you doing tonight.' I said, 'Nothing'. I asked

him, "What outfit you from?' He says, 'I'm from no outfit. I'm just like you.' And then he asked me, 'Say, do you know where we can pick up something tonight?' and I says, 'No not tonight.' Brown asked me, 'When you find something come and get me and let me know' * * *" (Pros. Ex. B).

4. Since the testimony of accused Taylor, and of other defense witnesses, in no way strengthened the prosecution's case any resume thereof is omitted.

5. While it may be said that a suspicion is raised that accused Taylor was to some extent implicated in the disposal of the fruits of the offense alleged, as an accessory after the fact, there is no legal evidence in the record from which any reasonable inference may be drawn that he is guilty of robbery as alleged (See: CM 212505, Tipton, 10 BR 244; CM 316052, Elmore (1946); CM 316977, King et al, (1946)).

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings and sentence as to accused Taylor.

Edward I. Robinson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Edward R Taylor, Judge Advocate.

FEB 13 1947

JAGN-CM 318264 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 Technician Fourth Grade Thomas M. Brown (33819381), 532nd Port Company, USFET, and Private Harry Taylor Jr. (34135161), 525th Port Company, 397th Port Battalion, USFET, I concur in the holding by the Board of Review and for the reasons therein stated recommend that as to the accused Taylor the findings of guilty and the sentence be disapproved. Upon disapproval of the findings of guilty and the sentence as to accused Taylor you will have authority to order the execution of the sentence as to accused Brown.

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 318264).

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.

JAGH - CM 318267

13 MAR 1947

UNITED STATES	)	CONTINENTAL BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Furth, Germany, 12-16 August 1946. To be hanged by the neck until dead
	)	
Private JAMES C. DEVONE (RA 34115568), 3757th Quartermaster Truck Company (Heavy)	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private James C. Devone, 3757th Quartermaster Truck Company (Heavy), did, at or near, Nurnberg, Germany, on or about 10 May 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill T/Sergeant Paul R. Skelton, a human being, by shooting him with a rifle.

Specification 2: In that Private James C. Devone, 3757th Quartermaster Truck Company (Heavy), did, at or near, Nurnberg, Germany, on or about 10 May 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill S/Sergeant William Timmons, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. Evidence of two previous convictions by summary court-martial was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

At about 1900 hours, on 10 May 1946, Staff Sergeant William Timmons, Technician Fourth Grade Paul R. Skelton and Sergeant Elmer D. Holdway, all account clerks in the fiscal section of Stars and Stripes, accompanied by Miss Kathleen Gass, Miss Kathleen O'Farrell and Miss Rose Korb, drove to the Stork Club in Nurnberg, Germany (R 10-11, 17-19, 24). They drank beer, danced and conversed until about 2230 hours (R 12, 19, 24-25), when they left in a jeep driven by Sergeant Timmons (R 12, 19, 25). Miss Korb was riding on the front seat next to Sergeant Timmons. Sergeant Holdway was seated over the right rear wheel, Sergeant Skelton over the left rear wheel, and Miss Gass and Miss O'Farrell on the rear seat (R 12, 20, 25).

Sergeant Timmons drove toward Miss Korb's billet (R 13, 19, 25). The jeep headlights were on (R 21), the moon was shining, and visibility was fair (R 15). Miss Korb lived near "M" Company, 26th Infantry (R 12). At about 2320 hours (R 15, 21, 28), the jeep went through an underpass on the way to Miss Korb's billet (R 13), and turned right (R 13, 19). Just after the turn was made, the occupants of the jeep heard a shot, followed after a short interval by two more shots (R 13-14, 20, 26). Sergeant Timmons exclaimed, "Oh my God, I have been hit," stopped the jeep, alighted and collapsed (R 14, 21, 26). Sergeant Skelton slumped forward, falling over the front seat (R 14, 27). Sergeant Holdway picked Sergeant Timmons up and saw blood spurting from the latter's mouth (R 14-15). No challenge was heard by the occupants of the jeep before the shots were fired (R 16, 23, 28). Sergeants Timmons and Skelton were taken to a hospital (R 15, 22).

Both Skelton and Timmons died of gunshot wounds which caused massive hemorrhages (R 68-70). A bullet from a .30 caliber carbine was removed from Timmons' body (R 70-71; Pros Ex 8).

On 10 May 1946, accused was a member of the permanent guard detail of the 3757th Quartermaster Truck Company, which was located at or near Platnersburg, a section of Nurnberg, Germany (R 30, 35, 38). Each member of the guard detail was on duty four hours each day and off duty twenty hours, each man having the same shift each day (R 30-31). The company had ten carbines with which to arm its guards. Seven were kept in the supply room under lock and key, and the remaining three were used by the guards, each guard receiving a carbine from the man he relieved (R 33).

On 10 May 1946, Private First Class Joseph Armstead was on guard from 1800 to 2200 hours at Post No. 3 (R 44), a walking post which ran completely around the company's billets (R 31). Armstead had left his post from about 1930 to 2200 hours (R 44, 49-50), but left his carbine locked in his room (R 45, 49). Accused was to relieve Armstead at 2200 hours (R 45). Accused was late and at the end of his tour of duty, Armstead asked and received permission from the sergeant of the guard to place the carbine with which he had been armed on accused's bed (R 45, 49). This Armstead did, returning to his own room, at about 2200 hours (R 45, 49, 51). Shortly thereafter, accused entered Armstead's room, stayed about fifteen minutes and left. He later returned a second time. About 2300 or shortly thereafter accused returned a third time with the carbine and told Armstead that there was no ammunition in the carbine (R 46, 51). Armstead gave accused ten rounds and accused again left the room (R 46-47, 51). The serial number of the carbine was 1280352, and Armstead did not fire it during his tour of duty (R 48-49).

On the afternoon of 12 May 1946, several agents of the CID went to the site of the alleged shooting and found three expended carbine cartridge cases (R 63-66; Pros Exs 4, 5). Diagrams showing the location of the spot where the expended shells were found were drawn in court by witnesses and received in evidence (R 64, 68; Pros Exs 6, 7). These expended cartridge cases were examined by a ballistics expert (R 71), who identified them as being United States Army .30 caliber shells, and testified that they had been fired from United States Army carbine, .30 caliber, bearing serial number 1280352 (R 73-74). He also identified the bullet removed from Timmons' body as having been fired from the same weapon (R 74).

On 16 May 1946, the accused told the CID agents that he had fired the carbine and requested that he be taken to the scene of the shooting (R 57). On the following morning, accused was taken to the scene of the shooting, as he had requested (R 62, 65). On 17 May 1946, after having been warned of his rights under Article of War 24, accused made a sworn statement (R 57-61; Pros Ex 3), in which he stated:

* * *

"I went back to my post and at about 11:20 that night left it and went down the path near the British House.

"The German Police have been all around the edge of the area picking up German girls when they leave our Company and I went down the path to see if I could see or find any. I went down to the air raid shelter or mound of ground and waited behind it for about 5 or 6 minutes. I saw a German man walking around across the street from where I was. As I looked at him he was on my right on the ground near the railroad tracks. I lifted my carbine and fired one shot. He started to run across the street toward the woods and I fired a second shot. Just as I fired the third shot a jeep popped up the road. The German was running toward the woods and when I fired the third shot he was between me and the jeep. * * *"

The accused then went back on guard for a few minutes and then returned to his room, where a German girl was waiting for him, and went to bed.

4. <u>For the defense</u>:

Elsie Forster, a German girl, testified that she was with accused in his room from about 1930 to about 2100 or 2130 hours on 10 May 1946 and returned to his room at about 2200 hours, telling accused she had not gone home because there were German police in the vicinity and she was afraid

they might arrest her (R 77, 80, 86). She remained with accused until about 0800 hours the following day (R 78, 79). Accused left the room sometime after 2200 hours for about ten or fifteen minutes. At about 2300 hours, accused again left his room and was gone for about twenty minutes (R 86-88). She did not see a "rifle" in his hand when he left at 2300 or when he returned twenty minutes later (R 91). While he was gone, another soldier entered and left a "rifle" on one of the other beds in the room (R 89-90).

The accused, having been apprised of his rights as a witness, elected to be sworn as a witness. He testified that on 10 May 1946 he was drinking beer and schnapps in the day room of his organization from 2000 to 2045 hours (R 92, 97-98, 100). At 2045 he went to his room and saw his girl friend and another soldier (R 92). He then returned to the day room and continued drinking (R 92-93). He went back to his room at about 2200 hours, and about 2230 hours went to Armstead's room, where he continued drinking and talked until about 2300 hours, when he returned to his own room (R 92-93). At about 2330 hours, he went again to Armstead's room, to ascertain where his "rifle" was (R 99). Being informed that the rifle was in his (accused's) bed, accused returned to his room and went to bed, but did not look for the rifle then (R 93-94, 99), though he did see it under the bed that night (R 99-100). Accused did not fire a weapon on the night of 10 May 1946, and did not report for guard duty that night (R 94).

Accused also testified that he was interrogated by the CID on 15, 16 and 17 May 1946. On 16 May, he had been operated on for piles (R 94-97). At the time he made his statement on 17 May, he was suffering from the effects of the operation, did not understand what was happening, did not remember whether he signed the statement and did not read it. It was read to him by one of the agents but accused was suffering so much he did not know what was being read. The statement was not voluntary, and the words were put into accused's mouth by the agents (R 95, 97-98).

The court handed accused a document and asked whether his signature appeared on it. The document was not identified, and accused stated he did not know whether or not he had signed it (R 100). At the request of the defense, accused signed his name with his left hand, then with his right hand (R 101-102). These signatures were offered in evidence by the defense (Def Ex 1). Also offered were the accused's motor vehicle operator's permit, bearing his signature (Def Ex 2) and the signature of accused on a statement dated 16 May 1946, though sworn to 17 May 1946 (Def Ex 3).

5. It was established that the shot which caused the death of Sergeant Timmons was fired from the carbine with which accused was armed when he left Private Armstead's room, shortly before the shooting. Since it was the duty of the accused, who was on guard, to retain possession of the weapon during his tour of duty, there was competent evidence, independent of accused's extra-judicial confession, from which the court could

reasonably conclude that the accused fired the shot which killed Sergeant Timmons. After being warned of his rights under Article of War 24, accused made the statement which was introduced in evidence as Prosecution Exhibit 3. He also requested that the Criminal Investigation Division agents take him to the spot from which the shots were fired so that he could point out the place to them. It did not appear, however, that he did so, though he was taken to the scene. Three expended cartridge cases were found near the scene of the shooting which were identified by a ballistics expert as having been fired from the carbine with which accused had been armed.

The voluntary nature of the confession was questioned by the defense, who claimed that the accused was suffering from a recent operation when the statement was made, did not understand what was happening and did not read the statement. It appears from the record of trial, however, that accused made no complaint concerning his physical condition while the statement was being taken (R 67), and that several changes were made in the statement, which he initialed, and that he signed it and each of its pages. Since the trial, accused has claimed that "the CID write a false statement on me and he put word in it just like he wish to." This contention is belied by the action of the accused, in taking the CID agents to the scene of the shooting. In our opinion, the court properly found the confession to have been made voluntarily, and it was entitled to be admitted in evidence.

The evidence that the accused fired the shot which killed Sergeant Skelton is less conclusive. No bullet was found in his body, nor was there testimony as to what caliber of weapon killed him. The occupants of the jeep testified that they heard three shots, and that after the second shot Sergeant Skelton slumped forward in the seat. The accused admitted that he had fired three shots. Since there was no evidence of any other shots having been fired in the vicinity, and inasmuch as one of the three shots fired by the accused hit Sergeant Timmons, the court was justified in concluding that it was one of the same three shots which killed Sergeant Skelton.

Murder is the unlawful killing of a human being with malice aforethought. Malice, however, does not necessarily mean personal ill-will toward the person killed, nor an actual intent to take his life.

> "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 * * *" (MCM 1928, par 148a, P 163).

The great weight of authority is that the felonious intent is transferred from the intended victim to the actual victim, where the latter is killed by an act intended to kill the former (Wharton's Criminal Law, 12th Ed, Sec 138).

Although accused did not state specifically, in his sworn pre-trial statement, that he fired his carbine at the German, the circumstances surrounding the shooting warrant no other reasonable conclusion. Accused knew that the German police had been arresting German girls as they left his company area and he specifically stated that on the night of 10 May 1946, he left his post and went to see if he could find these police. He further stated that he waited behind a mound of ground for five or six minutes and then saw a German walking around across the street from him. Accused then lifted his carbine and fired one shot, whereupon, the German started to run across the street toward the woods. If his purpose was merely to frighten the German away from the area, it would seem that he had accomplished this after firing the first shot but he fired a second and a third shot. When he fired the third shot the German was between the accused and the jeep in which the victims were riding.

There was no provocation for the shooting, and there is no evidence from which it might be inferred that the shots were fired in the heat of sudden passion even though he thought the German at whom he fired was one of the policemen who had been arresting German girls as they left the area. There was no contention that the accused fired in the exercise of his duties as a guard. Since there was neither justification nor excuse for his shooting at the German, the killing of the two sergeants constituted murder.

6. The charge sheet disclosed that the accused was 28 years of age when the offenses were committed. He was inducted into the Army of the United States on 1 July 1941 and honorably discharged on 13 October 1945. On 3 December 1945, he enlisted in the Regular Army for three years.

7. The Board of Review has considered the following communications pertaining to clemency on behalf of the accused: letter from the Honorable Josiah W. Bailey, United States Senate, dated 7 October 1946, which transmitted a copy of an undated letter from the accused to Senator

Bailey; undated letter from the accused to the Secretary of War received on 15 September 1946; letter from the Honorable Clyde R. Hoey, United States Senate, dated 16 October 1946; undated letter from accused to Mr. Justice Owen J. Roberts; letter from the Honorable Wayne Morse, United States Senate, dated 4 November 1946, which transmitted a copy of a letter dated 26 September 1946 from the accused to Senator Bailey; several letters from Mrs. Estelle Devone, mother of the accused addressed to the Secretary of War and to the Under Secretary of War with inclosures thereto; copy of letter from the accused to the Honorable Homer Ferguson, United States Senate; letters dated 23 October 1946, 18 November 1946, 6 January 1947, and telegram dated 14 January 1947 from Mr. Franklin W. Williams, Assistant Special Counsel, NAACP, Legal Defense and Educational Funds, Inc.

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

A. Wettenstein, Judge Advocate

William A. Self, Judge Advocate

Shirley R. Smith, Judge Advocate

JAGH - CM 318267 1st Ind

WD, JAGO, Washington 25, D. C. JUN 2 0 1947

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 James C. Devone (34115568), 3757th Quartermaster Truck 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 of murder. Without legal provocation or excuse accused fired shots from a carbine, one or more of the bullets striking and killing two noncommissioned officers who were riding along the road in a motor vehicle. It must be inferred from the evidence that the shots were fired in the direction of a German civilian with the purpose of frightening him or that the shots were fired in a manner which was likely to and did cause death and in wanton and conscious disregard of the safety of others. In either case malice aforethought was present. I am not convinced, however, that the lethal shots were fired with premeditation, that is, with a deliberate intention to kill. Under the circumstances I believe that the sentence should be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty-five years, that the sentence as thus commuted be carried into execution, and that an appropriate U. S. penitentiary be designated as the place of confinement. I so recommend.

3. Inclosed are a draft of 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 recommendation meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Draft ltr sig USW
3 - Form of action

(GCMO 251, 25 July 1947).

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

JAGK - CM 318296

19 MAR 1947

UNITED STATES v. First Lieutenant HARRY S. MAYER, JR. (O-712192), Air Corps.	PACIFIC AIR SERVICE COMMAND Trial by G.C.M., convened at Headquarters, P.A.S.C., APO 323, 1 November 1946. Dismissal, total forfeitures, and confinement for three (3) years.

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

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

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

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

Specification 1: In that First Lieutenant Harry S. Mayer, Jr., Headquarters Pacific Air Service Command, APO 323, did, at Manila, P.I., on or about 15 August 1946, feloniously take, steal, and carry away 2200 gallons of gasoline, of the value of about $200.00, property, of the United States, intended for the military service thereof.

Specification 2: In that First Lieutenant Harry S. Mayer, Jr., ***, did, at Manila, P.I., on or about 25 August 1946, feloniously take, steal, and carry away 4000 gallons of gasoline, of the value of about $360.00, property, of the United States, intended for the military service thereof.

Specification 3: In that First Lieutenant Harry S. Mayer, Jr., ***, did, at Imus, P.I., on or about 13 July 1946, wrongfully and knowingly sell 20 gallons of hydraulic brake fluid, of the value of about $40.00, property of the United States, intended for the military service thereof.

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

Specification: In that First Lieutenant Harry S. Mayer, Jr., ***, did, from on or about 15 July 1946 to on or about 25 August 1946, wrongfully and knowingly traffic, transport and dispose of property of the United States, intended for the use of the military

service thereof, to unauthorized civilian persons, thereby engaging in the illegal practice commonly known as "Black Marketeering."

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 at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence, stating that he considered it to be wholly inadequate, designated the Pacific Coast Branch, United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial for action under the provisions of Article of War 48.

3. Evidence for the prosecution

The record discloses that this case was tried on 1 November 1946 (R. 37). Private First Class Francis B. Wienhold, Headquarters Squadron, PASC, testified that he was a prisoner awaiting trial, but that before his confinement he was a heavy equipment mechanic under the accused, who was motor pool officer. During the latter part of August, Wienhold, the accused officer, Johnnie Lee, "a fellow by the name of Vasicek and later on Sergeant Behn" entered into an agreement to sell gasoline "to the black market" and divide the proceeds of the sales (R. 7-8). The agreement was entered into in the motor pool office. The unit was receiving about 4,000 gallons of gasoline three times a week and it was found that this amount was more than was needed to operate the pool. Lee was the driver of the gasoline supply truck. He had been detailed as truck driver by the accused after instructions had been given him by Wienhold. On several occasions the accused informed Wienhold and Vasicek that he was "low on pesos." Wienhold, Vasicek and Lee would then take gasoline which had been left in the trailer "out and sell it." The sales were made to Filipinos. On one of these occasions, Wienhold and Lee took 9 drums, sold them for 400 pesos and Wienhold gave accused 200 pesos as his share while they were in the cab of the "Rio in the Heavy Equipment Lot." After this occurrence, Lee was transferred and Wienhold, Vasicek and accused continued the gasoline sales. Vasicek took 9 drums out and sold them to "Pop." Later, Wienhold sold 2200 gallons for 2500 pesos which he divided with accused, Sergeant Behn and Vasicek. Several times prior to this occurrence the accused had stated, "Well, I am low on pesos" and each time that he said this Wienhold asserted that he and the other men took gasoline out and "got rid of it." During these occurrences Wienhold met a Filipino civilian named "Paul" who was desirous of securing a truck to haul 4000 gallons of gas which he, Paul, was planning to secure at the gas dump on a false requisition. Wienhold informed accused of Paul's plan and accused told Wienhold that it was all right to haul the gas for him. Paul experienced difficulty in securing the false requisition but Vasicek obtained a similar amount of gasoline on his requisition and hauled it to Taytay and delivered it to a "fellow" for Paul.

After some difficulty Wienhold located Paul and got 2,000 pesos for the gasoline which he divided with accused, Sergeant Behn and Vasicek at Sergeant Behn's house (R. 10). The foregoing incidents occurred the latter part of August. Wienhold testified that shortly after the gasoline transactions, accused dispatched a trailer for Paul to haul soap and sugar, but the plot was discovered and the men were arrested and confined (R. 9-10). Wienhold testified further that on or about 12 July the accused secured a plane and took him, Vasicek and Belmont to Samar to secure motor parts at the warehouse of the "AFWESPAC". They were unable to secure the motor parts but obtained some "house equipment." After they had loaded this on the plane they secured six cans of brake fluid. They agreed to sell the brake fluid as it had a good black market price. About a week after they had returned to Manila, Wienhold and accused took the brake fluid to "Mom's" in Imus and sold it to her while they were drinking beer. Wienhold divided the money with accused (R. 12).

On cross-examination, Wienhold testified that the 2200 gallon "deal" occurred around the middle of August and before the 4000 gallon "deal," but that prior thereto there were several other sales including the 9 drums "with Lee." (R. 13) The accused never received any of the money directly from the civilians, but was given his share after the money was collected (R. 16).

In response to a question by the court Wienhold asserted that by August he meant "August of this year." He understood his rights under Article of War 24 and his testimony was voluntarily given (R. 18).

Private First Class George C. Vasicek, Headquarters Squadron, PASC, testified that he also was a prisoner and understood his rights under Article of War 24. Prior to his confinement he was a driver under accused at the motor pool. One day he was in the accused's office and "they" discussed selling gasoline on the black-market. Two or three days later "they had 9 drums they said for me to take and go down in the morning and sell the gas." Vasicek stated that he delivered the gas and that Wienhold "went down" the evening of the same day and collected the money. Vasicek was paid his part at the Heavy Equipment lot. Wienhold "was supposed to pay Lt. Mayer and Behn." A little after that "they had 2,200 gallons of gasoline left over and Wienhold took it to the place where we got rid of it" and Vasicek got his part of the money. Subsequent to this transaction, Paul saw Wienhold "about" taking a load of gasoline to Taytay. It was explained to accused that the gasoline was to be secured on a requisition which was to be obtained by Paul. When Paul failed to get his requisition Vasicek stated that he took the 4,000 gallons issued for the company and delivered it to Taytay. The accused "gave" Wienhold and Vasicek a jeep to go get the money "from Taytay." The next evening, at Sergeant Behn's house, "they" called accused who came over and Vasicek saw accused get his part of the money (R. 21-23).

Vasicek testified further that on another occasion, and at the suggestion of accused and Wienhold he agreed to haul a load of sugar for Paul but

that he got "there" too late and he brought the truck back. On another occasion arrangements were made to haul a load of soap for Paul. Wienhold told Vasicek "it was to be worked the same way." They were to meet Paul at "Little Rosy's." Before leaving the motor pool accused asked Wienhold if he was going along and Wienhold said, "Yes." They met Paul at the appointed place and he had a soldier with him. The soldier could not drive very well so Vasicek went into the depot with him. They got the load of soap but were held up at the gate by the military police and "this other guy says he was going after the checker, and he went out the other gate and left me there by myself" (R. 24). The witness Vasicek stated that the accused authorized the "deal" and got his share of the money in all the transactions; "he was standing right where we was making the deal" (R. 24).

On cross-examination the witness stated that Wienhold was Paul's "contact man" and that the money was paid to him. Paul had agreed to give Wienhold, the accused and the witness, 1500 pesos for the use of the truck to haul the sugar. The accused was "there" when the agreement was made and knew all about it (R. 27).

Private First Class Johnnie R. Lee testified that he was formerly assigned to the motor pool, PASC, and knew the accused. He understood his rights concerning self-incrimination. He stated that in conjunction with the accused and Wienhold he sold nine drums of Government gasoline from the pool for 400 pesos. He kept 100 pesos for his part and gave Wienhold 300 pesos. Over the objection by defense counsel the witness was permitted to state that Wienhold "said he was going to give Lt. Mayer a share of it." (R. 28)

On cross-examination, the defense asked the witness if the accused knew about "these transactions", to which he replied, "Yes sir, he knew about them all" (R. 28).

Technical Sergeant William R. Behn was also called as a witness for the prosecution and testified that he knew the accused, that he was truck master at the motor pool during July and August prior to his confinement. During this period he, Vasicek, Wienhold and accused "were selling gasoline out of the tanks." The accused was in charge of the motor pool and Behn stated that when he saw what was going on he went to accused and asked to be "cut in." The accused had agreed to give him one-half of the proceeds, but after he (accused) had conferred with the rest of the "boys" they only gave him one-fourth. Sergeant Behn testified that he personally paid accused his share from the sale of the 2200 gallons of gasoline. When the 4,000 gallons were sold the proceeds were divided at his house and he saw the accused accept his share of the money. Over objection by the defense, the witness was permitted to state that he knew that the accused "knew the things going on in the motor pool" with reference to the sale of gasoline (R. 30-31).

On cross-examination the defense questioned the witness at length concerning his testimony that the accused knew of these transactions. The witness replied that since the accused got his share of the proceeds of these sales, he would know what was going on (R. 31).

In response to questions by the court, Sergeant Behn stated that from one sale they received 250 pesos each and that he gave the accused his part. From the 4000 gallon sale they got 2000 pesos or 500 pesos each which was divided at his home (R. 33).

Captain Keith A. Potter, Air Corps, Headquarters PASC, a witness for the prosecution, identified a statement which he testified was voluntarily given and signed by the accused in his presence and in the presence of Colonel Harvin. Prior to making the statement the accused was warned by Colonel Harvin. Before signing it Captain Potter testified that he also warned accused under the 24th Article of War and told him that he "could expect nothing from making a statement." The statement which was read into the record by the prosecution and marked "Prosecution's Exhibit 1" is as follows:

"I, HARRY S MAYER, JR., First Lieutenant, Air Corps, having been fully warned of my rights under the 24th Article of War, and understanding that I do not have to make a statement, that if I do make a statement anything I say may be used against me, do hereby voluntarily offer the following:

"I have, on several occasions, received money from the sale of gasoline. I, personally, made no contacts, except to receive some of the money. Vasicek and Weinhold, truck drivers, obtained false requisitions and drew the gas from the gasoline dump. In one instance Two Thousand Pesos (₱2000) were received for the sale of four thousand (4000) gallons of gasoline. Sergeant Behn, Vasicek, Weinhold and myself met at Sergeant Behn's house, and, in the presence of Mrs. Behn, the money was divided, each of us receiving Five Hundred Pesos (₱500). All in all I believe I have received a total of Twelve Hundred Pesos (₱1200) from the sale of gasoline.

"Originally the truck drivers were Vasicek, Weinhold and a man named Lee. However Lee was transferred out due to the fact that a jeep was issued out to him on a trip ticket one night and reported stolen. The fellows who worked with him came to me and said they were sure he had sold the jeep. I agreed with them. However I knew nothing of the deal and had no way of proving it. The men said if I did not transfer him out they would take care of it themselves. I never did trust Lee. At one time I received only Two Hundred Pesos (₱200) from him on a sale of gasoline. We were sure Lee was holding out. Lee was the original man who made the original contacts. I believe they were made quite some time before I found out about it. I suspect he, Vasicek and Weinhold cut me in to keep me quiet because I knew all about how Lee was going down to the depot then tearing up the requisitions so no record would be kept.

"Behn came in on it because he had known what was going on so one day he came to me and said he thought it about time he had a cut in on some of the deals. I stalled him off and told him to forget about it. He came again and said it was about time he got his share, so I said OK.

"Once when we were out of brake fluid I went to Samar and brought

back thirty (30) gallons. It was brought to my attention that brake fluid brought a good price in the black market so ten (10) gallons were put in the supply and twenty (20) gallons were sold. Weinhold made all of the arrangements. Where it was sold or to whom I don't know. I received about Sixty Pesos (₱60) for the twenty (20) gallons.

"One time I was approached by Vasicek and Weinhold and told that they had made arrangements with a civilian, Paul, I believe, to haul an amount of sugar for which they would receive One Thousand Pesos (₱1000), I was to receive a share of the money. The places they were to haul from and to, were not known even by the drivers themselves. This arrangement fell through due to the fact that the civilians did not make the necessary arrangements. About a week to ten days later the truck was dispatched.

"Another time I dispatched the truck, with Vasicek as the driver, for the purpose of contacting Paul again to make arrangements for the hauling of black market supplies. Where they were to be hauled to and from were unknown to me. Vasicek was to receive Fifteen Hundred Pesos (₱1500) for his share. The proceeds were to be split between Vasicek, Weinhold and myself. Sergeant Behn knew nothing about it.

/s/ Harry S. Mayer, Jr.

HARRY S MAYER, JR
1st Lt, Air Corps

SUBSCRIBED AND SWORN TO BEFORE ME THIS 15 DAY OF OCTOBER 1946.

/s/ Keith R. Potter

KEITH R POTTER, Capt., AC
Acting Staff Judge Advocate"

The prosecution requested the court to take judicial notice of the July 1946 price list of 80-octane gasoline and Army SF Catalog SNLK-1 listing the price of hydraulic brake fluid.

4. The defense offered no testimony and after being advised of his rights the accused elected to remain silent.

5. The undisputed testimony of the witnesses shows that during July and August 1946 a conspiracy existed between the accused, Private First Class Francis B. Wienhold, Private First Class George Vasicek and Technical Sergeant William R. Behn to sell gasoline which had been provided for the military service to Filipino civilians on the black market and to divide the proceeds of the sales. The conspiracy having been proven, the rule applies that where several persons have combined for some unlawful purpose or have acted in concert in the commission of an offense, the acts and declarations of one co-actor

in pursuance of the common design or act are admissible against any other co-actor on trial for such offense. Each participant is an agent for the others, so that an act done by one in furthering the unlawful design is the act of all, and a declaration made by one at the time is evidence against all. The foregoing exception to the hearsay rule has been said to be universally accepted by the courts (Wharton's Criminal Evidence, 11th Ed., Vol.2, sec. 699, pp. 1184-1188). Proof of a formal agrement to accomplish the unlawful purpose is unnecessary where, as here, a tacit understanding is shown to have existed (Alaska SS CO. v. International Longshoreman's Association, 236 Fed. 964; CM 273791, Gould, 47 BR 29,65). It is also unnecessary that a conspiracy be charged or a co-conspirator be named in the charges and specifications to make the acts and declarations of accused's accomplices binding upon him, where, as here, it is clear that the substantive offenses charged were committed pursuant to a common agreement or understanding and such acts and declarations were in fact in furtherance of the commission of the unlawful acts charged (Wharton's Criminal Evidence, 11th Ed., sec. 701, p. 1190 (citing American and English authorities); CM 275547, Garrett, 48 BR 77,99; CM 307097, Mellinger).

It is contended that inasmuch as accused was the motor officer in charge of the pool for which the gasoline and brake fluid in question were issued, he should have been charged with embezzlement rather than larceny. But accused did not have possession of such property in contemplation of the law, he had only a custody limited to the care and lawful operation of the pool. His custody or control of the property in the pool was subject to the orders and control of his superior officers. It follows that the taking and selling by accused and his confederates of this property constituted larceny thereof (CM 220398, Yeager, 12 BR 397; CM 252103, Selevitz, 33 BR 394; CM 268478, Brown, 44 BR 294; CM 275547, Garrett, 48 BR 104; CM 317327, Durant).

It was necessary to show by direct or circumstantial evidence that the gasoline and brake fluid were "property of the United States, intended for the military service thereof." The evidence shows that the gasoline was issued to the motor pool by a gasoline dump, both military installations of the United States, and that the brake fluid was taken from a warehouse of the AFWESPAC at Samar. As stated by the Board of Review in CM 310950, Dickerson, 1 BR (NATO-MTO) 203,

> "Such proof, in the opinion of the Board of Review, is sufficiently established and in a manner which reasonably excludes any hypothesis of a different ownership. While gasoline possesses optically no peculiar characteristics evidential of ownership, it, like any other property, may be established as Government owned, by circumstances indicative of its origin, possession and use. In this determination absolute proof is not essential."

It is contended by counsel that the court erred in not inquiring further into the manner in which accused was warned of his rights before making his

confession. As has been heretofore stated, Captain Potter testified that he was present when Colonel Harvin (the accuser) warned accused of his rights under Article of War 24, and that before accused signed his confession he (Potter) warned accused again and told him specifically that he could "expect nothing from making a statement but he voluntarily made it anyway." There is no evidence tending to rebut such proof or to indicate that the statement was involuntary. We, therefore, conclude that the statement was properly received in evidence.

The record shows that the charges were investigated by Lieutenant Colonel Fred H. Bounds, A. C., who recommended trial by general court-martial. Prior to this investigation, Colonel Harvin had procured the sworn statement or confession from the accused. This statement was subscribed and sworn to before Captain Keith R. Potter, A.C., the acting staff judge advocate, as is authorized by Article of War 114. Captain Potter, in his capacity as acting staff judge advocate, recommended trial by general court-martial and testified at the trial concerning the manner in which the statement was obtained. He also reviewed the record of trial and recommended that the sentence be approved by the reviewing authority. Counsel for the defense contends that error prejudicial to accused's rights occurred by virtue of Captain Potter's participation in the trial and his subsequent action in reviewing the record in that,the requirements of Article of War 46. being intended for the protection of accused, the acting staff judge advocate, by his participation in the trial, disqualified himself to review the record and recommend final action. The language contained in Article of War 46 indicates that this article was adopted primarily in order that the reviewing authority might have the benefit of the opinion of a legal officer before he takes his action. Although it is not the best practice for a staff judge advocate or acting staff judge advocate to review the record of trial after having been a witness in the case, no reported case has been found wherein such circumstance alone has been held to be fatal error. The court-martial is entitled to have the facts. We therefore conclude that while it would have been better procedure for an officer other than Captain Potter to have reviewed the record in the capacity of acting staff judge advocate, no error prejudicial to accused's rights, within the meaning of Article of War 37, occurred by reason of his review and recommendation.

The Board of Review is of the opinion that the evidence, with reference to Specifications 1, 2 and 3 of Charge I and Charge I is legally sufficient to support the findings of guilty thereunder. With regard to the specification of Charge II, it is apparent that no specific offence is charged therein, such specification alleging that accused "from on or about 15 July 1946 to on or about 25 August 1946, wrongfully and knowingly traffic, transport and dispose of property of the United States, intended for the use of the military service thereof, to unauthorized civilian persons, thereby engaging in the illegal practice commonly known as 'Black Marketeering'." Although the unauthorized sale or disposition of Government property in foreign theaters has been commonly termed "Black Market" operations, we are unable to find

any case where a conviction was upheld on a general allegation not alleging the specific property sold, transported or disposed of. If the specification in question is intended to refer to the illegal acts denounced in Specifications 1, 2 and 3 of Charge I, then it is duplicitous and violates the rule against unreasonable multiplication of charges (MCM 1928, par. 27, p. 17). Although there is evidence in the record, including accused's admissions, that offenses other than those denounced under Charge I may have been committed, the Board of Review is of the opinion that the specification of Charge II is fatally defective in that it fails to sufficiently allege specific acts of "black marketeering." As the Board of Review said in CM 257469, Mackay, 37 BR 129,140,

> "The omission of essential elements in specifications cannot be overlooked or lightly passed over. This method of pleading is too uncertain and indefinite to acquaint the accused with the specific offense as to which he must defend, and might deprive him of an opportunity to offer a plea of former jeopardy in a subsequent trial for the same offense. The specification is fatally defective. ***"
>
> "The determining question in each case is whether the accused has sufficient notice of the offense with which he is charged.***"

6. War Department records show that accused is 24 years of age, married and the father of a son. He attended North Carolina State College in 1941 and Philadelphia Textile School in 1942, majoring in textiles at both schools. He enlisted as a private in the Air Corps on 30 January 1943 and accepted appointment as second lieutenant, AUS, on 26 February 1944. On 23 April 1945 he was promoted to first lieutenant. This officer has an acceptable combat record, having been awarded the Purple Heart, Distinguished Flying Cross, Air Medal with seven clusters and four bronze stars. On 16 August 1946 he was punished under Article of War 104 by the Commanding General, Pacific Air Service Command for misconduct in leading a convoy. An efficiency report dated 31 December 1944 gave him a numerical efficiency rating of 4.2 and a similar report dated 30 June 1945 shows a rating of 4.9 or excellent in both instances.

7. The court was legally constituted and had jurisdiction over the person and of the offenses. 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 insufficient to support the findings of guilty of Charge II and its specification, legally sufficient to support the findings of guilty of Charge I and the specifications thereto and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of Article of War 94.

Chester D. Silvers, Judge Advocate

(Sick in Hospital), Judge Advocate

Gilbert E. Ashcraft, Judge Advocate

JAGK - CM 318296 1st Ind

WD, JAGO, Washington 25, D. C. APR 15 1947

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 Harry S. Mayer, Jr. (O-712192), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of about 2200 gallons of gasoline, of the value of about $200; larceny of 4,000 gallons of gasoline of the value of about $360; wrongful sale of 20 gallons of brake fluid of the value of about $40; all property of the United States intended for the military service, in violation of Article of War 94; and of wrongfully and knowingly trafficking in, transporting and disposing of property of the United States to civilians, thereby engaging in "Black Marketeering," 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 three years. The reviewing authority approved the sentence, stating that he considered it to be wholly inadequate, designated the Pacific Coast Branch, United States Disciplinary Barracks, Fort McQuaide, California, as the place of confinement 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 insufficient to support the findings of guilty of Charge II and its specification alleging engagement in "Black Marketeering"; legally sufficient to support the findings of guilty of Charge I and the specifications thereunder; and legally sufficient to support the sentence and to warrant confirmation of the sentence.

The evidence shows that at Manila, P.I., during the months of July and August 1946, the accused was motor pool officer for his unit; that a conspiracy existed between accused and three or more enlisted men of his unit to sell Government gasoline and brake fluid; that in pursuance of such conspiracy, on or about 15 August 1946, 2200 gallons of gasoline which had supplied the motor pool was transported from the pool and sold to a Filipino civilian for 2500 pesos; that on 25 August 1946, 4000 gallons of similar gasoline were transported from the pool and also sold to a civilian and that on or about 13 July 1946 20 gallons of brake fluid were likewise sold to a civilian. The accused, by suggestion, authorized the sale of the gasoline, although he did not personally accompany the enlisted men when the sales were consummated. After each transaction the proceeds of

the sales were divided, accused taking a major part of the money. He accompanied one of the enlisted men in the sale of the brake fluid and received his part of the proceeds of the transaction. A total of about 5,000 pesos was received by accused and the enlisted men from these illegal sales.

The records of this office show that on 5 November 1946, Technical Sergeant William R. Behn, Private First Class Francis B. Wienhold and Private First Class George C. Vasicek, enlisted men involved with accused in these illegal transactions were convicted by general court-martial and each 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 seven years. The reviewing authority in each case approved the sentence, remitted four years of the confinement imposed, and ordered the sentence executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement. He designated the Philippine Rehabilitation and Distribution Center, or elsewhere as the Secretary of War might direct, as the place of confinement. The record of trial in the case of the above named enlisted men has been examined in the Office of The Judge Advocate General and found legally sufficient to support the sentence in the case of each accused. (See CM 318399, Behn, Wienhold and Vasicek.) I recommend that in the instant case the findings of guilty of Charge II and its specification be disapproved; that the sentence be confirmed and carried into execution and that an appropriate United States disciplinary barracks be designated as the place of confinement.

4. On 30 January 1947, counsel for the accused in this case, Earle Hepburn, Esq., Philadelphia, Pennsylvania, appeared before the Board of Review, made oral arguments in behalf of accused, and filed a brief which is appended to the record.

In a letter to the Under Secretary of War dated 12 February 1946, Honorable Francis J. Myers, United States Senate, expressed interest in the case. In a letter to The Judge Advocate General dated 4 February 1947, Mr. Stanton D. Sanson, Empire State Building, New York, urged that clemency be extended to accused. Consideration has also been given to a letter dated 20 March 1947 from Lieutenant Colonel Myer Fried, GSC, to Mrs. Lucille Mayer, and to a letter dated 3 February 1946 from Judge Harry S. McDevitt to The Judge Advocate General.

Accused has a creditable combat record, and efficiency reports of excellent. He has been once punished under Article of War 104. He is 24 years of age, and married.

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

CM 318296

6 Incls
1. Record of trial
2. Form of action
3. Brief and ltr of counsel for acc'd
4. Ltr fr Mr Stanton D Sanson
5. Ltr fr Lt Col Myer Fried
6. Ltr fr Judge Harry S. McDevitt

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 157, 5 May 1947).

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

JAGK - CM 318313

12 MAR 1947

UNITED STATES	1ST U. S. INFANTRY DIVISION
v.	Trial by G.C.M., convened at Regensburg, Germany, 1 and 2 October 1946. Dismissal, total forfeitures and to pay a fine of five hundred dollars ($500.00).
Captain LAWRENCE I. DAVIS (O-1746326), Dental Corps	

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

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

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Captain Lawrence I. Davis, 650th Medical Clearing Company, did, at Furth, Germany, on or about 17 August 1946, with intent to deceive, officially state substantially that two (2) packages did not contain United States Government property, or words to that effect, which statement was known by said Captain Lawrence I. Davis to be untrue.

