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SUPPLEMENT I

1 June 1945 — 1 November 1945

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ERRATA

1 Dig. Op. ETO, p249, is corrected by deleting the last sentence of the digest appearing thereon of CM ETO 4029, Hopkins.

1 Dig. Op ETO, p.171 is corrected by adding in line 10, immediately before the citation of "CM ETO 2414, Mason 1944" the words: "with a dangerous weapon" and by inserting immediately after that line the following:

"Confinement in a penitentiary is not authorized for the crime of assault with intent to do bodily harm (no allegation as to use of a dangerous weapon, instrument or thing) (CM ETO 2157, Check, 1944)."

359 (AW 2) Persons Subject to Military Law:

(d) Camp Retainers and Persons Serving with Armies of the U.S.

(9) Civilian Employees:

Not Digested:
15734 Kendrick (Technical Observer, re radar)

Cross References: 450(2) 13090 Brynjolfsson (Merchant Seaman of Icelandic nationality; minor sentence)
454(96) 14632 Long (Army Exchange Service civilian employee; punishment; contract termination, etc.)

(13a) Merchant Seamen:

Cross References: 402(1) 17318 Gessner (Merchant Seaman; forfeiture)

(e) Persons Under Court-Martial Sentence:

(15) Cross References: 416(9) 16342 Wiseman

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365 (AW 8) General Courts-Martial: Appointment

Cross References: 450(2) 13090 Brynjolfsson (for trial of civilian employee)
450(1) 16886 Robinson (membership; extra man sits)
450(4) 13319 Beets (reference to trial; error)

Law Member

(9) Detail or Designation:

Cross References: 385 14133 Corriveau (relief not expressly shown; substitution)
385 8649 Sirlosky (Lt. as law member)
419(2) 14486 Marks (record showed "wrong" law member sat; corrected)

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368 (AW 11) Appointment of Trial Judge Advocates and Counsel:

(2) Defense Counsel

Cross References:	416(9)	14735 Clark, et al (special counsel not available; acts as own counsel)
	454(65a)	9986 Goldberg (no defense counsel)

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374 (AW 17) Trial Judge Advocate to Prosecute; Counsel to Defend:

Cross References:	378(3)	5080 Pugliano
	416(9)	4756 Carmisciano (inadequate defense counsel)
	450(1)	13222 Howard (counsel admits lack of adequate defense; prejudicial)
	454(38)	15486 Richter (law member; interest; previous case consider TJA files in closed session)

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375 (AW 18) Challenges:

Cross References:	395(47)	14382 James (Waiver of objection; court tried similar previous case)

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377 (AW 20) Continuances:

Not Digested
17023 Sanchez

Cross References:	385	15216 Miller (deny due process; after V-E Day)
	450(4)	14224 Page (missing defense witnesses)
	450(4)	17698 Stewart (to get witnesses)

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378 (AW 21) Refusal or Failure to Plead:

Cross References:	385	11987 Johnston (AW 28-58; omit "without leave" from plea of AW 61 guilt)
	408(4)	12466 Walker (try to change)
	416(9)	12580 Groin (Ct. considers partial guilt plea as one of "not guilty")
	454(18a)	9779 Stanley (Law member states wrong maximum penalty on guilty plea; guilty plea as a confession in open court)

(3) Inconsistent Statements After Plea of Guilty:

Cross References:	450(1)	13222 Howard

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381 (AW 24) Compulsory Self-Incrimination Prohibited:

Cross References:	395(1c)	In General - Burden of Going Forward
	451(36a)	16922 DiMenero (confession; not proved voluntary)
	450(4)	7869 Adams (warning of rights; confession)
	416(9)	16196 Leone (burden of proof; AWOL return)
	385	6301 Kirby (confessions; fail to warn re rights)
	385	14133 Corriveau (question accused re place of apprehension)
	454(54a)	6983 Carlson (confession; fail to warn of rights)
	454(18a)	13279 Tielemans ("poisonous" infiltration; confession)
	416(9)	15196 Nicholas (adjuration to speak truth)

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385 (AW 28) Certain Acts to Constitute Desertion:

Not Digested:

8414 Morris
8448 Tracy (red. exc.)
8449 Kollman (variance)
8760 Mascuillo, Jr.
9857 Harrell
10004 Kehoe, Sr.
10054 Brown
10057 Mastropietra (red. to AW 61; R/A)
10217 Rivera
10218 Gaines
10273 Haneberg
10443 Mays
10444 Markowitz
10532 Marks
10578 Parisien
10618 Morrow (had M/R; other evidence)
10690 Nolan (termination proof not necessary)
10716 Roberts
10758 Bedwell (R/A change time of return
11116 Purnell
11252 Sabatino
11257 Hintt
11386 Toon (doubtful M/R; other evidence)
11455 Sharp
11580 Halko
11757 Magoon
11856 Debeau
11869 Hise (Was accused awakened on morning of movement)
11929 Brattesani
12220 Monks
12222 Pacheco
12350 Spinelli
12381 Porter
12470 Mayo
12515 Frenya
12617 Baliko
12726 Dye
12784 Brown
12813 Blankenship (one spec. reduced to AW 61.)
12902 Cross
13023 Leighton
13096 Balcerzak
13253 Bragalone
13292 Kazsimir
13463 Weeks
13482 Ianuzzo
13475 Podesta (notice)
13668 Kaplet
13762 Allen
13764 McGraw
13814 Karney
14095 Bijeaux
14131 La Nore
14135 Gerrito (reduced to AW 61 AWOL by B/K)
14202 Schmidt, et al
14239 Davis
14359 Hart
14560 Hadala
14583 Lajoie
14609 Panagos
14625 Fassnacht
14690 Whalen
14691 Englese
14742 Langan (guilty of lesser AW 61)
14835 Herrera
14866 Luppe
15137 White
15138 Leslie
15246 Whitehead
15441 Romanowski
15550 App
15653 Perez (period of absence)
15654 Lyons
15689 Fors
15740 Lockwood
15741 Long
15814 De Loggio
15881 Halversen
16080 Fisher
16310 Harders
16325 Gripps, et al
16344 Martini (red. to AW 61, R/A)
16727 Santangelo, et al.
17186 McFalls
17231 Crenman
17232 Davis
17830 Reid

Avoid Hazardous Duty and Shirk Important Service

Cross References: 416(9) 13018 Ostrowski (with "straight" AW 58; place; manner)
16655 Pagano (condonation)

Accused was found guilty of desertion in violation of AW 58 under the alleged AW 28 circumstance that he failed to take up a defensive position under enemy shell fire. He remained absent until surrender the next day. HELD: LEGALLY INSUFFICIENT. (1) Confession: "The company commander, a captain, testified that as a result of reports he received on absentees, he questioned accused at noon when the situation had eased up. Accused told him he was in the quarry the entire night, had not slept, and did not know the company had moved into B***. Over objection ***, the captain was permitted to testify that accused afterward made conflicting statements as to where he had been and changed his story saying he was on the hill.' When cautioned by the prosecution to confine his testimony to what accused had actually said, he stated, 'I can't tell you definitely, there were four similar cases' Accused's statement to his commanding officer that he had spent the entire night in the quarry, when considered in connection with the action that occurred that same night and the part that accused was under a duty to play in it, amount in substance to a confession of guilt. The damaging character of the statement was aggravated by the improper reception of the company commander's testimony of his conclusion that accused had afterward 'made conflicting statements as to where he had been'." (MCM, 1928, par 144a, p 116.) "The incriminating statements were elicited by questions propounded immediately after an engagement with the enemy by an aroused company commander to a soldier suspected of having deserted his unit during that very engagement. It does not appear that accused was warned of his privilege against self-incrimination. While the company commander had the right to question his men as to where they had been, confessions so obtained cannot be related in court unless the safeguards established by the law to prevent the reception of involuntary confessions have been observed. The record discloses that in this case no inquiry was made into the circumstances under which accused made the statement in question. The statement, since it amounted to a confession, was erroneously admitted in evidence (III Bull. JAG 227-228). Therefore, in determining the sufficiency of the evidence, the testimony of the company commander as to the statements made by accused must be excluded and the remaining evidence examined to see if it is of such quantity and quality as practically to compel findings of guilty of the offense charged or of any lesser included offense * * *." (2) Other Evidence: "Far from compelling a finding that accused quit his place of duty with intent to avoid hazardous duty, the evidence in the record, apart from his pre-trial statements, is reasonably consistent with the conclusion that accused without his own fault, but because of the confusion caused by enemy fire, rain and darkness, and the obstructions created by dense hedgerows, became separated from his unit and was unable to find it until early the following morning." (CM ETO 6301 Kirby 13 Jul 45)

Accused was found guilty of two desertions in violation of AW 58 under AW 28 circumstances; of an absence without leave in violation of AW 61; and of a breach of arrest in violation of AW 69. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL ON THE AW 58 CHARGES. (1) First Desertion: "The testimony of the first sergeant *** shows that accused absented himself without authority from his unit or from medical channels on or about 18 September 1944 at a time when enemy patrols were active in the vicinity of his unit and that at an undisclosed time thereafter the company moved forward and attacked the enemy, with which it remained in contact more or less continuously until after the termination of his absence. The absence without leave thus shown to have commenced may be presumed to have continued until terminated by accused's return to military control (MCM, 1928, par. 130a, p 143). The morning report entry of accused's company of 31 December, to the admission of which the defense stated there was no objection, showing such termination by confinement by military authorities at ***, as of 22 October 1944, was proof only of return to military control ***. Absence without leave from 18 September to 22 October 1944 was established. The record is utterly barren, however, of evidence that at the time accused absented himself he intended to avoid hazardous duty. His unit was not shown to be engaged in combat at that time ***, nor was it shown that combat was reasonably imminent or that accused was aware of its imminence. The testimony sheds no light upon the activity or tactical situation of the company or medical units on the day the accused left." The record is sufficient, therefore, to prove only AWOL in violation of AW 61. (2) Second Desertion: "The morning report entry *** of Detachment 93 ***, to the admission of which the defense stated there was no objection, is competent to prove that accused absented himself without leave from the 93rd Replacement Battalion ***. Detachment 93, Ground Force Replacement System was evidently a subdivision of the 93rd Replacement Battalion. However, AW 28 intent was inadequately shown, so the record is sufficient only to support a finding of AWOL in violation of AW 61. (3) Breach Arrest: The finding of guilt on the AW 69 specification was supported. "The failure to show the time or place of the termination of the unauthorized absence is immaterial ***, particularly as the absence was alleged to have begun and terminated on the same day ***." (4) Time of Trial: No prejudice resulted from trial 4 days after service of charges, in view of accused's express consent to trial at the time, and the absence of indication of injury to his substantial rights. (CM ETO 8147 Pierce 16 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances (commenced about 31 August 1944; terminated about 22 January 1945). HELD: LEGALLY SUFFICIENT. "It would be a frustration of the purpose of AWs 58 and 28 if, under the circumstances, here disclosed, the prosecution was required to prove that particular and specific hazards immediately awaited accused's organization in the performance of its prescribed

mission and that accused had knowledge of the same. The statute does not require such restricted interpretation. AW 28 denounces absence without leave 'to avoid hazardous duty'. If the prosecution proves that accused was engaged in the performance of a duty where these hazards - although the time and place of their occurrence or existence were unknown when an accused left his organization - existed and that by course of prior events or as a result thereof he must have known of their future existence the burden of proof is sustained by the prosecution." The situation described herein (detail facts) is well within the ambit of battlefield desertion cases decided by the Board of Review. (CM ETO 8172 St. Dennis 27 Jun 45)

Accused were found guilty of desertions in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. "The legality of this conviction of desertion to avoid hazardous duty depends on whether or not the evidence that the company was in a 'defensive position' is proof of hazardous duty then existing or imminent." In view of TM 20-205 definition of the term, it is apparent that it "includes the position of our troops at fortified localities or other areas far removed from the scene of battle and from any imminent danger. The phrase is meaningless as a showing of dangerous duty which the accused sought to avoid, unless the proximity of the enemy can be judicially noticed. *** An essential element thereof is that the matter *** must be of common and general knowledge. *** The Board of Review will take judicial notice that the date of 12 January 1945 was during the closing stages of the great German winter offensive and that there were near that time heavy battles in Luxembourg. Judicial notice will not be taken as to the exact location of enemy troops, their precise movement, nor the amount, kind and proximity of enemy fire in the vicinity of ***, on that date. Such matters are not of common or general knowledge to the world at large, nor to the military establishment, but must have then been learned by presence on the field of battle or from classified communications. They can now be determined only from secret reports. *** Judicial notice thereof would be improper ***." "The scant evidence as to the subsequent activities of the company during the accused's absence is of little importance inasmuch as the intent to avoid hazardous duty under AW 28 must exist at the time the accused absented themselves without leave ***. The Board of Review does not herein intend to express the opinion that the phrase 'defense position' denotes lack of hazardous duty, for it is obvious that if there were any evidence that the enemy was near, or endangering, or apt to endanger, the position, the record of trial would sustain the sentence (CM ETO 8358 Lape, et al, 28 Jun 45)

(1st Ind. CM ETO 8358 Lape, et al, 28 Jun 45: "The legal insufficiency *** was apparently due to the inadequacy of the testimony adduced for the prosecution rather than the unavailability of sufficient evidence.")

Accused was found guilty of two desertions in violation of AW 58 under AW 28 circumstances and of AWOL in violation of AW 61 (lesser to originally-charged AW 75, misbehavior. HELD: LEGALLY SUFFICIENT. (1) First AW 58-28 Desertion: "During the early part of August 1944, in the Salerno area near Naples, Italy, accused's company was engaged in training for an amphibious operation. General preparations were made, and both pillbox and water training were pursued. The troops worked with regular army equipment and also with special invasion equipment, such as, invasion gas masks and life belts. It was generally known that an amphibious landing would be made. Accused accompanied the unit to Salerno, took reveille on 3 August 1944. He was not present in the company when the unit embarked in landing crafts on 10 or 11 August for the invasion, but returned to duty 13 August." "The Board of Review will take judicial notice of the widely publicized and generally known facts that the 36th Infantry Division /accused's unit/ participated in heavy fighting in Italy including the bloody landing on the Salerno beachhead, was withdrawn from combat in that country, and took part in the historic invasion of the Southern shores of France beginning 15 August ***. Considering these matters of common knowledge, together with the prosecution's evidence of the return to the Salerno beachhead with its awesome suggestions of past terrors, for amphibious training with invasion equipment, and accused's admission of past service with the division, *** the court could reasonably infer *** that on 3 August 1944 accused knew an amphibious operation was imminent and absented himself to avoid it." (2) Second AW 58-28 Desertion: "On 28 December 1944, accused was returned to his company for duty after a period of confinement. The unit was then in a rest and training area, where it remained until 3 January 1945. On the latter date, a five-hour movement in trucks was made to a new area, where although no small arms or artillery fire was heard, it was assumed that the enemy was to the right front because friendly cannon were faced in that direction. There was of course no training in that area, and the men were all 'dug in'. Accused was told by his squad leader that he was to be on guard that night. Orders came down during the evening to the squad leaders that the company was to make an attack, but the evidence does not reveal whether they were transmitted to the men. The men knew, however, as a general matter, that they were likely to move at any time, and were in fact told not to pack all their equipment, but it is not in evidence whether accused was then present. He was absent without authority the next morning, and some of his equipment was found beside his partially dug foxhole. The attack was not made as scheduled, but the company moved instead to another training area on 5 January. Accused returned to military control 8 January." "Accused in his unsworn statement has in fact admitted the requisite intent to avoid hazardous duty. He said in effect that he twice tried to go into the French campaign but that his nerves would not allow him to do so and that during shelling he loses control of himself. The morning reports *** show that he was back and present for duty on only two occasions: for three days beginning 15 September 1944 and for six days before this offense. They must have been the two attempts to return of which he spoke. These reports and the evidence show also that by his absences

and confinements he has avoided all action in France. Return to his unit in a rest area, a long road trip to the front where he was at least close enough to be near friendly artillery and to have to dig in, in connection with his statements as to his nervousness, and his past evasion of danger, are substantial facts from which the court could likewise infer that his absence beginning 3 January 1945 was with intent to avoid hazardous duty ***." (3) The AWOL was adequately established by morning report entries. (CM ETO 8519 Brigueglio 27 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances occurring about 24 January 1945. HELD: LEGALLY INSUFFICIENT. The evidence established accused's AWOL from 24 January to 5 February 1945. "With respect to the intent entertained by him at the inception of his unauthorized absence, the record shows merely that between 15 January and 15 February his battalion was engaged with the enemy in Luxembourg, that for two weeks during the first half of February it enjoyed a rest period at M** and D**, and that prior to the time accused left *** he was on duty as a 'PW chaser'. Such evidence is legally insufficient to establish the required AW 28 intent." "Had the prosecution properly introduced evidence of the additional facts set forth by the Staff Judge Advocate, and of accused's participation in such hazards of battle at the time of departure, the record would have been legally sufficient ***. But the court could not, nor may the Board of Review ***, take judicial notice of these matters for they are not matters of common and general knowledge to the military establishment ***". "The Board of Review views with misgivings the inadequate preparation and conduct of the proceedings ***. The investigating officer reported that he had secured no statements of witnesses (only one six-line statement by the first sergeant ***; the same officer stated that no explanatory or extenuating circumstances were developed; the advice of the Staff Judge Advocate consists of a mimeographed form; a first lieutenant sat as law member of the court; the testimony of the sole witness was reported on two pages; the defense asked him not a single question and offered no evidence upon the issues; the record does not reveal that either the prosecution or defense addressed an argument to the court; and the review of the Staff Judge Advocate *** is based largely upon facts not in evidence and is most cursory in its treatment of the issue in the case." (CM ETO 8649 Siglesky 14 Jul 45)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. Accused's company was relieved of its front line position, and withdrawn to an assembly area 600 to 1000 yards to the rear for the purpose of reorganization. Accused rifleman apparently participated in the withdrawal, but disappeared almost immediately. He did not return to military control until apprehended a month later. Although he may

have chosen a moment to leave when hazards appeared to be decreasing, "the court may have regarded this only as a temporary respite, as it actually appears to have been, and assumed that the accused also recognized it as only temporary. In any event the unit was in contact with the enemy, the hazards though less than before, were still impressive, and no other reason for desertion is apparent." (CM ETO 8692 Martin, 4 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, commencing about 21 January 1945 and terminating by surrender about 31 January 1945. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL IN VIOLATION OF AW 61. "Where desertion with intent to avoid hazardous duty is alleged, this specific intent must be proved ***. In order to meet this burden it is incumbent on the prosecution to present substantial evidence to establish that accused at the time of his initial absence, (a) knew that present or imminent hazardous duty was required of him and (b) that he intended to avoid its performance ***. While a court-martial is warranted in inferring that an accused had the aforementioned knowledge and intent, in a case where the accused makes his unauthorized departure under circumstances which lead reasonable minds to this conclusion, the record of trial in this case is devoid of any substantial evidence to this effect. The prosecution produced evidence that during the month of January and, specifically on 21 January 1945, accused's company was in a defensive position northeast of ***, Luxembourg, and that about 25 or 26 January 1945 the company went into an attack in another location, taking the town of ***, Luxembourg. A mere showing that accused's organization was in combat during his absence is alone not sufficient to establish his intent to avoid hazardous duty *** and this is likewise true of a general showing that his unit engaged in some combat activities during the month in which the absence occurred ***. All that remains, therefore, is the bare statement that accused's organization was, at the time of his initial absence, in a defensive position. As to the proximity of enemy forces, knowledged by accused that an attack was impending, or that preparations were being made therefor, the record is silent. No circumstances are shown from which the court could reasonably infer that accused knew hazardous duty was imminent and intended to avoid it. *** There is no substantial evidence to support the finding that at the time he absented himself without leave, accused intended to avoid hazardous duty." (CM ETO 8708 Lee 9 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. Accused returned from a hospital 20 September 1944. "He was a member of a group of hospital returnees who were bring returned to their respective companies for duty. His presence on that date at the S-1 office of his regiment *** was determined by standard operating procedure which

involved roll call. The letter order *** showed accused present. "Whether or not accused knew at the time he absented himself that his company was engaged in combat with the enemy and that his return to the company would mean that he would be exposed to the hazards of such combat was essentially a question of fact for determination by the court. He was a hospital returnee, and was one of a group of soldiers who were mustered at the S-1 office of the regiment for the purpose of returning them to their units. They were issued ammunition and combat rations. From this evidence the court was justified in inferring that accused understood full well the purpose of the operation; that he realized that his return to his unit would mean that he would face the same perils and hazards as his fellow soldiers, and that in order to avoid them he absented himself without leave." His organization had been assigned and was engaged in heavy combat with the enemy -- whether at V**, France, or at St. B**, France is unimportant as both places were in the line of the general north-easterly advance of the regiment. "Accused did not report to the company and its morning report showed his AWOL on that date." (Cf: 6637 Pittala; 7032 Barker.) "The holding in CM ETO 7532, Ramirez, is not controlling. In that case there was no evidence either of the tactical situation of accused's company or of circumstances under which he absented himself without leave from which it could be inferred that he knew that his company was exposed to battle hazards and that his absence was motivated by a desire to avoid them." (CM ETO 8955 Mendoza 20 Jul 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) Motion for Not Guilty: "At the close of prosecution's case, defense moved for a finding of not guilty insofar as desertion was concerned. The motion was denied. At the close of its case the defense renewed, and thereby saved, its motion. Again, it was denied. Since there was some substantial prosecution evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tended to establish every essential element of the offense charged, the court's ruling was proper ***." (2) Evidence: (a) "The relevancy of the German offensive some eight or nine days after accused absented himself seems extremely dubious to say the least. The intent to avoid hazardous duty must exist at the time of absence ***. That accused cannot be charged with foreknowledge of the offensive is obvious. However, no substantial rights *** were injuriously affected. The statements of the president and the law member clearly indicate the court did not consider this as relevant on the matter of intent. And accused testified he left because he 'figured' he would not have such chance on the line." (b) "Failure of the court to rule on defense's request that court take judicial notice that the Roer operations did not commence until 23 February 1945 did not injuriously affect the substantial rights of accused. The postponement lacked significance as to intent unless accused claimed a foreknowledge thereof. This accused did not claim." (3) The evidence supported the finding of accused's guilt. (CM ETO 9565 Strange 3 Aug 45)

Accused was charged with three desertions in violation of AW 58 under AW 28 circumstances. As approved, he was found guilty of one AW 28-58 desertion and two AWOLs in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) AWOLS: Morning Reports: Re the AWOLS, "the entries in the morning reports as to the absences alleged were signed by an officer not authorized by then current regulations to sign them." (Personnel officer; 25 October - 30 November 1944.) "The fact that a Third Army circular of 12 April 1944 (Cir. No. 3, Sec.V, par. 3) authorized unit personnel officers to prepare morning reports did not authorize such officers to sign them. The acts of preparation and signature are separate and distinct (pars. 5, 6, AR 345-400, 7 May 1943, then current; pars. 4, 42, ibid, 1 May 1944, next revision; pars. 4, 43, ibid, 3 Jan. 1945). According to Webster, 'prepare' means 'to make ready'. The analogy of a lawyer who is authorized to prepare, but not to sign, wills and deeds is pertinent. Although these morning reports would therefore have been inadmissible ***, the defense counsel in open court agreed to their correctness and in effect judicially admitted, or stipulated to, the facts therein contained ***. Having thereby relieved the prosecution of the burden of proceeding with the evidence, accused may not now receive the benefit of their original inadmissibility. The evidence as to these specifications is therefore legally sufficient to support the findings of guilty as modified by the reviewing authority." (2) AW 28-58 Desertion: (a) Morning Report: "By reason of the Theater directive (sec. 4, cir. 119, Hqs., ETO, 12 Dec. 1944), authorizing personnel officers to sign morning reports, and the pertinent Army Regulations (par.43, AR 345-400, 3 Jan.1945), the report in evidence was without question competent to establish the AWOL beginning 22 December 1944, which is presumed to have continued until the return to military control proven as of 10 January" 1945. (b) Hazardous Duty: "The proof of the tactical situation is scant. Judicial notice will be taken only that the date of 22 December 1944 was during the opening stages of the great German winter offensive, that some of the heaviest fighting of that offense occurred in and around Bastogne, and that this was at a time of great apprehension in the area ***. Thus the evidence as to operations, aided by judicial notice, is proof only that the organization was in an active zone at a crucial time. Accused's statements on 14 or 15 January when confronted with return to combat of his intent not to serve in action again, was some evidence from which reasonable inferences may be drawn as to the state of his mind 19 days before that date when considered in connection with his unsworn statement. Lastly, his unsworn statement at the trial, although couched in terms of nervousness, is in the plainer meaning of its language an admission of continuing fear and cowardice." The finding of guilt was supported. (CM ETO 9597 Jusiak Jr., 25 Aug 45)

Among other things, accused were found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL IN VIOLATION OF AW 61. Although AWOL was admitted by the pleas of partial guilt, the evidence failed to establish the AW 28 circumstances required to permit accused to

be found guilty of the AW 58 offense of desertion. Conjecture and vague testimony would not suffice. "It had to be fairly proven in open court in this case that they absented themselves in the midst of personal dangers in combat, or that such dangers were, when their absence began, within their knowledge, real, personal and imminent." "There is no certain evidence that their company was in battle on 29 November 1944. If it were, the inference is that the action was at Lembach, 44 miles to the north of Barr as authentic maps show, and Barr is on no direct or main route from Provencheres to Lembach. There is no evidence that accused knew of any battle, of where they were going, nor of what their personal status would be at the undisclosed destination. There is no evidence of what their assignments in the company were, nor whether their immediate prospect was confinement, investigation, or duty in such assignment. Each accused pleaded guilty to an absence without leave between Provencheres and Barr. Because of such pleas, perhaps it can be inferred from the weak evidence that these accused were on the truck with the reinforcements. There is no other evidence of hazardous duty in the case. That single fact is too barren to be the basis of an inference of cowardly intent ***. Judicial notice will not save the prosecution's case. The Board of Review will notice judicially the generally and commonly known facts that Strasbourg, a few miles to the north of Barr, fell to the French on 23 November 1944, and that there were at the time of this offense German troops beyond the Rhine 14 miles east of Barr. Judicial notice will not be taken of the exact disposition of our own and enemy troops at a specific time, or of the amount, kind and proximity of hazardous enemy fire at such time and place, for such matters are not of common knowledge. Proof of such hazards is required ***. The specification is not broadened by the use of the phrase 'and important service', for the reason that the words 'combat with the enemy' specify and limit the duty and service alleged." (CM ETO 9665 Hamilton et al 3 Aug 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. The Specification, which contains no allegation of the length of accused's absence, is not therefore defective although it is preferable to allege the duration. The offense of desertion is complete when a soldier absents himself without authority from his place of service with the requisite intent ***, and proof of the duration of the absence is not essential to sustain a conviction of the offense ---." (CM ETO 9836 Cave Jr., 11 Aug 45)

Accused was found guilty of two desertions in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1)First AW 28-58: "Accused was a member of Company H, ***, which on 11 November 1944 was in a rest area at Bayon, France. He was present at a formation that morning, when the company was alerted to move, but

absent at a subsequent formation that day when details of the move were given." He remained away until 10 January 1945. "Reference to authentic maps reveals that Bayon is located on the Moselle River, 17 miles southeast of Nancy, and the Board of Review will take judicial notice that the Metz-Strasbourg general offensive began 8-10 November 1944, and that the front lines had then been long stabilized in the foothills of the Vosges Mountains about twenty miles east of Bayon. Receipt of an alert by accused and this company in a rest area close to the battle lines, followed by his immediate unauthorized absence *** constitutes a set of facts from which the court could reasonably infer intent to avoid hazardous duty ***." (2) Second AW 28-58: This offense occurred at a battalion command post. "As all the military world knows, there was not a possibility that accused could be at a battalion command post within four kilometers of battle and not know of the existence thereof. Since he knew where he was bound, and of the dangers, no logical inference could be drawn from the evidence but that from fear he shirked the terrible duties of combat which others performed without his aid ***." (CM ETO 9862 Irwin 3 Aug 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, from about 19 Jan 45 to apprehension about 26 Feb 45. HELD: LEGALLY SUFFICIENT. (1) The initial absence was sufficiently established by a morning report for 21 Jan 45 showing accused from duty to AWOL on 19 Jan 45. No objection was raised to its admission. "It bore the certificate of the company commander that he was the official custodian of the morning report and that the extract was a true and complete copy for the dates recited. It contains an exact statement of the alleged initial date of absence ***." "The extract *** was properly received in evidence as an official writing (MCM, 1928, pars. 116a, 117a, pp. 118-119, 120-121). The fact that the morning reports of the organization were prepared by the company commander in large part from reports of platoon leaders whose knowledge was based on reports made by the squad leaders who in turn made a physical check of the men present, does not render the morning reports necessarily inadmissible on the ground that the entries are 'obviously' not based on personal knowledge. In the preparation of morning reports by company commanders it is not unusual for them to utilize information reported to them by subordinates acting under their direct or general supervision. This is a reasonable practice growing out of the pyramidical structure of a military unit. It is sanctioned by the custom of the service and is often made indispensable in time of war by the exigencies of military operations in the field. It would seem both needless and imprudent to require a company commander to divert his attention from his mission in order to conduct an immediate and personal investigation of a soldier's unauthorized absence reported to him by a presumably reliable subordinate acting within the scope of his duties. Under field conditions in time of war a competent company commander generally does not, and frequently cannot, make such an investigation, but properly relies in large part on the reports of the platoon leader and non-commissioned officers who were in charge of the missing

soldier. The provisions of the Manual relating to the admissibility of morning reports as official writings are to be construed in the light of these considerations which were undoubtedly well-known at the time the Manual was promulgated." "The morning report entry in the instant case was also admissible *** as a record made in the regular course of business within the meaning of the Federal statute making such records competent evidence of the occurrence or event so recorded (Act of June 20, 1936, ch. 640, sec. 1, 49 Stat. 1561, 28 USCA sec. 695). The rule of evidence contained in the statute cited is applicable in the trial of cases before courts-martial ***. It constitutes an exception to the general rule against hearsay distinct from the exception which permits the introduction of official writings. The former is based upon the probability of the trustworthiness of the records because they are the routine reflections of the day to day acts, transactions, occurrences or events of an organization ***. The exception relating to an official writing is based upon the probability of the truth of its contents because the officer or other person making it had the duty to know the matter stated and to record it (MCM, 1928, par. 117a, p.121). Since the two exceptions are separate and distinct from each other, the limitation contained in the Manual with reference to official writings which excludes entries 'obviously not based on personal knowledge' is inapplicable to records made in the regular course of business (MCM, 1928, par. 117a, p. 121). Furthermore, it is specifically provided in the statute above cited that 'lack of personal knowledge by the entrant or maker' shall not affect the admissibility of a writing or record made in the regular course of business, but may be shown to affect its weight. There is no reason in principle why an official writing, or what purports to be an official writing, may not be admissible as a record made in the regular course of business if it meets the requirements of the statute. There is nothing in the Manual for Courts-Martial which leads to the conclusion that a morning report may be introduced in evidence only as an official writing. The two bases of admissibility are not mutually exclusive and may coexist with reference to the same writing." "The morning report entry in question meets all the requirements of the Federal statute. It was made in the regular course of the organization's business. By the terms of the statute, the word 'business' is expressly made to include 'business, profession, occupation, and calling of every kind'. It is the normal practice of reporting units to make entries in the morning report within a reasonable time after the occurrences or events recorded. The entry in this case was made within two days after the commencement of the alleged absence. Thus to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter', was fulfilled ***." (Dissent.) (CM ETO 10199 Kominski 17 Sep 45)

Accused officer was found guilty of desertion in violation of AW 58, under the AW 28 circumstance that he quit his place of duty as a bombardier on an airplane with intent to avoid the hazardous duty of performing as bombardier, and that he absented himself until after the completion of the particular mission on which he was scheduled to fly. He was also found guilty of a violation of AW 96 for the offense of wrongfully refusing to go on the mission on that same day. HELD: LEGALLY SUFFICIENT. (1) AW 28-58: Bombardier: "The evidence showed that accused, a bombardier, was ordered to participate in a combat mission over Germany; that he attended a briefing ***; that he assumed his post in the plane to which he was assigned; and that while the plane was preparing to take off he abandoned his post and thus prevented the plane from participating in the mission. Clearly, his place of duty was in the plane and in thus abandoning it, he was guilty of absence without leave. The orders directing accused to participate in a combat mission over enemy territory were orders that directed the performance of hazardous duty (CM ETO 4138, Urban). Accused's presence at the briefing and his partial compliance with these orders makes it manifest that they were brought to his attention. Lastly, his abandonment of his post on the airplane at the threshold of its mission, admittedly because he was 'yellow', sufficiently establishes that his intent in so doing was to avoid hazardous duty." "The correlation of the legal principles" herein with those in the Urban case "is a matter of technical value and interest. Urban was charged with an unauthorized absence from his organization with the intent to avoid hazardous duty. The proof showed that he absented himself from his station for a period of six days with full knowledge that he, and the rest of the crew, were in combat operational status and were under anticipated orders to fly on combat missions at any time. These facts justified the court in finding that his unauthorized absence from his organization was motivated by his desire to avoid the perils and hazards of these future combat flights which he knew were certain to occur. Under these circumstances it was necessary for him to absent himself from his organization in order to accomplish his purpose. In the instant case, /accused/ was charged with absenting himself from his place of duty, viz, the bomber as it was about to depart on its mission, with the intent to avoid hazardous duty. Proof of his alleged misconduct was therefore narrowed to the specific and particular perils and hazards of this particular mission. The case therefore may be assimilated to the well-known pattern of cases involving absences without leave to avoid hazardous duty by Ground Force personnel when confronted with immediate, specific hazards of a present defined mission ***." (2) AW 96: Refuse to Fly: The AW 96 specification "in effect alleged that accused wrongfully refused to accompany his crew which had been ordered by Captain **** to execute a combat operational mission over enemy held territory." "The gravamen of the offense charged is a wrongful refusal to accompany his crew on a combat mission that had been ordered *** rather than a willful disobedience or a failure to obey ***. Consequently, the failure to prove the identity of the officer who ordered the mission did not mislead accused or prejudice his substantial rights." The evidence sufficiently supported the finding

of guilt herein. (3) Multiplicity: "Accused conduct constituted two separate and distinct offenses." The AW 28-58 offense required accused's specific intent to avoid hazardous duty at the time he left his place of duty (the bomber). This element is not involved in the second offense. "It was competent for Congress to denounce accused's conduct as constituting more than one offense and to authorize punishment for each offense." There was no multiplication. (4) "Combat flying reaction short of legal insanity is, of course, no defense. Accused's mental responsibility for his conduct was under the evidence solely a question of fact for the court ***. (CM ETO 10363 Mangiapane 28 Jul 45).

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "Accused, when told the anticipated crossing of the Roer /River/ would probably be against the enemy and was 'figured' to be dangerous, voiced disapproval of the idea and stated when the shells started to come he would not be around- that he was going AWOL because one more would not hurt him. Three days later he absented himself without leave. At that time his unit was in the H*** Forest near P***, Germany. The H*** Forest extends from P*** eastwardly for about six miles to within about three miles of the Roer. Of this the court could take judicial notice ***. Thus it appears that at the time and place accused absented himself without leave he and his unit were three to nine miles from the Roer. Four days later his unit made the crossing. It was not necessary to show that the assault crossing, normally a hazardous operation, was, in fact, as hazardous as anticipated. The inference is compelling that accused absented himself to avoid the crossing: - He declared his intention. The material intent was his intent at the time he absented himself without leave ***." (CM ETO 10743 Martin 23 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt. (2) Stipulation: "Neither accused nor his counsel expressly consented to the stipulation relating to termination of the alleged desertion, and it does not appear that the court accepted it. Since accused's unsworn statement indicates that he surrendered voluntarily to military control, the court should have scrutinized the stipulation more closely and should have rejected any part of it not satisfactory to accused ***. However, since the offense was committed at the instant accused left his organization with the necessary intent ***, and since proof as to the termination is immaterial ***, accused's substantial rights were not injuriously affected. (2) Date of Trial: "Although it appears that accused was tried on the same date the charges were served upon him, defense counsel expressly stated that accused did not object to being tried at the time. Accused's unsworn statement suggests a probability that he would not have benefited by further time in which to prepare for trial, and in the absence of a showing of prejudice resulting to him from trial on such short notice, the findings cannot be disturbed ***." (CM ETO 10955 Volatile 11 Aug 45)

Accused was found guilty of a breach of arrest occurring in November 1944, in violation of AW 69; and of a December 1944 desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) Restraint Status; AW 28-58: "The fact that accused was in a temporary status of restraint did not render him immune from such hazardous duty or important service which his commanding officer might have been fit to impose upon him at any time and clearly did not preclude the commission by him of the alleged offense of desertion." (2) Specification: In the absence of a direct attack or a showing of prejudice, the failure of the AW 28-58 specification "to allege the specific nature of the hazardous duty or important service which accused intended to avoid, in conformity with the approved form, clearly was not such a material error as to require disapproval of the finding of guilty ***." (3) Evidence: Accused had knowledge that his company was to move out the day of his alleged offense to a position on the line, "although he testified that he thought the position would be a defensive one. Other testimony indicated his preference for rear area. He admitted he left because of a phobia about looking at dead bodies. He was away 34 days. His guilt of AW 28-58 was established, as was his separate guilt of the charged AW 69 offense. (CM ETO 11258 Pergolizzi 10 Aug 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) Condonation: While ordinarily it will be presumed that the defense of condonation does not exist "where not raised at the trial by defense counsel ***, further inquiry ***appears proper in the instant case because of certain facts appearing in the allied papers attached to the record of trial." "In deciding this question, it should be remembered that restoration to duty is not generally regarded as a defense and operates as such only in the single case of desertion, where it is hedged about with certain important restrictions ***. It may also be noted that Army Regulations in force when this rule was first adopted differ from Army Regulations on this point currently in force, and apparently contemplated, as present Army Regulations do not, either the express removal of a prior administrative charge of desertion as having been erroneously made or the express restoration to duty of an admitted deserter under certain *** penalties set forth in the then regulations ***. It is felt that the rule which makes restoration to duty without trial a defense to the desertion to which such restoration relates should not be extended but, on the contrary, should be narrowly construed. *** In the instant case it appears that accused's restoration to duty was made primarily on the recommendation of the division assistant adjutant general, to whom the matter had been referred by a warrant officer in the office of the staff judge advocate, and that neither the commanding general nor his staff judge advocate had knowledge of the action taken. Without attempting to set forth the exact procedure necessary, it is concluded that the action here taken was not such as to constitute an 'unconditional restoration to duty by an authority competent to order trial' and hence did not amount to constructive condonation of accused's offense ***." (2) The evidence supported the finding of accused's guilt. (CM ETO 11401 Schultz 8 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances (18 November 1944). HELD: LEGALLY INSUFFICIENT. (1) Except for the morning reports, there is no competent evidence that the absence was without leave. *** The morning reports were signed by the regimental personnel officer, rather than by the commanding officer, as required by AR 345-400, 1 May 1944, sec VI, par 42. "The presumption of regularity *** cannot arise *** because the morning reports were signed by an officer not authorized by the ARs to sign the same and were therefore not admissible in evidence. They possessed no efficacy as official writings ***. Attention is particularly invited to the fact that par. 42, AR 345-400, 3 January 1945, was not in effect on the dates of these morning reports. Likewise, the directive of the CG, ETO, contained in Cir 119, ETO, 12 December 1944, sec 4, was not in effect. Were either applicable, the morning reports would have been admissible. (2) Surrender: "Nor will absence without leave be inferred from the proven surrender of accused at a distant station. The record of trial is therefore legally insufficient to support the findings of guilt and the sentence. (Note that accused had been recommended for the Congressional Medal of Honor, for action on 6 June 1944.) (CM ETO 11693 Parke 5 Jul 45)

Accused was properly charged with desertion, in violation of AW 58 under AW 28 circumstances. He partially pleaded guilty in violation of AW 61. He was found guilty per his plea of AW 61 guilt. HELD: LEGALLY SUFFICIENT. (1) Guilty Plea: Specification: "The accused in effect pleaded guilty to the following specification, and was found guilty thereof 'In that *** did absent himself from his organization and duties at ***.' The customary formal words 'without proper leave' were omitted from plea and findings, and the words 'and duties' were used in lieu thereof. Obviously, lack of authority to be absent is a necessary element of the offense ***, but certainly no stereotyped and invariable form need be used to state it. If the accused had leave or was evacuated through medical channels or assigned elsewhere, he would have no duties at the station alleged. The finding of absence 'from his organization and duties' excludes the possibility of any other absence than one without leave, and was therefore the equivalent of the customary form. It was the same as a finding that 'he was absent from his organization where it was his duty to be and where he had duties to perform' viz., without leave. This is the case of an interpretation of a finding and not of a specification.. The Board of Review should not be too technical in weighing the words used ***. It is not contemplated in the military judicial process that findings should become entangled in the sterile

artificialities of common law verdicts. However, this liberal attitude does not excuse the carelessness here exhibited which is deplorable." (CM ETO 11987 Johnston 20 Jul 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, from 9 Dec 44 to 14 Jan 45; and of an escape from confinement on 14 Jan 45 in violation of AW 69. HELD: LEGALLY SUFFICIENT. "On 9 Dec 44, the mission of accused's company was the 'tactical operation' of crossing the Saar River in the vicinity of Dillingen, Germany at 0330 hours. The company issued boat numbers, boat orders, and the order of march from the 'assembly area' to the river line. Accused was present at the 'orientation' ***." The assembly area was about three miles from Dillingen (see authentic maps). "He was not present when a check of personnel was made 500 yards short of the river line and could not be found despite search. There was some 'confusion' in the crossing ***. A statement by the accused at the time of return to the company that he 'took off' because he 'couldn't stand it any longer' was excluded ***." "Reference to military maps *** shows that Dillingen *** is about two miles north of Saarlautern, five miles from the [illegible] and about one mile east of the Saar River. The Board of Review will take judicial notice of the following; that the point so located was within the German West Wall or Siegfried Line, a belt of fortifications which extended from Switzerland to the North Sea and which was not traversed by our troops south of the Luxembourg border until the Spring of 1945 and that the Battle of Saarlautern was in progress in the first half of December 1944. These are general facts of history, published in the press throughout the world as they occurred, and therefore common knowledge of which judicial notice is proper ***. Thus the evidence, specific as to place and time, when focused within the facts of common knowledge is that of an impending night crossing amidst Siegfried Line defenses about two miles from the combat area at Saarlautern. The evidence is also that the crossing was a combat action against the enemy. Among military men certain professional terms have a technical meaning, as exact and determinative as the technical terms of other professions. The record of trial *** is replete with such terms. For the convenience of the lay reader, some of these *** have been underlined in the statement of the evidence ***. TM 20-205, Dictionary of U.S. Army Terms, 18 Jan 44, contains the following definitions: Operation: Military action; carrying out a military mission. Tactical operations Combat operation. Assembly area: Area in which the elements of such command are assembled preparatory to further action. In addition 'orientation' may be judicially defined as the process of instructing personnel as to their environs and duties, and 'situation' as the location and combat relation of our troops and those of the enemy at a certain time, or as the tactical or strategic picture at the time. With commonly known facts judicially noticed and terms defined, the clear proof in this case is: Accused was told the

location of the enemy troops, and that a combat military action of crossing the Saar River to the east was ordered. He was present about two miles from the river at Siersdorf where the company was assembled preparatory to action, but absent after the march then made to the river. The crossing of this stream in the Siegfried fortifications began at 0330 hours in a confused manner about two miles north of the active sector in Saarlautern. Thus properly considered, the record of trial shows beyond all reasonable doubt that hazardous duty, of which he must have known, was imminent at the crossing or soon thereafter, and the court was justified in inferring that he left *** to escape the dangers he feared ***." (CM ETO 12007 Pierce 8 Sep 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "Accused's platoon had been attached to the **th Infantry in pursuit of the enemy after the Saint Lo 'break through' in Normandy. "Immediately prior to accused's departure his platoon was engaged in mine removal work and was in the spearhead of the pursuit of the Germans. That such duty was hazardous will not be gainsaid. Accused had been engaged in such work. It is therefore a fair and just inference that accused was actually engaged in hazardous operations when /an/ order was received by the platoon to return to the company. There is no substantial evidence that he knew of the order *** and not a scintilla that such return meant that the platoon's hazardous duties were indefinitely suspended. Rather the evidence supports the conclusion that all members of the platoon understood that any return to the company area meant there would be a temporary rest period of 3 or 4 days and then the platoon would resume its usual operations of perilous mine removal work in pursuit of the enemy. Such interludes of rest between periods of hazardous duty are the common lot of combat engineer battalions with infantry divisions. The inference is most impressive that accused knew and understood clearly the consequences involved in the return to the company and that continued hazardous duties lay ahead. These were the perils and hazards he sought to avoid. The situation thus presented is of the same nature as that of a typical battleline desertion case. The 'enemy' which accused faced were not German soldiers *** but the dangerous mines planted by them on the roads to prevent and hinder the American advance. Accused had actually engaged in this highly perilous work and knew the risks involved. He left his command without authority in the midst of a hard campaign at an opportune time in order to avoid these certain future hazards. His guilt was proved ***." (Distinguish CM ETO 5958 Perry-Allen; compare CM ETO 5079, Bowers.) (CM ETO 12044 May, Sr 5 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. An extract copy of a morning report which was used "did not set forth any signature or initials on that part of the reports extracted. The certificate to the extract stated in pertinent part: '*** the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report' /relating to accused/. The personnel officer testified that he signed the extract copy and was the custodian of the original, of which the copy was a true representation; that it was not his duty to know the truth and correctness of the remarks; and that 'the field copy' thereof was submitted to the company in the field and was not changed. There was no testimony as to who signed the original reports. The defense counsel objected to the introduction of the extract copy on the grounds that it was hearsay. His objection was overruled." "Strong reason exists for holding in this case that the circumstances of the presence of the accused on the night march, the heavy fire at the river on the unprotected assault boats, his absence across the stream, and apprehension seven months later in a rear area remote from the battle lines, prove the unauthorized absence from 6 September 1944 until 1 April 1945 ***. Be that as it may, *** the morning report was properly admissible and competent to prove the AWOL for the period alleged. It is presumed in the absence of evidence to the contrary that the original, of which the extract was but a copy of a part, was regular and signed in another and proper part by an officer competent to sign it, and cognizant of the facts therein contained ***. The finding of the court that accused left his organization with the intent to avoid hazardous duty was amply supported ***." (Compare prior case of CM ETO 4756 Carmisciano.) (CM ETO 12619 Hatfield 1 Sep 45)

(1st Ind; CM ETO 12619 Hatfield): "The court and the personnel for the prosecution and defense tried the case on the theory that extract copies of morning reports must be identified by a competent officer before they are admissible in evidence. The law is that extract copies are admissible without such identification in court. They should contain, however, the signatures or initials authenticating the original, and the extract copy introduced in this case did not contain such signatures or initials. It is better practice in courts-martial to introduce the original morning reports identified by some person who can testify that they were such original reports of the command involved. After the introduction of these original reports, which are the best evidence, an extract copy may be substituted for them with leave of court. In this case the defense counsel should have asked the witness who, if anyone, signed the originals. If the originals were not signed by a person having personal knowledge, the properly identified original work sheets signed by a person having knowledge thereof should have been introduced in evidence as official statements."