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

Specification 1: In that Captain Lawrence I. Davis, ***, did, at Furth, Germany, on or about 16 August 1946 wrongfully and in violation of Army Regulation sell for ten dollars ($10.00) in money orders, to Staff Sergeant Evan G. Lansing, 650th Medical Clearing Company, one carton of tax-free cigarettes, which had been purchased by said Captain Lawrence I. Davis from the Army Exchange Service.

Specification 2: In that Captain Lawrence I. Davis, ***, did, at Furth, Germany, on or about 9 August 1946 wrongfully and in violation of Army Regulations sell for twenty-five dollars ($25.00) in money orders to Corporal Otto Hamac, 650th Medical Clearing Company, three (3) cartons of tax-free cigarettes which had been purchased by said Captain Lawrence I. Davis from the Army Exchange Service.

Specification 3: In that Captain Lawrence I. Davis, ***, did, at Furth, Germany, on or about 16 August 1946, wrongfully and in violation of Army Regulations sell for fifty dollars ($50.00) in money orders to T/5 Thomas Bates, five (5) cartons of tax-free cigarettes which had been purchased by said Captain Lawrence I. Davis from the Army Exchange Service.

Specification 4: In that Captain Lawrence I. Davis, ***, did, at Furth, Germany, on or about 16 August 1946, wrongfully and in violation of Army Regulations sell for thirty ($30.00) dollars in money orders to Private Donald Chase, 650th Medical Clearing Company three cartons of tax-free cigarettes which had been purchased by said Captain Lawrence I. Davis from the Army Exchange Service.

He pleaded not guilty to all charges and specifications. He was found guilty of Charges II and III and the specifications thereto, but not guilty of Charge I and its specification. No evidence of any previous conviction was introduced. The court sentenced accused to be dismissed the service, to forfeit all pay and allowances due or to become due and to pay to the United States a fine of $500.00. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the prosecution.

a. Charge III and the Specifications thereto.

In his opening statement the trial judge advocate read to the court excerpts from various opinions of the Branch Office of The Judge Advocate General with the European Theater of Operations, United States Army, which related to so-called "black market" transactions, and also read into the record paragraph 13d (1), Army Regulations 210-65, providing as follows: "The resale by military or civilian personnel of merchandise, purchased in an Army exchange is prohibited" (R. 7).

During all the times hereinafter mentioned the accused was a dental officer assigned to the 650th Medical Clearing Company, 1st Medical Battalion, located at Furth, Germany (R. 113). This company was being deactivated during the latter part of August 1946 and the accused had received orders to proceed to the Port at Bremerhaven, Germany (R. 67,68).

Staff Sergeant Evan Lansing, 416th Medical Collecting Company, Furth, Germany, testified that on the morning of 16 August 1946 he was approached by the accused who asked him if he was interested in buying some cigarettes. Sergeant Lansing replied that he was interested and after accused stated that the price was "a ten dollar money order" for one carton, Lansing filled out the necessary money order blank, gave it to Corporal Raspanti, the mail clerk, and the accused delivered the cigarettes to Lansing in the company mess hall (R. 8,9).

Technician Fifth Grade Thomas Bates, 416 Medical Collecting Company, testified that he saw accused at "breakfast time" on 16 August 1946; that he was going on a three day pass and needed cigarettes; that after conferring with accused he gave him a $50 money order for five cartons of cigarettes. The cigarettes were later left on his bed, but he did not know who actually delivered them to his room (R. 14).

Corporal Ottis C. Hammac, 416 Medical Collecting Company, testified that during August 1946 he was a member of the "650th" and that on some date between the 2nd and 12th of August the accused took him to "the house" and sold him three cartons of cigarettes for $25 and that he made out a money order to accused through the Army Post Office for the purchase price (R. 22,23).

Technician Fifth Grade Donald Chase, formerly of the 650th Medical Clearing Company, stated that on 16 August 1946 he, Corporal Bates, Sergeant Lansing, and three or four other fellows were in the mess hall preparing to leave on weekend passes when the accused came in offering to sell cigarettes. The men were "all short of cigarettes and he says he wants a ten dollar money order and we said we would gladly supply it for the cigarettes." Corporal Chase gave to the mail clerk, Corporal Raspanti, his currency control book and 300 marks and received from accused three cartons of cigarettes (R. 18).

All of the cigarettes which the witnesses stated they purchased from accused were tax free, sealed with a yellow label and of the type supplied soldiers in the theater through the post exchanges (R. 9,14,19,23).

Technician Fifth Grade Joseph Raspanti, formerly the unit mail clerk of the 650th Medical Clearing Company, testified that on the morning of 16 August 1946 when the men were going on pass, he accepted from Sergeant Lansing, Corporal Bates and Corporal Chase their money order books, applications and money. He made out the money orders to the accused, or his wife, as requested, and gave the money orders to accused. He distinctly remembered giving accused a $30 money order for Corporal Chase and a $10 money order for Sergeant Lansing (R. 25). He also made out a money order to accused for Corporal Hammac but he had forgotten the amount (R. 27). The currency control books of Sergeant Lansing, Technician Fifth Grade Bates and Technician Fifth Grade Chase, referred to by Technician Fifth Grade Raspanti as "money order books," showing the proper entries therein, were received in evidence as Prosecution's Exhibits 1, 3, and 4 respectively and withdrawn at the conclusion of the trial (R. 10,15,19). The regular sale price of cigarettes at the post exchange is shown to have been 70 cents per carton (R. 21).

b. Concerning Charge II and its Specification.

On motion of the prosecution, the court took judicial notice of the provisions of Headquarters, United States Forces European Theater, Circular 138, dated 16 October 1945, and more particularly section 1, paragraph 6(c), thereof

providing that each parcel submitted for mailing to the United States through United States postal facilities in the theater will bear thereon the certificate of a commissioned officer as shown in paragraph 3 of Annex A thereto (R. 23).

During the latter part of August 1946, Technician Fifth Grade Joseph Raspanti, the unit mail clerk of the 650th Medical Clearing Company, received two packages for mailing which were addressed to Mrs. Lee Davis, 3640 E 151st Street, Cleveland, Ohio. The return address shown on the packages was "Capt. L. I. Davis, 650th Medical Clearing Company, APO 162." The packages did not contain the certificate required by Circular No. 138 and Raspanti notified the accused to come in and certify to the contents as required by regulations. The accused appeared at the postal section, asked Raspanti for a pencil, and in his presence wrote the following on each package, "This package does not contain U.S. Govt property. Capt L.I. Davis, D.C." (R. 31,33,50). These packages, showing the foregoing certificate, were received in evidence as Prosecution's Exhibits 5 and 6 (R. 28,31). The pencil used by the accused in writing the certificate, a Dixon green No. 3375 was identified by Technician Fifth Grade Raspanti and received in evidence as Prosecution's Exhibit 7 (R. 32). Second Lieutenant Thomas N. Foster, 162 Army Postal Unit, testified that pursuant to authority granted him by higher headquarters he opened the boxes, marked Prosecution's Exhibits 5 and 6, and that the following items were found therein:

1 special service USA tennis racket
1 suitcase, Rodip (apparently purchased by accused from PX)
2 pair of shoes
1 box of toys
1 hat
1 reversible snow coat (Parka)
(Pros. Ex. 5)

1 pair of football shoes
1 German Medical Dental set consisting of motor, generator, microscope, cable and scales (Pros. Ex. 6)
(R. 46,47, Pros. Ex. 11).

The tennis racket referred to was proven to have been United States Government property (R. 34, Pros. Ex. 8). The reversible snow coat, commonly called a Parka type, was identified by Captain Charles John Harnisher, 416 Medical Collecting Company, as "our company property." Captain Harnisher stated that he did not give accused permission to mail it home (R. 70). Technician Fourth Grade George R. Williams, 1st Battalion Company, also identified the Parka coat as United States Government property, issued for the military service (R. 75). Corporal James Fencl, 162 Army Postal Unit, stated that he was present when Lieutenant Foster opened the parcels marked Prosecution's Exhibits 5 and 6 at APO 162, Nurnberg, Germany, on 16 August 1946 and he identified the tennis racket, Prosecution's Exhibit 8, and the Parka coat, Prosecution's Exhibit 9, as having been in the "Box" marked Prosecution's Exhibit 5 (R.52).

On cross-examination the accused admitted that the "boxes" contained Government property particularly the tennis racket, Parka coat and shoes and that he knew it was illegal to send them home (R. 99).

4. For the defense

The defense called Lieutenant Colonel William Primtup, Quartermaster Corps, 514 Quartermaster Group, as a character witness. He testified that the accused was under his command from August to November of "last year" and that he considered accused a very outstanding officer, not only as a dental officer but in "every respect" (R. 77). Lieutenant Colonel Howard I. Olson, Quartermaster Corps, stated that accused served for about five months as dental officer in the group of which he was executive officer and that he would rate accused for efficiency as excellent or better. He had not heard the men make any acrimonious or derogatory statements concerning the accused (R. 79).

Liesolotte Echter, a German civilian, of Furth, Germany, testified that she was employed as dental assistant to the accused and that on Saturday afternoon, 17 August 1946, she did not have any required duties and offered to help the accused pack some boxes. She further asserted that she went to accused's quarters and, in his absence, packed the articles shown to have been in the boxes, Prosecution's Exhibits 5 and 6. The tennis racket and the shoes were "down in the cellar in a box" and the parka was "in the closet." A "man" came and nailed the boxes up. She packed everything that she thought belonged to the accused and told accused that she had "packed everything what was in the closet and was lying around in the room" (R. 81-91).

At his own request accused was sworn as a witness and when shown the cerficates in Prosecution's Exhibits 5 and 6 emphatically denied that the signatures thereon were his. He denied ordering any of the items found in the parcels to be packed but after they were sealed he did examine the boxes. Accused asserted that he merely talked about packing with his dental assistant, Liesolotte Echter, and she volunteered to do the packing for him (R. 93,96). On cross-examination accused stated that the last time he saw the "boxes" they "were just plain, without anything on them" but he knew they would not "go home" without a certificate on them. When asked if he recognized the signatures on the box accused replied, "No, I don't, not at all. I had never signed my name that way, for one thing. I usually -- I mean, I always write 'Lawrence I. Davis,' and I don't even know what that says -- (reading from box) -- 'L.I. Davis', Capt. L.I. Davis" (R. 98-100).

Piotr Hillman, a former member of the Polish underground movement and who had been a hotel receptionist prior to the war, testified that he was presently engaged in the detection of concealed codes and ciphers for the Military Government. He was a CAF 9 "acting on an 11" and sometimes had to confirm handwritings in the performance of his duties. This witness stated that prior to taking the stand he had investigated the handwriting on the "boxes" (Pros. Exs. 5 and 6) and compared it with some samples "I got from

Captain Davis and later on one sample which I dictated to him." The defense counsel then asked Mr. Hillman if, after making comparison of the handwriting on the "boxes" and that of Captain Davis, there was a "semblance or iota" of doubt in his mind that the writing on the "boxes" might not be that of accused. Hillman replied that there was such doubt. On cross-examination he admitted that he had not had any training or instruction in the comparison of handwriting. Everything he knew was gained by experience. In response to questions by the court the witness stated that his comparison of accused's handwriting and that on the exhibits revealed that out of 19 characteristic elements found, 13 were positive, four negative, one questionable and one questionable towards positive. By positive he meant that the handwriting on the samples he secured from accused and that on the "boxes" were the same, however, "This board here, this wood, makes the comparison harder" (R. 107-113).

The defense thereupon rested.

5. Testimony in rebuttal.

Captain Charles John Hornisher was recalled by the prosecution as a character witness against accused. He stated that he had been accused's commanding officer since "23 May," that he knew accused's reputation as to character and that it was "bad". He also stated that Technician Fifth Grade Raspanti had a good reputation as a soldier, never caused any trouble and had never been given a reprimand. On motion of the defense the testimony relating to Technician Fifth Grade Raspanti was ordered stricken from the record (R. 114,115).

Second Lieutenant George A. Mason, Jr., 1st Medical Battalion, stated that he had known accused since the first part of June when he was assigned to the 650th Medical Clearing Company in Furth. The witness was only assigned to the company for about ten or twelve days and he testified that he knew accused's character and reputation and that it was bad. Lieutenant Mason was company supply and motor officer (R. 117-119).

No further material evidence was presented by either side.

6. Comment.

Except for the plea of not guilty, the prosecution's evidence to support the findings of guilty of Specifications 1 to 4 inclusive of Charge III and Charge III stand unchallenged in the record. The enlisted men named in the specifications identified the accused, and testified as to the date, place and other details showing the purchase from accused of tax free cigarettes in the amount and for the consideration alleged. Except for the three cartons sold to Corporal Hammac for the total sum of $25.00, all others were sold for $10 per carton. The evidence also shows that accused solicited such sales in the company mess hall, that the men were short of cigarettes, that they were going on weekend passes and were willing to pay exhorbitant prices. Such peddling, at unconscionable prices of tax free cigarettes rationed to military

personnel through the post exchanges has been uniformly denounced as not only conduct prejudicial to good order and military discipline, as a violation of Article of War 96, but also, in the case of an officer, such disgraceful and compromising conduct as is unbecoming an officer and gentleman in violation of Article of War 95. This is so because an officer who would seek and achieve personal gain by reason of the scarcity of supplies among the men of his organization would not merit the respect and confidence of such enlisted men (CM 282694, Andrews, 24 BR (ETO) 15; CM 298514, Stanley, 20 BR (ETO 319).

The only exception to the regulations prohibiting resale of merchandise purchased at Army exchanges is that found in paragraph 13d (3), AR 210-65, providing that as a matter of economy, convenience, or necessity as agent for other military personnel, one may receive actual reimbursement without profit for such merchandise. The enlisted men who bought the cigarettes identified them as tax free, bearing the seal showing that they were provided for military personnel only, and there is no evidence in the record tending to contradict this testimony. But even if it could be doubted that the cigarettes were tax free and purchased at the post exchange the sale at $10 per carton is so unconscionable as to be conduct prejudicial to good order and military discipline in violation of Article of War 96.

The specification of Charge II alleges that on or about 17 August 1946, with intent to deceive, the accused officially stated that two (2) packages did not contain United States Government property, which statement was known by him to be untrue. The record shows that two packages, each bearing a certificate that it contained no United States property and with the signature "Capt L. I. Davis, DC" affixed thereto were intercepted by the postal officer. Inside the packages were items of United States Government property, namely, a Parka coat, tennis racket and shoes. The value of these items is not considered of very material importance. The only question is whether accused made the false certificates. Accused testified that he did not make the certificates appearing on the packages and Miss Echter asserted that she alone packed the items and a "man" nailed up the boxes. Technician Fifth Grade Raspanti testified that the packages were delivered for mailing without any certificate and that he notified accused who subsequently and in his presence executed and signed the certificates. If accused affixed his signature to the certificates he is charged with knowledge of the facts to which he certified. That someone other than he packed the boxes and that he did not check the contents would not operate to relieve him of responsibility for making the false certificates. Any other rule would render such a certificate of very doubtful import (CM 20269, Cox, 12 BR 373,379; CM 249444, Goodwin, 32 BR 121,125).

It may be doubted that Mr. Hillman qualified as a handwriting expert. The prosecution did not object to his testimony and although he stated that he had some doubt that the signatures on the certificates were accused's, on cross-examination he asserted that thirteen of the nineteen characteristics found were positive and that the signatures might have been that of accused. His

testimony is not convincing. But the testimony of Technician Fifth Grade Raspanti is most convincing. It was his responsibility to see that no package went through the mail without the required certificate and he personally observed the execution thereof by the accused.

The Board of Review has given full consideration to all the testimony and, inasmuch as the sentence is one requiring confirmation, we have no hesitancy in concluding that the competent evidence is convincing beyond a reasonable doubt that the accused sold the tax free cigarettes as alleged, that he made the certificates on the packages as alleged, that the certificates were false, known by him to have been false, and were made with the intent to deceive. The intent to deceive, requisite to a conviction of the offense alleged in the Specification of Charge II, may be inferred from the surreptitious manner in which the packages were mailed, or attempted to be mailed, together with the admissions of accused that he knew the regulations and that it was unlawful to send Government property through the mail.

The making of a false certificate with the intent to deceive has been consistently held to be a violation of Article of War 95 (CM 249998, Palka, 32 BR 274; MCM, 1928, par. 151).

6. War Department records show that accused is 26 years of age and married. He was commissioned a second lieutenant, MAC, AUS, on 26 August 1942, and first lieutenant, DC, on 31 May 1944, upon his graduation from the University of Pittsburgh Dental School. He was promoted to captain 14 January 1946. In March 1945 he was transferred as a replacement officer to the European Theater. There are two efficiency reports shown in the records. The adjective rating on one dated 31 December 1944 is "very satisfactory" and the other dated 1 July 1945 is "excellent."

7. The court was legally constituted and had jurisdiction over the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction for a violation of Article of War 95 and is authorized for a violation of Article of War 96.

Celestin D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Aylsworth, Judge Advocate

JAGK - CM 318313 1st Ind

WD, JAGO, Washington 25, D. C. MAR 17 1947

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 Captain Lawrence I. Davis (O-1746326), Dental Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully selling one carton of tax free (post exchange) cigarettes to Staff Sergeant Evan G. Lansing for $10.00, three cartons to Corporal Ottis Hammac for $25, five cartons to Technician Fifth Grade Thomas Bates for $50, and three cartons to Private Donald Chase for $30, in violation of Article of War 96. He was also found guilty of making a false official statement on each of two packages which he placed or caused to be placed in the mail, that the packages did not contain any United States property, which statement was known by him to be untrue, in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to pay to the United States a fine of $500.00. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of 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 of the sentence.

During the period 9-16 August 1946, at Furth, Germany, when there was a shortage of supplies of cigarettes in his organization, accused solicited sales among the enlisted men of his organization and sold to four different men a total of twelve cartons of tax-free cigarettes, of the type sold at the post exchange, for a total sum of $115.00. The normal price of the cigarettes at the post exchange was 70 cents per carton or a total of $8.40. It was also proven that on or about 17 August 1946 two packages were delivered to the mail clerk of accused's organization addressed to Mrs. Lee Davis, 3640 E. 151st Street, Cleveland, Ohio, and bearing the return address of accused. The packages did not have thereon the required certificates that no United States property was contained therein. The mail clerk notified accused to execute and place the certificates on his packages. He testified that the accused thereafter in his presence executed and signed the required certificates. Subsequently the packages were opened and found to contain a Government issue parka coat, special service tennis racket, shoes, some German dental equipment and other items. The only items conclusively shown to have been United States property were the parka coat, tennis racket and shoes. The accused admitted that the packages contained Government property but

denied that he executed and signed the certificates thereon.

Two character witnesses in the case testified that accused had a good reputation and was an excellent officer. The commanding officer of accused's company and a former officer of the same unit stated that his character and reputation were "bad."

4. The staff judge advocate attached to the record of trial twelve letters and affidavits from various persons attesting to the good character and reputation of accused. These written statements are from responsible persons in and near Cleveland, Ohio, including accused's wife, Mrs. Lee Davis. In her affidavit Mrs. Davis states that pursuant to a request from her husband she sent him, among other things, twenty cartons of cigarettes for use in "bartering for things which he might bring home."

There is also attached to the record affidavits of the four enlisted men executed subsequent to the trial of the case in which each states that he is not absolutely sure the cigarettes he purchased were the post exchange tax-free variety. Subsequent to the date of these affidavits Technician Raspanti executed another affidavit, which is also attached to the record, wherein he asserts that he was intimidated by the accused and threatened by him with court-martial action for perjury. The threats are alleged to have taken place in the mail room and in the presence of a civilian, Charles Hoffmeister. Raspanti reasserted that he saw the accused sign the postal certificates on the packages.

On 12 March 1946 Mr. F. Joseph Donohue, Attorney, Washington, D. C., in company with Mr. N. D. Davis, Cleveland, Ohio, father of the accused, appeared before the Board of Review in behalf of accused, made oral arguments and filed a brief which has been considered. Mr. Donohue also filed additional papers in the form of newly discovered evidence including a statement of Mr. Ira N. Gullickson, a handwriting expert of Washington, D.C., wherein the writer states that he has examined other samples of writing, allegedly of the accused, and by comparison with these writings and photostatic copies of the writings on the boxes (Pros. Exs. 5 and 6) he is of the opinion "That the writer of the standards is not the writer of the two questioned writings." These papers have been appended to the record of trial.

5. In view of all the circumstances of the case, including the comparative youth of this officer, I recommend that the sentence be confirmed but that that portion thereof adjudging total forfeitures be commuted to a reprimand, that as thus commuted the sentence be carried into execution but that the execution of that portion thereof adjudging dismissal be suspended during good behavior.

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

(GCMO. 115, 31 March 1947).

3 Incls
1. Record of trial
2. Form of action
3. Papers filed by Mr. Donohue, attorney

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

JAGK - CM 318341

19 DEC 1946

UNITED STATES	)	KOREA BASE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Korea Base Command, 31 October 1946. Dishonorable discharge and confinement for life.
	)	
Private WALTER WOLFORD (35783962), Medical Detachment 382 Station Hospital	)	

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE I: Violation of the 92 Article of War.

Specification: In that Private Walter Wolford, Medical Detachment, 382 Station Hospital, APO 901, did, at Bupyung, Korea, at or near APO 901, on or about 19 September 1946, forcibly and feloniously, against her will, have carnal knowledge of Pak Bong In.

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

Specification 1: In that Private Walter Wolford, ***, did at Bupyung, Korea, at or near APO 901, on or about 19 September, 1946, unlawfully enter the dwelling of Pak Bong In, 756 So Wa Jung, Bupyung, Korea, at or near APO 901, with intent to commit a criminal offense to wit, rape, therein.

Specification 2: In that Private Walter Wolford, ***, did at Bupyung, Korea, at or near APO 901, on or about 19 September 1946, unlawfully enter the dwelling of Kim Keong Sum, and Lee Ul Yung, 756 So Wha Jung, Bupyung, Korea, at or near APO 901, with intent to commit a criminal offense, to wit, to take away from her residence, Lee Ul Yung, by force, with intent to rape.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: In that Private Walter Wolford, ***, did, at or near, 756 So Wha Jung, Bupyung, Korea, at or near APO 901, on or

about 19 September 1946, with intent to do him bodily harm, commit an assault upon Kim Keong Sun, by striking him in face with his fist and kicking him in the body with his boots.

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and its specification, Charge II and Specifications 1, 2 and 5 thereof, and not guilty of Specifications 3 and 4 of Charge II. Evidence of one previous conviction was considered. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. At the trial of the accused herein the victims of the alleged offenses, all Korean nationals, failed to identify the accused as being the person, or among the persons, committing the offenses set forth in the charges and specifications. Although it was proven that three soldiers unlawfully entered the dwelling of Pak Bong Im on some date prior to 24 September 1946 and that two of them forcibly and feloniously, against her will, had carnal knowledge of Pak Bong Im; that three soldiers, on about the same date, unlawfully entered the dwelling of Kim Keong Sun and Lee Ul Yung and attempted to rape Lee Ul Yung, the only testimony tending to establish the identity of the accused as being a party to these crimes is the following statement of Captain James T. Campbell, Assistant Provost Marshal, Korean Base Command:

"An alleged rape and assault had been reported to me as having taken place on the 19th of September. I took the defendant and PFC Hansen to the scene of the alleged rape and assault for identification purposes.

* * *

"Q. How was he identified at this time?

"A. To the scene of the alleged rape and assault, the houses of Pak and Kim, I took PFC Wolford and PFC Hansen, and three MP's. They were all dressed alike, in OD's. I had the MP's remove their brassards and place them in their pockets. I had previously sent them to their quarters to get OD caps in the place of their helmets. And at the scene I had them remove their pistols and pistol belts, which I hung on my arm, and I lined the defendant, PFC Hansen, and three of the MP's in a line, placed them in a line, and then brought out the group to Mrs Pak's house, first, and she immediately pointed out the defendant as being one of the American soldiers who had raped her, and also pointed out PFC Hansen as one of those who had been present, and she placed her hand on both of them, and then I changed the line-up, placing Wolford and Hansen in different positions in the line of five, and Mrs Pak did the same thing again. Then I took

the same group - that is, Wolford and Hansen and the three MP's, with two interpreters I had with me, over to Kim's house where, in the same procedure of line-up, all five dressed alike, Kim picked the defendant and Hansen out immediately, on two occasions, on two different line-ups" (R. 29-30).

It must therefore be determined whether or not the testimony of Captain Campbell, standing alone, was competent evidence to establish the identity of the accused.

In CM 316705, Brown, recently before the Board of Review, the victim of the alleged rape, a Japanese national, identified the accused in the court room as her assailants and also related that she identified them at an identification parade held the day after the crimes were perpetrated upon her. An officer who conducted the parade also testified that the victim identified each accused at the parade as being the persons who assaulted her. It was held in that case, (1) that where, at the trial, the victim identified the accused as her assailant, the victim could also testify that she identified the accused as her assailant at an identification parade, if fairly conducted, and (2) that testimony of third persons attending the identification parade concerning the identification of accused by the victim, was competent as tending to corroborate (or discredit) the victim's testimony on the question of identity. Prior to the decision in the Brown case the Board of Review considered the case of CM 270871, Shirley, 45 BR 351, wherein the only evidence identifying accused as the culprit was the testimony of a military policeman that subsequent to the crime the victim (who died before the trial) pointed out the accused, who was then in custody, as his assailant. It was held that such evidence was hearsay and since the accused was in custody and not required to speak, his silence could not be construed as an admission against interest, and therefore a conviction could not stand where predicated upon such evidence alone. The Brown case did not attempt to overrule the Shirley case but reaffirmed the principle previously applied in CM 232790, Brandon, 19 BR 193, that where a witness identifies the accused as the culprit in court, such witness or other witnesses may be permitted to testify by way of corroboration of his testimony as to his extrajudicial identification of the accused as the culprit, where the circumstances surrounding the extrajudicial identification indicate that no improper suggestion or coercion was employed.

The instant case falls squarely within the rule set forth in the Shirley case and is supported by McCarthy v. United States (28 Fed. 2d 298). The testimony of Captain Campbell regarding the identification of accused by the victims at the identification parade, not being in corroboration of an identification in open court by such victims, is inadmissible. Therefore, the record of trial is barren of any evidence tending to identify the accused as the perpetrator of the offenses charged against him.

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

Chester D. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Albert G. Atkinson, Judge Advocate

JAGK - CM 318341 1st Ind

WD, JAGO, Washington 25, D. C. AUG 9 1946

TO: Commanding General, Korea Base Command, APO 901, c/o Postmaster, San Francisco, California

1. In the case of Private Walter Wolford (35783962), Medical Detachment 382 Station Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. 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 318341).

1 Incl
Record of trial

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

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

JAGH - CM 318342

28 APR 1947

U N I T E D S T A T E S	)	NEW YORK PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Camp Kilmer, New Jersey, 15 and 22 October 1946. Dismissal, total forfeitures, and confinement for two (2) years
Captain FRANKLYN C. IRVIN (O-1945172), Transportation Corps	)	

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

1. The record of trial in the case of the officer named above has been examined and the Board of Review 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 Captain Franklyn C. Irvin, Transportation Corps, alias Major Frederick J. Erwin, 1262nd Army Service Unit, Personnel Center, Separation Center, 17th Company, Fort Dix, New Jersey, did, at Camp Kilmer, New Jersey, on or about 5 September 1946, with intent to defraud falsely, make in its entirety a certain writing to wit, a special order in the following words and figures, to wit:

CKCB R E S T R I C T E D VW

HEADQUARTERS CAMP KILMER
New Brunswick, N.J.

SPECIAL ORDERS) 17 September 1946

NUMBER.....259 E X T R A C T

22. HRTS on TDY in compliance with Letter Orders fr USFET, Major Frederick J Erwin o1794172 TC, is placed on further TDY for an undetermined period at the San Francisco Port of Embarkation, San Francisco, California. WP RWAT to CO for instructions and/or further orders. UCTDY or unless sooner relieved by proper authority, Major Erwin will return to this station.

AUTH: VOTAG

This Personnel under Tee Cee Project. Travel by Military aircraft or by commercial aircraft is directed for both going and returning except where other means of authorized travel are more expeditious.

TDN TCS 601-3 P 432-02 A212/60425

Sec 111 AR 35-4820 will apply

By ORDER OF COLONEL DUFFIE:

STUART H WARD
CAPT TC
Adjutant

Official Seal
Headquarters
Camp Kilmer, N.J.

STUART H WARD
Capt TC
Adjutant

Distribution "AA"

R E S T R I C T E D

which said order was a writing of a public nature which might operate to the prejudice of another.

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

Specification: In that Captain Franklyn C. Irvin, Transportation Corps, 1262nd Army Service Unit, Personnel Center, Separation Center, 17th Company, Fort Dix, New Jersey, did, at Camp Kilmer, New Jersey, on or about 17 September 1946, for the purpose of obtaining unauthorized passage by aircraft, wrongfully, unlawfully and with the intention to deceive and mislead, misrepresent himself to be Major Frederick J. Erwin.

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

Specification 1: In that Captain Franklyn C. Irvin, Transportation Corps, alias Major Frederick J. Erwin, 1262nd Army Service Unit, Personnel Center, Separation Center, 17th Company, Fort Dix, New Jersey, did, at or near Newark, New Jersey, on or about 17 September 1946, wrongfully appear in public, wearing, without authority, the insignia of a major of the United States Army.

Specification 2: In that Captain Franklyn C. Irvin, Transportation Corps, alias Major Frederick J. Erwin, 1262nd Army Service Unit, Personnel Center, Separation Center, 17th Company, Fort Dix, New Jersey, did, at or near Newark, New Jersey, on or about 17 September 1946, pass and utter as true and genuine a certain writing in words and figures as follows:

CKCB VW

RESTRICTED

HEADQUARTERS CAMP KILMER
New Brunswick, N.J.

SPECIAL ORDERS) 17 September 1946

NUMBER.....259 EXTRACT

22. HRTS on TDY in compliance with Letter Orders fr USFET, Major Frederick J Erwin o1794172 TC, is placed on further TDY for an undetermined period at the San Francisco Port of Embarkation, San Francisco, California. WP RWAT to CO for instructions and/or further orders. UCTDY or unless sooner relieved by proper authority, Major Erwin will return to this station.

AUTH: VOTAG

This Personnel under Tee Cee Project, Travel by Military aircraft or by commercial aircraft is directed for both going and returning except where other means of authorized travel are more expeditious.

TDN TCS 601-3 P 432-02 A212/60425

Sec 111 AR 35-4820 will apply

By ORDER OF COLONEL DUFFIE:

STUART H WARD
CAPT TC
Adjutant

Official Seal
Headquarters
Camp Kilmer, N.J.

STUART H WARD
Capt TC
Adjutant

Distribution "AA"

a writing of a public nature which might operate to the prejudice of another, which said writing was as he, the said Captain Franklyn C. Irvin, alias Major Frederick J. Erwin, then well knew, falsely made and forged.

The accused was arraigned on 15 October 1946 after which he requested and was granted a continuance until 22 October 1946 (R 6-7). When the court reconvened pursuant to adjournment, the accused entered a plea to the jurisdiction on the ground that he was no longer a person subject to military law because he had reverted to an inactive status on 15 October 1946 under the provisions of paragraph 56, Special Orders Number 207, Headquarters 1262d Army Service Unit, Personnel Center, Separation Center, Fort Dix, New Jersey, dated 26 July 1946 (R 10; Def Ex A). The prosecution introduced into evidence as prosecution's Exhibit 1, a copy of paragraph 99, Special Orders No. 263, Headquarters 1262d Army Service Unit, First Army, dated 24 September 1946 which revoked the accused's terminal leave and his reversion to inactive status, effective 16 September 1946 under the authority of War Department Circular Number 116, 20 April 1946 (R 12). After hearing the argument of both the prosecution and the defense, the accused's plea to the jurisdiction was denied (R 18). He then pleaded not guilty to and was found guilty of all Charges and the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to two years and forwarded the record of trial for action under Article of War 48.

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

Prior to 26 July 1946 the accused, a captain, Army of the United States, was assigned as Chief of the Transient Branch, Headquarters Camp Kilmer, New Jersey (R 19). On 26 July 1946, he was placed on terminal leave for eighty days at the Separation Center, Fort Dix, New Jersey, pursuant to paragraph 56, Special Orders No. 207, 1262d Army Service Unit, Personnel Center, Separation Center, Fort Dix, New Jersey, 26 July 1946 (which provided that the accused was to revert to an inactive status on 15 October 1946 (R 9; Pros Ex A).

In a pre-trial statement which was admitted in evidence as prosecution's Exhibit 4 (R 39) the accused stated that on 5 September he had an opportunity to obtain employment in California. Not having sufficient

money for the trip and knowing that Air Transport Command planes sometimes traveled without full loads, he decided to cut special orders which would enable him to travel to California on an Air Transport Command Plane. Going to the Transient Branch at Camp Kilmer, he cut a stencil for a purported Extract Paragraph 22, Special Orders No. 259, Headquarters Camp Kilmer, New Jersey, which purported to place "Major Frederick J. Erwin, 01794172, on further temporary duty for an undetermined period at the San Francisco Port of Embarkation until the completion of the temporary duty or unless sooner relieved by proper authority." The order recited as authority the verbal orders of The Adjutant General and further provided:

> "This Personnel under Tee Cee Project. Travel by Military aircraft or by commercial aircraft is directed for both going and returning except where other means of authorized travel are more expeditious.
>
> "TDN TCS 601-3y-P 432-02 A 212/60425
>
> "Sec III AR 35-4820 will apply" (R 25, 39; Pros Exs 2, 4).

The accused then took the stencil to the mimeograph section of the branch. Private First Class Dorothy H. Greene, WAC, who was on duty in that section, noticed that the accused was wearing the insignia of a major and congratulated him on his promotion. Accused started to run off the stencil himself, and Private Greene, thinking he was still on duty offered to run it for him (R 19-21). She did not read the order, but saw the word "Restricted" and the seal of the headquarters on it. About 50 copies were run off after which Private Greene asked for the stencil and one copy of the order. The accused told her it was a personal order and was not to be filed (R 22, 39; Pros Ex 4). The accused took the entire run of the order and destroyed the stencil (R 39; Pros Ex 4).

An extract of the true paragraph 22, Special Orders No. 259, Headquarters Camp Kilmer, dated 17 September 1946, bearing the seal of that headquarters, which has no reference to the accused or to "Major Erwin" was received in evidence as prosecution's Exhibit 5 without objection (R 41).

On 17 September 1946 the accused, wearing the insignia of a major, Army of the United States, and representing himself to be Major Frederick J. Erwin, presented to Miss Ann E. Smith, Passenger Clerk, Air Transport Command, Newark Airport, Newark, New Jersey, a copy of orders purporting to entitle Major Frederick J. Erwin to transportation by air to Long Beach, California (R 23-25; Pros Ex 2). The orders entitled accused, insofar as Miss Smith was concerned, to a No. 2 priority (R 24). Accused informed Miss Smith that he was to get a No. 1 priority under the "Tee Cee" project (R 24-25; Pros Ex 2). Miss Smith took two copies of the orders and the "information card" and presented same to Captain Howard

G. Roth, of the Traffic Section, Air Transport Command, her officer in charge, for disposition (R 24-27; Pros Ex 2). Accused identified himself to Captain Roth as Major Frederick J. Erwin and wore major's insignia on his collar (R 26-27, 31). Captain Roth examined the orders presented by accused, told the accused that he, (Captain Roth) was not sure whether accused was eligible for a No. 1 priority or a No. 2 priority, but that they would get the accused out to Long Beach, California, via ATC the next day (R 23-25, 27, 29; Pros Exs 2, 3). Captain Roth told accused that accused would receive a No. 2 or a No. 1 priority, depending upon what Captain Roth's headquarters had to say (R 27-29; Pros Ex 2, 3). Captain Roth ascertained from his headquarters that the Tee Cee project had been discontinued prior to 17 September 1946 (R 32). Accused left the airport on 17 September and returned the following morning, 18 September 1946 (R 30, 32). Captain Roth told accused that there was some discrepancy about the orders and that a detail was coming over from Camp Kilmer to check them (R 30). On 18 September 1946, Major Frank W. Hobson, CMP, Provost Marshal, Camp Kilmer, New Jersey, went to Newark Airport, Newark, New Jersey, and met the accused who wore green slacks, khaki shirt, a Transportation Corps insignia and insignia of a major on his collar. Major Hobson placed accused under arrest and returned accused to Camp Kilmer on 18 September 1946 (R 33-35).

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

The accused, having been advised of his rights, elected to be sworn and testified that he entered the service on 30 April 1941 (R 43-44). He was sent to Fort Dix, then to Fort Bragg, where he trained until 7 January 1942. When his unit was alerted at Fort Bragg, North Carolina, for shipment overseas, he was disqualified for overseas duty because of an old knee injury (R 44). At his own request, he was permitted to accompany the unit on a limited service status, but while he was at Fort Dix awaiting shipment, the knee was dislocated and he was transferred to a casual detachment at Fort Dix, where he served until 3 January 1943 (R 45). He was accepted for "limited service OCS" after being initially disqualified because of the knee injury. He was commissioned from OCS on 31 March 1943 and was assigned to New York Port of Embarkation (R 46). His fiancee's family, who had previously opposed his plans for marriage, withdrew their objections to the marriage of the accused to their daughter when he was commissioned. He received a three-day leave and was married (R 46-47). On 7 April 1943, he reported to Camp Kilmer and was assigned as Personnel Officer of the New York Port of Embarkation Replacement Pool, a casual organization. In September 1943, he attended the Adjutant General's School at Fort Washington and completed a two-month course. Returning to Camp Kilmer, he spent one month cleaning up the work at the pool and was assigned to Post Headquarters, Camp Kilmer, as Assistant Chief, Military Personnel Branch (R 47-48).

Accused and his wife lived at Plainfield, New Jersey, but his wife objected to that residence because it was too far from her family. While accused was at Fort Washington, his wife gave up their apartment and moved back with her family (R 47-48). Accused knew nothing of this move until it had been accomplished. He expected to be at Camp Kilmer until the end of the war, due to his limited service status (R 48). In February 1944, accused's wife gave birth to a baby, after which her father insisted that she remain at the home of her parents. In March, however, accused was promoted to First Lieutenant, which pleased his father-in-law and the latter permitted accused and his wife to live together again (R 49). In May 1945, accused and his wife were again separated (R 48). In June 1945, he was promoted to Captain, and he and his wife were reconciled again. Late in August 1945, they were separated for the last time (R 48-50). Accused's father-in-law visited Camp Kilmer and "tried to make things just as unpleasant as he could". On the advice of his attorney the accused requested a transfer overseas (R 50). He was assigned as a Troop Transport Commander in September 1945, and held that assignment until February 1946. He had completed an overseas trip just before Christmas, 1945, and after buying presents for his baby, borrowed a car to take them to the home of his wife's parents. His father-in-law refused to allow him to enter the house or see the baby (R 51).

Upon his return to Camp Kilmer in February 1946, he was assigned as a "trouble shooter" in the Military Personnel Branch, and, about a month later was made assistant chief of the Transient Branch, where he remained until 10 July 1946 (R 52).

In June 1946, accused requested and received an assignment on a troop train to California. While on delay en route from California to his station, he visited his former WAC secretary and her fiance, and discussed with them a business enterprise which the couple was starting in Los Angeles. There was some discussion concerning the possibility that accused might obtain employment in California. About three weeks before the incident for which the accused was tried, he received a letter from the same couple, inviting him to come to California to discuss his entering their business, which had been started and which was progressing well (R 53).

Accused went on terminal leave on 27 or 28 July 1946. He had made an allotment of $200 per month to his wife, which did not leave accused much money (R 53-54). His wife would receive her last allotment check early in August, but would not know it was the last one until September. Accused expected that legal action against him would be initiated in September, and he believed a trip to California would be an immediate means of escape from the problems which he foresaw. The only reason why accused cut the orders in question was to get passage to California (R 54). He wanted to get to California, look the situation over, and if it looked promising he intended to return east, pack and move to California (R 55).

Accused wore a major's insignia because his wife's parents had acted more kindly toward him on each previous occasion when he had been promoted (R 55). He did not expect to see his wife, but knew that mutual friends would see him and report his promotion to her (R 56).

On cross-examination, accused testified that on 5 September 1946 he cut the order and took it to the mimeograph section, where Private Greene offered to run it for him, but he ran it himself (R 58; Pros Ex 3). He presented the order to the Air Transport Command at the Newark Airport and was promised transportation on the strength of the order (R 59). He had made the trip before and knew that it was necessary to have orders to obtain a seat on the plane. He was wearing major's leaves on 5, 17, and 18 September (R 60, 63). He admitted that he had received instruction in the Articles of War and military law at OCS and at Camp Kilmer (R 62-63).