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilty. (2) The Specification alleges that accused absented himself at or near Guillenello, Italy, while the proof shows that at the time he absented himself his unit was near the town of Valmontone, Italy. While these two towns may have been near each other, this fact is not shown by the record. However, there is no variance between the date alleged and the date proved and, since accused was shown to have absented himself on that date and was not thereafter seen with his company, the specific absence to which the Specification relates is clear and, in the absence of objection, it may be assumed that the Specification adequately apprised accused of the offense ***. Further, the record as a whole is sufficiently precise to preclude a second trial for the offense involved. Thus, the variance *** is not fatal." (3) The time of the termination of accused's absence was not shown. However, this is immaterial because the offense charged 'is complete when the person absents himself without authority from his place of service' with the necessary intent ***." (CM ETO 12729 Lanque 25 Aug 45)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances occurring on or about 23 November 1944. HELD: LEGALLY SUFFICIENT. "The single issue *** is whether the morning report entry of 11 January 1945", reading "dy to AWOL 23 Nov 1944 time unknown" "is proof of accused's presence, with an ensuing absence from the company on 23 November. If it is, the events of 20 November, recited in evidence, are of little significance. It has already been held that a like entry, contemporaneously made, is prima facie proof of presence at the time stated (CM ETO 7312, Andrew), but the entry in the instant case was made more than six weeks after the event, and nine days after the preference of charges. As to the delay, the following language is binding: 'On the other hand, documents which may correctly be termed 'official writings' gain admissibility in evidence because of an official duty upon the entrant to record the true facts. It is not necessary that the entry be made contemporaneously with the happening of the event recorded. This principle permits the delayed entry in a morning report to be received in evidence as proof of the unauthorized absence of an accused which occurred prior to the date of actual entry' (SP JGN 1945/3492, 29 March 1945, IV Bull, JAG 86) ***. Nor is the fact that charges were preferred at a prior time any cause to impugn the integrity and competence of the entry. Records concerning personnel must be made correct for many administrative reasons other than courts-martial; for example, if the entry was in lieu of 'missing in action', notification and stoppage of benefits to next of kin were necessary, or if the record showed continuous duty, pay and length of service adjustments were required. It is but incidental that these records, which must be made correct, may be introduced in evidence. It is therefore" held "that proof was

made of accused's presence in the company on 23 November and of his absenting himself that day without authority." The additional AW 28 circumstances were likewise adequately shown. (CM ETO 12951 Quintus 14 Jul 45)

Accused was found guilty of two desertion, in violation of AW 58 under AW 28 circumstances, (a) from about 18 December 1944 to about 22 January 1945, and (b) about 25 January to about 23 February 1945. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL IN VIOLATION OF AW 61. (1) First Desertion: This AWOL, commencing 18 December 1944, was sufficiently shown. However, the proof of the existence of imminent hazardous duty was inadequately shown. The unit was "outposting the Rhine" around that date "and somewhere between there we went into a defensive position on a hill." There was occasional shelling. "Even assuming that 'outposting the Rhine', accompanied by occasional shelling, constitutes hazardous duty within the meaning of AW 28, it is obvious that the evidence shows not that such duty was in progress on 18 December 1944 when accused's absence began, but merely that it existed 'around' that date. This is insufficient to prove the existence of hazardous duty at the time of commencement of the absence ***, and whatever value it might have as evidence that such duty was then imminent is of no consequence here in view of the complete failure of proof that accused was or had reason to be aware of it. (2) Second Specification: "This is based upon an absence proved to have commenced on 23 January 1945 ***. It is shown that 'on or about' that day, accused's organization was 'preparing to move in behind the 30th and 7th in reserve, after which we were to go through them and attack in the Colmar Woods'***. The company was assembled for briefing on the attack and was briefed, but the witness 'wouldn't say everyone was there' The attack actually occurred and the unit sustained casualties. There is no evidence of combat activity or other hazardous duty on the day accused's absence began and, as previously indicated in connection with Specification 1, evidence that preparation and briefing for an attack occurred on or about such day constitutes inadequate proof that such activity occurred on or before the day ***. Therefore, as far as the record reveals, the preparation and briefing apparently relied on to show present or imminent hazardous duty may well have occurred after accused's departure, thus foreclosing the possibility that he was aware of it. This, combined with the absence of proof that accused was present at the briefing in any event, removes any basis for inference that he was aware of the impending attack and deserted for the purpose of avoiding it ***. There is no proof that his unit was in combat or even in reserve, but 'was preparing' to go into reserve. Of course, the mere fact that his organization engaged in combat during his absence is insufficient to establish an intent to avoid hazardous duty at the time of departure ***." (CM ETO 13103 Israel 31 Aug 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "While the evidence is meager, it does show that accused went AWOL on 21 February 1945 from Germany where his organization had been in combat and could reasonably anticipate further hazardous duty, that he told his acting first sergeant that he had done his share at the front and 'didn't want to go to the front again since I was going to be court-martialed', and that he was apprehended after a ten day absence in Luxembourg, all were facts from which the court could properly find that at some time during his absence he entertained the intent not to return ***." (CM ETO 13171 Vallejo 23 Jun 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, and that he remained absent until apprehended in Paris about five months later. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL, in violation of AW 61. "The prosecution adduced testimony to show that accused left his company when it was in a rest area somewhere in the country, that thereafter it spent three days in Paris and that at least one member of his squad, who was also the only witness in the case, had no information or knowledge as to where they were going or what their next action would be. There is no evidence *** tending to show that accused had any notice or knowledge of impending hazardous duty at the time he absented himself without leave. It is true the morning report shows his absence to have been initiated on 28 August instead of 'about the 14th' of the same month, but the conclusive effect of the prosecution's testimony as a whole is to indicate initial absence on or about the earlier date. Testimony that thereafter accused's organization proceeded to Paris, thence 'following' the enemy to the Siegfried Line and later engaged them in the H** Forest while accused remained AWOL, is no proof of knowledge or notice to him at the time of his departure, of hazardous duty impending, or that his going absent without leave was with intent to avoid it. Had desertion been charged in general terms, the duration of the unauthorized absence and its termination by apprehension would have been circumstances highly relevant to an issue, which was eliminated by the language of the specification in this case, viz., intent not to return." (CM ETO 13961 DeCarlo 14 Jul 45)

Although no evidence was adduced in this AW 58-28 case "proving that accused absented himself at "A**, France" and 'LaM**, France', as alleged, such failure of proof does not affect the validity of the trial inasmuch as the place of the commission of an alleged offense does not have the same importance or significance in military matters as it does in civil courts where the jurisdiction of the court is dependent upon the situs of an offense ***." (CM ETO 14095 Bijeaux 20 Jul 45)

Accused were found guilty of desertion in violation of AW 58, and in violation of AW 58 under AW 28 circumstances; and also of escape from confinement in violation of AW 69. HELD: LEGALLY SUFFICIENT. (1) Procedural Errors: (a) Relief of Law Member: "The order *** appointing Captain ***, law member, for the trials of accused, did not expressly relieve the law member *** previously appointed ***. The relief of *** as law member was implicit in the appointment of Captain *** as such." (b) Member's Opinion: "A member of the court stated he had formed an opinion that accused were guilty. He was excused and withdrew. While the member should not have expressed his opinion, *** no substantial rights of the accused were affected thereby," (c) Locations: Question Accused: "The prosecution asked accused if St. V**, Belgium, where they were apprehended the first two times, was a suburb of V**, Belgium, where they were alleged and found to have been apprehended the first two times. It was improper to have so asked accused, particularly in view of their elections, subsequently expressed, to remain silent. However, no substantial rights were injuriously affected thereby. Their offenses were complete when they absented themselves without leave. The place of their apprehension was immaterial." (2) AW 28-58. These offenses were proved. "As to Specification 1, the variance between the allegations, findings, and actions on the one hand that accused deserted at W**, Germany, and the proof on the other hand that accused deserted at H**, Belgium, prejudiced no substantial rights ***. The place of desertion is not of the essence of the offense ***." (3) AW 58: "Each accused's unauthorized absence of 35 days in an active theater of war, commenced by an escape from confinement while awaiting trial for and following hard upon two unauthorized absences to avoid hazardous duty, and terminated by apprehension, supports the court's inference and findings that at some time accused intended not to return ***." (4) AW 69 Escape: "Accused were alleged and found to have escaped from confinement ***at H**, Germany. The escapes were proved to have been made at R**. The reviewing authority" changed the place of escape to H**, Germany. "Clearly, escapes at R**, Germany were not lesser included offenses of escapes at H**, Germany - assuming the place of escape to have been material. However, the place of escape was not of the essence of the offenses ***. Thus, the variance" was not prejudicial. "The limited approvals of the findings is not to be construed as disapprovals of the finding of guilty of" the escape specification "of Charge II. While the reviewing authority in approving only so much of Charge II and Specification as hereinbefore set out, failed to declare affirmatively that the misconduct was in violation of AW 69, the approved findings were clearly in violation of AW 69 and negate a construction that the reviewing authority did, in fact, disapprove Charge II. Even should the actions be construed as disapproval of the findings ***, the resulting failure to designate an AW, would not be material in the instant case. The approved findings were of an offense of which the court had jurisdiction ***." (CM ETO 14133 Corriveau, et al 20 Jul 45)

Accused was found guilty of desertion on about 30 Sept 44 in violation of AW 58 under AW 28 circumstances, remaining away until surrender on about 20 April 1945. HELD: LEGALLY SUFFICIENT. "It is clear that the competency of the several morning report entries is vital ***. Considering first the several entries of the morning reports found in 'Record of Events' as evidence of the element of hazardous duty alleged, they contain matter descriptive of combat action in which the company was engaged on the dates and places indicated. These historical events were proper material to be entered in the company morning reports ***." "The entries of the morning reports for 29 Sep, 30 Sep, 1 Oct and the others (described) "were authenticated by an Assistant Adjutant, CWO Dickson, who was also assistant personnel officer, and who in the absence of Captain **, personnel officer, was acting personnel officer. Because of the fact that these entries were made prior to 12 Dec 44, they were not admissible ***. Neither did he possess that authority by virtue of the fact that he was acting personnel officer at that time ***." "However, *** these entries were properly admissible in evidence under the Federal 'Shop book-rule' statute (Act June 20, 1936, c. 640, Sec. 1; 49 Stat. 1561; 18 USCA 695). From the testimony of the company clerk, it appears that entries *** during the period in question were made from morning report summaries signed by the company commander and submitted through channels to the personnel section in the rear echelon from which data company clerks prepared the morning reports. It further appears that it was the practice" for CWO Dickson, "Assistant Adjutant, to authenticate the morning reports in the absence of Captain **, Personnel Officer. An examination of the pertinent entries reveals that such entries were made at or within a reasonable time after the occurrence of the event therein set forth. The requirements of the Federal 'shop book rule' statute appear to have been met in that the 'Record of Events' entries were made in the regular course of business and that it was the regular course of business to make such entries at the time of the event. The circumstances here showing viz: the lack of personal knowledge on the part of the extract or maker did not make the entry inadmissible. By statutory declaration such factor simply affects its weight." The comments contained in IV Bull JAG p 86 "have been carefully considered by the Board of Review and in its opinion they are not intended to mean that entries of a morning report if shown to be made in the regular course of business and at the time of the occurrence of the event recorded, are removed from the 'shop book rule' but were intended to emphasize the basis for admissibility of morning reports made in the normal way on the theory of being an official writing and therefore not dependent on a showing of the conditions precedent for application of the 'shop book rule'. While there is language contained therein which taken alone and removed from its context might be construed as excluding the Federal 'shop book rule' statute as one of the bases for admission of morning reports in evidence, a fair interpretation of the opinion taken as a whole leads to the conclusion that the Judge Advocate General sought to clarify the status of morning reports as official documents and did not intend to deny the application of the Federal statute where the

vidence in a given case supports its use." A correction entry of 22 pr 45 for a 2 Oct 44 entry, authenticated by a personnel officer, was roper (See CM ETO 14367 Cannise). "When accused was found not to ave become a prisoner or a casualty, his status must necessarily ave been that of AWOL", and the previous MIA entry was properly hanged. "Although the morning report entry showing accused's eturn to military control is at variance with the place alleged n the specification, no substantial rights of the accused are rejudiced thereby ***. The law member's ruling which prohibited he defense from showing the complete change in officer personnel of ccused's company was not prejudicial." "When the operations of the ompany at the time and place shown by the historical entries on the orning reports are synchronized with accused's unauthorized eparture from his organization, there was *** substantial evidence rom which it was fully justified in drawing the conclusion that ccused absented himself without leave to avoid the perils and azards of battle which he knew existed and which he sought to void ***." (CM ETO 14165 Pacifici 17 Oct 45)

Accused was found guilty of desertion in violation f AW 58 under AW 28 circumstances. HELD: LEGALLY INSUFFICIENT FOR ORE THAN AWOL IN VIOLATION OF AW 61. "The record contains no vidence that accused was notified that he was to be relieved from uty with the service company, with which he had been for some two eeks trying out as a truck driver, and returned to his line ompany. Neither is there any evidence that accused was aware of azardous duty, and the record is devoid of evidence of circumstances urrounding the absence from which an inference might be drawn egitimately that accused entertained the intent requisite for desertion." CM ETO 14138 Spitzer 18 Aug 45)

Accused was found guilty of desertion in violation of AW 58 nder AW 28 circumstances, to wit; that he went AWOL on about 22 arch 45 with intent to avoid hazardous duty, to wit: making an assault rossing of the Rhine River. He remained AWOL until his surrender at ankfurt on about 31 Mar 45. HELD: LEGALLY SUFFICIENT. (1) Evidence: he Board of Review will take judicial notice that on 22 March 1945 the lied armies had no bridgehead across the Rhine River south of that Remagen, more than 50 miles to the north of Oppenheim, and that on e night of 22 March the Third Army made its historic assault boat rossing of the Rhine, at Oppenheim ***. The question is therefore uerely presented whether prospective participation in that crossing s hazardous duty reasonably apparent to accused. The proof does t show the location of enemy troops, and that fact is too specific r judicial notice ***. However, the Rhine was the last great barrier fore the heart of Germany, a broad river, and one crossed by invasion eldom in history. What perils lay beyond it were not then known, but

it must have been evident to accused as it was to the world that the Germans must protect it or abandon any hope of peace without defeat. It could not have been anything but a fearful prospect, a dangerous and hazardous venture, and the court could rightfully infer that accused intended to avoid it ***. "Accused had been informed of the impending crossing ***, and had been drinking but was not drunk ***." (2) Comments: "Inasmuch as the accused was on trial for his life, the Board of Review may perhaps with propriety, express its concern with the inadequate investigation, and the lack of inquiry by counsel and court into the full facts ***. That the accused was drinking liquor when alerted was, for example, a circumstance which fully developed might have shown another cause, that of drunkenness, rather than cowardice at the time of the actual offense. The trial was perfunctory. In view of the unsatisfactory state of the record, and in justice to the accused, the Board of Review *** expresses the opinion that the trial reflects no credit upon the administration of military justice or upon the Army. (CM ETO 14510 Collins 22 Sept 45)

Accused was found guilty of one desertion under AW 28 circumstances and of three more straight desertions, all in violation of AW 58. HELD: LEGALLY SUFFICIENT. The evidence supported the findings of guilt. "While the last two absences of accused did not appear to have been initiated when combat was imminent and personal danger near, the evidence, including his signed statements, conclusively indicate that each of his charged unlawful absences were made with the obvious intent to avoid any possible hazardous duty. The intent necessary to the offenses here does not rest upon the implications and circumstantial evidence surrounding each running away but is declared by accused in his statements as his purpose in absenting himself. He knew that always somewhere just ahead was a dangerous enemy they must attack and that in so doing, casualties would probably be suffered. Only by absenting himself from his organization could he avoid sharing that hazardous duty." (CM ETO 14685 Knutson 27 Jul 45)

Accused was found guilty of two desertions in violation of AW 58 under AW 28 circumstances: (a) from about 2 Apr to 11 Apr 45; and (b) from about 16 Apr to 20 May 45. He was also found guilty of two violations of AW 96 by breaching his restriction on 2 Apr and 16 Apr 45. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL IN VIOLATION OF AW 61 ON THE AW 58 SPECIFICATIONS. (1) First Specification: Accused was AWOL as alleged. "On 2 Apr 45 his organization moved out of the assembly point at Reitberg, Germany and continued on toward the Elbe River. There is no evidence that his unit ever contacted the enemy or performed any combat operations on or after 2 Apr 45. It was conceded that no casualties were sustained after 16 Apr and after crossing the Rhine on 25 Mar until a time not designated, the company

suffered a 'few minor casualties.' History will show that insofar as actual combat is concerned, hostilities had ceased in that vicinity during April ***. There was no evidence that the accused's organization was subjected to enemy fire or even anticipated any. A mortar battalion usually operates from the rear similar to an artillery organization. It is not often subjected to small arms fire****It is not enough to say that it was supporting the 30th Division, which in turn was supporting an armored division, which may have been in contact with the enemy. Furthermore the record of trial is devoid of any evidence as to accused's whereabouts or his relation to the company at any time prior to his initial absence and there is no evidence that he participated in or was even aware of his organization's activities for the week or five days preceding 2 Apr 45. Likewise, while there is evidence that accused's platoon commander informed his squad leader of an alert and that the information 'was handed down by way of command', there is a complete absence of any testimony that accused was present *** or that this information ever actually reached him ***. The record is vague and indefinite as to the actual time of accused's departure ***." The platoon commander stated that even at that time it was not known whether they were going into an assembly point or into position." This evidence failed to show more than an AWOL. (2) Second Specification: The AWOL was shown. "While there is evidence that early on the morning of 16 April, accused's company moved out into a firing position across the Elbe River, there is no testimony that discloses he either knew of this move or was expected to participate in it. On the contrary there is positive testimony that since his return from his first absence, his company commander ordered him kept in the company rear echelon and, as a matter of fact, he was kept there and ordered to work in the kitchen. There is no showing that the position he occupied in the kitchen was in any way hazardous and, at the time he absented himself, this was his place of duty. The fact that his unit did not suffer any casualties during this operation lends credence to the inference that it was not hazardous. Likewise the record fails to disclose accused was aware that any 'important service' as contemplated by AW 28, was expected of him." (3) The breaches of restriction were shown. (4) "Penitentiary confinement is not authorized for the offenses of AWOL or breach of restriction ***." (CM ETO 14905 Murtha 13 Oct 45)

Accused was found guilty of misbehavior before the enemy in violation of AW 75; of AWOL in violation of AW 61; and of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY INSUFFICIENT. "The question is *** presented whether the court's refusal to grant a continuance was an abuse of discretion, and if so, whether such abuse deprived the accused of due process of law. Trial of accused on two capital charges, after an indication of possible want of mental capacity, on the third day after service of the charge sheet, creates a situation warranting close scrutiny of the action of the court in peremptorily ordering trial over accused's objection. Trial at the

time was not shown to be required or even desirable for reasons of military necessity or for any other cause. *** (In this connection it will be noted that although the U.S. was at war in other parts of the world, the trial was held more than a month after the German surrender; thus the situation comes within at least the spirit of "AW 70 ***)". Accused herein requested an extention, and "presented evidence indicating that had it been afforded he might have presented a valid defense ***." It is obvious that expedition was not required because, although the charges were referred on 2 June, they were not served until 15 June. Among other things, in his opposition for the motion for continuance the trial judge advocate quoted from MCM 1928, par. 64a, p. 50, "to the effect that the court will accede to the views of the reviewing authority on a question which is merely one of law." He preceded this statement with another statement that the Staff Judge Advocate wanted the trial to go ahead. The provision in the Manual "prescribes the procedure when a reviewing authority has returned a record to the court disagreeing on its action on a special plea or similar objection and has no application to the situation presented by this record, and its wrongful citation to the court could well have been misleading." Accused was deprived of due process of law. The record is legally insufficient. (CM ETO 15216 Miller 28 Sep 45)

CM ETO 15212 Hovis 28 Sept 45 is an AW 28-58 companion case to CM ETO 15216 Miller, digested above. Holding is the same.

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances in Luxembourg from about 21 Jan to 16 Feb 45. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL. Assigned to Company E, accused and other replacements reported to duty at the company rear command post. He spent the night there, but couldn't be found the next day when the rest went forward. On that day, the company's forward echelon had just completed an attack and was occupying a front-line sector. "There was no showing of existing hazards at the place where accused absented himself, or of hazards then impending of which he must have known. The location of the rear command post was not shown, and the record is silent as to whether it was far removed from enemy fire or well within its range. Under operational tactics in this war, it could have been near or far from the enemy, dependent upon the situation. As to impending hazards, accused was not proven to have been told what his assignment would be, or of any combat, or where the company was. He had just been returned to the company with other replacements. The proof that the company 'had just completed' an attack, was no proof that there were, after he reached the trains, signs and sounds of battle from which he must have known of its existence and progress. Exact locations of our own and enemy troops, and the amount, kind and proximity of enemy fire, would have been proper evidence. Unless we are willing to hold that

assignment in any capacity to an infantry company during war is hazardous duty, and all who leave it without permission, are guilty of the cowardly offense of desertion, the case must fall. We cannot hold that the proof should be so lax. The Board of Review will take judicial notice of well-known historical facts, such as D-Day, the Battle of the Bulge and the Rhine crossing, but it cannot take notice of the day to day location and operations of companies and divisions. The record is legally sufficient only for AWOL in violation of AW 61. (Compare CM ETO 7532 Ramirez.) (CM ETO 15223 Skuczas 22 Sep 45)

Accused was found guilty of a willful disobedience in violation of AW 64, and of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL ON THE AW 58 CHARGE. (1) AW 28-58: "An extract copy of a competent morning report established accused's original AWOL on 6 Feb 45, which *** was terminated by return to military control on 13 Feb. The only evidence of the tactical situation on 6 Feb was that the mission of the battalion was 'preparing to cross the Sauer River'. "There is no evidence of hazardous duty existing at the place where accused's unauthorized absence began, or of impending hazardous duty of which he knew at the time of his departure. There was not even proof of the location of the company. Not all absences without leave from combat troops are desertion, and circumstances must be proved from which intent to avoid hazards may be inferred. The proof is" insufficient to show more than AWOL in violation of AW 61." (CM ETO 15225 Barth 2 Oct 45)

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Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances on about 8 Jan 45, i.e. AWOL to avoid hazardous duty and to shirk important service, to wit, "holding a defensive position in the line in the vicinity of S**, Luxembourg. He was also found guilty of a subsequent AWOL. HELD: LEGALLY SUFFICIENT. (1) Both AWOLs were established. (2) Hazardous Duty: "Excluding accused's unsworn claim to have applied for infantry service six months before the offense, all the evidence *** points toward cowardice. He admitted leaving existing hazardous duty in the presence of falling shells and his past actions under fire were those of a coward. It remains but to consider whether the Specification which described the duty as 'in the line' so limited the offense alleged as to void the conviction. We think not, for two reasons: first, presence of the company under artillery fire was, under the fluid fronts of modern warfare sufficiently 'in the line' to fall within the allegation *** and secondly, accused admitted knowledge that the company was going 'in the line' (in the other sense of extreme front line) inevitably sooner or later in language from which reasonable imminence of such duty will be inferred. As to the latter, we have held that it is unnecessary for the dangers

sought to be avoided to be immediate or specifically known, and that intent upon the part of an infantryman in combat to avoid dangers soon to be encountered will suffice to support conviction of desertion ***." (CM ETO 15227 Mason 29 Sep 45)

Accused was found guilty of straight desertion in violation of AW 58, and also under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) Stomach Trouble; AW 58-28: While accused "sought to explain his departure on the ground that he was unable to secure a proper diet and adequate medical treatment at his own unit, he had been returned to duty by the proper medical authorities after four months in hospital and the fact that, in his view, he needed treatment not available in his unit furnishes no justification for his absenting himself to secure such treatment in a manner decided upon and selected by him. Further, his explanation *** is rendered suspect by the fact that he absented himself late at night at a time when his company was alerted for movement." Moreover, while away, he concealed his true status until such time as he "was ready to go back". He remained AWOL for about two months, and did not return to his unit until after the cessation of hostilities in this theater. (CM ETO 15243 Napolitano 9 Aug 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, in that he went AWOL with intent to avoid hazardous duty, to wit: an amphibious operation against the enemy, at Naples about 19 July 44. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL. "The only circumstances appearing in the record from which knowledge of the alleged amphibious operation could be inferred are that the company was taking some amphibious training 'around Naples' and that it was common knowledge in a company section, of which accused was not a member, that an amphibious landing would be made in enemy territory. It does not appear that accused was present with the company prior to 19 July, that he had taken any part of the preceding two weeks of training, or that his platoon or section or he as an individual was at any time aware of the 'common knowledge'. There was nothing inherent in the tactical situation of his organization so far as is shown, to charge him with such knowledge. It is therefore extremely doubtful if such meager and vague evidence is legally sufficient to charge him with knowledge, on 19 July, of any future amphibious operations by his organization ***. Moreover, even if accused were present with the company and possessed the 'common knowledge', it does not appear when, according to such knowledge the operation, which actually occurred nearly a month later, was to have been undertaken. Mere knowledge that his organization might engage in an amphibious operation at some indefinite time in the future does not without more, furnish the necessary probative basis from which the ultimate fact of intent to avoid the operation may be inferred. ***.

Assuming accused was absent from his company on 15 August, which fact does not affirmatively appear, mere proof that the operation was carried out during his absence does not discharge the burden of proof which rested on the prosecution *** (CM ETO 16022 Barfield 13 Sep 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances at Anzio, Italy, on about 1 February 44, remaining away until apprehension at Paris about 28 December 44. HELD: LEGALLY SUFFICIENT. (1) Morning Report: A properly signed morning report of Company G showed accused as "Reasgd fr hosp unknown sc 1 Feb, AWOL fr date of asgmt & drpd fr rolls as an absentee". An extract thereof "was properly received in evidence, since it did not contain 'entries obviously not based on personal knowledge' ***. This entry, together with the other evidence *** established the commencement of accused's absence and that it was unauthorized. The original entry was signed by the company commander. It was his unqualified duty to know the men assigned to the company and their status, and there is no suggestion in the record that he did not perform that duty." (2) Return: "Unauthorized absence, once shown to have existed, will be presumed to have continued' 'in the absence of evidence to the contrary', until a return to military control is effected ***. Even if accused's assertion in his pretrial statement that he 'turned in ' to a military police lieutenant in Rome on about 6 June 44 were accepted as evidence, it is not shown thereby whether at such time he revealed his true status as being 'absent without leave'. *** The period during which accused was under military control in Rome would not interrupt or terminate the period of AWOL begun on 1 February 1944, for the purpose of the present charges ***. At any rate, the actual date of the termination of accused's absence is not decisive so far as concerns the legality of a conviction" re AW 28-58. (3) Hazardous Duty: "Judicial notice will be taken that at the time accused absented himself fighting of the fiercest nature was in progress on the Anzio beachhead. *** It is established that accused was told that he was joining a unit then 'in combat' on this beachhead; knowledge on his part that there was action at this place and that he was going there was virtually admitted ***." The finding of guilt was established. (4) Sanity: Although not specifically raised, "accused in his unsworn statement suggested mental instability. The court would have been justified in causing an inquiry into his sanity made, but on this record it did not become incumbent on the court, to do so *** (5) Trial was two days after service of charges. However, defense and accused signed written waivers, and accused consented in open court. Trial had to be hastened because of a redeployment problem. Moreover, the present trial was a rehearing of an original similar trial a month earlier. (CM ETO 16573 Sabella 22 Sep 45)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. In this memorandum opinion, it is stated: "Errors reciting the year 1945 in two of the prosecution's exhibits 'A and B) were rendered obvious clerical with 1944 clearly intended, by the place and by the date of the entry as 1944 in the case of Prosecution's Exhibit A, and by the citation in Prosecution's Exhibit C of Prosecution's Exhibit B as a 1944 order. American troops have occupied the city of Metz in December in only the year 1944 since World War I. Furthermore the parties apparently attempted to correct the error by stipulation. The delay in the preparation of the records of Prosecution's Exhibit C and D did not affect their competency ***. Since the absence without leave was shown by presumption and Prosecution's Exhibit D to have continued at least until 6 June 1945, the prosecution's judicial admission of prior termination was appropriate as beneficial to the accused ***." (CM ETO 16936 Kempain 6 Oct 45)

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387 (AW 30) Closed Sessions:

Cross References:	450(4)	12604 Mendez (TJA and Defense Counsel present during closed session.)

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390 (AW 33) Records--General Courts-Martial:

Cross References:	385	16936 Kempain (wrong dates on exhibits)
	450(1)	16886 Robinson ("extra" member sit on court)
	450(2)	13090 Bryhjelfsson (papers accompanying)

"The record, before authentication, was examined, found to be correct and signed by a member of the court in lieu of special defense counsel who was absent, Such practice, while irregular, was not prejudicial ***." (CM ETO 12761 Breckie 29 June 1945)

"The original sentence *** which included 20 years *** obviously was illegal as to ten years of the confinement imposed, because only 2/3rds of the members *** concurred (AW 43). After the president announced the findings and sentence the court adjourned on 9 February to meet at his call. The record of the first day's trial was signed only by the trial judge advocate, conforming thereby to the requirement of the MCM that he will sign the record of each day's proceedings ***. Fourteen days later *** the court reconvened on its own motion. All members of the court and the personnel of the prosecution, who were present at the previous session of the court whereat the instant accused was tried, were present. The accused, defense counsel, assistance defense counsel and reporter were also present. The court then proceeded to reconsider its sentence and upon a secret written ballot, all members of the court concurring, it imposed the identical sentence which it imposed at the first session ***. The record was then duly authenticated as required by AW 33 and transmitted to the reviewing authority on 5 March 1945." The record was not a legal record of trial until the final act of authentication by the president and trial judge advocate. "The conclusion therefore is that the action of the court in the instant case was not irregular nor did it violate any right of the accused ***. The court's action herein must be distinguished from *** CM 233806, McCaslin, 20 B.R. 149, II Bull. JAG 184, where after the legal record of trial had been 'brought into existence' authenticated and transmitted to the reviewing authority, the court reconvened pursuant to call of the president in alleged 'revision proceedings' and attempted to revoke its prior sentence *** and impose a new sentence ***. The subsequent action of the court was void because (1) it attempted to act on a legal record of trial which had been completed and left the 'bosom of the court' and (2) it possessed no greater authority than the reviewing authority who by AW 40 is prohibited from returning a record of trial for revision within the view to increasing the severity of the sentence. In the instant case the legal record of trial had not come into existence. It remained under the control and authority of the court and it had not been transmitted to the reviewing authority. Furthermore the new sentence was identical with the first sentence. **** "The second sentence was not more severe (AW 40). "There is nothing *** which prohibits such action by the court during the period it maintains plenary control over the record of its proceedings in a given case." (CM ETO 8397 Statum, 28 Jun 45)

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394 (AW 37) Irregularites; Effect of:

In General

Cross References: 385 8649 Siglasky (AW 28-massed errors)

394 (AW 37) Irregularities: Effect Of:

In General

Cross References:	395(1d)	(See compelling evidence - in general)
	433(2)	11009 Marsh (no prejudice, where compelling evidence of guilt)
	433(2)	12210 Black (prejudicial error, but compelling evidence)
	450(1)	13222 Howard (defense counsel admits no plausible defense; compelling evidence)
	450(1)	16005 Jones et al
	436(9)	15433 Burns (no proof; place of AWOL)
	452(18)	15252 Nichols
	450(4)	13125 King (limitation of it to cross-examine German witness)
	451(2)	2397 Johnson-Lorer
	451(36a)	16516 Shaffer, et al

Charging under Wrong A.W.

Cross References:	442	14408 Griffin (AW 84-94)
	452(18a)	15851 Wolfe (ch. robbery under AW 94 instead of 93)
	454(18a)	13402 Green (AW 96-83)

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395 (AW 38) President May Prescribe Rules:

(1) Accessory before the fact:

Cross References:	454(18a)	9643 Hayner

(1a) Aid and Abet:

Cross References:	450(1)	10053 Miller (murder, etc.)
	450(1)	10860 Smith (murder, etc.)
	450(1)	12652 Fladger (murder, etc.)
	450(4)	11683 Beal (rape; jointly charged)
	450(4)	14615 Lewis (rape; punishment)
	450(4)	15768 Dunbar
	450(4)	15393 Dale
	450(5)	10446 Ward (rape)

(1b(1) In General: Best Evidence (listing only since 1 Jun 45)
(1c) Burden of Accused to go Forward with Evidence:
(1c(1) Compelling Evidence Rule: (listing only from 1 Jun 45)

(1b(1) Best Evidence Rule (listing only since 1 Jun 45)

Cross References:	395(10)	See generally, under confessions)
	450(1)	7867 Westfield
	450(1)	12486 Herbert
	450(4)	13419 Greene
	450(4)	14040 McCreary

(1c) Burden of Accused to go Forward with Evidence:

Not Digested:
9292 Chiles, et al (offense under AW 94, re government truck)

Cross References:	416(9)	9843 McLain (desertion; unsworn statements not evidence)
	416(9)	14069 Marziano, Jr. (desertion)
	419(2)	10721 Petroski (AW 96 wrongful vehicle use)
	450(1)	14745 Howell (rebut re malice)
	454(69)	6983 Carlson (himself within exceptions to a statute)
	416(9)	16196 Leone (AW 58)

(1c(1) Compelling Evidence Rule: (listing only from 1 June 45)

Not Digested:
15851 Wolfe (possibly bad evidence)

Cross References:	416(9)	12239 Blackshear
	416(9)	15604 Agnew
	433(2)	11009 Marsh
	433(2)	12210 Black
	450(1)	13222 Howard
	450(1)	15860 Ensley
	450(1)	15902 Mariano
	450(1)	17106 Conley
	450(4)	13317 Parker
	450(4)	15393 Dale
	450(4)	15774 Kennedy
	450(4)	17560 England
	450(17)	11905 Howse
	451(32)	13126 Green
	451(36a)	16516 Shaffer, et al
	452(7)	15154 Sohn
	452(18)	15272 Nichols, et al
	454(54a)	6983 Carlson

(1d) In General: Due Process of Law
(1e) In General: Evidence Weight: Burden of Proof: Reasonable Doubt
(1g) In General: Leading Questions
(1h) In General: Physical Objects: Lethal Weapons: Etc.
(1jj) In General: Res Judicata
(I1) In General: Variance: (Also see 428AW70), subsecs 10-12)

(1d) Due Process of Law:

Cross References:	385	14510 Collins
	385	15216 Miller
	450(1)	13222 Howard
	452(21)	15843 Dickerson, Jr. (confessions)
	454(18a)	13279 Tielemans
	454(38)	15486 Richter (judicial notice; it considers TJA file)

(1e) Evidence Weight: Burden of Proof: Reasonable Doubt:

Cross References:	416(26)	16655 Pagane (burden of proof; condonation)

(1g) Leading Questions:

Cross References:	419(2)	6533 Gibson
	433(2)	4995 Vinson
	450(4)	15274 Spencer (child witness; rape)
	450(4)	15840 Bishop (rape; Polish refugee victim; unwilling witness)

(1h) Physical Objects; Lethal Weapons; Etc:

Cross References:	450(1)	7867 Westfield (gun; ballistics)
	450(4)	13317 Parker (ballistics report; unidentified)

(1jj) Res Judicata:

Cross References:	451(2)	15080 Lawton

(I1) Variance: (Also see 428AW70), subsecs 10-12)

In General; Variance

Cross References:	385	12729 Lanoue (time; place - AW 28-58)
	385	14133 Corriveau (place; AW 28-58 desertion; place; AW 69 escape)

(I1) In General: Variance:(Also see 428 (AW70), subsecs 10-12 (contd.)
(3) Admissions--Statements: by Accused
(4) Admissions--Statements: By One of Conspirators or Joint Accused:
(7) Character of Accused or Other Offenses:

(I1) Variance (Also see 428 (AW70) subsecs 10-12 (continued)

Cross References:	385	14165 Pacifici (M/R re place; specification)
	416(9)	10842 Ramey (misapply jeep; place)
	416(9)	12128 Bailey (place; escape from confinement and desertion)
	416(9)	13018 Ostrowski (place; desertion)
	416(9)	15206 Burton (desertion - ch.time period to undetermined period)
	416(9)	15433 Burns (place of AWOL)
	422(5)	4376 Jarvis (careless fire-arm discharge v. willful discharge)
	450(4)	14040 McCreary (place of rape)
	450(1)	17724 Copeland (nameof victim)
	451(32)	13812 Howe (housebreaking; ownership)
	451(36a)	11972 Allison (larceny)
	454(96)	14632 Lang (minor; typographical)
	454(18a)	8555 Kenney (ownership; black market;changed by R/A; fatal)

(3) Admissions--Statements; by Accused:

Cross References:	416(9)	9204 Simmers (date of AWOL)
	416(9)	9978 Green (unsworn statement,corpus delicti)
	450(4)	14040 McCreary (corroborator; best evidence rule)
	450(4)	15768 Dunbar
	450(4)	17560 England
	451(36a)	11972 Allison (larceny)

(4) Admissions--Statements: By One of Conspirators or Joint Accused:

Cross References:	450(4)	7869 Adams
	452(18)	15252 Nichols (prejudice)

(7) Character of Accused or Other Offenses:

Cross References:	402(5a)	Previous convictions; see in general.

(7) Character of Accused or Other Offenses 395(7-8a-8aa-8b)
(8a) Character of Victim
(8aa) Identity of Victim
(8b) Prisoners of War; Enemy Property; Enemy Nationals

(7) Character of Accused or Other Offenses: (contd.)

Cross References:	416(9)	15343 Deason (confession of)
	416(9)	15604 Agnew
	424	13269 Robinson (AW 66-prior meritorious conduct)
	452(18)	13406 Weiskopf (AW 93-larceny and AW 94-misappropriation)
	416(9)	15512 Miller (desertion; other AWOLS)
	451(36a)	16516 Shaffer, et al (other offenses; prejudicial)

(8a) Character of Victim:

Cross References:	450(4)	13125 King (German rape; limit (cross-examination)
	450(1)	10002 Brewster (bad man,, 1st Ind.)
	450(4)	11683 Beal (rape victim)
	450(4)	15929 Anderson et al (rape victim; admissible)
	450(4)	10700 Smalls (rape victim)

(8aa) Identity of Victim:

Cross References:	450(1)	17724 Cleveland
	451(50)	17663 Taylor

(8b) Prisoners of War: Enemy Property: Enemy Nationals:

Cross References:	450(1)	10053 Miller (murder)
		14141 Piche
	450(4)	10375 Diaz (rape)
		14040 McCreary
		14547 Teacher
	450(4)	15274 Spencer (rape)
	450(4)	15929 Anderson
	451(50)	13369 McMillon ("permission" to the German property; robbery)
	453(12a)	10361 Schinhan (extortionate sales to prisoners of war)
	450(4)	9301 Flackman (rape; fraternization; etc; robbery; German)
	450(1)	10002 Brewster (murder German)
	450(1)	13415 Rice (murder; prisoner of war)
	450(1)	11230 Valenzuela (Nazi witness; impeachment)
	395(63a)	12650 Combs (questioning of German witness re beliefs;; oaths)

(9) Circumstantial:

Cross References:	450(1)	12652 Fladger
	450(1)	13416 Wells (insufficient)
	451(50)	14845 Gerringer
	452(21)	13575 Lamb, et al

(10) Confession: Validity

Not Digested:
13154 Furman (Was accused beaten-q. of facts)

Cross References:	416(9)	12128 Bailey
	416(9)	12239 Blackshear (copy; inadmissible;compelling evidence)
	452(21)	15843 Pickerson, Jr. (2 confessions; first destroyed; assume duress)
	454(18a)	9288 Mills (voluntariness; repudiated; black market; desertion)
	951(36a)	16923 Di Manero (no proof of voluntary nature)
	385	6301 Kirby (fail to warn of rights. Must be excluded)
	450(4)	13419 Greene (voluntary nature of oral v. written; best evidence)
	450(4)	14040 McCreary (best evidence rule)
	451(17)	11905 Howse (accused's right to take third to repudiate confession)
	454(54a)	6983 Carlson (reduce to writing; no warning;duress; inadmissible)
	454(18a)	13155 Busby (black market)
	454(18a)	13279 Tielemans ("poisonous" infiltration)
	416(9)	15196 Nicholas (adjuration to speak truth)
	416(9)	15343 Deason (desertion-of of other offenses)
	450(1)	17106 Conley (copy-no certification)
	450(4)	15768 Dunbar
	450(4)	15393 Dale

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(10) Confession: Validity (contd.)

"Prosecution's Exhibit I is a confession by accused covering the offenses alleged in the specifications to the Charge and Additional Charge I. This confession was admitted after it was stipulated that accused made a sworn statement to the investigating officer on 7 January 1945. It is marked page one of Prosecution's Exhibit I and another statement by accused, dated 4 March 1945, is marked page two of this exhibit and is also attached to the record of trial. The latter statement is a confession of guilt as to the offenses charged in the specifications of Additional Charges II and III. Inasmuch as this second statement was never offered or received in evidence and is obviously not covered by the stipulation as to what transpired on 7 January 1945, its submission *** was highly irregular. In view of the compelling nature of the evidence of these last mentioned offenses, excluding the confession dated 4 March 1945, it cannot be said that " prejudicial error resulted. (CM ETO 12413 Belzil 14 Jul 45.)

"Since accused voluntarily testified under oath at the trial to substantially the same facts as were contained in his written confession, any error committed by the court in admitting the confession over his objection was thereby rendered harmless and his substantial rights could not have been prejudiced ***." (CM ETO 11838 Austin Jr., 18 Aug 45)

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(11) Confessions; Corpus Delicti:

Cross References:	419(2)	5633 Gibson (AWOL)
	416(9)	9978 Green (AWOL Desertion; wrongful use, truck wrongful disposal, oxygen, containers. Use of unsworn statement)
	419(2)	10498 Wiseman (failure to repair; AWOL)
	450(1)	12486 Herbert (identity of murder victim)
	454(18a)	11076 Wade (black market gasoline)
	454(18a)	11075 Chesak (black market gasoline)
	450(4)	14040 McCreary
	452(18)	15252 Nichols (misapply truck)
	452(21)	13707 Housel (attempt; utter counterfeit)

(11) Confessions: Corpus Delicti (contd.)
(12) Confessions: By One of Conspirators or Joint Accused:
(12a) Cross Examinations:
(12b) Documents: In General:

(11) Confessions: Corpus Delicti: (contd.)

Cross References:	454(13)	15147 Wooten (attempt to escape)
	452(21)	13575 Lamb, et al (insufficient evidence; black market)
	454(18a)	13155 Busby (black market)
	416(9)	16628 Quintanilla (desertion)
	416(9)	15512 Miller (desertion)
	454(18a)	15197 Blackburn

(12) Confessions; By One of Conspirators or Joint Accused:

Cross References:	450(4)	15768 Dunbar

(12a) Cross Examination:

Cross References:	395(35a)	9908 Stout (of accused)
	452(7)	15154 Söhn (of accused)
	451(32)	13126 Green (of accused)
	450(1)	15860 Ensley (of accused)
	450(1)	15902 Mariano (of accused)
	450(4)	13125 King (German rape victim; limit; prejudice)

(12b) Documents: In General:

Cross References:	450(1)	7867 Westfield (reports - oral evidence of former statements)
	395(10)	12413 Belzil (fail to introduce a confession as an exhibit)
	450(1)	11059 Tanner (death certificate; no objection)
	450(1)	12486 Herbert (hospital records;murder victim)
	395(12b)	16149 Bagley (morning report data sheet)
	385	12619 Hatfield (morning report work sheets (1st Ind.)
	416(9)	15196 Nicholas (confinement requests)
	450(4)	13317 Parker (ballistics report; unidentified)

(12b) Documents in General (contd.)

Cross References:	416(9)	16628 Quintanilla (personnel status card; no foundation)
	433(2)	9877 Balfour (psychiatry report-to raise sanity issue)
	419(2)	11306 Pouche (company roster; AWOL)
	416(9)	11356 Crebessa (company roster; duration)
	416(9)	11513 Rosati (AWOL transfer order)
	416(9)	17260 Venezia (hearsay; report of shipping sergeant; transfer)
	419(2)	13565 Slominski (AWOL transfer order)

"The instrument executed by the company commander was competent evidence of absence without leave because it was 'An official statement in writing *** /made by an officer who/ *** had the duty to know the matter so stated and to record it' (MCM, 1928, par. 117a, p. 121), but even if it were to be considered not an official statement, it was then, under the evidence, clearly an entry in the regular course of business of the company and thus admissible under the principles set forth in"CM ETO 4691 Knorr. The latter case "has not been overruled (CM ETO 6107, Cottam and Johnson; CM ETO 7686, Maggie and Lewandowski)." (CM ETO 16149 Barley 25 Aug 45)

(Note: Explanatory note attached to file in above case states: "In support of the charge of absence without leave, a mimeographed paper entitled "Data for Morning Report of Co. ***', signed by ' ***, Capt Inf', containing the entry 'Pvt. *** for reasgd and jd orgn as of 14 Nov 44. Pvt *** fr duty to AWOL as of 15 Nov.44", was introduced in evidence over the objection of the defense (Pros. Ex.1). The company clerk of Company *** testified that this paper bore the signature of Captain ***, the commanding officer of the company on the date in question, since killed in action; that these mimeographed forms were made out in the company every day and normally received by him as company clerk every day; that this practice had been followed for a year and a half or two years; that the date of the document was 17 November 1944, and was received by him on that date.")

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(17) Documentary: Copies of Records 395(17-17a-18)
(17a) Documentary: Maps
(18) Documentary: Morning Reports

(17) Documentary: Copies of Records:

Cross References: 385 16936 Kempain (wrong dates on exhibits)

(17a) Documentary: Maps:

Cross References: 385 12007 Pierce (B/R case)

(18) Documentary: Morning Reports:

Cross References: 385 -8147 Pierce Morning Report entry of 31 December. No objection. Showed termination of AWOL by confinement by military authorities at ***, as of 22 October. HELD: Proof only of return to military control.

Morning report entry of Detachment 93. No objection. HELD: Adequate to prove AWOL from 93rd Replacement Bn. Detachment 93, Ground Force Replacement System was evidently a subdivision of 93rd Replacement Bn.

(18) Documentary: Morning Reports:

Cross References:	385	8519 Briguglio AWOL adequately established by morning report entries.
	385	11693 Parke Morning reports for 18 November 1944 re AWOL signed by regimental personnel officer. HELD: "The presumption of regularity *** cannot arise *** because the morning reports were signed by an officer not authorized by the ARs to sign the same and were therefore not admissible ***. They possessed no efficacy as official writings. "Neither Par 42, AR 345-400, 3 Jan 45, nor Cir 119, ETO, 12 Dec 44 were in effect. Had either been applicable, morning reports would have been admissible.
	416(9)	9201 Simmers Morning report extract showed accused assigned duty to AWOL, but did not show date of change of status. HELD: On face, extract merely showed an entry for an undisclosed date. Although certificate was dated 3 October 44, it may not be conjectured that this was date of AWOL. Extract, therefore, had no corroborative value to show date of accused's initial absence.

(18) Documentary: Morning Reports

Cross References: 416(9) 9978 Green, et al Not necessary to consider whether morning report entry, made four months after original absence, was properly received, because other evidence showed even greater AWOL than charged.

Unimpeached morning report entries, plus other evidence, established desertion and AWOL guilt.

416(9) 11924 Polidoro Original 20 November morning report entry showed accused's AWOL as commencing 15 November. Subsequent 17 February correction changed date to 6 November. HELD: Last entry must have been based on subsequent information rather than current knowledge. Earlier entry was more likely to reflect personal knowledge. Established date of initial absence is concluded to have been 15 November.

385 12951 Quintus Morning report entry made six weeks after event, and nine days after preference of charges. HELD: Admissible to show accused's presence in company on 23 November, and of his absenting himself without authority that day.

385 13961 DeCarlo Morning report showed accused's absence on 28 August. Other evidence showed absence "about the 14th". HELD: The absence will be considered as of about the 14th.

(18) Documentary: Morning Reports

Cross References: 419(2)

10617 Dominguez Morning report signed by personnel officer prior to 12 Dec 44 inadmissible. Will not be considered, despite failure to object thereto.

Morning report signed by personnel officer 16 January 45 is competent.

Morning report entry showing termination of absence by confinement by the military police. HELD; Hearsay. Although no objection, admissible herein, because it was beneficial to accused, to the extent of showing termination of his wrongful absence.

416(9)

13484 De Vito Morning report of 1 Dec 44, showing accused's AWOL, was signed by officer, without indication of his capacity. Authentication of extract thereof, two months later, was by same officer as adjutant. Since it does not affirmatively appear that the officer was not the commanding officer, or officer acting in command, at the time of the 1 Dec 44 entry, it is presumed that the original entry was properly signed. Further, affirmative statement of no objection by the defense constituted a waiver of defective authentication of the extract.

(18) Documentary; Morning Reports:

Cross References:

Other morning reports prepared under Cir 119 ETO 12 Dec 44 were properly admitted.

416(9) 9839 Wells Proper to overrule objection to morning report extract, made on the ground that authenticating officer was not personally in the courtroom.

Morning report extract showed accused from duty to AWOL, but failed to show date of this change of status. Held: Without probative value to show date of accused's initial absence. Was merely an entry for an undisclosed date.

416(9) 9843 McClain Morning report entry showing accused's AWOL as of an earlier date, made 23 days after charges were preferred, was admissible. (Follow CM ETO 12951 Quintus.

419(2) 9272 Hayes, et al Defense Counsel objected to extract copy of morning report on ground that authentication was by assistant personnel officer. Held:Assistant personnel officer was not official custodian, and could not authenticate this morning report extract. Objection was not waived.

(18) Documentary; Morning Reports:

Cross References:	395(12b)	16149 Barley Signed, written "Date for Morning Report of Co.***admissible to show AWOL as an official statement in writing, or as an entry made in regular course of business.
	416(9)	14625 Fassnacht Morning Report signed by personnel officer 31 Oct 44 improperly admitted over objection. Similarly signed morning reports dated subsequent to 3 Jan 45 properly admitted.
	385	9597 Jusiak, Jr. Morning reports signed by personnel officer during October and November 44 were inadmissible. Fact that Third Army Cir.No. 3, sec. V, par 3, 12 Apr 44 authorized unit personnel officers to prepare morning reports did not authorize them to sign them. However, stipulation as to correctness of the documents' contents was sufficient to permit use thereof. Morning reports signed by personnel officers subsequent to Cir 119, Hq ETO 12 Dec 44 and AR 345-400, par. 43, 3 Jan 45, admissible.
	385	12619 Hatfield Morning report extract did not include signature or initials on the part extracted. Certificate to extract stated that "foregoing is a true and complete copy (including any signature or initials ***)." Objection thereto overruled.

(18) Documentary; Morning Reports:

Cross References: 385

12619 Hatfield /Held: Morning report was properly admissible to prove AWOL. In absence of contrary evidence, presumedthat the original, of which extract was a copy of but a part, was regular, and was signed in another and proper part by a competent officer. (Compare to earlier case of CM ETO 4756 Carmisciano.)

(1st Ind: 12619 Hatfield: Extract copies of morning reports are admissible without special identification in court."They should contain, however, the signatures or initials authenticating the original, and the extract copy introduced in this case did not contain" them. Better practice is to introduce originals, identified by one who can testify to that effect, and thereafter substitute an extract with leave of court. If originals are not signed by a person having personal knowledge, the properly identified original work sheets signed by a person having knowledge should be introduced as official statements.

419(2)

14486 Marks Adjutant may not authenticate extract of a morning report because he is not official custodian. However, failure to object is this regard will be deemed a waiver.

(18) Documentary; Morning Reports:

Cross References: 385 14486 Morin (contd.)

Morning report original signed in November 1944 by a warrant officer (same person who subsequently authenticated extract as Adjutant). Original authentication does not show his capacity. In absence of evidence at least of unusual circumstances, it will not be assumed that this warrant officer was one who could authenticate under provisions of AR 345-400, 1 May 1944, sec VII, par 42, then in force.

385 16573 Sabolik M/R entry of company: "Located fr hosp unknown se 1 Feb, AWOL fr date of asgnt & drpd fr roll as an absentee." Held: Not an entry obviously not based on personal knowledge. Admissible and, with other evidence, established commencement of AWOL.

385 10199 Kamizski (M Sgt) M/R, made 2 days after commencement of AWOL and properly signed, (no objection) admissible to show commencement even though company commander may not have had personal knowledge. (Grounds of admissibility are similar on basis of official writing or entry made in regular course of business.

416(9) 14456 Fogler M/R extract stated it included any signature or initials. It did not include any. No objection. Moreover, there was direct evidence from clerk who prepared the original. Nor did authenticating officer of extract state his

(18) Documentary; Morning Reports:

Cross References:	416(9)	14456 Fowler /capacity, other than that he was official custodian. No objection. M/R properly introduced on AW 58 charge.
	416(9)	15233 Hanley M/R of 25 Apr 45, signed by warrant officer, showed (a) accused's return from AWOL as of 18 Apr; and (b) correction of a 20 Nov 44 entry of another unit showing his AWOL as of that earlier date. Held: (1) Warrant officer presumed to be proper officer to make the M/R entry. (2) His lack of personal knowledge (required to make the document admissible) is apparent on document's face re the corrected entry for the other unit as of the 20 Nov 44 date. That entry was improperly admitted.
	416(9)	13263 Kelley (2 Oct 45) M/Rs prior to 12 Dec 44, signed by asst. personnel officer. Evidence established "regular course of business" in manner of signing. Documents admissible under that doctrine. (2) Other M/R entries of 15 Dec 44 and 3 Mar 45 signed by personnel officer. Last entry corrected and changed a prior 11 Nov 44 entry from MIA to AWOL. Defense moved to strike, because of no personal knowledge. Motion properly denied. "Regular course of business" was proved. Secondly, personnel officer may make corrections of entries prior to the time he was authorized to sign M/Rs.

(18) Documentary: Morning Reports (contd.)

(18) Documentary: Morning Reports:

Cross References:	416(9)	13303 Sweezy (29 Sep 45) M/R entry of 10 Nov 44 showing AWOL corrected by M/R of 4 Apr 45, signed by personnel officer. Personnel officer authorized to sign the 4 Apr 45 entry, and could make corrections of prior M/R even before 12 Dec 44.
	416(9)	14362 Campise (2 Oct 45) M/R of 8 Oct 44 showed accused MIA. Signed by personnel officer. No regular course of business proved. This entry was inadmissible. However, M/R of 19 Feb 45 corrected the 28 Oct 44 M/R to show accused as AWOL instead of MIA. Was signed by personnel officer. The latter could then sign. Moreover, he could correct entries made prior to 12 Dec 44. Lateness went only to weight and credibility.
	416(9)	15512 Miller WOJG authenticated M/R prior to 12 Dec 44. Improperly admitted. Not to be assumed that the WOJG was commanding officer.
	419(2)	13199 Golej M/R of 4 May 45 corrected a 14 Apr 45 entry to show an AWOL as of 14 Feb 45. Final entry made after preference of charges. Held: Contemporaneousness of entry with event not necessary. Proper for entry to be made after charges preferred. Defense had a duty to produce evidence to substantiate its objections.
	419(2)	16585 Thompson M/R prior to 12 Dec 44 should not have been admitted, since it was signed by regimental personnel officer. Further, M/R showing accused's return to a distant station should not have been admitted because it was hearsay.

(18) Documentary; Morning Reports:

Cross References: 385

14165 Pacifici 16 Oct 45
M/R entries under "Record of Events", which describe combat conditions, are proper entries of historical events.

M/R entries in Sep and Oct 44 were signed by a CWO,Assistant Adjutant, who was also assistant personnel officer.He was Acting Personnel Officer in absence of Personnel Officer, at time. Not admissible as official document, even though he was "Acting Personnel Officer." However, entries were admissible under Federal "Shop Book Rule", since evidence showed they were made from M/R summaries signed by company commander, and submitted through channels to personnel section in rear echelon, from which data company clerks prepared the M/Rs. Further, it was the practice of the CWO, Assitant Adjutant, to authenticate in the absence of the Personnel Officer.Entries were made within reasonable time after occurrence of event.Were in regular course of business. Lack of personal knowledge did not make entry inadmissible. That factor merely affected weight to be given.IV Bull JAG p.86 is discussed, and it is concluded that statements therein do not prevent application of Shop Book Rule where evidence supports its use.

Correction of a 2 Oct 44 entry in a 22 Apr 45 entry,authenticated by a personnel officer, properly admissible.
M/R entry was at variance with place alleged in Specification. No prejudice.

(18) Documentary; Morning Reports:

Cross References: 416(9) Burns 26 Oct 45
M/Rs between 18 Feb and 29 May 45, signed by Regimental Personnel Officer during period he had authority to sign same, properly admitted, Fact that their original entries were prepared by such officer from a "summary" authenticated and submitted by Company Commander under Standard Operating Procedure did not render them inadmissible, even though not based on personal knowledge. Were admissible under Federal Shop Book Rule.

Other M/Rs, signed between 25 Sep and 26 Oct 44, inadmissible as official documents because signed by a personnel Officer. He had no authority to sign at that time (distinguish authority to prepare). However, they were admissible under Shop Book Rule, since it was shown that they were made in regular course of business. Were evidence of the facts recited therein.

416(9) 14735 Clark M/R entries signed by assistant adjutant prior to 12 Dec 44 inadmissible. Shop Book Rule could not apply, because there was no showing that they were made in the regular course of business.

(21) Hearsay: In General:

Cross References: 433(2) 9877 Belfour (psychiatry report)
450(5) 10446 Ward ("opinion" of investigating officer)

(21) Hearsay: In General:(contd.) 395(21-22-23-28)
(22) Hearsay: Res Gestae
(23) Conclusion: In General
(28) Stipulations

(21) Hearsay; In General:

Cross References:	419(2)	11306 Pouche (beneficial to accused)
	416(9)	17360 Venezia (shipping transfer;report of sergeant)
	416(9)	14735 Clark (re unavailability of special defense counsel)

(22) Hearsay; Res Gestae:

Cross References:	450(4)	11589 Sokolski

(23) Conclusion; In General:

Cross References:	385	6301 Kirby (re accused's conflicting statements)
	450(4)	15274 Spencer (rape;child witness)

(28) Stimulations:

Cross References:	450(1)	11059 Tanner (as to a deceased; murder)
	385	10955 Volatile (termination;A.W.28-58;consents)
	416(9)	9839 Wells (inconsistent with not guilty plea)
	385	9597 Jusiak, Jr. (inadmissible M/R. Stipulation as to correctness of contents sufficient to permit their use)
	419(2)	14486 Marks (re return to military control-not sufficient to show AWOL)
	385	16936 Kompain (correction of mistakes by)
	419(2)	13199 Golej (return of AWOL to military control)
	416(9)	16196 Leone (desertion)
	450(4)	17698 Stewart

(28a) Value:

Cross References:	454(18a)	9779 Stanley (gasoline and jerricans in ETO)
	454(18a)	9288 Mills (truck valued at over $50)
	454(18a)	11076 Wade (gasoline)
	454(18a)	11075 Chesak (gasoline)
	451(58)	13369 McMillon (some value)
	451(17)	11546 Clarke (Belgian franc)
	454(18a)	9643 Haymer (AW 96 black market)
	454(18a)	10864 Smith (gasoline)

(29a) Judicial Notice; In General:

Cross References:	454(96)	14632 Lang (ARs to ETO directives re Army Exchange Service); U.S. at war;establishment in Paris Army Exchange Service location in Paris;employment of civilians)
	451(9)	16512 Rowland (notice of matters on bulletin board)
	454(54aa)	17469 Allen (accused;notice of theater directives and circulars)
	385	9565 Strange (failure to renew on motion)
	385	9862 Irwin (AW 28-58 circumstances)
	416(9)	14345 Di Leo ("Battle of Bulge")
	419(2)	11271 O'Hara (accused charged with bulletin board notices)
	451(2)	15080 Lawton (former GCM record in Branch Office)
	454(18a)	9643 Haymer (pricelists;oil)
	385	8358 Lane (not taken of enemies detailed)activities
	385	8519 Briguglio (Inf.Div. general movements)
	385	10743 Martin (geography; locations)
	385	8649 Siglasky(AW 28; not taken)

(29a) Judicial Notice; In General:

Cross References:	416(9)	14069 Marziano, Jr. (ETO dotted with military posts)
	454(18a)	9288 Mills (truck valued at over $50)
	454(18a)	9779 Stanley (gasoline and jerricans in ETO)
	454(18a)	11076 Wade (gasoline)
	454(18a)	11075 Chesak (gasoline)
	454(65a)	9986 Goldberg (ETO Cir. mail censorship rules)
	454(54a)	10418 Blacker (foreign currency situation; liberated countries)
	454(54a)	12453 Marshall (foreign exchange rates)
	454(56b)	11903 Wofford (orders re fraternization)
	454(69bb)	11500 Hulett (accused charged with notice; directives of higher Hq; S.O.P.
	454(105)	12469 Atherton Price lists; vehicles)
	453(11)	10027 Wetherford (ETO Cir; Accused charged with notice)
	421	12428 Davis (fail to read order required to be read)...
	385	9665 Hamilton et al (extent of, in A.W.28 circumstances)
	451(17)	11546 Clarke (value of Belgian franc)
	385	9597 Jusiak Jr. (AW 28-58 conditions)
	452(7)	15749 Seder (Army Regulations)
	454(18a)	10864 Smith (gasoline; QM price lists)
	385	12007 Pierce (Siegfried Line, etc.)
	385	15223 Skoezas (AW 28)
	385	14510 Collins (AW 28 - Rhine crossing)

(29a) Judicial Notice; In General (contd.)

Cross References:	385	16573 Sabella (Anzio beachhead)
	450(1)	14547 Keech (Breakthrough)
	450(4)	14338 Reed (Time zones German time)
	454(38)	15486 Richter (To effect due process)

(30a) Presumptions:

Cross References:	395(1c)	See in general; burden of explanation.
	419(2)	10721 Petroski (burden to explain; wrong vehicle use)
	451(17)	11546 Clarke (embezzlement; uncorroborated explanation)
	385	9597 Jusiak Jr. (continuance of AWOL)
	416(9)	13484 De Vito (M/R regularity)
	416(9)	13104 Fingland (desertion; condition continues)
	450(1)	14745 Rowell (murder; malice)
	385	12619 Hatfield (Morning Report regularity)
	450(1)	17415 Cheshey (malice; murder; weapon)
	385	8147 Pierce (AWOL continues)
	385	11693 Parke (M/R regularity not presumed, where signal by unauthorized officer)
	395(35a)	9988 Stout (defense counsel explained accused's rights)
	450(2)	9365 Mendoza (lethal qualities of rifles)
	450(2)	9972 Christon (deadly weapon; malice)
	450(1)	10860 Smith (deadly weapon; malice)
	450(1)	12486 Herbert (of identity, from name of murder victim)
	416(9)	13018 Ostrowski (manner of return to military control; AWOL - desertion)
	385	16573 Sabella (AWOL continues)
	385	16936 Kempain (AWOL continues)

(30a) Presumptions:

Cross References:	416(9)	15233 Henley (warrant officer; proper to make M/R entry)
	419(2)	13199 Golej (M/R as correct)
	433(2)	9377 Balfour (findings presumed correct)
	416(9)	16196 Leone (continuance of AWOL)
	450(4)	16622 Moore (sanity)
	419(2)	13565 Slominski (knowledge of AWOL transfer order)
	416(9)	11518 Rosati (no-transfer of accused in an AWOL status.)
	416(9)	11356 Crebessa (no transfer of accused in an AWOL status)
	416(9)	17407 Abraham (en route to join case)
	416(9)	14735 Clark (unavailability of special defense counsel; continuance of AWOL)

(33) Accused; Common Trial:

Not Digested:
9418 Thompson, et al (joint and common; no objection)

Cross References:	450(4)	15274 Spencer, et al
	452(21)	13575 Lamb, et al (no relation of offenses.)

"Accused although charged separately were tried together. The convening authority did not direct that they be so tried. Neither accused consented to such trial nor did either object thereto. No motion for separate trials was made. Each accused was accorded his right to one peremptory challenge against any member of the court except the law member. Warrant for the consolidation of these trials is found in the fact that the charge of rape raised similar issues and involved similar evidence as to both accused. In our opinion neither accused was prejudiced by the common trial ***. The fact that the convening authority did not specifically direct a common trial is not controlling, particularly in view of his ratification of the proceedings by approval of the sentence as to both accused." (CM ETO 11779 Bohn 15 Sep 45)

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(35) Accused; Entrapment 395(35-35a-35b)
(35a) Accused; Explanation of Rights
(35b) Accused; Identity of

(35) Accused; Entrapment:

Cross References: 454(18a) 15197 Blackburn
454(54a) 12453 Marshall
452(18) 13406 Weiskopf
454(18a) 9643 Haymer

(35a) Accused: Explanation of Rights:

"In explaining to the accused his rights as a witness the law member advised him, without further explanation, that if he elected to 'testify under oath you may be cross-examined by the Trial Judge Advocate and the court on any and only on any matter which is brought forward in your direct testimony'. This explanation was, of course, inadequate for 'when accused testifies in denial or explanation of any offense charged or even any fact tending to prove his guilt of that offense, even though it has not been the subject of direct testimony, it is properly the subject of cross-examination' ***. Also, any fact 'relevant to his credibility as a witness is properly the subject of cross-examination' ***. However, there is little possibility that accused was misled to any extent *** for he was an officer with professional education and experience knowing or capable of discovering his rights; no questions designed to test his credibility were asked of him, the scope of cross-examination was not unusually broad, and finally, it may be presumed that defense counsel performed his duty in explaining to accused his rights as a witness ***."
(CM ETO 9988 Stout 29 Jun 45)

(35b) Accused; Identity of:

Not Digested:
9544 Lapolas, et al (rape)
9988 Stout (identity of wife of accused bigamist)
13568 Nelums, et al (rape; lineup)

Cross References: 450(1) 7967 Westfield (insufficient proof; murder-rape; identification parade.)
450(4) 8270 Cook (identity; identification parade)
450(4) 10891 Murphy (identity; extrajudicial)
450(4) 13419 Greene (extrajudicial)

(35b) Accused: Identity of:

Cross References:	416(9)	13104 Fingland (plea to general issue)
	450(4)	9306 Tennant (insufficient identity proof)
	450(1)	15902 Mariano
	450(4)	12604 Mendez (TJA points to accused)
	450(4)	14338 Reed (extra-judicial, by prosecutrix)
	450(4)	13317 Parker (rape)
	450(4)	15774 Kennedy (pre-trial, competent evidence)
		15870 Harris (pre-trial)
	416(9)	16342 Wiseman (gen.prisoner)

(35c) Accused; Intoxication of:

Not Digested:
7702 Shropshire
11845 Stark
12850 Philpot

Cross References:	443(1)	13296 Wright (AW 85 drunk on duty)
	450(2)	9365 Mendoza (murder)
	450(1)	10002 Brewster (murder)
	450(1)	14745 Rowell (murder)
	450(1)	14141 Pycko (murder)
	450(4)	14040 McCreary (rape)
	451(9)	12400 Buck (additional finding of guilt of offense requiring specific intent)
	450(1)	12855 Minnick (sanity;drunkenness; murder)
	450(4)	14338 Reed
	451(1)	16887 Chiddock (assault to murder)
	450(4)	17698 Stewart
	451(36a)	16516 Shaffer, et al
	450(1)	16772 Chutniguitt (drunk Indian; sanity)

(36) Accused; Mental Capacity 395(36-36b-36c)
(36b) Accused; As Witness; Oath
(36c) Accused; Unsworn Statement

(36) Accused; Mental Capacity:

Not Digested;
8581 George (rape)
7702 Shropshire
13458 Stover (AW 75-amnesia)
13485 Birley (AW 75-also dissent)

Cross References:

385	10363 Mangiapane (combat flying reaction)
433(2)	13376 Aasen (AW 75)
450(1)	12855 Minnick (murder; sanity; drunkenness)
385	15216 Miller (due process; deny continuance for investigation)
433(2)	9877 Balfour (imp.discussion)
433(2)	13004 Disano
450(4)	16622 Moore (motion for examination; presumption)
451(2)	16887 Chaddock (psychotic v. psychopath; drunk)
433(2)	15661 Satmary (physical illness; combat exhaustion;AW 75.)
450(1)	17724 Coreland (low intelligence)
450(1)	16978 Morgan (low intelligence)
450(2)	13090 Brynjolfsson (lapse of memory)
450(1)	16772 Chutnicutt (drunk Indian)

(36b) Accused; As Witness: Oath

Cross References:

451(50)	3931 Marquez (take stand to regulate confession; cross-exam.)
395(10)	11838 Austin Jr.(One"confession" error)
451(17)	11905 Howse (take stand to repudiate confession)

(36c) Accused; Unsworn Statement

Cross References:

416(9)	9978 Green (admissions in, as part of corpus delicti)
454(18a)	9779 Stanley (rebuttal evidence to)
416(9)	9843 McLain (unsworn statement not evidence)
385	9597 Susiak, Jr.

(37) Court; Correction of Action 395(37-41a-42a-43-43a)
(41a) Reference to Trial
(42a) Court Martial Orders
(43) Court Martial Orders; Publication
(43a) In General

(37) Court: Correction of Action:

Cross References: 419(2) 14486 Marks (substitute correct order of law member appointment)
450(1) 16686 Robinson (extra member sits on court)

(1st Ind: CM ETO 15179 Ohlson 2 Aug 45): "The record of trial discloses that subsequent to the announcement of the findings and sentence, revision proceedings were held at the instance of the reviewing authority which purported to change the original findings. These proceedings were a nullity because only four members of the original court are shown to have been present. The findings as originally announced were appropriate (MCM, 1928, par. 79a, p. 65), and no further action was necessary. The published general court-martial orders should, therefore, reflect the findings as originally announced by the court."

(41a) Reference to Trial:

Cross References: 9986 Goldberg (different court)

(42a) Court Martial Orders:

Cross References: 395(37) 15179 Ohlson (improper revision proceedings)

(43) Court Martial Orders; Publication:

Cross References: 40[illegible] 12466 Walker (premature publication)

(43a) In General:

Cross References: 43[illegible](2) 9877 Balfour (sanity-presumed correct)
3[illegible]5 14133 Corriveau (fail to designate AW)
3[illegible] 11987 Johnston (leave out "without leave" in AWOL)
416(9) 13263 Kelley (re AWOL)

(45) Findings: Lesser Included Offenses:

AW 38	385	8147 Pierce (AW 61 as lesser)
		8358 Lape " " "
		8708 Lee " " "
		8519 Brigoglio " "
		11987 Johnston " " "
		14138 Spitzer " " "
		9665 Hamilton, et al "
		16022 Barfield " " "
		15223 Skuczas " " "
		15225 Barth " " "
		14905 Murtha " " "
AW 58	416	15233 Hanley
		16104 Blachette (AW 61 as lesser)
		15442 Bifano (AW 61 as lesser)
		9204 Simmers " " "
		11924 Polidoro " "
		13655 Click " " "
		12128 Bailey " " "
		10842 Ramey
		13174 Drowe
		16196 Leone
		14735 Clark
AW 90	448	10939 Gerner (not lesser to AW 96 "Nazi Doctrine Speech" charge)
AW 92	450	9365 Mendoza (to manslaughter)
		9972 Christon (to manslaughter)
		10446 Ward (fornication as lesser to rape)
		15774 Kennedy (assault to rape as lesser)
		13090 Brynjolfsson (assault; death prior to rape)
AW 93	451(6)	17586 Skinner (AW 96 not lesser herein)
		17707 Hawkins (AW 96 assault and battery)
		11729 Held (AW 96 assault and battery - lesser)
AW 93	451(51)	16254 Stordeor (AW 96 false swearing is lesser to AW 93 perjury)
AW 94	452(21)	See in general; black market; AW 94 as lesser to AW 96 offense.

(45) Findings: Lesser Included Offenses (contd.)
(46) Members; Absence or Relief from Duty
(47) Court Members; Disqualification

(45) Findings: Lesser Included Offenses:

AW 94	416(9)	14456 Fowler (AW 96 wrong use of jeep; lesser to AW 94 embezzlement)
AW 95	453(26a3)	12759 Trayner (AW 96 drunkenness as lesser-unlawful firearm discharge to pushing a civilian;AW 96 as lesser)
AW 96	454(18a)	See in general; black market; AW 94 as lesser)
		8555 Kenney (engage in private business as lesser)
		9643 Haymer (solicitation as lesser)
AW 96	454(56b)	13767 Allen (fraternization, as lesser to wrongful sexual intercourse)
AW 96	454(96)	14632 Lang (attempt to utter forged instrument)

(46) Members; Absence or Relief from Duty:

Cross References:	450(4)	15768 Dunbar (neither prosecution nor defense counsel shown to have been present)
	419(2)	14486 Marks (no member of another court "sat"-clerical error)

(47) Court Members; Disqualification:

Cross References:	433(2)	11009 Marsh (Investigating officer sat as court member; not prejudicial, in view of compelling evidence. Dissent)
	450(4)	10891 Murphy (Took oath; summary court officer in related cases)
	385	14133 Corriveau (on withdrawing; expresses opinion of accused's guilt as reason therefor)

"The staff judge advocate states in his review that accused was tried by the same court which had just tried Private H** for similar offenses committed at the same place and at substantially the same time. The record of trial affirmatively shows that the defense

(47) Court Members: Disqualification
(48) Members: Improper Action
(48a) Motion for Finding of Not Guilty
(48aa) Motion for Bill of Particulars
(49) Motion for Severance
(49b) Motion to Continue
(49c) Motion to Elect 395(47-48-48a-48aa-49-49b-49c)

declined to make any challenge either for cause or peremptorily, and that accused stated that he had no objection to any of the members present. The fact that members of the court may have tried an alleged co-wrongdoer for the same offense does not of itself render them ineligible ***. The burden rested on accused to make and maintain a challenge to any member of the court who may have been objectionable to him ***." (CM ETO 14382 James 2 Aug 45)

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(48) Members; Improper Action:

Cross References: 454(96) 12758 George (President's intemperate remarks)
454(38) 15486 Richter (Consider TJA file in closed session)

(48a) Motion for Finding of Not Guilty:

Cross References: 385 9565 Strange (renewed)
451(2) 15080 Lawton (renewed)
454(13) 15147 Wooten

(48aa) Motion for Bill of Particulars:

Cross References: 454(18a) 10189 Sludeo
454(38) 17339 Gunning (waive by failure to make)

(49) Motion for Severance:

Cross References: 450(4) 15274 Spencer, et al
450(4) 15768 Dunbar

(49b) Motion to Continue:

Cross References: 385 15216 Miller

(49c) Motion to Elect:

Cross References: 450(5) 10446 Ward (prosecution cannot be compelled to elect)

(49d) Motion to Quash
(49e) Motion to Strike
(49f) Plea in Bar

(49d) Motion to Quash:

Cross References: 454(54a) 12594 Lechinsky

(49e) Motion to Strike:

Cross References: 454(18a) 10189 Sluder (black market variance)
424 13269 Robinson (additional charges)
454 12594 Lechinsky
454(69 bb) 11500 Hulett

(49f) Plea in Bar:

Cross References: 451(2) 15080 Lawton
416(2b) 16655 Pagano (condonation)

After trial on 19 June 1945, accused WAC officer was found guilty of AWOL in violation of AW 61. HELD: LEGALLY SUFFICIENT. Plea in Bar: "Upon arraignment, the accused moved the court as a special plea to dismiss the proceedings on the ground that (1) the accused who was arrested on 30 March 1945 had been denied a speedy trial in violation of the 5th and 6th Amendments of the Constitution; (2) no copy of the charges was furnished her within 8 days of her arrest--it was served on her on 13 June 1945--nor was a proper investigation made as required by AW 70; and (3) she was improperly confined, degraded and punished by being confined before trial. The motion or plea was overruled ***." "The accused did not plead to the jurisdiction of the court, nor did she enter a plea in abatement. Her plea was offered as a reason to dismiss the proceedings. It was therefore one in bar. A proper plea in bar of trial falls within the following classes: Statute of Limitations; former trial; or pardon (MCM, 1928, pars. 67, 68, 69, pp. 52, 53, 54). The matters presented by defense counsel may not properly be pleaded in bar of trial." The motion was correctly overruled. (2) The evidence, as well as the plea of guilt, established the AWOL, terminated by apprehension. (CM ETO 15849 Walton 18 Aug 45)

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(53) Staff Judge Advocate; Improper Action
(56) Credibility
(57) Competency; Accomplice or Co-Conspirator
(58) Competency; Children
(62a) Impeachment 395(53-56-57-58-62a-63a)
(63a) Oath

(53) Staff Judge Advocate; Improper Action:

Cross References:	385	15216 Miller (advice re continuance)
	450(4)	15768 Dunbar (Assistant TJA testifies)

(56) Credibility:

Cross References:	452(18)	13406 Weiskopf

(57) Competency; Accomplice or Co- Conspirator:

Not Digested:
4172 Davis, et al

(58) Competency; Children:

Not Digested:
12551 Malone (German child; no voir dire)

Cross References:	450(4)	10891 Murphy (German child; no voir dire)
	450(4)	15274 Spencer (leading questions to; conclusion)

(62a) Impeachment:

Cross References:	450(1)	7867 Westfield (former inconsistent statements; reports)
	450(1)	11230 Valenzuela (German Nazi)
	454(59)	12758 George (arrest;pending indictment)
	450(1)	16005 Jones, et al (prosecution's own witness)

(63a) Oath:

"The record discloses that the law member denied to the defense counsel the right to ask preliminary questions of a civilian German witness concerning the religious belief of the witness and whether he was insensible to the taking of an oath. The basis of counsel's objection was that the witness was a German and that Naziism is a religion, under which an oath is not considered binding except insofar as it is beneficial to the German State. The better practice dictates that counsel should have been permitted a preliminary questioning of

the witness. However, the defense counsel was offered the right to cross-examine the witness along the lines indicated upon completion of his testimony, but he declined to avail himself of the opportunity. Any error committed was thus in effect abated. Furthermore, the testimony of the witness related solely to offense *** of which the accused were found not guilty. Under the circumstances the ruling of the law member was harmless ***." (CM ETO 12650 Combs, 23 Jun 45)

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396 (AW 39) Limitations Upon Prosecutions as to Time:

Cross References:	451(2)	15080 Lawton (vs. se judicata; plea in bar)

397 (AW 40) Limitations upon Prosecutions; As to Number:

(1) Former Jeopardy:

Cross References:	444(3)	12333 Lewis (See 1st Ind.)
	454(54a)	12594 Lechinsky (ambiguous "foreign exchange" specification)
	385	12729 Lanove (Time and place variance-AW 28-58)

(5) Reconsideration

Cross References:	390	8397 Statum (of sentence; record of trial)
	450(4)	15091 Gallahan (Increase sentence on reconvening)

399 (AW 42) Places of Confinement; When Lawful:

Cross References:	454(18a)	9288 Mills (Black market-AW 96,94)
	454(105)	12489 Atherton et al (Unauthorized vehicle use)
	452(18)	14925 Bullock (indecent assault)
	442	14408 Griffin, et al (wrongful use gov't vehicle.AW 94 AW 84-94;penitentiary confinement)

399 (AW 42) Places of Confinement; When Lawful:

Cross References:	454(96)	14632 Lang (utter forged instruments; civilian)
	385	14905 Murtha (AWOL not authorized. Breach of restriction-not authorized)
	454(103)	17749 Major (wrongful possession; Govt. property)

"Confinement in a penitentiary is authorized upon conviction of conspiracy to commit an offense against the U S. by AW 42 and sec. 37, Fed Crim C (18 USCA 88) ***." (CM ETO 12181 McCandless, et al 30 Jun 45)

"Penitentiary confinement is not authorized upon conviction of an attempt to commit sodomy ***." (CM ETO 17279 Castillo 4 Oct 45)

"Confinement in a penitentiary is authorized upon conviction of a warrant officer of embezzlement where the amount involved exceeds $35.00 by AW 42 and sec 22-1202 (6.76), District of Columbia Code." (CM ETO 16804 Bradley 15 Sep 45)

"Confinement in a penitentiary is not authorized for either AWOL or for AW 75 misbehavior (CM ETO 14455 Nice 13 Sep 45)

"Penitentiary confinement is not authorized upon conviction of attempt to commit rape for the reason that this offense is not punishable by penitentiary confinement for more than one year by any statute of the U S. of general application within the continental U S. or by the law of the District of Columbia (AW 42). (CM ETO 16554 Gibson Jr. 8 Sep 45)

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400 (AW 43) Death Sentence; When Lawful:

Cross-References:	390	8397 Statum (2/3 vote; 20 yr sentence; subsequent reconsideration of; record of trial)
	450(4)	7869 Adams (vote; death case)

402 (AW 45) Maximum Limits of Punishment:

(1) Specific Sentences:

Cross References:

452(21)	10898 Williams (attempt;wrongful AW 94 disposition)
450(2)	9365 Mendoza (voluntary manslaughter; quarrel)
450(1)	10860 Smith (accessory after fact; murder)
451(36a)	11972 Allison (larceny; multiplicity)
454(18a)	9779 Stanley (law member explains wrong maximum, on guilty plea)
454(18a)	11936 Thorpe, Sr. (Black market; gasoline; fine for conspiracy; AW 94,96; Black Market)
454(7)	12711 Olley (Assault;aggravated; indecent liberties)
454(64a)	11237 Moudy (mails;interfere with vehicle;unauthorized use of; analogy-misapplication)
452(18)	13406 Weiskopf (multiplicity; sentence not issued thereby)
451(6)	11729 Held (multiplicity; sentence not issued thereby)
452(18)	14925 Bullock (wrongful use govt. vehicle; AW 94)
450(4)	14040 McCreary(assault to rape)
453(26a3)	12759 Traynor (Release civilian prisoner;unauthorized;dismissal)
454(96)	14632 Lang (civilian; cancel Army Exchange Service contract; utter forged instrument; separable sentence)
454(18a)	13402 Green (AW 83 offense-AW 94 94 black market offense)
450(4)	14224 Page (fail to include dd in life sentence for rape)
450(5)	10446 Ward (fornication-6 mos. attempted fraternization)
450(4)	14615 Lewis (aid and abet a rape)
450(4)	15091 Gallahan (increase sentence, when court reconvened)
454(18a)	15197 Blackburn (conspiracy; black market)
454(100 aa)	14174 Hitchcock (willful destruction of property)

(1) Specific Sentences 402(1-5a-10b)
(5a) Previous Convictions
(10b) Policy in Regard to Sentences

(1) Specific Sentences:

Cross References: 450(2) 13090 Brynjolfsson (civilian; manslaughter; assault to rape)
454(54aa) 17469 Allen (use another's name on money order to send money home)
454(103) 17749 Major (wrongful possession of Govt. Prop. AW 96)

Accused merchant seaman was found guilty of an offense, and sentenced by court-martial. HELD: LEGALLY INSUFFICIENT IN PART. Insofar as this sentence provides for confinement at hard labor for five years, it is sufficient. But it is "legally insufficient to support that part of the sentence which provides for forfeiture of all pay and allowances due or to be come due from the U. S. Government, for a like period ***." (CM ETO 17318 Gessner 6 Oct 45)

(5a) Previous Convictions:

Cross References: 419(9) 16342 Wiseman (general prisoner)

"Accused's testimony admitting a prior conviction for desertion for which he received a 15-year sentencewas manifestly injurious to his case. However, as it appears that such testimony was not elicited by the court or prosecution, but was spontaneously and voluntarily given by accused, the error was clearly self-invited and not fatal ***." (CM ETO 12749 Scalamonti 24 Aug 45)

(10b) Policy in Regard to Sentences:

Cross References: 424 13269 Robinson (1st Ind; mutiny; disobedience)
450(1) 10002 Brewster (dd-murder of German)
450(1) 14141 Miller (murder; drunk)
450(4) 12329 Slawkowski (German rape)

(10b) Policy in Regard to Sentences

402(10b)
403

(10b) Policy in Regard to Sentences:

"Attention is invited to letter of the War Department 21 July 1945 on the subject of Courts-martial, addressed to all officers exercising general court-martial jurisdiction, which contains the following:

'1. Records of trial by general court martial have recently been received in the War Department in which excessive sentences were given upon convictions for comparatively minor offenses. Some of these have been in cases in which the accused had an outstanding combat record.

'2. Such cases reflect unfavorably on the War Department and tend to discredit the administration of military justice. It takes only a few such cases to create an erroneous impression of the entire court-martial system and thereby to outweigh in the public's estimate in all the other cases in which appropriate action has been taken. Corrective action by the War Department does not repair the damage done.

* * *

'3. While military discipline is a command function and there is no intention to infringe upon the province of the commanding officer in the field, it is imperative that the policies announced above be carried out in order to avoid unnecessary trials and unnecessarily harsh sentences which are destructive of discipline and public confidence'.

"There is considerable evidence that this accused was drunk, that his conduct was not normal, and some of the officers testified that it was undoubtedly due to drink, I recommend that the period of confinement be substantially reduced." (1st Ind CM ETO 11870 Kibbey 20 Aug 45)

403(AW 46) Action by Convening Authority: (In General)

16307 Bryant (counsel for time being)

Cross References:	450(4)	15091 Gallahan (send case back to increase rape sentence)
	450(4)	13319 Boets (waive irregularity in trial reference by subsequent ratification)
	385	16216 Miller (advice to court re special pleas)

(2) Action Where President Not Confirming Authority
(3) Execution of Sentence 400(2-3-4)
(4) Plea of Guilty

(2) Action Where President Not Confirming Authority:

Cross References: 450(4) 8270 Cook (Holding not upset by dicta)
450(4) 14224 Page (premature publication of GCMO)
451(36a) 16516 Shaffer, et al (evidence weight)

(3) Execution of Sentence:

Cross References: 454(54a) 12453 Marshall (Dismissal - DD of officer)

One of the accused herein was found guilty of a violation of AW 96 resulting from his black-market activities. Dishonorable discharge was suspended, and GCM order published. The Board of Review reduced the finding of guilt to that of the AW 94 lesser offense. Inasmuch as both this and an additional charge of which accused was found guilty "both involve moral turpitude and his sentence is also legal and valid, this is not a case to be submitted to the CG, ETO, under the 5th paragraph of AW 50½ for restoration to accused of any rights, privileges and property of which he may have been deprived by virtue of the error (Ops. JAG 250.404, 13 April 1923, Memorandum for the Secretary of War; Cf: CM ETO 5546, Roscher and Stapleton). You now hold no jurisdiction to effect correction and the situation must remain as found." (1st Ind, CM ETO 13276 Clower, et al, 29 Jun 45)

Accused officer was found guilty of a number of offenses. His sentence included a "dishonorable discharge". HELD: LEGALLY SUFFICIENT. "The words 'dishonorable discharge' as used in the sentence were inappropriate in the case of an officer. However the effect is the same as if the proper word 'dismissed' had been used *** (CM ETO 17609 Wood 27 Oct 45)

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(4) Plea of Guilty:

"The record of trial was not transmitted pursuant to paragraph 3 of AW 50½, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater for examination and review by the Board of Review in his office and himself, but without such examination and review the approved sentence was promulgated *** by GCMO ***. Apparently the reviewing authority acted on the assumption that he was authorized to order execution of the sentence without appellate review by the Board of

(4) Plea of Guilty:

Review and Assistant Judge Advocate General, and based his action on his authority to execute sentences involving dishonorable discharge 'based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty' (par.3 AW 50½). This, however, was error because the accused sought to change his plea of guilty by statement to that effect in open court, and the defense counsel moved the court that such be done and that the decision be based on the evidence then before the court. The motion was denied! Accused's"statement of his desire to change his plea to not guilty was, without question, an inconsistent statement within the meaning of AW 21 and the Manual. We hold that the court's denial of his request was ineffectual and that the court will be deemed to have proceeded to trial and judgment as if he had pleaded not guilty. The burden was therefore left upon the prosecution to prove the offenses beyond a reasonable doubt, which, however, *** was fully met and the court's error harmless. The findings nevertheless were not in legal effect based solely upon a plea of guilty. That part of the action ordering the sentence executed and the issue of the GCMO were therefore premature and wholly void. The action should be amended and the order should be nullified and recalled ***."
(CM ETO 12466 Walker 8 Sep 45)

(1st Ind; CM ETO 12466 Walker 8 Sep 45: The GCMO already issued "is null and void. You should sign another action bearing the same date but withholding the order directing the execution of the sentence, pursuant to AW 50½. A new general court-martial order must be issued dated subsequent to the date of this indorsement."

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(5) In General:

Cross References: 390 397 Statum

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416 (AW 58) Desertion:

Not Digested

9072 Diodato (AW 61 as lesser)

9292 Chiles et al
9406 Sullivan
9470 Safford
9541 Onofreo et al
9595 De Laurier (civil-in clothes att.ret.to. U.S. 14 days)
9681 Bennett (3 desertions continuing not temporary interruptions)
9824 Wensing
10185 Polander
10189 Sluder
10211 Stoner
10212 Balsano
10213 Rupert (18 days under AW 28 circumstances although not alleged OK)
10250 Kates
10314 White
10629 Conrad
11201 Livingston (stowaway)
11202 Moore (stowaway)
11830 Green Jr. et al
11856 Debeau
11930 Kenehan (straight AW 58 charge; AW 28 proof. OK.Slight date variance. From arrest status)
11972 Allison
12043 Noe
12120 Campbell
12224 Ciullo
12859 Baker
13154 Forman, et al
13285 Faught
13463 Weeks
13482 Manuzzo
13638 Kemplin
13708 Muldrow (34 days etc).
13896 Nadler
14095 Bijeaux
14171 Payne
14298 Michels
14357 Keller Jr.
14436 Biggers
14574 Wood
14575 Dugger
14576 Hargett
14584 McNamara
14595 Arnett (2 absences) 4 days in between)
14625 Fassnacht
14764 Collins
14866 Iuppe
15074 Sutherland
15147 Wooten
15154 Sohn
15184 Newland
15194 Roling
15195 Evely
15268 Consentino
15441 Romanowski
15444 Marchione
15511 Thomas
15556 Gannon
15593 Joseph
15689 Fors
15704 Carver
15776 Butler
15814 De Loggio
15850 Miller
15851 Wolfe
15882 Casey
15901 Hicks
16078 Martens
16108 Kenton
16342 Wiseman
16343 Cucolo
16620 Tarver
16666 Sherman
16869 Henry
16880 Ferrara (enroute to join hazardous duty)
16897 Bruno
17409 Farraday Jr.
17442 Blakely
17479 Mittler
17551 Yanofsky
17555 Brady
17556 Houston
17558 De Lozier
17697 Hopkins
17794 Carr
17840 Bronson
14583 Lajoie
13956 Depero

416 (AW 58) Desertion:

Cross References:

385	14655	Knutson (AW 28 circumstances)
452(18)	15252	Nichols
454(18a)	9288	Mills (with black market offenses)
454(18a)	15197	Blackburn (with black marked)
385	14133	Corriveau (35 days and escape)

(2a) Citizenship:

Cross Reference: 416(9) 16196 Leoue (restoration)

(2b) Condonation:

Cross Reference: 385 11401 Schultz

"Accused was found guilty of two desertions in violation of AW 58, both under AW 28 circumstances: (a) about 31 Dec 44 to 18 Jan 45; and (b) about 26 Jan 45 to 2 Feb 45. HELD: LEGALLY SUFFICIENT. Condonation: Accused testified that on 15 Feb 45 he talked with the Staff Judge Advocate of the Division which subsequently ordered his court-martial. He was told he could await trial, or go back to his unit on the line on duty. He returned to his organization, and was thereafter continuously in combat until 1 May 45 when he was again confined. "The burden of supporting a special plea, including a plea in bar, by a preponderance of proof rests upon the accused ***. Accused's testimony that after his second absence, he was restored to duty, by someone, and performed combat duty in the line, is corroborated by that of two defense eye-witnesses, as well, inferentially, as by the Charge Sheet. The only evidence, however, leading to prove that such restoration was unconditional and that it was 'by an authority competent to order trial' consists of the uncorroborated testimony of accused himself. For the purpose of this holding, the Board of Review will assume, without deciding, that an unconditional restoration to duty without trial by the Staff Judge Advocate of the authority competent to order trial, may successfully be pleaded in bar of trial for the desertion, as constructive condonation by that authority. Such restoration, however, was not established by the defense because the court was not bound to accept as probative thereof, the uncorroborated testimony of accused, but might reject it in whole or in part, as the testimony of a highly interested witness ***. While interest no longer

excludes a party from the witness stand, it is still a major factor to be weighed by the jury, or court-martial, in determining the witness credibility ***" "The full purport of the conversation between the Staff Judge Advocate and accused, assuming there was one, and any evidence bearing upon the authority of that officer to act for the division commander in the premises, should have been presented by the defense if it intended to establish constructive condonation. Upon the state of the record, one cannot say that the defense was established or that the court was bound to believe accused's uncorroborated testimony with respect thereto or that it constituted a discharge of the defense's burden of supporting the plea, which the Board will assume to have been entered. Nevertheless, though this record is technically sufficient, accused's testimony, if true, marks this case as one deserving immediate and careful clemency and administrative attention in order that substantial justice may yet be achieved. In other words, the Board of Review does not have legal power to reach a situation of the nature here disclosed, and urges that those possessing such power investigate the facts surrounding accused's subsequent conduct and take such corrective action as may be deemed advisable." (2) Time of Trial: Trial was held 2 days after charges were served. There was a specific waiver of objection. There is no indication that accused's substantial rights were prejudiced. (CM ETO 16655, Pagano, 13 Oct 45).

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(5) Specification; Desertion:

Cross Reference: 385 13961 De Carlo (AW 28)

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(9) Proof of Intent; Unauthorized Absence:

Accused was found guilty of desertion occurring on or about 3 October 1944 and terminating about 26 December 1944, in violation of AW 58. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL ON 26 December 1944 in violation of AW 61. (1) Morning Report: "The document introduced into evidence as an extract copy of the morning report of Battery C, **th Field Artillery Bn, is defective in that, although it shows accused from duty to absence without leave, it fails to show the date upon which this change of status occurred. On its face, it consists only of a copy of an entry *** for an undisclosed date and a certificate dated 3 October 1944 reciting that the copies entry is a true and complete copy of the original. While it might be possible *** to say that the officer who prepared the document simply misinterpreted the form and that the date 3

October 1944 refers to the date when accused initially absented himself rather than to the date of certification, so to interpret the document would involve recourse to mere conjecture, violate accepted principles of construction and open the door to possibilities of grave error." The extract "has no probative value as showing the date of accused's initial absence." (2) Other Evidence: "Neither the testimony of the military policeman who effected accused's arrest nor the unsworn statement made on his behalf by his defense counsel adequately show the date upon which he initially absented himself. The admissions shown constitute admissions of absence without leave only and are not sufficiently broad to establish that the period of absence without leave admitted was the same as the period of absence without leave charged ***. The only fact which *** can be said to show with certainty is that accused was absent without leave on the day of his apprehension, i.e., 26 December 1944." (CM ETO 9204 Simmers 9 Jun 45).