A psychiatrist testified that he had observed the accused at the Station Hospital at Camp Kilmer over a period of several weeks (R 64-65), and that accused is a highly intelligent, impulsive type, who often acts without giving proper or mature judgment to his acts. This condition is innate in a person but is not a mental disease (R 66). In spite of his intelligence he acts without the rationalization which is expected of a person of his intelligence (R 67). The accused's offense is directly attributable to an escapist attitude. His desire to escape from his unhappy marital condition would not affect his judgment to the point that he would be unable to distinguish between right and wrong (R 68).

Lieutenant Colonel John Ehinger, Camp Kilmer, New Jersey, testified that the accused served under his supervision from April 1943 to February 1944. The witness stated that he considered the accused one of his best officers (R 69-70). His professional qualifications for personnel work are outstanding. He is of value to the military service and his character "has been the best" (R 71).

Major Victor Warcholik, Chief of the Transient Branch, Camp Kilmer, New Jersey, testified that the accused served as his executive officer for five weeks. He rated the accused as Superior during the period (R 75-76).

It was stipulated that if Mr. Joseph K. Reichbard, Attorney, Department of Justice, were present and sworn he would testify that he was formerly assigned to Camp Kilmer as an enlisted man and as an officer. He worked with the accused and knew the accused as a splendid worker who worked overtime constantly (R 77-78).

5. In our deliberation upon this record careful consideration has been given to a brief filed on behalf of the accused by Messrs. Maurice J. McKeowen and Sidney Schreiber of Newark, New Jersey, attorneys for the accused. Oral argument by Mr. McKeowen and Mr. Schreiber were heard by the Board of Review. Numerous assignments of error have been made,

all of which have been considered by the Board. The two important assignments of error which will be discussed below are:

a. That the court did not have jurisdiction to try the accused.

b. That the special order involved in the specification of Charge I is not an instrument which can be the subject of common law forgery in violation of Article of War 93.

6. As noted above, the accused was placed on terminal leave for 80 days effective 26 July 1946 by paragraph 56, Special Orders No. 207, 1262d Army Service Unit, Personnel Center, Fort Dix, New Jersey. Under the provisions of this order the accused was to revert to an inactive status on 15 October 1946. (The date on which he was arraigned). On 18 September the accused was placed under arrest by Major Frank W. Hobson, the Provost Marshal at Camp Kilmer. Terminal leave of the accused and his reversion to inactive status was revoked by competent authority on 24 September 1946, effective 16 September 1946. Charges were served on the accused on 9 October 1946 and he was arraigned on 15 October 1946. After his arraignment the accused moved for a continuance until 22 October 1946 which was granted. When the court reconvened the accused entered a plea to the jurisdiction on the grounds that he was no longer a person subject to military law having reverted to an inactive status on 15 October 1946. In support of the accused's plea to the jurisdiction the defense counsel argued that the orders revoking the accused's terminal leave and his reversion to an inactive status were never delivered to the accused (R 9-10, 13-16). Although no evidence as to accused's non-receipt of the order in question was introduced, it is noted that the distribution shown on the orders does not include the accused's name (Extract par 92, SO 163, Sep Ctr, Ft Dix, N J, 24 Sep 1946; Pros Ex 1).

After hearing argument the law member overruled the plea to the jurisdiction (R 16).

It is well settled that where a soldier is arrested for a crime prior to the termination of his enlistment, and where the term of his enlistment expires before his trial and conviction by court-martial, military jurisdiction, having once attached by the arrest, is continued for all purposes of trial judgment, and execution (In re Walker, 3 Am. Jurist 281; Barret vs. Hopkins, 7 Fed. 312; Mosher vs Hunter, 143 Fed. (2d) 745; Winthrop's Military Law and Precedents, 2d Ed (1920 Reprint) p 90; CM 202601, Sperti, 6 BR 171; CM 202770, Cooley, 6 BR 259; CM 203393, Little, 7 BR 145, 149; CM 210678, Sharp, 9 BR 305, 319).

In Winthrop on Military Law, at the page cited the author said:

"It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly attached to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offense was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him,—as by an arrest or the service of charges,—the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused."

In the light of the foregoing authorities, even if we were to assume that the orders revoking the accused's reversion to inactive status are inoperative because such order was not delivered to the accused, he, nevertheless, did not cease to be subject to military law because military jurisdiction had attached when proceedings with a view to trial were commenced against him by arrest and service of charges prior to the termination of accused's tour of active duty.

It has recently been held by the Board of Review in a case where an accused officer, who was sentenced to dismissal, was released from active duty and finally separated from the service under honorable conditions after conviction but prior to final action by the confirming authority, that the action of the War Department in separating the accused from the military service under honorable conditions effected a constructive pardon or remission of the sentence adjudged (CM 312219, Murray, 5 Bull JAG 278).

The present case is readily distinguishable from the Murray case in that the War Department's action in the latter case was inconsistent with the accused's status as an officer awaiting final action by the confirming authority on a court-martial sentence, whereas in the present case the War Department took no action which was in any way inconsistent with the accused's status as a person awaiting trial under charges which had been seasonably initiated.

Accordingly, we are of the opinion that the law member's action in denying the accused's plea to the jurisdiction was proper.

7. The specification of Charge I avers that the accused forged a special order purporting to place a Major Frederick J. Erwin on temporary duty for an undetermined period at the San Francisco Port of Embarkation in violation of Article of War 93.

The purported special order, which, is fully set forth in the specification of Charge I and Specification 2, Charge III purports to direct travel by military or commercial aircraft "both going and returning except where other means of authorized travel are more expeditious," it recites a procurement authority, and provides that Section III, Army Regulations 35-4820 will apply.

In discussing the crime of forgery the Manual for Courts-Martial provides in relevant part:

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice. (Clark.)
>
> "* * * A writing falsely made includes a false instrument that may be in part or entirely printed, engraved, written with a pencil, or made by photography or other device. * * *"
>
> * * *
>
> "To constitute a forgery the instrument must on its face appear to be enforceable at law, * * * <u>or one which might operate to the prejudice of another</u>, * * *."
>
> * * *
>
> "The false writing must be made or altered with intent to defraud or injure another. It is immaterial, however, that anyone be actually defrauded or injured, or that no further step be made toward carrying out the intent to defraud than the making of the false writing." (MCM 1928, par 149j, pp 175-176)(Underscoring supplied).

The evidence relevant to the elements of proof as stated in the Manual for Courts-Martial are discussed below:

> "(<u>a</u>) <u>That a certain writing was falsely made * * * as alleged;</u>" (Underscoring supplied).

The making of the false Extract, Paragraph 22, Special Order 259, Headquarters Camp Kilmer, New Jersey, 17 September 1946 was established by the introduction into evidence of the genuine paragraph 22 of the relevant special orders (Pros Ex 5) and of the false document (Pros Exs 2, 3), as well as by the accused's testimony and his confession.

"(b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice;" (Underscoring supplied).

"Where the false document is absolutely and palpably void on its face, it cannot be the subject of forgery, but where it is apparently valid on its face and susceptible of use to defraud as intended, it is not necessary to conviction that the forged document be sufficient in itself, without extrinsic evidence or acts, to accomplish the forger's purpose; it is enough that it may, under some contingency aid in bringing about the result" (Neff vs. U.S. (CCA 8th, 1908) 165 Fed. 273, 280; CM 297220, Pritchard, 33 BR (ETO) 157, 158).

"It is enough if the forged instrument be apparently sufficient to support a legal claim and thus effect a fraud. It is well settled that the signing of a fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person. The public mischief, i.e., the legal tendency to defraud, is equally great in either event. Neither is it material that no person suffered loss by reason of appellant's acts. * * * It is sufficient if there is an intent to defraud someone by making or altering a writing which act might prejudice another" (Mellon v. United States (App. D. C. 1940). 110 Fed. (2nd) 556, 560-61).

An instrument is capable of forgery if it is apparently sufficient to support a legal claim directly or indirectly (Wharton's Criminal Law, 12th Ed, Sec 8871, pp 1193-1196 and cases cited therein). It is, consequently, immaterial if additional action on the part of the accused such as the filing of a voucher or claim were necessary before the Government would actually have been prejudiced.

In the instant case the instrument in question purports to direct travel by military or commercial aircraft and provides that Section III, Army Regulations 35-4820 will apply.

In relevant part Section III, Army Regulations 35-4820 provides:

"19. Air travel.—a. Authorization for payment of per diem and other expenses.

(1) (As changed by C 4, 11 Feb 46) For travel by air under competent orders on duty without troops, under regulations to be prescribed by the Secretary of War, officers of the Army, and of the legally constituted Reserves thereof while on active duty,

and of the National Guard while in Federal Service, or while participating in exercises, or performing duties under sections 92, 94, 97, or 99 or the National Defense Act, shall, in lieu of mileage or other travel allowances be allowed and paid their actual and necessary travel expenses not to exceed $8 per day, or, in lieu thereof, per diem allowances at rates not to exceed $7 per day. See sec. 12, act 16 June 1942 (56 Stat. 364; 37 U.S.C. 112; M.L. 1939, Sup. III, sec. 1371c-12 (3); sec. I, WD Bul. 28, 1942), and sec. 212, act 3 May 1945 (Public Law 49-79th Cong.; sec. I, WD Bul. 7, 1945).

"(2) Travel by officers of the Army, including the Reserve components thereof and the National Guard while on active duty in the Federal service, on commercial aircraft, domestic or foreign, including travel between airports and centers of population or posts of duty when incidental to travel on commercial aircraft, shall be allowed at public expense when authorized or approved by competent authority, and transportation requests for such travel may be issued upon such authorizations. Such expense shall be allowed without regard to comparative costs of transportation by aircraft with other modes of transportation. See sec. 12, Act 16 June 1942 (56 Stat. 364; 37 U.S.C. 112; M.L. 1939, Sup. II, sec. 1371c-12 (4); sec. I, Bul. 28, WD, 1942). See also AR 55-120.

"b. Travel by air defined.--(As changed by C 3, 21 No. 45) The term 'travel by air' is defined as a journey by Government or other aircraft, including aircraft flights for training purposes, made pursuant to orders of competent authority, which requires one or more landings away from the starting point. It includes all necessary delays en route because of unfavorable weather conditions, necessary repairs to aerial equipment, refueling, and other delays incident to the mode of travel. It likewise includes necessary delays for subsistence and lodging not in excess of 24 hours at any one point. (AG 245.6 (15 Nov 45) (4 Feb 46))."

* * *

"24. Temporary duty travel in general.—Payment of a flat per diem is the only authorized method of reimbursing officers for subsistence expenses incurred in connection with temporary duty travel. Nothing in these regulations will be interpreted as authorizing payment of per diem for sea travel on surface or undersea vessels. In the event traveling officers are required to pay for meals or other necessary services furnished on such vessels, reimbursement may be claimed and paid on an actual expense basis.

"25. Travel and temporary duty performed within United States.—(As changed by C 1, 18 Sep 45) a. Rates of per diem.— The following rates of per diem are prescribed for travel and temporary duty away from permanent stations within the continental limits of the United States:

"(1) While traveling.—$7 per day while traveling except when the order includes the words 'Travel with troops,' 'Travel with troops going,' or 'Travel with troops returning,' or one of the abbreviations 'TT,' 'TTG,' or 'TTR.'

"(2) At points of temporary duty.—Officers will be reimbursed for subsistence expenses incurred in connection with travel and temporary duty, including attendance at service schools, performed within the United States in accordance with the following table:

Government Quarters

Period	Not furnished	Furnished
1st through 30th day	$7 per day	$5 per day.
31st through 60th day	4 per day	2 per day.
61st day to end of TDY	2 per day	Nothing.

"b. Temporary duty at any one point.—'Temporary duty at any one point' is cumulative under the same order. It is likewise cumulative under a supplemental order issued by the original or other headquarters when travel status under original and supplemental orders remains unbroken. * * *"

It is apparent from the foregoing that the false special order might not only have authorized the accused to travel by military aircraft, or by civilian aircraft at Government expense, but it might also have furnished a basis for a claim for $7.00 per diem while traveling, $7.00 per day for not more than 30 days at any one point of temporary duty, and lesser amounts for each day in excess of 30 days to the end of the temporary duty directed.

The payment of per diem as provided in Army Regulations 35-4820 is authorized by the act of 16 June 1942 (56 Stat. 364; 37 USC 112) and is enforceable by action in the Court of Claims (28 USC 250 (1)).

Thus the instrument in question <u>might</u> impose a legal pecuniary liability on the United States for the payment of per diem and the reimbursement of any expense involved in obtaining travel by civilian aircraft.

The extract of special orders was apparently perfectly valid on its face. Its invalidity depended upon the intrinsic facts that the person indicated therein was fictitious, and that the order had not in fact been issued by competent authority. The instrument was thus capable of effecting a fraud. It is conceivable that an officer of the Air Transport Command would have furnished travel by military aircraft, or that travel by civilian aircraft would have been provided at Government expense if requested. It is also conceivable that a disbursing officer <u>might</u> have honored a claim of the accused for per diem, and <u>might</u> thus be subjected to prosecution or assessment or embarrassment (CM 297220, <u>Pritchard, op cit</u>).

In their brief counsel for the accused argued that the Government could not have been prejudiced by the accused's acts because ATC planes do not ordinarily carry their full passenger load and the plane that the accused was to take was at most half filled. They contend that the added cost to transport the accused was <u>de minimis</u>.

This argument is invalid, even if we were to disregard the real possibility that the instrument in question might have supported a monetary claim for <u>per diem</u> and the expenses incidental to travel by commercial aircraft.

It is well established that pecuniary loss to the Government need not necessarily be involved in the forger's intent to defraud it.

> "It is enough if the acts charged * * * tend to impair or impede a governmental function" (<u>Head</u> vs. <u>Hunter, Warden</u> (CCA 10th 1944) 141 Fed (2d) 449, 451, and cases cited therein).

An indictment may be maintained for forgery when the fraud is directed against the public at large (Wharton op cit, sec 908). At common law the forgery of any matter of judicial or executive record was indictable (Wharton, op cit, sec 890). In United States v. Randolph (1853) (24 Fed Cas No. 16,120) it was held that naturalization papers were instruments subject to forgery. (See also Johnson v. Warden (CCA 9th, 1943, 134 Fed 2nd 166, 167, cert. denied 319 U.S. 763; United States v. Mullin (D.C. E.D. Mo. 1943) 51 Fed Supp 785, 787).

Counsel for the accused cited CM 261047, De Angelo, 40 BR 105 as authority for their argument that the military special order is not a subject of forgery. In that case the Board of Review held that the making of a false furlough did not constitute common law forgery. In that case the Board of Review stated:

> "It is readily apparent from the definition and discussion of the offense contained in paragraph 149j, MCM 1928, that the offense contemplated by this Article of War is forgery as known at common law. A military furlough is not such an instrument as 'might operate to the prejudice of another', nor, if genuine, would it 'apparently impose a legal liability on another or change his legal liability to his prejudice' (MCM, 1928 par. 149j). The Specification fails to allege an offense in violation of Article of War 93 but does state an offense in violation of Article of War 96."

It is noted that the Board of Review in the De Angelo case did not discuss in detail all of the rights and privileges and other matters incidental to a furlough from which it would follow that a furlough order could not "operate to the prejudice of another," nor "apparently impose a legal liability on another," etc. After considering the rights incident to a furlough, including the fact that enlisted men on furlough are entitled to receive the monetary value of the garrison ration for the period during which they are on authorized furlough and are not subsisted at Government expense (par 8, AR 615-275), we question the reasons advanced by the Board of Review in the De Angelo case. Since, however, the opinion in the De Angelo case is limited in its application to military furlough and does not purport to lay down a broad rule applicable to all military special orders, it is therefore not determinative of the issues in the instant case.

For the reasons stated above we are of the opinion that the forged special order involved in this case is a writing of a nature which would, if genuine, apparently impose legal liability on another, or change his legal liability to his prejudice.

"(c) that it was the accused who so falsely made or altered this paper," (Underscoring supplied).

The accused admitted that he prepared the stencil and ran off the order, in his sworn testimony and in his confession. This fact is further established by the testimony of Private Greene, that the accused came to the Mimeograph Section of the Transient Branch, Camp Kilmer, New Jersey, on 5 September 1946, and that he brought a stencil to be run off on the mimeograph machine. She further testified that the accused refused to let her file the stencil as was required by the standing operating procedure in that office.

"(d) the facts and circumstances of the case indicating the intent of the accused thereby to defraud or prejudice the rights of another person." (Underscoring supplied).

Both in the accused's pre-trial statement (Pros Ex 4) and in his sworn testimony at the trial he denied any intention to use this false order to perpetrate a fraud against the Government by attempting to collect either travel pay or monetary allowance. Despite these denials all the facts and circumstances tend to show that it was the accused's intent to defraud or prejudice the right of the United States Government. The accused is a mature officer with considerable military service. The accused admitted his intent to use the false instrument to obtain Government transportation by military or commercial aircraft and other evidence shows that he attempted to do so. He thereby would have put the Government, directly or indirectly, to the expense of transporting him from Newark, New Jersey, to San Francisco, California. It need hardly be added that manifestly his transportation, if effected, would put the Government to considerable expense, thus defrauding the Government, since the accused was not rightfully entitled to such transportation at all.

In our opinion the record of trial is legally sufficient to support the findings of guilty of the specification of Charge I.

8. That the accused committed the offenses alleged in the specification of Charges II and III is established beyond doubt by clear and convincing evidence adduced by the prosecution as well as by the sworn testimony of the accused.

9. The accused is 29 years of age, married, and a high school graduate. After attending Rutgers University for two years, he worked as a clerk in the office of a life insurance company. The records of the War Department disclose that he was inducted 30 April 1941 and was discharged as a technician fifth grade on 30 March 1943 to accept a commission. On 31 March 1943, he graduated from the Army Administration Officer Candidate School, was commissioned a second lieutenant, Army of the United States and entered active duty. He was promoted to first

lieutenant on 6 April 1944 and to captain on 12 March 1945. His efficiency index is 41.2 (Excellent).

10. In announcing the sentence, the president of the court made the following statement:

> "Let the record show that the court unanimously joins in the recommendation for clemency and directs defense counsel to prepare an appropriate form of recommendation for clemency, based upon the prior excellent service of the accused and the mental strain under which he was laboring because of his unhappy marital conditions." (R 88).

Subsequently, the recommendation was prepared as directed, and was signed by all members of the court except Lieutenant Colonel Bisnoff. The review of the Staff Judge Advocate (par 4d, page 9) indicates that Colonel Bisnoff had departed from Camp Kilmer en route to a new station before the recommendation was prepared, and that it would have been signed by him had he been present.

Attached to the record of trial are letters to the reviewing authority from twenty-nine officers and enlisted men, all of whom had served with the accused and all of whom recommended clemency in his case. In addition to the brief filed on behalf of the accused by Mr. McKeowen and Mr. Schreiber, and supporting papers attached thereto, the Board of Review has considered the following additional communications pertaining to clemency on behalf of the accused: letter to The Judge Advocate General from the Honorable H. Alexander Smith, United States Senate, dated 17 December 1946; letter to the Secretary of War from the accused, dated 18 December 1946; letter to the Secretary of War from the Honorable Robert W. Kean, Member of Congress, dated 20 December 1946; letter to the President from Mr. Leslie A. Irvin, mother of the accused, dated 23 December 1946; letter to The Adjutant General from the Honorable Albert W. Hawkes, United States Senate, dated 30 December 1946; letter to The Judge Advocate General from Mr. Daniel F. Carney, Attorney at Law, Melford, Massachusetts, dated 27 January 1947.

11. 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. 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. A sentence to dismissal is mandatory upon a conviction of a violation of Article of War 95 and a sentence to dismissal, total forfeitures and confinement at hard labor for two years is authorized upon a conviction of violations of Articles of War 93 and 96.

[illegible], Judge Advocate

Waldemar A. Solf, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 318342 1st Ind

WD, JAGO, Washington 25, D.C. APR 28 1947

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 Franklyn C. Irvin (0-1945172), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of forgery of a special order in violation of Article of War 93, misrepresenting himself as Major Frederick J. Erwin for the purpose of obtaining unauthorized passage by aircraft in violation of Article of War 95, wrongfully appearing in public wearing, without authority, the insignia of a major and uttering the forged order in violation of Article of War 96. 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 five years. The reviewing authority approved the sentence, reduced the period of confinement to two years and forwarded the record of trial for action under Article of War 48.

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

The accused, while on terminal leave, returned to Camp Kilmer, New Jersey, where he had been stationed, typed a stencil for a purported order directing travel of Major Frederick J. Erwin to San Francisco, California, on indefinite temporary duty. He took the false order to the mimeograph section and ran off about fifty copies, taking the stencil and all of the copies with him. At this time, he was wearing major's insignia, although he was a captain. Several days later, wearing the insignia of a major, he introduced himself at the Newark Airport as Major Erwin and presented the false order, requesting transportation to San Francisco via Air Transport Command aircraft. He was promised passage on the following day, but the falsity of the orders was discovered and when he reported to the airport was placed in arrest.

4. In announcing the sentence, the President of the court made the following statement:

"Let the record show that the court unanimously joins in the recommendation for clemency and directs defense counsel to prepare an appropriate form of recommendation for clemency, based upon the prior excellent service of the accused and the mental strain under which he was laboring because of his unhappy marital conditions" (R 88).

Subsequently, the recommendation was prepared as directed, and was signed by all members of the court except a Lieutenant Colonel Bisnoff. The review of the Staff Judge Advocate (par 4d, page 9) indicates that Colonel Bisnoff had departed from Camp Kilmer enroute to a new station before the recommendation was prepared, and that it would have been signed by him had he been present. Attached to the record of trial are letters recommending clemency to the reviewing authority from twenty-nine officers and enlisted men, all of whom served with the accused.

Careful consideration has been given to a brief filed on behalf of the accused by Messrs. Maurice J. McKeowen and Sidney J. Schreiber, attorneys at law, Newark, New Jersey, and to the following additional communications pertaining to clemency: letter to The Judge Advocate General from the Honorable H. Alexander Smith, United States Senate, dated 17 December 1946; letter to the Secretary of War from the accused dated 18 December 1946; letter to the Secretary of War from the Honorable Robert W. Kean, Member of Congress, dated 20 December 1946; letter to the President from Mrs. Leslie A. Irvin, mother of the accused, dated 23 December 1946; letter to The Adjutant General from the Honorable Albert W. Hawkes, United States Senate, dated 30 December 1946; letter to The Judge Advocate General from Mr. Daniel F. Carney, Attorney at Law, Melford, Massachusetts, dated 27 January 1947.

5. In view of all the circumstances including the accused's excellent military record and the recommendations for clemency by the members of the court and others familiar with the accused's record and character, I recommend that the sentence, as modified by the reviewing authority, be confirmed but that the forfeitures and confinement be remitted and that the sentence, as thus modified, be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Record of Trial
2. Form of Action

(GCMO 146, 2 May 1947).

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

JAGK - CM 318373

31 JAN 1947

UNITED STATES	ANTILLES DEPARTMENT
v.	Trial by G.C.M., convened at APO 851, c/o Postmaster, Miami, Florida, 21 November 1946. Dismissal and total forfeitures.
Captain JOHN L. CALLAWAY (O-363698), Finance Department.	

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

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

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

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

Specification 1: In that Captain John L. Callaway, Finance Department, attached unassigned Personnel Center, Antilles Department, Fort Buchanan, Puerto Rico, was, at San Juan, Puerto Rico, on or about 1330, 18 October 1946, in a public place, to wit: The Royal Palm Bar, 659 Ponce de Leon Avenue, drunk while in uniform.

NOTE: Specifications 2,3 and 4 differ materially from Specification 1 only in the date, time and place in San Juan as indicated below:

Spec.	Date	Time	Place
2	19 Oct 46	1000	Corner Allen and San Jose Streets
3	19 Oct 46	1930	In front of Crescionio Officers' Club and Mess, 604 Ponce de Leon Ave.
4	20 Oct 46	1100	(Same as Spec. 3)

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

Specification 1: In that Captain John L. Callaway, ***, did, at San Juan, Puerto Rico, on or about 1330, 18 October 1946, wrongfully appear in The Royal Palm Bar, 659 Ponce de Leon Avenue, a public place, without his tie.

NOTE: Specifications 2, 3 and 4 differ materially from Specification 1 only in the date, time, place and equipment as indicated

below:

Spec.	Date	Time	Place	Equipment
2	19 Oct 46	1000	Corner Allen and San Jose Streets	Cap and tie
3.	19 Oct 46	1930	Front Crescioni Officers Club and Mess, 604 Ponce de Leon Avenue	Cap, tie and insignia of rank
4	20 Oct 46	1100	Vicinity of Crescioni Officers Club and Mess	Cap, tie and insignia of rank

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

Specification: In that Captain John L. Callaway, ***, having been duly placed in arrest at Fort Buchanan, Puerto Rico, on or about 21 October 1946, did, at Fort Buchanan, Puerto Rico, on or about 2 November 1946 break his said arrest before he was set at liberty by proper authority.

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

3. Evidence for the prosecution

As to Specification 1, Charge I and Specification 1, Charge II

About 1:30 p.m., 18 October 1946, the accused was in the Royal Palm Bar on Ponce de Leon Avenue, San Juan. At this time "he was sitting on this Chief Petty Officer's knee and wasn't saying anything. He had his eyes closed and every once in a while he would raise his head and holler and then slump his head over again." Sergeant Virgil F. Wiebe and the Chief Petty Officer carried the accused from the bar to a taxi and took him to the Crescioni Apartments where they carried him inside and put him to bed. The accused did not have a tie. In the opinion of Sergeant Wiebe the accused was drunk (R. 8,9).

As to Specification 2, Charge I, and Specification 2, Charge II

On 19 October 1946 at about 10:00 a.m. Sergeant Jimmy L. Morgan was driving a jeep in San Juan. At the corner of Allen and San Jose Streets he observed the accused with two civilians. The civilians requested Sergeant

Morgan to take charge of the accused. The accused got in the jeep and Sergeant Morgan drove to the Crescioni Apartments. The accused walked to the jeep rapidly and "was leaning over forward as if he was about to topple over at any time." While in the jeep he was talking in a high tone of voice and at times almost singing (R. 12-15). Lieutenant Burton M. Schuman, the officer in charge of the Crescioni Apartments, observed the accused about 10:30 a.m., 19 October 1946, seated in a jeep in front of the apartment. The accused appeared to be drunk. Lieutenant Schuman, Sergeant White and Sergeant Wiebe bodily carried the accused to his room and put him to bed. The accused "seemed to be either unwilling or unable to stand on his feet." He was dressed in tropical worsted shirt and pants but was without his cap and tie (R. 9,11-15,26,27). In the opinion of Sergeant Wiebe the accused was drunk (R. 10). Sergeant Morgan stated that the accused had been drinking and seemed like a drunken man (R.13). Lieutenant Schuman said the accused "seemed to be drunk" (R. 26).

As to Specification 3, Charge I and Specification 3, Charge II

On 19 October 1946 Mr. Louis E. Rumpff, Deputy Director, Civilian Personnel, Antilles Department, was standing in front of the Crescioni Apartments. Several officers were also present. About 7:30 p.m. Mr. Rumpff observed the accused approaching the Crescioni. The accused was dressed in officers' tropical uniform but without insignia and cap. His shirt was unbuttoned and "his shirt tail on the right hand side in the rear was out." The accused bumped into Mr. Rumpff and then attempted to open the door of the apartment. Mr. Rumpff observed that the accused had been drinking to the point that he could not control his actions (R. 15-17). Second Lieutenant Scrogham observed the accused entering the Crescioni Apartments on the evening of 19 October 1946. The accused was drunk and staggering. Lieutenant Scrogham had to assist his wife out of the path of the accused to prevent her being bumped into by him. The accused was in uniform but was without insignia of rank or branch of service (R. 21).

As to Specification 4, Charge I, and Specification 4, Charge II

On 20 October 1946 First Lieutenant Joseph J. Ritko, a Military Police officer, was directed by the Provost Marshal to locate and apprehend the accused. He found the accused at about 11:00 a.m. on the public street about fifty yards east of the Crescioni Apartments. The accused was dressed in tropical worsted trousers and shirt but was without a cap or insignia and was drunk. He took the accused to the 161st General Hospital for a blood alcohol test (R. 18,19). Second Lieutenant Joseph P. Scrogham observed the accused talking to Lieutenant Ritko about noon 20 October 1946. The accused had been drinking and looked like a drunk person. His uniform was "messed up" and he was without his cap, tie and insignia of rank and branch of service (R. 21,22). Captain Paul George LaBissoniere, Medical Corps, examined the accused at the 161st General Hospital about noon 20 October 1946. The examination consisted of observing the accused's movements, speech, appearance, physical condition

and a blood alcohol test. The tests showed 4.0 milligrams of alcohol per cc of blood. This amount of alcohol in the blood indicates "either bordering a comatose state or actually in it." 2.0 to 2.5 milligrams of alcohol per cc of blood indicates intoxication. From this examination Captain LaBissoniere concluded that the accused was drunk (R. 22-24).

Additional charge and specification

On the morning of 21 October 1946, Colonel William R. Irvin, Commanding Officer of Post, Port and General Depot, APO 846, went to the quarters of the accused and informed the accused that he was in arrest of quarters (R.28). Thereafter, on the same day, Colonel Irvin wrote a letter to the accused outlining his arrest in quarters. By this letter the accused was placed in arrest of quarters in Room 8, Building T-123. He was permitted to leave his quarters for the purpose of going to the officers' mess for meals, (a) breakfast 0700-0745; (b) lunch 1200-1300, and (c) dinner 1800-1900. He was also permitted exercise on the golf course between 1000 and 1200 daily. Further provision was made for reports to the adjutant of the post at 0800,1000,1300,1600. The accused acknowledged receipt of this letter at 1600 hours 23 October 1946 (R. 28,29, Pros. Ex. 2). This order of arrest was not revoked and was in effect on 2 November 1946. Colonel Irvin did not give the accused authority to visit the officer's club on 2 November 1946 at any time other than as set forth in his letter of 21 October 1946 (R. 29). The accused was observed to be at the officers' club, Fort Buchanan, at about 9:00 p.m. 2 November 1946 by Lieutenant Colonel John J. Healy and First Lieutenant Tony D. Curda (R. 30, 33).

4. For the accused

The rights of the accused as a witness were explained to him and he elected to remain silent.

5. The evidence shows that the accused was drunk in a public place while in uniform on four separate occasions between 18 October 1946 and 20 October 1946. His condition was such that on two occasions it was necessary to actually carry him into his quarters and put him to bed. On one occasion a blood alcohol test showed 4.0 milligrams of alcohol per cc of blood. 2.0 to 2.5 milligrams of alcohol per cc of blood is considered by the medical profession to show intoxication. Under the facts as outlined above, the Board of Review is of the opinion that the accused was guilty of such gross drunkenness in public, while in uniform, as to constitute a violation of Article of War 95 (CM 240799, Shapiro, 26 BR 131; CM 276285, Lucas, 48 BR 272). The evidence also shows that on these occasions of drunkenness the accused was without his cap, tie and insignia of rank and branch of service as alleged in Specifications 1,2,3 and 4, Charge II.

The accused was placed in arrest of quarters, and the limits of his arrest were set forth in writing. He was not released from his arrest. The evidence establishes that on 2 November 1946 the accused was at the Officers' Club, Fort

Buchanan, at about 9:00 p.m., a time he was not permitted to be there by the terms of his arrest. This constituted a breach of his arrest as alleged in the Additional Charge and Specifidation.

6. War Department records show the accused to be 37 years of age and married. He graduated from high school and attended Southwestern University 1-1/2 years. He enlisted in the Army 6 September 1933 and served continuously therein until 16 October 1936. At the time of discharge he was a private first class. His character and efficiency rating as a soldier were both excellent. On 1 March 1938 he was appointed a second lieutenant, Finance-Reserve. He was ordered to active duty 7 April 1941, and was promoted to first lieutenant 10 June 1941. From May 1943 to August 1943 he attended the Army Finance School at Duke University, from which school he graduated with a superior rating. On 31 October 1944 he received a letter of commendation for his superior service in handling the payment of troops at Camp John T. Knight, California. He received a temporary promotion to captain 6 April 1945. His efficiency ratings for the period 1 July 1944 to 31 December 1945 are excellent.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 Articles of War 69 and 96, and mandatory upon conviction of a violation of Article of War 95.

(On Leave), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. [illegible], Judge Advocate

JAGK - CM 318373 1st Ind

WD, JAGO, Washington 25, D. C. FEB 21 1947

TO: 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 John L. Callaway (O-363698), Finance Department.

2. Upon trial by general court-martial, this officer was found guilty of being drunk in uniform in public places on four separate occasions in violation of Article of War 95. He was also found guilty, under four specifications, of being in improper uniform, in violation of Article of War 96; and of breach of arrest, in violation of Article of War 69. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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 of the sentence. The record shows that between 18 October 1946 and 20 October 1946 the accused was exceedingly drunk in public while in uniform on four separate occasions. While drunk he was in improper uniform. He was placed in arrest in quarters and twelve days later breached his arrest. All offenses occurred in San Juan Puerto Rico.

4. This officer is a high school graduate and attended college 1-1/2 years. He served as an enlisted man from 6 September 1933 until 16 October 1936. In 1938 he was commissioned a second lieutenant in the Finance Department, Reserve Corps. On 7 April 1941 he was called to active duty and has served continuously since that time.

In view of the length of service of the accused and his prior good record as an enlisted man and officer, I recommend that the sentence be confirmed, but that the forfeitures be remitted and that the sentence as thus modified be suspended during good behavior.

5. 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
(GCMO 51, 27 Feb 1947).

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

JAGH - CM 318380

UNITED STATES v. KAZUE YABUSAKI, an American civilian member of the crew of the SS Cape Perpetua	YOKOHAMA BASE Trial by G.C.M., convened at Headquarters, Yokohama Base, United States Army, APO 404, 13 November 1946. Confinement for two (2) years and six (6) months. United States Penitentiary

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

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1. The record of trial in the case of the above-named accused 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, Kazue Yabusaki, an American civilian member of the crew of the SS Cape Perpetua, did at Yokohama, Honshu, Japan, on or about 20 September, 1946, wrongfully and unlawfully represent himself to be an agent of the Counter Intelligence Corps of the U.S. Army, by representing himself as such agent to Mitsu Kurihara and Yae Kurihara, said Kazue Yabusaki well knowing that said representation was false.

Specification 2: In that, Kazue Yabusaki, an American civilian member of the crew of the SS Cape Perpetua, did, at Yokohama, Honshu, Japan, on or about 20 September 1946, by trickery, wrongfully and unlawfully, take and carry away, from Mitsu Kurihara and Yae Kurihara, the sum of five thousand (¥ 5,000) Yen, lawful money of Japan and the property of Mitsu Kurihara, with intent to permanently deprive the owner of her property.

The accused pleaded not guilty to, and was found guilty of, the Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for two years and six months. 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 pursuant to the provisions of Article of War 50½.

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

Yae Kurihara, a Japanese girl who stated that her business was "to receive male visitors," identified the accused and testified that he called at the home of the witness and her sister, Mitsu Kurihara, on 20 September 1946 (R 7). The accused stated that his name was Yamamoto (R 8), and the witness at first believed him to be a "customer." The accused asked the witness if she had bought any sugar lately. When she replied in the affirmative, the accused stated that it was American sugar and that it was illegal for the witness to buy such sugar (R 7). The accused showed the witness and her sister a card which bore English words, and the accused's picture and stated that he was a CIC agent and that he would turn the witness in to the CIC (R 8). The two sisters became frightened, and Mitsu Kurihara asked "What shall we do?" The accused then stated that if he were given 5000 yen he would help the sisters. Mitsu Kurihara explained that she had only 1000 yen at that time, but that she would borrow 4000 yen and give it to the accused on the following day (R 7). The accused told the witness that he was a Nisei. Before the accused returned on the following day to collect the balance of 4000 yen, the witness reported the incident to a friend, Take Yashiko. The friend and several CID agents accompanied the witness to the Kurihara house to await the arrival of the accused. The 4000 yen were marked by the CID agents who secreted themselves in another room. When the accused arrived, Take Yashiko gave the marked currency to the accused and he was arrested by the CID agents as he was counting the money (R 9).

Mitsu Kurihara substantially corroborated the testimony of her sister, Yae Kurihara. She further testified that the accused explained his position as a CIC agent by stating that he was hired by the military police and he arrested people (R 13).

Take Yashiko, a Japanese girl, testified that her friend, Yae Kurihara, came to the home of the witness on 20 September 1946 and explained the circumstances of the accused's visit to the Kurihara house. On the following day the witness went to the Kurihara home where the accused was in another room. Mitsu Kurihara stated, "He's a Nisei. Can you come over? Maybe you can recognize whether he is a nisei or not though he is wearing Japanese clothes." The witness went to the room where the accused was present where a discussion of the amount he was to be given was in progress. The witness told the accused that she did not have the money at the time but that the two sisters would go to Tokyo to obtain the money. The accused told the

witness that he was "Yamamoto of the CIC" (R 14). Thereafter the witness learned that there was no one in the CIC with the Eighth Army by the name of Yamamoto. The witness and three CID agents went to the Kurihara home, arriving there before the accused returned. The CID agents secreted themselves in one of the rooms and one of them marked the money. At about 1330 the accused returned to the Kurihara home and the witness gave the accused the marked money. The accused placed the money in his pocket after a cursory check, but the witness urged him to count it carefully. As he was counting the money again, the CID agents entered the room with drawn pistols and apprehended the accused (R 15). On cross-examination the witness identified the accused as the person to whom the money was given although he had stated that his name was Yamamoto (R 15).

Edwin F. Marsullo, a special agent of the 44th CID, identified the accused as the person whom he had apprehended in a Japanese home and answered affirmatively to a question as to whether accused is "a person subject to military law." He testified that he went to the Japanese house with two other agents and the agents put their initials on 4000 yen. Upon receiving a prearranged signal they entered a room in which they found accused sitting cross-legged, counting the marked money (R 16). He further stated that the accused signed a written statement after his rights against self-incrimination were fully explained to him (R 16-17). In his confession which was introduced in evidence as Prosecution's Exhibit A (R 17) the accused stated:

> "I have been read the 24th AW and I understand that I did not have to make this statement.
>
> "On about 15 July 1946 I left my ship the Cape Perpetua and went to Amarudani near Ishikawa, Cho Yokohama. I stayed there one month. I have lived at various places, the addresses of which I am not sure of for the remainder of the time in Yokohama.
>
> "About 4 or 5 days ago I sent a telegram to my family who were living in Hiroshima asking for 5000 yen. The money did not come. I needed the money to pay my debts. Two days ago I met a fellow who told me that a certain woman had bought some sugar. I went to this woman's house and told her that I was from the CIC. I asked her for the sugar. She told me that she had bought sugar. She asked me not to arrest her and told me that she would give me money if I did not turn her in. She gave me 1000 yen and told me to come back the next day for 4000 yen. While I was counting it agents of the CID arrested me. ***"

4. After his rights as a witness were properly explained to him, the accused made an unsworn statement through his counsel substantially as follows:

The accused was born in Seattle, Washington and is a citizen of the Unted States. As an infant he was brought to Japan where he was educated. His family remained in Japan and now resides in Hiroshima. He joined the Merchant Marine with the thought of returning to Japan to visit his parents who were aged and sick because of the smoke of the atomic bomb. When the accused arrived in Japan, he was without sufficient funds to go to Hiroshima. He wanted to be dressed decently because he was proud of being an American. He also wanted enough money so that he would not be a burden on his family and so that he could help them out. The events for which he was tried happened on the spur of the moment and he became involved in the transaction without realizing what he was doing or how wrong it was.

5. A serious question presented by the record is whether the accused was within the jurisdiction of the court.

6. In pertinent part Article of War 2 provides:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law' whenever used in these articles:

* * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

With respect to the question of whether the accused was accompanying or serving with the armies of the United States in the field, the record merely shows the following pertinent evidence:

a. The accused was physically present in Japan on or about 20 September 1946 and had been in Japan since about 15 July 1946.

b. Edwin Marsullo, a special agent of the 44th CID, answered affirmatively to a question as to whether accused is "a person subject to military law."

c. In his confession the accused stated: "On about 15 July 1946 I left my ship the Cape Perpetua, and went to Amarudani near Ishikawa, Cho Yokohama. I stayed there one month."

d. In his unsworn statement made through his defense counsel, it was stated that the accused was born in Seattle,and returned to Japan as an infant and was educated in Japan. He joined the Merchant Marine with the intention of returning to Japan to visit his family.