Accused was found guilty of desertion from about 12 November to 23 December 1944, in violation of AW 58. HELD: LEGALLY INSUFFICIENT. (1) Morning Report: The court properly overruled defense's objection that an extract copy of the morning report should be excluded because the officer executing the authentication was not personally present in court. The objection was without merit. (MCM, 1928, par.116a, pp.119,120.) (2) Morning Report; Undisclosed Date: The extract copy of the morning report was defective, "in that although it shows accused from duty to absent without leave it fails to show the date upon which this change of status occurred. On its face, it consists only of an entry in the company morning report for an undisclosed date and a certificate date 12 November 1944 reciting that the copied entry is a true and complete copy of the original. *** The extract copy of the morning report here introduced is without probative force to show the date of accused's initial absence." (3) Stipulation: "The only other evidence of record is the stipulation that he 'was returned to military custody by apprehension on or about 23 December'. It must be admitted that the phrase returned to military custody by apprehension' is more or less a term of art in military law, employed almost exclusively in cases where the offense involved is absence without leave or desertion, and as such, might be said to support the limited inference that accused was absent without leave on the day of his apprehension, i.e., 23 December 1944 ***. Even so, standing alone and without more, it is an extremely narrow base for the inference suggested *** Further, so to interpret the stipulation would be to convict accused upon the strength of a stipulation alone." (MCM, 1928, par.126b, p.136.) "If interpreted as above suggested, the stipulation is inconsistent with accused's plea of not guilty. It was not shown that he understood the effect of the stipulation or that he consented to its use. Under these circumstances, it is concluded that the stipulation, standing alone, does not constitute substantial evidence upon which to base a conviction of the lesser included offense of absence without leave. It follows that the findings of the court must be disapproved in their entirety." (CM ETO 9839 Wells 3 Aug 45)

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(9) Proof of Intent; Unauthorized Absence 416(9)

Accused was found guilty of desertion in violation of AW 58, after his absence commencing about 20 November at a replacement depot, and terminating about 6 days later by apprehension in Paris. HELD: LEGALLY SUFFICIENT. (1) Morning Report; Delayed Entry: Charges against accused were preferred on 29 November 1944. A morning report entry re his AWOL was made 23 days later. However, it has been held in CM ETO 12951, Quintus, "That because morning reports do not depend for their validity upon contemporaneity but upon the duty of the responsible officer, with integrity, to learn and record the true facts, and because they must be made correct for many reasons other than to serve as evidence in court, delayed entries ***, even though made after charges are preferred, are competent evidence of the facts recited." That rule will be followed here. (2) Desertion: Length: Despite the short 6-day absence, the proof adequately established accused's guilt of desertion. "The unauthorized absence was from replacement channels in an active theater of operations, terminated by apprehension. Accused was in civilian clothes and in his effort to avoid return to military control feigned ignorance of his native language. It is no matter that the absence was short; the brevity thereof was not of his making. At the time of his apprehension his conduct was obviously irregular when judged by military standards and pointed away from an intention to return to military control. His arrest eliminated the opportunity for further exploitation of his absence from military control but did not erase inferences which arise from his conduct. Under such circumstances the duration of the absence has but little weight in determining his culpability. A prima facie case was made, from which the court could reasonably infer the requisite specific intent, and the defense not having gone forward with the proof (for the unsworn statement is not evidence), the Board of Review will not disturb the finding" of accused's guilt. (CM ETO 9843 McClain 3 Aug 45)

The various accused herein were found guilty of offenses including desertion in violation of AW 58; AWOL in violation of AW 61; the sale of Army tires and gasoline in violation of AW 94; and of attempted larceny of government rations, wrongful use of an Army truck, and wrongful disposal of Army oxygen bottles, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) AWOL and Desertion: "The alleged violations of AW 58 and 61 were established by the unimpeached entries in their organizations' morning reports, other competent testimony and the admissions of accused themselves in their pretrial statements and their unsworn statements at the trial. It is not necessary *** to consider whether the morning report entry as to accused Coelho, made more than four months after his original absence, was properly received in evidence, since in his pretrial statement he admitted being absent without leave for an even greater period than that alleged. Sufficient proof of the corpus delicti of the offense charged is established by the evidence that accused was apprehended in a private home in S*** without a pass, and his admissions in his unsworn statement that he went 'over the hill' from the 3rd Replacement Depot ***. Inasmuch as the unauthorized absences of accused ranged in duration from 39 to 112 days, and in each instance were terminated by apprehension the findings of all guilty of desertion are fully warranted ***." (2) Sales; AW 94:

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"Concerning the alleged violations of AW 94 involving the sale of Army tires and gasoline, each accused involved in his pretrial statement admitted his participation in the transactions as charged ***. The corpus delicti for each of these offenses is found in the testimony of the French civilian and his employee that the alleged sales took place, together with their identification of Green, Caruso and Coelho as participants in the transactions ***." (3) Wrongful Use; Wrongful Disposal: AW 96: "Substantial evidence of all the elements of the offenses of wrongful use of a government vehicle and wrongful disposal of 60 containers of oxygen in violation of AW 96 was introduced ***. The driver testified that his truck containing 60 containers of oxygen was missing less than ten minutes after he left it in a parking lot and several days later accused Green took him to the spot where the oxygen tanks had been dumped. Accused ***, *** and *** in their pretrial statements admit their participation in both offenses. Accused ***, in his pretrial statement, admits his part in the theft of the truck and while he does not mention the disposal of the oxygen, the court could reasonably infer that since he took part in the larceny of the loaded truck and the discarded oxygen was discovered a few days later, he also participated in the wrongful disposal of the oxygen containers." (4) The attempted larceny of the Government rations, in violation of AW 96, was also adequately shown. (CM ETO 9978 Green, et al 26 Jun 45)

Accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. The evidence failed to show either the place of accused's initial absence other than 'APO 350, U.S. Army', or that of his apprehension. These omissions were not vital to the proof of desertion in this instance. The gravamen of the offense charged is AWOL accompanied by the intent at some time during his absence not to return to the service ***. The accused's absence without leave for a period of 59 days, his apprehension while dressed in civilian clothes and his denial of his proper identity fully support the court's findings of guilty of desertion." (CM ETO 10568 Ritchie 8 Aug 45)

Charged with two desertions in violation of AW 58, accused jeep driver, a private, was found guilty of two AWOLs in violation of AW 61, from about 12 to 30 December 1944, and from about 30 December 1944 to about 7 February 1945, when he was apprehended in Paris. He was also found guilty of the misapplication of his jeep, in violation of AW 94. HELD: LEGALLY INSUFFICIENT IN PART. Neither the finding of guilt of the first AWOL nor of the misapplication were supported. (1) AWOLs: "Accused's company commander authorized him to be absent from his organization and to drive the motor vehicle supplied him. He was detailed to drive the motor vehicle under the directions of Lt. S**, one of the officers of the same organization. There was no evidence that accused had any knowledge of the purpose of the lieutenant's trip to O**, or of its duration, or of any limitation on S**'s authority, or if or when accused was to return to the organization. It clearly appears from the record that he was detailed as a driver for Lt. S** and therefore, after leaving the organization, was under his command. It would be unjust and unreasonable to expect a

private under such circumstances to question the authority of his commanding superior officer, to whom he had been detailed for duty as a driver. Accused's explanation of his absence was put in evidence by the prosecution. It was not improbable, nor was it contradicted. It cannot be ignored by the court ***." During the period of accused's first AWOL, "it appears without contradiction that he was under the direction of his superior officer, without knowledge of any lack of or limitation on the latter's authority as exercised, to utilize accused's services or the vehicle assigned to him." "The fact that accused and the lieutenant were 'picked up' by military police during a check up, for failure to have with them copies of their orders, was not sufficient evidence to put the accused on notice that Lt. S** was AWOL ***. Whatever question was raised in the accused's mind was immediately dispelled by S**'s action in ordering him to remain in Paris and by supplying him with what appeared to be authentic orders authorizing them to be there. It was not until the 7th or 8th of January that accused definitely learned that the lieutenant was absent from his organization without authority ***. From that time until he was apprehended on 7 February 1945, accused was admittedly conscious of being AWOL ***. This period of time is covered by Specification ***", which was supported by the evidence. "In defense accused contended that even during that period of time he was justified in remaining away because he was continually told by S** to remain with him and that they would return *** in a few days. True, the accused was in a difficult situation. His only excuse *** was S**'s authority. If he turned himself in and thereby antagonized S**, the latter might fail to protect him. If he did not turn himself in he knowingly remained AWOL and took his chances. He elected to follow the latter course. He was therefore clearly guilty ***. His predicament should however be considered in mitigation." (2) Misapplication of Jeep: This offense was charged to have occurred at W**, Germany, on 12 December 1944. By exceptions, the court found that it occurred at W** on 8 January 1945. "The uncontradicted evidence shows that both accused and the vehicle were continuously in Paris, France, from about 23 December 1944 until about 7 February 1945. The court obviously understood, by its finding ** to convict accused of misapplying the vehicle at Paris rather than at W**, and, through inadvertance, omitted to further amend ***. But the offense of which accused was thus found guilty is distinct from the offense alleged, committed at a substantially different place and a substantially different time from that to which he entered his plea. There is no such similarity as is to be cured by the action of the reviewing authority or AW 37 ***." (CM ETO 10842, Raney, 23 Aug 45).

Accused was found guilty of desertion, in violation of AW 58, HELD: LEGALLY INSUFFICIENT. Accused's alleged desertion was from the 234th Repl.Co., 90th Repl. Bn. at Verviers, Belgium, on about 14 Nov 44, terminated by surrender at or near Namur, Belgium, on about 12 Mar 45. "The testimony of the sergeant of the 376th Repl. Co. and the roster in that company's files indicate that accused was assigned to that unit from the 15th Repl.Co. at some unspecified time, and likewise at a time unknown

did not arrive. This evidence is disconnected from the offense charged, of absence from the 234th Replacement Company. The testimony of the first sergeant of the 234th Repl.Co. shows that on 14 Nov that company received a directive from the 3rd Repl.Depot, whose relation to accused is not shown to carry 41 enlisted men, including accused only inferentially, as AWOL and that the company complied with the direction on that day. Accused never reported to the company and had no permission from it to be absent. Knowledge of such an order, on the part of accused, will not be presumed." (See CM ETO 11518, Rosati.) "In addition, it must be said that the competent evidence admits of a number of inferences which are at least as consistent with the hypothesis of innocence as with that of guilt: Accused may never have been attached to or directed to proceed to the 234th Replacement Company. He may have been attached but directed not to report thereto by reason of transfer to another organization or illness or other disability. He may have been delayed in reporting through transportation difficulties. In short, (1) there is no proof that he was required to be present with the company and (2) even assuming, arguendo, that he was absent therefrom, there is no basis for the inference that such absence was through his own fault ***. The evidence fails to meet the standards required of circumstantial evidence because it is as consistent with innocence as with guilt ***." (CM ETO 11356 Crebessa 10 Oct 45).

Accused, attached unassigned 234th Repl. Co, 90th Repl. Bn, was found guilty of desertion on about 14 Nov 1944, remaining absent until surrender about 12 Mar 45, in violation of AW 58. HELD: LEGALLY INSUFFICIENT. "The case must stand or fall upon the testimony of the first sergeant of the 234th Repl.Co. It has fatal weaknesses: the only reasonable inference is that he gained all of his knowledge from an order transferring accused in an AWOL status, and accused never reported to the company. Assuming that parole evidence of the written directive was admissible in the absence of objection, and further, that a man need not be present with his company before he can be AWOL from it, we cannot hold that accused is presumed to have notice of an order issued transferring him in an AWOL status ***. There is no proof by which it can be inferred that accused had notice that he should report to this company, and therefore none that he was under a duty to be there. How could we hold him for AWOL from a command to which he is not shown to have known he must report? Lack of permission from this company to be absent from it is immaterial, for the case does not show he was under any duty of which he had notice, to secure such permission. There is no competent evidence at any specific place and time that he was absent from any other command, guard, quarters, station or camp without proper leave, and the record of trial is *** legally insufficient to support the findings and sentence ***. "The stipulation as to surrender at Nemur, Belgium, on 12 March 1945 *** will not save any part of the case ***." (CM ETO 11518, Rosati, 10 Oct 45).

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(9) Proof of Intent; Unauthorized Absence 416(9)

Accused was found guilty of desertion in violation of AW 58, after his absence commencing about 6 November and terminating by apprehension about 9 December 1944. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. COMMENCING 15 November 1944. (1) DATE OF AWOL: There was confusion in the Morning Report entries re the commencement of the AWOL. On 20 November, an entry re accused's absence as of 15 November was made ascribing the absence to enemy action. On 19 December, a correction was made to show that the absence was not due to enemy action. On 17 February a third entry was made, changing the date of original absence to 6 November. The last entry must have been based on subsequent information rather than current knowledge. "The earlier record is certainly more likely to reflect personal knowledge of the event than an entry made months after the event. The date of initial absence as established by competent evidence is 15 November 1944." (2) Intent to Desert: Accused was a member of a machine gun platoon and in an assembly area when he commenced his absence. The platoon "shortly after moved into defensive positions but it is not shown that accused had any knowledge ***. "Mere unauthorized absence for 24 days under the circumstances as shown herein does not in itself constitute a substantial basis, nor is any other circumstance shown to support an inference of the requisite intent to establish desertion." (CM ETO 11924, Polidoro, 15 Jun 45).

Among other things, accused was found guilty of desertion in violation of AW 58 after (a) a 45 day absence, and (b) a 2-hour absence. HELD: LEGALLY SUFFICIENT. (1) First Desertion: Accused was absent without leave approximately 45 days. "Such absence in an active theater of war at a time of critical military operations, which is unexplained, fully sustains the charge of desertion ***." (2) Second Absence: After his first absence, accused was returned to his organization on 26 January 1945 and placed under arrest in quarters. He had been informed on 27 January of expected combat movement the next morning. "Taking advantage of the confusion incident to the movement *** on the morning of 28 January, he left without authority." He was apprehended about two hours later. He was properly found guilty of desertion for this absence. (CM ETO 12045, Friedman, 5 Jun 45).

Accused was found guilty of an escape from confinement on 8 January 1945, in violation of AW 69; and of desertion 8 January, terminated by apprehension six days later, in violation of AW 58. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61, ON THE AW 58 CHARGE. "The evidence failed to show beyond a reasonable doubt, that the accused intended to desert the service *** on 8 January 1945. Without considering the statements which accused made to the arresting sergeant, which, if they be regarded as showing intent to desert, were tantamount to a confession and manifestly inadmissible as such, the only proof of desertion is the showing that accused escaped from confinement from his escort guard of military police and remained absent without leave for a period of six days. There is no proof that accused was under charges in his

own organization and no specific proof that his prior absence therefrom was without authority. There is no proof as to the location or duties of his organization. The statement that he was with a 'front line organization' is too indefinite and general to show beyond a reasonable doubt that accused was attempting to avoid hazardous duty at the time he made his escape. When apprehended, he was not attempting to conceal himself or to resist arrest. He gave his correct name and serial number. He continued to wear his uniform. His statements indicated no intention of deserting, and he was not engaged in crime, unlawful acts or in any gainful occupation." (2) Variance: "The Specification of Charge I alleges that accused deserted the service at the Paris Detention Barracks. The proof shows that he escaped from confinement at a hospital near M**. This slight variance as to place was not prejudicial **** (CM ETO 12123, Bailey, 20 Jul 45).

Accused was found guilty of two specifications of desertions, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "The copy of the pretrial statement of accused was not admissible in evidence over objection by the defense. The reason is that there was no proof of reasonable diligence to procure the original or that the original was lost or destroyed ***. This error, ***, however, was not fatal under the provisions of the 37th AW, because excluding its contents, there was substantial and compelling evidence of the accused's guilt as charged. The rule is that erroneous receipt on evidence of an extrajudicial confession will not require holding the proceedings of a court-martial invalid, if the evidence of accused's guilt, outside of the confession, is compelling ***." (CM ETO 12239, Blackshear, 30 Aug 45).

Accused was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) Desertion: "Accused's unauthorized absence of 66 days in an enemy country, commencing under the conditions shown, support the court's inference and finding that at some time he intended not to return." (2) Procedure: (a) "The charge sheet and accompanying papers reveal that accused was originally charged with desertion to avoid hazardous duty terminated by apprehension. Without reinvestigation and without a re-execution by the accuser, the specification was so deleted as to allege desertion terminated in an undisclosed manner. Insofar as termination was concerned, its manner was immaterial and the change not prejudicial to any substantial rights of the accused ***. Insofar as desertion was concerned the effect of the deletion was to enlarge the specification thereby permitting the prosecution to show 'straight' desertion, as proved, in addition to desertion to avoid hazardous duty, as originally alleged ***. When arraigned the accused did not object. While the practice here followed was highly irregular and improper, accused's substantial rights were not injuriously affected ***." (b) Partial Guilty Plea: "After the accused had pleaded not guilty to desertion in violating AW 58 but guilty of absence without leave in violation of AW 61, the President announced: 'The court

will consider his plea as not guilty'. It is unnecessary to decide the meaning and effect of the President's ruling." (CM ETO 12580, Groin, 15 Jun 45).

Accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) "The only proof of the place of desertion is that accused left his organization near the M** River, whereas the Specification alleges that he deserted at or near A**, France. 'As the place of desertion is not of the essence of the offense, the variance is immaterial within the contemplation of AW 37'". (2) The Specification fails to allege either the place or manner in which accused's wrongful absence was terminated. This deviation from the approved form *** is not fatal, however. The offense of desertion is complete when the person absents himself without authority with the requisite intent ***, and proof of apprehension or surrender at a particular time and place is not essential for a conviction of wartime desertion ***. In the absence of proof to the contrary, the presumption is that accused returned voluntarily to military control ***. It follows that the same presumption applies to a specification alleging desertion or absence without leave, which fails to allege manner of termination. (CM ETO 13018, Ostrowski, 27 Jul 45).

Accused was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) Return to Military Control: "Since the record of trial contained no specific evidence of the time and place of accused's return to military control, the court by substitution and exception found him guilty of desertion and remaining in desertion until he 'returned to military control at a time and place unknown.' Qualification of the findings in this particular form is unfortunate in its tendency to suggest a finding that the period of AWOL may have been of a shorter duration than that alleged. The Manual for Courts-Martial specifically provides that 'A condition having been shown to have existed at one time, the general presumption arises, in the absence of any indication to the contrary, that such condition continues' (MCM 1928, par.112, 130a, pp.110, 143). Hence, the unauthorized absence, having been amply proved to have commenced on 1 July 1944, may properly be presumed to have continued at least until 9 November 1944, the date of termination alleged in the specification ***, in view of the clear-cut evidence that accused was not present for duty with his company at any time between the two dates specified. Therefore, the court's finding may and should be regarded as designed merely to reflect the lack of proof of the exact time, place and manner of termination of the absence and not to constitute a finding that the period of absence ended earlier than 9 November 1944. On this basis, the finding of guilty of desertion is clearly supported by the evidence, an unexplained AWOL of more than four months being sufficient to justify an inference of the intent not to return ***." (2) Best Evidence: Motion to strike a first sergeant's testimony, on the ground that it was not the best evidence, was denied. This was proper. "In any event, however, no suggestion was made by the defense that accused was not a member of the company and the admission of his identity as the person described in the

specification which arises from his plea to the general issue therefore supplies adequate proof that he was ***." (CM ETO 13105, Fingland, 11 Aug 45)

Accused was found guilty of desertion in violation of AW 58, after a 28-day absence terminated by voluntary return about 14 December 1944. He was also found guilty of another desertion of 17 days in March 1945 in violation of AW 58; and escape from confinement in violation of AW 69. HELD: LEGALLY SUFFICIENT IN PART: (1) First Desertion: Accused left his organization properly on 14 November 1944 on a 2-day pass. On or about 16 November when he was required to return to duty, his company occupied a defense position of a hazardous nature in Germany. There was no evidence that accused was aware of this fact at the time his unauthorized absence commenced. There is therefore no evidence to support a finding that he absented himself with intent to avoid hazardous duty. The question presented is whether this AWOL from V**, Belgium, on 16 November 1944 terminated by a voluntary return to military control at Paris 28 days later was such a prolonged absence as would justify the court "in inferring from that alone an intent to remain permanently absent ***." "There was no evidence showing where accused's organization was located when he left on pass with other enlisted men and none indicating that at that time there was any hazardous duty to be anticipated ***." It is concluded that, in view of all the facts, only an AWOL in violation of AW 61 was proved. "There was no evidence tending to show a motive for desertion or tending to show that prior to going AWOL accused stated that he was going to desert, or sufficient evidence from which the court could reasonably infer that he intended not to return to the military service.." (2) The second desertion was adequately proved (detail facts). (3) Escape: "Although the evidence did not disclose clearly what restraint was included within the confinement described as 'the stockade', it was apparent that at the time he freed himself from such restraint 'the stockade' was patrolled by guards. Even if accused may have affected his escape by stealth rather than by force his offense was none the less an escape from confinement within the meaning of AW 69 ***." (CM ETO 13174, Druce, 7 Sep 45).

Accused was found guilty of (a) desertion in violation of AW 58 from about 30 September to about 28 October 1944; and (b) of AWOL from about 8 Nov to 13 Dec 44 charged as a desertion. HELD: LEGALLY SUFFICIENT. (1) First Desertion: "The only evidence of the absence alleged consisted of extract copies of morning reports signed by an assistant personnel officer on various dates prior to 12 Dec 44. These reports showed accused AWOL from 30 Sept 44 to 28 Oct 44. There was testimony to the effect that from 5 August until an undisclosed time, the system used in the regiment concerning morning reports consisted of the forwarding of a memorandum signed by the company commander through official channels to the personnel officer who prepared and signed the originals. In his absence, his assistant signed. The Board of Review has heretofore held that prior to the

promulgation of Cir 119, ETO, 12 Dec 44 (Sec IV), neither personnel officers nor their assistants were authorized to sign morning reports in the absence of evidence of a regular course of business, and that reports so signed were not competent evidence ***. These opinions, however, specifically stated that the Knorr case (CM ETO 4691), holding morning reports signed by personnel officers in the regular course of business were admissible under the Federal Statute (Act of 20 June 1936, ch. 640, sec.1, 49 Stat.1561, 28 USCA sec 695) was not overruled. The principles of the Knorr case have recently been reaffirmed in CM ETO 10199, Kaminski and CM ETO 16149, Bagley, *** Regular course of business was fully proved in the case before us, and the reports were therefore competent to establish AWOL for the period alleged. There was evidence that on 30 Sept the company was in a defensive position with 'much patrolling being done at night'. While accused was gone there was action, and from the middle of September to the middle of October there was 'a complete turnover of men in the company'. It is our opinion that from 28 days unexplained and unauthorized absence from a rifle company in combat, the court reasonably could infer under all the circumstances *** that accused intended to desert the service ***." (2) Second Desertion: The basis of the AWOL proof herein likewise rests on morning report extracts. "The entries of 15 Dec 44 and 3 Mar 45 were sufficient to establish the unauthorized absence, if competent evidence. The originals thereof were signed by the personnel officer who, by the theater circular above cited, was then authorized to sign them. The entry of 3 March 45 corrected and changed a prior entry dated 11 Nov 44 of missing in action on 8 November to AWOL on that date. The defense counsel moved to strike these exhibits from the record because of 'no personal contact *** between the company commanders and the rear echelon', and because of the delay, His motion was denied. The ruling was proper. As recently held with full analysis in companion cases (CM ETO 13303, Sweezy; CM ETO 14362, Campise), that a regimental system existed of compiling and authenticating morning reports based on notes and memoranda forwarded through official channels from the company will not of itself vitiate the reports, for personal knowledge so gained meets the standards required ***. And we have also held that morning reports are admissible in evidence, not because of contemporaneousness of entry with event, but because of the duty of a responsible officer to learn and record the true facts ***. A further point, not raised by the defense, but worthy of note is that the personnel officer has the power to correct entries made prior to the time of his authorization to act as an authenticating officer of morning reports (CM ETO 14362, Campise). The failure of the court to make a separate finding of a violation of AW 61 as to this Specification was immaterial ***." (CM ETO 13263 Kelley 2 Oct 45).

Accused was found guilty of desertion in violation of AW 58, from about 10 Nov 44 until his surrender on about 12 Apr 45. HELD: LEGALLY SUFFICIENT. "Accused was an ammunition bearer in an infantry battalion, which attacked N**, France on 8 Nov 44. He was last seen in his company

on 9 November, and was not present therein until 12 Apr 45. Search of regimental aid station records and those of the attached medical company, showed no record of treatment or evacuation of accused from 9 to 20 November. An extract copy of the company morning reports of 4 and 15 Apr 45," showed "Fr MIA 10 Nov 44 to AWOL as of 10 Nov 44." "The delay in making the correctional entry of the morning report of 4 Apr 45, obviously the result of accused's status having been erroneously carried as missing in action, did not render the evidence incompetent ***. Since the date the entry was made was subsequent to 12 Dec 44, the personnel officer was authorized to sign the original reports ***, and the source of the permanent record as an official writing based on signed memoranda forwarded through official channels in the organization was appropriate ***. AWOL for the period was therefore established. The defence evidence presented many strong mitigating factors, which must be considered by the Clemency Board, but the evidence was only mitigating." Absence for 5 months was sufficient to establish a desertion, for whatever personal reason. (CM ETO 13303, Sweezy, 29 Sep 45).

Accused was found guilty of desertion, in violation of AW 58, HELD: LEGALLY SUFFICIENT. The extract copy of the morning report of Detachment No. 3, GFRC, for 1 December 1944, introduced to show accused's initial absence on that date, indicates that the extracted original entry was signed by William E. Carroll, First Lieutenant, Infantry. No indication of the capacity in which he signed this entry appears. When the extract copy was prepared some two months later, on 6 February 1945, it was authenticated by William E. Carroll, First Lieutenant, Infantry, as adjutant of the detachment. The Army Regulations in force at the time of the preparation of the original entry provided that morning reports should be signed by the commanding officer of the reporting unit or the officer acting in command (AR 345-400, 1 May 1944, par. 42). Since it is assumed that the William E. Carroll who signed the original *** was the same officer who executed the certificate of authentication, some question may arise whether the original entry was signed by a person having authority to do so. However, especially in view of the lapse of time between the making of the original entry and the preparation of the extract copy and the additional fact that Lieutenant Carroll was, on both dates, an officer of the same detachment, the extract copy contains nothing which affirmatively shows that he was not, on 1 December 1944, either the commanding officer of the reporting unit or the officer acting in command. The presumption of regularity in the preparation of official documents was therefore not defeated by anything on the face of the document and it may be assumed that the original entry was signed by a person havin authority to do so ***. Further, the defective authentication of the extract copy (in that it was not authenticated by the proper custodian, III Bull. JAG 96) was waived by the affirmative statement of defense counsel that there was no objection to the admission of the proferred document ***." Other morning reports, prepared under Cir 119, ETOUSA, 12 Dec 44 were competent evidence of the facts recited therein. "While accused may not have been absent from military control during the entire periods of his absence from

his company, both his own pre-trial statement and sworn testimony support the inference that accused intended, either at the times of absenting himself or some time during those absences, to remain permanently away from the service." (CM ETO 13484 De Vito, 3 Aug 45).

The evidence with reference to Specification I *** fails to show that the absence without leave was initiated by an escape from confinement or terminated by apprehension, or other facts and circumstances indicating an intent to permanently leave the service of the U.S. The absence without leave period was of but 15 days duration, and an interval of 26 days elapsed before the absence without leave alleged in Specification 2 began. The evidence re the first specification established only the lesser offense of AWOL in violation of AW 61. (CM ETO 13655 Cliché 6 Jul 45).

Accused was found guilty of desertion in violation of AW 58, after an absence commencing in France about 9 September and terminating by apprehension in Scotland about 27 October 1944. HELD: LEGALLY SUFFICIENT. "If the condition of AWOL 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. Inference of such intent may also be drawn from the circumstances that he was apprehended at a considerable distance from his station; that he attempted to secure passage on a ship; that while absent he was in the neighborhood of military posts and did not surrender to the military authorities or that he was travelling under an assumed name and by virtue of fraudulent representations at a considerable distance and away from his place of duty. Unless admitted by accused, intent can be proved only by the inferences and presumptions which may reasonably be drawn from all the circumstances. Here accused was apprehended many miles from his place of duty, in fact, in another foreign country while seeking transportation to the U.S. some three thousand miles further from his place of duty. The court could take judicial notice that both the country where accused was properly stationed, as well as that country where he was apprehended, were dotted with military posts where he could have surrendered if he had so desired." (CM ETO 14069, Marziano, Jr., 12 Jul 45).

Accused were found guilty of desertion in violation of AW 58, after a 6-day absence from 18 to 25 December 1944, terminated by apprehension in Paris. HELD: LEGALLY SUFFICIENT. The evidence "establishes that on 18 December, 1944, during an enemy counter-attack both accused absented themselves from their advanced combat positions and withdrew to the rear. It is abundantly clear that neither accused remained in the assembly area where combat units were being reorganized, nor did they make any effort to rejoin their organization. Instead, they denied that they were member

members of 'L' Company to which they belonged and absented themselves without authority from their organization while it was engaged with the enemy. They were apprehended six days later, 25 December 1944, many miles to the rear at Paris, France. Although the period of accused's unauthorized absence was of relatively short duration, length of absence alone is not controlling *** on a charge of desertion (CM 9843, McClain). In the latter case, as here, the brevity of the absence was not of the accused's making inasmuch as return to military control was terminated by apprehension. Winthrop stated that in time of war, 'an absence of slight duration', such as even a part of a day, may under certain circumstances fully justify a finding of an intention to desert the military service. (Winthrop, 1920, sec. 987, p.638.) The circumstances indicate that accused absented themselves at the outset of one of the most crucial periods of fighting during the war in Europe. It is a well known historical fact of which the court and the Board of Review may take judicial notice that the 'Battle of the Bulge' began on 18 December 1944, when the break-through occurred in the Ardennes Forest ***. Accused are not charged with desertion based upon an intention to avoid hazardous duty or to shirk important service but in a specification alleging straight desertion, the prosecution may prove an act of desertion under the 28th AW ***. It is clear *** that accused had knowledge of the existence of a crucial tactical situation ***. The battle then being fought surely involved hazardous duty. The fact that they denied membership in a combat organization and absented themselves without authority at this time and under the then existing combat conditions, plus the fact that they were apprehended, many miles distant from the front lines, furnishes a substantial basis to support the court's findings that accused intended to desert the military service of the U.S. ***." (CM ETO 14345, Di Leo, et al 16 Aug 45).

Accused was found guilty of two desertions in violation of AW 58, i.e. (a) from about 25 Oct 44 to about 18 Feb 45; and (b) from about 14 Mar to about 18 May 45. HELD: LEGALLY SUFFICIENT. (1) First Desertion: "The extract copy of the morning report for 28 Oct 44 with an entry carrying accused as 'Duty to MIA' was improperly admitted ***. Regular course of business was not sufficiently shown. On that date the provisions of par. 42, AR 345-400, 1 May 44, governed the preparation of morning reports in the ETO and only the commanding officer of the reporting unit or the 'officer acting in command' were authorized to sign them ***. The presumption of regularity *** cannot be applied because the contrary affirmatively appears", to wit: it was signed by the personnel officer. The extract copy of the morning report for 19 Feb 45, although also signed by the personnel officer, was admissible because "on and after 12 Dec 44, unit personnel officers were authorized to sign morning reports ***." "So far as the entry *** pertains to events occurring before 12 Dec 44 ('Fr MIA 25 Oct 44 to AWOL 2359 hrs. 25 Oct 44') a different question is presented. The statement made in CM ETO 6951 Rogers in this regard was dicta and is overruled. There is no "doubt that an entry made on 19 Feb 45 as to events occurring on 25 Oct 44 would be competent evidence of the occurrence of the events so recorded and the lateness of the entry would go only to the

weight and credibility to be accorded it ***, at least in those circumstances where the officer preparing the report had on 25 Oct 44 a duty to know and record the matter stated. It is difficult, however, to see the importance of this last clause. It is difficult to see how the evidentiary value of what is entered on 19 Feb 45 is either increased or diminished by the entrant's duty, or lack of it, on 25 Oct 44. What is received by him and recorded on 19 Feb is new information pertaining to past events, but this new information is neither the more nor less accurate because the entrant may or may not have had a duty to find it out four months ago. The information he gains and records on 19 February he gains and records because of the position he occupies on that date, namely, as the person whose duty it is to prepare and sign morning reports, and not because of the position he held on 25 October and its accuracy seems to us entirely unrelated to this latter fact." "With respect to the entry of 19 February, Captain M**, the Personnel Officer, testified that it was entered upon the basis of information received through official channels. *** It is apparent from this testimony that informal morning reports were submitted from the companies to the Personnel Officer and on the basis of these the official morning report was prepared." "To be sure, Cir.119 Hq ETOUSA *** did not in haec verba grant personnel officers authority to prepare morning reports other than on the basis of what they themselves had actually observed. Nevertheless, the authors of that directive were familiar with the organization of divisions. They were aware that it would be physically impossible under combat conditions for a personnel officer to make daily visits to every company and check on the status of each individual in them. With an average of more than 3000 men in each regiment a personnel officer must necessarily rely on information submitted to him by others. We think the very designation of the personnel officer as the person authorized to prepare and sign morning reports was in itself a grant of authority to prepare and sign them on the basis of information submitted through customary military channels ***." "The entry made on 19 Feb 45, relative to accused ('Fr MIA 25 Oct 44 to AWOL 2359 hrs. 25 Oct 44') is competent evidence of his AWOL on that date." The four month desertion was established. (2) The second desertion was also established. (Dissent.) (CM ETO 14362, Campise, 2 Oct 45).

Accused enlisted man was found guilty of a 24-day desertion in violation of AW 58, of the wrongful use of an Army jeep in violation of AW 96 (lesser to original charge of embezzlement of the jeep under AW 94), and of the wrongful impersonation of an officer in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Morning Report: "Although the certification on the extract copy of the morning report states it to be 'a true and complete copy (including any signature or initials appearing thereon) of that part ***' pertaining to accused, no signatures or initials are set forth on that portion extracted. *** Here there was not only no objection but there is the additional fact that the clerk who prepared the original morning report identified and verified the entries from the witness stand ***. The officer authenticating the extract did not state his capacity, but did state that he was the official custodian of the morning reports

and failure to object could be deemed a waiver of the irregularity ***." The morning report extract was properly introduced. (2) 24-day Desertion: "The actual period of absence was 24 days. In determining that "accused's intent to desert existed, the court had the right to consider his change to the uniform of a commissioned officer as more damning than a change to civilian clothes, as it is well known that a man of military age can more easily avoid detection in military garb than in civilian clothes ***, and it is equally apparent that one in officer's apparel may avoid being checked more easily than a man in enlisted uniform. Accused himself proved this in his confession ***. Other proper considerations on the question of intent were his continued possession of a vehicle which would have facilitated return to military control and his actual repeated presence in military installations where he could have surrendered ***. His failure to surrender under such circumstances is further evidence of an intent not to return to military control. The absence occurred in a theater of active operations during a critical period of the war, and was terminated by apprehension." (3) Jeep-Embezzlement; Wrongful Taking: Found by the court to be guilty of embezzlin the jeep in violation of AW 94, the reviewing authority properly reduced accused's guilt to the wrongful application of the vehicle to his own use, in violation of AW 96. This was a lesser offense. (4) The wrongful impersonation of an officer was also adequately shown. (See Sec.32, U.S.C.C., 18 USCA sec 76; Little v U.S., 169 Fed.620; U.S. v Rush, 196 Fed. 579.) (CM ETO 12456, Fowler, 22 Sep 45).

Among other things, accused was found guilty of desertion in violation of AW 58, from about 28 October 1944 to about 14 January 1945. HELD: LEGALLY SUFFICIENT. (1) One morning report, signed by a personnel officer on 31 October 1944, was improperly admitted in evidence over objection. It "was not competent to establish the date of accused's initial absence ***. The remaining entries, made subsequent to 3 January 1945, were properly received in evidence ***. (2) Evidence: "The date of initial absence was properly established by the testimony of Sergeant L**, who by his testimony showed that accused, therefore absent on pass, was due to return that day but failed to return and was not with his company until 14 January. This evidence was sufficient to support accused's admission that he absented himself without leave about that time. Accused's words were that he 'took off'. This expression has achieved in this war the definite connotation of departing without leave that was found in the phrase 'over the hill' as used in the last war. This initial absence alleged ***, and its unauthorized character was thus established independently of the incompetent morning report entry. Accused told the investigating officer that he was returned to his organization by the military police three or four days after his initial absence, 28 October, and remained there about two hours before he left again. However, accused did not repeat this when he testified under oath, and the court had a right to disregard this statement to the investigating officer as self-serving. The court was justified in finding that accused was AWOL from his organization for a period of 2½ months, and from this protracted absence, occurring in an active zone of military operations, it had the right to

infer intent to desert and to find him guilty as charged." (CM ETO 14626, Fassnacht, 23 Aug 45).

Accused were found guilty of various desertions in violation of AW 58; of various AWOLs in violation of AW 61; of breaking their restriction in violation of AW 96; and of escapes from confinement in violation of AW 69. HELD: LEGALLY INSUFFICIENT IN PART. (1) Defense Counsel: Accused elected to defend themselves, "apparently because special counsel whom they had requested were not present ***." It appears that these requested counsel were not available (hearsay statements). "In the absence of an affirmative showing to the contrary, it will be presumed that individual counsel was not reasonably available and that there was no abuse of discretion on the part of the convening authority ***." "The president and law member repeatedly impressed upon accused the advisability of using the regularly appointed defense counsel. His persuasion may have caused accused ultimately to accept and place undue confidence in such counsel, who then failed to make objections to certain inadmissible and incompetent evidence. Since there is no prohibition against an accused acting alone as his own defense counsel ***, no undue amount of influence or persuasion should be employed in causing an accused to accept regularly appointed defense counsel whose services he does not desire. However, it appears *** that accused, as well as the defense counsel, actually participated freely in the cross-examination of witnesses and conduct of the defense, so that no prejudice resulted to accuseds' substantial rights from the action ***. Moreover, evidence which should have been excluded if proper objection had been made will be excluded from consideration here ***." (2) Offenses: It is established "that prior to 12 Dec 44, in the ETO, only the commanding officer of the reporting unit, or in his absence, the officer acting in command, had authority to sign, as distinguished from prepare, original morning reports ***. Therefore, it is clear that in the absence of any affirmative showing *** that the entries signed by the assistant adjutant prior to 12 Dec 44 were made in the regular course of business so as to render them admissible under the Federal 'shop book rule' ***, such entries were improperly received in evidence and cannot be considered here. Excluding them, there is no substantial, competent evidence to support the findings of guilty of described specifications. As to other Specifications, "independent of such inadmissible morning report entries, there is substantial, competent oral testimony ***." As to a third group, there is adequate evidence establishing the initial AWOL as of 21 Feb 45. "There is no showing, however, that the AWOL existed until 30 Apr 45, as alleged, or for any other certain period of time. One of the items of proof for desertion *** is that accused's absence 'was of a duration and was terminated as alleged' ***. In so-called 'short' (AW 28) desertions, it is held that proof as to duration or termination of the absence is immaterial because the offense is complete at the moment the accused absents himself with the requisite intent ***. Moreover, in 'straight' (AW 58) desertions, such as is here alleged, neither

the place nor manner of termination of the absence is an essential element ***. The question here presented is whether it was necessary for the prosecution to establish affirmatively the time of termination ***." "The Manual provides that once the condition of AWOL is shown to have existed, it may be presumed to have continued, in the absence of evidence to the contrary, until accused's return to military control ***. But there is no evidence as to when A** returned to military control. While he was seen in the stockade about 14 May 45, he might well *** have returned there within a few hours ***, in which event the inference of an intent to desert would be unwarranted and unreasonable. *** In the absence of any proof of duration", only an AWOL was shown on this charged desertion. (CM ETO, 14735, Clark, et al 23 Oct 45).

Accused was found guilty of a 41-day desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) Confession: "The agent who took the written statement of accused read 24 to him, and told him 'it would be better if he came clean, told the truth and it would be better all the wayaround'. Although the written statement does not amount to a confession of the crime of desertion, it is a confession of the lesser included offense under AW 61 and the rules of evidence regarding admissibility of confessions apply ***. The agent's statement does not make the document inadmissible under MCM 1928, par 114a, p.116, since not of a character 'to induce a substantial hope of favor or fear of punishment' (Winthrop's Military Law and Precedents (Reprint, 1920), p.329); mere adjurations to speak the truth are not sufficient to render statements made in response thereto involuntary ***." (2) Confinement Request: "The court also received a confinement request, after testimony of the requesting officer that he signed same. The document is probative of nothing, it not appearing that the witness ever saw accused or that he was confined on the request, but no rights of accused were affected by its improper admission, in view of the evidence of accused's apprehension." (CM ETO 15196, Nicholas, 8 Sep 45).

Accused was found guilty by the court of desertion in violation of AW 58, from about 11 Dec 44 to about 29 Jan 45. The reviewing authority changed the finding to one of desertion at the time specified "for an undertermined period of time." HELD: LEGALLY SUFFICIENT. "The initial absence, having been shown to have been unauthorized, was presumed to have continued until shown terminated ***. It was properly shown terminated by the morning report as of 29 January ***. From the long absence of 48 days in an active theater of operations, together with the accused's statements of intent on 10 December, the court could properly infer that he intended permanently to leave the service of the U.S. *** It is the opinion of the Board of Review that the action (unusual on this evidence of the reviewing authority is not approving the court's finding as to the date of the termination of the absence did not vitiate the finding of the court of desertion upon the substantial evidence properly before it. The desertion was committed when the status of unauthorized absence coincided

with the intent to desert, and the length of the absence thereafter was but an evidentiary matter bearing on intent. "The court's finding of the intent to desert, based on competent evidence, was not disapproved by the reviewing authority nor in our opinion did he intend to disapprove the finding as to such guilty intent. His action was not a disapproval of evidence. **** The Board of Review is not limited by the reviewing authority's characterization, not the essential part of his action, of the period of desertion as 'undetermined'. The word 'undetermined' is not here a word of limitation ***. (Dissent: "The length of absence is the decisive factor on the question of desertion ***, and I do not see how we can determine the period of absence in the face of the reviewing authority's approval of only an undetermined period." (CM ETO 15206, Burton, 1 Oct 45).

Accused was found guilty of desertion in violation of AW 58, commencing about 17 Nov 44, and terminating by apprehension on 18 April 45. HELD: LEGALLY SUFFICIENT ONLY FOR A ONE-DAY AWOL IN VIOLATION OF AW 61. (1) Evidence: "The first sergeant of accused's company testified that accused was not present for duty nor did he report to the company 17 November 1944; that he did not personally make a search for accused, but that a platoon sergeant made a search and reported to him that accused was not there, and that he did not see him again until he (accused) rejoined the company after V-E Day. The company mail orderly testified that accused did not report to the company 17 November 1945, and that he would have known it if accused had, since 'they' always told him when a man reported so he would know where to send his mail." "The testimony of these two witnesses does not show beyond a reasonable doubt that accused was not present with his company on 17 November 1944 or on any other date, and it is silent on the question of his authority to be absent." (2) Morning Report: Additionally a morning report entry of 25 April 45, signed by a warrant officer, contained (a) an entry showing return from AWOL to duty as of 18 April; and (b) a correction of a 20 Nov 44 entry of another unit, i.e. that it should have shown accused from sick to AWOL rather than to duty. "This case differs from the typical morning report case in that accused did not absent himself from the reporting unit (Company F, 11th Infantry). The correcting entry shows on its face that the alleged unauthorized absence was from another organization (i.e. Company D, 5th Medical Battalion). There was no duty disclosed by this record imposed upon the warrant officer who signed the morning report to have personal knowledge of the personnel assigned to this second organization, with which he is not shown to have had any official connection, or, a fortiori, of their status. The lack of personal knowledge required to make such documents admissible is apparent on the face of this morning report entry and its reception into evidence was therefore erroneous (memo for the JAG 30 March 1945, Washington, D.C.) This objection does not apply to the final entry ***. The return to duty was to the reporting unit, and his unauthorized absence was from that unit. The warrant officer who signed this entry is presumed to be the proper officer to make this morning report for the reporting unit.

416(9) (9) Proof of Intent; Unauthorized Absence

This entry establishes accused's AWOL for a portion of 18 April 1945 ***." (3) Trial on the same day as the charges were served did not result in prejudice, in view of both the defense's express consent and no indication that accused was injured. "The procedure, however merits the severest criticism." (CM ETO 15233 Hanley 22 Sep 45)

Accused was found guilty of a 33-day desertion in violation of AW 58, and of a black market offense. The reviewing authority disapproved the finding of black market guilt. HELD: LEGALLY SUFFICIENT. "The confession of accused was shown to have been made voluntarily without improper inducement and was received without objection." The black market findings of guilty were "disapproved because based solely on the confession, but there is adequate corroborative evidence of the corpus delicti of the desertion ***. Even though he could not be legally convicted on this record of the black market charges, the court could properly consider these activities and the income therefrom in determining his intent. Other proper considerations on this point include his continual proximity to American forces to which he could have surrendered, the military situation at the time, his wearing of civilian clothes, possession of a gun and a large sum of money when apprehended, his departure from the cafe on recognizing the apprehending agents, and his violent attempt to break arrest ***." The finding of guilt was adequately supported. (CM ETO 15343 Deason, 8 Sep 45)

Accused was found guilty of a number of desertions in violation of AW 58, and of a number of AWOLs in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) Morning Reports: "Assuming that the morning report entries *** are competent ***," the findings were supported. "The entries *** in support of Spec.2 of Charge I and Specs 3, 4, and 5 of Charge II are signed by the regimental personnel officer between 18 Feb and 29 May 1945, during a period when such officer was expressly authorized to sign original morning reports ***; and the fact that the original entries were prepared by such officer from a 'summary' authenticated and submitted by the company commander under a standard operating army procedure does not render them inadmissible on the groundthat they are 'obviously' not based on personal knowledge of the personnel officer, since, under the Federal 'shop book rule' (28 USCA 695), they are admissible as writings or records made in the regular course of business ***." Certain other described entries, "signed between 23 Sep and 26 Oct 44, were not admissible on the theory that the personnel officer who signed them had an official duty to know the facts and record them, because prior to 12 Dec 44 a personnel officer had no authority to sign an original morning report, as distinguished from authority to prepare it (AR 345-400, 1 May 44, sec VI, par 42; ***). However, since the record of trial affirmatively shows that such morning report entries were made by such officer at the time of the acts or events which they evidenced, or within a reasonable time thereafter, and in the regular course of business of the organizations

concerned, they are nevertheless admissible under the Federal 'shop book rule' as evidence of the facts recited therein ***." (2) Place: Offense: As to certain of the specifications, "the lack of, or variance with respect to proof as to the place at which accused absented himself without leave is immaterial within the contemplation of AW 37 ***. (3) Termination: Nor did prejudice result from the fact that it was found that one of the AWOLs terminated on 11 Apr instead of 23 Apr, "since the proof established a longer period of absence than that found, and accuse was benefited thereby ***." (CM ETO 15433 Burns, 26 Oct 45).

Accused was found guilty of two desertions in violation of AW 58, (a) from 13 March to 10 June 45, and (b) from 12 June to 18 June 45. He was also found guilty of an escape from confinement in violation of AW 6 on 12 June 45. HELD: LEGALLY INSUFFICIENT IN PART. The second desertior was not supported. Rather, the evidence showed only the lesser offense of AWOL in violation of AW 61. This second absence, "while initiated by an escape from confinement and terminated by apprehension, lasted at mos only six days. He offered as an explanation for his departure the fact that he desired to repay certain money to a civilian living in Nancy. Thus, his absence was neither much prolonged or unexplained. Further, the fact that his second absence took place after the cessation of hostilities in this theater makes it less likely that he entertained the inte to remain permanently away from the service. In general, it may be saic that Americans are not now deserting in Europe." (CM ETO 15442, Bifano, 16 Aug 45.)

Accused was found guilty of a 4½-month desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) A Morning Report entry extract prior to 12 Dec 44 was improperly introduced. 'The authentication of tl original *** was by a warrant officer, junior grade, without indication of the capacity in which he signed. The Board of Review in CM ETO 14486, Marks, declined to indulge in the assumption, in the face of the inherent improbabilities, that the warrant officer in that case was in command of a company. (At the time of the authentication of the mornin report in the Marks case and in the present case the commanding officer or the officer acting in command of the reporting unit was the only person authorized to make such authentication (AR 345-400, par.42,1 May 44). *** However, the admission of this entry 'Duty to missing' was no prejudicial to accused. (2) Confession: A pretrial confession, however was sufficient to show an AWOL. "It is not required that the evidence of the corpus delicti be sufficient of itself to establish beyond a reasonable doubt that the offense has been committed, nor must it cover every element of the offense; it is only necessary that such evidence show 'that the offense charged has probably been committed' ***. It is here independently established that at the time of the alleged initial absence, accused's organization was at L** (near St.Lo), France, and th during the period of alleged absence he stayed at irregular intervals a

a hotel in the Paris area, sometimes for eight days; on these occasions he had a jeep with him. Also during this period he was seen 'too much' (according to the military police) around the Rainbow Club, Paris, in the afternoons and evenings. Further independent evidence shows that when on 8 December 1944 /date of his apprehension/ he was checked for a pass by a military policeman because of circumstances which aroused suspicion he displayed a trip ticket, and said a captain had his travel orders. A further check disclosed that the jeep in his possession at the time and described on the trip ticket was carried on military police records as stolen, and accused was taken into custody; thus his return to military control was effected by apprehension. There was sufficient evidence independent of both the morning report and the confession, to show that the offense charged was probably committed *** and consideration of the confession as evidence of *** desertion was therefore proper. This case is clearly distinguished from CM ETO 10331, Hershall Jones, wherein it was held that although there was sufficient evidence, aliunde the accused's confession, in the first sergeant's testimony of unauthorized absence of some seven months from the battery, of an absence without leave of some three months, this was insufficient independent evidence to render admissible the accused's confession of three separate subsequent absences without leave from different organizations during the seven month period. The corroborative evidence present in the instant case was lacking in the Jones case. It was recently held that where a confession admitted both an unauthorized absence and black market activities for both of which he was charged, and there was not sufficient corroboration to permit a conviction of the second charge, statements in the confession as to the black market activities could nevertheless be considered by the court insofar as they bore on the question of accused's intent to desert (CM ETO 15343, Deason). Thus the court here properly considered the fact that accused 'walked out' of the place of detention after his apprehension, had a vehicle which would have facilitated his return to military control at any time, and was actually in and out of various ordnance headquarters during his absence, which facts are contained in the confession. Other proper factors for consideration on this point include his subsequent use of a fictitious name and assumed rank, his unexplained absence for a period of 132 days ***, and the general military situation during this period. The fact he remained in uniform in no way negatives the conclusion of an intent to desert, since 'it is well known that a man of military age is safer from inquiry by the police if in uniform than if he were civilian clothes'." The finding of guilt was sustained. (CM ETO 15512 Miller 15 Sep 45).

Accused was found guilty of two desertions, in violation of AW 58, HELD: LEGALLY SUFFICIENT. "Accused was charged with two desertions of 25 and 15 days' duration respectively, the second commencing on date which terminated the first. The evidence shows that accused was absent without leave from his organization continuously for 40 days, commencing with the initiation of the first offense alleged, at a time when he was under arrest in quarters, and terminating with the second, interrupted, for a

brief fraction of the day on which the first was alleged to have ended and the second begun, by his apprehension in civilian clothes in Paris, where he eluded custody and was again apprehended, again wearing civilian clothes, 15 days later. The inference of intent not to return is thus based on substantial evidence ***." (CM ETO 15548 Clark, 13 Sep 45).

Accused were found guilty of desertions of 114 days each, in violation of AW 58. HELD: LEGALLY SUFFICIENT. Accuseds' presence with other organizations during the period of their absence, "if wrongful and unauthorized, would not preclude their being absent without leave from their own." (CM ETO 15549, Hartman et al, 14 Sep 45).

Accused was found guilty of desertion from about 31 Aug to 19 Dec 1944, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "Over defense counsel's objection, a witness was permitted to testify as to the contents of an envelope found on accused when he was taken into custody and evidence was presented that the vehicle in which accused was sitting when first apprehended, contained certain items of government property. While it is permissible to show that an accused committed other offenses during his unauthorized absence *** as bearing on his intent not to return to military control, the proof of such offenses should be complete and not merely of an isolated suspicious circumstances. Hence this evidence was incompetent, and its admission constituted error. Inasmuch as the other evidence is clear and compelling as to the guilt of accused, it is not believed he was seriously prejudiced thereby ***." (CM ETO 15604, Agnew, 22 Sep 45)

Accused was found guilty of desertion in violation of AW 58; of stealing a government jeep in violation of AW 94; and of attempting to sell a government jeep in violation of AW 96. HELD. LEGALLY INSUFFICIENT IN PART. (1) Evidence: "On the evening of 21 June 45, accused absented himself without authority from his organization in company with another soldier from his unit. In absenting themselves, the men took with them, without authority," the vehicle described. "On 26 June they entered into negotiations with certain Belgian civilians looking toward the sale of the vehicle. While accused's companion apparently was the moving spirit ***, accused also participated ***. These transactions led to their apprehension and arrest that same day by American military police." The findings of guilty on the AW 94 and 96 specifications were supported. "However, it will be noted that the AWOL, although terminated by apprehension and accompanied by other illegal activities, was of 5 days' duration only. In a pretrial statement, accused asserted that at the time of his initial absence his companion told him that he was going to a nearby Polish camp in a jeep to pick up some laundry and was going to return to the area immediately thereafter. On the basis of those repres

representations he decided to go along 'for the ride.' Thereafter, his companion refused to return and also prevented him from doing so. It is thus seen that accused's absence was neither prolonged nor unexplained and there is accordingly little basis for the inference that accused's absence was accompanied by the requisite intent to constitute his offense that of desertion. Further, the fact that his absence took place after the cessation of hostilities in this Theater makes it unlikely that he entertained the intent to remain permanently away from the service. In general, it may be said that Americans are not now deserting in Europe. Only an AWOL was shown. (CM ETO 16104, Blanchette, 12 Sep 45)

Accused La Brake was found guilty of desertion in violation of AW 58 from 17 Mar to 6 Apr 45. Accused Leone was found guilty of desertion in violation of AW 58 from 19 Mar to 8 Jun 45. HELD: LEGALLY SUFFICIENT ONLY FOR AWOLS IN VIOLATION OF AW 61. (1) "Short" Desertion: This type of desertion is one which has occurred under AW 28 circumstances, even though not alleged. "Accused absented themselves from a rest area /three miles from the front lines/ where their company had been for four or five days undergoing training and 'preparation for a move upon completion of our assignment'. The record contains not the slightest evidence of when or where the company was to move or did move - to say nothing of accused's knowledge thereof. Training of a combat unit imports ultimate combat, but is not proof of its imminency and is insufficient alone to support an inference of an intent to avoid hazardous duty ***." It does not appear that these absences followed hard upon previous unauthorized absences to avoid hazardous duty. Nor does it appear that the rest area was subjected to shelling. (2) "Straight" Desertion: (a) La Brake: This accused's "unauthorized absence of 20 days did not, of itself alone, constitute a substantial basis for inferring an intent not to return ***, even though it was terminated by apprehension *** many miles away." (Distinguished cases.) (b) Leone: The stipulation showing Leone's return to military control should not have been accepted. It affirmatively appears that Leone claimed to have returned to military control prior to 8 Jun 45, the time he was stipulated to have returned ***. With the stipulation eliminated there only remains the proof that Leone absented himself without leave on 19 March 1945 under the shown circumstances." Although the place and manner of termination is not essential in a desertion case, "what of the time of termination where, as here, the intent to desert may be inferred, in part at least, from the duration of the unauthorized absence?" "Once an unauthorized initial absence is shown, to sustain a conviction of 'straight' desertion only such further allegations need be proved as will support an inference of an intent not to return." "Leone could be presumed to have continued AWOL only 'until his return' which, as evidenced by his presence in court to say nothing of his statement to the court, was sometime subsequent to his initial absence and prior to his arraignment. It, therefore, follows that he may have returned as he stated he did, prior to 8 June 1945, when he was alleged and found, but not proved, to have returned." It is concluded that his AWOL terminated at a time not shown. "To hold otherwise would be to enable the

prosecution to throw upon an accused the burden of proving his return ***. To thrust such a burden upon an accused would be to compel him to present evidence against himself, and is, in effect, violation of AW 24 ***." "Proof of an unauthorized absence for an undetermined period, commenced under the circumstances as here shown, does not support an inference of an intent to desert. Leone's offense of AWOL was committed when he absented himself. Insofar as the offense of AWOL was concerned, proof of its duration was unnecessary ***." (3) Citizenship: "Public Law 221, 78th Congress, approved by the President 20 Jan 44, amended the statute relating to loss of nationality or citizenship as a result of conviction by court-martial of desertion in time of war (54 Stat.1168; 8 U.S.C.801(g)), so as to limit its application to persons who are dishonorably discharged or dismissed from the service as a result of such conviction. The amendment provides for restoration of nationality or citizenship lost by desertion in time of war to persons restored to active duty in time of war, re-enlisted or re-inducted in time of war with permission of competent military or naval authority. The amendment however, does not obviate the necessity of relieving by appropriate order of restoration, the jeopardy in which the accused's citizenship has been placed by his illegal conviction of desertion and the sentence of dishonorable discharge based thereon, despite its suspension by the reviewing authority." (4) Both accused were guilty only of AWOLs in violation of AW 61. (CM ETO 16196, Leone et al, 16 Oct 45).

Accused was found guilty of desertion in violation of AW 58; of escape from confinement in violation of AW 69; and of housebreaking in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The offenses were adequately proved. (2) General Prisoners: "At the time accused was tried his status was that of a general prisoner under sentence of dishonorable discharge (suspended) and a ten year term of imprisonment. Although he was not described and identified as a general prisoner in the charge sheet and specifications, there was no question as to his identity, as he pleaded to the general issue and by so doing admitted that he was the person described in the specifications ***. Evidence of previous conviction for offenses committed by accused prior to the time he became a general prisoner was received in evidence. This was error inasmuch as in the case of a general prisoner, evidence of previous convictions admitted should be limited to evidence of offenses committed during an accused's status as a general prisoner ***. The confirming authority was apprised of the nature of this error and the sentence imposed has accordingly been reduced. (CM ETO 16342 Wiseman 28 Sep 45).

Accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. "Eliminating an 'Extract copy of Personnel Status Card of Delta Base Section Stockade' recording his escape therefrom 9 November 1944, for the introduction of which under either the 'official statement' or 'shop-book rule' no proper predicate was laid, the testimony of the apprehending officer furnished sufficient proof of the corpus delicti to render admissible the confession of AWOL ***. The duration

of this absence, his misrepresentation of identity when apprehended, and his admitted activities during the period involved support the inference of intent not to return which is essential, in this case, to sustain the conviction of desertion ***." (CM ETO 16628, Quintanilla 5 Oct 45)

Accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY INSUFFICIENT. "The competent evidence shows that on 28 July accused was a member of the 451st Reinforcement Company, 86th Reinforcement Battalion, and that on the morning of that day he was told by his Company Commander to pack his equipment and go to the assembly area for shipment after dinner to the 35th Division. It is presumed that this meant detachment of the accused from the 451st Reinf. Co. and his transfer, physically and on paper, to the 35th Division.

The 'report' of the shipping sergeant that accused was not there (at the assembly area) when the men left was hearsay. This sergeant did not testify. The record does not show to whom the report was made or whether it was oral or in writing. The same may be said of the 'check' made with the 35th Division and the resulting 'report' from there. This evidence was, accordingly, incompetent." Disregarding this incompetent evidence, there is no evidence "that accused did not report as ordered and that he did not leave for his new command, in which case the fact that accused was not present with his old command two days later, 30 July, the day when the search was made, is utterly without significance or materiality. His old company and camp were not his place of duty on 30 July. The morning report entry of 9 August 1944 was without materiality. Wrongful and significant absence is only that which occurs in connection with the soldier's place of duty, or his command, guard, quarters, station, or camp ***." (CM ETO 17260 Venezia 13 Oct 45).

Accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. "The prosecution showed that, on paper at least, accused had been transferred to the ** Infantry Division on or before 16 February, that word of this was officially received at the Division and that on the same day accused was assigned to Company **, 7th Infantry in that division. There is some evidence that accused did not report to Company **. It is reasonable to presume that accused's ordered transfer was from a replacement depot. His routing to Company ** was through Division Hq. It is a fair presumption that had accused reported or arrived at Division Hq, he would in due course have appeared for duty at Company **; and the corollary is equally reasonable that accused's failure to appear at Company ** indicated that he had not arrived at Division Hq. While this evidence may not convince beyond a reasonable doubt that accused in fact failed to report pursuant to his transfer and that failure to do so was willful, it is sufficient circumstantially to support the confession of accused that he willfully absented himself without leave from a replacement depot near Naples, and was absent for some months ***." (CM ETO 17407 Abraham 23 Oct 45)

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419 (AW 61) Absence Without Leave 419

Not Digested

8414 Morris
8837 Wilson
9072 Diodato (lesser to AW 58)
9572 Dawson
9665 Hamilton et al
9886 Bowens
10054 Brown
10414 Hopkins
10466 Sanford
10496 Pierson
10618 Morrow
10761 Baldock
11269 Gordon
11271 O'Hara
11386 Toon (aggravated)
11481 Sanders
11637 Monti
11725 Whitfield
11775 Porter
11830 Green Jr et al
11972 Allison
12096 Amlauer et al
12447 Wilson (WAC officer)
12481 Domingos
13253 Bragalone
13292 Kazsimir (en route)
13707 Housel
14128 Brandon et al
14212 Healan
14455 Nice (M/R)
14609 Panagos
14801 Winkles
14845 Gerringer
15062 Finigan
15252 Lambert
15268 Consentino
15304 Tax
15441 Romanowski
15506 Badders
15507 Andrade
15550 App
15653 Perez
15704 Carver
15793 Stidham
16344 Martini (reduced by RA from AW 28-58)
16565 King
16889 Klish
17232 Davis
17330 Freund
17609 Wood
17840 Bronson
17884 Fucco

Cross References:

385 (AW 28) AW 61 as lesser to AW 28-58:

8147 Pierce
8358 Lape
8708 Lee
8519 Brigoglio
11987 Johnston
14138 Spitzer
9665 Hamilton et al
16022 Barfield
15223 Skuczas
15225 Barth
16196 Leone
14905 Mortha
14735 Clark et al

416 (AW 58) AW 61 as lesser to AW 58:

9204 Simmers
11924 Polidoro
13655 Click
12128 Bailey
15442 Bifano
10842 Raney
16104 Blanchette
15233 Hanley
13174 Drace

419(AW 61) Absence Without Leave

Cross References:

450 (2) 58) AW 61 is lesser to AW 28-58:

450(4) 13770 Nordike
416(9) 14735 Clark et al
416(9) 15433 Burns
416(9) 13263 Kelley
399 14455 Nice (No Pen.Conf)
452(7) 15749 Seder
451(32) 13126 Green
385 9597 Jusiak (with AW 28-58)
416(9) 10842 Remey (insufficient AWOL evidence)
395(18) See Morning Report summaries
416(9) 9978 Green
385 11987 Johnston (Omit "without leave")
451(6) 11729 Held
395(49g) 15849 Walton
395(12b) 16149 Bagley (Written "Date for M/R" admissible as AWOL evidence)
385 15227 Mason
385 15216 Miller

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(2) Proof

Accused officer was found guilty of a number of specifications alleging his failure to repair, in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) The evidence sufficiently supported the findings of guilt. (2) Corpus Delicti was adequately established, to permit the introduction of the confession re Specification 3. "The evidence shows that accused did not attend any classes on 20 January, and that a search made for him at his quarters and the mess failed to reveal his whereabouts. Although a note was left on his bed *** 20 January, requesting him to report to the commanding officer the following morning, he failed to report until *** 22 January. This evidence clearly constituted sufficient proof of the corpus delicti ***." (3) Week End: "Defense counsel also contended that since the accused was not required to be at his station from 1800 hours on Saturday, 20 January, until Monday morning, he should not be found guilty of AWOL for that period of time. It is too clear for argument that an accused who has acquired voluntarily a status of absence without leave is in no position to claim a cessation of that status during periods when he might have been lawfully absent had he remained at his place of duty." (CM ETO 10498 Wiseman 5 Jul 45)

Accused officer was found guilty of an AWOL and two failures to repair in violation of AW 61; and of being drunk in uniform in a public place in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Failure to Repair: "Accused's failure to read the squadron bulletin board, as he admitted he was required to do, does not excuse his failure to repair for the briefing and mission as alleged ***." (2) Multiplication: Defense moved to strike the specifications re failure to repair, on the ground that the times thereof fell within the period of the charged AWOL. The court correctly overruled this motion. "A combat bombing mission, and briefing operations preceding it, are not routine scheduled duties within the meaning of the manual, and these specifications tend to explain the gravity of an AWOL of otherwise relatively little seriousness ***. Even if there were a multiplication ***, the error is harmless since any one of the specifications supports the sentence ***." (Sentence was dismissal and TF.) (CM ETO 11170 Tucker 6 Jul 45)

Absence without leave will not be inferred from the proven surrender of accused at a distant station. (The full digest of this case is under sec 385.) (CM ETO 11693 Parke 5 Jul 45)

Among other things, accused officer was found guilty of absence without leave in violation of AW 61. HELD: LEGALLY SUFFICIENT. "Even if a portion of accused's absence was due to enemy operations and the weather as claimed by accused, such circumstances did not afford a sufficient answer to the accusation once he deliberately absented himself without authority ***." (CM ETO 10360 Gailey 19 Jul 45)

Accused was found guilty of a series of AWOLs, in violation of AW 61. HELD: LEGALLY SUFFICIENT IN PART ONLY. "Each of the original morning report entries, of which duly certified extract copies were introduced in support of Specifications 1, 2 and 3, was dated prior to 12 December 1944, during a period when there was no authority in the ETO for a personnel officer to sign an original morning report. Since the evidence affirmatively shows that the original entries were signed by the personnel officer, and hence themselves inadmissible as evidence, the extract copies thereof were not competent to prove the matters recited therein, regardless of the failure of the defense to object to their admission ***. There being no evidence of the AWOL alleged in Specification 1 other than the incompetent morning report entries, the record does not support the finding of guilty ***. The testimony of the company first sergeant is sufficient, however, without the incompetent morning report entries, to show that accused absented himself without leave" as alleged in Specifications 2 and 3. "Since, on 12 December 1944, theater unit personnel officers were authorized to sign original morning reports (Cir.149,ETOUSA, 12 Dec 1944, sec IV), the entry for 16 January in support of Specification

4, was competent evidence *** to show AWOL *** on 11 January 1945. The entry showing termination of this absence by confinement in the military police headquarters at A**, Belgium, although hearsay, was beneficial to accused to the extent of showing termination of his wrongful absence, and therefore was competent in the absence of objection ***." (CM ETO 16617 Dominguez, 19 Jul 45)

Accused were found guilty of a November 1944 AWOL, in violation of AW 61. HELD: LEGALLY INSUFFICIENT. The only evidence to show the AWOLs were extract copies of morning reports of the 39th Replacement Battalion, 19th Replacement Depot, certified by the assistant Personnel officer, 19th Replacement Depot, (date of certification not shown.) Defense counsel objected thereto, on the ground that the personnel officer had not signed. "While not artistically phrased, defense counsel's objections were apparently levelled at the validity of the purported authentication of the extract copies as well as their introduction without corroborative testimony as to circumstances surrounding the initial discovery of the alleged absences. Defense counsel specifically called the court's attention *** to the fact that the certificates as to authenticity *** bore the signature of the assistant personnel officer. Objection on the ground that the unit personnel officer was not authorized to authenticate the extract copy may not therefore be regarded as waived." It is held that "a morning report as with any other public record, an authenticated copy, to be admissible in evidence, 'must be certified by the official custodian thereof ***.'" The assistant personnel officer could not properly authenticate the instant morning report. (Cf: CM ETO 5234, Stubinski.) (CM ETO 9272 Hayes et al 31 Jul 45).

Among other things, accused officer was found guilty of the following violations of AW 61: (a) AWOL from 3 to 5 November 1944, and four specific failures to repair for various duties re prospective combat missions at four different times within that period. HELD: LEGALLY SUFFICIENT. (1) Multiplication: "While accused has been specifically charged with failure to repair at four separate times, included within the period for which he was tried for AWOL, it was not an unreasonable multiplication ***. The MCM prohibits joining charges for failing to report for a routine scheduled duty, such as reveille, with a charge of AWOL, when such failure to report occurred during the period for which the AWOL is charged (MCM, 1928, par 27, p.17). In the instant case the duties for which accused failed to repair were specifically scheduled duties of a most serious and important nature and can hardly be regarded as the type of routine duties contemplated by the prohibition in the MCM." In MCM, 1921, par 66, p. 65, it is stated: "And so a person subject to military law should not be charged under AW 61 for failure to report for a combat duty at a time included in a period for which he is charged with AWOL under the same article; otherwise when the duty is not a routine duty. Routine duties are those that are regularly scheduled, such as reveille, retreat,

stables, fatigue, schools, drills, and parades, but do not include practice marches or other previously specially appointed and important exercises of which the accused is chargeable with notice' ***. Inasmuch as accused was bound by the notices posted on the bulletin board ***, he was chargeable with notice that he was scheduled for these duties and the important roll that bombing missions play in modern warfare is not open to serious question. It is clear that under the above provision of the 1921 MCM the joinder of charges herein was proper." (CM ETO 11271 O'Hara 11 Aug 45)

Among other things, accused officer was found guilty of (a) violations of AW 61, to wit: (i) a straight AWOL from 3 November to 4 November 1944; and (ii) failing to repair on 4 November 1944 at 1015 for take-off on a combat mission, at 1200 for briefing for a combat mission, at 1400 for take-off on a combat mission, and at 0815 for briefing for a combat mission; and (b) of the wrongful taking and use of an Army motor vehicle. HELD: LEGALLY SUFFICIENT. (1) AW 61; Multiplicity: The evidence showed "that accused left his station and camp area *** on the afternoon of 3 November without proper leave, permission, or notice to anyone, in fact, without even checking the bulletin boards, and hitch-hiked to a town twenty miles distant where he spent most of that night and the next day drinking." The evidence supported the findings of guilt on all the AW 61 specifications. As to multiplicity, the four specifications charging failure to repair "describe four distinct offenses which if not so charged, on proper objection might not have been shown in aggravation of the AWOL. The duplication *** does not affect the legal propriety of the sentence and the findings of guilty of the specification need not be disturbed." (2) AW 96; Wrongful Vehicle Use: "Accused admits that he was found in a jeep which the evidence shows had been taken wrongfully and without permission and Private E** testified that accused rode around in it with him, driving it some of the time. Accused does not explain what he was doing in the jeep or how he came there. As accused and the other occupants of the jeep had been together in his tent during the evening, the natural presumption is that they all, including accused, were equally guilty of the wrongful taking and use of the car." (CM ETO 10721 Petroski 9 Aug 45)

Among other things, accused was found guilty of an AWOL in violation of AW 61. HELD: LEGALLY SUFFICIENT. The AWOL Specification "alleges that accused was absent without leave from his command from 9 December 1944 to 17 February 1945; but omits any allegation of place. The unauthorized absence from his organization was proved. As place is not of of the essence of the offense, the Specification is not fatally defective ***." (CM ETO 12350 Spinelli 1 Sep 45)

Accused was found guilty of AWOL in violation of AW 51, after his absence from 12 November to 24 December 1944. HELD: LEGALLY INSUFFICIENT. (1) Law Member: Initially, it appeared that the officer who sat as law

member for the trial of accused had actually been detailed as such for the trial of another. However, "a copy of a proper order detailing him for the trial of accused herein, which order was originally omitted from the record through a clerical error, has been received, thus disposing of this jurisdictional ground." (2) Morning Report: The finding of AWOL guilt was based solely on a morning report to establish the initial absence. The extract copy "is authenticated under date of 31 December 1944 by 'G 'George R. Marier WOJG USA', who certified that he was 'the Adjutant of ***' and the official custodian of the morning report." The extract shows that the actual morning report entry was signed by "George R. Marier WOJG USA". "Since an adjutant of a unit is not as such the duly constituted official custodian of the morning report of that unit, his authentication of an extract copy of such report is improper, but a failure to object to such authentication may be deemed a waiver of the objection ***. A different question arises with respect to the authentication of the original morning report. In November 1944, during which month the purported event occurred and the original morning report recording was made, the only person authorized by the effective regulations to make morning reports was 'the commanding officer of the reporting unit or in his absence *** the officer acting in command', as provided by AR 345-400, 1 May 1944, section VI, paragraph 42. *** The certificate of the extract copy, which is dated 31 December 1944, shows that Warrant Officer (Junior Grade) George R. Marier was adjutant of the company. In addition, the Army Regulations provided that the duties to be assigned warrant officers 'are, in general, for the purpose of relieving commissioned officers of a considerable burden of administrative and technical details' (AR 610-5, 13 Sept 1941, par.3b). It is well known that warrant officers are only very rarely and under unusual circumstances commanding officers of companies, particularly in this theater. While it is, of course, conceivable that the warrant officer, shown to be an adjutant on 31 December 1944, was the commanding officer of the replacement company on 12 and 16 November 1944, the Board of Review, in the absence of evidence at least of unusual circumstances, considers this possibility remote and declines to indulge in the assumption in the face of the inherent improbabilities. It is concluded, therefore, that the morning report entry is incompetent and should not have been admitted in evidence. Had the adjutant been a commissioned officer, another question could be presented which is not here decided. Nor will AWOL be inferred from the stipulation that accused returned to military control on 24 December 1944 ***." (Distinguish CM ETO 5414, White and 5234 Stubinski.) (CM ETO 14486 Marks 6 Sep 45).

Accused was found guilty of AWOL from about 27 Jan to 5 Apr 45, in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) Morning Report: The initial AWOL rested upon a 4 May 45 morning report correcting a 14 Apr 45 entry to show accused from duty to AWOL on 14 Feb 45. "The defense counsel objected to the introduction of the extract copy of the morning report on the grounds that it was not a current entry, not identified, and not corroborated by other evidence. The latter two objections are untenable by the clear provisions of *** MCM, 1928, par.116a. p.119. par.

117a, p.121. Concerning the first objection on contemporaneousness of entry with event, and concerning the further possible objection that the entry was made after charges were preferred, it has already been held *** that neither objection is warranted ***. The reason is that the entries gain admissibility because of the official duty of a responsible officer to record the true facts, and no useful purpose would be served by repeating detailed analysis here. Nor need we question their prima facie correctness because many officers and men in the company were at the time thereof casualties or transferred, nor engage in inferences that the person making the entry (presumably the company commander or other officer authorized under existing regulations) gleaned his knowledge only from witnesses who were before the court. If such were done, the purpose of the morning report as prima facie evidence would be defeated. The law presumes that the person making the report performed his bounden duty, and knew and recorded the facts from knowledge gained at the time of the event recorded, or gained from responsible and official sources thereafter. It is important to the Army and to the prompt and fair administration of justice therein that the rules as to the admissibility of morning reports be not hedged about by artificial and sterile rules of form, too strict for the persons who operate the courts to administer and disconnected with any invasion of the rights of the accused. They constitute a convenient and practical method of making proof of the exceedingly simple fact of AWOL, and the mode has many analogies in the civil courts. Since this entry does not appear to be obviously 'not based on personal knowledge', it was presumptively correct ***. If the person making the entry had not such knowledge, it was the plain duty of the defense to call him to the stand if available; or to face the ultimate fact of justice both to the prosecution and the accused in the case, that if accused was regularly present in any Army unit during the period alleged, he could defeat the proof by the testimony of ant one person from such unit. The means to secure such testimony, if existent, are available upon demand (AW 22; MCM, 1928, par. 97, pp. 86-89)." (2) Return to Control: "The trial judge advocate served as investigating officer ***. His 'stipulation' that accused returned to military control on 5 April constituted a judicial admission that unauthorized absence terminated earlier than other proof showed ***." (CM ETO 13199 Golej 20 Sep 45)

Among other things, accused officer was found guilty of a violation of AW 61, in that, "while en route between AAF Station 385 and AAF Station 590, without proper leave /he did/ absent himself from his command from about 16 Feb 45 until apprehended in civilian clothes about 20 Mar 45." HELD: LEGALLY SUFFICIENT. "While there is no direct evidence accused did not report to his new station during the period of his alleged absence, as his orders required him to do, the uncontradicted proof that he left France by airplane and landed in England, that he failed to sign the officer's register at his new station as required by Army Regulations and his apprehension over a month later in civilian clothes in a different locality from that of his new station, constitutes a strong chain of circumstantial evidence from which the court could properly infer that

accused was absent without leave for the period alleged ***." (CM ETO 15867 Mitchell 28 Sep 45).

Accused was found guilty of an AWOL in violation of AW 61. HELD: LEGALLY INSUFFICIENT. "The extract copy of the morning report of accused's company purporting to show his initial absence on 8 November 1944 was improperly received in evidence since the regimental personnel officer had no authority under Army Regulations to sign the original on that date ***. There was therefore no proper evidence of his alleged absence on 8 Nov 44. Regarding the extract copy of the company morning report reciting accused's return to military control on 26 Dec 44 in Paris, this information was obviously hearsay and not within the personal knowledge of the officer making the entry. It was therefore not competent evidence of the facts therein stated ***." There was no competent evidence in the record to establish the charged AWOL. (CM ETO 16585 Thompson 27 Sep 45)

Accused member of Reinforcement Detachment 105, 2981st Reinf. Co., EFRC, was found guilty of AWOL in violation of AW 61. HELD: LEGALLY INSUFFICIENT. "Accused was transferred on 19 Nov 44 in an AWOL status to the 212th Reinforcement Co., by a published special order of the Eleventh Replacement Depot, duly identified and introduced in evidence. He never reported to the assigned company and had no permission from the company to be absent. He returned to military control 2 February 1945. The case is controlled by the opinions in CM ETO 11518, Rosati, and CM ETO 11356, Crebessa, and reference is made to the opinions of the Board of Review therein. The accused will not be presumed to have knowledge of an order transferring him in an AWOL status, and it is not competent proof of the offense alleged that he did not have permission to be absent from a company where he had no proven duty to be." (CM ETO 13565 Slominski, 10 Oct 45)

Accused was found guilty of AWOL in violation of AW 61. HELD: LEGALLY SUFFICIENT. "Accused was convicted of AWOL from his station, with the 352nd Replacement Company, 72nd Replacement Battalion, from about 4 February 1945 to about 28 March 1945. The roster, being a properly identified official record kept in due course, with the system of entries therein fully explained, was competent evidence to show: accused's assignment to a shipment of men from the 15th Replacement Depot to the 3rd Replacement Depot and thereafter to his alleged company; his departure from the 15th Replacement Depot and failure to arrive at the 3rd Replacement Depot (CM ETO 10199 Kaminski). The first sergeant of the accused's alleged company was charged with the duty of knowing who was assigned to such company, and he testified accused was assigned thereto. The shipment arrived at the company 4 February, and accused was not with it. It was his duty to be with this company on such date

and he was not there. His absence was therefore unauthorized and was presumed to have continued until return to military control was shown ***. It was not proven terminated by direct evidence until 5 April when accused was in the depot stockade, but the hearsay testimony of prior return on 28 March as an appropriate judicial admission beneficial to the accused, was competent to establish termination of the absence ***." (CM ETO 11206 Peache 10 Oct 45).

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421 (AW 63) Disrespect Toward Superior Officer;

Not Digested

15867 Mitchell
17140 Lowrus

Accused officer was found guilty of a breach of restriction in violation of AW 96; and of disrespect in violation of AW 63. HELD: LEGALLY SUFFICIENT. (1) Breach of Restriction: Accused argued that he had no notice or knowledge of the restriction which he was charged with breaching. Under the evidence (detailed), "The court was clearly warranted in concluding that accused knew of the continuance of the restriction and willfully breached it. Willful or wrongful intent is not a necessary element of the offense charged, and the failure of accused to read an order he was required to read, and which he had an opportunity to read, is no excuse for his failure to observe the terms of the order ***." (2) Disrespect: By indorsement to a letter re his proposed AW 104 punishment, accused replied (addressed to his battalion commanding officer, through channels): "The undersigned declines to accept punishment under the 104th AW because it is the opinion of the undersigned that the Commanding Officer *** Battalion is not competent to render a just and adequate decision in this case or any other case affecting the undersigned." AW 63 "is extremely broad in scope and makes punishable a wide range of conduct. The language here employed by accused implies that the officer to whom the communication was addressed would not judge accused's case fairly but would be swayed by prejudice or other improper motives. As such, it falls within the conduct described by Winthrop [Reprint, 1920, p 567] as violative of the 63rd Article of War." Accused was guilty as charged. (CM ETO 12428 Davis 20 Jul 45).

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422 (AW 64) Assaulting or Willfully Disobeying Superior Officer:

Not Digested

8689 Wexler
11265 Murray Jr.
11845 Stark ("lift weapon" guilty of lesser AW 96 assault)
12471 Fecor (willfully disobey)
12488 Wilson (lift weapon)
14186 Coleman (willfully disobey; lift weapon)
16341 Kilgrease (cut superior officer)
16344 Martini (willfully disobey)

422(1) (AW 64) Assaulting Superior Officer

Cross Reference: 422(5) 9886 Bowens (Draw weapon)

Among other things, two accused were found guilty of a violation of AW 64, in that, acting jointly and in pursuance of a common intent, they shot Captain G**, their superior officer, who was then in the execution of his office, in the thigh and abdomen with a pistol. HELD: HEGALLY SUFFICIENT. AW 64: Joint Intent: "Had accused and his companion been jointly charged with assault with intent to commit murder or assault with intent to do bodily harm with a dangerous weapon in violation of AW 93, the evidence *** would clearly support a conviction of either ***. To hold that accused cannot be held liable for the acts of his accomplice simply because the offense was charged under the 64th AW and thereby given a military aspect would *** lead to an inconsistent conclusion and a distinction between offenses without reasonable basis. The offense as herein charged is a much graver offense than the corresponding civil offense inasmuch as a violation of AW 64 is punishable by death. While certain military offenses, such as desertion, cannot be committed by two persons jointly ***, there is no legal principle which prohibits charging two persons with the joint commission of an offense simply and solely because it is a military offense. *** Accused's guilt of the specification laid under the 64th AW, although charged as a joint offense may be sustained." The evidence sustained the finding of guilt. (CM ETO 14212 Healan 20 Oct 45)

422(5) (AW 64) Proof: In General

Cross References: 385 15225 Barth (with AW 28-58)
424 13269 Robinson (with AW 66 mutiny)

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(5) Proof: In General 422(5)

Accused officer was found guilty of the willful disobedience of an order to assume command of a company, in violation of AW 64. HELD: LEGALLY SUFFICIENT: "The evidence showed that accused received an order to assume command of Company K from his battalion commander, his superior officer, known to him to be such. While it is true that the order could have been couched in more positive language, there can be no doubt on this record that a direct order was intended to be given and that accused so understood. Accused made no contention to the contrary. 'But if an order be actually given, it is no less to be obeyed though expressed in a courteous instead of a peremptory form. G.C.M.O. 46 of 1883' (Winthrop's, *** Reprint, 1920, fn.16, p.574). CM ETO 1096, Stringer, is distinguishable because there the accused had the choice of becoming a mess sergeant or being 'busted to private'. *** The evidence likewise established that accused willfully disobeyed the order. Twice he was asked whether he refused to assume command of Company K and twice he answered in the affirmative." (CM ETO 10497 Switzer 14 Jul 45)

Accused officer was found guilty of willful disobedience, in violation of AW 64. HELD: LEGALLY SUFFICIENT. "Accused's assertion of incapacity by reason of lack of adequate training to qualify him to command a machine gun platoon, stated no defense ***." (CM ETO 15181 Hollin 18 Aug 45).

Among other things, accused was found guilty of (a) violations of AW 64 on 20 December 1944 in that he drew an automatic pistol against his superior officers, and willfully disobeyed an order to give up his pistol on another date; and (b) violations of AW 96 in that he unlawfully carried a concealed weapon (automatic pistol) on two separate occasions. HELD: LEGALLY SUFFICIENT. (1) Draw Weapon: The phrase "on any pretense whatsoever" in AW 64 "does not exclude the use of such protective measures as are necessary for legitimate self-defense (MCM, 1928, sec 134a, p 147). However, there is no showing of any justification for the use of the weapon and under the circumstances the court was fully warranted in finding accused guilty" hereunder (detail evidence). (2) Willful Disobedience and Violation of Order: There was a standing order in the command which prohibited the carrying of arms, except when authorized, on the dates in question herein. Accused "refused to surrender the pistol, after having been ordered to do so by Lt. C**, on the evening of 28 November. His possession of the weapon and his refusal to surrender it, under the circumstances shown, constituted a violation of both a standing order *** and a violation of a direct order of a superior officer, as alleged under AWs 96 and 64 ***." No multiplicity resulted. (CM ETO 9886 Bowens, 11 Aug 45)

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Accused was found guilty of a willful disobedience in violation of AW 64; of exciting a mutiny in violation of AW 66; and of an additional willful disobedience in violation of AW 64. He was sentenced to life imprisonment. HELD: LEGALLY SUFFICIENT. (1) Exciting a Mutiny: A number of new men, including accused, had been assigned to a QM Truck Company. They reported a few hours prior to the unit's scheduled departure for Germany. They were extremely disorderly, despite the company commander's attempts to quiet them. A roll call could not be obtained. They cursed, were boisterous, fired shots, stated they did not want to go to Germany. The trouble continued into the next day. A week later in Germany, some of those new men were AWOL for two hours. A violent dispute about food, with accused leading, occurred (commanding officer had reduced the two men to "C" rations, at a meal where old men got "B" rations, because of their activities). Willful disobediences occurred. Military police were called. A number of shots were fired. "The evidence is clear and decisive that coincident with the arrest of accused and immediately following his transfer to the stockade a full-blown mutiny developed among the men of the company wherein Captain F**'s authority was temporarily overthrown and nullified. He was subjected to personal indignities by the mutineers and as a concluding stroke was fired upon by some of them. The affair was an exhibition of mob violence coupled with complete defiance of authority. The conduct of the men, as proved, included definite overt acts of mutiny ***." "Accused's profane and obscene language which included threats of violence to officers and men and his deliberate open defiance of the authority of his superior officers and disobedience of their lawful orders in the immediate presence and hearing of other members of the company who were involved in the subsequent disorders formed a matrix of substantial evidence which supports the court's finding that he contributed principally to the subsequent mutiny. With this evidence placed against the proof of his conduct on the two prior occasions, the court was fully justified in concluding that his actions, taken as a whole, were a proximate and moving cause of the mutiny. The fact that there might have been other contributing causes to the mutiny is no defense." (Winthrop, Reprint 1920, pp. 582-583, and note 72; MCM, 1928, pars. 136c, p. 151.) "Although the conduct of the company commander in failing to suppress the prior mutinies and to cause appropriate punishment to be imposed upon the offenders *** is probably subject to severe criticism, if not disciplinary action, such shortcomings afford accused neither defense nor palliation." (2) "Testimony of the prior mutinous conduct in the company and accused's participation therein on 12 and 20 April was admissible as relevant testimony which enlightened the court as to the causes and circumstances surrounding accused's conduct and was of assistance to it in determining the question of fact whether his actions were the proximate and contributing cause of the ensuing mutiny on 29 April ***." (3) Willful Disobediences, as charged, were adequately proved. (4) Defense's motion to strike the additionally-charged willful disobedience was properly denied. "The convening authority possessed power to determine who should be tried by a general court-martial and also for what offense he should be tried ***. There was no necessity for further investigation of this additional Charge. (CM ETO 13269 Robinson 13 Jul 45).

(1st Ind: CM ETO 13269 Robinson 13 Jul 45) The life sentence "is excessive when judged by the standards adopted by other general court-martial authorities in similar cases. A review of the cases arising in this theater will show that the approved sentences have ranged from five to 20 years. I recommend a substantial reduction ***. While penitentiary confinement is authorized ***, I do not believe that it is appropriate. In essential features accused was guilty of a military offense. I therefore recommend that" the proper U.S. Disciplinary Barracks be designated as the place of confinement).

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427 (AW 69) Arrest or Confinement:

Not Digested

9272 Hayes et al	12045 Friedman	15184 Newland
9406 Sullivan	13292 Kazsinir	15268 Consentino
9681 Bennett	13482 Ianuzzo	15442 Bifano
10213 Rupert	13762 Allen	15704 Carver
11201 Livingston	14212 Heslan	15776 Butler
11202 Moore	14583 Lajoie	16342 Wiseman
11856 Debeau	14835 Herrera	16620 Tarver
11930 Kenehan	15074 Sutherland	17840 Bronson
12043 Noe	15137 White	17442 Blakely

Breach of Arrest

(3) Cross References: 385 8147 Pierce (time and place)
385 11288 Pergolizzi
[illegible]

Escape from Confinement

(6) Cross References: 416(9) 13174 Bruce
454(13) 15147 Wooten (attempt to escape)
450(1) 12652 Fladner
416(9) Bailey
385 Corriveau; (place of;) findings fail to show violation of AW 69)
385 12007 Pierce
416(9) 14735 Clark
416(9) 16342 Wiseman

Amongoother things, accused was found guilty of an escape from confinement in a regimental stockade, in violation of AW 69. HELD: LEGALLY

427(6)
428(1) 2a.)

Escape from Confinement
(1) Charges; Investigation
(2a) Charge Sheet as Basic Instrument

INSUFFICIENT ON THIS SPECIFICATION: An element of the proof required to establish the commission of the offense of escape from confinement is "that accused freed himself from the restraint of confinement ***. The evidence shows that the physical restraint of accused in this case disappeared with the removal of the guard from the open side of the barn. There was not merely a lack of effectiveness of the physical restraint imposed, but the elimination of the physical restraint itself. The record of trial, therefore, is not legally sufficient to support the findings of guilty of the offense charged ***." (CM ETO 15441 Romanowski 20 Aug 45).

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428 (AW 70) Charges; Action Upon:

(1) Investigation

Not Digested

12850 Philbot (1st indorser of case was subsequently AW 70 investigator; compelling evidence; not prejudicial)

Cross References:

385 8649 Siglasky (inadequate)
466 13269 Robinson (add charge; no reinvestigation)
451(1) 17056 Boger (accused not present at)

"It appears from the report of the investigating officer and from stipulations in the record of trial that accused was so intoxicated at the time of the investigation of the charges, on the same day the offense was committed, that he was incapable of understanding or interrogating the witnesses. However, it appears that at the direction of the commanding officer, an officer represented accused's interests at the investigation, and that subsequently, *** accused stated to a second investigating officer that he did not desire to cross-examine the witnesses and desired no further investigation of the case. There was thus a substantial compliance with AW 70, and accused's substantial rights were not injuriously affected within the meaning of AW 37 ***. Moreover, it is well settled that the provisions of AW 70 are not jurisdictional and are 'intended primarily for the benefit of the appointing and referring authority' ***." (CM ETO 13476 Givens 14 Aug 45)

(2a) Charge Sheet as Basic Instrument:

Cross Reference:

454(65a) 9986 Goldberg (paste over original charge)

(3) Investigation; Rights of Accused 428(3,4a,5,)
(4a) Joint or Separate Charges
(5) Multiplication of Charges

(3) Investigation; Rights of Accused:

Cross Reference: 385 14510 Collins (adequacy of)

(4a) Joint or Separate Charges:

Cross References: 450(4) 11683 Beal (rape; aiding and abetting)
422(1) 14212 Healan (AW 64 assault on officer)
450(4) 15393 Dale
451(2) 17056 Boger

The unjustified failure to prosecute one of several joint offenders does not as a matter of law affect the criminal liability of any of them. (CM ETO 4979 Ashley et al 3 Jul 45).

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(5) Multiplication of Charges Based on Single Act:

Not Digested
10759 Hoole (assault and drunk and disorderly; civil and military
10760 Roberson (various drunkenesses) (aspects; not multiplicity)
(AW 96 specifications)

Cross References: 454(38) 17339 Gunning (drunk; assault; trespass)
419(2) 111170 Tucker (failure to repair; AWOL)
451(6) 11004 Evans (assaults)
451(36a) 11972 Allison (larceny)
454(65a) 9986 Goldberg (mail censorship; false certificate)
452(18) 13406 Weiskopf (AW 93 larceny to AW 94 misappropriation)
451(6) 11729 Held (AW 93 and 96 assaults)
385 10363 Mangiapane (AW 28-58 and AW 96 refusal to fly)
419(2) 10721 Petroski (AWOL and failure to repair)
419(2) 11271 O'Hara (AWOL and failure to repair)
451(58) 15941 Fuller (assault to rob; robbery)
452(7) 12451 Kaplan (AW 94-95 false pay claim)
454(96) 14632 Lang (forgery; utter forged instrument; AW 93,96, and by verdict)
452(7) 15154 Sohn (AW 94-96 same false claims)
450(4) 15774 Kennedy (rape and assault)
450(4) 15768 Dunbar (a number of individual rapes)
454(19b) 15794 Ruf (bribery)
451(51) 16254 Stordeur (AW 95-96, false swearing)
422(5) 9886 Bowens (AW 64 offenses; standing order)

CHARGES: ACTION UPON
(5) Multiplication of Charges Based on Single Act
(5b) Reference to Trial:
(7) Signature and Oath:
(8) Specifications; Sufficiency
(9) Amendments

"The same facts and circumstances may give rise to two or more offenses and an officer may be charged with and found guilty of violations of AW 95 and 96 although the separate offenses stem from the same set of acts." (CM ETO 15062 Finigan 22 Aug 45)

(5b) Reference to Trial:

Cross Reference:

424 13269 Robinson (Within convening authority discretion)

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(7) Signature and Oath:

Cross Reference:

416(9) 12580 Groin (same)

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(8) Specifications; Sufficiency in General:

Cross References:

450(1) 10053 Miller (murder; omit "with malice aforethought")
451(17) 11546 Clarke (ownership; persons (missing in action)
416(9) 13104 Fingland (desertion return; time and place unknown)
454(69) 10499 Diutsch (misappropriation; ambiguous; no objections)
451(36a) 11972 Allison (larceny)
454(18a) 8555 Kenney, et al (reviewing authority charges ownership, # Q 96 in larceny case)
385 11987 Johnston (Omit "without leave" from place of AW 61 guilt)
416(9) 13018 Ostrowski (manner of desertion)
454(56b) 15855 Wilson (fail to allege standing order violated)
454(18a) 10189 Sluder (Bl.Mkt; indefinite; various; data)
450(2) 13090 Brynjolfsson (manner of beating victim)
453(11) 14596 Peterson, et al

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(9) Amendments:

Cross References:

451(36a) 11972 Allison (larceny)
454(65a) 9986 Goldberg (amend after investigation)

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(10) Specification; Dates 428(10,12,13a,13b)
(12) Specifications: Place:
(13a) "Willfully, Unlawfully, Feloniously" - Omit One or More of Words: also "wrongfully"
(13b) Specifications; Multifariousness:

(10) Specifications; Date:

Cross References:

451(36a) 11972 Allison (larceny)
453(11) 10027 Wetherford ("about")
416(9) 13104 Fingland (return; desertion)
385 12729 Lanove

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(12) Specifications: Place:

Cross References:

385 14095 Bijeaux (No proof; AW 28-28)
385 14133 Corriveau (proof; AW 28658; AW 69)
453(11) 10027 Wetherford (proof; drunk offense)
416(9) 13018 Ostrowski (desertion)
416(9) 13104 Fingland (desertion; return)
385 12729 Lanove
419(2) 12350 Spinelli (AWOL)

(13a) "Willfully, Unlawfully, Feloniously" - Omit One or More of Words: also "wrongfully"

Cross References:

451(6) 11004 Evans (omit "feloniously and willfully"; assault; AW 93.)
454(54a) 12594 Lechinsky (allege "wrongful" foreign exchange)
454(54a) 10418 Blacker (allege "wrongful" foreign exchange)
454(54a) 12453 Marshall (foreign exchange; transmission profits)
451(50) 6235 Leonard (omit "Willfully" and "feloniously")
451(50) 15419 Green (omit "feloniously")

(13b) Specifications; Multifariousness:

Not Digested: 11608 Hutchinson (use first offense, where several are proved)
8837 Wilson (use first offense, where several are proved)
8542 Myles (use first offense where several are proved)
12770 Williams (use first offense where several are proved)

CHARGES: ACTION UPON
MISBEHAVIOUR BEFORE THE ENEMY
(15) Trial Within Five Days
(15a) Advice; Staff Judge Advocate:
(15b) Review; Staff Judge Advocate
(1) In General

(15) Trial Within Five Days:

Not Digested

10758 Bedwell 12472 Syracuse

Cross References:

385 15216 Miller
385 8147 Pierce
385 10955 Volatile
450(4) 7869 Adams
385 16573 Sabella
416(9) 15233 Hanley
416(2b) 16655 Pagano

(15a) Advice; Staff Judge Advocate

Cross Reference:

385 8649 Siglasky (mimeographed)

(15b) Review; Staff Judge Advocate:

Cross Reference:

385 8649 Siglasky (fact not in evidence)

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433 (AW 75) Misbehaviour Before the Enemy:

(1) In General

Not Digested

9601 Ciucio, et al
9823 Bennetto (officer; shock)
10014 O'Toole (officer; shock)
10757 Grenoble
11265 Murray, Jr.
14298 Michels (from restraint)
14455 Nice
15553 Pelosi
15858 Ingham (drunkenness as)
11637 Monti 14298
12261 Williams-plunder and pillage; companion to 11725 Whitfield - digested herein)
13458 Stover (amnesia)
13485 Bibby (dissent re mental capacity)
16889 Klish

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(1) In General

Cross References:

385 15216 Miller
433(2) 16344 Martini

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(2) Proof

Cross Reference:

399 14455 Nice (No pen.conf)

Accused was found guilty of misbehaviour before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. "Accused was 'before the enemy' and had a duty to defend the road block which he established as ordered. The only question *** is whether under the circumstances his departure from the road block with his platoon to get further orders constituted a shameful abandonment of his post within *** AW 75. Considering the evidence *** most favorable to accused, his conduct was not governed by cowardice or timidity, but by his intention to prevent his men from being taken prisoners and their valuable equipment captured which the rapid advance of the enemy, as reported to him, was likely to bring about. He had been surrounded and cut off by the enemy before. Later developments made it clear that his withdrawal *** was ill-advised and showed extremely bad judgment on his part, resulting fortunately in no advantage to the enemy. He started back with his platoon to the road block about 15 minutes after reporting ***. The position was left undefended, however, for about three hours." The finding of guilt was sustained. (CM ETO 10015 Wallace 27 Jun 45)

Accused was found guilty of misbehaviour before the enemy in violation of AW 75, in that on about 17 January 1945 he refused to go into a bull-dozer tank as ordered, and to move out in same when the company moved out to engage with the German Army. HELD: LEGALLY SUFFICIENT. (1) Evidence: Misbehaviour: "Accused made an anticipatory refusal of a command that on the next day he get in a tank and go forward with his company. From the general tactical situation existing at that time ***, it may be inferred that contact with the enemy was expected on the following day. Accused actually did not go forward the next day. There is no direct evidence that at the time his vehicle was ready to proceed accused again expressly refused to get in it, or that this order was repeated. However, other elements of the offense being present and proved, such advance refusal would in itself be 'misbehaviour' within

AW 75. "There is some indication that this company was not in as close proximity to actual physical contact with the enemy as had been expected ***. In fact, when it reached its objective ***, the enemy was not there. ***'Before the enemy' within the purview of AW 75 means existing or imminent contact ***. Whether or not accused was 'before the enemy' was a question for the court ***. It may be said that the general tactical situation offered sufficient proof ***." (2) Court Membership: "The record *** shows that Major ***, who sat as a member of the court which tried accused, without objection of the latter, had been the investigating officer *** and that this fact was not disclosed ***. The investigation was held *** 48 days before the trial." It has been "held that the presence of the investigating officer on the court was not jurisdictional error invalidating the proceedings, but procedural error only." (CM 210612, Maddox (9 BR 277).) "In the present case the evidence is competent and compelling. Accused himself on the stand admitted in effect that he said that he would refuse to get in a tank and go forward the next day. This statement was in answer to an inquiry by his company commander as to whether or not he would perform his assigned duty the next day. The over-all and existing tactical situation, as pointed out, brought the misconduct of accused within the provisions of AW 75 insofar as it applies to misconduct in the presence of the enemy ***." (CM ETO 11009 Marsh 28 Jun 45)

(Dissenting Opinion to CM ETO 11009 Marsh 28 Jun 45): "The investigating officer participated in the trial as a member of the court after having investigated the charges pursuant to AW 70 and MCM, 1928, par. 35a, p. 25. In his report he recommended trial by general court-martial and stated that there were no explanatory or extenuating circumstances.*** He examined four witnesses ***. All four gave him sworn statements against the accused, and only two testified at the trial. Two of the witnesses gave him evidence damaging to accused which was not brought out at the trial." Although inquiry was made whether any court member was aware of any ground for his challenge, "the investigating officer remained silent." "The right of an accused to be tried by an impartial court is fundamental. The investigating officer *** did not stand impartial. He had prejudged the case ***. Failure by accused to exercise his right to challenge and his statement that he did not object to any member *** did not in the circumstances constitute a waiver." Knowledge on the part of accused that the investigating officer was sitting on the court is not to be presumed. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Courts indulge every reasonable presumption against waiver of fundamental rights and do not presume acquiescence in their loss." "This case is to be treated as if the defense, having used its right to a peremptory challenge on another member, had challenged the investigating officer for cause ***, and the challenge was not sustained ***." "The fact that the evidence of accused's guilt may have been of such character as virtually to compel findings of guilty, cannot dispel substantial doubt as to the impartiality of the court in reaching its findings and in imposing

a sentence which includes confinement for life." Prejudicial error resulted. Accused should be granted a rehearing.