The specifications upon which the accused was tried do not allege that the accused was a person accompanying or serving with the armies of the United States in the field, and the evidence does not show affirmatively sufficient jurisdictional facts to establish that the accused was a person subject to military law within the provisions of Article of War 2 (d). Whereas a failure to allege jurisdictional facts has been held not to be a fatal defect (CM 195867, Jones, 2 BR 307; Givens v Zerbst, 255 U.S. 11), a failure to prove jurisdictional facts renders the proceedings invalid (CM 286743, Leiby et al, 7 BR (NATO-MTO) 1).

There is nothing in the record to show that the SS Cape Perpetua (of which vessel the accused had once been a crew member) was under Army control, carried military personnel or military cargo, or that the vessel itself was allocated to the Army by the War Shipping Administration. The testimony of Edwin Marsullo that the accused was a person subject to military law was, of course, a bare conclusion on the part of the witness, and cannot be considered as competent evidence of the necessary jurisdictional facts. In the Leiby case it was held that a crew member is not a person serving with the armies in the field where, as in the instant case, it was not shown that he was on a vessel owned by or allocated to the Army, or under Army control, or carrying military personnel or military cargo of any description. In the same case, it was held that where offenses were committed by an accused after his ship had arrived in a foreign port and while he was in a city during a period when that city was a supply base within an active theater of operations, his mere presence in the city does not constitute accompanying or serving with the armies in the field.

Since it was neither alleged, nor proved that the accused is a person subject to military law, the only remaining basis for jurisdiction of a general court-martial to try the accused must be found under the provisions of Article of War 12, which provides in relevant part:

> "General courts-martial shall have the power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals * * *." (Underscoring supplied)

Article of War 12 must be construed in accordance with Article of War 15 which provides:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect

to offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."

The question for consideration is whether Article of War 12 confers upon general courts-martial jurisdiction to try American nationals, who are not persons subject to military law, for offenses committed in occupied enemy territory.

Article of War 12 appeared for the first time in the Articles of War in the Act of March 2, 1913. In urging the adoption of this article, The Judge Advocate General stated:

> "Article 12 is a new article. It simply declares the jurisdiction of general courts-martial. I take it there is no impropriety in making that a matter of express provisions" (Statement of Gen E. H. Crowder, 14 May 1912, with respect to HR 23228, Revision of the Articles of War, 62d Cong., 2nd Ses.).

It is noted that the original Article of War 12 conferred concurrent jurisdiction on general courts-martial to try:

> "* * * any other person who <u>by statute</u> or the law of war is subject to trial by military tribunals."

The words "<u>by statute</u>" do not appear in the present article, thus limiting the concurrent jurisdiction of general courts-martial to try persons, not otherwise subject to military law, to those cases <u>only</u>, where the offender and the offense are within the jurisdiction of a military tribunal under the law of war.

Further explanation of the legislative intent with respect to the jurisdiction of military tribunals (including courts-martial) may be found in General Crowder's testimony before the Senate Military Affairs Committee with respect to Article of War 15 in 1916. He said:

> "Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commissions. A military commission is our common law-war court. It has no statutory existance, though it is recognized by statute law. As long as the article embraced them in the designation 'persons subject to military law' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court martial (ARTS 12, 13, and 14), it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced * * *. It just saves the war courts the jurisdiction they now have and makes concurrent a jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. * * *" (Senate Report No. 130, 64th Cong., 1st Ses., p 40)

It is apparent from the foregoing that general courts-martial have concurrent jurisdiction with military commissions to try persons subject to military law for violations of the laws of war. The fact that all violations of the laws of war are not specifically enumerated in the punitive articles does not deprive courts-martial of such jurisdiction. Persons subject to military law may be tried under Article of War 96 for violations of the laws of war, either as (a) disorders and neglects to the prejudice of good order and discipline, (b) conduct of a nature to bring discredit upon the military service, or (c) crimes and offenses not capital. Furthermore, many of the common law crimes made punishable by Articles of War 92 and 93 are also considered to be war crimes. (Par 355, FM 27-10, Rules of Land Warfare; Dig Op JAG 1912, p 1071)

In addition to the foregoing, general courts-martial have the power to try "any other person (other than those subject to military law) who by the law of war is subject to trial by military tribunals."

The additional jurisdiction conferred upon general courts-martial by virtue of Article of War 12 cannot exceed, and is limited by, the jurisdiction conferred by the law of war only, upon other military tribunals.

Military tribunals are authorized by the laws of war (as distinguished from special statutory provisions relevant to martial law which are not here applicable) to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, in the enemy's country during its occupation by our armies and while it remains under military government (Dig Op JAG 1912, p 1067). The two classes of offenses are:

a. Violation of the laws of war (Ex parte Quirin et al, 317 U.S. 1; Application of Yamashita, 66 S. Ct. 340; Dig Op JAG 1912, p 1067). It is to be noted that crimes committed against the civilian population such as arson, murder, assaults, highway robbery, larceny, burglary, fraud, forgery, and rape, which are made punishable by the penal codes of all civilized nations, when committed by soldiers of a belligerent, are considered to be violations of the laws of war (FM 27-10, Rules of Land Warfare, par 355; Dig Op JAG 1912, p 1071).

b. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are closed or their function suspended, cannot be taken cognizance of by the ordinary civil tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute for the regular criminal judicature (Dig Op JAG, 1912, p 1067; Dow v Johnson, 100 U.S. 158, 166). Such jurisdiction is implied from the occupant's duty under international law to take "all measures in his power to restore and insure, as far as possible, public order and safety" (Article 43, Hague Regulations, Annex to Hague Convention No IV of October 18, 1907; FM 27-10, par 282).

The occupant may substitute his own tribunals to administer local laws where military necessity or the maintenance of public order and safety demands such action, where the machinery of justice has been dislocated by the events of war as to be practically inoperative, or where the trial of certain classes of cases may be inimical to the interest of the occupant (CM 302791, Kaukoreit et al, 5 Bull JAG 263; Spaight, War Rights on Land, p 358; Garner, International Law and the World War, Vol 2, p 87; par 42d, FM 27-5, Military Government and Civil Affairs).

Military tribunals appointed by competent authority have jurisdiction over American nationals in occupied Japan as a substitute for the criminal jurisdiction of local courts, in spite of the fact that local criminal courts are open for the trial of Japanese nationals. It is contrary to our national policy to permit the courts of a conquered and occupied enemy to try American nationals (Coleman v. Tennessee, 97 U.S. 509; Dow v. Johnson, 100 U.S. 158, 165).

In this connection the Board of Review takes judicial notice of the Instrument of Surrender executed at Tokyo Bay, Japan, on 2 September 1945 by representatives of the Emperor of Japan and accepted by General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers (Occupation of Japan, Dept. of State, Publication 267, Far Eastern Series 17, Appendix 8, p 62), and the text of a message approved by the President transmitted on 6 September 1945, through the Joint Chiefs of Staff, to the Supreme Commander for the Allied Powers which provides in relevant part:

> "1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender * * *"
>
> "2. Control of Japan shall be exercised through the Japanese government to the extent that such an arrangement produces satisfactory results. This does not prejudice your rights to act directly if required." (Occupation of Japan, op. cit, Appendix 16, pp 88-89)

Pursuant to the powers vested in him as Supreme Commander for the Allied Powers, General MacArthur directed that "Japanese courts will henceforth exercise no criminal jurisdiction over United Nations Nationals * * *. Japanese courts will continue to exercise jurisdiction over acts prejudicial to the object of the occupation insofar as such acts constitute violations of Japanese law. However, military occupation courts may also assume jurisdiction over such acts or any other act which are prejudicial to the objects of the occupation" (Memo for the Imperial Japanese Government (SCAPIN 756) (AG 015, 19 Feb 46) LS, GHQ, SCAP, dated 19 Feb 46).

The Commander-in-Chief, United States Forces, Pacific, has further established the policy that "Merchant Seamen will not be surrendered under any circumstances to local civil authorities in occupied areas. Offenses committed in port or ashore by such persons in those areas are triable by Military Occupation Courts" (Radio Message CINCAFPAC to WD, Nr 2-21280, 12 October 46).

In the circumstances the Military Occupation Courts were the successors to the jurisdiction of the local criminal tribunals insofar as jurisdiction over American nationals is concerned. Since courts-martial have concurrent jurisdiction with such Military Occupation Courts, we are of the opinion that the court had jurisdiction over the person of the accused in the instant case.

7. Military commissions and provost courts do not have jurisdiction under the laws of war to try American nationals who are not "subject to military law" for purely military offenses (Hammond v. Squier, 51 F. Supp. 227, 231). In discussing military jurisdiction, Field Manual 27-10, Rules of Land Warfare, provides:

> "While general courts-martial have concurrent jurisdiction with military commissions and provost courts to try any offender who by the law of war is subject to trial by military tribunals, it has generally been held that military commissions have no jurisdiction of such purely military offenses specified in the Articles of War as those articles expressly make punishable by sentence of court martial (except where the military commission is also given express statutory jurisdiction over the offense (A.W. 80, 81, 82)). In practice, offenders who are not subject to the Articles of War, but who by the law of war are subject to trial by military tribunals, are tried by military commissions or provost courts." (FM 27-10, Rules of Land Warfare, par 7)

Since military tribunals do not have jurisdiction to try persons for purely military offenses, it follows that the accused may not be convicted by court-martial for such an offense.

8. Specification 1 of the Charge avers that the accused did, at Yokohama, on or about 20 September 1946, wrongfully and unlawfully represent himself to be an agent of the Counter Intelligence Corps of the U. S. Army by representing himself as such agent to Mitsu Kurihara and Yae Kurihara, well knowing that said representation was false.

It is to be noted that no allegation of fraudulent intent is made. There can be no doubt that the offense alleged is a military offense within the scope of Article of War 96 as a "disorder * * * to the prejudice of good order and discipline," and as "conduct of a nature to bring discredit upon the military service" (CM 266137, Miller,

43 BR 136; CM 258380, Lightsey, 38 BR 21; CM 243926, McKay, 28 BR 127; CM 233900, Baker, 20 BR 201). Since we have concluded that the accused is not a person subject to military law, and that the court-martial derived its jurisdiction in the instant case by virtue of the law of war, it must appear that the offense alleged is either an offense against the law of war or an offense which may be tried by a military commission "as a substitute for the regularly constituted judicature." If the offense is merely military in character we must hold that military courts lack jurisdiction over the offense. In our consideration of the question we will regard only the substance of the specification, and not the fact that it is laid under an Article of War which is expressly limited in its application to persons subject to military law.

It is well settled that soldiers of an occupying power in occupied enemy territory are not subject to the jurisdiction of local criminal law (Coleman v. Tennessee, 97 U.S. 509, Garner, International Law and the World War, Vol II, p 477). In the instant case, however, the accused is not a member of the armed forces of an occupying country, and as an American citizen in Japan, he is subject to Japanese Criminal Law under such provisions as the Supreme Commander for the Allied Powers may elect to make.

In Neely v. Henkel, (no 1), (1900) 180 U.S. 109, 114, the United States Supreme Court held that the penal code of an occupied country (Cuba) was applicable to a citizen of the United States who commits a crime in a foreign occupied country which is made punishable by the law of such occupied country.

In U.S. v. Bowman, (1922) 260 U.S. 94, the Supreme Court held that the United States Criminal Code provisionsdenouncing acts which are directly injurious to the Government and which are capable of perpetration without regard to particular locality and subjecting all who commit them to punishment, are applicable to citizens of the United States in a foreign country, even though there be no express declaration to that effect. But crimes against private individuals or their property like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must be made punishable by the law of the country in which such crime is committed.

Accordingly we must determine whether the specification alleges one or more of the following:

a. A crime or offense under the laws of war
b. A violation of the Japanese Criminal Code
c. An offense directly injurious to the United States.

Wrongfully pretending to be a member of the armed forces of a belligerent within an active theater of operations during hostilities may be an offense under the laws of war. But since hostilities had ceased with the unconditional surrender and total subjugation of Japan, the specification obviously does not allege an offense made punishable under the laws of war.

We have not been able to find any provision in the Japanese Criminal Code which denounces the offense alleged in the specification.

There remains for consideration whether the specification alleges an offense directly injurious to the United States.

The statute most nearly applicable to the offense alleged is Criminal Code Section 32, 18 USC 76, Falsely pretending to be a United States Officer, which provides in relevant part:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, * * * and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person * * * any money, paper, document, or other valuable thing, shall be fined not more than $1000, or imprisoned not more than three years, or both."

It is self-evident that pretending to be a United States officer with intent to defraud the United States is an offense directly injurious to the United States and, as such, the statute is applicable to all United States citizens whether within the territorial jurisdiction of the United States or in a foreign country. Furthermore, it has been held that this statute should be construed in harmony with its aim which is not merely to protect innocent persons from actual loss, but to maintain the general good repute and dignity of the Federal service itself (Russell v. U.S., (CCA Wash 1921) 271 Fed 684). Since pretending to be a Federal officer with intent to defraud private individuals in a foreign country would seriously affect the good repute and dignity of the Government itself, we are of the opinion that this section of the Criminal Code is applicable to American citizens in occupied Japan.

This statute defines two distinct offenses, one, with fraudulent intent pretending to be a Federal officer or agent and undertaking to act as such, and the other, with fraudulent intent and in such pretended character, demanding or obtaining any money, paper, document or other valuable thing (Kane v. U.S., 120 Fed (2d) 990; U.S. v. Rush, 196 Fed 579; U.S. v. Taylor, 108 Fed 621; Lomar v. U.S., 241 U.S. 103, 36 S. Ct. 535).

Fraudulent intent is clearly an essential element of both offenses denounced by the statute. In the absence of an allegation of fraudulent intent in the specification, it is the opinion of the Board of Review that the specification does not allege a violation of 18 USC 76. Decided before Lefowich 31 BUS

Since we have concluded that the specification does not allege a violation of the laws of war, the United States Criminal Code, or the Japanese Criminal Code, we are of the opinion that the specification alleges no more than a military offense (CM 266137, Miller, 43 BR 136), of which a court-martial may not take cognizance where an accused is not a person subject to military law.

Accordingly the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specification 1 of the Charge.

9. Specification 2 of the charge avers that the accused by trickery, wrongfully and unlawfully took and carried away 5000 yen, the property of Mitsu Kurihara, with intent permanently to deprive the owner of her property.

The offense alleged is one against property of which military tribunals may take cognizance as substitutes for the local criminal courts.

Although the word "steal" is omitted, the specification includes the essential allegations of larceny. "Steal" means to take and carry away feloniously; to take without right or leave, with intent to keep wrongfully (State v. DeWitt, 53 S.W. 429, 152 Mo. 76; People v. Lommerts, 58 N.E. 22, 164 NY 137; State v. Mann, 25 Ohio St 668). Since the specification avers that the accused "did * * * by trickery, wrongfully and unlawfully, take and carry away * * * with intent to permanently deprive the owner of her property," we are of the opinion that the specification alleges larceny by trick.

Larceny is denounced by Section 235, Chapter XXXVI, Criminal Code of Japan, which provides:

> "Whosoever shall have stolen the property of another shall be adjudged guilty of larceny and punished with penal servitude for a period not exceeding ten years." (The Criminal Code of Japan, translated by J. E. de Becker, Kelly & Walsh Ltd, Yokohama (1907), p 85)

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another with intent to deprive such owner permanently of his property therein (MCM, 1928, par 149g, p 171).

To constitute larceny the taking and carrying away must be by trespass; that is, it must be taken from the owner's possession without his consent.

"Though a person who appropriates another's property to his own use may have the intent necessary to larceny, yet, if there is no trespass in taking the property, there is no larceny. For example, the possession of the property may have been lawfully obtained by the person who appropriates it, in which case a trespass by him is impossible so long as he has such possession * * *." (MCM, 1928, par 149, p 172)

In the case of larceny by trick the trespass has been described as fictional in character (Holmes, 10 Harvard Law Review 457, 470). It has been held that one commits larceny by trick where he obtains possession of property by trick or fraud, with intent to appropriate the article to his own use, and where the owner intends to part with

possession only, as distinguished from both title and possession (State v. Skilbrick, 66 Pac 53; People v. Solorese, 62 Cal 139; People v. Walker, 83 NY Supp 372; People v. Laurence, 21 NY Supp 818; People v. Tomlinson, 102 Cal 19; CM 234335, Tupper, 20 BR 339, 342). Where, however, the owner's intention is to part with both title and possession, the offense may be either obtaining property by false pretenses (People v. Mills Sing, 42 Cal App 385, 183 Pac 685), or the common law crime of cheating.

When the test of the owner's intention with respect to the passing of title is applied to the instant case, it is clear that the evidence does not amount to larceny by trick.

In the instant case the accused pretended to be a CIC agent, and by means of threats of arrest and prosecution for the illegal possession of sugar, he induced Mitsu Kurihara to give him 1000 yen. At the time of the first visit, when the accused received 1000 yen, it was certainly the intention of Mitsu Kurihara to pass title and possession of the money to the accused.

The offense proved by the evidence is extortion which has been judicially defined as the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction (Daniels v. U.S., (CCAA) 17 Fed (2d) 339, 342). In U.S. v. Dunkley (District Ct. N.D., Calif), 235 Fed 1000, th court stated:

> "At common law extortion was the unlawful taking by an officer, by color of his office, from any one any money or thing of value that is not due to him, or more than is due, or before it is due and so the offense is defined by Blackstone. But the word 'extort' had come to have a much wider meaning than this, and, as generally understood, it means the wrongful exaction of money or property; the taking or obtaining of anything from another by compulsion or oppressive exaction, whether by an officer or otherwise."

Criminal Code Section 55, 18 USC 171, provides:

> "Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than $500 or imprisoned not more than one year, or both." (Underscoring supplied)

Extortion is denounced by Sections 222, 223, Chapter XXXII, and Section 249, Chapter XXXVII, Criminal Code of Japan.

Relevant portions of the Criminal Code of Japan provide:

"Whosoever shall be found guilty of having used threats to do injury to life, person, liberty, reputation or property, shall be punished with penal servitude for a period not exceeding one year, or a fine not exceeding one hundred yen * * *. (Sec 222, Chapter XXXII, Criminal Code of Japan, Op Cit p 30)

"Whosoever shall have made threats of injury to the life, person, liberty, reputation or property of an individual, and by means of such * * * threats shall have caused a person to do an act which he had no obligation to do * * * shall be punished with penal servitude not exceeding three years" (Sec 223, Chapter XXXIII, Criminal Code of Japan, Op Cit pp 80-81).

"Whosoever shall have terrorized a person, and thus caused delivery of property shall be punished with penal servitude for a period not exceeding ten years." (Sec 249, Chapter XXXVII, Criminal Code of Japan, Op Cit, p 88)

It is, accordingly, our opinion that the evidences proves that the accused extorted 1000 yen from Mitsu Kurihara in violation of Section 249, Chapter XXXVII, Criminal Code of Japan, and that he made threats in violation of Sections 222 and 223, Chapter XXXII of that Code.

It is noted, however, that the accused's fraudulent pretense to be a CIC agent was discovered after 1000 yen was delivered to him, but before he returned to collect the balance of 4000 yen. In the circumstances the owner fully consented to deliver the property to the accused without fear, force, intimidation or fraud, but solely for the purpose of establishing evidence of a crime. It has been held in such crimes against property as extortion, robbery, and larceny where the lack of consent on the part of the owner is essential, that where property is delivered by the owner, without fear or without the use of force or intimidation or fraud, but merely for the purpose of prosecuting the taker, the crimes are not committed (People v. Gardiner, 25 NYS 1072; Connor v. People, 18 Colorado 373, 25 IRA 341).

There remains for consideration whether a conviction can be supported where a wrongful taking and carrying away by trickery is alleged and extortion is proved.

It is true that a certain element of trickery may be found in the accused's pretending to be a CIC agent, but the trickery was not the means by which he obtained possession of the property from its owner, as would be in the cases of obtaining property under false pretenses, cheating, or larceny by trick. Instead, the gist of the offense proved was the illegal compulsion or oppressive exaction (CM 307029, Dietz;

CM 312137, Brooks). These elements are not necessarily included in the offense alleged. Extortion is not a lesser included offense of larceny by trick since the gist of extortion is the illegal compulsion or oppression, elements which are totally lacking in, and which cannot be reasonably implied from, the specification in question. Accordingly, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 2 of the Charge.

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

D. Lottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip A. Smith, Judge Advocate

MAR 5 1947

JAGH - CM 318380

WD, JAGO, Washington 25, D. C.

TO: The Adjutant General

1. In the case of Kazue Yabusaki, an American civilian member of the crew of the SS Cape Perpetua, 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 disapproved.

2. This office was advised that Yokohama Base was inactivated on 31 December 1946, in view of which 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. It is requested that this holding be returned to this office together with five copies of the published War Department general court-martial order.

(CM 318380)

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 - Record of trial
2 - Draft of GCMO

(GCMO 77, 12 March 1947)

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

JAGH - CM 318398

18 MAR 1947

UNITED STATES	)	SAN BERNARDINO AIR MATERIEL AREA
	)	
v.	)	Trial by G.C.M., convened at Muroc Army Air Field, California, 24 and 25 October 1946. Dismissal and confinement for six (6) months
	)	
First Lieutenant OSCAR A. DOTY, JR (0-700709), Air Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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: (dated 31 Aug 1946) Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, was, at Lancaster, California, on or about 28 August 1946, in a public place, to wit, the French Cafe and vicinity thereof, disorderly while in uniform.

Specification 2: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, was, at Lancaster, California, on or about 28 August 1946, in a public place, to wit, the Lancaster Sheriff Substation of Los Angeles County and vicinity thereof, disorderly while in uniform.

Specification 3: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, did, at Lancaster, California, on or about 28 August 1946, display a defiance of and a gross disrespect toward the civil police authorities of Los Angeles County, when apprehended by said civil authorities who were then in execution of their duty.

CHARGE II: (dated 31 Aug 1946) Violation of the 96th Article of War.

Specification: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, did, at Lancaster, California, on or about 28 August 1946, wrongfully strike with his fists and bite with his teeth the person of one Charles Wilson.

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

Specification 1: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, being indebted to the Bank of America, Mojave, California, in the sum of fifty-two dollars ($52.00) for payment on loan by said Bank of America, Majave, California to said First Lieutenant Oscar A. Doty, Jr., Which amount became due and payable on or about 4 June 1946, did, at Mojave, California, from on or about 4 June 1946 to on or about 25 August 1946, dishonorably fail and neglect to pay said debt.

Specification 2: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, did, at Lancaster, California, on or about 15 July 1946, make and utter to the Valley Club, a certain check, in words and figures as follows, to wit:

~~00-7100/Lancaster/Branch/00-7100~~

~~BANK/OF/AMERICA~~ No. 172

~~National/Trust/and/Savings/Association~~

National Bank of Fort Sam Houston

San Antonio, Texas Lancaster, Calif., 15 July 1946

Pay To The Order Of Valley Club $25.00

Twenty-five - - - - - - - - - - - - & no/100 DOLLARS

Member Federal Reserve System

S/Lt. O. A. Doty, Jr., O-700709
620 BU Muroc Calif 320 17th St Crowly, Louisiana

endorsed on the back thereof: Stamped: Pay to the Order of
BANK OF AMERICA
National Trust & Savings Association
VALLEY CLUB CAFE
Aleck Bethanis
172-753

and by means thereof did obtain from the Valley Club twenty-five dollars ($25.00) lawful currency of the United States and did wrongfully fail to maintain sufficient balance in the National Bank of Fort Sam Houston, San Antonio, Texas, to meet payment of said check when presented for payment through the normal banking process for checks.

Specification 3: (Finding of not guilty).

Specification 4: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, did, at Bakersfield, California, on or about 17 July 1946, with intent to deceive, wrongfully and unlawfully make and utter to the Colonial Motor Hotel, a certain check, in words and figures as follows:

GUEST CHECK

8/17/46, 193

Pay to the Order of Cash $ 25.00

Twenty-Five and no/100 DOLLARS

I have this amount, which is free from claims, and is subject to this check to my credit with Drawee and have authority to make this Check. Through this representation I have obtained the above amount or the value thereof from Payee.

Value Received and Charge Same To The Account Of

TO National Bank (S/ Oscar A. Doty, Jr 1st Lt AC 0-700709
Write name of bank here (Maker's Name
Ft. Sam (620 BU Ext 391
Location of branch bank (Give full address Phone number
San Antonio, Tex. ((Muroc, Calif.
Location of bank, City and State City State

endorsed on the back thereof: /s/ John Anderson
M/Sgt 16034663
620AAFBU APGC (ORD)
Muroc Army Air Field
Muroc, Cal.

Stamped: Pay to the order of
419Bank of America 419
National trust & savings Association
Colonial Motor Hotel
George C. Maness

and by means thereof did fraudulently obtain from the Colonial Motor Hotel, twenty-five dollars ($25.00) lawful currency of the United States and did wrongfully fail to maintain sufficient balance in the National Bank of Fort Sam Houston, San Antonio, Texas, to meet payment of said check when presented for payment through the normal banking process for checks.

CHARGE I: (dated 8 Oct 1946) Violation of the 95th Article of War.

Specification: In that First Lieutenant Oscar A. Doty, Jr., 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California, did, at Bakersfield, California, in the period from on or about 22 July 1946 to on or about 26 August 1946, in a public place, to wit: the Apex Bar, while in uniform, drink intoxicating liquor with the following enlisted men, to wit: Master Sergeant John Anderson and Sergeant Glenn O. Massie, and in view of other people.

CHARGE II: (dated 8 Oct 1946) Violation of the 96th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Specifications and Charges and was found guilty of Specifications 1, 2, and 3 of Charge I (dated 31 Aug 1946) and of Charge I (dated 31 Aug 1946), of the Specification of Charge II (dated 31 Aug 1946) and of Charge II (dated 31 Aug 1946), of Specifications 1, 2, and 4 of the Additional Charge and of the Additional Charge, of the Specification of Charge I (dated 8 Oct 1946) and of Charge I (dated 8 Oct 1946). He was found not guilty of Specification 3 of the Additional Charge and of the Specification of Charge II (dated 8 Oct 1946) and of Charge II (dated 8 Oct 1946). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Staff Judge Advocate, Headquarters San Bernardino Air Materiel Area, San Bernardino Army Air Field, California, dated 9 December 1946, except as hereinafter set forth.

4. Specification 1 of the Additional Charge alleges that accused, being indebted to the Bank of America in the sum of fifty-two dollars ($52.00) on a loan, did "dishonorably fail and neglect to pay said debt."

Mere failure and neglect to pay a debt is no offense (CM 121152 (1918), Dig Op JAG 1912-40, par 454 (47), p 356). Dishonorably failing to pay a debt is an offense, but the Board of Review is of the opinion that the evidence applicable to Specification 1 of the Additional Charge is insufficient to support the allegation. The statement of the evidence applicable to this specification in the Review of the Staff Judge Advocate, while essentially correct, is rather brief, and is therefore more fully summarized here.

The accused was indebted to the Bank of America in the original amount of two hundred and four dollars (R 97). The loan was to be repaid in four equal monthly installments of $51.00 each, beginning 4 April 1946. Although paid late, the April and May payments were made. The June payment was not paid, nor was the July payment made when due on 4 July. The accused, however, was given an extension of time in which to make these last two payments to 12 July (R 100). He made no payment until 25 July, at which time he gave the bank a check for $52.00 which was one-half the balance then due. This was the result of a conversation between the bank's cashier and accused a few days previously, in which the cashier demanded payment (R 100). On the following day, 26 July, the Bank of America charged off the remaining balance, $50.00, to an account the accused had in another branch of the bank. The check for $52.00, which was drawn upon a different bank, was returned for insufficient funds and was resubmitted for payment on 8 August. It was returned a second time for the same reason and was received by the Bank of America on 19 August. On 21 August the bank received a telegram from accused stating that if "trouble occurred" with the $52.00 check a money order would be promptly sent (R 99). This evidently was in response to a notification to accused that the check had been returned unpaid. The accused did not send a money order (R 99), but at some subsequent date he went in person to the bank and paid $25.00 "to help redeem" the check and on 10 September the balance of the check was paid (R 103).

There is no evidence that the accused knew the $52.00 check was not good. It does not appear that he received any consideration from the bank such as an extension of time on the strength of giving the check. The extension of time granted was prior to the transaction involving the check. While accused did say he would send a money order,

it appears that instead he went in person and paid as much as he could. The Board of Review is of the opinion that this evidence fails to support the allegation of "dishonorably" failing to pay the debt, or to support any lesser offense. It has been held that merely failing to pay a debt is no offense unless characterized by dishonorable conduct such as deceit or a fraudulent design to evade payment (CM 221833, Turner, 13 BR 239, I Bull JAG, p 106), or unless the failure or neglect involves evasion or indifference to just obligations (CM 240754, Raquet, 26 BR 115, III Bull JAG, p 7).

5. The Specification of Charge I (dated 8 Oct 1946) alleges that accused "did, at Bakersfield, California, in the period from on or about 22 July 1946 to on or about 26 August 1946, in a public place, to wit: the Apex Bar, while in uniform, drink intoxicating liquor with the following enlisted men, to wit * * *, and in view of other people," in violation of Article of War 95.

The evidence shows that the accused on or about 22 July 1946 was in the company of two enlisted men, a sergeant and a master sergeant, two civilian girls and another civilian, who was a former officer, at the Apex Bar, a public place, and that, together with the others, the accused, drank intoxicating liquor on that occasion. The enlisted men were from the same Army Air Base as the accused and accused was in uniform. The evidence also shows that on other subsequent occasions during the period alleged accused accompanied the master sergeant to the same Apex Bar and drank intoxicating liquor with him. The sergeant testified (R 21) that the number of times was fifteen or twenty. There is no evidence that on any of these occasions the accused was intoxicated or that his behavior was in any way unseemly. This course of conduct on the part of the accused, while not such as to be a violation of the 95th Article of War, was conduct prejudicial to good order and military discipline, and constituted a violation of Article of War 96 (CM 234558, Field, 21 BR 41; CM 230209, Jordan, 22 BR 345; CM 283744, Leonard, 16 BR (ETO) 279; CM 297482, Walker, 18 BR (ETO) 33).

There remains for consideration whether the specification sufficiently alleges an offense under the 96th Article of War. It is noted that neither the word "wrongfully" nor any similar word is contained in the specification. It is doubtful whether the specification would be sufficient to support a finding of guilty under Article of War 95, even if warranted by the evidence, since no additonal circumstances connected with the drinking are alleged which would constitute conduct unbecoming an officer and a gentleman. (CM 283744, Leonard, supra). The other cases, above cited, hold that drinking with enlisted men in a public place is not per se a violation of Article of War 95 but they do not discuss the respective specifications.

The question now raised is whether the word "wrongfully", or some other similar word, or the allegation of additional circumstances is necessary, in order to constitute an offense under Article of War 96.

The specification in this case alleges that the accused drank intoxicating liquor with enlisted men in a public place, while in uniform, over a period of time "from on or about 22 July 1946 to on or about 26 August 1946." The word "with" as used in the specification plainly connotes being "in the company of," or being or acting together, not merely being "in the presence of." Such a continued course of conduct is clearly prejudicial to good order and military discipline and as such, is wrongful. The Board of Review is, therefore, of the opinion that the specification sufficiently alleges an offense in violation of Article of War 96.

6. The accused is 23 8/12 years of age, is married and a high school graduate. War Departmemt records show that he entered the service 18 July 1942 and on 16 December 1942 he entered pilot training. Having been eliminated for flying deficiency upon completion of thirty flying hours, he was assigned to AAF Navigational Training at Selma Field, Louisiana. He was commissioned second lieutenant, Army of the United States, 4 December 1943 and promoted to grade of first lieutenant, 14 May 1945. He entered OTU Bomb training with the 497th Bomb Group on 1 March 1944 and proceeded to the Pacific Theater of Operations on 19 October 1944. He returned to the Zone of Interior on 14 August 1945. While overseas he was awarded the Distinguished Flying Cross, Air Medal with five Oak Leaf Clusters, Asiatic-Pacific Theater Ribbon with four bronze stars and the Presidential Unit Citation.

From 9 May 1944 to 31 December 1944 he had five efficiency ratings of excellent. From 1 January 1945 to 30 June 1945 he was rated very satisfactory. From 1 July 1945 to 31 December 1945 his efficiency rating while with the 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California was excellent. In his review, the Staff Judge Advocate stated that for two periods 1 January 1946 to 30 June 1946 and 1 July 1946 to 31 August 1946, at the same post, his efficiency rating dropped to 2.2. Accused's efficiency report for the first period is not in his 201 file and the report for the period 1 July 1946 to 31 December 1946 gives no rating, the reason stated being that the officer was in confinement.

The accused served as combat crew bombardier while in the Asiatic-Pacific Theater. Upon his return to the Zone of Interior he was assigned to the 620th Army Air Forces Base Unit, Muroc Army Air Field, Muroc, California on 22 November 1945. He has served as bombardier with secondary assignments of Assistant Communications Officer and Assistant Armament Officer.

The accused was punished by a reprimand and forfeiture of $91.00 of his pay under the 104th Article of War on 18 July 1945, for using abusive language to an enlisted man while accused was in an intoxicated condition on or about 1 July 1945.

The Board has considered a letter written by the accused to Senator Allen J. Ellender dated 23 January 1947 and forwarded to the Office of The Judge Advocate General by Senator Ellender by letter to the Chief, Military Justice Group, dated 29 January 1947.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review, the record of trial is legally insufficient to support the findings of guilty of Specification 1 of the Additional Charge, legally sufficient to support only so much of the finding of guilty of the Specification of Charge I (dated 8 Oct 1946) as involves a finding of guilty of this specification in violation of Article of War 96, legally sufficient to support all other findings of guilty, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and authorized upon a conviction of a violation of Article of War 96. Confinement at hard labor for six (6) months is authorized upon a conviction of a violation of Article of War 96.

A. Rottenstein, Judge Advocate

Wilhelmer A. Sff, Judge Advocate

Irving L. Smith, Judge Advocate

JAGH - CM 318398 1st Ind

JAGO, Washington 25, D. C. MAR 21 1947

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 Oscar A. Doty, Jr. (0-700709), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being disorderly in uniform in a public place (2 specifications), of displaying gross disrespect toward the civil police authorities and of drinking with enlisted men in a public place while in uniform, over a period of about a month, all in violation of Article of Article of War 95; of assaulting a civilian, of dishonorably failing and neglecting to pay a debt and of making and uttering two checks with insufficient funds, all in violation of Article of War 96. He was sentenced to be dismissed the service and to be confined at hard labor for six (6) 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 review of the San Bernardino Air Materiel Area Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and of the law, with the following exceptions. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of dishonorably failing and neglecting to pay a debt and, insofar as it relates to accused's drinking with enlisted men, is legally insufficient to support the findings of guilty of an offense under Article of War 95 but is sufficient to support a finding of guilty under Article of War 96; that the record of trial is legally sufficient to support the findings of guilty of all other charges and specifications of which the accused was found guilty, to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

During the evening of 28 August 1946, the accused was present at the Apex Bar in Lancaster, California, in company with a girl companion, a Miss Taylor. While accused was seated at his table, Miss Taylor went across the room to play a pin ball machine. Several men were at the machine, including Mr. Wilson. Wilson apparently made advances to Miss Taylor, and allegedly placed his hand upon her hip. The accused asked the bartender several times to tell Wilson to leave Miss Taylor alone. Later Miss Taylor left the room and went outside followed by Wilson. When they returned, shortly thereafter, accused approached Wilson, took him by the elbow, and invited him outside. When they reached the sidewalk accused demanded an explanation as to Wilson's actions. At this point accused struck Wilson and knocked him partially down,

whereupon a crowd immediately gathered. A police cruising car which was passing stopped and two officers, deputy sheriffs, tried to stop the fight. The police testified that Wilson readily backed away and gave no trouble, but accused continued swinging his arms and resisting the officers. He was then forcibly placed in their car and taken to the police station. At the police station he continued to curse the police who arrested him and the booking officer. He was charged with disturbing the peace and resisting arrest and was placed in a cell where he continued to be disorderly until the Provost Marshal at Muroc Field came and took him back to the field. There accused was examined by a medical officer who found that he had suffered minor cuts and bruises and that he was slightly intoxicated.

During the months of July and August 1946, the accused made and uttered two checks in the amount of $25.00 each, for which he obtained cash from the payees. Both checks were returned by the bank upon which they were drawn because of insufficient funds. The cashier of the bank testified that during the month of August 1946, the accused had seventeen checks returned for lack of funds.

On 28 February 1946 the accused borrowed $204 from the Bank of America, Mojave, California, which he agreed to repay in four monthly installments payable the fourth day of each month beginning in April.

Although the accused did not meet the installment payments as they became due, he did repay the entire loan on 10 September 1946. The evidence neither shows that his delay in repaying the loan was dishonorable nor that he attempted to evade his obligation with respect thereto.

On or about 22 July 1946, the accused accompanied a master sergeant, a sergeant, two girls and a civilian, who was a former Army captain, to the Apex Bar in Lancaster, California, where they danced and drank intoxicating liquor. The master sergeant testified that on several other occasions during the period alleged accused drank intoxicating liquor with him at the Apex Bar. On these occasions accused was in uniform and the Apex Bar was a public place.

4. The accused is 23 8/12 years of age, is married, and a high school graduate. He entered the service 18 July 1942 and was commissioned a second lieutenant, Army of the United States, on 4 December 1943. He was promoted to the grade of first lieutenant, Army of the United States, on 14 May 1945. Accused's efficiency reports during his commissioned service vary from excellent to satisfactory. On 19 October 1944, he entered upon foreign service in the Pacific Theater of Operations. While overseas he was awarded the Distinguished Flying Cross, Air Medal with five Oak Leaf Clusters, and the Asiatic-Pacific Theater Ribbon with four Bronze Stars.

On 18 July 1945, the accused was punished by a reprimand and forfeiture of $91 of his pay under the 104th Article of War, for using abusive language to an enlisted man while accused was in an intoxicated condition.

5. Consideration has been given to a letter attached to the record from the Honorable Allen J. Ellender, United States Senate, dated 29 January 1947, together with a letter from accused to Senator Ellender, dated 23 January 1947.

6. I recommend that the findings of guilty of Specification 1 of the Additional Charge be disapproved and that only so much of the findings of guilty of Charge I (dated 8 Oct 1946) and its Specification be approved as finds the accused guilty of the offense alleged in the Specification in violation of Article of War 96, and that the sentence be confirmed and carried into execution but that the portion thereof adjudging dismissal be suspended during good behavior. The accused was sentenced to six months confinement, and with allowances for good conduct time the sentence will terminate on or about 23 March 1947, therefore, it is not considered necessary to designate a place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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(GCMO 116, 31 March 1947).

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAGH - CM 318398 1 MAY 1947

MEMORANDUM FOR GENERAL HOOVER:

SUBJECT: Findings of the General Court-Martial in Case of United States v. First Lieutenant Oscar A. Doty, Jr. (0-700709)

1. First Lieutenant Oscar A. Doty, Jr., 0-700709, was tried by general court-martial upon, and was found guilty of, several charges and specifications, one of which was Specification 4, of Additional Charge alleging a violation of the 96th Article of War. This Specification reads in pertinent part as follows:

> "In that First Lieutenant Oscar A. Doty, Jr., * * * did, at Bakersfield, California, on or about 17 July 1946, (with intent to deceive, wrongfully and unlawfully) make and utter to the Colonial Motor Hotel, a certain check, in words and figures as follows: * * * and by means thereof did (fraudulently) obtain from the Colonial Motor Hotel, twenty-five dollars ($25.00) lawful currency of the United States and did wrongfully fail to maintain sufficient balance in the National Bank of Fort Sam Houston, San Antonio, Texas, to meet payment of said check when presented for payment through the normal banking process of checks."

2. After the reading of this Specification during the arraignment the record at page 9 shows the following procedure:

> "Prosecution: At this time the Prosecution wishes Specification 4 of the additional Charge to be changed to delete the words 'with intent to deceive, wrongfully and unlawfully', and 'fraudulently'. The reference for that is paragraph 73 of the Manual for Court-Martial, which says if the Defense has not been misled in the preparation of its case, the specification may be changed.
>
> "President: Will you repeat those words you want deleted?

"Prosecution: Yes, sir, I would like to delete from Specification 4 of the additional charge, 'with intent to deceive, wrongfully and unlawfully', and 'fraudulently'. Is that change in the specification authorized, sir?