Accused was found guilty of misbehaviour before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (1) Prior Conduct: Similar Offenses: "Even if evidence of prior dereliction was admissible to show the character of accused's intent and his absence of innocent purpose in going to the rear as here charged, such evidence was not properly developed in this case. Specific instances were not related, the circumstances surrounding the prior acts were not shown, and the testimony given in effect amounted to no more than the broad statements of two witnesses that accused was habitually cowardly in combat. As such, whatever probative value the evidence of prior misconduct may have had was outweighed by the dangers attendant upon the manner of its presentation and the evidence, as presented, should have been excluded ***. However, although prejudicial error was committed, other evidence of record compellingly shows that accused, although his initial departure may have been for a legitimate purpose, thereafter sought safety in the rear and failed to do his whole duty before the enemy by remaining at the company motor park instead of returning to his platoon at the front." He was properly found to be guilty. (CM ETO 12210 Black 20 Jul 45)

Accused was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. "Lt.H**, at the time and place alleged, was authorized to order accused to leave the motor pool and join his platoon which was then engaged in hand-to-hand combat with the enemy. Accused's unequivocal refusal to fight, accompanied by his statement that he would rather suffer the consequences than obey the order, constituted disgraceful behavior before the enemy within the clear purview of the cited authority ***." (CM ETO 11790 Andes 10 Aug 45)

Accused officer was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (1) The evidence "shows that accused abandoned his platoon because of his fear of enemy artillery fire and sought safety at the company command post some two miles from the place where the platoon was located." This constituted AW 75 misbehavior in the circumstances. (2) Mental Responsibility: "The burden of proving that accused was mentally responsible for his actions rested on the prosecution ***. In discharging this burden the prosecution was aided by the presumption of sanity which relieved it merely of the necessity of introducing evidence to that effect until such time as there was some assurance that accused's mental responsibility was a real issue in the case." "The defense's evidence on the question of accused's mental responsibility consisted of the testimony of Major D**, a psychiatrist,

who stated that in his opinion accused was suffering from 'psychoneurosis, anxiety state, moderately severe' and that at the time of the alleged offense he was incapable of distinguishing between right and wrong and could not control his behavior. This opinion was based in part on statements of third parties not in evidence. Regardless of the strength we accord to the presumption, short of permitting it to shift the burden of proof or endowing it with evidentiary effect, this evidence is sufficient to dissipate it. It is clear testimony, directly contrary to the presumed fact, of the opinion of an independent witness who is presumably familiar with the various neuroses and psychoses which result from combat. However, despite the fact that the prosecution can derive no benefit from the presumption, and despite the fact that they offered no medical testimony tending to prove accused sane there is still substantial evidence establishing that before his offense was consummated accused knew the difference between right and wrong and could adhere to the right. In the statement he made on the day he committed the alleged offense, accused related how he ran down the hill from the platoon command post about 200 yards and then stopped and tried to get up courage to go back. The court could infer from this that accused had some comprehension of his obligation to stay at his post and some consciousness that what he was doing was wrong. Both in his extra-judicial statement *** and in his testimony at the trial accused told how he left the platoon command post to investigate the difficulties the men were having with the mule supply train. He told how he fled from there in panic when the enemy opened up with another artillery barrage; how he ran some distance down the hill; how at last he stopped, deliberated on returning, and finally decided to report to the company command post because he felt that his nervous condition would have an adverse effect on the morale of the men. Certainly the court could conclude that a man who was capable of deliberating and deciding on the desirability of a course of conduct was not a man whose faculty of choice had been paralyzed and whose moral sense had been destroyed. The testimony of a psychiatrist is valuable, but he will not be permitted to usurp the function of the judge. Such opinion evidence will be given careful consideration, but it is not binding and the conclusions thereof need not decide the ultimate issue. The responsibility for decision was the court's. Particularly is this true when not all the assumed facts, as the premise of the hypothesis, are in evidence, as in the case here. The effect of the expert's conclusion is that accused was afraid, so afraid that he did not know what he was doing. The 75th AW is intended to punish cowardice, and it would be reductio ad absurdum to hold that a man cannot be punished for cowardice because he was too cowardly. The Article is essential to military success in battle and must be enforced to deter cowardice and panic. The conclusion of the psychiatrist places accused within the terms of the Act. There is substantial evidence in the record to sustain the court's implied finding that accused was sane and cowardly at the time of the offense ***." (CM ETO 13376 Aasen 11 Aug 45)

Accused was found guilty of a misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT: "Accused was charged with ***

refusing to advance with his command, which had been ordered forward by Captain *** B**, to engage with the German Army. *** It *** clearly appears that, being tactically before the enemy, accused culpably refused to participate in the mission which his platoon had been ordered to perform of going forward to engage - by maintaining a road block against - components of the German Army. While there is no direct testimony that it was Captain B** who issued the order to the platoon, as alleged ***, it may reasonably be inferred that he did from the showing that the order was issued and complied with, that he was the company commander, and that, upon learning that accused had not accompanied his platoon to the road block, he ordered him forward to report to him at his command post in B***." Accused's conduct amounted to a violation of AW 75. (CM ETO 12393 Kohlenberg 23 Aug 45)

Among other things, accused was found guilty of a violation of AW 75, in that he quit his post at E**, Germany, 7 April 1945, for the purpose of plundering and pillaging. HELD: LEGALLY INSUFFICIENT ON THIS CHARGE. "The prosecution was required to prove that (a) accused quit his post as alleged and that he was then in the presence of the enemy and (b) that he left with the intention of plundering and pillaging ***. Both the prosecution and the defense evidence showed clearly that accused while 'before the enemy' absented himself without leave from his place of duty at the time and place alleged. The offense of pillage has been defined variously as follows: (1) '*** the forcible taking of private property by an invading or conquering army from the enemy's subjects' (Black's Law Dictionary (3d Ed.), p. 1361). *** (2) 'The taking by violence of private property by a victorious army from the citizens or subjects of the enemy' (Bouvier's Law Dictionary, Vol. II, p.2591). *** (3) 'The plundering, ravaging, or carrying off of goods, commodities, or merchandise by open force or violence' (48 C.J. 1181). *** (4) 'The term 'pillage' imports latrocination (analogous to highway robbery), or robbery by force and violence, and not a simple larceny merely. Merlin defines it to be the plundering, ravaging, or carrying off of goods, commodities, or merchandise by open force or violence.' (American Ins. Co. v Bryan, N.Y., 26 Wend. 563, 573, 37 Am.Dec. 278, citing 23 Merl. Reprt. art. 'Pillage') ***. (5) 'To strip of money or goods by open violence: to sack as in war; to spoil; loot; as, to pillage a captured town' (Webster's New International Dictionary, Second Edition.) *** (6) 'It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private property ***' (Winthrop's Military Law and Precedents (Reprint 1920), p.627). *** The closely related word 'plunder' has been defined as follows: 'A word having no especial legal signification. As a noun it means booty; pillage; raping; spoil; that which may be taken from the enemy by force. As a verb, in its most common meaning, it means to take property from persons or places by open force ***' (49 C.J. 1036). *** It is noted from the foregoing that force and violence characterize the conduct referred to in AW 75 as 'to plunder or pillage'. The evidence

shows that accused and W** discovered some weapons at the home of the burgermeister in R**, which were broken up by a 'man from the village'. W** testified that he broke the trigger mechanism of one gun. Accused testified on cross examination that he had in his pocket a '.25 caliber' pistol which was taken from him when he was arrested. He was asked, 'What did you do with the pistol you found up in the attic?' He answered, 'The pistol was turned in to the ***.' Asked 'You broke up the rifles but you kept the pistol?' he replied , 'Yes, sir'. As above indicated, the record fails to show that accused at any time took any property from anyone by force or violence. His taking the pistol implied only that he may have committed a different offense, not charged of simple larceny. The evidence of the prosecution is wholly consistent with accused's testimony that they went to R** to get something to drink." The record insufficiently supported the finding of guilt on this charge. "It is unnecessary to consider whether or not the specification contains an allegation of a lesser included offense of AWOL, ***, since such offense was already alleged" in another specification, of which accused was found guilty. (CM ETO 11725 Whitfield 25 Aug 45). (Also see companion case of 12261 Williams)

Accused was found guilty of two misbehaviors before the enemy in violation of AW 75, (a) on 12 March 45, returning the next day; and (b) on 15 March 45, not returning "thereto for the reason that he refused so to do". HELD: LEGALLY SUFFICIENT. (1) The evidence established the charged misbehavior. (2) Sanity: (a) A psychiatric report showed accused to be "insane" at the times of his offenses. The report was hearsay, but in view of its admission without objection by the prosecution, quoted portions will be treated as original testimony by its maker. "This use of the report is favorable to accused and affords him its maximum value as evidence." (b) Findings: "By its findings of guilty there was implicitly included therein a finding that accused was sane on the date of the commission of the offenses There was no duty on the court to pass upon the issue" separately. "The question *** was one of fact and it was peculiarly an issue within the prepogative of the court. Its finding is entitled to the presumption that it is correct ***. (c) Testimony: Opposed to the psychiatry report, two sergeants testified, one stating that accused was in his right mind, calm and normal on 12 March 45, and the other stating that he was normal but was scared. Further evidence showed that when "the captain asked him why he had come back /on 15 March/ *** he said he just came back, he couldn't take it any more *** and *** he would rather be court-martialed" than to go back to his outfit. He also stated that he knew what he was saying. The court's finding of sanity is supported by prosecution's evidence --" the explicit testimony of fellow soldiers who observed accused's condition, actions and attitude at the crucial times and places. In addition there is evidence that on 15 March accused's company commander on the occasion of discovering his second dereliction talked with him and warned him of the results of his misconduct. Accused displayed only a cold-blooded determination not to return to combat. "By its conclusion the court simply resolved a conflict in the evidence against accused." (d) Discussion: "It is true that in the administration of military justice extraordinary care

and circumspection are required whenever there arises a question as to the mental condition of an accused. The court may call for additional evidence with respect to the accused's mental responsibility (MCM 1928, par.75, p.58) and it will inquire into his existing mental condition whenever at any time the case is before the court it appears to the court for any reason that such inquiry ought to be made (par.63,p.49). The appointing authority may in his discretion suspend action on charges pending the consideration of the report of one or more officers, or the report of a board convened under AR 600-500 (par.350, p.26). The reviewing authority will take appropriate action where it appears from the record or otherwise that accused was insane at time of commission of the offense or time of trial, regardless of whether such question was raised at the trial or how it was determined if raised (par.87b, p.74)." However, these provisions "should not be interpreted as endowing the report or the opinion of a mental specialist or a psychiatric board with the power of ultimate determination of the question of an accused's mental responsibility in a case before a court-martial. That is the duty of the court in the first instance and of the reviewing or confirming authority when they are required to act upon a sentence. The testimony of a specialist or of a member of a psychiatric board before a court is entitled to the respect and consideration of like testimony before a civil court, but it is not binding or conclusive on a court-martial any more than it binds a jury or a civil court sitting without a jury. It is part of the evidence in the case to be weighed and evaluated as any other evidence. It was not the intention of Congress or of the MCM to constitute a board convened under AR 600-500 as an independent fact finding agency whose findings must be accepted as final by a court-martial A fortiori, the opinion of a psychiatrist, although an officer of the Army with recognized professional duties to perform in his command, does not oust the court from its duty to determine the ultimate fact of an accused's mental responsibility for his acts." (Cite Underhill's Criminal Evidence 4th Ed., sec.232, p.434). (CM ETO 9877 Balfour 8 Sep 45)

Accused was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. "The evidence established that accused was serving in the presence of the enemy and that he refused to obey the order of his superior officer as alleged. Refusal to obey the order of a superior officer in the presence of the enemy constitutes misbehavior within the meaning of AW 75 ***. Whether the refusal was due to cowardice or to the fact that his ability to control his actions was temporarily shattered by the impact of battle so as to render him incapable of obeying the order, was a question of fact ***." (CM ETO 13004 Disano 7 Sep 45)

Among other things, accused was found guilty of misbehaviors before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. "Although the record contains some evidence that as a result of the

German breakthrough accused's company had abandoned certain of its equipment and that the men were not as fully equipped as desired, such facts do not constitute a defense to the Charge as other men of the company advanced and fought as courageous soldiers of gallant armies have done throughout history. Military necessity demanded performance of duty on this occasion. The breakthrough was stopped while accused cowardly escaped and sought safety in the rear." His violation of AW 75 was established. (CM ETO 16108 Keeton 15 Sep 45)

Among other things, accused was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. "While the specifications *** do not definitely recite that the misconduct alleged was committed 'before the enemy', the language used, in Specification 1, 'fail to advance with the squad which was then ordered forward to clear the enemy out of the town of S**' and in Specification 2 'fail to advance with the squad which was then ordered forward to clear the enemy out of the town of K**', clearly alleges in each instance a movement directed against the enemy whose immediate presence is thus indicated. The defense did not object to the form of either specifications. Both were adequate in this case ***." (CM ETO 16344 Martini 26 Sep 45)

Accused was found guilty of misbehavior before the enemy in violation of AW 75, in that he did run away from his company on about 18 Mar 45, which was then engaged with the enemy, and did not return. HELD: LEGALLY INSUFFICIENT. Sanity: Illness: Combat Exhaustion: "There is evidence that accused at the time of the commission of the offense was sane within the legal definition of the term***. Therefore as to the question of his mental responsibility the record is sufficient to sustain the implied findings that accused was sane *** However, /a medical witness/ emphasized the fact that accused's affliction did not concern the question of his mental responsibility. He ruled out of consideration the mental afflictions of 'psycho-neurosis', 'obsession' and 'amnesia' by stating 'but neither of these apply in this particular case'. In 'early July' 1945 he diagnosed accused's affliction as: 'combat exhaustion, old, recovered and was suffering from a tape-worm infestation. The finding of Major C** on 18 July 1945 was: 'Pvt Satmary, was suffering from Combat Exhaustion at the time of my examination (122 days after offense). The discharging diagnosis in this case was: Psychoneuroses, acute anxiety state with psychomatic complaints mod severe'. Unlike the majority of battle line desertion and misbehavior cases the record of trial shows that accused went ot the clearing station immediately upon leaving his company where a diagnosis of 'Combat Exhaustion' was made. The morning report did not charge him with any dereliction but reported him in the clearing station and thence to the 104th Evacuation Hospital. The records corroborate accused's testimony. Therefore there exists in the record of trial bona fide proof that accused was suffering from 'combat exhaustion' supported by a showing that his conduct after he left his company was regular. He remained under military

control." Discussion: "The solution *** depends upon the determination of two subsidiary questions: (1) 'Genuine and extreme illness or other disability at the time of the alleged misbehavior' is a defense to a charge laid under the 75th AW ***. Does 'combat exhaustion' come within the classification of 'other disability'? The rule of 'esjudem Generis' is applicable ***, 'Combat exhaustion' is certainly a manifestation of a condition whereby a soldier will not be an adequate fighting unit' (Mayer's testimony) and therefore the results are the same as if he suffered an attack of acute appendicitis or a strangulated hernia. The placing of bona fide 'combat exhaustion' such as is exhibited in this case, in the same class as 'genuine and extreme illness', and therefore a complete defense to the charge within Winthrop's pronouncement /Reprint, p. 624/, seems to be reasonable and just and consistent with common sense and practical experience. (2) The second subordinate question is whether in this case the existence of this defense was an issue of fact for the court ***. We have heretofore held that ordinarily the existence of a 'genuine and extreme illness' is a question of fact for the court and if there is substantial evidence that the accused was physically capable of performing his duties the finding of the court will not be disturbed on appellate review ***. The foregoing is the rule generally applied because of conflicting evidence in the record, however, in the instant case, it appears that there is substantial evidence in proof of this defense and the prosecution utterly failed to meet the challenge. The official records show beyond doubt that accused immediately upon leaving the battle line placed himself in medical hands for diagnosis and treatment. ***Thereafter while in proper medical channels accused was examined and the diagnosis of his illness was made by two Army medical men whose conclusions stand undenied. The only evidence in the prosecutor's case' was that given by a private who merely stated that accused had appeared to be as "a man under a nervous strain, Sir. I do not know if he had ever been under fire before. He was awfully scared. His face was red and flushed." This witness's "testimony" thus supports defenses evidence; it does not deny it. A careful study *** fails to reveal any evidence which created an issue of fact for the court. There is nothing improbable or questionable in the evidence supporting this defense. If the testimony of the accused is wholly disregarded there remains competent substantial proof of accused' disability at the time he left the battle line: (a) official records and (b) testimony of army medical officers. The evidence is entitled to the same consideration as that accorded to the prosecution's evidence. Without contradiction therefore the record of trial shows that accused was rendered incapable of performing his duties at the time and place alleged in the same manner and degree as if he were seized with a severe physical illness." (CM ETO 15661 Satmary 17 Oct 45).

AW 83 MILITARY PROPERTY - WILLFUL OR NEGLIGENT LOSS, DAMAGE OR WRONGFUL DISPOSITION

AW 84 WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS

AW 85 DRUNK ON DUTY

441(1) 441(AW 83) Willful or Negligent Loss, Damage, or Wrongful Disposition of Military Property

442 Waste or Unlawful Disposition of Military Property Issued to Soldiers

443 (1) Proof

441 (AW 83) Willful or Negligent Loss, Damage, or Wrongful Disposition of Military Property:

(1) Proof:

Cross Reference: 454(18a) 13402 Green (erroneously placed under AW 96; AW 94)

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442 (AW 84) Waste or Unlawful Disposition of Military Property Issued to Soldiers

Among other things, accused were found guilty of violations of AW 84. HELD: LEGALLY SUFFICIENT FOR GUILT UNDER AW 94. The specifications hereunder alleged crimes under the ninth paragraph of AW 94, "viz., the sale by the accused wrongfully and knowingly of property of the U.S., furnished for the military service thereof. The 84th AW is of narrow application. Primarily it is intended to cover cases of the wrongful sale or disposition of military property of the U.S. issued for the use of military personnel ***. The primary element of the offense is that the property involved had been issued for use in the service. The automobile tires, tubes and wheels in the instant case may or may not have been 'issued' within the meaning of the 84th AW. The evidence leaves this point in doubt. However, there is no difficulty in concluding *** that they were property of the U.S. furnished for the military service ***. The importance of this distinction lies in the fact that wrongful sale of Government property under the ninth paragraph of the 94th AW of a value in excess of $50.00 authorizes penitentiary confinement ***. The wrongful sale of Government issued property under the 84th AW of any value is a military offense only, for which penitentiary confinement is not authorized ***." (CM ETO 14408 Griffin et al 16 Aug 45)

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443 (AW 85) Drunk on Duty:

Not Digested:

10719 Patton, Jr.	15782 Rush	16616 Austin
12924 Calvo	15783 Doyle	16955 Browne
13452 Bellon	15785 Kelly	17524 Tanner
15756 Seibels	16318 Hoefler	15855 Wilson, et al
11903 Wofford	12761 Brockie	10360 Gailey

Cross Reference: 453(11) 10027 Hetherford

Accused officer was found guilty of being found drunk on duty as Staff Officer, in violation of AW 85. HELD: LEGALLY SUFFICIENT. "The evidence shows that accused was a staff officer, being the S-3 of his organization, and that he was given an important mission to perform in connection with the forward movement of his division across the Rhine River in enemy territory. Detailed plans had been made for this operation and senior officers of the battalion were engaged in working throughout the night in its execution. Accused had a duty to perform and was 'on duty' within the meaning of AW 85. It has been held by decisions and established by custom and usage in the service that all members of a command may properly by considered as continuously on duty during time of war and while in a region of active hostilities ***." The evidence supported the court's finding of guilt. "Winthrop states that, in time of war, the offense is complete when an accused has rendered himself, by intoxication, 'more or less' incompetent for duty and that a 'lesser degree of intoxication' may be held sufficient to constitute" a violation of AW 85. Furthermore, the extent of an accused's intoxication is essentially a question of fact. (CM ETO 13296 Wright 14 Jul 45)

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(3) Leaving Post Before Being Relieved:

Not Digested:

12466 Walker 14206 Platta (to rape girl) 17373 Howe

Accused was found guilty of a violation of AW 86, in that, while on duty with a Tank Destroyer and Crew guarding the Company CP, he "became under the influence of intoxicating liquor and left his post." He was found not guilty of a charged violation of AW 64. GCM orders were published. HELD: LEGALLY INSUFFICIENT. "Accused was a member of a tank destroyer crew was scheduled to perform guard duty ***. He was not notified of the detail and did not report. Between the hours of 1600 and 1900, he had been on post as a guard for a prior tour of duty and was properly relieved. It was permissible for the men to have some freedom of movement in the vicinity of the tank destroyer. Accused was absent all night, but it does not appear whether or not it was from any command or area. There was no showing that he was on any regular guard detail let alone being posted as a sentinel, and no proof of drunkenness." "For the accused to be legally convicted of a violation of AW 86 the proof must show that he was posted as a sentinel ***. The evidence is to the effect that this accused was not posted. The Specification does not properly allege, nor will the evidence sustain, a conviction of absence without leave from guard. (CM ETO 12333 Lewis 29 Jun 45)

(1st Ind CM ETO 12333 Lewis 29 Jun 45) "It is quite evident that the court, due no doubt to the clumsy alteration of the charges *** - recorded findings the reverse of what it intended. The Staff Judge Advocate fell into the same error, as it is evident from his review that he

444(3) (3) Leaving Post Before Being Relieved
444(5) (5) Drunk on Post

supported the sentence on the evidence with respect to offering violence to his superior officer, and stated that the acquittal of accused of the other offense was proper. These errors cannot now be corrected. Accused has been acquitted of one offense and the evidence will not support the other.")

Accused was found guilty of a violation of AW 86 in that, being on guard and posted as a sentinel, he left his post before being regularly relieved. HELD: LEGALLY SUFFICIENT. "The evidence shows that after accused had verbally accepted the duties of first relief as a one-man sentinel posted at a tank guarding a road block in an active combat zone in observation against the approach of the enemy, and had actually entered upon his tour of duty, he deliberately left his post without apparent excuse, and without notice to the rest of the guard without having been regularly relieved, and remained away for more than 12 hours. His guilt of the offense charged was not dependent upon his being formally 'posted' as a sentinel for any particular length of time by a non-commissioned officer ***. It was clearly shown that he was on 'guard' and was on post charged with the duties of a sentinel." His conviction was supported. (CM ETO 12394 Steele 23 Aug 45)

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(5) Drunk on Post:

Cross Reference: 444(3) 12333 Lewis (Become drunk and leave post)

Among other things, accused was found guilty of being drunk on post, in violation of AW 86. HELD: LEGALLY INSUFFICIENT. "The corporal of the guard testified he found accused drunk 'at the warehouse across the railroad track' about 30 to 50 yards from his post. He was then inside the building apparently talking with several men. This, under the circumstances shown, was not an immaterial distance from his post within the meaning of the Manual ***, 1928, par. 146c, p.161. The court's findings indicated that it did not believe accused's testimony that he was not drunk and was on his post when found by the corporal of the guard. *** The record of trial is legally insufficient to support the court's findings of guilty ***." (CM ETO 11982 Jones 26 Jun 45)

Accused was charged with a number of violations of AW 96, each specification reciting that he "did, at the times and places respectively alleged, 'with intent to influence the beliefs of' the enlisted man or enlisted men named ***, 'wrongfully and unlawfully utter to' the said *** men 'oral statements substantially as follows:' Each specification then /narrated/ the alleged statement, which /consisted/ in each instance of language characteristic of Nazi doctrines." With some changes in the wording, accused was found guilty of the specifications. But in place of guilt of AW 96 as charged, he was found guilty of the "lesser" offense of violating AW 90. HELD: LEGALLY INSUFFICIENT. (1) The Offense: "The offense of using provoking speeches to another in violation of AW 90 is not a lesser included offense of wrongfully and unlawfully uttering Nazi doctrines with intent to influence the beliefs of another in violation of AW 96. The original specifications properly stated an offense in violation of the Act of Congress of June 28, 1940, 18 USCA, sec 9, 13 ***. AW 90 has a long history and its main object was to check such manifestations of a hostile temper as, by inducing retaliation, might lead to duels or other disorders. ***To influence successfully the beliefs of another by conversation requires an intent supported by tact, judgment and understanding. To provoke another with words, no such intent is necessary and the effect is produced by opposite qualities such as anger conceit and hatred. *** The alleged offense of wrongfully and unlawfully uttering words to another with intent to influence his beliefs in violation of AW 96 is an offense entirely different from the offense of unlawfully provoking another by uttering words in violation of AW 90. A court may find an accused guilty of an offense lesser than the offense charged only when the lesser offense is necessarily included in that charged ***." (CM ETO 10939 Gerner 15 Jun 45)

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(1) Murder in General 450(1)

(Note: The murder and rape cases have been segretated hereunder. Murder cases are found under subsections 1, 2 and 3. Rape cases follow under subsection 4.)

450 (AW 92) Murder; Rape

Murder

Not Digested:

7702 Shropshire
8533 Batiste (Insulting language as provocation)
9194 Presberry (self defense; position of body; etc)
9305 Johnson (run over woman with truck; question whether she was dead already)
9467 Roby (self defense; argument)
9468 Owens
9810 Johnson
10532 Marks
10780 Olsen (Germans)
10957 Turner (German)
11151 Bryant
11178 Ortiz (self defense; malice; etc.)
11231 Mitchell
11269 Gordon
11481 Sanders
11543 Logan (assault and battery as provocation. Ten-fifteen minute lapse)
11958 Falcon
12169 Nold (sanity)
12224 Ciullo (threat to shoot a witness inchoat)
12320 Norris
12331 Johnson
12377 Graham (self defense)
12586 Kinsey (self defense)
12608 Hammond, et al (joint act; German)
12661 Wise (heat of argument)
12850 Philbot (1st indorser of case to GCM was later AW 70 investigator; compelling evidence; not prejudicial. Drinking)
13139 Ridenoor
13379 Robinson
13568 Nelums, et al (German; identity; lineup)
14047 Lancaster
14048 Mason
14053 Wray
14126 Bennett (victim's previous threats)
14380 Hall (drunk-German)
14433 Lamas
14573 Morton
14824 Barber
14987 Harrison (self defense*
15200 Bobo (gambling, fracas, drinking)
15340 Lozano (drunk)
15416 Radcliffe
15425 Lemons
15787 Parker
15788 Polson (drinking; discussion)
15817 Sweeney
15836 White
15862 McDaniel (drunk)
16122 Burton (close intoxication question)
16123 Campbell
16187 Rollins (Proof of Death weapon as club)
16188 Brown
16191 Rothmeier
16250 Green (self defense)
16340 Damasco
16397 Parent
16440 Jones
16581 Atencio (drink)
16589 Lane
16621 Makara
16668 Sumpter
16739 Leonard
16851 Moore (drunk)
16874 Miller (identity)
16892 McCutchen
17018 Copeland
17023 Sanchez (continuance)
17074 Maye (shoot through door)
17205 Cabau-Montalvo
17373 Howe
17441 Hall, Jr. (five minute lapse)
17446 Croft
17507 Votodian

450(1) (1) Murder in General

450 (AW 92) Murder; Rape

(1) In General: Accused negro was found guilty of both rape and murder in violation of AW 92, and of assaults with intent to murder in violation of AW 93. HELD: LEGALLY INSUFFICIENT. (1) Identity: While the offenses were shown to have been committed, accused's identity as their perpetrator was not adequately proved. The following competent evidence re identity was adduced: "(a) Some five hours following the commission of the crimes, accused had in his possession the gun issued to him, which was shown by ballistics testimony to be the one from which were fired the shells found at the scene of the crimes * * *. (b) All of the crimes were shown to have been committed by a tall soldier about the same height as accused. Sergeant Lane testified also that the soldier he saw coming out of the woods had features similar to those of accused. (c) One witness positively identified accused at the trial as the colored American soldier who came to the Le Bourgeois home at the time in question. His identification, however, was based upon the fact that accused had a gold tooth, whose presence he discovered long after the crimes, was tall, and was the only negro in the courtroom. (d) Three other civilian witnesses * * *, while unable to identify accused as the culprit, in no manner excluded his identity as such and Madame * * * testified accused might have been the man who fired at her. (e) Expert handwriting testimony, as well as visual comparison, tends to show that it was accused who wrote on the piece of cardboard which he tore from the corner of the cigarette carton and gave to Madame ***. The specimen which accused wrote reveals an apparent attempt to dissimulate his true handwriting, as indicated by hesitance in making each of the two letters in his own name on the specimen which were present in the only legible word in the writing on the cardboard. (f) There is not one word in the entire record of trial of explanation or denial of accused's evident connection with the crime." The above evidence insufficiently established identity. It is to be noted, among other things, that "the expert expressly testified he could not say the two writings were by the same person." Accused's possession of the lethal weapon some five hours after the offenses does not exclude every reasonable hypothesis except the one of his guilt. "This is not the case of the discovery of a lethal weapon in the possession of a civilian suspect in an orderly community in the U.S. during stabilized peacetime conditions. Accused's weapon was the implement of his trade. It was his right and duty to have it in his possession." (2) Hearsay: Apart from the failure to establish accused's identity, sufficient prejudice resulted from the introduction of hearsay to require a reversal of his conviction. "Over vigorous objection * * *, the prosecution was permitted to introduce the testimony of Agent Peters, who was not present at the identification line-up at the company bivouac area, that Sergeant Lane stated to him on the day following the line-up that he had picked out a certain man (as the man he had seen coming out of the woods), but could not tell the name of accused or of the person he had picked out. Peters thereupon testified that from his own investigation, he knew that the person picked out was accused. In elaboration he testified that Lane refused to attend a fur-

ther identification parade at the company area and stated he was 'not going to know anything' and had 'never seen anything', because at the identification the troops began to riot and chased Barnes with their carbines, threatening to kill Lane and his men. Over a month later, Lane told witness he had picked out the man he had seen coming from the woods. Witness learned that the identification parade was conducted by Lt Frank Carr, who gave him a written report thereof stating 'that Sergeant Lane and Barnes had picked out a man whom he, Lt Carr, identified as" the accused.'" "As hearsay, the testimony was not evidence and was improperly admitted * * *. Even assuming that this highly incriminating statement in Lt Carr's report was admitted under the guise of impeachment of a supposedly hostile witness, this could not give it any value as evidence which it did not otherwise possess. The generally recognized rule denies substantive evidentiary value to impeaching admissions in former inconsistent extrajudicial statements of a witness not a party to the action * * *. As Lt Carr was not present as a witness available for cross-examination * * *, his report, even had it been offered in evidence, was clearly hearsay. Barnes' parol testimony as to the contents of the report was definitely not the best evidence. Such testimony was thus doubly incompetent. * * * The fact that the obviously hearsay character of the testimony was fully demonstrated to the members of the court cannot be held to lessen its damning effect. It was received under a formal ruling of the law member, as competent evidence. * * * His admonition that the statement was admissible but not for the purpose of proving its truth was not only meaningless but was inconsistent with the prosecution's statement, which the law member adopted, that the statement was admissible for whatever value it might have for the court." (CM ETO 7867 Westfield 21 Jun 45).

Accused was found guilty of the murder of a German civilian, in violation of AW 92. HELD: LEGALLY SUFFICIENT. "The evidence does not disclose even a shadow of excuse or justification for the homicide. Accused was a trespasser at the time he shot the deceased who had arisen from his bed to greet accused at the kitchen door. After his demand for liquor had been refused, he raised his rifle and shot his victim." His "intoxication" at the time was not such as to destroy his mental capacity to entertain the necessary intent. (CM ETO 10002 Brewster 5 Jun 45).

1st Ind CM ETO 10002 Brewster 5 Jun 45: "The Staff Judge Advocate suggests that the dishonorable discharge might be suspended dependent upon so-called 'policy' of the Theater. I do not agree. Accused is a murderer. The fact he killed an allied enemy under the circumstances here revealed increases rather than decreases the enormity of his crime. American judicial ideals and principles will not permit even a partial condonation of so evil an act. 'A murder is not excusable merely because the person murdered is a bad man' * * *."

450(1) (1) Murder in General

Accused aider and abetter was found guilty of murder of a German civilian, in violation of AW 92, HELD: LEGALLY SUFFICIENT. (1) Specification: "The Specification in alleging the killing omits the words 'with malice aforethought' but describes the conduct which accused is alleged to have aided and abetted as 'willful, deliberate, felonious and unlawful murder'. This omission was harmless. * * * The intent to charge the accused with being an aider and abettor in the substantive crime of murder is clearly found * * *. The offense in chief, the murder, is sufficiently specified. The time, place and identity of the victim are set out with unmistakable clarity. The allegation that the offense was 'murder', as distinguished from any other offense, necessarily imposed upon the prosecution the burden of proving malice aforethought. * * * Military Law does not concern itself with the superfluous. It would have been unnecessarily repititious to have charged accused with aiding and abetting a murder, and then to add: 'committed with malice aforethought'." (2) Evidence: It was shown "that accused aided and abetted the murder, as alleged. With malice toward the victim, he was an active participant in the preliminaries. Although he left before the shooting occurred and not accompany the killer on the last fatal march he did go with the group to the home of the victim and was present while the deceased was being taken out of the house. By his presence and spoken word, he encouraged and fortified L** if he did not in fact actually instigate the commission of this murder. (CM ETO 10053 Miller 8 Aug 45).

Accused was found guilty of murder, in violation of AW 92, HELD: LEGALLY SUFFICIENT. The suggestion, implicit in described testimony, that the victim's death would not have resulted had she received different medical treatment, cannot avail accused. There was no evidence that Dr. D** was negligent. Cited 1 Wharton, Criminal Law (12ed., 1932) sec. 199, p. 257. (CM ETO 10714 Turner 8 Oct 45).

Accused Smith and Toll were found guilty of the murder of Hunn in violation of AW 92, and an assault to murder Harrison, in violation of AW 93. HELD: LEGALLY SUFFICIENT ONLY AS TO SMITH. (1) Smith: Both accused were riding in a vehicle on some official business. Smith admitted firing at some "blackbirds" along the road; finally admitted that he had shot at some negroes while Toll was driving. Both victims were negroes. The evidence as a whole (detailed) warranted the conclusion that Smith was guilty as charged. "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 * * * . The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death * * * and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life * * *. Assault with intent to commit

murder is an assault aggravated by the concurrence of a specific intent to murder. It is an attempt to murder and must consist of an overt act beyond mere preparation or threats * * *. The malice above discussed is an essential element * * *." (2) Toll: The court properly concluded that Toll was present at the time the offenses were committed. However, the evidence was inadequate to justify the conclusion that he may have fired the shots (detail). "The legality of the conviction of Toll depends on whether he aided and abetted Smith * * * to test the legal sufficiency of the evidence on this point, his acts prior to, and at the time of, the firing of the fatal shots" must be examined. "His subsequent acts, unless material to show preconcert of action with the principal, affect only his liability, if any, as an accessory after the fact." "The offense of aiding and abetting as a principal is separate and distinct from that of an accessory after the fact." "It may be noted in passing that the maximum penalty for an accessory after the fact where the principal receives death, is dishonorable discharge, total forfeitures and confinement for ten years (sec. 333, Fed. Crim. Code (18 USCA 551)." The necessary elements of the offense of aiding and abetting are: (a) "Preconcert of action or prior arrangement with the principal actor, plus presence at the crime; or" (b) "Overt act aiding or encouraging the crime done with intent to aid or encourage." "'Mere presence at the crime is not enough; there must be a common purpose and intent to aid or encourage the persons who commit the crime, and an actual aiding or encouraging' (Halsbury's Laws of England, Vol. 9, sec. 528)." Preconcerted action was not proven in the instant case. "Guilt will not be inferred from his presence if preconcert of action were shown such as in the case where the accused with knowledge accompanied the murderer upon his unlawful mission of robbery and was in position to warn or assist * * *." "In the absence of a showing of a prior plan or conspiracy, other circumstances amounting to an overt act of aiding and encouraging the crime, must have been proved * * *". This was not done. "Toll's case * * * is clearly one of those where another has suddenly and unexpectedly commiteed murder in his presence without his intended help * * *." The evidence was insufficient to support either of the charges against Toll. (CM ETO 10860 Smith 22 Jun 45).

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Death Certificate: Two exhibits were received in evidence to prove the cause and the date of deceased's death (gunshot). Defense neither objected nor expressly consented. "Failure to object to these certificates on the ground that their genuineness was not shown may properly be regarded as a waiver of that objection * * *. It can be assumed, therefore, that each certificate was in fact signed by the officer whose signature purports to be thereon. * * * Although the certificates were statements made by persons who were not witnesses testifying before the court under oath and subject to cross-examination they were in this case properly received as official writings * * *. Post mortem examinations made by medical

officers are required to be made in cases where death is due to foul play, violent or unnatural causes (except in certain instances not pertinent to this case) by paragraph 19d(1), AR 40-590, and paragraph 18b(1), AR 600-550. It is apparent that the prosecution, the defense and the court treated them as official writings. The certificates were made by medical officers stationed at an Army hospital who had the duty to know the facts recited in the certificates (except the word 'carbine' in Pros. Ex. 2) and to record them. It does not appear that the entries in the certificates were not based upon personal knowledge. It is to be noted, nevertheless, that the question of the competency of Pros. Ex. 1 and 2 could have been avoided by having followed the far more satisfactory practice of calling the medical officers as witnesses. There is other evidence of J**'s death and of the fact that it was caused by the gunshot wound inflicted by accused. The stipulation that '* * * the deceased was a human being' carries the necessary implication that "he" was dead at the time of the trial, that is, that he died at some time between 21 February and 12 March, 1945. This fact and the additional proved fact that the bullet passed through J**'s body in the region of the heart followed by his immediate collapse, his inability to speak as he lay on the ground, and his lapse into unconsciousness, warranted the court in finding, in the absence of any indication to the contrary, that J**'s death was caused by the gunshot wound he received on the night of 21 February." (2) The evidence supported the finding of accused's guilt of murder for this homicide resulting from shooting about 30 minutes after a fist fight in which he was beaten by deceased (detail). (CM ETO 11059 Tanner 22 Jun 45).

Accused was found guilty of the rape of a German woman in violation of AW 92; and of assault with intent to do bodily harm with a dangerous weapon in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) Impeachment: Nazi: The law member improperly excluded defense's attempted cross-examination of the prosecution's German witness R***, concerning the witness' status under the Nazi regime. "These questions under the circumstances were proper for purposes of impeachment on ground of bias or prejudice (MCM 1928, par. 124b, p. 134). No prejudice to accused resulted however since the witness' testimony was unimportant * * *." (CM ETO 11230 Valenzuela 16 Jun 45).

Accused was found guilty of murder, in violation of AW 92, HELD: LEGALLY SUFFICIENT. "There is no direct evidence of record identifying as one and the same person the Nathaniel Fuse who was shot by accused and the Nathaniel Fuse who died at the * * * General Hospital at 0135 hours on 3 May 1945. Upon the conclusion that the record otherwise sufficiently establishes this identity depends its legal

sufficiency to establish the corpus delicti of the offense charged. The Board of Review is of the opinion that the record does contain substantial evidence from which the court could reasonably infer identity of person. Identity of name raises a presumption of identity of person, a presumption that is strengthened where, as in this instance, the name is not a common one (MCM, 1928, par. 112a p. 110). Furthermore, the possibility that two soldiers of the Army of the U. S., both named Nathaniel Fuse, were both suffering from gunshot wounds on 2 May 1945 and were both in medical channels at the same time is such remote coincidence as not to constitute a reasonable hypothesis inconsistent with guilt. From the identity of name and the other circumstances proved by competent evidence, the court was justified in inferring the identity of person. The hospital records themselves would have been the best evidence of the name they reflected. No objection was asserted, however, to Major D***'s testifying to the name shown by the records, and the objection was therefore waived (MCM, 1928, par. 116a, p. 120). (CM ETO 12486 Herbert, 25 Jun 45).

An MP was killed at a cafe fracas. Accused was found guilty of Murder in violation of AW 92, as well as two escapes from confinement in violation of AW 69, HELD: LEGALLY SUFFICIENT. "While there was no direct evidence to show that accused personally perpetrated the murder * * *, the circumstantial evidence adduced points strongly to him as the man who fired the shot which resulted in H***'s death. Smith had started to unsling his carbine only three or four seconds before the shot was heard whereas accused's carbine was already unslung and in firing position. Smith was to the rear of the deceased whereas accused was directly opposite him, the missile passed through H**'s body almost directly from right to left, and, when apprehended a short time after the homicide, accused's carbine appeared recently to have been fired. If Wahle's observations were accurate, the absence of bullet holes in the canvas top of the vehicle almost conclusively shows that, of the two men, accused must have fired the fatal shot. In any event, in view of the background of the homicide, the actions of the two men at the time the military police vehicle drew to the curb shows a concerted design to avoid arrest. They had earlier been disorderly in a cafe and had not only been heard to say that they were going to return to inflict violence on the lieutenant but had loaded their weapons in preparation therefor. In view of Wahle's persistent efforts to dissuade them, they certainly must have recognized him when he leaped from the vehicle and have realized that their activities had been reported to the military police. Both unslung their carbines and the court was justified in inferring that they then mutually intended to aid each other to escape and to shoot if necessary, as in fact one of them did, in order to avoid apprehension. Under the circumstances shown, even if it was Smith who fired the shot accused may be held responsible for his act * * *." (CM ETO 12652 Fladger, 23 Jun 45).

480(1) (1) Murder in General

Accused was found guilty of murder, in violation of AW 92. HELD:: LEGALLY SUFFICIENT. (1) Sanity of Accused: (a) Law: "Accused is not mentally responsible for the killing of M** unless he was at the time 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. Where a reasonable doubt exists in the minds of the court as to the mental responsibility of accused, he cannot legally be convicted (MCM, 1928, par. 78a, pp. 62-63). The mental responsiblility of accused is a question of fact, and the burden is upon the prosecution to prove beyond a reasonable doubt that he is mentally responsible for the offense. He is presumed, however, to have been in fact sane at the time of the offense until a reasonable doubt of his sanity at that time appears from all th evidence. This presumption merely supplies in the first instance the required proof of the capacity of accused to commit the crime charged and authorizes the court to assume at the outset that he is mentally responsible for his act. When evidence tending to prove that accused was not mentally responsible for the alleged offense is introduced either by the prosecution or by the defense, or, in appropriate cases, on the court's own initiative, and such evidence creates a reasonable doubt as to the sanity of accused, he is entitled to an acquittal. The burden, however, of producing evidence of insanity is not upon the prosecution but upon the defense * * *. It is immaterial whether the insanity is permanent or temporary, or whether it is produced by excessive drinking, and the defense of drunkenness has been maintained throughout the cases. An insane person cannot be convicted of an offense committed while he is in that condition, while voluntary drunkenness is generally no excuse for crime * * *." (b) Facts: "While intoxicated, accused engaged in an unprovoked altercation with deceased in the course of which he became angry and fired a shot into the ceiling. As deceased was attempting to get away, accused aimed and fired his rifle at him and killed him. Immediately thereafter he informed his companion who was waiting for him outside that he had killed the deceased. On the way back to camp he enjoined his companion not to mention that he had done the killing. After returning to camp two or three hours later he was troubled, made statements indicating remorse and related to other members of his unit that he had shot and killed the deceased. He stated his reason * * *, namely that the latter had shoved him, and gave details * * *. He admitted that the shooting was not an accident. C** testified that at the time of the shooting and on the way back to camp accused did not seem natural, was violent in his actions, seemed abnormal and a little wild, did not seem to make sense in what he said, could not be reasoned with, and that the liquor seemed to affect his mind. He further testified that although the shooting brought accused slightly back to normal, his condition seemed no different after he reached camp. There was evidence that C** had himself drunk heavily and was intoxicated. It was for the court to determine what weight should be given to his appraisal of accused's mental condition. The two other witnesses who saw accused and talked with him upon arrival at camp and to whom he revealed what he had done, testified that he

spoke coherently and as normally as he usually did, that he did not stagger, was not violent in any way and appeared to know what he was talking about. The psychiatrist found that he was not suffering from psychosis, meaning that he was not insane. The slight amount of brain injury he had sustained prior to his entry into the service merely made him more susceptible to the influence of alcohol than the average person. He was perfectly capable of distinguishing right from wrong when not intoxicated. The witness based his opinion that accused was suffering from some mental derangement or impairment which rendered him temporarily insane, upon the assumption that due to alcoholic intoxication he was suffering from a temporary blackout at the time of the killing. The only indication that he suffered a blackout came from the accused's own statement to the witness while he was under observation and when he was not under oath or subject to cross-examination. There is no evidence in the record to corroborate the truth of that statement. On the contrary the evidence warranted the court in finding that he did not suffer a blackout. Admitted the witness did not know the condition of accused at the time of the killing. He testified that accused's behavior immediately following the slaying indicated that he was able to distinguish right from wrong, and that it was for the court to determine what his condition was at the time of the shooting. There was substantial evidence, therefore, to sustain the court's finding that accused at the time of the offense was so far free from mental defect, disease or derangement as to be able concerning the act charged to distinguish right from wrong. There is nothing in the record to suggest that although accused was aware of the moral quality of his act, he was unable to adhere to the right. A specific finding of mental responsibility is not required, it being included in the general finding of guilty * * *." (2) Drunkenness of Accused:"Accused drank about one-half to three-fourths of a quart of cognac over a period of approximately two hours before the slaying and * * *he was intoxicated at the time he fired the fatal shot. It is a general rule of law that voluntary intoxication is not an excuse for crime committed while in that condition, but it may be considered as affecting mental capacity to entertain a specific intent where such intent is a necessary element of the crime * * *. Evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime charged and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. It was for the court "to determine". There was substantial evidence to support a finding that accused at the time of the offense was capable of forming the purpose and intent to kill, and that he intentionally shot and killed the deceased." (Dissent: The evidence supported only a finding of voluntary manslaughter. (CM ETO 12855 Minnick 20 Aug 45).

(1st Ind: CM ETO 12855 Minnick 20 Aug 45: "It is recommended that the death sentence should be commuted to life imprisonment. Accused's abnormal susceptibility to alcohol due to

pre-existing brain injury, his drunken condition, the absence of deliberation, his sudden anger, and his youth, make out a strong basis for the recommendation.")

Accused was found guilty of assault to murder in violation of AW 93, and of murder in violation of AW 92. HELD: LEGALLY INSUFFICIENT. Defense Counsel Statements: "In the opinion of the Board of Review, the defense counsel's announcement to the court--'He told me two or three stories, none of which agree with one another. I can't even say that they are plausible'--was highly prejudicial under the circumstances shown. For a defense counsel * * * to announce in effect to the court trying accused on a capital charge that he has no plausible defense, is to violate his bounden duty to 'guard the interests of the accused by all honorable and legitimate means known to the law' and 'to represent the accused with undivided fidelity, and not to divulge his secrets or confidence' (MCM, 1928, par. 45b. p. 35). It is difficult to conceive of anything more nearly fatal to the rights of an accused than for the court to hear from his defense counsel, who has received the confidences of accused, a statement to the effect that he had no plausible or consistent defense. This was little short of pleading guilty to a capital charge over the protests of the accused he was appointed to represent, who had previously entered a plea of not guilty. The rule is basic that the guarantee of due process of law in the Fifth Amendment to the U. S. Constitution extends to persons on trial before courts-martial * * * It is incumbent upon the Board of Review, as well as all other military justice authorities, to insure that every accused before a court-martial receives a fair trial. The right to counsel is fundamental. * * * The right to counsel means the effective assistance of counsel." Accused's conviction herein was based on strong evidence. "But the compelling evidence rule, ordinarily applied to determine whether an error is harmful cannot properly be applied under the present circumstances. To apply it here would be to beg the issue. Had not his own counsel announced to the court that his versions of what happened were in disagreement and seemingly not plausible, accused might well have decided to take the stand and testify." "Certainly, if accused had been refused the right to testify, the error would have been fatal, regardless of the strength of the evidence. Here, while accused was given the opportunity to testify, his counsel had already 'put two strikes against him' * * *. This error on counsel's part is so grave that it stains the entire record and trial and it cannot be wiped out by a mere weighing of the evidence admitted." (CM ETO 13222 Howard 18 Aug 45).

(1st Ind: CM ETO 13222 Howard 18 Aug 45): The record herein indicates a possibility that accused might be insane, or was at the time of the offense. "It is therefore recommended, before further proceedings are undertaken in this case, that a thorough mental examination be made * * *."

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(1) Murder in General 450(1)

Accused was found guilty of the murder of a prisoner of war, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: The circumstances showed that accused shot and killed prisoner of war F** at the time and place alleged. "It was shown that he fired at least two shots at F** and must have known that his death or serious bodily injuty might result. Even if accused was told by the white soldier that it would be 'all right to kill these prisoners of war', as contended in his unsworn statement, this was manifestly beyond accused's duty and authority as a soldier and conduct that even a man of accused's limited sense and understanding should have recognized as criminal * * *." (2) International Law: It was indicated that the SS prisoner who was killed was a prisoner of war. "'It is simply cold-blooded murder to shoot a prisoner unless he has forfeited his immunity by some definite act of resistance or hostility' (Spaight, War Rights on Land (1911) p. 267. 'The law of war forbids the wounding, killing, impressment into the troops of the country, or the enslaving or otherwise maltreating of prisoners of war, unless they have been guilty of some grave crime; and from the obligation of this law no civilized state can discharge itself.' (Mr. Webster, Sec. of State, to Thompson, Min. to Mexico, April 5 1842, Webster's Works, VI, 427, 437) (7 Moore, Digest of International Law (1906 Ed.) sec. 1128, p. 218)." (CM ETO 13415 Rice 14 Jul 45).

Accused negro was found guilty of the murder of a German civilian, Frans D**, in violation of AW 92. HELD: LEGALLY INSUFFICIENT. (1) Circumstantial Evidence is sufficient upon which to base a finding of guilt. However, mere conjecture or suspicion does not warrant a conviction. (2) Evidence: "Frans /deceased/, accused, and two other soldiers entered Maria's and Frans' room in the attic, one of these two other soldiers leaving shortly afterward. Frans left the room, followed by Maria and then by accused. That was the last time any witness testified as to seeing Frans until he was found bleeding on the bed. L** and the dark soldier were then the only persons in the room. L** left and went to the toilet. After that she saw a soldier upstairs in the attic sitting in a chair whom she was unable because of the dark to recognize. She then saw accused as he went upstairs between the second and third floors where he hit her and she went downstairs to the officer. Some time later she saw the dark soldier leaving at the front door of the hotel. "Even assuming that the pistol which fired the bullet that struck Franz was in accused's possession after the shooting, there is no proof that he had it in his possession immediately before or at the time of the shooting. Witnesses then with him saw no gun or holster upon him." "Yet on this single fact of such tenuous evidence of possession rests the whole case * * *." A number of other possible theories (detail) as to who may have shot deceased present themselves. "It is no doubt true that the finger of suspicion points to the accused as the possible perpetrator of the crime, because of his subsequent possession of the pistol, assuming this fact

to have been proven. Withdraw that assumption, and others of the hypothesis are the more plausible. Considering how easily possession could be gained, and assuming such possession, it cannot be held as a matter of law that the inference of accused's guilt is more reasonable than of guilt of the others." The evidence insufficiently supported the finding of guilt. (CM ETO 13416 Wells 8 Sep 45).

Accused was found guilty of the murder of a German civilian, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Drunkenness: "There was evidence that accused had been drinking heavily of various intoxicants since before the noon meal that day, that he was very drunk, was not in his right mind, did not know what he was doing, was itermittently unable to hear and at one point threw himself violently against a wall. He claimed in an unsworn statement through counsel that he could remember nothing at the time of the shooting and for some time thereafter. There was evidence, however, that shortly after the shooting he was in sufficient control of his faculties to recognize a superior officer, to understand what was said to him, and to attempt to avoid and later to break arrest, and that his behaviour was 'just like any drunk'. He also mentioned shooting some Germans. A medical board which examined accused less than two months after the commission of the alleged offense concluded that his past record of drinking was insufficient to indicate any injury due to alcoholism and that he was, at the time both of the alleged offense and of the examination, sane and responsible for his actions. The court was justified by substantial evidence in determining against accused the issues of whether he killed his victim with malice and whether he was sufficiently under the influence of alcohol to destroy his mental capacity to entertain the general criminal intent necessary to murder. * * * This case is distinguishable from CM ETO 9365, Mendoza, where accused's extreme drunkenness, and a severe blow on the head, which rendered him temporarily unconscious shortly before the crime, and the fact that the victim of his shooting through a closed door was one of his best friends were held to negate the existence of malice and to require a holding that he was guilty of voluntary manslaughter and not murder." (CM ETO 14141 Rycko 8 Aug 45).

(1st Ind: CM ETO 14141 Rycko 8 Aug 45): "Although the findings of guilty of murder may not be held as a matter of law to be unsupported by substantial evidence of malice on accused's part, and the court's determination that malice existed may not be disturbed, nevertheless in view of the advanced degree of his drunkenness and the fact that he had recently been engaged in combat lead me to regard his offense as of no more moral gravity than voluntary manslaughter. I therefore recommend that the period of confinement be reduced to ten years or less."

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(1) Murder in General 450(1)

Accused Indian soldier was found guilty of murdering a German girl in violation of AW 92, and of assault with intent to do bodily harm by choking his victim in violation of AW 93. HELD: LEGALLY SUFFICIENT. "The only serious issue * * * was whether a temporary insanity, produced by intoxication, existed at the time * * *. The report of the Board of Officers and medical testimony admitted in evidence went no further than to establish the possibility of accused's insanity at the time of the alleged offense to a degree that would impair both his ability to differentiate between right and wrong and to adhere to the right. The abnormal conduct of accused on previous occasions when he was intoxicated was taken into consideration by the medical witness in reaching his conclusion. Such evidence alone, namely, the possibility of mental incompetency, did not necessarily establish a reasonable doubt as to accused's sanity. The record of trial discloses a detailed account of accused's action from 2315 to 2500, at 2315 and again at 2400. Some of accused's actions during the period preceding the shooting were conceded by the medical witness to indicate he had some judgment. His actions in first concealing himself after he fired the fatal shot and later in effecting his escape, indicate that he was not devoid of judgment, although in the medical witnesses' opinion, he could have done these things from instinct. The determination of the question * * * was within the peculiar province of the court * * *. From the court's intelligent and impartial examination of the medical witness, it is obvious that it fully appreciated the issue and thoroughly considered it." The findings will not be disturbed. (CM ETO 16772 Chutnicutt 2 Nov 45).

Accused was found guilty of murder and rape in violation of AW 92, and of larceny and assault to do bodily harm with a dangerous weapon, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (CM ETO 16978 Morgan 26 Oct 45).

(1st Ind; CM ETO 16978 Morgan 26 Oct 45: "Members of the board of officers appointed to examine this soldier testified that he is mentally deficient * * *, with a mental age of eight or ten years * * *, and that he is to be classed as feeble minded or mentally deficient. The Manual provides that 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' (MCM, 1928, par. 78a, p. 63).'.

"The board found 'that he is not so mentally deficient as not to know the difference between right and wrong' * * *, but it failed to find that such ability concerned 'the

particular acts charged' and failed to find that the soldier was, concerning those acts, able to adhere to the right at the time of the offenses. In a case of this kind, involving the supreme penalty, I believe that these requirements of the Manual should be rigidly complied with, and that, therefore, under the circumstances of this case, a complete mental examination should be ordered to determine the above matters.")

Accused was found guilty of murder, in violation of AW 92, HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilty. (2) Confession: "Objection was made * * * to the introduction of the signed written confession of accused because there was no certification that it was a true copy of the original and was signed at the same time as the original. Since the testimony of the 'CID' agent who took the statement shows that the carbon copy was a true copy of the original and was signed by accused and corrections initialed by him, the carbon copy was primary evidence and admissible. * * *. Whether the statement was voluntarily made was a question of fact for the court * * *. Moreover, even if the confession was erroneously admitted * * *, the other evidence is compelling as to accused's guilt * * *." (CM ETO 17106 Conley 2 Oct 45).

Accused was found guilty of murder, in violation of AW 92, HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilty. (2) Accused: Cross Examination: While testifying on his own behalf, a court member told accused that he did not believe he was telling the whole truth. A similar comment was made to another witness. This constituted a grave irregularity, and improper conduct. However, in view of the compelling evidence, no prejudice resulted. (CM ETO 15860 Ensley 28 Sep 45).

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: During combat conditions, accused was taking a prisoner ("civilian" who admitted he was a German soldier) from one headquarters to another. En route, he stopped; killed the victim by firing a number of shots into him; returned and reported that he had delivered him. (2) Malice: The Board of Review does not have the legal power to weigh evidence. "Upon the evidence adduced of accused's anger, the wounding of his brother, the arrogance of the man believed to be a German prisoner or spy, and from the judicially noticed stirring times of the great German breakthrough with all the accompanying nervous tension, the nearby siege of Bastogne, and the then recent German massacre of prisoners at Malmedy, the court-martial as the

fact-finding body might well and properly have found that the accused acted in passion, adequately provoked by the individual enemy as the apparent representative of the cruel, inhuman and hated foe. Such a finding would reduce the offense to manslaughter,* * *. Likewise the court-martial had the power to infer malice from the facts, and to determine that the acts sprang from a 'wicked and malignant heart' of the same ilk as that of Germans at Malmedy, and that the presumption of malice from the use of a deadly weapon was not rebutted. The court so found and the matter was of fact, * * *." That finding will not be disturbed. (3) Death Cause: Even assuming that another may have subsequently fired the final fatal shot, yet "if accused shot at deceased with a machine gun from close range, lodged a bullet in his arm, hit him with enough force to leave him prostrate, pushed him off the road with his foot, and left him in the snow, his acts constituted a contributing cause of the death that resulted directly from whatever subsequent cause, and he was therefore guilty of the homicide." (CM ETO 14547 Keech 29 Sep 45).

Accused was found guilty of the murder of an officer and a warrant officer in violation of AW 92, and of assault with intent to murder a corporal, in violation of AW 93. HELD: LEGALLY SUFFICIENT. The burden of adducing evidence to rebut the presumption of malice necessary to constitute the two killings murder and the shooting of Corporal B** assault with intent to commit murder, devolved upon accused at the close of the prosecution's case proving the apparently deliberate and unjustified shooting * * *. Accused's only defense was that his voluntary intoxication caused him to remember nothing whatsoever about the fight with Sergeant W**, the subsequent shooting, or his examination by the medical officer about thirty minutes after the shooting. Voluntary drunkenness is of no excuse for crime committed while in that condition, but may be considered as affecting mental capacity to entertain a specific intent * * *. Accused's asserted drunkenness to the extent that it affected his mental capacity to entertain a specific intent is refuted by certain facts inconsistent with such a condition. He recognized the 103rd Division patch on Sergeant W**'s sleeve, he recognized T/Sergeant R** and called him by name, he recognized Captain N** by addressing him as 'Captain', he procured a rifle from the enlisted men's quarters and from a distance of approximately fifteen feet made several bullets effective. He also realized the danger of his position immediately after the shooting and raised his hands crying out to his captors not to shoot. Shortly thereafter he admitted intending to kill Captain N** whom he saw at the time he shot. Whether he was too drunk to consciously and purposefully execute a murderous design was a question for the court's determination." (CM ETO 14745 Rowell 18 Aug 45).

450(1) (1) Murder in General

Accused was found guilty of rape and murder in Germany, in violation of AW 92, HELD: LEGALLY SUFFICIENT. "The defence objected * * * to the prosecution's cross-examination of accused, contending that it went beyond the scope of the direct examination and violated accused's constitutional right against self-incrimination. It need not be determined whether the cross-examination was too great in latitude or infringed accused's constitutional right against self-incrimination. In total, accused, upon cross-examination, admitted that he was in the cellar and that his personal weapon was the 'tommy gun'. Indepent of accused's admission the evidence is compelling that accused was present in the cellar. Five witnesses so testified. Except that one of the five was only 'ninety-eight per cent' certain as to accused's identity, the record contains no suggestion that some person other than accused may have committed the alleged offenses. Accused's admission to his presence in the cellar did not injuriously affect his substantive rights * * *. Nor did his admission that his personal weapon was the 'tommy gun'. Five witnesses testified accused had a gun, the majority identifying it as a carbine. Whether the weapon was a carbine or submachine gun was immaterial." (CM ETO 15302 Mariano 6 Sep 45).

Accused were found guilty of murder in violation of AW 92; of burglary in violation of AW 93; and of the wrongful use of a vehicle in violation of AW 96. HELD: LEGALLY SUFFICIENT IN PART. (1) Perjury: Exclude Testimony: The law member excluded one witness's testimony on the ground that perjury therein was apparent. This was error. The witness was "for the prosecution." He testified to certain facts in direct conflict with statements made in his prior extra-judicial statement. Thereupon the trial judge advocate interrogated him upon the conflicting declarations contained in said prior extra judicial statements, and the statements themselves were admitted * * *. The prosecution asserted that the statements were introduced * * * 'for the purpose of impeaching the credibility (sic) of the witness' and 'for the purpose of impeaching the witness now on the stand'. * * *The trial judge advocate, law member and defense counsel wholly ignored the established principle that forbids the prosecution to impeach its own witness, but which permitted the prosecution to invite /the witness's/ attention to prior conflicting statements 'to refresh his memory and move him to speak the truth by probing his conscience * * *.' The prior statements were not original substantive evidence in aid of establishment of the prosecution's case against each accused * * *." "The successful impeachment by the prosecution of its own witness, however, did not justify the action of the law member in striking all of /the witness's/ testimony and ruling as a matter of law that it was inadmissible * * *." However, no AW 37 prejudice resulted (discuss). (2) The murder, committed during a burglary, was established. Both accused could be held as principals, since each aided and abetted in its commission. (3) Burglary: Was also established. As to intent to rob, "there is

substantial evidence that accused sought alcoholic beverages. Their inquiries and demands and the action of A** after entering the house permits the definite inference that the two accused intended to take and carry away such intoxicating liquor as they might discover in the place, using such force and compulsion as might be necessary." (4) There is no proof of the wrongful use of the Government vehicle, and the finding of guilty in this regard was improper. (CM ETO 16005 Jones, et al 6 Oct 45).

Accused was found guilty of murder, in violation of AW 92, and of assault to murder in violation of AW 93. HELD: LEGALLY INSUFFICIENT. (1) Court Membership: It has been held that "'Where an officer who was not detailed thereon sat as a member of the court, the proceedings were thereby invalidated'." "The reason is that jurisdiction depends wholly upon appointment of courts in strict compliance with the 8th AW. The court has such powers and only those, as are granted by law, and if the court which tries an accused is not constituted according to the law which authorizes its creation, it is without jurisdiction and not a legal court and its actions are void. This is one of the reasons that the proceedings of such a court are the fit subject for attack by Habeas corpus writs in the civil courts * * *." "If in the case before us, it can be argued that the appointing authority intended to detail /two described/ officers to the court appointed by the Special Orders of 5 June because the accused was named, it can be argued with equal facility that the same intent existed in the Beadle case for the distant place of actual meeting was named and the officer relieved was a member of the second court. The case is therefore controlling. Furthermore, the appointing authority may as well be deemed by his action to have intended to withdraw /accused's/ case from the second court and refer it again to the first. Laxity in construction with regard to jurisdictional questions as to the possible intent of the appointing authority is not appropriate; the traditional rule of the common law is that jurisdictional requirements will be strictly construed and that power of a court to function and thereby take the life or freedom of a man must be shown plainly to have been gained by clear compliance with the parent law". "Nor will the action of the reviewing authority be such a ratification as would breathe life into the void proceedings. Since a nunc pro tunc order could not achieve that result, his approving action could not so do * * *." (1st Ind: "The accused may again be tried the same as if these proceedings had not been held * * *." (CM ETO 16886 Robinson 29 Sep 45).

Accused was found guilty of murder in violation of AW 92. HELD: LEGALLY SUFFICIENT. "The Manual expressly provides that malice is presumed from the use of a deadly weapon (MCM, 1928, par. 112a, p.110; * * *) However, this is a presumption of fact, not of law, and the

inference of malice to be drawn from the use of a deadly weapon is obviously weaker in a case where a homicide is committed by a combat infantryman to whom the use of a carbine is commonplace than it is where a homicide is committed is a settled, peaceful community where the very possession and use of firearms is extraordinary. In any event, the use of a deadly weapon is only one piece of evidence bearing upon the question of malice and the presumption or inference arising from this fact may be rebutted * * *. In other words, it is a more accurate statement of the rule to say that malice, if it exists, is to be inferred from all the facts and circumstances of the case, of which the method by which the homicide is committed is only one * * *." (CM ETO 17415 Chesney 24 Oct 1945).

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The sanity of accused was a fact question. "A mere showing that accused is of low intelligence does not relieve him of legal responsibility for his offense unless his mental deficiencies are so pronounced as to render him unable to distinguish right from wrong and adhere to the right * * *." (1) Identity; Victim: "It is clear that the person whom the Specification alleged to have been killed by accused was the same person whom the evidence showed that accused had actually killed at the time and place alleged. The variance in the name alleged--Mazus Franc--and the name by which deceased was identified in evidence and findings of guilty--merely Franz--was therefore immaterial since it affirmatively appears that it neither misled the court nor prejudiced accused * * *." (CM ETO 17724 Copeland 27 Oct 45).

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(2) Murder; Finding of Offense Included

Accused was found guilty of murder in violation of AW 92. HELD: LEGALLY SUFFICIENT ONLY FOR VOLUNTARY MANSLAUGHTER IN VIOLATION OF AW 93. (1) Homicide; Degrees of: "Although most of the states have divided the crime of murder into degrees depending upon the heinousness of the offense and have prescribed a lesser punishment for the lesser degrees of murder, no similar amelioration of the common law rule has taken place in military law * * *. In military law, as at common law, all unlawful killings with malice aforethought, without regard to varying degrees of culpability, are classified as murder * * *. Where murder is charged, the prosecution will be held to a high standard of proof, especially with reference to the element of malice aforethought * * *; (2) Evidence: "The element of malice aforethought necessary to constitute a homicide murder may * * * be supplied by proof that accused had knowledge that his act would 'probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not' * *.

(2) Murder; Finding of Offense Included 450(2)

In the instant case, accused fired two shots through the partially closed door of a kitchen in the house where he and other members of his squad were billeted and there was evidence from which the court could find that he knew the room to be occupied at the time. * * * If nothing else had been shown, the court would have been justified in finding that accused, who was an infantryman and as such certainly familiar with the lethal qualities of a service rifle, had knowledge that his act probably would cause the death of or grievous bodily harm to one of his fellow squad members and hence acted with malice aforethought * * *. However, this is a presumption of fact, not of law, and the inference of malice to be drawn from the use of a deadly weapon is obviously weaker in a case where a homicide is committed by a combat infantryman to whom the use of a rifle is commonplace than it is where a homicide is committed in a settled, peaceful community where the very possession and use of firearms is more or less extraordinary. In any event, the use of a deadly weapon is only one piece of evidence bearing upon the question of malice, and the presumption or inference arising from this fact may be rebutted * * *. It is a more accurate statement of the rule to say that malice, if it exists, is to be inferred from all the facts and circumstances of the case, of which the method by which the homicide was committed is only one * * *. Although it was here shown that accused used a deadly weapon, it was also shown that he was extremely drunk at the time. While intoxication is no defense * * *, it may be operative to reduce murder to manslaughter if sufficiently extreme to render the accused incapable of entertaining malice aforethought * * *. All the evidence * * * points to the fact that accused's drunkenness was well advanced. * * * His mental capacity was undoubtedly further impaired by the severity of the blow he received when he fell on the concrete paving of the courtyard at the culmination of his struggle with S** and B**, which, either alone or in conjunction with his drunkenness, rendered him at least temporarily unconscious. His act in shooting through the door * * * resulting in the death of one of his best friends, was without motive or reason and in and of itself is some indication that he was unaware of his surroundings and his activities at the time. He was guilty only of manslaughter. (3) Nature of Manslaughter: "Upon first examination it might seem that if accused was so intoxicated as to be incapable of entertaining malice aforethought, he could not have sufficient mental capacity to commit voluntary manslaughter * * *. However, it should be remembered (a) that while voluntary manslaughter is an intentional killing without malice aforethought, a specific intent is not a necessary element of the offense and (b) that although drunkenness may be considered as affecting mental capacity to entertain a specific intent, it is not regarded in the law as a defense to those crimes which require for their commission a general criminal intent only * * *. Thus even though it be conceded that accused was too drunk to commit murder, it does not necessarily follow that he was incapable of committing voluntary manslaughter. Yet, in order that his offense be voluntary manslaughter * * * and intentional killing without malice must be shown. However, this intent need not necessarily

be an actual or express intent to take life; a constructive intent will suffice. And the very drunkenness which operates to negative the existence of malice aforethought * * * will, if voluntary incurred, supply in law the requisite intent for voluntary manslaughter. * * * While extreme drunkenness may operate to expunge from an unlawful homicide the element of malice aforethought, it goes no further than this, and operates only to reduce the crime to voluntary manslaughter." Accused was guilty of voluntary manslaughter, in violation of AW 93. (4) Punishment: "The Table of maximum punishments presribes the punishment only for the type of voluntary manslaughter which occurs when there is an intentional killing upon a sudden quarrel or heat of passion. However, by analogy, the maximum punishment set forth for the type of voluntary manslaughter there specifically dealt with will be deemed controlling here * * *." (CM ETO 9365 Mendoza 19 Jun 45).

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT ONLY FOR VOLUNTARY MANSLAUGHTER, in violation of AW 93. "The record is entirely silent as to the identity of the deceased (except that he was a white American soldier). There is not a scintilla of evidence which will explain the cause or reason of the altercation between accused and deceased * * *. There is not even an inference that they knew each other or had met at any previous time. There is not a line of evidence pertaining to the meeting of accused and deceased or how their quarrel commenced. It is impossible to discover who precipitated the disagreement or who was the primary aggressor. When their contact with each other is first revealed, they were engaged in a 'scuffle' on a public street in Antwerp. Accused had been called from a cafe by his companion, B***, immediately prior thereto, but what passed between B*** and accused remains secret. The homicide was connected directly with and arose out of the altercation. * * * From the moment the curtain arose on the scene deceased is portrayed as the aggressor. He is first seen with his arms raised against accused as the latter retreated. At that moment accused held no weapon in his hand but continued his retreat. He 'broke away'. Deceased followed in pursuit. As accused backed into the street he pulled the pistol from his pocket and fired. The inference is clear that this first shot did not take effect. Deceased exclaimed, 'We will have no more of that'. A second shot followed from accused's weapon. This was undoubtedly the fatal one because deceased fell to the ground immediately after the report." "While the law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death * * * and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life * * *, the presumption is not conclusive. Evidence rebutting it may be found in the evidence introduced by prosecution or defense * * *. Such evidence exists in the instant case. A mutual combat wherein deceased was the aggressor was shown. However, the evidence failed to prove such immediate threat by deceased

to the life or body of accused as to justify accused in taking deceased's life in self-defense * * *, but it does show a situation wherein it must be supposed in the absence of proof to the contrary that accused's judgment and discretion were unseated and passion and anger guided his actions * * *." The finding of guilt must be reduced to that of voluntary manslaughter. (CM ETO 9972 Christon 22 Jun 45).

Accused civilian employee (merchant seaman) of the War Dept serving with the Armies of the United States in the field was charged with the murder and the rape of a woman. He was found guilty of manslaughter in violation of AW 93; and of rape in violation of AW 92. HELD: LEGALLY SUFFICIENT ONLY FOR ASSAULT WITH INTENT TO RAPE IN VIOLATION OF AW 93; AND OF MANSLAUGHTER IN VIOLATION OF AW 93. LIFE SENTENCE MUST BE REDUCED TO 20 YEARS. (1) Jurisdiction: Civilian Employee: Accused was a civilian of Icelandic nationality. "He entered into an employment contract as an able bodied seaman with the U. S., to serve on a vessel controlled by the War Department for a period of one year from arrival in the ETO, unless sooner relieved at the pleasure of the government. * * * Pursuant to the contract, he became attached to the U. S. Army Transportation Corps, Water Division, with which * * * he was serving as an employee of the War Department in Bournemouth * * *, England, to which place * * * he had been ordered by the Port Captain of the 14th Port to proceed in order to await orders assigning him for transportation." He was subject to the Article of War while in this status. This conclusion remains, even though he may have been an alien and a minor (20 yrs of age), and even though the offense may have been committed in England. Any doubt on this latter question is removed by The United States of America (Visiting Forces) Act, 1942 (5 and 6, Geo. 6, c.31) (quote in part). "The jurisdiction of the court-martial appointed by the Commanding General, United Kingdom Base" was proper. "Similarly, power to detain and imprison accused, notwithstanding the cessation, by virtue of his sentence or otherwise of his status as a member of our military forces, is expressly recognized 'for the removal of doubt', by Section 5(2) of the Allied Powers (War Service) Act, 1942 (5 and 6 Geo. 6, c.29). * * * Papers accompanying the record indicate accused, against whom criminal proceedings by the British Crown had evidently been instituted, was released from custody of the British authorities on the basis of a certificate by the SJA of the 14th Port * * *. Such certificate was executed pursuant to Section 2(2) of the Visiting Forces Act * * *." (2) Murder: Manslaughter: Accused was charged with murder. The court found him "guilty of willfully, feloniously and unlawfully killing deceased in the manner alleged, in violation of AW 93. Such finding, as in the case of a specification in the same language, would be supported by proof of either voluntary or involuntary manslaughter * * *. The proof herein, which as indicated would have supported findings of guilty of murder * * * sustains findings of guilty of the lesser included offense of

450(2) (2) Murder: Finding of Offense Included

voluntary manslaughter. This finding was proper. (3) Rape: "It is elementary that if the girl had died prior to accused's penetration of her private parts with his penis, * * *, he was not guilty of rape. * * * What evidence there was that the girl was still alive at the time of the assumed penetration was wholly circumstantial" (detail). "Circumstantial evidence is insufficient to sustain a conviction unless it excludes every reasonable hypothesis except the one of accused's guilt of the offense sought to be proven * * *, and where it is as consistent with innocence as with guilt * * * Here an essential element of the offense, without which accused cannot be guilty thereof, is the existence of life in the victim at the precise time of its commission * * *." The finding of guilt of rape was not supported. However, "accused was clearly proven guilty of an assault upon the girl with intent to commit rape * * *. There is no indication * * * that she was not alive at the time the lethal blow was struck but on the contrary every indication that death was caused thereby and that accused's purpose in striking her was to force her to submit her body to his sexual gratification, despite her resistance and without her consent. (4) Specification: "The failure of proof that accused beat portions of victim's body in addition to her face and head, as alleged * * *, was not fatal, as such allegation may be regarded as immaterial and surplusage * * *." (5) Responsibility: Defense attempted to establish "that accused's lapse of memory might have been caused by a sudden and even initial attack of petit mal and that he thus might not have been accountable for his actions * * *. Even assuming that the defense established such possibility, the court was not bound to accept it as an actuality, in view of the absence of any evidence of such affliction and of affirmative prosecution evidence that accused behaved normally and was not mentally deranged, defective or abnormal at the time in question." (6) Confession: "The questions as to whether accused's pretrial statement was voluntary and understood by him were of fact and exclusively for the court's determination." (7) Sentence: Forfeitures: Civilian: "Accused was sentenced to forfeit all pay and allowances due or to become due and to be confined at hard labor for life. Although the forfeiture portion may be inoperative because of paragraph 12 of his employment contract with the government (Pros. Ex.1), authorizing the U. S. to terminate the same and all pay, rights and claims against the U. S. thereunder in the event accused at any time should be unable to prosecute work by reason of misconduct, or because of its expiration, nevertheless, there is no legal objection to the forfeiture provision to the extent to which it may be operative with respect to any existing rights of accused under the contract * * *." However, the sentence to confinement for life of this civilian is excessive, in view of the above holding. "The maximum punishment imposable upon an enlisted man for voluntary manslaughter includes confinement for 10 years * * *; that for assault with intent to commit rape includes confinement for 20 years. But, if an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, punishment should be imposed only with reference to the act or omission in its most important aspect * * * Accordingly only so much of the portion of the sentence

(2) Murder: Finding of Offense Included 450(2-4)

(4) Rape: Proof in General:

under consideration is valid as includes confinement at hard labor for 20 years." (CM ETO 13090 Brynjolfsson 9 Oct 45).

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(4) Rape: Proof in General:

Not Digested:

7702 Shropshire
8156 Pead (Penetration; lack of verbal refusal, but implied by resistance)
8450 Garries
8511 Smith
8542 Myles
8837 Wilson (rape inconsistent with fraternization
8581 George (sanity)
9025 Clegg, et al
9418 Thompson, Jr. et al
9544 Rapolas et al (penetration; medical officer. Identity))
10038 Mathewes, Jr. (German)
10103 Washington (German)
10141 Daniels et al (German)
10339 Boyd
10455 Keffer
10699 Autrey (with German girl; bust AW 96 fraternization charge)
10742 Byrd
10751 Webb (German)
10841 Utsey (German girl)
10857 Welch et al (joint charge; no intent necessary)
10863 Johnson
10871 Stevenson, et al
11217 Meeks, et al (German; joint)
11589 Sokolowsky
11590 Nelson
11608 Hutchinson (German girl)
11621 Trojillo
11725 Whitfield (German)
11779 Bohn, et al (German; lesser; attempt)
11838 Austin, Jr.
11914 Lawler, et al (German)
11950 Abbott
11970 Manko, et al (German girl)
11971 Cox, et al (German girl)
12056 Reyes
12070 Mistler (German)
12096 Amlaner (German girl)
12162 Grose (German girl)
12180 Everett
12205 Jones (German girl)
12329 Slawkawski (German)
12410 Romans (German)
12465 Standberry (German)
12472 Syacsore (German)
12551 Malone (German girl. Child witness. No voir dire)
12552 Long (German girl)
12592 Kolanko, et al German; with fraternization
12650 Combs, et al (German girl)
12662 McDonald (German girl)
12683 McCullough, et al (German)
12696 Parsons (German girl)
12770 Williams (German)
12873 Spohn, et al (German)
12954 Burgess (German)
12994 Keys (German-fear; no resistance)
13000 Pugh; et al (joint; aid and abet; German)
13178 O'Neil (German girl)
13255 Gonzales (German)
13369 McMillon, et al (German)
13425 Kelley (German girl)
13461 Mainville (German girl)
13476 Givens (German)
13568 Nelums et al (German)
13708 Muldrow
13824 Johnson, et al (joint)
13898 Jay (German)

450(4) (4) Rape: Proof in General

Not Digested:

14032 Andrews, et al (German)
14066 Heishman, Jr., (German)
14128 Brandon, et al (German)
14174 Hitchcock (German)
14206 Platta (German)
14209 May (German)
14210 Lofton
14256 Barkley (penetration; no medical evidence -ok; German)
14284 Casey (German)
14382 Janes (German)
14448 Lucky (German)
14563 Collins (German)
14564 Anthony, et al (German)
14604 McArthur, et al (German)
14614 Gaines (German)
14801 Winkles, (German)
14831 Hart (German)
14873 Scott (German)
14875 Swain (German; weak resistance; Accused's earlier activities)
15063 Adams (German; companion to 14040 McCreary)
15091 Gallahan
15105 Davis (German)
15249 Chutnicutt (Bust on AW 96; fraternization charge; German)
15250 Johnson, Jr. (German)
15251 Randle (German)
15252 Lambert
15373 Smith, et al
15579 Pinkett (German; identif; find prophylactic in garden)
15617 Anthony, et al (German)
15619 Capps, et al (German)
15620 Eagans, et al (German)
15679 Baker, et al (German)
15704 Carver
15705 Pyles (German)
15772 Arnold (German)
15787 Parker (Was girl dead? Revolting case)
15879 Jackson (German)
15905 Arias (German)
15995 Lewis
16006 Crowder (German)
16018 Augustine
16151 Ingream (Reputation for chastity goes only to question of consent; aid and abet
16353 Lilley
16399 Reid
16405 Zimmerman, Jr.
16409 Conrad
16424 Borrow
16536 Curtis
16616 Austin
16622 Moore
16627 Atkins, et al
16640 Willet, et al
16688 Kramer (German)
16705 Roberts (see dissent, re force in German rapes)
16873 Brooke, et al
16901 Johnson, et al
16971 Brinley (identity; alibi)
17057 Taylor et al
17185 Harvey
17275 Galmon
17498 Bresnahan
17507 Votodian
17508 Mosa
17541 Fox
17542 Cox
17705 Heilig
17843 Cooper, et al

(4) Rape: Proof in General:

Cross References:

450(1)	7867	Westfield (In conjunction with murder)
451(6)	11004	Evans (With assault, housebreaking, etc).
454(56b)	12869	DeWar (With fraternization, etc).
454(56a)	13286	Wade (With other offenses)
451(32)	13126	Green (With other offenses; German girl)
453(11)	14596	Peterson, et al (With drunkenness; AW 95)
399	16554	Gipson, Jr. (No pen. conf. for attempt)
450(1)	15902	Mariano (With murder)
451(32)	15090	Dural, et al (With housebreaking)
450(4)	10446	Ward (Lesser - fornication)
450(1)	16978	Morgan (With murder)
450(2)	13090	Brynjolfsson (With manslaughter; death prior to).

Separately charged but jointly tried, both accused herein were found guilty of the rape of a French woman, in violation of AW 92. They were sentenced to death. HELD: LEGALLY SUFFICIENT. (1) Court vote: Death Sentence: Since the Circuit Court opinion in Stout v. Hancock, 146 F (2nd) 741 (1944) has become final, "It may now be considered as settled that the long standing administrative interpretation of AW 43 is correct, viz: that, except as to AW 82, for violation of which the death penalty is expressly made mandatory, a two-thirds vote is sufficient for a finding of guilty of any offense, even though the dea penalty is authorized therefor. Consequently it is immaterial whether or not the findings of guilty herein were by three-fourths vote of the members of the court or by a greater fraction or by unanimous vote, as the vote certainly exceeded the two-thirds required by AW 43. * * * As to the vote upon the sentences, it sufficiently appears from the record of trial, the certificate of the president of the court, and the affidavits of eight of the 12 members thereof, all of which are consistent, that this vote was unanimous and therefore in accordance with AW 43." (2) Warning of Rights; Confession: "The officer who secured accuseds' pretrial statements testified that he warned each of his rights under AW 24 and each stated he understood them. He told them they did not have to make a statement but that he 'would like to have one', and they had no objections. 'Possibly' he indicated to one of accused 'here is a good chance to get it off your chest'. No promises or threats were made to either accused, no compulsion was used in connection with the statements, and neither accused could have considered the officer's statement to be an order. Witness at first stated he told H** he had already taken a statement from A**, as was the case, and then denied this assertion. H** testified * * *that the officer said 'make a statement' and that A** already made one * * *. The issue whether accuseds' statements, which will be treated argument

as confessions, were voluntarily given, assuming that H**'s testimony raised it, was for the court's determination which will not be disturned on appellate review because of the presence in the record of trial of substantial evidence of voluntariness* * *. Certain it is that the act of informing an accused that a statement is desired of him does not ipso facto render the same involuntary. * * * The issue is always the character and extent of the solicitation, which here was not sufficiently compulsory to require the court's conclusion of voluntariness to be set aside. Likewise mere adjurations to speak the truth are not regarded as sufficient to render statements made in response thereto as involuntary * * *. The same is true of the advice to H** that his co-accused had already made a statement * * *. (3) Trial four days after the charges were served herein did not result in any prejudice. (4) Testimony of Co-accused: Non-prejudicial error resulted when the law member ruled that evidence from one accused against the other accused would not be considered as to the latter (ruling was beneficial to accused). "Even by the common law rule * * * each separately indicted accused was a competent witness for or against any other separately indicted accused. Such competency exists under Federal statute(Act. Mar.16, 1878, c.37; 20 Stat.30; 28 USCA 632) irrespective of whether the accused were separately or jointly tried * * *." (5) The evidence supported the findings of guilt. (CM ETO 7869 Adams et al 25 Jul 45).

Accused was found guilty of the rape of an aged woman, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Identity: This question was one of fact for the court. "Evidentiary questions as to the extra judicial identifications of the accused must be noticed. This Board of Review held in accord with the federal and majority rule that testimony with regard thereto, including statements made by the identifying parties, should be freely accepted in evidence (CM ETO 3837, Bernard W. Smith). There is subsequent obiter dicta in two other cases, entirely unnecessary to the holding thereof, that such statements are hearsay (CM 270871, IV Bull. JAG 4; CM ETO 6554, Hill). The holdings do not conflict with the Bernard W. Smith case. The language of the Hill case was that testimony by third parties of such statements is not prejudicial where the identifying parties are present at the trial and identify the accused from the stand, and the holding was that of legal sufficiency. Thus, under the holding of the Hill case, there is no reason to disturb the testimony in the case at bar concerning the pre-trial identifications by the Carettos, for they identified accused in court. Likewise, no civil or military court according to available authorities, has held that a witness at the trial may not testify to personal prior recognition of the accused as Madame Dugois has done in this case (CM ETO 7209, Williams). Therefore the only question to be decided anew (since the intervening cases) is whether it was competent evidence for third persons to testify that the prosecutrix 'recognized' and 'pointed out' the

accused. Such actions could not be hearsay under any theory; signs of recognition are observed in facial expression and gesture. Testimony thereof was of circumstance, and * * * was properly admissible. While under the language of CM 270871, supra, and the Hill case, her statement that she 'could not forget his face' might be artificially argued as hearsay, which is not conceded here, none would upset the findings because of its admission. Under the Bernard W. Smith case, which has not been overruled, for holdings are not upset by dicta, it is competent evidence and if the defense had quarrel with the fact of the statement having been made or the concurrent verity thereof, the prosecutrix was available at the trial under oath for cross-examination." (2) The rape was established. (CM ETO 8270 Cook, 29 Jun 45).

Accused was found guilty of the rape of a German girl about 6 March 1945, in violation of AW 92; of fraternizing with her in violation of AW 96; and of robbing her of her ring in violation of AW 93. HELD: LEGALLY INSUFFICIENT ON THE RAPE CHARGE. (1) Rape: "The prosecutrix' testimony shows that she accompanied accused from the air-raid shelter, walked beside him along the dark street, and followed him into the house up the stairs, and into the bedroom; further, that, when he left her alone there, she awaited his return. She undressed at his suggestion and lay down on the bed. The most that her weeping and mild protestations, delayed until then, could have reasonably charged him with notice of, was the reluctance of the consent which her docility seemed to demonstrate. She was larger than he and accustomed to dealing with all sorts of people. He did not at any time threaten her, although she believed, on several occasions, that he had his pistol in his hand. Her uncertainty as to whether he had or not may not lawfully be resolved against him. * * * Moreover, at no time did she testify that he used his pistol in a threatening manner. Neither did he strike or lay hands on her. Her conduct was not such as to lead accused to believe that their intercourse was without her reluctant consent, or that such consent was induced by fear of death or other great bodily harm, with neither of which had he either expressly or impliedly threatened her. Admitting that accused's status as a member of the conquering forces added, to his knowledge, some degree of persuasive force to his unconscionable demand, such knowledge and demand alone will not support the inference that accused intended or threatened to use ultimate force if necessary to achieve his purpose. If this were the case, every successful solicitation of a German woman to sexual intercourse by an American soldier (certainly by any armed American soldier) would lay him liable - depending on the subsequent disposition of the woman to assert she consented through fear - to prosecution for rape. Moreover, in rape cases, to negative consent in the absence of resistance, the woman's fear, induced by conduct on the part of the accused reasonably calculated to inspire it, must be of death or great bodily harm. The prosecutrix testified that she took off her clothes because she was afraid accused would eventually do something to her

since she had elderly parents and had to work for them; that he would harm her and her family in some way. It is true that, following this testimony", further testimony was elicited "that she was also afraid 'since he had the pistol there that he could shoot me'- could not would, be it noted! And could was doubtless used advisedly, as she had testified to no threat or indication on the part of the accused which might have given her reasonable cause to believe that he would have shot her, had she refused to submit. Had she, indeed, been of a mind to submit willingly, it is hardly conceivable, under the circumstances, that she would have conducted herself very differently. Such half-hearted protests as she testified to, expressed only at the eleventh hour, when she was taking and had taken off her clothes, are of a type which might be expected from almost any consenting female in the situation shown. Accused's persistence despite them presents no basis for inferring that he intended to complete his purpose regardless of all resistance." It is also noted that prosecutrix' delay in reporting the offense "is incompatible with the sense of outrage which might reasonably be expected * * *." Although she personally had not intended to report it, she did so at the insistence of another woman. (2) Fraternization: "The evidence presents a case of fraternization by having sexual intercourse, an offense incompatible with rape, and of which accused was also found guilty on the identical facts." (3) Robbery: "Resistance of the victim is generally immaterial in robbery, the degree of force required is less than is necessary to constitute sexual intercourse, rape, and the menace or threat involved need not be to cause death or other great bodily harm. Accused's actions in exploiting his status as an armed member of the conquering forces to induce prosecutrix to accompany him to an unoccupied house at midnight and there, after indulging in sexual intercourse with her reluctant consent, demanding her ring as an implied prerequisite to permitting her to leave, sufficiently constituted application of constructive force and implied threat to render his unlawful taking robbery." (CM ETO 9301 Flackman 16 Jun 1945).

Accused was found guilty of the rape of 6 year old Nellie in Luxembourg, in violation of AW 92. HELD: LEGALLY INSUFFICIENT. (1) The Rape of this child was adequately established. "The evidence of the injuries sustained by the child's genital organs and the medical testimony pertaining thereto were of such substantial character as not only to authorize the inference, but also to compel the conclusion that a male penis had entered beyond the lips of the girl's vulva. There was thus a penetration of her genital organs within the legal definition of rape." Because the girl was only 6 years and 9 months of age, the law "presumes that she was incapable of consenting * * *." Independently thereof, it also appears that force and violence were used "The injuries inflicted upon her head and genital organs are mute objective witnesses of the violence visited upon her. A mere baby, she resisted by the use of the only means available to her— the cry of the young for its mother." (2) Conclusions of Witnesses:

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The following testimony was introduced without objection: (a) that one witness "felt that a soldier was lying on it (the bed)"and "I had a feeling that it was a soldier"; (b) the testimony of another witness that a person with whom she collided on a stairway "was a soldier; I had that feeling." Determination of the admissibility of these statements is made, because of the narrow evidentiary basis upon which this opinion must rest. "The statements of the two witnesses were their conclusions which were the direct result of observation through their senses. They were not the result of a course of reasoning from collateral facts. Strictly speaking, both /witnesses/ * * * testifed as to facts in the form of a 'composite statement or shorthand rendering of collective facts' * * *. They therefore did not intrude into the field of the court as a fact-finding agency. * * *" The statements were admissible. (3) Identity of Accused: The evidence "points the finger of suspicion at accused, but convictions cannot be sustained on suspicions alone * * *. There must be evidence that is sufficient to exclude every reasonable hypothesis except the one of accused's guilt.* * *." "The prosecution's theory of the case was premised on the hypothesis that the rape was committed by one of the 15 patrol members" who entered the small house where it occurred. "Its process of trial was therefore to eliminate, either by direct evidence or inference based on substantial evidence the probability that any soldier except accused committed the crime. Had the evidence shown the basic premises, to wit that the criminal was one of a closed group of suspects the situation would have presented an entirely different problem. The weakness in the prosecution's case as presented is that it failed to close the group of suspects. With the evidence complete there remained the reasonable hypothesis that the rapist was a man not a member of the patrol--an outsider, a marauder, an intruder--who clandestinely entered the house and attacked the child * * *. Under this state of the evidence it is as reasonable and logical to conclude that accused was not the rapist as it is to conclude that he was. * * *The prosecution failed to sustain the burden case upon it. * * *The fact that the 'evidence * * * will leave the crime shrouded in mystery' * * * however tempting, affords no reason to sustain the findings of guilty." (Detail evidence at great length. Note that a blood spot near the fly of accused's trousers was not identified; was insufficient to show his guilt of rape). (CM ETO 9306 Tennant 25 Aug 45).

Accused was found guilty of raping a German woman, in violation of AW 92. HELD: LEGALLY SUFFICIENT. The accused "testified to acts of cooperation which, if voluntary, might well, under normal circumstances, have justified him in the belief that he had seduced the woman and that there was consent. The prosecutrix herself corroborated in part accused's claim that she cooperated in certain acts during the period preparatory to the intercourse. These admissions did not destroy the prosecution's case. If consent gained through fear of bodily injury is void so as to make the act rape, then acts of cooperation performed as a result of the same fear may be disregarded as evidencing consent.

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The prosecutrix contended that she was powerless to refuse to cooperate. Certainly she did not admit that she volunteered cooperation. What she did followed the command of his voice or his hand. Under ordinary circumstances * * *, the general conduct of the prosecutrix might have justified the accused in assuming the existence of consent. But the circumstances here were not ordinary. This accused had no right to such assumption. A man who enters a strange house, carrying a loaded rifle in one hand is not justified in believing that he has accomplished a seduction with the other hand." (CM ETO 10375 Diaz 16 Aug 45).