"President: Yes."

(It is to be noted that the president, although the law member was present, ruled upon this matter.)

No objection to this procedure was made by the defense and upon completion of the arraignment the accused pleaded not guilty "to all Specifications and Charges." The court, in its findings, found the accused:

* * *

"Of Specification 4 of Additional Charge: Guilty"

* * *

3. While the action by the court relative to the proposed change in the Specification in question was irregular and indefinite, it is the opinion of the Board that the prosecution, defense and the court itself proceeded under the impression that the Specification had, in fact, been amended as requested by the prosecution. Consequently, it is logically presumed that the accused's plea of "not guilty" and the court's finding of "guilty" pertained not to the original Specification but to this Specification with the changes as proposed. In view of these circumstances the Board is of the opinion that the Specification must be considered as having been thus amended, in order that accused's substantial rights may not be injuriously affected. In our written opinion, the Board inadvertently set forth the original Specification.

4. In its opinion the Board adopted the statement of the evidence and the law contained in the Review of the Staff Judge Advocate except as to matters concerned with the Specifications other than the one now considered. In his Review the Staff Judge Advocate did not refer to the amendment of this Specification in question and did not discuss the legal effect thereof.

This Specification, as amended, states the offense of uttering a check against an account wherein the accused wrongfully failed to maintain a sufficient balance, a lesser included offense of the original allegation. The finding of guilty of such an offense is legally sufficient to support the same sentence as that involved in the original specification.

The accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. On 25 March 1947, the Under Secretary of War disapproved certain findings of guilty, not now under consideration, confirmed the sentence, remitted the confinement adjudged and suspended the execution of the sentence, as modified, during good behavior.

In our opinion the legally sustainable findings of guilty are legally sufficient to support the sentence adjudged.

_____, Judge Advocate

Dillemar T. Jeff, Judge Advocate

Philip L. Smith, Judge Advocate

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

JAGN-CM 318430

UNITED STATES v. Privates First Class JEAN P. TURGEON (11145446), HAROLD G. WHITE (11129011), JOHN W. SCOTT (15233190), and Private GEORGE R. CULLER (13208739), all of Air Corps, Unassigned Attached Squadron TO-2, 3502d Army Air Forces Base Unit, TS.	HEADQUARTERS TECHNICAL DIVISION AIR TRAINING COMMAND Trial by G.C.M., convened at Chanute Field, Illinois, 6 December 1946. Each: Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class John W. Short, Private First Class Harold G. White, Private George R. Culler and Private First Class Jean P. Turgeon, Air Corps Unassigned Attached Squadron TO-2, 3502d AAF Base Unit, TS, acting jointly and in pursuance of a common intent, did, at Urbana, Illinois on or about 18 October 1946, wrongfully take and use one (1) 1937 Hudson Terraplane, the property of Mr. Robert J. Tibitts.

Accused pleaded not guilty to, and were found guilty of, the Specification and the Charge, and were 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 only so much of the

sentence as to each accused as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for a period of one year, designated the Branch United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification. The only question requiring consideration is whether or not the record of trial is legally sufficient to support the sentence as to each accused as approved by the reviewing authority.

4. It is apparent that the court in arriving at the sentences and the reviewing authority in modifying them believed that the offense alleged was joyriding as defined in the D. C. Code (Sec. 22-2204) and that the maximum punishment was dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The Specification as drawn, however, does not allege want of consent by the owner, an essential element of the statutory offense. The offense set out in the Specification is a disorder under Article of War 96 and the maximum punishment as set out in the Table of Maximum Punishments, Manual for Courts-Martial, 1928, paragraph 104c, is confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and its Specification as to each accused and to support only so much of the sentence as to each accused as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

[illegible], Judge Advocate.

[illegible], Judge Advocate.

Edward R. Taylor, Judge Advocate.

JAGN-CM 318430 1st Ind
WD, JAGO, Washington, D. C.
TO: Commanding General, Headquarters Technical Division,
Air Training Command, Scott Field, Illinois.

1. In the case of Privates First Class Jean P. Turgeon (11145446), Harold G. White (11129011), John W. Scott (15233190), and Private George R. Culler (13208739), all of Air Corps Unassigned Attached Squadron TO-2, 3502d Army Air Forces Base Unit, TS, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that so much of the sentence as to each accused as exceeds confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period be disapproved, and that a Post Guardhouse be designated as the place of confinement. Upon disapproval of so much of each sentence as exceeds confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period you will have authority to order the execution of the sentences.

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 318430).

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.

JAGN-CM 318431

U N I T E D S T A T E S	)	NINTH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Augsburg, Germany, 23 July 1946. Dishonorable discharge and confinement for four (4) years. Disciplinary Barracks.
Sergeant DOZIER T. LORD (14021273), Battery B, 34th Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

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

Specification: In that Sergeant Dozier T. Lord, Battery B, 34th Field Artillery Battalion, did, at Ober-Schleissheim, Germany, on or about 23 June 1946, through gross and culpable negligence unlawfully kill Renate Tikevsky, a German civilian, by running into her with a truck.

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

Specification: In that Sergeant Dozier T. Lord, Battery B, 34th Field Artillery Battalion, did, at Ober-Schleissheim, Germany, on or about 23 June 1946, through neglect, suffer one truck 3/4 Ton Weapons Carrier, military property belonging to the United States to be damaged to the extent of

about $330.00, by driving it into a tree.

Accused pleaded not guilty to, and was found guilty of, both Charges and Specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for four years. 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 Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of both Charges and Specifications. The only question to be considered here is whether or not the record of trial is legally sufficient to support the sentence.

4. The pertinent evidence briefly summarized is as follows: At 2300, 23 June 1946 accused invited Private First Class Arnold E. Lane to go to a show. Both soldiers mounted a three-quarter ton weapons carrier. Accused drove and initially appeared to have been sober (R. 7). Early in the trip accused executed a left turn. When reminded that they were intending to go in the other direction accused turned the vehicle and after proceeding down the road a short distance the truck started to weave and barely missed civilians on the edge of the road (R. 7, 11). Private Lane grabbed the wheel noticing that accused was "pretty drunk" (R. 7, 8). Lane let go of the wheel and accused drove about fifteen yards on the left side of the road, then pulled hard to the right, "lost control of the vehicle" and hit a tree and two little girls who were standing there (R. 7, 9, 11, 13, 15). As a result of this double collision the truck was damaged (R. 23; Pros. Ex. 3) and one of the girls died (R. 13, 17; Pros. Ex. 2).

5. The killing of the child and the damage to the truck, the offenses alleged in the Specifications of the Charges both resulted from the "loss of control of the vehicle." The Manual for Courts-Martial sets forth the following rule: "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" (MCM, 1928, par. 80a, p. 67). Here the two offenses were but different aspects of the same act. 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. CM 313544, Carson, 1946 (V Bull JAG, 202). In this case the finding of guilty of the

offense of involuntary manslaughter is the more important aspect of the act charged in that it carries the heavier penalty. The maximun punishment provided for involuntary manslaughter under paragraph 104c, MCM, 1928, is dishonorable discharge, total forfeitures and confinement at hard labor for three years.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings but 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 three years.

[illegible], Judge Advocate.

Hugh J. Brack, Judge Advocate.

Edward R Taylor, Judge Advocate.

JAGN-CM 318431 1st Ind
WD, JAGO, Washington 25, D. C.
TO: The Adjutant General, Washington 25, D. C.

1. In the case of Sergeant Dozier T. Lord (14021273), Battery B, 34th Field Artillery Battalion, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. Upon taking such action you will have authority to order the execution of the sentence.

2. In view of the nature of the offenses and their surrounding circumstances and the combat record of the accused and since it appears that he has had no prior convictions either civilian or military, it is recommended that the period of confinement be reduced to two years and that the execution of that portion thereof adjudging dishonorable discharge be suspended until the soldier's release from confinement.

3. This office has been advised that the Ninth Infantry Division was inactivated, in view of which it is recommended that a War Department General Court-Martial Order be published. A draft of such General Court-Martial Order is inclosed.

4. The return to this office of the holding together with copies of the published War Department General Court-Martial Order is requested.

2 Incls
Record of trial
Draft of GCMO

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO, 44, 25 Feb 1947).

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

JAGK - CM 318442

4 MAR 1947

UNITED STATES	NINTH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Augsburg, Germany, 16 July 1946. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant ARNOLD E. TYNDALL (0-1335363), Infantry.	

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 93rd Article of War.

Specification: In that, Second Lieutenant Arnold E. Tyndall, 3552 Quartermaster Truck Company, did, at or near Augsburg, Germany, on or about 11 April 1946, willfully, feloniously, and unlawfully shoot Christian Reutter in the abdomen with a pistol, resulting in the death of the said Christian Reutter on or about 23 April 1946.

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

Specification 1: In that Second Lieutenant Arnold E. Tyndall, 3552 Quartermaster Truck Company, did, at or near, Augsburg, Germany, on or about 2 April 1946, wrongfully and willfully operate a government vehicle in a careless (and negligent) manner (with wanton and reckless disregard to the rights and property of others) to the prejudice of good order and military discipline.

Specification 2: In that Second Lieutenant Arnold E. Tyndall, 3552 Quartermaster Truck Company, did, at or near, Augsburg, Germany, on or about 10 April 1946, wrongfully and willfully operate a government vehicle in a careless (and negligent) manner (with wanton and reckless disregard to the rights and property of others,) to the prejudice of good order and military discipline.

He pleaded not guilty to Charge I and its specification and guilty of Specifications 1 and 2 of Charge II except the words "and negligent" and "with wanton and reckless disregard to the rights and property of others" and guilty to Charge II. He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to be-

come 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 only so much of the findings of the specification and Charge I as involved a finding that the accused carelessly and negligently discharged a pistol at the time and place alleged resulting in the death of Christian Reutter at the time alleged in violation of the 96th Article of War, approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

On 11 April 1946 Corporal Franklin E. Hoffman was the driver of the jeep used by the accused. Between 5:00 and 5:30 p.m., 11 April 1946 Corporal Hoffman was in the room of the accused discussing an intended trip with the accused (R. 6,7). Upon completion of this discussion their talk turned to the firing of weapons. Lieutenant Tyndall's automatic pistol had just been returned to him after being cleaned by the "company articifer." Lieutenant Tyndall took his pistol from the bureau drawer and pulled the slide back so that they could inspect the barrel. The slide was released and the accused pointed the pistol towards a window and pulled the trigger. The pistol fired, and the bullet passed through the window frame and struck Christian Reutter, a German civilian. After the pistol fired the accused "turned the pistol over and looked at it and noticed there was a clip in it." Corporal Hoffman and the accused took the wounded German to a civilian hospital for treatment after which they proceeded to the home of the German and informed his wife of the incident (R. 8-11).

Examination of Christian Reutter disclosed that he had been shot in the abdomen. He died on 23 April 1946, death resulting from "The pneumonia was directly the cause of Christian Reutter's death, but pneumonia was also caused by the shot" (R. 12-14).

About 9 p.m., 2 April 1946, Second Lieutenant Louis C. Feister, Staff Sergeant Ralph H. Martens, Sergeant Robinson, and the accused left the noncommissioned officers club of the 3552 Quartermaster Truck Company, Augsburg, Germany, to go to their company. They left in a jeep with the accused driving (R. 16, 18). A girl was standing on the sidewalk near a fence. The accused said, "I wonder if she will scare very easily." He drove the jeep upon the sidewalk and towards the girl. The girl did not move and after driving three or four feet in her direction the accused drove the jeep into the street (R. 15, 16,19). The accused drove the jeep along the street at a speed of about 35 miles per hour and while driving at this speed "he would cut the wheel sharply causing the jeep to veer from one side to the other." Lieutenant

Feister protested the manner in which the jeep was being driven and the accused then drove in a normal manner until within a few blocks of the company area. The accused saw a girl crossing the street in front of them and to their right. Instead of turning to the left towards the company the accused turned to the right in a circling movement and came up behind the girl. The girl ran and accused followed her. He was driving toward her and if he had kept going, and if the girl had not run, he would have hit her. The accused turned back into the street and proceeded towards a street which would bring them to the company. Instead of making a left turn which would take them to the company the accused again turned to the right away from the company. Two middle aged couples were standing on the sidewalk. The accused made a wide turn upon the sidewalk and dispersed these people by driving directly to where they were standing. The people "spread in all directions to get out of the way" (R. 16,19). Sergeant Martens described accused's actions as "we came on to Augsburg and as we got near the company, he made a right turn and chased civilians and on the way in he drove very recklessly"(R. 18).

On 10 April 1946 at about 2 p.m. the accused asked Adus J. Clark, First Sergeant of the 3552 Quartermaster Truck Company to ride with him to the maintenance shops to see about the jeep used by accused. They started to the shop in a 2-1/2 ton truck with the accused driving. Instead of stopping at the shop the accused said, "Let's take a ride and come back by later." The accused then drove the truck some 10 or 12 miles at a speed of between fifty and sixty miles per hour. He then drove into an open field. Sergeant Clark asked him where he was going and accused stated, "I'm going in here and raise a little dust." He made a circle through the field and stopped. Sergeant Clark then said, "Sir, this is not being scared at your driving, but this old vehicle is going to the bad. Take it easy going back into town." The temperature gauge registered 200 degrees. The accused again circled the field and started back towards town. They overtook a three-wheeled German vehicle. "Lieutenant Tyndall hooked the truck onto the vehicle and pushed it about fifty to seventy-five yards." His speed at this time was between 25 and 35 miles per hour. They then proceeded to the maintenance shop. Lieutenant Tyndall went into the shop and Sergeant Clark drove the truck to the company (R. 20,21,22).

4. <u>For the defense.</u>

Major John J. Nichols, 4th Quartermaster Detachment, Munich, Germany, testified that the accused had been transferred from Augsburg to Headquarters 4th Quartermaster Detachment because of the charges involved in this case. He investigated these charges against the accused and found that Lieutenant Gilford, the commanding officer of the accused, objected to the accused's assignment to the unit and had made no effort to correct any errors by accused. Lieutenant Tyndall's performance of duty with his present organization is excellent and his reputation is excellent. Notwithstanding the fact that the accused pleaded guilty to the careless use of vehicles, Major Nichols

would be glad to have accused as a member of his organization (R. 29,30,31).

Second Lieutenant Floyd M. Davis, 4th Quartermaster Battalion, testified that Lieutenant Guilford stated during the investigation of the charges now being tried that "this is a good opportunity now to get Lieutenant Tyndall out of the company" (R. 32).

The accused elected to testify as a witness after a proper warning as to his rights. He testified that on 2 April 1946 he was platoon commander of the 3552 Quartermaster Truck Company in Augsburg. The company's principal duty was the hauling of supplies. The company operated 72 or 73 trucks and seven jeeps. Concerning the specification of Charge I he stated that on 11 April 1946 he was in his room talking to Corporal Hoffman about a proposed trip. Their conversation turned to weapons. He had a .45 in his room which had been cleaned by the weapons master of the company. There was no magazine or ammunition in the gun when he sent it to be cleaned. He pulled the slide back so they could examine the barrel. He let the slide go forward and then held the gun away from Corporal Hoffman and himself, after which he "snapped the trigger to let the hammer go forward." The weapon fired and he started to clear it to see why it fired. He did not think that there was any ammunition in it and did not know that the weapon master had put ammunition in it when it was cleaned. He never had any instruction with a pistol and his experience with a pistol consisted of the firing of approximately two clips of ammunition. Corporal Hoffman saw that a German had been hit by the bullet. He finished clearing the pistol and then went to the aid of the German. They took the German to the hospital, after which they informed the German's wife of the incident. The next morning he made a report of the incident to his commanding officer and was told to forget about it (R. 26,27,28). In reference to Specification 1, Charge II, he stated that on the night of 2 April 1946 he had gone to the enlisted men's club to see the floor show. After the show there was drinking and dancing. He did not drink and for that reason he drove the jeep when his party left the club. Lieutenant Feister and Sergeants Martens and Robinson were laughing and cutting up and seemed very happy. He was driving about 30 or 35 miles an hour and "I did take the wheel and give it a couple of switches across the road, just to help along with the laughs. The rest were about drunk anyway." Lieutenant Feister said that he should not drive in that manner so he drove Lieutenant Feister to the company. He then started to pick up Lieutenant Davis, at which time he saw the civilians mentioned by Sergeant Martens. He then said, "I pulled alongside the civilians and as we were driving along, I pulled the clutch in and we had a good laugh over that" (R. 25). Concerning Specification 2, Charge II, he testified that on 10 April 1946 Sergeant Clark was giving driving tests. He asked the sergeant, jokingly, to take him out and see if he "was good enough to drive." He also said, "Let's go down to the maintenance shop." When they reached the turn leading to the maintenance shop Sergeant Clark said, "Lieutenant, I don't go out very much, let's go out in the country." They drove some distance on the road to Landsberg. They were laughing, telling jokes and cutting up. He decided they had gone

far enough and turned around in a field. He stopped the truck and they dismounted. After about five minutes they again entered the truck. When the truck was standing the heat register was 200 degrees but when they started driving the temperature came down to about 185, which is normal under ordinary conditions. They overtook a three-wheeled German vehicle which was "running pretty slow," making 10 or 15 miles per hour. Another vehicle prevented his passing this vehicle. They laughed and made some comments as to the slowness of this vehicle. The accused then stated, "I merely bumped him. He said I hooked the bumper over his bumper and pushed him. There was no bumper on the German vehicle" (R. 26).

5. The specification of Charge I alleges a violation of Article of War 93 in that the accused did on or about 11 April 1946 willfully, feloniously and unlawfully shoot Christian Reutter in the abdomen with a pistol, resulting in the death of Christian Reutter on or about 23 April 1946. The reviewing authority approved only so much of this specification and charge as involves a finding that the accused carelessly and negligently discharged a pistol at the time and place alleged, resulting in the death of Christian Reutter at the time alleged in violation of Article of War 96. It therefore becomes necessary to determine whether or not the approved finding is a lesser included offense of the one charged.

It has always been considered that among the lesser included offenses of murder, which involves the element of deliberation, are included the offenses of voluntary and involuntary manslaughter (MCM, 1928, par. 146a; CM 287101, Davis, 10 BR (ETO) 79), the latter of which terms encompasses the culpably negligent aspect of an act which, if done deliberately, would, other elements being present, constitute murder. So also, involuntary manslaughter is a lesser included offense of voluntary manslaughter, voluntary manslaughter containing the element of willfullness in which is included the element of culpable negligence to be proved in involuntary manslaughter (CM 292271, Bentley, 4 BR (ETO) 217; CM 272994, Daniels, 50 BR 267). Furthermore, it has been held that a charge of simple negligence or carelessness is necessarily included in an allegation of involuntary manslaughter (CM 293509, Coats, 8 BR (ETO) 39). Therefore, since involuntary manslaughter is a lesser included offense of voluntary manslaughter, it follows that such negligence is necessarily included in a charge of voluntary manslaughter.

In Fitzgerald v. State (20 Southern 966 (Ala.)) the court in discussing a murder case said:

> "It is laid down by Bishop that 'every act of gross carelessness, even in the performance of what is lawful, and, a fortiori, of what is not lawful, and every negligent omission of a legal duty, whereby death ensues is indictable either as murder or manslaughter. 1 Bish Cr Law, Sec 314.'

* * *

"Our own adjudications are in line with these texts, and always predicate criminality, not upon mere negligence or carelessness, but upon that degree of negligence or carelessness which is denominated 'gross' and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which in some instances take the place of criminal intent."

The Board of Review is of the opinion that a careless and negligent discharge of a pistol is a lesser included offense of voluntary manslaughter when it is alleged that the voluntary manslaughter occurred by shooting with a pistol. The reviewing authority in this case approved a finding of carelessness and negligence, not amounting to such gross negligence as to constitute involuntary manslaughter.

In CM 271392, Ebard (1 NATO-MTO 103), it was held that assault with intent to do bodily harm with a rifle did not include the offense of "through carelessness, discharge a service rifle in his company area." It is noted that the finding of such offense includes an additional element, "in his company area," which was not in the original charge.

Specifications 1 and 2 of Charge II allege a wrongful and willful operation of a Government vehicle in a careless and reckless manner with wanton and reckless disregard to the rights of others to the prejudice of good order and military discipline. The evidence shows that on 2 April 1946 the accused did on three occasions drive a jeep upon a sidewalk and towards civilians standing thereon. On the first occasion the civilian refused to move. The second time the civilian ran for protection and one witness stated that had the accused continued his driving toward her and if she had not run she would have been struck by the jeep driven by the accused. The third occasion a group of people scattered in all directions for safety. Thereafter on 10 April 1946 the accused drove a 2-1/2 ton truck some 10 or 12 miles at a speed of between 50 and 60 miles per hour. Returning from this drive he came up behind a three wheeled German vehicle which was traveling very slowly. He thereupon pushed this German vehicle with his truck a distance of between 50 and 75 yards at a speed of between 25 and 35 miles per hour.

Such acts by the accused amount to reckless driving as charged (CM 293509, Coats, supra).

6. War Department records show the accused to be 22-10/12 years of age and single. He graduated from high school and attended Atlantic Christian College for two years. He was inducted into the Army in August 1944. Upon completion of officer candidate school he was appointed and commissioned a second lieutenant, Army of the United States, 19 May 1945. His efficiency

reports for the period 19 May 1945 to 31 December 1945 are "Excellent."

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

Webster A. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert B. Lafferty, Judge Advocate

JAGK - CM 318442 1st Ind

WD, JAGO, Washington 25, D. C. MAR 1 2 1947

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 Arnold E. Tyndall (0-1335363), Infantry.

2. Upon trial by general court-martial this officer was found guilty of voluntary manslaughter in violation of Article of War 93 and of reckless driving (2 Specs.) 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 only so much of the findings of guilty of Charge I and its specification as involved findings that accused carelessly and negligently discharged a pistol at the time and place alleged, resulting in the death of Christian Reutter in violation of Article of War 96. He approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

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

The record of trial shows that on 11 April 1946 the accused while in his quarters at Augsburg, Germany, was examining an automatic pistol which had been cleaned by the company armorer. Having inspected the barrel of the weapon he then pointed the gun towards a window and pulled the trigger in order to cause the hammer to go forward. The pistol fired and wounded Christian Reutter, a German civilian. The civilian died from this wound on 23 April 1946. The court found the accused guilty of voluntary manslaughter but the reviewing authority was of the opinion that the negligence of the accused was not sufficient to amount even to involuntary manslaughter and he thereupon approved only so much of this finding as involved a careless and negligent discharge of the pistol resulting in the death of Christian Reutter as alleged in violation of Article of War 96. The evidence also shows that on two occasions the accused operated a Government vehicle with wanton disregard to the rights of others and under such circumstances as to amount to reckless driving.

Under the District of Columbia Code the offense of reckless driving is punishable for the first offense by a fine of not more than $250.00 or

imprisonment for three months or both (sec. 40-605 (6:246), Title 40, D.C. Code).

The accused is under 23 years of age. He was inducted into the Army in August 1944 and commissioned a second lieutenant, 19 May 1945. His efficiency reports show a rating of excellent.

4. Consideration has been given to a letter requesting clemency from Lieutenant Marjorie L. St. John as well as to the 23 requests for clemency attached to the record and signed by various officers serving in the European Theater with accused.

5. In view of the action by the reviewing authority, the relative minor nature of the charges of reckless driving, the youth of the accused, and all the circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $75 pay per month for three months, and that the sentence as thus modified be carried into execution.

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

CM 318,442

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Lt St John

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 101, 19 March 1947).

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

JAGN-CM 318443

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Augsburg, Germany, 16 July
Staff Sergeant LUTHER	)	1946. Dishonorable dis-
JEFFCOAT (33807408), 3977th	)	charge and confinement for
Quartermaster Truck Company.	)	ten (10) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Staff Sergeant Luther Jeffcoat, 3977th Quartermaster Truck Company, did, at Munich, Germany, on or about 25 March 1946, wilfully, feloniously, and unlawfully kill Wojim Spaleikowitsch, by cutting him to death with a knife.

Accused pleaded not guilty to, and was found guilty of, the Charge and its Specification, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

Between 2030 and 2200 25 March 1946 Technician Fourth Grade

J. D. Harris and Technician Fifth Grade John R. Collins were talking with a civilian in front of the enlisted men's club about the purchase of schnapps (R. 7, 13). Accused appeared and took part in the discussion. Accused said "Are you going to stand here all day talking to a civilian about schnapps." Accused then drew a knife, grabbed the civilian and said "You will give me a bottle of schnapps." Accused and the civilian scuffled and accused commenced "cutting the civilian." Accused and the civilian were finally separated. Accused again cut the civilian on the right leg as he was getting into his car. The civilian then left the scene in his car (R. 13).

At about 2200 the same date a civilian appeared at the 98th General Hospital, Munich, with deep lacerations on his buttocks and hands (R. 19). Attendants carried him to the Displaced Persons Hospital located directly to the rear of the 98th General Hospital (R. 20). There he identified himself as Spaleikowitsch. Examination revealed that he was suffering from four stab wounds, one on his throat, one on his left hand, one on his thigh and one on the left cheek of his buttocks (R. 22). He died at 0015 from loss of blood due to the deep wound on his buttocks (R. 23).

4. Evidence for the defense:

Staff Sergeant Oscar B. Bryant testified that he examined the knife of accused on 26 March 1946 and did not find any blood. He further testified that accused had never received "extra duties" nor had he been subject to trial by court-martial (R. 30). Accused after being informed of his rights elected to remain silent (R. 32).

5. It is alleged in the Specification of the Charge that accused "did * * * kill Wojim Spaleikowitsch, by cutting him to death with a knife." The evidence establishes that on 25 March 1946 in Munich about 2200 accused cut an unidentified civilian with a knife and that shortly thereafter a civilian named Spaleikowitsch entered a hospital in the same city, suffering from knife wounds from which he died. There is no evidence in the record to identify the man cut by accused and the man who died from knife wounds in the Displaced Persons Hospital as being one and the same person. Admittedly a man was cut by accused and shortly thereafter a man suffering knife wounds was admitted to a hospital. However, Munich is a city of over 600,000 population and an inference that accused's victim and Spaleikowitsch were one and the same is not warranted as there is no indication in the record that the scene of accused's affray and the hospital in which Spaleikowitsch died are in close proximity. In cases involving homicide the identity of the deceased with the person alleged to have been assaulted by the accused must be fully established (CM 316930, Mitchell (1946); CM 202359, Turner, 6 BR 87, 122; CM 309701, Taylor, 32 BR (ETO) 336; CM 248113, Coe, 1 BR (CBI-IBT) 34; CM 309037, Dillon, 2 BR (CBI-IBT) 367.

6. The only question remaining is whether the record of trial is legally sufficient to support a finding of guilty of a "lesser included" assault.

A "lesser included offense" must be one which is "necessarily included in that charged." Par. 78c, MCM, 1928 (Emphasis supplied). (CM 201377 Overdier, 5 BR 104; CM 223331 Ross, 13BR 378; CM 229477 Floyd, 17 BR 152. The criterion for determining each case is not the act of accused but the offense with which he is charged (Par. 78c, MCM, 1928; State v. O'Brien (Vt.) 170 A 98, 100; State v. Fredlund (Minn) 273 NW 353, 113 ALR 215; Orcutt v. State (Okla) 3 P2d 912; State v. Brooks (Wis) 254 NW 374, 94 ALR 401). The rule is very well stated in the case of Commonwealth v. Dean, and others, 109 Mass 349, 352, wherein the court said:

> "It is the duty of the Commonwealth to prove the identity of the offense charged in the indictment with that on which he seeks to convict before the jury of trials. It is a rule of the common law as well as a provision of the constitution of this Commonwealth, that no one shall be held to answer, unless the crime with which it is intended to charge him is set forth in the indictment with precision and fullness; and this rule is not to be defeated by allowing the defendant to be convicted upon evidence of another offense of the same kind, committed on the same day, but not identical with it. Commonwealth vs. Blood, 4 Gray, 31. The prisoners could not be lawfully convicted of an assault which was not an ingredient in the felony with which they were originally charged."

In this case the accused is charged with the killing of Spaleikowitsch, the manner in which the offense was committed being alleged. The prosecution established by legal evidence the identity of Spaleikowitsch, the fact of his death, and that he died as a result of knife wounds. The prosecution, having thus established the corpus delicti, failed to prove that accused inflicted the fatal wound, but in attempting such proof did introduce evidence of an assault by accused upon an unidentified civilian.

This case does not present a problem of identity repsecting the victim of the offense charged - such identity was clearly proven as alleged. The prosecution failed to prove any connection between the act of accused and the offense with which he is charged, and the conclusion is inescapable that such act cannot be held to constitute a necessarily lesser included offense in that charged since such connection cannot rest on surmise but must affirmatively appear from the record of trial.

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

Edward J. Johnson, Judge Advocate.

George T. Brack, Judge Advocate.

Lewis R. Tucker, Judge Advocate.

JAGN-CM 318443 1st Ind
WD, JAGO, Washington 25, D. C. MAR 9 1947
TO: The Under Secretary of War

1. In the case of Staff Sergeant Luther Jeffcoat (33807408), 3977th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence.

2. I do not concur entirely in the holding by the Board of Review.

The evidence does not sufficiently prove that the person whom accused cut with a knife was the person named in the Specification as the victim of the homicide, and death of a human being through the act of accused was not therefore proved. The finding of guilty of voluntary manslaughter must fall. But it was clearly proved that at the time and place alleged accused did in fact willfully, feloniously, and unlawfully cut a human being with a knife as alleged. This offense was tantamount to an assault with intent to do bodily harm with a dangerous instrument, and was a lesser offense included in that charged. In proving the offense of voluntary manslaughter as charged it was necessary to prove the assault with intent to do bodily harm with a dangerous instrument.

The failure to prove the name of the person assaulted was not fatal to a conviction of the lesser included offense. Only one assault was proved and the proof of the circumstances of its commission was explicit and of positive and definite identifying character. The name of the victim is useful in pleading this kind of offense only in order that the offense may be identified with certainty. The finding of guilty of the lesser included offense as amplified by the record of trial might certainly be proved in support of a plea of former jeopardy should an attempt be made to try accused again for this particular cutting.

A similar situation was discussed in CM 271043, Guy, 2 BR (NATO-MTO) 169. The remarks of the Board of Review in that case, in which accused was convicted of manslaughter but the name of the victim was not competently proved, are pertinent here:

> "The identity of the woman who was slain was not established by any competent evidence."
>
> * * *
>
> "However, the omission of proof of the woman's name did not amount to a variance but more exactly is to be termed a failure of proof. There is apparent authority for the view that such a want of proof is fatal to the validity of a conviction (Smith v. State, 80 Fla. 710, 86 So. 640, cited in Wharton's Crim. Ev., 11th Ed., p. 1845). But a valid reason for the application of such a rule here is not easily perceived. As in the case of a variance,

a want of proof of this character should only be held substantially injurious to accused and hence fatal to the validity of the conviction if the court were misled, or if some substantial injury was done to accused, such as that he was prevented from intelligently preparing and presenting his defense, or if he is exposed to the danger of a second trial on the same charge (Wharton's Crim. Ev., 11th Ed., p. 1082; Underhill's Crim. Ev., 4th Ed., p. 106). The transaction alleged in the Specification was the very one established by the evidence. It was of no moment to accused in preparing and presenting his defense that the woman who was killed was known as Sohrah Ben Mohamed or by some other name. It is not conceivable that the court was misled. Nor could accused be successfully prosecuted again for the killing of a woman at the place and time here alleged. The record of trial reflects all the facts upon which he was convicted and is available to demonstrate that he has been once tried for this crime if he should again be placed in jeopardy for the same offense (16 C.J. 264, 265, 266, 286). It is concluded that no substantial right of accused was injuriously affected by this failure of proof (AW 37)."

3. The maximum sentence authorized by paragraph 104c of the Manual for Courts-Martial, 1928, for the offense of assault with intent to do bodily harm with a dangerous weapon, instrument or thing, is dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Penitentiary confinement is authorized by Article of War 42 for this offense, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 455, Title 18, U. S. Code.

4. It is recommended that only so much of the finding of guilty of the Specification be approved as involves a finding that accused did, at the place and time alleged, willfully, feloniously and unlawfully cut a human being, of name not shown, with a knife; and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years.

5. Two forms of action are inclosed. Form A is designed to carry out my recommendation as stated above. Form B is designed to carry out the holding by the Board of Review.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Form A
3 - Form B

(GCMO 142, 25 April 1947).

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

JAN 8 1947

JAGQ - CM 318449

UNITED STATES v. Private WILLIE W. BROWN (33790158), Headquarters Headquarters Detachment, Section II, 1449 Area Service Unit, Fort Bragg, North Carolina.	FORT BRAGG Trial by G.C.M., convened at Fort Bragg, North Carolina, 4 October 1946. Dishonorable discharge.

MEMORANDUM by the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, 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 review, to The Judge Advocate General.

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

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

Specification: In that Private Willie W. Brown, Headquarters Headquarters Detachment Section II, 1449 Area Service Unit, Station Complement, Fort Bragg, North Carolina, but then a member of the 311th Company, 510th Port Battalion, Indiantown Gap, Pennsylvania, did, at Indiantown Gap, Pennsylvania, on or about 28 October 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at Rocky Mount, North Carolina, on or about 5 August 1946.

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

Specifications 1 and 2: (Findings of not guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 and Specification 2 of Charge II and of Charge II, but guilty of the Specification and the Charge under the 58th Article of War. 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 may direct for a period of ten years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge and forwarded the record of trial pursuant to Article of War 50½.

3. The only question requiring consideration here is whether or not in view of the evidence pertaining to the mental condition of accused, the record of trial is legally sufficient to support the findings of guilty of desertion, and the sentence.

All of the evidence contained in the record relating to the mental responsibility of the accused is embodied in a stipulation as follows:

> "Defense: Yes, sir. If it please the court, the defense, the T.J.A., and the accused, hereby stipulate that if I.S. Dribben, Captain, Medical Corps, Chief Neuropsychiatric Section, were present in court he would testify as follows: '20 August 1946. Patient is a 21 year old colored private with 3 years military service, of which at least 18 months has been AWOL. He has multiple complaints, chief of which are headaches and dizziness. There is history of automobile accident 1937, with 2 hours of unconsciousness. Psychiatric history shows essentially that he reached the 5th grade in school, quitting at the age of 13 because of same type headaches (which contraindicates the accident of 1937, being the basic etiological factor). His family background shows NP determinants with father being in a sanatorium for nerves. He denies conflict with civilian law. He states he never had a job prior to induction, having worked as a longshoreman for 2 days and for Sears Roebuck for 3 days. Mental status shows fluent speech with marked conversion of hypochondriacal trends. No suicidal tendencies noted. He impresses examiner with his emotional inadequacy and immaturity. He wants an operation on his head, saying, "Something's there that shouldn't be". No significant signs for psychosis. Psychological tests show mental age of 5 years 8 months by Wechsler-Bellevue, indicating marked mental deficiency. DX: Psychopathic personality with emotional immaturity, inadequacy and mental deficiency. RX: After suitable disciplinary action, disposition by AR 615-369.' Signed: I. S. Dribben, Captain, Medical Corps, Chief, Neuropsychiatric Section. Also on 20 August 1946 - 'According to TM 27-255 the following questions are herewith answered: (1) Whether both at the present time and at the time the offense was committed the accused knew the difference between right and wrong? No. (2) Whether he had the capacity to keep from doing wrong? No. (3) Whether at the present time he has the mental ability to understand the nature of the proceedings against him and to do what is necessary to present his defense? No.' Signed: I. S. Dribben, Captain, Medical Corps, Chief, Neuropsychiatric Section." (R 16, 17).

The legal standard of mental accountability under military law is clearly and succinctly stated in fifth subparagraph of paragraph 78a, page 63, MCM, 1928, and reads as follows:

> "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right."

Every person brought to trial before a court-martial is presumed to be sane and mentally accountable for the offense charged against him. This presumption continues until sufficient evidence is presented either by the defense or the prosecution which raises a reasonable doubt to the contrary. In that event the presumption of the accused's sanity is vitiated, and the legal burden is placed upon the prosecution to prove, beyond a reasonable doubt, that the accused was "so far free from mental defect, disease or derangement, as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right." If the prosecution fails to establish such proof and the court-martial has reasonable doubt on either of these two issues of accountability the accused should be acquitted.

Although the defense counsel in an appropriate case is under a duty to present evidence of the accused's mental deficiency the court is also under a duty to guard the accused's right in this particular. The Manual for Courts-Martial states:

> "The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense." (par. 63, MCM, 1928).

War Department Technical Bulletin (TB MED 201), 1 October 1945, provides in part as follows:

> "c. Mental capacity at time of trial. No person should be brought to trial unless he possesses a sufficient mental capacity both to understand the nature of the proceedings against him and intelligently to conduct or to cooperate in his defense. When there is any reasonable doubt as to this matter, the court has the duty to answer in the negative the following question:
>
> Does the accused at the time of trial possess a sufficient mental capacity 'intelligently to conduct or cooperate in his defense?' (1st subparagraph of par. 63, MCM, 1928.)

If the accused cannot meet this test, he may not legally be tried."

The doctrine is well established that the presumption of mental accountability of accused is vitiated if competent evidence to the contrary is introduced and unimpeached by the prosecution. Concerning the duty of a court-martial to consider such testimony it has been said that:

"*** While it is the function of the court as trier of fact to consider the report of the board [a medical board] and accord to it that weight and credence to which, in the judgment of the court, it may be entitled, yet since the report of the board, supported by other evidence, was unimpeached by the prosecution, it is prima facie proof of mental derangement and the court could not entirely disregard such evidence. ***" (CM 128252, Heppberger).

Therefore, as the stipulated testimony of the psychiatrist was not impeached by the prosecution the sole question remaining is to decide whether that evidence was such "prima facie proof of mental derangement" that the court, as triers of fact, could not entirely disregard it. In the opinion of the Board the stipulated evidence on this point is so inconsistent, ambiguous and contradictory that it is virtually meaningless. In his diagnosis of accused the witness states that he found "No significant signs of psychosis" and he recommends "after suitable disciplinary action, disposition by AR 615-369" (Italics ours). Thereafter, he answers the three questions required by TM-27-255 in the negative stating that accused cannot distinguish right from wrong, adhere to the right or understand the nature of the proceedings against him. These conclusions are so inconsistent with his findings and recommendation that it is considered the court was warranted in disregarding this entire evidence. How an expert on mental diseases could recommend "disciplinary action" against accused and at the same time conclude that he is mentally deranged to the degree stated is beyond comprehension. Further, the "recommendation" clearly indicates that the witness understands the difference between "disciplinary" and "administrative" action.

4. In view of the above it is considered that this case is clearly distinguishable from the doctrine enunciated in the authorities cited and that the court was warranted in its finding that the presumption of mental accountability was not vitiated by the stipulated testimony.

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence and to warrant execution thereof.

W A Johnson Jr., Judge Advocate.

(Dissent)

_____, Judge Advocate.

_____, Judge Advocate.

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

JAGQ - CM 318449

Jan 8, 1947

U N I T E D S T A T E S v. Private WILLIE W. BROWN (33790158), Headquarters Headquarters Detachment, Section II, 1449 Area Service Unit, Fort Bragg, North Carolina.	))))))))))	FORT BRAGG Trial by G.C.M., convened at Fort Bragg, North Carolina, 4 October 1946. Dishonorable discharge.

DISSENT by DICKSON, Judge Advocate

1. I must dissent from the holding of the majority of the Board. My views on the law are succinctly stated in TB MED 201, War Department Technical Bulletin, 1 October 1945.

The following is quoted from Paragraph 2 of said Bulletin:

"Although the defense counsel, in an appropriate case, is under a duty to present evidence of the accused's mental deficiency, the court is also under a duty to guard the accused's right in this particular. The Manual for Courts-Martial states:

> 'The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense.' (MCM, 1928, par. 63.)

"c. Mental capacity at time of trial. No person should be brought to trial unless he possesses a sufficient mental capacity both to understand the nature of the proceedings against him and intelligently to conduct or to cooperate in his defense. When there is any reasonable doubt as to this matter, the court has the duty to answer in the negative the following question:

> Does the accused at the time of trial possess a sufficient mental capacity 'intelligently to conduct or cooperate in his defense?' (1st subparagraph of par. 63, MCM, 1928.)

If the accused cannot meet this test, he may not legally be tried."

The only testimony before the court was that of Captain Dribben, M.C., Chief of the Nueropsychiatric Section, who testified that accused's family background shows NP determinants with father being in a sanatorium for nerves; that psychological tests show accused's mental age as 5 years and 8 months by Wechsler Bellevue, indicating a marked mental deficiency; and that at the time of the trial the accused did not have the mental ability to understand the nature of the proceedings against him and to do what was necessary to present his defense.

2. The above testimony being unimpeached and uncontradicted, it became the duty of the court "to guard the accused's rights" by making proper inquiry into the mental capacity of the accused. The court wholly failed to perform its duty in this respect and proceeded with the trial and made its findings and sentence without any inquiry whatsoever into the mental capacity of the accused. Such action on the part of the court was error. This error injuriously affected the substantial rights of the accused. For this reason the record of trial is legally insufficient.

3. The fact that the reviewing authority subsequent to the trial appointed a Board of Officers to inquire into the sanity of the accused does not in any sense lessen the error of the court but on the contrary it confirms my view that the court itself committed fatal error by its failure to make proper inquiry into the mental capacity of the accused.

_____, Judge Advocate.

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

JAGN-CM 318467 27 January 1947

U N I T E D S T A T E S	)	NEW YORK PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Camp Kilmer, New Jersey, 27 November 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private First Class GUILFORD P. JOHNSON (31485056), 9225 Technical Service Unit-Transportation Corps, Company I, 10th Regiment, Overseas Replacement Depot.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

CHARGE II: Violation of 96th Article of War.

Specification: In that Private First Class Guilford P. Johnson, 9225 Technical Service Unit-Transportation Corps, Company I, 10th Regiment, Overseas Replacement Depot, Camp Kilmer, New Jersey, having been restricted to his company area, did, at Camp Kilmer, New Jersey, on or about 2 October 1946, break said restriction by leaving the company area.

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

Specification: In that Private First Class Guilford P. Johnson, 9225 Technical Service Unit-Transportation Corps, Company I, 10th Regiment, Overseas Replacement Depot, Camp Kilmer, New Jersey, having been duly placed in confinement in Post Stockade, Fort Dix, New Jersey, on or about 12 October 1946, did, at Fort Dix, New Jersey, on or about 12 October 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private First Class Guilford P. Johnson, 9225 Technical Service Unit-Transportation Corps, Company I, 10th Regiment, Overseas Replacement Depot, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 2 October 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Brattleburough, Vermont, on or about 8 October 1946.

Specification 2: In that Private First Class Guilford P. Johnson, 9225 Technical Service Unit-Transportation Corps, Company I, 10th Regiment, Overseas Replacement Depot, Camp Kilmer, New Jersey, did, at Fort Dix, New Jersey, on or about 12 October 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Sterling, Massachusetts, on or about 26 October 1946.

Accused pleaded not guilty to all Charges and Specifications, was found guilty of all Charges and Specifications and 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 disapproved the finding of guilty of the Specification of Charge I and Charge I, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

Accused was ordered to proceed from Fort Belvoir, Virginia, "to Overseas Replacement Depot Camp Kilmer, NJ (for further movement outside Continental United States)" to arrive "no later than 9 August 1946 (Pros. Ex. 1). On 30 September 1946 accused, then assigned to Company I, 10th Regiment, Camp Kilmer, was placed under restriction to the company area pending trial as a result of a previous alleged unauthorized absence (R. 9-10; Pros. Ex. 9).

On 2 October 1946 accused breached such restriction and absented himself without authority until he was apprehended, "sober" and dressed in "OD uniform," at Brattleburough, Vermont, 8 October 1946 (R. 10-11; Pros. Ex. 8).

It was stipulated,

> "* * * that if Harold L. Purdy, Captain, Ordnance Department, were present in court and sworn as a witness for the prosecution, he would testify substantially as follows:- I am Harold L. Purdy, Captain, Ordnance Department, Security and Intelligence Division, Headquarters 1262 ASU, First Army, Fort Dix, New Jersey. I know the accused to be Private First Class Guilford P. Johnson, Army Serial Number 31485056, because on the 12th Day of October 1946, Private Johnson was confined in the Post Stockade Annex, Fort Dix, New Jersey, and did break said confinement at approximately 2100 hours and 12 October 1946."

An affidavit of Captain Purdy to the same effect was admitted in evidence without objection.

On 26 October 1946 accused was arrested, "sober", "neat", and dressed in "OD uniform," by civilian police at Sterling, Massachusetts, and turned over to the military police at Fort Devens.

4. Evidence for the defense:

Accused, having been advised of his rights, elected to make an unsworn statement in his own behalf which, in substance, was as follows: He returned from Korea where he was on duty with the 24th Corps, Military Government. He went home and found his "folks" worried because he had enlisted in the Regular Army while he was overseas. He knew that he had no basis for an emergency furlough but he went home again. His mother was still more worried. She told him "it would kill her," so he went home again and stayed unitl a policeman arrested him the following Monday. When he was arrested by Chief of Police Buck on a Saturday night, he told the latter that he was planning to return to camp on Monday morning. In the meantime his mother had written to Major Church about an injury he had had previously when he was home and before he entered the service. He was sent to the hospital to have this alleged injury examined. He left the hospital the day before the trial began (R. 14).

5. The breach of restriction as alleged in the Specification of Charge II is clearly proven by direct evidence.

As to the alleged escape from confinement (Specification

of Charge III) the only evidence is the stipulated testimony and affidavit of Captain Purdy stating bald conclusions as to "confinement" and "break." Captain Purdy, in such stipulation and affidavit, is identified simply as "Captain, Ordnance Department, Security and Intelligence Division, Headquarters 1262 ASU, First Army, Fort Dix New Jersey." There is nothing in the record to show Captain Purdy's official capacity or his duty to know the purported facts contained in such testimony. Without a proper foundation having been laid such evidence, even though introduced without objection, is not properly admissible, and cannot support a finding of guilty as to the alleged escape (Par. 395(23) Dig. Ops. JAG 1912-40).

Captain Purdy's statement and affidavit are equally incompetent to prove the unauthorized absence which is an essential element of the desertion (Par. 130a, MCM, 1928) alleged in Specification 2, Charge IV, and there remains in the record no legal evidence from which such absence without leave any be reasonably inferred.

As to the desertion alleged in Specification 1 of Charge IV the prosecution apparently sought to prove the necessary intent primarily by showing that the absence without leave originated in a breach of restriction, that the accused was apprehended at some distance from his proper station, and that before his absence commenced he knew he had been transferred to the Port of Embarkation for further movement outside continental United States. Unquestionably these, and all other circumstances surrounding an unauthorized absence should be considered in determining, in each case, the intent of the absentee (Par. 130, MCM, 1928). In this case, the movement overseas was not imminent (CM 268240, Closson, 44 BR 238; CM 265447, Hodge, 43 BR 44-46; CM 267342, Rose, 43 BR 378-379). His restriction was pending trial for an unauthorized absence carrying a relatively small punishment if resulting in a legal finding of guilt, which would certainly not justify an implication he would risk desertion to avoid it. The prosecution's evidence shows accused traveled to his home and according to his uncontradicted statement he did so to visit his mother, neither aspect of such travel raising, alone, a legal implication of intent to desert. Considering every aspect of this transaction separately or together the circumstances do not support any reasonable inference (CM 212505, Tipton, 10 BR 244) that accused intended to desert as alleged. The evidence does prove the lesser included offense of absence without leave in violation of Article of War 61. However, such absence is but another aspect of the breach of restriction set out in the Specification of Charge II of which accused was found guilty and the accused's actions in this respect can only be punished in their most serious aspect (CM 313544, Carson, V Bull. JAG 202); here as a breach of restriction punishable by confinement at hard labor for one month and by forfeiture of two-thirds pay for a period of one month. (Par. 104c, MCM, 1928).

6. For the reasons stated the Board of Review holds the record

of trial legally insufficient to support the findings of guilty of Charge III and its Specification, and of Specification 2 of Charge IV; legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge IV and of Charge IV, as involve a finding of guilty of absence without leave from 2 October 1946 to 8 October 1946, in violation of Article of War 61; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for a period of one month and forfeiture of two-thirds pay for a period of one month.

Edward T. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Edward R. Taylor, Judge Advocate.

JAGN-CM 318467 1st Ind 20 Feb 1947
WD, JAGO, Washington 25, D. C.
TO: Commanding General, New York Port of Embarkation, Brooklyn, New York.

1. In the case of Private First Class Guilford P. Johnson (31485056), 9225 Technican Service Unit-Transportation Corps, Company I, 10th Regiment, Overseas Replacement Depot, I concur in the foregoing holding of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge III and its Specification and of Specification 2, Charge IV, be disapproved; that only so much of the findings of guilty of Charge IV and Specification 1 thereunder be approved as involves absence without leave, at the place alleged, from 2 October 1946 to 8 October 1946 in violation of Article of War 61; and that only so much of the sentence be approved as involves confinement for one month and forfeiture of two-thirds pay for one month. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 318467).

/s/ Thomas H. Green

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.

JAGH - CM 318499

16 APR 1947

UNITED STATES v. Privates First Class JAMES C. WHITE (38772377), HAROLD M. PERKINS (46061994), both of Company L, 5th Infantry, and SAFORD R. SEMONES, JR (33916288), Company I, 5th Infantry, and Technicians Fifth Grade MARVIN ADAMS (34863540) and GEORGE T. LAW (45031866), both of Service Company, 5th Infantry	ZONE COMMAND AUSTRIA Trial by G.C.M., convened at Salzburg, Austria, 25-27 September 1946. Each: Dishonorable discharge (suspended). White, Semones, Adams, and Law: Confinement for two (2) years. Perkins: Confinement for four (4) years. The Wurzburg Rehabilitation Center

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

1. The record of trial in the case of the above-named soldiers has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the findings and sentence as to accused Perkins, Semones, Adams, and Law, and legally sufficient to support the findings, but legally insufficient to support the sentence in part, as to accused White. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private First Class James C. White, Company L, 5th Infantry, while posted as a sentinel, did, at Salzburg, Austria, on or about 1 June, 1946, wrongfully allow an unauthorized person, Private Ira Waits, Company M, 5th Infantry, to enter the confines of his post.

CHARGE II: Violation of the 80th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Private First Class James C. White, Company L, 5th Infantry, did, at Salzburg, Austria, on or about 10 June, 1946, feloniously take, steal and carry away jewelry, value about $100.00, captured property of the United States.

Note: He was arraigned at a common trial together with Private First Class Saford R. Semones, Jr., 33916288, Technician Fifth Grade Marvin Adams, 34863540, Private First Class Harold M. Perkins, 46061994, and Technician Fifth Grade George T. Law, 45031866, all of the Fifth Infantry. However the record of trial was found legally sufficient as to accused Semones, Adams, Perkins, and Law.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and III and the Specifications thereof, and not guilty of Charge II and its 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 to be confined at hard labor for four years. The reviewing authority approved the findings of guilty of Charge I and its Specification, approved only so much of the findings of guilty of Charge III and its Specification as involves findings of guilty of willfully, knowingly, and unlawfully misappropriating the property alleged, in violation of Article of War 96, and approved the sentence, but reduced the period of confinement to two years. As thus modified the sentence was ordered executed but the execution of that portion thereof adjudging dishonorable discharge was suspended until the soldier's release from confinement. The Wurzburg Rehabilitation Center, Wurzburg, Germany, or such other place as the Secretary of War may hereafter designate was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 38, Headquarters Zone Command, Austria, 25 November 1946.

3. As accused was acquitted of Charge II and its Specification and the evidence is considered to be legally sufficient to sustain the findings of guilty of Charge I and its Specification, no further discussion relative thereto is required.

With reference to the approved findings of guilty of Charge III and its Specification, the record of trial presents for consideration the following question:

Is the offense of willfully, knowingly, and unlawfully misappropriating the property described in the Specification of Charge III in violation of Article of War 96, lesser than and included in the offense charged, namely, larceny of such property in violation of Article of War 93?

4. The Specification of Charge III alleges the larceny of jewelry of a value of about $100.00 captured property of the United States.

The evidence shows that the property described in the Specification was stolen by others who gave the accused a portion of the stolen property (R 22). Thus the proof shows that the accused received stolen property which is not an offense necessarily included in larceny (Dig Op JAG 1912-40, Sec 451 (43)). The reviewing authority apparently realizing that the element of taking by trespass and asportation necessary to constitute larceny had not been proved, attempted to cure the variance by approving only so much of the findings of guilty of the Specification of Charge III as involved the finding of guilty of misappropriation of the described property in violation of Article of War 96. It is thus evident that the reviewing authority's action is based on the theory that misappropriation of property in violation of Article of War 96 is an offense necessarily included in the offense of larceny of the same property in violation of Article of War 93.

Whether misappropriation of military property in violation of Article of War 94 is necessarily included in a specification alleging larceny in violation of the same article is a question which has previously been considered by the Board of Review, but which requires further consideration in the light of recent cases.

In CM 143532, Sutula and CM 147022, Murphy, it was held that misappropriation is a lesser included offense of larceny, under Article of War 94. In both cases, the property involved had been issued to another soldier and was taken by trespass. In CM 193003, Simkins, it was held that misappropriation is a lesser included offense of larceny under Article of War 94. In the Simkins case there was no initial trespass.

These cases were expressly overruled by the Board of Review in CM 197396, Christopher, 3 BR 91, where an accused was charged with larceny of an Army blanket but the proof showed embezzlement of the article described. The Board of Review cited the case of Evans v. U.S., 153 U.S. 584, 587, involving the sufficiency of an indictment for willful misapplication of national bank funds wherein the Supreme Court said:

> "The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. United States v. Cook, 17 Wall. 168, 174; United States v. Cruikshank, 92 U.S 542, 558.

'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' United States v. Carll, 105 U.S. 611.

"Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates."

The Board continued:

"Applying the principle thus enunciated to the words, 'feloniously take, steal, and carry away' in the present case we find little room for argument concerning the notion that these words carry in their content anything dissociated from wrongful taking of the property in question. Analysis of either their technical or ordinary meaning shows that they do not. Their underlying concept is that of a taking of property from another - the distinctive feature of larceny as opposed to criminal appropriation of property placed in the hands of the offender. * * *"

The Board concluded:

"In the light of the authorities cited, our conclusion on the question before us is that the descriptive words in the accusation 'feloniously take, steal and carry away' indivisibly signify and contain inexpugnable elements of a taking of the property in question by the accused, and do not impliedly include the appropriation thereof by him, either fraudulent or wrongful."

It may be concluded that the rule of the Christopher case is that an offense which does not exclude every type of a taking other than a taking by trespass cannot be included in a specification alleging larceny.

The Christopher case was followed by the Board of Review in CM 199841, Miotke, 4 BR 173, where accused was charged with misappropriating a woolen shirt in violation of Article of War 94 and the evidence showed that the article had been taken by the accused from the locker

of another to whom it had been issued. The Board of Review held the record of trial legally insufficient to support the findings of guilty. The reasons underlying the holding are stated in the following excerpt of the opinion:

> "* * * Wilful misappropriation of property was an offense unknown to the common law. A careful search of state and federal statutes fails to disclose a single instance where an act of misappropriating property is denounced as an offense where it is not predicated upon some sort of rightful custody, management, care, control, supervision or possession of the property in the person charged. 'Misappropriate means devote to an unauthorized purpose.' Par. 150i, MCM. One cannot misappropriate that over which he has no control or supervision. Neither can one devote property to a purpose where he exercises no lawful authority respecting such property * * *" (See also CM 221537, Hamilton, 13 BR 179).

The reasoning of the Miotke case was applied in CM 207203, Allen and Sharp, 8 BR 315 and CM 216239, Gibson, 11 BR 123, both of which are similar to the instant case in that they involve an averment alleging larceny in violation of Article of War 93 and a finding of guilty of misappropriation in violation of Article of War 96. In both cases the Board of Review held that the record of trial is legally insufficient to support the findings of guilty for the reason that misappropriation is not included in an averment alleging larceny because misappropriation involves initial rightful possession.

The Miotke case was expressly overruled by CM 243287, Pool, 27 BR 321 (3 Bull JAG, p 236-237) wherein an accused was charged with the misappropriation of a rifle issued to another soldier. There was no evidence that the accused had any rightful control or custody over the rifle which he carried off the post.

In holding the record of trial legally sufficient to support the sentence the Board of Review stated in part:

> "Larceny and embezzlement have long and fixed definite meanings. Misappropriation and misapplication are terms which have not acquired technical definitions in law. * * *"
>
> * * *
>
> "Winthrop has defined the terms, as used in the 60th Article of War (1874), as follows: 'Misappropriation' means 'the assuming to one's self, or assigning to another, of the ownership of such property, where the same is not

entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement. * * * The appropriation, however, need not be for the party's own benefit * * *'. 'Misapplication' is, strictly, distinguishable from the other term in that it is properly an appropriation not of the ownership of the property but of its use, and that, by the terms of the paragraph, it must be an appropriation for the personal "benefit" of the offender * * * whether or not specially entrusted to his charge * * *' (Winthrop's Military Law and Precedents, Reprint, 708).

"It is noted that according to this authority the principal differences between the two offenses are that misapplication contemplates 'use' rather than 'ownership' and applies only where the wrongful use is for the 'benefit' of the offender. It is believed that the former point of distinction has never been recognized in practice. The latter difference is based on the words of the statute and has consistently been recognized in the Manual. Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. The misappropriation of the property or money need not be for the benefit of the accused (MCM, 1928, par 150i). Winthrop recognized, as shown by the language quoted, that both offenses might include instances where the property involved was 'not entrusted to the party in a fiduciary capacity' or was 'not specially entrusted to his charge.'

"It is recognized that when misapplication is alleged under the 94th Article of War it is not necessary to show that the accused had lawful possession of the property applied to his own use (CM 205327, Patterson). This doctrine is in accord with that followed in the Federal courts. Section 36 of the United States Criminal Code (18 U.S.C. 87) provides that 'Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell * * * the property of the United States, furnished or to be used for the military or naval service' shall be punished. In a case where an indictment charged the misapplication and sale of property in violation of this section, and it was contended that a motion should be granted because the indictment 'did not state how the property came into the possession of the defendants', the Circuit Court of Appeals for the Second Circuit (Horowitz v. United States, 262 F. 48) held that the contention was not well taken. It was there stated:

'The statute does not restrict the offense to acts of servants, agents, or bailees, who, coming rightfully into possession of property, subsequently misappropriate it. Any one who does the things specified in the act commits the offense and is liable to punishment. The first word of the section is "whoever".'

"Giving consideration to the comments in Winthrop, to the almost synonymous meanings of the terms in ordinary use, and to what is believed to be the purpose of Congress in including the words in the statute, the Board of Review is of the opinion that an accused may be guilty of either misappropriation or misapplication of property, whether he was in original lawful possession thereof or obtained it by trespass. Both larceny and embezzlement are offenses of strictly limited application, and it is well known that many guilty persons have escaped punishment because charges were laid under one theory and the proof disclosed that the other was applicable. Furthermore, larceny contemplates the intention of depriving the owner permanently of his property, as does embezzlement. It is believed that Congress desired to provide less restricted offenses, along with larceny and embezzlement, to cover those cases where a person subject to military law makes wrongful and unauthorized use of Government property devoted to the military service, without regard to whether such person obtained control of the property rightfully or wrongfully."

* * *

"In the Miotke case the accused was found guilty of misappropriation, under the 94th Article of War. The proof showed larceny of the property. In holding that misappropriation under the 94th Article of War did not apply to a case where the property was not in the lawful possession of the accused, the Board of Review quoted from the Christopher case, and followed it as a precedent. But the Christopher case is not properly an authority for the rule stated. It simply held that misappropriation is not a lesser included offense of larceny, which is not the same thing as saying that misappropriation cannot exist in the absence of lawful possession. On the question whether misappropriation is in fact a lesser included offense of larceny, it is not now necessary to decide whether the Christopher case or the earlier cases were correctly decided.

"In the Miotke case the Board of Review also relied substantially on cases sustaining the fundamental difference between larceny and embezzlement and held that proof of larceny would not sustain a charge of misappropriation.

We think that the conclusion that, in effect, misappropriation is the same thing as embezzlement was not justified. The former is a more general term which includes not only offenses analogous to embezzlement, but offenses similar to larceny. The gist of the offense of misappropriation, and misapplication, is the application of the property to an unauthorized and wrongful purpose.

"For the reasons stated, the Board of Review is of the opinion that the Miotke case, and also CM 221537, Hamilton, should no longer be followed."

In the light of the Pool case it is apparent that the question as to whether misappropriation is a lesser included offense of larceny must be reconsidered.

It is significant that the report of the Pool case in Volume III, Number 6, Bulletin of The Judge Advocate General of the Army, June 1944 is followed by the following explanation at page 237:

"The use of the specification of misappropriation or misapplication of Government property in Violation of Article of War 94, based on the description of misappropriation in CM 243287, supra, should be circumscribed with administrative caution. These specifications should be used only for offenses which are serious and which are not properly chargeable under the standard specifications as larceny or embezzlement in violation of Article of War 93 or as a minor offense such as 'wrongful taking and using without consent of the owner' in violation of Article of War 96" (SPJGE 1944/7268, 30 June 1944).

In view of the Pool case which has been consistently followed by the Board of Review in recent years we are of the opinion that misappropriation of military property is incidental to larceny, embezzlement, misapplication, wrongful selling and wrongful disposition of military property. It does not follow, however, that it is an offense necessarily included in the other offenses denounced by the 9th subparagraph of Article of War 94. The indivisible and unexpungeable elements of larceny are a taking and carrying away by trespass. In misappropriation, the devotion to an unauthorized purpose, it is immaterial whether the initial taking is by trespass or not, or that there be any taking at all. Thus all types of misappropriation can not be included in larceny, since misappropriation may involve wrongful dealings with property which are in no way connected with larceny.

This view is supported by the line of Board of Review opinions which hold that wrongful possession is not an offense necessarily included in larceny for the reason that the wrongful possession may have been obtained by some means other than by trespass, although wrongful possession is always an incident of larceny.

In 151032, Yewell, et al, wherein it was held that a finding of unlawful possession of personal property was not a lesser included offense of larceny, the Board of Review stated:

> "Here the accused were found guilty of unlawful possession without specifying the kind of unlawful possession. Since all kinds of unlawful possession not included in larceny were not excluded from the findings of guilty the convictions in this case are not of an offense necessarily included in the offense alleged and for which the accused were tried and the findings of guilty were therefore unauthorized and illegal" (Underscoring supplied). (See also CM 294896, Faulkner, 58 BR 13; CM 198798, Sherwood, Dig Op JAG, 1912-40, Sec 451 (43) p 328).

By analogy to the cases involving wrongful possession cited above, it is clear that the finding of guilty of misappropriation as approved by the reviewing authority does not indicate how the accused misappropriated the property described in the specification. Obviously the reviewing authority attempted to exclude a taking by trespass. Trespass being eliminated and the kind of misappropriation not being specified, it cannot be said that the offense as approved was necessarily included in that charged.

It is also apparent that the specification in the instant case did not fairly apprise the accused of the offense of which he was found guilty as approved by the reviewing authority. Since misappropriation may involve acts which are in no way connected with larceny, it is impossible to determine in the instant case, of what particular offense the accused stands convicted.

As was stated by the United States Supreme Court in Evans v. U. S., 153 U.S. 584, 587 (cited in CM 197396, Christopher, supra):

> "The crime must be charged with precision and certainly, and every ingredient of which it is composed must be clearly alleged. United States vs. Cook 17 Wall. 168, 174. United States vs. Cruikshank 92 U.S. 542, 558. 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' United States vs. Carll, 105 U.S. 611."

Accordingly, we are of the opinion that the record of trial is not legally sufficient to support the findings of guilty of the specification of Charge III as approved by the reviewing authority.

5. In view of the position which we have taken as indicated above, it is not necessary to determine whether misappropriation, admittedly a very broad offense, and which appears in applicable military law only in the 9th subparagraph of Article of War 94, may be charged with respect to property other than "property of the United States furnished or intended for the military service thereof."

6. Since accused was found not guilty of Charge II and its specification and the record of trial is considered legally insufficient to sustain the findings of guilty of the specification of Charge III and Charge III, only the findings of guilty of Charge I and its specification remain to support the sentence. The offense of a sentinel in allowing an unauthorized person to enter his post is not specifically covered by the Table of Maximum Punishments. However, it constitutes a violation of General Orders No. 11, prescribed for a sentinel and is, therefore, analogous to a violation of standing orders for which the maximum punishment prescribed is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (CM 283685, Palmer). Two-thirds of the accused's pay as a private, for one month (considering a $22.00 Class F deduction) is $35.33.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and the specification thereof, legally insufficient to support the findings of guilty of Charge III and the specification thereof as approved by the reviewing authority, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six (6) months and forfeiture of $35.33 of accused's pay per month for six (6) months.

A. Ottenstein, Judge Advocate

Wilbur A. Wolf, Judge Advocate

Philip A. Smith, Judge Advocate

JAGH - CM 318499 1st Ind

WD, JAGO, Washington 25, D. C. MAY 2 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 U.S.C. 1522) is the record of trial in the case of Private First Class James C. White (38772377), Company L, 5th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein, recommend that the findings of guilty of Charge III and its Specification as approved by the reviewing authority be vacated and that so much of the sentence as is in excess of confinement at hard labor for six (6) months and forfeiture of $35.33 of the accused's pay per month for six months be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the portion of the sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 178, 20 May 1947).

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

April 7, 1947

JAGQ - CM 318507

UNITED STATES v. First Lieutenant DONALD E. HAYES (0-1003750), Air Corps.	)	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at Camp Kilmer, New Jersey, 3, 8, 15 and 17 October 1946. Dismissal, fine of $1500 and confinement for eight (8) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
HICKEY, SCHENKEN and PARSONS, 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 holding, 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 First Lieutenant Donald E Hayes, AC, Shipment Number AY-B119-RR-B(a), did, without proper leave absent himself from his station at Camp Kilmer, New Jersey, from about 9 April 1946 to about 18 April 1946.

Specification 2: In that First Lieutenant Donald E. Hayes, AC, Shipment Number AY-B119-RR-B(a), did, without proper leave, absent himself from his station at Camp Kilmer, New Jersey, from about 30 April 1946 to about 1 May 1946.

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

Specification: In that First Lieutenant Donald E. Hayes, AC, 9223 TSU-TC Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 26 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Boston, Massachusetts, on or about 17 August 1946.

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

Specification 1: In that First Lieutenant Donald E. Hayes, AC, 9223 TSU-TC Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Westover Field, Massachusetts, on or about 13 August 1946 present for approval and payment a claim against the United States by presenting to R. Martinez, Captain, AC, Westover Field, Massachusetts, an officer of the United States, duly authorized to pay such claims, in the amount of four hundred and twenty-six dollars and seventy cents ($426.70) in payment for pay and allowances claimed by First Lieutenant Donald E. Hayes, to be due him for the period 1 July 1946 to 31 July 1946, which claim was false and fraudulent in that the said First Lieutenant Donald E. Hayes was not entitled to such pay and allowances for such period and the claim presented on 13 August 1946 was then known by the said First Lieutenant Donald E. Hayes to be false and fraudulent.

Specification 2: In that First Lieutenant Donald E. Hayes, AC, 9223 Technical Service Unit-Transportation Corps Embarkee Transient Detachment 1A, New York Port of Embarkation, Camp Kilmer, New Jersey, did, at Cleveland, Ohio, on or about 12 July 1946, present for approval and payment a claim against the United States by presenting to G. F. Brewton, Commander SC, USNR, Field Branch, Bureau of S & A, Cleveland, Ohio, an officer of the United States, duly authorized to pay such claims, in the amount of five hundred ninety-seven dollars ($597.00) in payment for pay and allowances claimed by First Lieutenant Donald E. Hayes, to be due him for the period of 1 May 1946 to 30 June 1946, which claim was false and that the said First Lieutenant Donald E. Hayes, was not entitled to such pay and allowances for such period and the claim presented on 12 July 1946 was then known by the said First Lieutenant Donald E. Hayes to be false and fraudulent.

ADDITIONAL CHARGE: Violation of the 94th Article of War. (Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

The record of trial shows that immediately following the reading of the specifications and charges, "Special Pleas or Motions" were considered, whereupon the defense counsel moved for a continuance on the ground that

the accused had been "unable to properly prepare the case" (R 11-12. A continuance was granted and when the court met on 8 October 1946, a further continuance was requested on the ground that accused was not satisfied with the regularly appointed defense counsel and desired to secure other counsel (R 14-15). Another continuance was granted and when the court again met on 15 October 1946, the trial judge advocate announced that the accused had escaped from confinement earlier that day (R 17). The trial judge advocate recommended that the case be continued until accused might be present but the president (and law member) ruled that "we will try this officer in absentia." The court then adjourned to 17 October 1946 at which time defense counsel moved for a continuance because of the absence of accused, stating that although accused originally intended to secure other counsel, he had finally decided not to do so but intended to conduct his own defense with the assistance and advice of the regular defense counsel; however, accused had not revealed his evidence to the defense counsel and had retained all papers in his own possession (R 20). The trial judge advocate then read paragraph 10, MCM, as follows:

> "The fact that after arraignment and during the trial the accused has escaped does not terminate the jurisdiction of the court which may proceed with the trial notwithstanding the accused's absence."

The court thereupon ruled it had "jurisdiction in personam by reason of the fact that he was <u>duly arraigned</u>" and ordered the trial of accused in absentia (R 22).

The trial judge advocate then moved "that all the pleas be entered at this time" (R 22) and the defense counsel stated, "The accused pleads not guilty to all specifications and charges" (R 23). The accused was thereupon tried and found guilty of all specifications and charges. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service, forfeit all pay and allowances due or to become due, to pay a fine of $1500 to the United States, and to be confined at hard labor for fifteen years. The reviewing authority disapproved the finding of guilty as to the specification of the additional charge and the additional charge, approved the sentence but reduced the period of confinement to eight years, designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement, and witheld the order of execution pursuant to Article of War 48.

3. <u>Evidence</u>.

Inasmuch as the Board holds that there was an error of substance in the procedure, the evidence need not be summarized.

4. Paragraph 10, MCM, 1928, authorized trial in absentia where the accused escapes "after arraignment and during the trial." The question presented in this case is, "Was the accused arraigned before he escaped?"

Paragraph 62, MCM, 1928, reads as follows:

> "COURTS MARTIAL - PROCEDURE - ARRAIGNMENT. - The court being organized and both parties ready to proceed, the trial judge advocate will read the charges and specifications, including the signature of the accuser, to the accused, and then ask the accused how he pleads to each charge and specification. This proceeding constitutes the arraignment. The pleas are not part of the arraignment." (Underlining supplied).

Paragraph 52c, MCM, 1928, further provides "The proper time for making an application (for continuance) to the Court is after the accused is arraigned and before he pleads."

Although the trial judge advocate and the court repeatedly stated that the accused had been "duly arraigned" and that the arraignment had been completed, the record itself does not show that accused pleaded to the charges and specifications, or that he was ever asked to plead thereto.

Winthrop's Military Law and Precedents (Second Edition) page 236 states:

> "The arraignment is the calling of the prisoner to the bar of the court to answer to the charge or charges on which he is to be tried. In the practice of courts-martial it consists in reading to the accused the charges and specifications, and demanding of him whether he is guilty or not guilty. * * *"

Winthrop further states that the questions addressed to the accused may be omitted but only "by consent of the parties (and with the assent of the court)".

The prerequisite of a proper arraignment is emphasized in the decision of the Supreme Court of the United States in the case of Crain v. United States, 162 U.S. 625. In that case, the record of trial showed that the defendant and his counsel were present throughout the "trial" but the record failed to show that the accused was ever formally arraigned or that he pleaded to the indictment. In reversing his conviction, the court said:

"Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear, affirmatively, from the record that every step necessary to the validity of the sentence has been taken, *** We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of criminal law ***.

"It is true that the Constitution does not in terms declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous. *** The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial." (Underscoring supplied).

In consideration of the above, it is the opinion of the Board of Review that the accused was not arraigned prior to his escape and that his trial in absentia was not authorized.

5. 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.

s/ Albert D. Hickey, Judge Advocate

s/ Carlton G. Schenken, Judge Advocate

s/ Thomas L. Parsons, Judge Advocate

JAGQ - CM 318507 1st Ind

WD, JAGO, Washington, D. C.

TO: Commanding Officer, New York Port of Embarkation, Brooklyn, New York

1. In the case of First Lieutenant Donald E. Hayes (0-1003750), Air Corps, I concur in the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved.

2. Should you deem it advisable to order a rehearing in this case, attention is invited to the inadequate authentication of prosecution's exhibits Nos. 6, 7, 8, 9, 12, 13, 14, 17, 18, 19 and 20. Upon objection by accused these documents would not be admissible in evidence (par. 116a and b, MCM, 1928). In the event a rehearing is ordered it is recommended that the original pay vouchers or properly authenticated photostatic copies thereof be obtained for use at the trial.

3. In view of the request of the members of the family of accused, presented both to this office and to The Adjutant General, that the question of accused's mental responsibility be thoroughly investigated, it is recommended that prior to any rehearing on the present charges, or trial of accused upon additional charges, he be transferred to a general hospital for observation and report by a board of medical officers with respect to his mental responsibility. At least one member of the board should be an experienced psychiatrist. It is important that the board make separate and distinct findings and conclusions as to each of three questions, as follows:

(a) Was the accused at the time of the alleged offense "so far free from mental defect, disease and derangement as to be able concerning the particular acts charged" to distinguish right from wrong? (fifth sub-paragraph, paragraph 78a, MCM, 1928).

(b) Was the accused at the time of the alleged offense "so far free from mental defect, disease and derangement as to be able concerning the particular acts charged * * * to adhere to the right?" (fifth sub-paragraph of paragraph 78a, MCM, 1928).

(c) Was the accused at the time of his trial sufficiently sane "intelligently to conduct or cooperate in his defense?" (first sub-paragraph of paragraph 63, MCM, 1928).

4. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing 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 318507).

s/ Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGN-CM 318527

UNITED STATES	)	HEADQUARTERS FLYING DIVISION AIR TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Barksdale Field, Louisiana, 21 November 1946. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private SMITH SIMMONS, JR. (36498594), Squadron A, 2537th Army Air Forces Base Unit.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

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

Specification: In that Private Smith Simmons, Jr., Squadron "A", 2537th Army Air Forces Base Unit, having received a lawful command from First Lieutenant Edward W. Rodgers, his superior officer, to "load trash on the trash truck", or words to that effect, did, at Perrin Field, Sherman, Texas, on or about 15 October 1946, willfully disobey the same.

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

Specification: In that Private Smith Simmons, Jr., Squadron "A", 2537th Army Air Forces Base Unit, did, at Perrin Field, Sherman, Texas, on or about 15 October 1946, behave himself with disrespect toward Captain Hilton Lewis, his superior officer, by saying to him, "don't get in a hurry, I'll give it to you", and

"look, fellow, you are going to make me mad", or words to that effect.

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

Specification: In that Private Smith Simmons, Jr., Squadron "A", 2537th Army Air Forces Base Unit, did, at Perrin Field, Texas, on or about 26 September 1946, wrongfully impersonate an officer of the United States Army, when he knew himself not to be such, by having his photograph made while wearing the insignia and cap of a Captain in the Air Corps of the United States Army.

Accused pleaded not guilty to all Charges and Specifications, was found guilty of all Charges and Specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for seven years. The reviewing authority approved the sentence, reduced the period of confinement to five years, designated the Branch United States Disciplinary Barracks, Camp Gordon, Georgia, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification. The only question requiring consideration is the legal sufficiency of the record to support the remaining Charges and Specifications and the sentence. Only the evidence relating to such other Charges and Specifications will be here summarized.

4. Evidence for the prosecution:

On 26 September 1946 accused, accompanied by Private First Class Willie R. Young, went to the photographic studo at Perrin Field (R. 12). Accused was wearing "a pink officer's shirt," covered by a field jacket, and an officer's cap with enlisted insignia. After arrival in the studio he placed officers' insignia on shirt collar and cap and had his picture taken so dressed, after which he removed all officers' insignia and returned to his barracks (R. 13; Pros. Ex. B).

On 15 October 1946 accused was detailed to duty on a trash handling detail. He reported to First Lieutenant Edward W. Rodgers, the officer in charge of such detail, and requested to be excused because of alleged illness. Lieutenant Rodgers refused the request and directed accused "to report to the trash detail truck and work on it" (R. 6). The accused went with the detail but "he got on the truck and sat down and his work was very scarce" (R. 8). Later in the day

Lieutenant Rodgers checked on the detail and, being advised of accused's lack of effort, "told him in specific terms that he was to get off the truck and help load the trash on the truck * * *" (R. 7, 13). Private Jack L. Harris, enlisted man directly in charge of the trash detail, testified, in substance, as follows: He heard Lieutenant Rogers order accused "to get down off the truck every time it stopped and pick up the cans and pile them on the truck * * * /question/ Did he do that? /answer/ No, sir" (R. 8). On cross-examination he testified that when the truck stopped at "the civilian cafeteria" he told accused "to pick up what was there", that he went into the cafeteria for coffee with some other members of the detail, that accused stayed outside, and that when the witness returned to the truck "the stuff was in the truck" (R. 9). On redirect examination he stated the cafeteria stop was made after the order was given accused by Lieutenant Rogers, that the truck only made the one stop after such order was given, and that the accused did work on that occasion (R. 9). A member of the court then asked the witness, "How many stops were there made after that?" to which the witness replied, "Approximately two, sir" (R. 10). Upon a second redirect examination he was asked, with relation to the time the order was given, "From that time on did he help with this work in any way? " To which he replied, "No, sir. After the Lieutenant got through with him, he got on the truck. /question/ Did he refuse to work? /answer/ Sir, I wouldn't call it work, but I should say no, sir" (R. 10).

Private First Class Willie R. Young testified in pertinent part as follows: That he was a member of the trash detail; That when they stopped at the cafeteria "all but Simmons" /accused/ went inside for coffee (R. 13).

There was introduced in evidence a pre-trial statement made by accused wherein he states in pertinent part:

> "This /the order by Lieutenant Robers/, however, was after all the trash had been picked up that he told me this" (Pros. Ex. C).

5. Evidence for the defense:

The accused, being duly advised of his rights, testified in substance as follows:

He had the photographs in question made "just to have around, that's all" (R. 25). He put one on his "shelf" in his barracks and the remaining prints, including some taken in his uniform as a private, in his footlocker. He did not know he was violating any regulations by wearing such insignia unless he was to "walk up and down the street with them on" (R. 26).

When he went on the trash detail, 15 October 1946, he had a headache resulting from a previous application to his hair of "Konkaline" a lye preparation sent him from his home, but he nevertheless did obey the orders of Lieutenant Rodgers (R. 22-26).

6. It is alleged in the Specification of Charge III that accused did "wrongfully impersonate an officer." The record fails to show accused's act was accompanied by any intent to deceive or defraud, or any other facts from which it might reasonably be inferred that such act was "wrongfully" performed, an essential element of the offense as charged.

It is alleged in the Specification of Charge I that accused did "willfully disobey" a lawful command of his superior officer to "load trash on the trash truck." The giving and receipt of such orders are clearly proven as alleged. The testimony of Private Harris is somewhat ambiguous. It contains bald statements that accused did not work after the order was given but when such statements are taken in conjunction with the balance of his testimony we are forced to the conclusion that the substance of his testimony is that accused did in fact do the work he had been ordered to do at the one loading stop made after the issuance of the order, and that in his references to the accused's refusal to work and his references to "two" stops the witness must have been talking about the actions of the accused other than at the cafeteria stop, and the final stopping of the truck at the incinerator for unloading. Evidence that other orders were given, and not complied with by the accused, is not admissible to sustain a finding that he was guilty of the disobeience specifically alleged.

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, and Charge III and its Specification, but legally sufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for a period of six months and forfeiture of two-thirds pay per month for a like period.

Edward I. Hanson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Edward R Taylor, Judge Advocate.

JAGN-CM 318527 1st Ind FEB 21 1951

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Headquarters Flying Division, Air Training Command, Randolph Field, Texas.

1. In the case of Private Smith Simmons, Jr. (36498594), Squadron A, 2537th Army Air Forces Base Unit, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that the findings of guilty of Charge I and its Specification and Charge III and its Specification be disapproved, that only so much of the sentence be approved as provides for confinement at hard labor for a period of six months and forfeiture of two-thirds pay per month for a like period, and that a Post Guardhouse be designated as the place of confinement. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 318527).

1 Incl
Record of trial

0381963

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGN-CM 318575

U N I T E D S T A T E S	)	NINTH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Augsburg, Germany, 25 June
Corporal NORMAN L. BOMBARD	)	1946. Dishonorable discharge
(42084624), Company E, 47th	)	and confinement for twenty
Infantry.	)	(20) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Norman L. Bombard, Company E, 47th Infantry, did, at Garmisch, Germany, on or about 29 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Anni HOHN, a human being by shooting her with a pistol.

Accused pleaded not guilty to, and was found guilty of, the Specification and the Charge and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for life. The reviewing authority approved the sentence but reduced the period of confinement to twenty years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. <u>Evidence for the prosecution:</u>

Accused and three other soldiers, each with a girl companion, on the evening of 29 April 1946 were at the bar of the Alpenhof Hotel at Garmisch from approximately 1930 to 2200. Accused drank cognac, beer, cherry brandy and cocoa cola (R. 10, 11, 16, 22, 23, 29). About 2200 accused was escorted to his room, #109, in the hotel Sonnebichl by Privates First Class Jess C. Grace and J. D. Fortner and appeared to be drunk (R. 11, 16, 29, 30). On arriving in the room a girl was observed sitting on the bed (R. 12, 15, 24, 26). Accused addressed the girl as "Mickey" and her name was Anni Hohn. The girl asked accused where he had been and why he had not taken her out that evening (R. 12, 24, 33, 42, 47). It appears that it was "Mickey's" birthday, that she had been staying with the accused in his room for some time prior to 29 April, that earlier in the evening accused told Mickey that he had to drive off some place but that he would come back, and that Mickey had been looking forward to going to the club that evening to celebrate her birthday (R. 50, 51, 52). The girl remained seated on the bed while accused and his two companions conversed. The companions were urging accused to undress and go to bed. Fortner then said in effect that he was leaving whereupon accused grabbed a .45 caliber pistol, pulled the slide back on it, pointed it at Fortner and said "You're not going anywhere" (R. 12, 13, 17, 18, 24, 25, 32). Grace said "Put that pistol down" and accused placed it on a chair (R. 13, 14, 26). Grace went into an adjoining room, #110, on his way to the latrine and was gone approximately two minutes (R. 13, 14, 26; Pros. Ex. 1). Accused picked up the pistol and stood near the door with it in his hand. He was twirling it around a finger, threw it in the air, dropped it, picked it up and dropped it again. All of this time Mickey remained sitting on the bed. As accused stooped to pick up the pistol after dropping it the second time Fortner left the room via the hallway (R. 26, 27, 31). Only accused and the girl remained in the room when a shot was heard. Grace had just left the latrine and was in the room adjoining the accused's when he heard the shot and Fortner was in the hall just outside the accused's door when he heard it (R. 14, 27). Grace looked through the door and saw the girl lying in the bed but did not see the accused in the room (R. 14).

The occupants of the adjoining room, #110, Staff Sergeant Joshua Cox, and a girl, Josephine Wex, were roused from bed by the shot. Cox went into room 109 where accused was standing and saw a pistol on the floor and a girl lying on the bed. Accused said "She is dead"; "I wish I was dead"; "I shot Mickey" (R. 33, 34, 35, 36, 44, 45, 46, 49). Cox took the pistol from the room and turned it in to the orderly room. The pistol was identified and offered in evidence. The accused's initials were on the grips (R. 25, 31, 37; Pros. Ex. 3). Prosecution's Exhibit 5 was identified as being photographs of Mickey taken the day following the shooting showing the relative position in which her body was found immediately after the shooting (R. 42, 67). A medical officer examined Mickey and said that she was dead and he saw a wound

which might have caused death (R. 67, 68, 69; Pros. Ex. 6). Immediately after the shooting Mickey had blood on her head and face and a wound in her right temple. Her eyes were large and blood was coming out of her head (R. 34, 36, 45; Pros. Ex. 5).

Ingeborg Weighl, the bed companion of Sergeant Kilgore the same evening, testified that about three weeks prior to the shooting accused had an argument with Mickey and hit her in the face. Mickey objected to accused's drinking and after accused had hit her "He told her that he would shoot her and she answered 'Well I'm going to shoot you'". However the pair were friendly the night after the affair (R. 60, 61, 62).

Mickey was pregnant and wanted to have an abortion but accused was not responsible for the pregnancy (R. 51).

A pre-trial statement of accused was admitted into evidence without objection, it appearing that accused's rights under Article of War 24 had been fully explained to him prior to the execution by him of the statement (R. 63, 64, 65). In it accused stated that Mickey started to "harp" at him about his being out with another girl, calling him "Casanova" and other things that he did not know the meaning of, and that thinking he could scare and quiet her he took the pistol from his locker and turned around and the pistol accidentally went off, how he does not know.

4. Evidence for the defense:

Accused was examined on the night of 29 April 1946 by a medical officer and he was oriented as to time, place and person. He manifested symptoms which were compatible with a diagnosis of alcoholism, acute (R. 75, 76, 77). Defense Exhibit A indicates accused's blood alcohol level was 2.5 milligrams and that a level of 2 to 2.5 milligrams is definite indication the individual is intoxicated. After first being duly advised of his rights, accused elected to take the stand in his own behalf (R. 77, 78). He admitted that he had personally written the sworn statement (Pros. Ex. 3) but contended that the words were actually not his own, but were supplied to him under the promise, or guise of a promise, that he would be cleared of a murder charge. He also admitted that a statement he made to his company commander that Mickey had the pistol was untrue (R. 79, 85, 86). He said he did not recall any of the incidents immediately prior to the shooting or at the time of the shooting, but did remember visiting the Hoazar Hotel earlier in the evening with the soldier companions and the girls, and then going with the group to the Alpenhof in a jeep. He recalled the incident at the Alpenhof where he spilled beer on a girl's dress, that she went upstairs and he followed her, that she remonstrated to the MP's, that he took a purse belonging to the girl but denied that he remembered

leaving the Alpenhof and that his next presence of memory was at the time he observed Cox putting on his pants after the shooting in the accused's room (R. 79, 80, 83, 85, 86). Accused said he had been armed with a pistol for about three months but disclaimed any knowledge of its care and operation. However, he stated he was a combat veteran, that he kept a clip in the pistol, that he had a habit of playing with the pistol in his quarters, and that "I never did put one in before I put it away in the locker" (R. 80, 81, 85). Accused said that Mickey once told him, "I'll kill you", but that he didn't believe she meant it (R. 82, 83). Accused said he had been drinking heavily since the war ended, and indicated that on previous occasions he had overindulged to such extent that he had a lapse of memory of events (R. 80, 81).

5. The evidence in the record of trial proves beyond a reasonable doubt that the victim died from a gunshot wound inflicted by accused. To sustain an allegation of murder, however, it is necessary to prove that the homicide was with malice aforethought. The Manual for Courts-Martial proves that "malice aforethought" may be found when, preceding or coexisting with the act by which death is caused, there is an "intention to cause the death of, or grevious bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation)." MCM, 1928, par. 148a, p. 163. Malice may be inferred from the use of a deadly weapon in a manner likely to, and which does, cause death. Wharton's Criminal Law (12th Ed. 1932), Vol. I, sec. 420, p. 654-655.

There is evidence in the record which might be said to raise a suspicion that the killing was accompanied by intent and malice, but there is not, in the record, sufficient legal evidence to support any reasonable inference that such was the case, and a mere suspicion is not enough. In the absence of proof, directly or by reasonable inference, of the essential element of malice the findings of the court cannot be sustained. There remains then to be determined the question of whether accused may in this case be found guilty of the lesser included offense of manslaughter.

Involuntary manslaughter has been defined as "* * * homicide unintentionally caused * * * by culpable negligence in performing a lawful act * * *" (par. 148a, MCM, 1928). This is in accord with and includes the generally accepted rule that every unintentional killing of a human being arising from a wanton or reckless use of firearms in the absence of intent to discharge the weapon and under circumstances not evincing a heart devoid of a sense of social duty is manslaughter (5 ALR 603).

In this case it clearly appears from the evidence that accused was, immediately prior to the discharge of his weapon, handling it in a

grossly reckless manner, and the evidence is of such a nature as will clearly support an inference that such reckless handling continued until it resulted in his discharge of such weapon with fatal consequences.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves a finding of involuntary manslaughter, at the place and time and upon the person alleged, in violation of Article of War 93 and to support only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for three years.

Edward L. Irwin, Judge Advocate.

Hugh J. Brack, Judge Advocate.

Edward R Taylor, Judge Advocate.

JAGN-CM 318575 1st Ind MAR 5 1947
WD, JAGO, Washington 25, D. C.
TO: The Adjutant General, Washington 25, D. C.

1. In the case of Corporal Norman L. Bombard (42084624), Company E, 47th Infantry, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and Specification be approved as involves findings that accused did, at the place and time alleged, unlawfully kill one Anni Hohn, a human being, by shooting her with a pistol, in violation of Article of War 93, and only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. Upon taking such action you will have authority to order the execution of the sentence.

2. This office has been advised that the Ninth Infantry Division was inactivated, in view of which it is recommended that a War Department General Court-Martial Order be published. A draft of such General Court-Martial Order is inclosed.

3. In view of all the circumstances including the drunkenness of accused, it is recommended that execution of the dishonorable discharge be suspended until the soldier's release from confinement, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. The return to this office of the holding together with copies of the published War Department General Court-Martial Order is requested.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
Record of trial
Draft of GCMO

(G.C.M.O. 78, 12 March 1947).

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

JAGK - CM 318596

5 FEB 1947

UNITED STATES	12TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp O'Donnell, Tarlac, Philippine Islands, 18 November 1946. Dishonorable discharge (suspended), total forfeitures and confinement for four (4) years. Disciplinary Barracks.
Private RUFINO VOLANTE, (10327804), Headquarters Battery, 23rd Field Artillery Battalion, 12th Infantry Division (PS)	

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

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

2. Accused was tried upon the following charges and specifications:

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

Specification: In that Private Rufino Volante, Headquarters Battery, 23d Field Artillery Battalion, 12th Infantry Division (PS), did, at Barrio Calibangbang, Tarlac, Philippine Islands, on or about 26 October 1946, kill Private Jose Mendoza, L Company, 57th Infantry Regiment, 12th Infantry Division (PS), by driving into him with a vehicle. To wit: a truck.

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

Specification: In that Private Rufino Volante, *** did, at Calibangbang, Tarlac, Philippine Islands, on or about 26 October 1946 knowingly and willfully apply to his own use one truck $2\frac{1}{2}$ ton GMC 6x6, service number 4265153 of the value of about $2521.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of both charges and their specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for four years.

No evidence of previous convictions was introduced. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp McQuaide, California, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 15, Headquarters 12th Infantry Division (Philippine Scouts) dated 6 December 1946.

3. The Board of Review holds the evidence legally sufficient to sustain the findings of guilty of Charge II and its Specification, and no further discussion relative thereto is deemed necessary.

With respect to Charge I and its Specification, the record of trial presents for consideration the question as to whether the Specification alleges an offense cognizable under the 93rd or any other Article of War.

4. The Specification of Charge I alleges that the accused did "kill" the deceased "by driving into him with a vehicle, To Wit: a truck." It does not charge accused with the commission of any unlawful act or with negligence, nor is any wrongful intent alleged. The failure to allege that the act complained of was felonious, wrongful or unlawful is a fatal defect. In the absence of some word or words indicating the contrary an act must be presumed to be lawful and innocent. Therefore, the Specification fails to allege an offense cognizable at common law or military law and such defect cannot be cured by the proof. (CM 187548, Burke, 1 BR 55; CM 218667, Johns, 12 BR 133; CM 310612, Skinner, 32 BR (ETO) 297.)

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of Charge II and the Specification thereunder and legally sufficient to support the sentence.

Webster B. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Stokroyd, Judge Advocate

JAGK - CM 318596 1st Ind 1947

WD, JAGO, Washington 25, D. C.

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 Rufino Volante (10327804), Headquarters Battery, 23rd Field Artillery Battalion, 12th Infantry Division (PS).

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge I and its Specification be disapproved, and that all rights, privileges and property of which accused has been deprived by virtue of that part of the findings so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 96, 17 March 1947).

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

JAGH - CM 318659

12 JUN 1947

UNITED STATES	)	WESTERN BASE SECTION
v.	)	Trial by G.C.M., convened at Paris, France, 7 to 9 October 1946. Dishonorable discharge and confinement for life. Federal Reformatory
Private First Class CHARLES H. EWING (39723510), Detachment D, Company B, 3139th Signal Battalion, APO 887	)	

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

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

Specification: In that Private First Class Charles H. Ewing, Detachment D, Company B, 3139th Signal Battalion, United States Forces, European Theater, did, at Paris, France, on or about 26 May 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Jacqueline Fournier Ewing, a human being by shooting her with a pistol.

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

Specification: In that Private First Class Charles H. Ewing, Detachment D, Company B, 3139th Signal Battalion, United States Forces, European Theater, did, at Paris, France, on or about 26 May 1946, attempt to commit suicide by wrongfully, knowingly and willfully shooting himself in the head with a pistol.

He pleaded not guilty to and was found guilty of both Charges and Specifications. 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 for the term of his natural life. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, 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. The Board of Review adopts the statement of the evidence and law contained in the Western Base Section Judge Advocate's review, with the exception of the Staff Judge Advocate's comments contained on page 12 thereof.

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of 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).

[illegible], Judge Advocate

Walkemer A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

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

JAGH - CM 318659

12 JUN 1947

UNITED STATES v. Private First Class CHARLES H. EWING (39723510), Detachment D, Company D, 3139th Signal Battalion, APO 887	WESTERN BASE SECTION Trial by G.C.M., convened at Paris, France, 7 to 9 October 1946. Dishonorable discharge and confinement for life. Federal Reformatory

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

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

_____, Judge Advocate
Walderman A. Solf, Judge Advocate
Percy L. Smith, Judge Advocate

JAGH - CM 318659

1st Indorsement

War Department, J.A.G.O. JUN 26 1947 To the Under Secretary of War

1. Pursuant to the provisions of Article of War 50½ as amended by the act of 20 August 1937 (50 Stat 724; 10 USC 1522), there are transmitted herewith for your action the record of trial and the accompanying papers in the case of Private First Class Charles H. Ewing, 39723510, Detachment D, Company B, 3139th Signal Battalion, USFET, together with the review and holding thereon of the Board of Review.

2. Upon trial by general court-martial, this soldier was found guilty of the murder at Paris, France, of Jacqueline Fournier Ewing, his French wife, in violation of Article of War 92 (Spec, Charge I) and of attempting to commit suicide in violation of Article of War 96 (Spec, Charge II). He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate which was adopted in the accompanying review of the Board of Review as a statement of the evidence and law in the case. The Board of Review has held that the record of trial is legally sufficient to support the findings of guilty and the sentence.

4. Subsequent to the action of the reviewing authority, information pertinent to the accused's mental responsibility in addition to that considered by the court, was submitted to my office by the Honorable Francis J. Case, Member of Congress. This information indicated that further inquiry as to accused's mental responsibility should be made. Consequently upon the return of the accused to the United States and pending review of the record of trial, it was recommended that the accused be examined by a board of medical officers to determine the accused's mental responsibility at the time of the alleged offenses.

5. Pursuant to my recommendation the accused was examined by a Board of Medical Officers at Fitzsimons General Hospital, Denver, Colorado. In the report of its proceedings dated 23 May 1947, the Board of Medical Officers stated its findings and recommendations as follows:

"As a result of the testimony presented before the Board, observation of the patient, and review of all

pertinent clinical and court martial records, the Board finds that the diagnoses are:

"1. Schizophrenic reaction, unclassified, mild; manifested by flattening of emotional tone, impulsivity, lack of insight and pathological psychological test responses; precipitating stress, moderate; economic difficulties, routine army service in an emotionally immature individual; predisposition, moderate, bad familial environmental situation; degree of incapacity, moderate.
LOD: Yes.

"2. Epilepsy, grand mal and psychomotor types, cause undetermined, severe; manifested by recurrent disorders of consciousness, clonic seizures, behavior disturbances characterized by marked personality changes, and EEG findings compatible with a convulsive disorder. LOD: No, EPTS.

"After thorough review of all testimony and consideration of all other evidence the Board finds:

"a. That the accused at the time of the alleged offenses was not so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"b. That the accused at the time of the alleged offenses was not so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right.

"c. That the accused at the time of his trial was not sufficiently sane, intelligently to conduct or cooperate in his defense.

"d. That the accused is dangerous to himself and others, and should not be released to his own custody.

"The Board recommends that the sentence be set aside, and that the patient be transferred to a maximum security hospital designated for the care of dangerous psychotic individuals."

6. The command in which this case was tried, Western Base Section, has been inactivated.

7. In view of the findings of the Board of Medical Officers that the accused was not mentally responsible at the time of the alleged offenses, and that at the time of his trial he was not sufficiently sane to intelligently conduct or cooperate in his own defense, I dissent from the holding of the Board of Review and recommend that the sentence be disapproved in its entirety. Inclosed is a form of action designed to carry this recommendation into effect, should it meet with your approval.

CM 318659

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1 - Record of trial, CM 318659, Ewing
2 - Medical Report
3 - Form of Action
4 - Review by BR

(G.C.M.O. 254, 17 July 1947).

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

JAGN
CM 318664

UNITED STATES v. Private ANSELMO G. LAPADA (10308591), Company C, 56th Engineer Combat Battalion, 12th Infantry Division (PS).	)	12TH INFANTRY DIVISION Trial by G.C.M., convened at Camp O'Donnell, Capas Tarlac, P. I., 29, 30 October, 2, 5 and 9 November 1946. Dishonorable discharge and confinement for ten (10) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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

2. The only question which will be considered is whether the action of Lieutenant Colonel Avery W. Masters, President and Law Member of the court, in conferring with the Staff Judge Advocate under the circumstances hereinafter shown, was such an error as to require vacation of the findings and sentence.

3. The trial of this case commenced 29 October 1946. There were several adjournments throughout the trial, and the times and dates of such adjournments do not always appear, nor do the times and dates of reconvention. After Prosecution and Defense had rested, the following statements appear in the record:

"The Court will be closed for discussion.

The Court will come to order.

The Court will be recessed so that the court can consult legal advice.

The Court will adjourn and meet at the call of the President (R. 45).

[Authentication omitted]

0810 Anselmo Lapada 5 November 1946

The court reconvened at 1810 hours, 5 November 1946.

President: The court will come to order.

* * *

President: The court will be closed.

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, all of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

Of the Specification and Charge ——— Guilty

PREVIOUS CONVICTIONS, ETC.

The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions, which was read to the court and is attached as Exhibit _____.

The trial judge advocate read the data as to age, pay, service, and data as to restraint of accused as shown on the charge sheet as follows:

Age 23 Pay, $ 25.00 per month. Allotments to dependents, $ None per month.

Government insurance deduction, $ 0.89 per month.

Data as to service: No prior service. Enlisted 27 February in the Philippine Scouts for three (3) years.

Data as to restraint of accused: Arrested and confined in the Division Stockade 12th Inf Div (PS), Camp O'Donnell, Tarlac, P. I. 4 Sept 1946.

Prosecution to accused: Is that data correct?

Accused: Yes.

SENTENCE

The court was closed, and upon secret written ballot all of the members present at the time the vote was taken concurring, sentences the accused to

be dishonorably discharged the service, and 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 court was opened and the president announced the findings and sentence.

The court then, at 0915 o'clock, A.M., 9 November, 19 46 recessed for 15 minutes before proceeding to another case" (R. 46-48).

(Authentication omitted)

By certificate of correction dated 5 March 1947 the following statement was inserted on page 45 of the record immediately following the words: "The court will adjourn and meet at the call of the President" as above quoted:

"'Colonel Avery W. Masters FA, President of the court after adjournment 2 November 1946 proceeded to Headquarters AFWESPAC to consult with the Staff Judge Advocate. What legal advice was given to Col Masters by the Staff Judge Advocate is unknown since no information concerning this conference was given for incorporation in the Record of Trial. Both the Staff Judge Advocate and Colonel Masters have been returned to the United States for re-assignment.'

"This correction is made because the President of the court, Colonel Avery W Masters FA, did in fact consult the Staff Judge Advocate at Headquarters AFWESPAC for legal advice, but a statement to that effect was omitted, in error, from the record."

4. The record is otherwise silent as to the exact nature and extent of such conference between President and Staff Judge Advocate, or how much, if any, of the results thereof were transmitted to the court

sitting in closed session, but the inference is inescapable that it was in connection with either the law or the facts in this case and that the results of such conference must have been considered, directly or indirectly, by the court in its deliberations as to findings and sentence. Such activity is an invasion of the right of accused to be protected during his trial from any intrusion by one who is not properly part of the court-martial duly convened to try him. (CM 318089, Knothe (1946); CM 200734, Burns, 5 BR 5, par. 368 (1), Dig. Ops. JAG, 1912-40).

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

Edward T. Johnson, Judge Advocate

Joseph T. Brack, Judge Advocate.

Francis H. Dryden, Judge Advocate.

MAY 1947

JAGN-CM 318664 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, 12th Infantry Division (Philippine Scouts), APO 613, c/o Postmaster, San Francisco, California.

1. In the case of Private Anselmo G. Lapada (10308591), Company C, 56th Engineer Combat Battalion, 12th Infantry Division (PS), 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 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 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 318664)

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.

JAGK - CM 318670

11 MAR 1947

UNITED STATES	)	CONTINENTAL BASE SECTION
v.	)	Trial by G.C.M., convened at Furth, Germany, 18 October 1946. Dismissal.
First Lieutenant EMMID E. BRADFORD (0-1576956), Quartermaster Corps	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Emmid E. Bradford, 595th Quartermaster Laundry Company, did, at or near Reit-im-Winkl, Germany, on or about 10 June 1946, wrongfully grasp Ingeborg Leeb on the body and limbs and remove her clothing.

Specification 2: In that First Lieutenant Emmid E. Bradford, ***, did, at or near Furth, Germany, on or about 9 August 1946, in his statement to Lieutenant Colonel Howard I. Olsen, an officer detailed to conduct an investigation, wrongfully make under oath a statement as follows: that he transported and delivered Ingeborg Leeb to the German border police, at or near Unterwossen, Germany, on 11 June 1946, which statement the said First Lieutenant Emmid E. Bradford did not believe to be true.

He pleaded not guilty to and was found guilty of the charge and specifications. No evidence of any previous conviction 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

On 10 June 1946 Ingeborg Leeb, daughter of a German general, crossed the Bavarian-Austrian border in order to visit her sister. She did not have papers authorizing her entry into Bavaria and was arrested by the German police. Between 3:00 and 4:00 P.M., 10 June 1946, the German police delivered Miss Leeb to the accused as the commanding officer in the town of Reit-im-Winkl (R. 10,

11,19). Miss Leeb was accompanied by a German girl by the name of Scher. Miss Scher was not under arrest. Between 4:00 and 5:00 P.M. the accused took the two girls to the house where he was quartered. The accused had dinner, at a German bar, with the girls and then returned them to his house. Miss Leeb was cold so the accused fixed her a drink of alcohol. He then told Miss Scher that she was not under arrest and could not stay in the house during the night. He took Miss Leeb to an adjoining room and told her,

> "He told me, if I was tired, there was a bed - you can sleep here, and I said I would like to sleep alone and he said 'yes, you can have it.'"

Miss Leeb removed her outer clothing and went to bed (R. 12,13,14,23). Sometime between 12:00 and 1:00 A.M. the accused entered this room, disrobed, and got into bed with Miss Leeb. The accused then removed Miss Leeb's underclothes. Miss Leeb objected to the actions of accused, fought against him, and pushed him with her hands and feet. The accused was about to "break" the band on her shirt and because she owned only two sets of underclothes, she ceased her resistance in order to preserve her clothing (R. 15,16,21,22).

About 5:30 A.M., 11 June 1946, the accused gave Miss Leeb her papers and told her she could go. She left the house, "went to the German Post Office and I bought a ticket and went to Marquartstein," a distance of about 15 kilometers. She asked about and was directed to a doctor. She left the doctor's office about 8:00 A.M., after which she asked a German policeman where she could make a telephone call. The German policeman took her on his motorcyle to the border police at Unterwossen, arriving there about 9:00 A.M. (R. 17,18).

Frau Sabini Hartmann testified that the accused lived in her house at Reit-im-Winkl during June 1946. About 6:00 A.M., 11 June 1946, she saw Miss Leeb in the washroom of her home. She asked Miss Leeb for the address of Miss Scher. Miss Leeb asked her about the time the bus left for Marquartstein. Miss Leeb then stated that she had had a "rough night" and left the house by herself. Frau Hartmann heard the voices of men in Mr. Johnson's room on the night of 10 June 1946 but did not hear anything unusual in the house during the night (R. 26,27).

Dr. Heikel Konnemann testified that about 10 minutes before 8:00 A.M., 11 June 1946, Miss Leeb came to his house "to have an examination because she was raped." His examination disclosed no injuries usually found in rape cases. Her breasts were sensitive to pressure. This condition could have been caused by the wearing of a pack over her shoulders (R. 35,36).

Gunther Bode, a German policeman of the Unterwossen District, saw Miss Leeb about 8:15 A.M., 11 June 1946, at Marquartstein. Miss Leeb told him she had been raped by a colored soldier. He then took Miss Leeb to Unterwossen on his motorbike and turned her over to the chief of the border guards whose

name was Horl. The trip from Marquartstein to Unterwossen was made in three or four minutes (R. 29,30).

Georg Horl, a border policeman at Unterwossen, was on duty on the morning of 11 June 1946. About 9:00 A.M. Gunther Bode arrived by motorbike with Miss Leeb. Gunther Bode stated that Miss Leeb wanted to talk to him. He took a statement from Miss Leeb. The first time he saw Lieutenant Bradford was the next day (R. 31,32,33).

Lieutenant Colonel Olsen, 543 Quartermaster Group, Munich, Germany, identified a sworn statement made by the accused during an investigation of charges against accused. He detailed the circumstances surrounding the making of this statement. It was shown that this statement had been voluntarily made and it was received into evidence as Prosecution Exhibit 1 without objection by the defense (R. 37,38,39,40). In this statement the accused detailed the circumstances whereby Miss Leeb was delivered to his custody on 10 June 1946. He stated that he placed Miss Leeb in a bedroom for the night, and left immediately after locking the door. He then went to Lieutenant Johnson's room where he stayed for about four hours. He left Lieutenant Johnson's room and went to his room where he went to bed. The events of 11 June 1946 were stated as:

"At about 0630 hours on the morning of the 11th of June 1946 I went into the room where Miss Leeb was sleeping and told her to dress as I was ready to take her to Unterwossen, to the Border Police Headquarters. She said she would like to wash, so I gave her a towel and some soap which I got from my room. A little before 0700 hours, I went back to her room and she said that she was ready. I then left the house, went to the Orderly Room, got my jeep which was parked in front of the building and started back to the house. On the way I met the woman, Miss Leeb, coming down the road. I asked her why she had not waited in the house but she did not answer. (Later I found the key was still in the door of the bedroom where she had slept. I had forgotten to lock the door again when I left to get the jeep.) I told Miss Leeb to get into the Jeep; I turned the Jeep around and drove down the road leading out of town.

"The Jeep was not running well, so when I saw one of my men standing in front of the Serviceman's Center, I asked him to ride along with me to the town of Unterwossen. I did not want to leave the vehicle standing alone on the road if it should stop running.

"We arrived at Unterwossen at about 0730 hours and when we drove up to the Headquarters of the German Border Police, there was a policeman standing in front of the building. I stopped the Jeep and took Miss Leeb over to this Policeman. I told the German Policeman, with Miss Leeb Interpreting, that I wanted Miss Leeb taken to the Military Police of the Third Battalion, 39th Infantry at Traunstein. To make sure that he understood where I wanted her taken, I wrote on a piece of paper 'MILITARY POLICE, THIRD BATTALION, 39TH INFANTRY REGIMENT,

TRAUNSTEIN.' This paper I gave to the German Policeman along with all the papers that I had taken from Miss Leeb. I then asked him two or three times if he understood and each time he answered 'YES'. This German Policeman, I have later been able to identify as HANS STEINER. Then I went back to my Jeep and returned to Reit Im Winkl." (Pros. Ex. 1)

4. For the defense

Second Lieutenant Overton R. Johnson testified that on 10 June 1946 he was stationed at Reit-im-Winkl, Germany, and quartered in the same house as accused. He arrived home at about 8:30 P.M., at which time the accused was present. The accused stated that he was holding a woman wanted by the border police. The accused was with him in his room until about 1:30 A.M. During the night he heard nothing unusual in the house. He reported to the orderly room at about 9:30 A.M., 11 June 1946, at which time the accused was at his desk. Before leaving his billet he looked into the accused's room, but the accused was not there. The accused's bed had the appearance of having been slept in at that time (R. 42,43,44). Four bedrooms in the house were used as quarters. They were all on the same floor and his room was separated from that of accused's only by a partition. During part of the week of 10 June 1946 their unit was out of gasoline (R. 47).

Lieutenant Colonel Howard I. Olsen, the investigating officer, was called as a witness by the defense and identified several statements taken by him during his investigation. These statements were introduced in evidence for the defense as Exhibits A,B,C,D,E (R. 49,51).

Technical Sergeant Norman E. Torosian's statement says that at about 4:00 P.M., 12 June 1946, he answered the switchboard of the 3117th Quartermaster Service Company. The call was from Lieutenant Bradford requesting a connection with S-3 Third Battalion because he had a prisoner who had crossed the border illegally. He connected Lieutenant Bradford with Sergeant Warner of the S-3 Section and at the start of their conversation he heard Lieutenant Bradford state to Sergeant Warner that he was out of gas and could not furnish transportation. A few minutes later he checked the connection and "heard Sergeant Warner stating to Lieutenant Bradford to keep the illegal passer as prisoner for the night and that he would supply transportation the next morning to pick up this prisoner" (Def. Ex. A).

Georg Horl, a German policeman, testified that Hans Steiner was, at the time of this trial, in prison at Traunstein for smuggling a person across the border (R. 50).

Hans Steiner, a German policeman, said in his statement to the investigating officer that he went on duty at 4:00 A.M., 11 June 1946. He was off duty between 7:00 and 8:00 A.M. "After my return from having coffee shortly after 0730 Miss Leeb came into the office. She said that she walked from Marquartstein to Unterwossen." Her statement was taken and late that afternoon she was taken

to the Traunstein station (Def. Ex. B).

Private John D. Smith, 3117 Quartermaster Service Company, in a sworn statement says that about 7:00 A.M., 11 June 1946, he was standing back of the mess hall when the accused came by. The accused went to the orderly room and came back in a jeep. He met Miss Leeb on the road, placed her in the jeep, turned around and drove off (Def. Ex. C).

Sergeant Herman Alton, 3125 Quartermaster Service Company, in a sworn statement says that about 7:30 A.M., 11 June 1946, he was standing in front of his orderly room, at which time the accused, a soldier and a woman passed in a jeep (Def. Ex. D).

Lieutenant Edward J. Schultz stated in his sworn pre-trial statement that he had known Lieutenant Bradford for a period of five months while he was a company officer in the battalion. "His conduct, attention to duty and integrity have been above reproach. I have never at any time seen him when he was anything but a gentleman. I would particularly desire to have him serve with me in any company grade at any time" (Def. Ex. E).

Private James O. Milan, 595 Quartermaster Laundry Company, testified that about 7:00 A.M., 11 June 1946, he saw the accused as he came by the servicemen's center in a jeep. There was a woman in the jeep with him. The accused "told me the jeep was acting up and he wanted me to go with him at that time." They went to Unterwossen, Germany, a distance of between 6 and 7 miles, arriving there between 7:30 and 8:00 A.M. The accused took the woman to the police station (R. 51,52,56).

Major Irvin J. Bland, the commanding officer of the 4274 Quartermaster Battalion, testified that the accused was commanding the 3117 Quartermaster Service Company, a subordinate unit of his command. The 3117 Quartermaster Service Company was doing border guard and basic training. People arrested by accused's unit were to be turned over to military authorities in Traunstein. It was difficult to supply food to the border patrol because of transportation (R. 56,57).

Major Earl O. Wilson, 219 Quartermaster Battalion, testified that he had contact with the accused between 5 January 1946 and 29 March 1946 and that accused's character was excellent (R. 58).

The accused was informed of his rights as a witness and elected to remain silent (R. 59).

5. An assault is an attempt or offer with unlawful force or violence to do corporal hurt to another. A battery is an assault in which force is applied, by material agency, to the person of another, either mediately or immediately (MCM, 1928, par. 149l, pp. 177,178). For a man to fondle a woman not his wife, against her will, to slap her or to forcibly remove her clothing is an assault

and battery (CM 237229, Baldwin, 23 BR 337). The evidence establishes that on the night of 11 June 1946 the accused got into bed with Miss Leeb and forcibly removed her undergarments against her will. The fact that Miss Leeb ceased resisting to the actions of the accused in order to preserve her clothing will not relieve the accused of this charge because the assault and battery was complete when he first grasped her in an attempt to remove her clothing.

During an investigation, conducted by Lieutenant Colonel Howard I. Olsen, the accused made and delivered to Colonel Olsen a sworn statement. This statement contained an averment that he had transported and delivered Miss Leeb to the German border police, at or near Unterwossen, Germany, on 11 June 1946. It is charged that this statement was wrongfully made and that the accused did not believe it to be true. The evidence adduced in support of, and in defense to, this charge is sharply conflicting. Miss Leeb was delivered into the custody of accused on 10 June 1946. He held her overnight claiming that he was without the necessary gasoline to transport her to Unterwossen. Miss Leeb testified that on 11 June 1946 the accused released her and she then traveled from Reit-im-Winkl to Marquartstein by bus where she consulted a doctor. Thereafter a German policeman transported her to the border police at Unterwossen. The doctor corroborated Miss Leeb's visit to him on 11 June 1946 and a German policeman testified that he transported Miss Leeb to Unterwossen and left her in the custody of Georg Horl, a border policeman. This evidence was corroborated by the policeman Horl. The accused offered evidence to the effect that on the morning of 11 June 1946 he went to his orderly room and secured a jeep, returned to his quarters, placed Miss Leeb into the jeep, and transported her to the border police at Unterwossen. The evidence thus presents a question of fact to be determined by the court and the court having the evidence before it found the accused guilty, thus determining this question of fact against him. The Board of Review is of the opinion that the evidence is amply sufficient to sustain this finding by the court-martial..

6. War Department records show that the accused is 28-2/12 years of age, married and has one child. He is a high school graduate. Prior to his entry into the Army he was a warehouse manager and truck driver. He was inducted 12 February 1942 and upon completion of basic training he was sent to Officers' Candidate School. He was appointed and commissioned a second lieutenant, Army of the United States, 14 August 1942. On 3 February 1943 he received a temporary appointment to first lieutenant. His efficiency report for the period 1 July 1945 to 31 December 1945 is superior. On 11 December 1946 he was found guilty by a general court-martial of failing to obey a lawful order of his superior officer in violation of Article of War 96. He was sentenced to forfeit $75.00 pay.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 96.

Albert L. Gilbert, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Atkroyd, Judge Advocate

JAGK - CM 318670 1st Ind

WD, JAGO, Washington 25, D. C. MAR 1 1947

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 Emmid E. Bradford (0-1576956), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of assault and battery and of wrongfully making under oath a statement "that he transported and delivered Ingeborg Leeb to the German border police at or near Unterwossen, Germany, on 11 June 1946," which statement he did not believe to be true. No evidence of any previous conviction 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. 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 of the sentence.

On 10 June 1946 Ingeborg Leeb, a German national, was arrested for illegally crossing the Bavarian-Austrian border. She was delivered into the custody of the accused. The accused confined her in a bedroom of the house wherein he was quartered. Between 12:00 and 1:00 A.M. he entered the room wherein Miss Leeb was confined, disrobed, and got into bed with her. He then forcibly removed her underclothing, thus committing an assault and battery. The next morning he permitted Miss Leeb to leave the quarters. She went to see a doctor and later went to the border police at Unterwossen. Charges of rape were preferred against the accused and during an investigation the accused submitted a sworn statement wherein he stated that he delivered Miss Leeb to the border police at Unterwossen, Germany, 11 June 1946. This part of his statement was shown to be false. During the investigation the rape charge was changed to simple assault and battery.

4. War Department records show that the accused is 28-2/12 years of age, married and the father of a child. On 11 December 1946 the accused was found guilty by a general court-martial of failing to obey a lawful order of his superior officer, and sentenced to forfeit $75.00 of his pay. His 201 file contains numerous letters from his wife and mother asking The Adjutant General to require the accused to communicate with them and asking that he be required to furnish money for hospitalization at the birth of his child and for support of his wife and child.

5. The actions of the accused in this case demonstrate that he is unfit to be an officer. I recommend that the sentence be confirmed and carried into execution.

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

CM 318670

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Record of Trial
2. Form of Action

(G.C.M.O. 123, 3 April 1947).

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

JAGK - CM 318685

13 FEB 1947

UNITED STATES v. Private JOSE M. SUSTAITE (38144515), attached unassigned, Enlisted Detachment, 4006th Area Service Unit, Station Complement.	FOURTH ARMY Trial by G.C.M., convened at Fort Sam Houston, Texas, 12 December 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Jose M. Sustaite, Attached Unassigned, Enlisted Detachment, 4006th Area Service Unit, Station Complement, Fort Sam Houston, Texas, then Detachment, Veterans Administration Facility, Los Angeles 25, California, did, at Los Angeles, California on or about 9 February 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at New Braunfels, Texas on or about 24 October 1946.

He pleaded not guilty to and was found guilty of the charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence but reduced the period of confinement imposed to three years, designated the Branch United States Disciplinary Barracks, Fort Knox, Kentucky, 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 Detachment, Veterans Administration Facility, Los Angeles 25, California, was admitted in evidence without objection by the defense (R. 7, Pros. Ex. 2). Such extract copy, prepared on WD, AGO Form No. 44, 10 July 1943, reads as follows:

"Sustaite, Jose M. 38144515

Private Detachment Veterans Adm. Fac.

EXTRACT COPY OF MORNING REPORT OF -

Detachment, Veterans Administration
Facility, Los Angeles 25, Calif.

10 February 1945

Dy to AWOL as of 0700 9 Feb 45

10 March 1945

AWOL 30 da to dropped fr rolls

Det Vet Adm Fac, Los Angeles 25, Cal
12 Mar 45
I, WILLIAM E. SCANDLYN, 1st Lt, certify
AUS
that I am the personnel officer of Detachment, Vet Adm Fac and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Los Angeles 25, Calif. for the dates indicated in said copy which relates to Jose M. Sustaite, 38144515, Pvt Detachment Veterans Adm Facility.

/s/ WILLIAM E. SCANDLYN
WILLIAM E. SCANDLYN
1st Lt, AUS
Personnel Officer"

It was stipulated by and between the prosecution, defense counsel and the accused that accused was "arrested" by the civilian authorities near New Braunfels, Texas, on 24 October 1946, that when "arrested" he was wearing civilian clothes and that he was returned to military control at Fort Sam Houston, Texas, on 25 October 1946 (R. 7, Pros. Ex. 3).

Evidence for the defense

Accused, his rights as a witness having been explained to him, elected to make an unsworn statement to the court through defense counsel. In this statement he said that when he was inducted into the Army he was about 40 years of age and that he could speak only Spanish. After having been in several organizations, he "finally ended up in the Medical Department" as an

orderly. His father and mother are both 70 years old and he has supported them ever since he has been old enough to work. He was never able to get an allotment for his parents and, because of worry over their welfare and the mistakes he consistently made as a hospital orderly due to inability to understand instructions in English, "he went AWOL from the Army and went home." Later on his conscience bothered him so he went to the sheriff and told the sheriff to arrest him and return him to military control.

4. The prosecution apparently sought to sustain its burden of proving that accused deserted the service as alleged by an attempted showing of a prolonged period of absence without leave on the part of accused plus a stipulation that when "arrested" he was wearing civilian clothes. In order to show the inception of accused's absence without leave status, an extract copy of a morning report of the unit to which accused allegedly belonged was introduced in evidence, which extract contained the following entries:

> "10 February 1945
> Dy to AWOL as of 0700 9 Feb. 45
> 10 March 1945
> AWOL 30 das to dropped fr rolls."

The above morning report entries, as thus extracted, are obviously meaningless, for they relate to no named or described person. They fail completely to support any inference that it was accused who went absent without leave on 9 February 1945 and was dropped from the rolls thirty days later. The question remains, however, as to whether the statement of the certifying officer appearing in the certificate authenticating such copy that these morning report entries related to accused can be considered as substantive evidence giving meaning and effect to the apparently incomplete extracts.

Paragraph 117a, Manual for Courts-Martial, 1928, provides in pertinent part 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 complied 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. For instance, the originals of an enlistment paper, physical examination paper, outline figure and fingerprint card, guard report, individual equipment record, and morning report are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge." (Underscoring supplied.)

And in paragraph 116a of the Manual it is provided that:

> "In the case of a public record required by law, regulation, or custom to be preserved in 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.
>
> * * *
>
> "A copy of any book, record, paper, or document in the War Department, including its bureaus and branches, or in any command or unit in the Army may be duly authenticated by *** a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original. Thus, 'A true (extract) copy: (Sgd.) John Smith, Capt. 10th Inf. Comd'g., Co. A, 10th Inf.,' would be sufficient, prima facie, to authenticate a paper as a copy of an original company record of Company A, Tenth Infantry." (Underscoring supplied.)

The above quoted provisions of the Manual, when read conjunctively, manifestly apply only to those official statements which have been preserved in a public document of record and which were originally recorded by a person having an official duty to know and record the facts or events contained in such statements and the proviso making admissible in evidence an "official statement in writing *** in *** a certificate" must be so limited. A mere authenticating certificate stating, inter alia, that an extract copy of a certain record described in the certificate is a true copy is obviously not in itself a public document of record and thus the facts stated in such certificate have only the force and effect for which they were intended, that is, authentication. As indicated in the mentioned provisions of the Manual, the only duty of the authenticating officer is to perform the administrative task of certifying that the extract in question is a true copy of the original record. (See also par. 43b, AR 345-400, 3 Jan. 1945.) Therefore, in a prosecution for desertion or absence without leave wherein an extract copy of a morning report has been introduced in evidence to establish the inception of accused's absence without leave, only the extracted morning report entries may be employed to establish prima facie proof of such absence, the recitals in the authenticating certificate being merely sufficient to furnish prima facie proof of proper authentication and such administrative details as may be connected therewith, such as the place of submission of the morning report.

The statement contained in the authenticating certificate in the instant case to the effect that the extracted entries applied to accused cannot, therefore, be admitted in evidence on the theory that such certificate was a public document of record and that such statement was a record of a fact appearing therein. Nor can it be considered admissible on the theory that it was but a summary of what actually appeared on the morning report in

question. A certified copy must, in the absence of statutory authority to the contrary (see last paragraph of par. 117a, eighth paragraph of par. 129 and fifth paragraph of par. 152a, MCM, 1928), be a transcription in the literal terms, an exact duplication, of the original. A mere summary of the record by the ceritfying officer is inadmissible (Wigmore on Evidence, 3rd Ed., ss. 2108,1678; In re Kostohris' Estate, 96 Mont. 226, 29 P. (2d) 829,835). Moreover, the statement in question clearly cannot be considered "a memorandum or record of any act, transaction, occurrence or event," so as to be admissible in evidence under the so-called Federal shop book rule (see 28 U.S.C. 695; CM 312023, Schirmer).

Consequently, the Board of Review holds that the extract copy of the morning report in question is incompetent to prove prima facie that accused was absent without leave on 9 February 1945 or on any specific date subsequent thereto. Although accused admitted in his unsworn statement before the court that "he went AWOL from the Army and went home" and remained in an absent without leave status for an undetermined time, the record of trial is barren of any evidence tending to show the duration of such absence or the date of its inception. This being so, no inference of intent to desert the service may be drawn from accused's unspecified period of absence without leave. Furthermore, since the inception of such period may have been after 19 January 1946, the date when the wartime suspension of the limitation on punishment for the offense of absence without leave was terminated with certain exceptions not here material, there is not sufficient evidence remaining in the record of trial from which we might determine the proper punishment for the admitted commission of this offense by accused, should it be considered a lesser included offense of that charged.

The holding in CM 307181, Christ, in so far as it is inconsistent with the views expressed herein, should no longer be followed as the law to be applied in cases of this nature.

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

(On Leave), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schwarzl, Judge Advocate

(394)

FEB 21 1947

JAGK - CM 318685 1st Ind

WD, JAGO, Washington 25, D. C.

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

1. In the case of Private Jose M. Sustaite (38144515), attached unassigned, Enlisted Detachment, 4006th Area Service Unit, Station Complement, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. 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 318685).

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 318704

3 MAR 1947

UNITED STATES v. General Prisoner HENRY T. WHITESIDE (34222436), Detachment of Prisoners, 6677 Disciplinary Training Company (Ovhd) and Private LEROY ROBISON (36388280), Company "A", 838th Engineer Aviation Battalion.	PENINSULAR BASE SECTION Trial by G.C.M., convened at Leghorn, Italy, 3-9 September 1946. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
SCHEID, BOYLES and PARSONS, 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 were tried upon the following Charges and Specifications:

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

Specification: In that Private Leroy Robison, Company A, 838th Engineer Aviation Battalion, and Private Henry T. Whiteside, detachment of prisoners, 6677 Disciplinary Training Company (Ovhd), acting jointly, and in pursuance of a common intent, did, at or near Viareggio, Italy, on or about 2 December 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Major Lewis B. Hildebrand, a human being, by shooting him with a pistol.

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

Specification: In that Private Leroy Robison, Company A, 838th Engineer Aviation Battalion, and Private Henry T. Whiteside, detachment of prisoners, 6677 Disciplinary Training Company (Ovhd), acting jointly, and in pursuance of a common intent, did, at or near Viareggio, Italy, on or about 15 November 1945, wrongfully and unlawfully conspire to commit offenses against the United States, to wit, the wrongful disposition of motor vehicles belonging to the United States and did thereafter pursuant to such conspiracy at various times between

15 November 1945 and 2 December 1945, wrongfully sell motor vehicles, the exact number of which are unknown, property belonging to the United States.

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

Specification: In that Private Leroy Robison, Company A, 838th Engineer Aviation Battalion, and Private Henry T. Whiteside detachment of prisoners, 6677 Disciplinary Training Company (Ovhd), acting jointly, and in pursuance of a common intent, did, at or near Viareggio, Italy, on or about between 15 November 1945 and 1 December 1945, wrongfully sell motor vehicles each of a value in excess of fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

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

Specification: In that Private Henry T. Whiteside, detachment of prisoners, 6677 Disciplinary Training Company (Ovhd), did, at or near Viareggio, Italy, on or about 28 November 1945, wrongfully and with intent to do him bodily harm, commit an assault upon Leroy Robison with a dangerous weapon, to wit, a pistol ~~by~~ willfully and feloniously pointing such pistol at the said Leroy Robison in a threatening manner.

Each accused pleaded not guilty to, and was found guilty of, the Charges and Specifications, except that only accused Whiteside pleaded not guilty to and was found guilty of Charge IV and its Specification. Evidence of one previous conviction for violation of Article of War 61 was introduced in the case of accused Whiteside and evidence of two previous convictions for violation of Articles of War 61 and 96 was introduced in the case of accused Robison. Each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentences as to each accused and forwarded the record of trial for action under Article of War 48.

3. The evidence with respect to Charge IV and its Specification shows that at 11:00 AM about thelast Sunday in November 1945 accused Whiteside and Robison had a violent discussion in English which the witness (an Italian) did not understand (R. 126). When the witness left the room to summon help, accused had his hand in his pocket, and upon her return Whiteside was standing about five feet from Robison and had a revolver pointed at him (R 127, 128). When another person separated them, accused still had the pistol pointed at Robison (R. 129, 130).

With respect to Charges II and III and the Specifications thereunder the evidence shows that in November 1945 at Viareggio, Italy, both accused

acting through a girl friend as interpreter asked the Fruzza brothers (Sergio and Edilio Fruzza) the name of a person who would buy some tires and a truck (R 22, 23, 24, 50). About the same time Mr. Capizzi heard both accused and an Italian girl talking to the Fruzza brothers about a truck (R 143). Thereafter he saw both accused in an American type truck similar to a 6x6 U. S. Army truck, but with a smaller white bumper on which the letters "P.B." were inscribed in black (R 145, 146, 147). The Fruzza brothers, Capizzi and both accused, with Robison driving went in the truck from Viareggio to Lido di Camaiore (R 52, 148). This vehicle was described by Sergio Fruzza as having ten wheels, canvas cover, a white star on the hood, ash colored, with the inscription "P.B.S" on the bumpers, and similar to a 6x6 U.S. Army truck exhibited to him during the trial (R 55, 56, 57). At Lido di Camaiore they met some Italian civilians and proceeded into the countryside (R 149, 150); where accused sold the truck to five Italians for 70,000 Lire (R 27, 30, 53, 54, 55), accused Whiteside receiving the purchase money (R 55).

From November 1945 to January 1946, Mr. Camilli, an Italian, purchased from both accused five or six trucks for which he paid 70,000 Lire each (R 224, 229). Each truck had the letters "P.B.S" on the front bumper and was similar to a 6x6 U.S. Army truck observed by Mr. Camilli in front of the courtroom (R 227). He also identified Mr. Capizzi as the person who was involved with accused in the sale of the trucks and who accompanied accused on the occasion of one sale (R 225).

Sergio Fruzza was present on three occasions when accused sold trucks at Lido di Camaiore to the same five Italians for 70,000 Lire (R 59, 60, 61). The vehicles sold the second and third time by accused were the same type vehicles as the one sold on the first occasion, and had a white star on the hood, an inscription "P.B.S" on the bumper and the letters "U.S.A." followed by numbers on the sides of the hood (R 62, 64, 65). Six by six US Army trucks have "U.S.A." and a War Department serial number on the hood, a white 5-pointed star on top of closed vehicles and on both sides front and rear (R 117). During the months of November 1945, the US Army did not sell 6x6 trucks to individuals in Italy. They were sold by bills of sale to the Italian government or the Allied Control Commission (R 117). All US Army markings were obliterated when the vehicles were sold (R 118).

The evidence heretofore summarized as to Charges II, III, IV and their Specifications is exclusive of any testimony given by the witness Natalina Capurro relative to those offenses.

The record of trial is very voluminous, consisting of 371 pages of testimony and numerous exhibits, all of which, with the exception of that summarized above, relates to the motion of accused for a continuance and the facts and circumstances surrounding the actions of accused and Natalina Capurro on the night of December 1-2, 1946, the night Major Hildebrand was

allegedly shot and killed by accused. The motion for a continuance was made and persistently urged by the defense in order that the presence and testimony of certain witnesses, some of whom had been redeployed to the United States, or their depositions, might be secured and presented to the court. Both accused claimed alibis for the night of December 1-2 and the testimony of the absent witnesses was expected to relate solely to their alibis. In the view we take of the action of the court in refusing to grant the motion for the continuance, it is unnecessary to summarize the evidence pertaining to Charge I and its Specification in any more complete detail than is hereinafter set forth.

4. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges II, III and IV and the Specifications thereunder.

The evidence establishes beyond question that on the night of 1-2 December 1945 near Viareggio, Italy, Major Lewis B. Hildebrand, a white American Army officer, was killed by gunshots. The only witness who claimed to have seen the shooting was a woman named Natalina Capurro. Her testimony was the only evidence adduced at the trial to connect the accused with the homicide. Without her testimony the finding of guilty of the murder charge cannot be sustained. If her testimony is believed then the two accused are guilty of a brutal murder. On the other hand, if the testimony proffered by the motion for continuance is believed then the accused, two colored soldiers, could not have committed the murder because such proffered testimony would show that at the time Major Hildebrand was shot the accused Robison was in jail at Pisa, Italy, and the accused Whiteside was on guard duty at his camp some distance from the scene of the alleged murder.

All the testimony shows that Major Hildebrand was shot to death the night of 1-2 December 1945. The charges were dated and sworn to 5 August 1946; copies of the charges were served on the accused 22 August 1946, and the charges were referred for trial 3 September 1946 (R 6); on the same date the court met and at the outset the defense counsel presented to the court a written motion in proper form for continuance of the case in behalf of both accused sworn to by each accused (R 7-13). Prosecution objected

to the continuance. Then the following proceedings were had:

"President: I would like to ask the defense counsel a question. Knowing the witnesses and testimony you have to present in defense of this case, is it your opinion that, seeing these affidavits, if these witnesses were called, their evidence would be of a cumulative nature only?

"Defense: It is, sir.

"President: Is it your opinion that a failure to call the witnesses cited in the affidavits by Private Robison and General Prisoner Whiteside will in any way prejudice the case for the accused?

"Defense: No, sir.

"President: Subject to objection by any member of the court, the plea for a continuance by Private Leroy Robison is denied.

"Subject to objection by any member of the court, the plea for a continuance of this case by General Prisoner Henry T. Whiteside is denied." (R 14-15).

The trial proceeded and continued to 9 September 1946 (R 289). The prosecution rested (R 316). Thereupon the following proceedings were held:

"Defense: The defense at this time would like to renew its original motion for a continuance of this case until the necessary material witnesses mentioned in the affidavits of the two accused, Robison and Whiteside, can be secured from the United States of America.

"Prosecution: Now, if the court please, before the court rules upon that motion, the prosecution asks leave of the court for time to prepare and file a counter-affidavit in support of the prosecution's contention that the motion should be denied and also the opportunity to introduce to this court evidence as to why it should be denied.

President: The court would like to make inquiry into this request for a continuance prior to any action at all. May I have the affidavits?

"(Defense handed affidavits to the President.)

"President: Will the accused Robison, in conjunction with his counsel, answer a few questions for the court? In the affidavit of the accused Robison, he states that 'Due diligence has been used in an effort to procure these witnesses.' Will the accused—

"Prosecution: If the court please, I don't think we should ask the accused Robison any questions unless he wants to take the stand himself and have his rights explained to him.

"President: We will have his counsel answer? What efforts were made to procure these witnesses in the case of Private Leroy Robison?

"Defense: May it please the court, counsel for the defense learned only the names of the biggest majority of these witnesses on the morning that the affidavit was filed in this court. Before filing that affidavit, counsel for the accused endeavored to contact the organizations of the people mentioned in the affidavit of the accused Robison. At the time counsel for the accused made this inquiry he could only get information that the biggest majority of them that any record could be found on had been redeployed to the United States. Counsel for the accused then secured from those organizations the approximate dates of the redeployment of the people mentioned in the affidavit of the accused Robison. Many of the names mentioned were incomplete, by that I mean there was only the first or the last name. Counsel for the accused obtained the names of all the men belonging to the mentioned organizations who had last names or first names similar to those mentioned and they had all been redeployed.

"President: Are any of the witnesses requested under the jurisdiction of the appointing authority at the present time?

"Defense: With the exception of the one named on the affidavit as Private Scott, for whom no record could be found other than he was one of many Scotts released from the D.T.C., none of the mentioned witnesses in that affidavit by the accused Robison are under the jurisdiction of the appointing authority of this court.

"President: What date were the charges served on the accused?

"Defense: I think the prosecution can answer that question better than the defense, as he served them.

"Prosecution: My recollection, sir, is the 22nd. I will check and give you the exact date. It was the 22nd day of August, 1946.

"President: To the knowledge of the defense counsel, was any effort made to locate any of these witnesses in any way between the 22nd of August, the date on which the charges were served, and the fourth of September, when the trial was opened?

"Defense: In so far as counsel for the accused can state, to the best of his knowledge, he did look for the following-named witnesses requested by the accused Robison in his affidavit prior to 4 September 1946:

Private La Calandra, of the 101st Military Police, Company B.
Sergeant Bauer, of the 101st Military Police, Company B.
Lieutenant G. H. Thompson, of the 3330 Q.M. Trucking Company.
Private Hudson, of the 330th Q.M. Trucking Company.
Private Weaver, of the 3331st Q.M. Trucking Company.

"President: I am now referring to the affidavit filed by Private Whiteside. Will the counsel or Private Whiteside explain to the court what efforts were made to procure these witnesses for the accused between the 22nd of August and the 4th of September.

"Defense: The same thing that counsel for the accused has stated in so far as the accused Robison's affidavit pertains to the affidavit of the accused Whiteside. Many of the witnesses named in this affidavit, meaning the affidavit of the accused Whiteside, were unknown to counsel for the accused until the morning of the trial, 4 September 1946. At that time, counsel for the accused Whiteside made the same efforts that he made for the witnesses in the affidavit of the accused Robison and met with the same results. Prior to 4 September 1946, effort was made to locate the following witnesses named in the affidavit of the accused Whiteside?

"Lieutenant Dupress, of the 3331 Q.M. Truck Company, who had been redeployed.

"Sergeant Sam, whose name was Sergeant Samuel B. Samuels, of the 3331 Q.M. Truck Company, who was transferred to the 248th Quartermaster Battalion in Naples and redeployed therefrom.

"Sergeant Pearson, of the 3331st Q.M. Truck Company, who was redeployed to the United States in December 1945.

"Private Coleman, of the 3331 Q.M. Truck Company, who was redeployed to the United States 15 February 1946.

"President: To the knowledge of the defense counsel, are any of the witnesses listed by the accused Whiteside under the jurisdiction of the appointing authority?

"Defense: To the best of the defense counsel's knowledge, none of the witnesses stated in the affidavits of the two accused, Whiteside and Robison, are under the jurisdiction of the appointing authority of this court.

"President: Counsel for the defense has previously stated that it was his opinion that expected testimony from witnesses listed on both the affidavits of the accused Whiteside and the accused Robison would be cumulative in nature. Has anything taken place which makes him change his opinion?

"Defense: Counsel for the accused still maintains the original opinion that was expressed previously by counsel for the accused that any testimony that can be offered that will be of material and relevant benefit to the accused in this case coming from the witnesses the accused desire to secure from the United States will be cumulative evidence.

"President: As a result of his search for witnesses and the identification by name, serial number, and residence of witnesses as presented on the affidavits by the accused, does counsel for the accused believe that there is a reasonable prospect of obtaining the attendance of the absent witnesses at this trial?

"Defense: With the names as stated on the affidavits of the two accused in this case, counsel for the accused feels that he would be unable to find any of those witnesses.

"President: Subject to objection—

"Prosecution: If the court please, are you going to rule on the motion? I would like leave to file an affidavit for this record, if the court please.

"President: How long will it take?

"Prosecution: A few minutes.

"President: The court will recess for 20 minutes while the prosecution prepares an affidavit.

"(The court took a twenty-minute recess.)

"President: The court will come to order.

"Prosecution: May the record show that all the members of the court sworn to try this case are present, the two accused are present, the trial judge advocate and the assistant trial judge advocate are present, the defense counsel and the three assistant defense counsel are present, the reporter is present, the interpreter is present, and may I admonish all of us that we are still under oath.

"President: I would like to ask the defense counsel a couple more questions. Regarding these witnesses listed on the affidavits, to your knowledge have either of the accused ever conferred with any of the witnesses listed to determine what their expected testimony would be?

"Defense: To the knowledge of counsel for the accused, neither of them have talked to the witnesses named in the affidavits submitted before this court by both accused.

"President: Is it your opinion that the accused merely assume that the witnesses cited will testify as shown in the two affidavits, or can you state an opinion on that?

"Defense: It is the opinion of counsel for the accused, and his opinion solely, that the two accused in this case, in so far as their counsel knows or has any knowledge of, have never talked to any of the witnesses, and the testimony as stated in the affidavits is stated on an assumption and not on actual facts. This I want recorded as the opinion of the counsel for the accused, since he has been appointed along with the assistant counsellers for the accused to defend them in this case.

"President: That is your opinion as counsel for the two accused?

"Defense: Yes, sir.

"President: Have you found from official records or other sources what disposition the Army has made of the listed witnesses as a result of the redeployment program?

"Defense: May I have just a moment, sir?

"President: Yes.

"Defense: Counsel for the accused contacted the G-1 section of this headquarters and secured as nearly as possible the approximate dates or the months in which the witnesses stated in the affidavits of the two accused were redeployed to the United States, and begs permission of the court to read into the record what counsel for the accused found upon investigation.

"President: The permission is granted.

"Defense: Private La Calandra, the 101st Military Police, redeployed in February 1946.

"Sergeant Bauer, of the 101st Military Police, redeployed February 1946.

"Lieutenant G. H. Thompson, of the 3330 Q.M. Truck Company, redeployed February 1946.

"Charles Thompson, of the 3330 Q.M. Truck Company, redeployed June 1946.

"Isaac Hudson, of the 3330 Q.M. Truck Company, redeployed June 1946.

"Private Van Dyke, of the 3330 Q.M. Truck Company, no record of this man ever having been in that organization.

"Robert Jones, 3330 Q.M. Truck Company, redeployed December 1945.

"Fred (full name unknown), 3330 Q.M. Truck Company, no record of any man with the name of Fred having been in that organization.

"Moffitt, Emmet, transferred to the 248th Q.M. Battalion from the 3330 Q.M. Truck Company and redeployed to the United States in January of 1946.

"Lieutenant Dupress, 3331 Q.M. Truck Company, redeployed June 1946.

"Sergeant Pearson, 1st Sergeant 3331 Q.M. Truck Company, redeployed December 1945.

"Private Coleman, 3331 Q.M. Truck Company, redeployed January 1946.

"Sergeant Sam, real name Sergeant Samuel B. Samuels, redeployed 15 February 1946.

"Singleton, Steve, 480th Port Battalion, redeployed 8 August 1946.

"Lonnie Hall, 480th Port Battalion, redeployed 27 July 1946.

"Sergeant Wade, 3331 Q.M. Truck Company, redeployed November 1945.

"Private Weaver, 3331 Q.M. Truck Company, redeployed November 1945.

"Lt Colonel Adams, Commandant of the 49th Group, December 1945, redeployed February 1946.

"President: Has the prosecution any questions?

"Prosecution: If the court please, the prosecution at this time asks leave to file an affidavit in opposition to the affidavits filed by the two accused in this case.

'Leghorn, Italy

9 September 1946.

AFFIDAVIT

"Comes now Donald C. Young, Captain, QMC, AUS, ASN O-1588391, and in answer to the affidavits of General Prisoner Henry T. Whiteside and Private Leroy Robison, admits, denies, and alleges:

"That he is the trial judge advocate in the case of United States vs. General Prisoner Henry T. Whiteside and Private Leroy Robison.

"That at no time has request been made to him by either of the accused in said case or their counsel or any other person to produce in Court the witnesses listed in said affidavits.

"Denies that any diligence has been used by the accused or their counsel or anyone else to locate said witnesses and produce them in Court for the trial of said case.

" That he is informed and believes, and on such information and belief, alleges that the 3331st Quartermaster Truck Company and the 110th Quartermaster Battalion, both organizations of the United States Army, have been deactivated.

"That he is informed, and believes, and upon such information and belief alleges that any evidence and/or testimony that could be produced by said witnesses listed in said affidavits are solely cumulative in nature.

"That he is informed and believes, and therefore alleges, that the majority of the witnesses listed in said affidavits have been redeployed to the United States and are no longer under the jurisdiction of the appointing authority in this case.

(Signed) Donald C. Young, Capt,QMC
DONALD C. YOUNG, Captain,QMC

Subscribed and sworn to before me this 9th day of September 1946.

(Signed) G.D. Constanz,
G.D. CONSTANZ, 1st Lt. FA,
Actg Asst Adjutant General.'"

(R 317-323).

The prosecution seriously objected to the continuance (R 323-324) after which the following proceedings were had:

"Defense: Before ruling on this, the affidavits as presented to this court by the two accused in this case meet all of the requirements of the law as read by the prosecution.

"As far as the due diligence is concerned, counsel for the accused exercised as much due diligence as could be expected of a reasonable man upon the receipt of such short notice of the names of these people.

"Further, the investigation in this case was actually not begun until April 1946 and continued through the months of June and July. All of the people who have been redeployed, with the

exception of a few, were redeployed prior to any notice being served upon the accused in this case whatsoever that they were under suspicion or investigation.

"We submit the motion as it is.

"Prosecution: May I say for the record I don't want the court to get the idea that I have claimed that since counsel for the accused has learned the names of these witnesses the morning the trial started or that I infer that counsel has not been extremely diligent in trying to defend this case, doing everything he can for his clients, but the point I am trying to make is that the two accused waited until the morning of the trial to make the request for a continuance because of these witnesses.

"Now, there is another point to take into consideration here, if the court please. The court can't take judicial notice of it, but as a matter of fact we all know that the overwhelming majority of the men redeployed to the United States are discharged. There is a serious doubt in my mind if the process of this court can reach a United States civilian. There is a serious doubt in my mind if the process of any court in the United States can reach an American civilian and force him to come to Italy to testify in a military trial.

"I will submit the motion to the court for a ruling.

"President: Have you anything else for the defense?

"Defense: No.

"President: Subject to objection by any member of the court, the motion for a continuance on the part of the defense at this time is denied." (R 324-325).

The defense then introduced in evidence an entry made in a book during the regular course of business at the police station at Pisa Italy, indicating that accused Leroy Robison was on 1 December 1946 arrested by Private La Calandra "Time: 0300. Charge: Absence without leave, resisting arrest; disposition: booked and held". The record further indicated that Robison was released to J. H. Thompson (R 328). On Saturday night 1 December 1945, Captain McLeod received a call from the Pisa Police Station that they were holding three of his men, named Thompson, Bush and Jones. He told them to hold these men until Monday 3 December. On Sunday 2 December he instructed Lieutenant George H. Thompson to pick up these men on Monday (R 331-333). Staff Sergeant Bowman was company clerk of

3330 Q.M. Truck Company commanded by Captain McLeod. Bowman was in the orderly room of his company on Monday morning 3 December. About 10 o'clock of that morning Lieutenant George Thompson brought in two men he had just picked up from the police station one of whom was accused Leroy Robison. Lieutenant Thompson called the 3331st to pick up Robison. Lieutenant Thompson released Robison to a representative of the 3331st Quartermaster Truck Company (R 343-347). It was the practice for an officer of one company to pick up men from another company when they were in jail and bring them back to the battalion (R 349).

Sergeant George Bagley was a member of the 3331st Quartermaster Truck Company during December 1945. He knew accused Whiteside. He testified to circumstances indicating Whiteside may have been on guard duty the first few days of December. He remembers an incident wherein Whiteside claimed he attempted to stop a vehicle from leaving the area and Lieutenant Colonel Adams came out to investigate (R 350-351). In her sworn statement of 5 April 1945 (Pros. Ex. 16) Natalina Capurro said that at about 2100 hours on 1 December 1945 she went to the American bar to meet Whiteside, that she asked Robison about Whiteside and Robison told her that Whiteside was on guard duty at the camp "therefore it was impossible for him to come to the appointment".

From the foregoing it is clear that the issue between the prosecution and the defense is sharp and pointed. Prosecution asserts the accused murdered Major Hildebrand the night of 1-2 December 1945. Robison asserts he was in jail at Pisa at the time of the alleged murder. Whiteside asserts he was in camp. Both accused asked for a continuance in order that they might have time to secure named witnesses to establish their alibi. This the court denied, found both accused guilty of murder and sentenced them "To be hanged by the neck until dead".

The position taken by the trial judge advocate is revealed in the following paragraph quoted from his argument in opposition to the continuance:

> "I will say, from a practical standpoint, that if these men whose names appear in the affidavits were redeployed to the United States it will be necessary not only to locate them but to engage counsel in the United States to go before the Federal court and have subpoenaes issued. The prosecution has worked hard on this case, preparing a case of murder against these two accused. The prosecution feels that it has evidence now to convict these two accused, but, frankly speaking, the bulk of the testimony that we are to present to this court will come from the mouths of Italian witnesses. You know that if it takes three to four months, which the continuance will have to be granted for to bring these witnesses, after they are located, over to the Italian Theater to testify in this case, we might just as well move this court to

dismiss this case right now, because the prosecution won't have any testimony, after three or four months, from the mouths of these Italian witnesses. That is the practical side of it." (R 14).

The trial judge advocate evidently had in mind the Italian witness Natalina Capurro on whose testimony the prosecution's case must stand or fall. The evidence sought by defense to establish the alibi would also have had the effect of impeaching Natalina and her testimony. A brief discussion of Natalina (or Lina as she is called) and her testimony is in order.

Lina did not disclose to anyone her knowledge of the alleged murder until three months after it occurred. In April 1945 Lina was apprehended in Genoa and was taken to Leghorn. She made three separate sworn statements before C.I.D. agents, the first being dated 5 April 1945 (Pros. Ex. 16), the second dated 23 April 1945 (Def. Ex. B) and the third dated 11 June 1946 (Def. Ex. C). An examination of these statements and her testimony at the trial reveals the following:

"During the month of July 1945 I moved from Genoa to Viareggio where, as some girl friends of mine had told me, there were many American soldiers and, therefore, the chance for us to make a lot of money exercising prostitution. Later on, in this town, in the Bar Paradise which I used to frequent, I met an American colored soldier named Gusiarge (meaning accused Whiteside). I became his girl friend and he started coming to my house where he spent almost all nights ——" (Def. Ex. C).

While on the stand Lina testified in part as follows (R 210):

"Q. Were you in love with the accused Whiteside?
"A. Yes.

"Q. About how much money each evening did Whiteside give you?
"A. It depended. Sometimes 5,000 and sometimes 6,000.

"Q. Sometimes 5,000 and sometimes 6,000 what?
"A. Lire. 6000 lire.

"Q. That was nightly?
"A. Yes."

Lina further testified (R 256-257):

"Q. How much money did the accused Whiteside give you during the time you lived with him?
"A. The sum I do not know. I know that he gave me five or six thousand lire every morning, and he also bought me a fur coat for 35,000 lire."

One lire was of the value of one cent (R 257). Therefore, 6,000 lire were of the value of $60.00 and 35,000 lire were of the value of $350.00.

Lina further testified (R 235) as follows:

"Q. How did you meet the accused Whiteside, under what circumstances?
"A. I met him at the American Bar.

"Q. Did someone introduce you to him or just how did you come to meet him?
"A. I was drunk the night I met him."

Lina further testified (R 258) as follows:

"Questions by the Prosecution:

"Q. You testified this morning that you were afraid of the accused Whiteside; is that correct?
"A. Yes.

"Q. You also testified that on Christmas Day of 1945 in the Red Cross at Leghorn here he beat you; is that true?
"A. Yes.

"Q. Upon what part of your body did he beat you?
"A. On the face and here (indicating right arm).

"Q. Now, I notice on your right eye, or I should say on your right cheekbone, just below your right eye, there is a discoloration. Can you tell the court the cause of that discoloration? Answer yes or no.

"A. Yes.

"Q. What was the cause of it?
"A. He found me dancing with another soldier. He had come out of jail on the 24th of December.

"Q. Now, you say he found you dancing with someone else. To whom are you referring as 'he'?
"A. To Whiteside.

"Q. One of the accused in this case?
"A. Yes.

"Q. Do you have any other discolorations on your body?
"A. No.

"Q. You indicated a while ago your right arm. Where on your right arm did he strike you?
"A. Here and here (indicating).

Prosecution: Indicating the right arm, near the elbow, and the right cheekbone, just below the right eye.

"Q. After the soldier was killed that night, your testimony is that you and Whiteside and Robison returned to your home; is that correct?
"A. Yes.

"Q. And that you went into your house and retired; is that correct?
"A. Yes, I called to Gino so that he could sell the vehicle.

"Q. And you retired?
"A. Yes, I remained at home.

"Q. And your testimony is further that Robison and Whiteside and this boy Gino you refer to returned to your home between four and five o'clock in the morning; is that correct?
"A. Yes.

"Q. And that Whiteside went to bed with you, and Robison went to bed on the divan in the living room; is that true?
"A. Yes.

"Q. Now, that morning, at about eight o'clock or thereabouts, did any member of the household, your home, come into the bedroom which was being occupied by you and Whiteside?
"A. Yes.

"Q. Who?
"A. Mrs. Teresa, the owner of the house.

"Q. Were you and Whiteside in one bed, or was there more than one bed in that room?
"A. No, in the same bed." (R 258-259).

* * *

"Q. What time did you and Whiteside and Robison return to your home after the American soldier was shot?
"A. I awakened Gino at two-thirty, as soon as we got home. I don't know what hour it was. One is not looking every moment at the clock.

"Q. But that was the morning of the 2nd of December, 1945; is that correct?
"A. Yes.

"Q. And then Whiteside and Robison and Gino left on the truck; is that correct?
"A. Yes, they went away in the truck, yes.

"Q. And Whiteside and Robison and Gino returned to your home about what time?
"A. Four or five in the morning.

"Q. The morning of the 2nd of December, 1945; is that true?
"A. Yes.

"Q. You testified at just about the close of your cross-examination that the accused Robison and Whiteside stayed at your house for a period of about five days after the 2nd of December 1945. Do you recall your testimony in that regard?
"A. Yes.

"Q. Now, did they at any time during that five-day period leave your house?
"A. Sometimes they would meet at home, sometimes out, but always in my company.

"Q. Both during the day and night?
"A. No, not at night. We would not go out. We would return home about eleven, eleven-thirty.

"Q. In the evening, or in the morning?
"A. In the evening." (R 261).

The sworn statements and testimony of Lina are replete with contradictions, inconsistencies and highly remote probabilities. To point out all of them would be a laborious and useless task. Only a few will be mentioned. With reference to the night of 1-2 December 1945 she said that accused Robison while they were in the bar told her that accused Whiteside could not keep his appointment because he was on guard duty at camp so she went home with a soldier by the name of Andrea. She contradicts this by

saying that she did not go home with Andrea but went home with accused Whiteside. In her statement of 5 April 1946, she accused Robison and Andrea of committing the crime and Robison as the one who fired the shots that killed Major Hildebrand (Pros. Ex. 15-16). In her statement of 23 April 1946 she stated Robison and Whiteside committed the offense, Robison firing the shots (Def. Ex. B). She admitted she had falsified her statement of 5 April 1946, as to Andrea, "Because I liked Whiteside, and then I thought I was pregnant". Finally, in her statement of 11 June 1946 (Def. Ex. D) and in her testimony at the trial she contradicts both of her previous statements and accuses Whiteside of firing the shots that killed Major Hildebrand. On the trial she testified (R 200) as follows:

"Questions by the Prosecution:

"Q. Getting back to the shooting for a moment, how many weapons were used to shoot the soldier in the jeep that evening?
"A. One, only.

"Q. Who had that weapon?
"A. Whiteside.

"Q. One of the accused in this case?
"A. Yes.

"Q. Did the accused Robison have a weapon of any kind?
"A. No."

Lina's explanation as to how she happened to be the only eyewitness to the shooting of Major Hildebrand is so highly improbable as to border on being fantastic. According to her story the two accused harbored ill will toward the Major because of bad treatment they had received at his hands while they were prisoners in a D.T.C. of which the Major was Executive officer; that on the night of the shooting accused Robison learned that the Major was visiting in the home of an Italian girl situated not very far from where Lina lived; that Robison came to her house about 1:30 A.M. 2 December 1945 and got Whiteside out of bed and that both accused hurriedly left her house armed with an Army pistol with the intent of killing him as he left the house of his Italian girl friend (Def. Ex. B); that shortly after the accused left her house they returned and Whiteside entered her house and ordered her to come and go with him to camp; that she left her house with Whiteside finding Robison in front waiting for them in a Government truck; that she and Whiteside got in the truck with Robison and drove to a spot near the home of the Italian girl friend where

they met the Major driving toward them in his jeep that the accused got out of the truck and engaged the Major in an argument during which Whiteside shot the Major; this occurred about 2 A.M. 2 December 1945; the headlights were on, she remained in the truck and witnessed the shooting, after which the accused got back in the truck and all three returned to her house (R 173-199). The accused told her that if she ever told anyone they would cut her throat. She played no part in the shooting except to sit in the truck and witness the shooting which she said was done by Whiteside. There is nothing in the record to explain what could have motivated the two accused to take Lina along with them and give her an opportunity while seated in the truck to witness the ensuing events.

Such testimony from a witness whose character has been thoroughly self-impeached does not justify the Government in convicting the accused as herein accomplished and in sentencing them to death by hanging, without allowing them every reasonable opportunity to prepare and present their defense. Certain practical difficulties may have been involved and there is no place in the American system of justice for the consideration of mere practical difficulties where liberty and lives are at stake. In this connection the court was apparently influenced by the argument of the trial judge advocate, especially that part wherein he said:

> "You know that if it takes three to four months, which the continuance will have to be granted for to bring these witnesses, after they are located, over to the Italian Theater to testify in this case, we might as well move this court to dismiss this case right now, because the prosecution wont have any testimony, after three or four months, from the mouths of these Italian witnesses. This is the practical side of it."

Likewise it is apparent that the court was influenced by the court's own improper query addressed to the defense counsel "Is it your opinion that a failure to call the witnesses cited in the affidavits — will in any way prejudice the case for the accused", which was answered in the negative. The court itself was by law charged with the duty of judicially determining the question.

It is unnecessary to speculate whether or not the witnesses requested would testify as indicated or what additional evidence or materials, pertaining either to the facts or to the law, may have been acquired for use in defending the accused had the requested continuance been granted. Suffice it to say that there was definite indication of possible evidence

of a quantity and quality, which, if the court chose to believe it, would raise serious doubt as to the guilt of accused, or completely absolve them of any implication in the commission of, or participation in the crime of murder. In CM 268281, Bingham, et al., 44 BR 271, 276, the Board of Review held:

> "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. As was said in CM 126651, 'The question of a continuance is one for the sound discretion of the court. It is believed, however, that when it is apparent from the record that the court has abused its discretion, the conviction should be held illegal.'"

The record of trial clearly shows that the substantial rights of the accused were injuriously affected, and the Board of Review is of the opinion that the court abused its discretion in denying the motion for continuance.

Inasmuch as the motion was directed solely to Charge I and its Specification and as the expected testimony of the absent witnesses would have been relevant to that offense alone, the Board of Review is of the opinion that the abuse of discretion on the part of the court cannot be said to have affected in any way the substantial rights of accused with respect to the other charges and specifications. The evidence offered by the prosecution in support of them is full, complete and overwhelming. Indeed, it was not contradicted in any manner other than by the denial of accused contained in their pleas of not guilty.

5. The maximum confinement provided by Title 18, USCA, section 88, for the offenses alleged in Charge II and its Specification is two years. The maximum punishment prescribed by paragraph 104c, MCM, 1928, for the offenses stated in the Specification of Charge III is dishonorable discharge, total forfeitures and confinement at hard labor for five years, and for the offense set forth in the Specification of Charge IV, dishonorable discharge, total forfeitures and confinement at hard labor for five years.

Confinement in a penitentiary is authorized by Article of War 42 upon conviction of the offenses set forth in the Specifications of Charge II, III and IV as offenses of a civil nature punishable by confinement for more than one year by the statutes of the United States and the law of the District of Columbia.

6. The accused Whiteside is 30 years old. He has been previously convicted by courts-martial for the offenses of assault with intent to do bodily harm with a pistol and absence without leave. He has two civilian convictions for burglary and one for liquor law violations.

The accused Robison is 27 years of age and has previous convictions by courts-martial for absence without leave, misappropriation of a Government vehicle, robbery, assault with intent to do bodily harm and willful disobedience of the lawful order of a noncommissioned officer.

7. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as noted above, no errors injuriously affecting the rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification; legally sufficient to support all other findings of guilty and sentences to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, for twelve years as to Whiteside and for seven years as to Robison.

Arthur M. Schlei, Judge Advocate

Francis X. Tarpey, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 318704 1st Ind

WD, JAGO, Washington 25, D. C. MAR 13 1947

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 Prisoner Henry T. Whiteside (34222436), Detachment of Prisoners, 6677 Disciplinary Training Company (Ovhd) and Private Leroy Robison (36388280), Company "A", 838th Engineer Aviation Battalion.

2. Upon trial by general court-martial the accused were found guilty of murder, in violation of Article of War 92; of unlawful conspiracy to sell property of the United States, in violation of Article of War 96; and of unlawfully selling motor vehicles belonging to the United States, in violation of Article of War 94. Accused Whiteside was also convicted of assault with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93. Each accused was senteced to be hanged by the neck until dead. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 48.

3. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and the specification thereunder; and is legally sufficient to support all other findings of guilty and sentences to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, for 12 years as to Whiteside and for seven years as to Robison. I concur in that opinion and recommend that the findings of guilty of Charge I and its specification be disapproved and that the sentences be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, for twelve years in the case of Whiteside and for seven years in the case of Robison; that the sentences, as thus commuted, be confirmed and carried into execution, and that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

4. Consideration has been given to a telegram from Mr. Franklin H. Williams, NAACP, New York City, dated January 22, 1947, requesting careful review of the record and clemency on behalf of accused.

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.

4 Incls
1. Record of Trial
2. Dft ltr for sig USW
3. Form of Exec. action
4. Telegram dated 1/22/47.

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 120, 2 April 1947).

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