Accused was found guilty of two rapes in Germany, in violation of AW 92. He was also found guilty of fraternization in violation of AW 96. HELD: LEGALLY INSUFFICIENT FOR ONE OF THE RAPES. (1) First rape: A rather novel feature is introduced by the fact that it appears that the chief basis for the German victim's "submission was fear engendered by false German propoganda, not fear produced by the specific acts of the accused and his companion. Further, while evidence of the dissemination and effect of such propoganda was relevant as serving to explain the relatively feeble quality of the prosecutrix' resistance, there is nothing * * * from which it can be inferred that accused had knowledge of its dissemination and potential effect. Thus, knowledge of the fear produced thereby cannot be attributed to him and it cannot be said that he adopted and utilized the specific fear produced by the German propoganda in forcing the prosecutrix to have sexual intercourse with him. This being true, had the prosecutrix capitulated by reason of this fear alone and without any threatening conduct on the part of the accused, with the result that acting on the circumstances as they appeared to him he had been unaware that he was committing a crime known to the law, his act would not have been rape * * *. However, entirely aside from the effect of the fear entertained * * * as the result of German propoganda, it cannot be said that there is not substantial evidence to support the court's finding that the first act of intercourse constituted rape." Some resistance and lack of consent did appear (detail evidence). (2) Second rape: The evidence herein (detail) insufficiently showed a rape. "It is probable that the prosecutrix also did not consent to the second act * * * but again submitted because she thought resistance was not only useless but might result in her death at the hands of the accused. However, since accused was not shown to have had any knowledge of the misconceptions entertained by the prosecutrix as the result of German propoganda, her friendly behavior toward him in the interval between the two acts of intercourse and the virtual absence of any resistance on her part when he ultimately insisted that she again have intercourse might easily have led him to the conclusion that she was reluctantly consenting * * *, a conclusion for which there was no legitimate basis at the time for the first intercourse. The record fails to show that his conduct was especially threatening on this occasion." (3) Character Evidence: As developed by the

prosecution, certain evidence re the prosecutrix--that she was an honorable woman, and had never conducted herself improperly with men, went to her reputation for chastity, not to her reputation for truth and veracity. Evidence of previous lack of chastity is stated in 140 ALR p.580, sec. IIIa to be admissible in a rape case. "Regardless of its admissibility as part of the prosecution's evidence in chief, the testimony of the good reputation of the prosecutrix for chastity does not appear, in view of the evidence of consent thereafter introduced by the defense, to have injuriously affected the substantial rights of the accused in this case." (Dissent in part: Evidence failed to support the finding of guilty of the first rape). (CM ETO 10700 Smalls 17 Sep 45).

Accused was found guilty of the rape of a German woman in violation of AW 92, and of fraternization in violation of AW 96, by entering a civilian occupied house for the purpose of obtaining liquor on the same occasion. HELD: LEGALLY INSUFFICIENT ON THE FRATERNIZATION CHARGE. (1) Minor Child as Witness: A German child, age 11, was, without voir dire, sworn. He then testified. "At common law a child under 14 was presumptively incompetent to testify * * *. His competency is dependent upon his apparent sense and his understanding of the moral importance of telling the truth * * *. This may be determined by the character of his testimony alone without any preliminary examination touching thereon * * *." This child's testimony, "while clear and intelligent, is devoid of anything showing whether or not he possessed an understanding of the moral importance and duty of telling the truth." It will be assumed that error resulted herein. However, the error was not prejudicial (AW 37), because of the compelling nature of other testimony in the record which establishes accused's guilt. (2) The rape was adequately proved. (3) The fraternization charge, however, was not supported. "The conduct of accused was consistent only with the intent to commit rape * * *. Such behavior does not come within the meaning of the term 'fraternization' and 'fraternizing' as used in connection with the relationship of American soldiers and the German civilian population * * *." (4) Court Membership: No error resulted, when the court refused to sustain the challenge to one court member who had previously taken the oath of the accuser, and was the summary court officer in three related cases. He stated that he had formed no opinion. Defense subsequently refused to exercise its peremptory challange. "It was the function of the court to determine whether prejudice existed * * *." (5) Identification "Two witnesses testified as to the prosecutrix's and her son's identification of accused shortly after the alleged offense. "Even if incompetent * * *, its admission was no prejudicial error for there was other substantial and compelling evidence as to the identity of the accused * * *, and the prosecutrix had previously testified as to this identification by her * * *." (CM ETO 10891 Murphy 23 Jun 45).

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In this rape case, the prosecutrix' "statement to her mother that she had been raped served to rebut any inference of consent that may have been drawn had she remained silent * * *." (CM ETO 11589 Sokolowski 16 Aug 45).

Accused were found guilty of raping their victim in violation of AW 92, while acting jointly and in pursuance of a common intent. HELD: LEGALLY SUFFICIENT. "Accused were jointly charged with a single rape. 'Two persons cannot be jointly guilty of perpetrating a single joint rape but all persons present aiding and abetting * * * are guilty as principals equally with the actual perpetrator of the crime' * * *. From the circumstances attending the offenses and from the prosecutrix' testimony that both accused threatened W** with a knife and rifle and that while B** was raping her McC** went to the front of the building as if 'to see if anyone was coming', the court was justified in finding that accused were acting jointly and in pursuance of a common intent, the joinder therefore was not improper * * *. That the prosecutrix was or may have been 'a woman of easy virtue' who sold the favors of her body', as the defense sought to establish, did not constitute a defense." (CM ETO 11683 Beal, et al 18 Aug 45).

"Without in any way excusing the conduct of this accused, it is clear that rapes in Germany, not involving young girls or extreme physical violence, influenced as they are by war psychology and propoganda on both sides, are not quite the crime Congress had in mind in prescribing a minimum punishment of life imprisonment. Considering the circumstances shown by this record, and the unanimous recommendation of the court for clemency, it is believed the sentence /life/ could well be reduced." (CM ETO 12329 Slawkawski 8 Sep 45).

Accused were found guilty of rape, in violation of AW 92, and of fraternization in violation of AW 96. HELD: LEGALLY SUFFICIENT ONLY AS TO RAPES. (1) Identity: "Several times during the trial accused were asked to stand while witnesses referred to them and on one occasion the trial judge advocate pointed to them. This practice was frequently necessitated by the fact that they were two accused being tried together and it was to the interest of all concerned that it be made clear to which of the two a witness was referring. When Frau G** was testifying, however, she was asked if she had seen anyone in the courtroom before. She indicated that she had seen accused and certain court personnel. Accused were then asked to stand and the witness was requested to tell the court where she had seen him. This procedure, while improper, did not violate AW 24 or the pro-

vision of the 5th Amendment * * * and in view of the other evidence * * * as to identity no prejudice resulted * * *. The testimony as to the extra judicial identification of accused was properly admitted * * *." (2) The fraternization charges were not supported. "The only transaction which accused had with Germans was a criminal act, the rape. * * * A criminal act of violence is not an act of fraternization." (3) Court's Closed Session: "On one occasion the court was closed and cleared of all persons except the trial judge advocate and defense counsel who were permitted to remain. This was a violation of AW 30. The least that is required in such cases is that the accused be permitte to be present." However, no prejudice resulted herein. (CM ETO 12604 Mender et al 15 Sep 45).

Accused were found guilty of the rape of German girls, in violatio of AW 92. HELD: LEGALLY INSUFFICIENT. "In denying the defense the right to inquire into the background of Mrs. Fauck (one of the "victims" for the purpose of showing her interest, bias, prejudice, and hatred toward accused as members of the victorious military occupational force the law member clearly limited the defense's right to legitimate cross-examination, abused his discretion and committed serious prejudicial error." It appears that defense counsel assumed that the limitation of his right to cross-examine one "victim" also applied to his similar rights against the other victim. Moreover, there were inconsistencies and improbabilities in the testimony of this victim. As to the other victim, Miss Hehl, "the law member committed error in refusing to allow the defense to attempt to show she falsely testified as to her virginit by attempting to adduce evidence that she had borne a child or had intercourse for that purpose either at a Nazi youth camp or elsewhere pursuant to official Nazi policy." "Had the desired cross-examination been allowed and the evidence shown that Miss Hehl had had prior intercourse, the court might well have disbelieved the remainder of her testimony as well." Prejudicial error resulted. (CM ETO 13135 King, et al 9 Oct 45).

Accused were found guilty of the rape of a German girl, in violation of AW 92. HELD: LEGALLY INSUFFICIENT. "We assume for the purposes of this case that the prosecutrix was raped by three American soldiers and we consider solely the issue of the identity of accused as the perpetrators of this crime. R** was identified by the prosecutri and P** and M** by her mother, as the rapists. They countered with the defense of alibi * * *. To rebut this testimony the prosecution introduced evidence that at about 2140 hours, three American soldiers broke into the F** home a short distance from the prosecutrix' residence, and that R** was one of them. The prosecution, however, was not content to rest its case there. It produced the Inspector General of the Division as a witness and had him read into the record a ballistics report of unknown authorship. This report stated that the bullets

which were fired in the F** home came from a P-38 owned by accused Mason. This report was incompetent as hearsay and the failure * * * to object thereto was not a waiver of its rights (MCM, 1928, par. 126a, p. 137)." After a discussion of the detailed facts herein, it is concluded "that the legal evidence, apart from the incompetent ballistics report, was far from compelling on the issue of accused's identity as the rapists. The legal evidence that remained * * * 'does not contain the robust quality of moral certainty and determinativeness' which will sustain the finding in the face of this grievous error. It would be a great reflection on the administration of military justice if this case were to be sustained when the record reveals an error so glaringly prejudicial to the substantial rights of accused." (CM ETO 13817 Parker 22 Sep 45).

Accused and another were found guilty of the rape of a German girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The Specification alleges in effect that accused 'acted jointly and pursuant to a common intent, did', rape the victim. The evident meaning and effect of the word 'acted', in its context, is equivalent to 'acting' and it is so construed by the Board of Review * * *." (2) Reference to Trial: "The charges were referred to trial, by command of the appointing authority, to Captain Vernal W. P**, trial judge advocate of the court appointed by paragraph 1, Special Orders No. 121, Hq Third Armored Division. The order appointing the court which tried accused (par. 1, SO 137, same headquarters) named Captain P** as trial judge advocate, but did not direct that cases in his hands as trial judge advocate of the court named in the reference to trial (appointed by par. 1, SO 121) be brought to trial before the subsequent court. The irregularity, however, was waived by the subsequent action of the reviewing authority in approving the sentence * * *." (CM ETO 13419 Beets, et al 8 Sep 45).

Accused was found guilty of rape and burglary, in violation of AW 92 and 93 respectively. HELD: LEGALLY SUFFICIENT. (1) The voluntary nature of accused's confession was sufficiently established, despite defense's contrary objections. "It does not appear in evidence that accused had not cared to make a statement. Rather, it appears that he answered all questions put; telling him he would be tried seems to have been nothing more than a factual statement. There is no suggestion that accused was given the alternative between making confession and being court-martialed. Telling him that the matter would be turned over to 'CID' seems to have been nothing more than another factual statement. The battalion commander had no more time to give the matter. Accused did not ask for an opportunity to seek counsel and advice. Accused replied to questions. He was told his answers did not conform to the stories of others, thereupon he would

contradict himself, and this was pointed out to him. Finally accused made a confession which was reduced to writing and signed - all within perhaps two hours. Accused failed to testify concerning the confession. Whether this confession was made by accused to escape further questioning was a question for the court * * *. (2) An oral statement re the contents of the written confession was made to the court by the battalion commander. "While he stated that the written confession had been lost, the trial judge advocate implied it was at a command some distance away. Defense did not object on the ground that the best evidence was not offered. Failure to object on that ground constituted a waiver * * *." (3) Pre-trial Identification: "One witness twice testified that Private * * * had been identified as the other soldier involved, once over defense's objection * * *. Even if incompetent * * *, its admission was not prejudicial error for there was other substantial and compelling evidence as to the identity of the accused" (detail). (4) The evidence supported the findings of guilt. (CM ETO 13419 Greene 13 Jul 45).

Accused was found guilty of absence without leave in violation of AW 61, and of the rape of a German girl in violation of AW 92. HELD: LEGALLY INSUFFICIENT ON THE RAPE CHARGE. The alleged intercourse occurred, and it appears that it was without the victim's consent. "This being true, and since the Manual for Courts-Martial provides that the force involved in the act of penetration is alone sufficient to constitute carnal knowledge rape in cases where there is in fact no consent, it might be thought that no further inquiry into the legal sufficiency of the instant record of trial is necessary. However, the statement in the Manual that while force and want of consent are indispensable in rape the force involved in the act of penetration is alone sufficient where there is in fact no consent cannot be accepted entirely without qualifications. It is, of course, an accurate statement of the law as applied to cases where, for example, the woman, by reason of low mentality or unconsciousness is incapable of consenting and the accused, knowing this fact, none the less proceeds to have intercourse with her. * * * However, where a woman is in possession of her normal faculties, and, although subjectively not consenting, none the less fails to manifest that lack of consent to the accused, the mere fact that he proceeds to have intercourse with her will not constitute his act that of rape, even though there has been both penetration and want of consent * * *. This is true because in cases like that last mentioned, the basic underlying element of mens rea or guilty knowledge on the part of the accused is lacking and his act therefore is not a criminal one." "While it is probably true that subjectively the prosecutrix did not consent to the intercourse shown, it is concluded that her resistance was not sufficient to manifest that lack of consent to the accused. It is true that at one time she 'jerked back' when he touched her on the shoulder, that she made verbal protestations against disrobing and lying down, and that at one

time she partially ascended the stairs leading from the basement to call for her neighbor. However, she immediately desisted from this latter activity when directed to do so by the accused and returned to the cellar even though she was part way up the stairs and knew that the doorway at the top of the stairs was open at the time. Despite her verbal protestations, she did in fact comply with comparative docility with accused's directions to disrobe and to lie down on the sofa and it is a fair inference from her testimony that, far from attempting to protest or push him away when he attempted intercourse, she actually aided him in inserting his penis into her vagina. Previously, during conversation with the accused, she had told him she liked him. Aside from the act of intercourse itself accused did not physically mistreat her and she expressly admitted that he did not threaten her at any time. She was a mature woman, old enough to have a child ten years of age, and, even under the circumstances shown, her failure to oppose the carnal act more vigorously justified that accused in assuming that she consented, even though reluctantly, to his demands." (CM ETO 13770 Nordike, 3 Nov 45).

Accused was found guilty of rape of a German girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. "Regardless of how reluctant consent is given, consent negatives rape. If a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent. If a woman's failure to resist is induced by fear of death or great bolidly harm, it is not necessary to prove resistance. Thus, in the case under discussion, the court could properly and legally infer that A** did not more strongly resist the accused's advances and his act of penetration by reason of the fear that he engendered in her when he pointed his rifle at her and laid it down alongside of him on the bed." (CM ETO 13897 Cuffee 7 Sep 45).

Accused was found guilty of the rape of a German girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt. (2) Best evidence Rule: While accused pre-trial statement was reduced to writing, oral testimony was permitted re its contents. "This was not the 'best evidence', but that rule will not be enforced unless the party against whom the oral evidence is offered interposes timely objection thereto and requires that the written document be produced * * *." (3) Accused's pre-trial statement, whether construed as a confession or as an admission made after the commission of the alleged criminal act, is required to be corroborated by some independent evidence under the generally accepted doctrine recognized in CM ETO 8234, Young et al." There was sufficient corroboration herein

(MCM, 1928, par III, p 109; CM ETO 10331, Jones). (4) Accused's intoxication was a question of fact for the trial court. (5) Variance It was charged that the offense occurred at Westphalia. It was found that it occurred at "Erlinghausen, Westphalia". "Erlinghausen is not mentioned in the record. The community where the prosecutrix lived is described as Eidinghausen, which is situated in Westphalia. The variance however, is not fatal. It does not change the nature or identity of the offense * * *." (CM ETO 14040 McCreary 18 Aug 45).

(1st Ind: CM ETO 14040 McCreary 18 Aug 45): "While I approve the holding * * * of guilty of rape, I am also cognizant that the circumstances shown, particularly the evidence of accused's intoxication and the unsatisfactory state of the prosecutrix' testimony being unwilling to swear to penetration, take the pattern of an assault with intent to commit rape, the maximum punishment for which is dishonorable discharge, total forfeiture, and confinement at hard labor for 20 years. I recommend, therefore, that supplemental action be taken reducing the confinement to a period not exceeding 20 years."

Accused was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt. (2) Published Order: AW 50½: The sentence herein involved confinement in a penitentiary. Under AW 50½ (see pars 3 and 7), "the reviewing authority was without power to order its execution until the record of trial had been held legally sufficient to support it by the Board of Review with the approval of the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater. It follows that the general court-martial order was void. (2) Time of Trial: Although it was shown that two defense witnesses were not present at the time of trial, "there was no showing by the defense of any effort to locate the absent witnesses or to procure their attendance, or that their attendance could likely be had by a postponement of the trial. In these circumstances it was proper for the court to proceed with the trial * * *." (3) Sentence: "Although the sentence did not include dishonorable discharge, it has long been held that the maximum limits of punishment has no applicatio to offenses arising under AW 92 and consequently, the provision that a court must impose a dishonorable discharge when it imposes confinement in excess of six months (MCM, 1928, par. 104b, p.95) does not affect the validity of the sentence. (CM ETO 14224 Page 15 Sep 45).

(1st Ind: CM ETO 14224 Page 15 Sep 45: The original GCMO possessed no legal efficacy. A new GCMO, dated after this indorsement, must issue showing compliance with the provisions of AW 50½. A revised action, bearing the same date as the present one, but withholding the order of execution of the sentence, should also be forwarded."

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Accused was found guilty of the rape of a German woman, in violation of AW 92. HELD: LEGALLY SUFFICIENT. The prosecutrix identifed accused about one hour after the commission of the crime. The testimony as to this identification was competent * * *. Likewise she identified him in court. While it is true that she stated that she had relied at the pretrial identification chiefly on his size, the identification was nonetheless positive. It is often difficult to formulate in precise words the reason for one's recognition. She was evidently explaining why it was so easy to distinguish accused from his companions. Testimony as to identity is not inadmissible merely because it was based upon an impression resulting from facts difficult of precise explanation * * *. Moreover, three armed negroes entered the prosecutrix' house and one of them raped her. All were armed. Accused and two other negroes were apprehended near the scene of the crime and on the same street. The town was 'off limits' and no other American soldiers were seen walking on the streets. Their testimony that they had gone to get water was countered by the evidence that they were not wearing canteens. In addition, they admittedly did not bring with them a five-gallon can which was intended for that purpose. Their testimony that they had not been drinking was contradicted * * *. While it was improper for the court to take judicial notice of the particular date when the German time schedule was changed, they could properly notice judicially the existence of different time zones (MCM, 1928, par.125, p.135) and thus account for the apparent time discrepancy." The finding of guilt was supported. (CM ETO 14338 Reed 15 Sep 45).

Among other things, accused was found guilty of raping a German girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. "Although corroboration of a prosecutrix may be required if her testimony is contradictory, uncertain, improbable or impeached * * *, such is not the case here. Even if corroboration were required, there is ample in the evidence * * *. Corroboration as to penetration was clearly not necessary under any theory." (CM ETO 14587 Teachey 11 Aug 45).

Accused Jerro was found guilty of rape in violation of AW 92, and of sodomy in violation of AW 96. Accused Lewis was charged with aiding and abetting Jerro's rape in violation of AW 92; was found guilty of that offense in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Aid and Abet Rape: The specification of aiding and abetting a rape was properly placed under AW 92. The evidence sufficiently showed his guilt, and he could have been properly found guilty of the AW 92 offense. However, finding him guilty of a violation of AW 96 was not improper in the circumstances. The ten-year sentence imposed upon him "is legal for the following reasons: The Table of Maximum punishments does not prescribe any

limit of punishment for the substantive crime of aiding and abetting the commission of the crime of rape. The nearest related offense is the crime of rape itself, for which a life sentence or a death sentence are alternative mandatory punishments (AW 92). While death is a legal punishment for rape it is not legal punishment for the separate substantive offense of 'aiding and abetting' the commission thereof because Congress has not specifically authorized it (AW 43; MCM 1928 par. 103a, p.92). The sentence however may include confinement for life or any period less than life. Confinement for ten years, therefore, is legal * * *." (CM ETO 14615 Lewis et al, 28 Sep 45).

Accused was found guilty of raping a woman in violation of AW 92, and also of assaulting that same woman in violation of AW 93 by striking her with his fist and tearing her external genital organs. HELD: LEGALLY SUFFICIENT. (1) The rape was established. (2) Assault: "The brutal manner in which accused struck his victim in the face and bruised her genital organs intending to cause her bodily harm was clearly demonstrated. However, it was clearly apparent that this assault took place in connection with her rape that followed immedately. Under these circumstances, there was an unreasonable and improper multiplication of charges. "The accuser evidently drafted the charges having in mind that if the prosecution failed to prove that rape was committed it could still show accused was guilty of assault with intent to do bodily harm. Charging him separately in this manner was unnecessary since the evidence demonstrated that accused first assaulted his victim with the intent to commit rape, a more serious offense than assault with intent to commit bodily harm and a lesser included offense of rape * * * of which lesser included offense the court could have found him guilty had the evidence been insufficient to sustain a finding of guilty of rape. Nevertheless, no substantial right of accused was injuriously affected since he received the lesser mandatory punishment for the crime of rape (AW 92)." (3) Identification: "In view of the competent and compelling evidence of the identification of accused, no prejudice resulted from the evidence of the victim's pre-trial identification of him while he was in custody and with other negro soldiers * * *." (CM ETO 15774 Kennedy 28 Sep 45).

Accused M** was found guilty of rape in violation of AW 92. Originally sentenced to imprisonment for five years, the court reconvened and the sentence was increased to life. HELD: LEGALLY SUFFICIENT. "The convening authority returned the record of trial to the court advising it that the minimum sentence of confinement imposable by the court for a violation of AW 92 was imprisonment for life. In accordance with this mandate, the court reconvened and revoked its sentence, and, * * * sentenced the accused" to confinement for life. So long as the court found accused guilty of a violation

of AW 92, whether as a principal or as an aider or abettor, it was mandatory "to impose one of the mandatory sentences providied for in the article. It follows that its action of imposing the increased sentence of life imprisonment was authorized by AW 40 and that the sentence imposed upon M** as approved by the reviewing authority is legal." (CM ETO 15091 Gallahan, 9 Oct 45).

After a common trial, several accused were found guilty of the rape of German girls, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt. (2)Conclusions; Leading Questions: Fourteen-year-old prosecutrix Vera, when testifying, "repeatedly used the legal conclusion 'rape' and * * * in order to prove penetration the prosecution employed leading questions by pointing to each accused and asking her the identical question as to each: 'Did his private parts penetrate yours?' to which she replied 'yes'. To some extent such questions were used also in the interrogation of the mother. However, in view of Vera's immaturity and her reluctance to testify, the lack of any objection by the defense, natural difficulty resulting from differences in language as between the witnesses and their interrogator, other voluntary testimony by the mother, and other corroborating factors in the case, it is concluded that such testimony was both competent and substantial * * *." (3) Motion for Severance: was denied, the law member stating that if, "during the course of the trial, it should appear to him that any evidence was introduced of a nature to render a common trial unfair to any of the accused, he would then 'put in effect the severance with regard to such of the accused as it may appear was hampered in his defense', thus clearly recognizing the Federal rule * * * adopted and applied by the Board of Review in CM ETO 6148, Dear, et al. The case is distinguishable from CM ETO 283, held legally insufficient because there the two accused had antagonistic defenses. Had such a situation arisen in the instant case, or any other prejudice * * *, denial of the motion to sever would have constituted reversible error (FM 27-255, par. 91b, p.85). Since the record of trial shows no such resulting prejudice, the law member's ruling in this instance constituted a lawful exercise of judicial discretion." (CM ETO 15274 Spencer, et al 23 Aug 45).

Accused were found guilty of the rape of a German girl, in violation of AW 92, and of the robbery of their victim's rings, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Specification: Joint Rape: "It was here charged that Dale, Jones, Lewis and Keyton, acting jointly and in pursuance of a common intent, committed rape on Frau EG. While it appears to have been held that rape cannot be committed 'jointly' in the strict sense of the word, the form of allegation employed was not improper under the circumstances of the

instant case in view of the recognized rule of law that all who aid or abet in the commission of an offense are chargeable as principals * * * (2) The evidence established that four colored accused had five acts of intercourse with their victim. "There is ample evidence to show both that the first act of intercourse constituted rape and that while one of the soldiers actually engaged in this act of intercourse, two of his companions actively assisted him in accomplishing his purpose while the fourth acted as a look-out. * * * The court clearly could find that the men shared an unlawful community of purpose to accompli the rape * * * and that, being actually or constructively present at the scene of the crime, each participated * * * either as a principal or as an aider and abettor. * * * Each could properly be found guilty of rape, as a principal, of the first act of intercourse shown." (2) Robbery of the Rings: "Taken as a whole, the record rather clearly establishes that Keyton was the soldier who actually committed the robbery. The court also found Jones and Lewis guilty of this offense, apparently on the theory that they aided and abetted Keyton in its perpetration. In order that one may be held responsible as an aider and abettor for an offense committed by another, it must be shown that the crime committed was within the common purpose and design for which the parties combined together * * *." All four had just raped the girl. Keyton then took her rings. "The intent for which men combine together may be gathered from their acts and the circumstances that one of the men in fact took the rings in the presence of and without interference by the other two soldiers in itself constitutes some substantial evidence from which the court could find that all combined not only for the purpose of committing rape but for the purpose of committing robbery as well. (3) Pre-Trial Statements: "Each accused made a pre-trial statement substantially to the same effect as his testimony * * * and these statements were introduced" over objection that they were involuntary. Generally, they were exculpatory rather than incriminatory. In view of the compelling evidence of guilt, even assuming that they were involuntary, no AW 37 prejudice resulted. (CM ETO 15393 Dale, et al 13 Oct 45).

Three accused were charged with a number of rapes in violation of AW 92. They were found partially guilty of the lesser violation of AW 93 of assault with intent to commit rape. HELD: LEGALLY SUFFICIENT. (1) Presence of Counsel: Neither the prosecution or defense personnel named were specifically shown to have been present. However, various indirect references (detailed) sufficiently establish their presence. No prejudice resulted. (2) A Severance Motion was properly denied. "It does not appear from the evidence that their defenses were in fact antagonistic in any material respect * * *. Each accused admitted to his presence at the times and places alleged and to having, or attempting to have, intercourse with each prosecutrix." (3) Multiplicity: Motion to strike four of the specifications on the ground of multiplicity was properly overruled. "Accused were jointly charged with

six rapes. Prosecution attempted to prove six rapes, two by each of the three accused as principals aided and abetted by the other two. Each of the six alleged acts of carnal knowledge was, if proved, a separate and distinct offense. While two or more persons cannot be jointly guilty of perpetrating a single joint rape * * * all persons present aiding and abetting * * * are guilty as principals equally with the actual perpetrators' * * *. Thus, if the evidence and the court had sustained prosecution's theory of the case, each accused could have been convicted of each of the alleged offenses as charged." (4) Pre-trial statements were introduced over objection. Voluntariness thereof herein was a fact question. "In connection with prosecution's evidence * * *, it is to be noted that the assistant trial judge advocate testified that S** voluntarily reaffirmed his pre-trial statement to him as investigating officer * * *. The Board finds no error in permitting him to testify -- either because he was assistant trial judge advocate * * * or had been investigating officer * * *." "It is further to be noted that each accused's pre-trial statement tended to incriminate the other two accused. As set out in this holding, each pre-trial statement has been shorn of matters incriminating the other two insofar as was consistent with meaning. As to each pre-trial statement the court was carefully and properly instructed it was to be considered only as evidence against its maker * * *. (5) The evidence supported the findings. (CM ETO 15768 Dunbar, et al, 5 Oct 45).

Among other things, accused was found guilty of the rape of a 15-year old Polish girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt. At accused's invitation, the victim entered his jeep. "They were complete strangers, but considering the fact that at the time * * *, the area wherein the events transpired was but newly conquered by the * * * American Army with consequential displacements of conventions and practices of orderly society, there is nothing surprising that a young girl should accept such invitation from an American soldier. It is but a fair inference that accused was 'on the prowl'. He took her to an isolated lane; forced her out of the jeep; muffled her cries; struck her; succeeded in having intercourse with her. Accused was armed with a rifle. After the act, accused started to drive her back; was halted by an American officer who spoke the Polish language. The girl eventually told him of the sexual act. She was crying and was hysterical. (2)Prosecuting Witness was unwilling but not hostile in her testimony. "Her testimony was given through an interpreter * * *. Her direct examination is pregnant with proof of her bewilderment and embarassment. She was * * * but 15 years of age. It is fair to infer that she was a displaced person as she is of Polish nationality and at the time of the incident was discovered deep in the heart of Germany." Her clothing was poor and dirty. She must have been one of those who "are today pathetic and tragic victims of war. Captain T**'s testimony permits the definite inference that prior to the act of intercourse with accused she was a virgin.

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The young woman was the principal witness * * *. She was suddenly thrust into surroundings strange and confusing to her. She was required to relate to men of an alien nationality the details of an event of the most intimate and personal nature. Natural modesty temporarily closed the mouth of the child. She spoke freely of those incidents which did not touch or pertain to the actual coition, but when testimony was necessary to establish accused's carnal connection with her she 'did not know how to say it'. The rule prohibiting the use of leading questions on direct examination * * * was properly relaxed * * *." Despite this, she still didn't "know how to say it". "There is no mandate of law which required the court to remain supine and helpless under such circumstances, and thereby allow the accused an advantage to which he was not entitled. Beyond peradventure the court was not authorized to use physical or moral violence to compel the witness to testify. It is obvious also that the remedies provided by AW 23 whereby a non-military witness who refuses to testify before a court-martial sitting in the continental U. S. may be punished were not available to the court in the instant case. Confronted with the alternative of allowing the vital facts * * * to remain undisclosed * * * or to devise means whereby the embarassed and timid witness might be induced to speak freely, the court adopted the latter course. It was but a natural and practical procedure to bring into the court room the mother of the young girl * * *. The mother was strictly enjoined that she must remain silent * * * In the actual conduct of a trial a large discretion must be vested in a court-martial in order that it may efficiently and expeditiously perform its duties. This discretion does not permit arbitrary, unreasonable or captious exercise of authority. * * * Examples of the proper exercise of judicial discretion are: the relaxing of the rule prohibiting leading questions on direct examination * * *; granting or denying a motion to sever * * *; the order of the introduction of evidence * * *; the determination of the desirability or necessity of the separation and exclusion of witnesses * * *; the exclusion of spectators from the court room * * *; and the seating arrangement of the accused in the court room * * *." "It cannot fairly be said that the presence of the mother * * * caused the daughter to color the testimony." No error resulted. "The court performed its duties in an admirable and conscientious manner, * * *." (CM ETO 15840 Bishop 19 Oct 45).

Two accused were found guilty of the rape of a German girl in violation of AW 92. One was additionally found guilty of assault with intent to do bodily harm by striking his victim on the back of her hand with a revolver, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The rapes were established. (2) Identity: The identity of each accused was established. "While no other negro soldiers were present in court other than a member of the court, 'there is no requirement in the law that * * * an accused * * * be identified as the culprit either as one of a group or in any other particular way' * * *. There was no error in requiring accused to don helmets so that a witness might

distinguish one from the other. 'While such practice is susceptible of abuse * * * accused's constitutional privilege under the Fifth Amendment * * * was not infringed' * * *. Whether it was proper for the trial judge advocate, in having a witness distinguish between Robert and Leonard Harris, to point out the latter and to ask if he were the one need not be determined * * *. They were properly distinguished by the prosecutrix whose testimony furnishes complete proof of the offenses charged. That prosecution witnesses had failed to identify accused in an identification parade was a matter going only to the weight of their evidence in identifying them in court * * *." (3) Assault to do Bodily Harm: "'A pistol used as a billy or club is a dangerous weapon' * * *. While the assault consisted of no more than a striking of a hand with a pistol with such force as to cause the hand to bleed, the court, under all the circumstances shown, had substantial evidentiary basis for inferring therefrom that the assault * * * was with the intent to do bodily harm." (CM ETO 15870 Harris et al 6 Oct 45).

Accused were found guilty of the rape of a German girl in violation of AW 92, and of housebreaking in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) Character of Prosecutrix: "During interrogation of the prosecutrix by the court, she was asked whether she had ever had intercourse with American soldiers before, and on cross-examination by the defense she was asked if any 'SS troops' ever visited her except for two days during which she admitted they were quartered at her house. Objections by the prosecution were sustained in each instance. In view of the well-recognized rule that bad reputation of the prosecutrix for chastity may be shown as bearing on the probability of consent * * *, and in view of the showing that colored soldiers had visited prosecutrix for eight days prior to the visit by accused and that she had an illegitimate child, it would have been more proper to allow a thorough interrogation of prosecutrix * * *. However, from an examination of the record of trial as a whole," it is concluded that no prejudice resulted. (CM ETO 15929 Anderson, et al 28 Aug 45).

Accused was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. "During the closing argument, the defense made a motion that before the findings of the court were made public, accused be committed for observation as to determine his sanity. The court overruled the motion on the ground that it felt that there was no necessity to inquire into any existing mental condition of accused. The ruling of the court was not error in view of the lack of any evidence * * * rebutting the presumption of sanity * * *. It is noted in this connection that the Staff Judge Advocate in his review states that he is advised that on the day before the trial the Corps psychiatrist examined accused and informed defense counsel that in his

opinion accused was not mentally deranged. A certificate by the Commanding Officer of accused's company * * * accompanying the record of trial, states that accused's mentality both prior to and at the same of the offenses was normal." (CM ETO 16622 Moore, 2 Oct 45).

Among other things, accused was found guilty of the rape of a virgin German girl. HELD: LEGALLY SUFFICIENT. It is clear that the prosecutrix submitted to accused "because of fear for her mother and father who were held at bay with a pistol and whom accused threatened to kill whenever she offered resistance to his advances. Her testimony, 'If I had been alone, I would rather be shot than give up the honor of a virgin!,' conclusively negatives the theory that she submitted by reason of fear of death or other great harm to herself notwithstanding any threats or acts of violence directed toward her. Was the victim's conduct such as to lead accused to believe that their intercourse was with her consent and not against her will? In view of her repeated resistance, neutralized only by threats to her parents, together with his repentance following the sex relation, we believe that the answer * * * is conclusively * * * 'No'. Moreover, his actions justify the inference that he intended to use such force against her as might have been necessary to accomplish his purpose if the threat of harm to her parents proved ineffective." "The girl's submission because of fear of immediate death or great bodily harm to her parents did not constitute such consent that it negatives the offense of rape. It is difficult to conceive of the existence of a greater duress of compulsion than found in a situation where a woman must choose between the life of a parent, or her child, and her own physical chastity. She is forced to elect between two courses of action, either of which carries tragic sequences of lifelong duration. The compulsion which requires the election is in itself duress. The submission of her body to the lusts of the ravisher is not the act of a free agent. The evidence in this case presents a picture of accused's conduct which is far more offensive to the minds of a civilized people than those cases wherein passive acquiescence is obtained by fraud, surprise or false pretence." (CM ETO 17442 Blakely 27 Oct 45).

Accused was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. "While without consideration of accused's two written statements * * *, the evidence of his guilt is sufficiently compelling to sustain a conviction, an examination of the record * * * shows that the first statement * * * does not purport to be a confession, but does contain important admissions as to his connection or possible connection with the offense charged. Such statements are admissible in evidence without any showing they are voluntarily made * ***. The fact that accused was told 'that it would be much better for him if he would tell the truth right off, and that if he did come clean, they would do all they could for him' was not meant of such character as to be the

450 (4-5) (4) Rape: Proof in General
(5) Rape: Guilty of Lesser Offense

cause of accused's making a false statement. As regards the second statement * * *, there was no evidence of any threats of force used. When the CID agents showed accused apparel of Yvonne, he admitted his guilt and made the statement accordingly. * * * Both statements were properly admitted in evidence". "Even disregarding them, the evidence is sufficient to compel a finding of guilty." (CM ETO England 17560 26 Oct 45).

Accused was found guilty of rape, in violation of AW 92, HELD: LEGALLY SUFFICIENT. "After the prosecution had rested its case, the defense moved for a continuance because of the absence of witnesses who would testify as to the effect that liquor has on accused when he drinks. Voluntary drunkenness being no excuse for the offense charged these witnesses would have added nothing to the defense. No motion was made following arraignment of accused; and, moreover, it appears that stipulations were made as to the testimony of such witnesses. Under such circumstances, the court did not abuse its discretion in denying the motion * * *." (CM ETO 17698 Stewart 27 Oct 45).

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(5) Rape: Guilty of Lesser Offense:

Cross References: 450(2) 13090 Brynjolfsson (Assault; death prior to rape).

Two accused were found guilty of the rape of a 19-year old German girl in violation of AW 92, and of attempted fraternization in violation of AW 96. HELD: LEGALLY SUFFICIENT ONLY IN PART. (1) Pleading: First Act: "Accused Ward engaged in three acts, and accused Sharer in two acts, of sexual intercourse with the prosecutrix." Only one act was charged. "In the absence of a motion * * * to elect * * *, it will be presumed that" the prosecution "elected to rely upon the first act * * * by each accused as to which it introduced evidence * * *. In the event the evidence showed that the first act of intercourse by either accused constituted rape, and that the other aided and abetted in its commission, such other accused could properly be convicted as a principal * * *. The prosecution may not be compelled to elect, in a trial of two or more accused for offenses in the commission of which they aided and abetted one another, the offense of which accused it will rely upon for conviction, or whether its theory of guilt of any or all accused is as actor or aider and abettor * * *. It follows that the prosecution will not be deemed to have elected to stand upon the first theory of guilt of any particular accused as to which it offers evidence. The reason for the foregoing is that in such situation each accused is placed upon adequate notice that the proof may establish his guilt either as actor or as aider and abettor, or

for that matter on any other theory * * *. It follows again in the instant case, that the prosecution may be deemed to have relied, for its establishment of guilt of each accused, either upon the first act of intercourse engaged in by him or upon the first act of intercourse of his companion in which he aided and abetted. * * * It is reasonable to assume that each accused has been put upon notice that his guilt may rest upon proof either of his own first act or of his aiding and abetting his co-accused in the latter's first act and thus to permit the prosecution to establish guilt of each accused upon either theory.' (2) Evidence: Rape: The two accused, armed, entered the 19-year old virgin prosecutrix' home uninvited; had her go upstairs and undress. She testified that she did so because she was very much afraid, the Americans having only occupied the community two days before. She did not cry because she was afraid of being beated or shot. She was frightened. While one accused had intercourse with her, the other remained outside the room with his weapon. They took turns. In defense, accused claimed consent. "The prosecutrix' own testimony show that she offered no resistance whatever to either accused. She did not cry out although three members of her immediate family were within easy earshot downstairs. She did not complain of either act to her family until the accuseds' departure and never made any complaint herself to American military authorities. After two acts of intercourse with each accused, /blood on the sheets because she was a virgin (medical testimony)/ she and her mother drank wine with them. After her third act of intercourse with Ward (after her second with Sharer) she accompanied him to his own battery command post where she still made no complaint, and from whence she reluctantly departed only when directed to do so." "She testified that she was afraid because 'if one cries out they may be beaten or shot'. Her reference merely to the possibility, rather than the likelihood, or probability of violence, is understandable in view of the lack of threats and violence by accused Ward is not probative that he did anything" to really fear violence. "Her delay in complaining and the casualness of her subsequent conduct are ' 'incompatible with the sense of outrage which might reasonably be expected from such a crime * * *'". "Ward's first act clearly ruptured her hymen and caused her to bleed. It is inconceivable that, as Sharer testified, he did not see the blood on the sheet. But she offered no resistance to Sharer, did not cry out, and did nothing to indicate to him as a reasonable person that she was unwilling to engage in the sexual act. She did even less than in the case of Ward. While virginity, in connection with other circumstances, may be evidence of nonconsent, its effect as such is clearly negatived here by the utter consistence of her conduct with consent * * *. From the evidence that each accused waited outside the room, armed, while the other engaged in intercourse, it may as reasonably be inferred that each was merely awaiting his turn as that they were guarding against interference with their forcing of the girl. They were required to be armed." The evidence was insufficient to support a finding of guilt. (3) Lesser Offense: Fornication: However, it has been held "that it is an offense in violation of /AW 96/ for a soldier, married or unmarried, to engage

450(5) (5) Rape: Guilty of Lesser Offense
451(2) (2) Assault with Intent to Commit a Felony: Proof:

In sexual intercourse with an unmarried woman, under the circumstances of /CM ETO 4119 Willis/, and that such offense is included within rape, where the specification indicates that the female is unmarried. In the instant case, the acts of the accused, who were combat soldiers in the midst of a campaign in a newly occupied city, of engaging in promiscuous sexual intercourse with an enemy citizen only 19 years old while unlawfully in her home, with her mother nearby, constituted * * * conduct 'to the prejudice of good order and militaty discipline'" under AW 96. Maximum punishment therefor is 6 months CHL and 2/3rds forfeitures for a like period (CM ETO 4119 Willis). (4) Opinion Testimony: The investigating officer testified that the story "boiled down to rape" under the threat of weapons. He pointed out that the civilians were afraid, and the mere carrying of guns amounted to a threat. Even assuming the error to have been self-invited, the testimony should have been stricken as inadmissible. However, in view of the opinion herein, no prejudice resulted. (5) Attempted Fraternization: Charged with fraternization, accused were found guilty (as approved) of attempted fraternization.. "Accused's conduct so nearly approached, if indeed it did not amount to, wrongful fraternization, that it must be held to have constituted conduct to the prejudice of good order and military discipline in violation of AW 96, even though characterized by the reviewing authority technically as an attempt and even though many attempts to commit civil offenses are not themselves crimes * * *." "Wrongful fraternization, which constitutes disobedience of a standing order, is punishable, at maximum, by confinement at hard labor for six months * * *. As the attempt is a lesser included offense not listed in the table of maximum punishments the maximum penalty therefor is the same * * *." (CM ETO 10446 Ward, et al, 22 Sep 45).

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(2) Assault with Intent to Commit a Felony: Proof:

Not Digested:

Intent to Murder
11269 Gordon
11779 Bohn, et al

Intent, Sodomy
8511 Smith
14564 Anthony, et al

(2) Assault with Intent to Commit a Felony: Proof: 451(2)

Not Digested:

Intent to Rape

8511	Smith
13369	McMillon, et al
11914	Lawler, et al
14875	Swain
11725	Whitfield
12873	Spohn
10445	Keffer
14604	Mcarthur, et al
15619	Capps, et al

Cross References:

450(1)	7867	Westfield (Intent to murder)
450(1)	10860	Smith (intent to murder)
450(1)	13222	Howard (intent to murder)
450(1)	14745	Rowell (intent to murder; intoxication)
450(4)	14040	McCreary (to rape;,vs. rape; punishment)
451(58)	15941	Fuller (with robbery; multiplicity)
450(2)	13090	Brynjolfsson (assault to rape; lesser to rape)

Intent to Rape: Accused was found guilty of assault to rape a German girl, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "Accused, a complete stranger to both, forced the victim and her companion at the point of a gun and against their will to a point in a wood within hearing distance of soldiers some 100-200 meters distant, where with his carbine he directed the victim to lie down. When the girl screamed, he loaded the weapon, pointed it at both women, and directed the older to look away and the younger to come to him. On their knees, they pleaded for mercy, but accused persisted and repeated his direction to the girl to lie down. She screamed again, he slapped her face violently, again ordered her companion to turn away on pain of being shot, pushed the girl onto her back, and raised her dress above her knees, when she screamed once more, this time at the top of her voice. Accused fired his gun and the victim and her companion took advantage of the opportunity to arise and renew their pleas for release, whereupon accused desisted and permitted them to leave." This evidence sufficiently showed an assault to rape, interrupted by circumstances independent of accused's will. (CM ETO 10728 Keenan 16 Aug 45).

Intent to Murder: Among many other things, accused was found guilty of assault with intent to murder. HELD: LEGALLY SUFFICIENT. "While accused denied any intention of murdering Police Constable O** and asserted that the discharge of the pistol was accidental, the evidence clearly shows that while he was a fugitive from justice, he

pulled and cocked a loaded automatic pistol and threatened to shoot the unarmed officer who was attempting to arrest him if the officer came near him. During the ensuing struggle, the officer's hand did not touch the pistol and accused's hands and wrist were free--yet he fired three shots, two of which went into the officer's clothing and one of which wounded him in the left foot. Such circumstances fully warrant the court's conclusion that accused entertained the requisite intent to commit murder at the time he fired the shots * * *. Even if he merely intended to frighten or bluff the officer, his willful acts indicate 'a heart reckless of social duty' and a 'reckless disregard of human life', and as such are punishable to the same extent as if accompanied by a specific intent to murder the officer * * *." (CM ETO 15074 Sutherland 8 Sep 45).

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Intent to Murder: Accused general prisoner was charged with four AW 93 assaults with intent to commit the felony of murder upon Brown, Williams, Higgins, and Napper. Previously, ten soldiers including accused had been charged with murder and riotous conduct arising out of the same incident, although the victims were others than those named in the instant case. Accused had been acquitted of the murder and riotous conduct charged, although he had been found guilty of an AWOL at the time those offenses had occurred. Now a general prisoner, he was found guilty of the instant AW 93 specifications. HELD: LEGALLY INSUFFICIENT. (1) Plea in Bar: "At the opening of the instant trial, the defense interposed a special plea wherein it asserted that the acquittal of accused of the charges of murder and riotous conduct * * * barred the prosecution of the present charges of assault with intent to commit murder upon four persons not named in the charges on the former case. In support of said plea, defense counsel offered in evidence the record of trial in CM ETO 5764, Lilly et al" (record of that former trial). The court refused to admit it, but did admit the general court martial orders therein. (a) "While defense counsel * * * used language which designated the plea as that of double jeopardy, * * * he fully presented * * * the substance of a plea of res judicata regardless of the nomenclature used by him." (Detail). (b) "The law member committed serious error in refusing to admit in evidence the record of trial * * *." "Paragraph 68, (p.53) MCM 1928 was misinterpreted by him * * *. Paragraph 68 specifically authorizes the admission in evidence of the record of trial of the prior case if the General Court-Martial Order 'is not sufficiently explicit'. Defense counsel asserted that GCMO 1031 did not reveal the actual issues involved in the Lilly case, which contention was entirely correct * * *." In view of the subsequent disposition herein of this case, the law member's ruling, however, will be disregarded. The Lilly record of trial will be considered as having been admitted. It is on file in the BOJAGD with the ETO, "and is before the Board of Review, which may take Judicial notice of the records in said Branch Office * * *." (2) Plea as Res Judicata: It may be taken for granted that the instant offenses are separate and distinct from those charged in the first case. "The doctrine of res judicata, by which a fact of matter distinctly put in issue and directly determined by a court of competent jurisdiction

cannot afterwards be disputed by the parties, is applicable to judgments in criminal prosecutions. "The issues of fact and law between the U. S. and accused which were adjudicated and determined by the court's finding in the Lilly case are binding upon the Government in its subsequent prosecution of accused in the case under review." There is a definite and marked distinction between the plea of res judicata and pleas of former jeopardy, autrefois acquit and autrefois convict. Two important differences exist: (1) Jeopardy may attach, so as to support a plea of former jeopardy (but not one of res judicata before the rendition of any judgment * * *; (2) The plea of res judicata may be available in cases (for example, where there is no identity of offenses in the two prosecutions) in which a plea of former jeopardy, autrefois acquit or autrefois convict could not be sustained "Defense counsel grasped the substance of the legal problem. While his elucidation of same was faulty and at times confused, in effect he exhibited the same for consideration of the court. He first presented the plea at the opening of the trial. Ordinarily a court cannot in advance of the trial * * * determine a plea of res judicata because factual issues are involved * * *. However, the defense at the conclusion of prosecution's case in chief moved for a finding of not guilty, thereby preserving accused's rights to have the issue considered upon appellate review * * *." (3) The Facts: "A rationalization of the findings and the evidence introduced at the /Lilly/ trial clearly and irrefragably indicates that the court, having before if conflicting evidence on the issue as to whether accused was present at the time and at the place of the commission of the murders and occurrence of the murders and occurrence of the riotous conduct, elected to believe that offered by the defense. It determined that accused was not present and therefore did not participate in the murders and rioting. No other rational or consistent interpretation can be placed on the proceedings of the trial with its resultant findings." (4) Application to Instant Case: "The second step in applying the doctrine of res judicata is to define the issues of fact which were before the court in the instant case." "the conclusion of the matter is that in the Lilly case, "there was determined the exact issue of fact with respect to accused as arose in the instant case, and, it was there found that accused was not a participant in the riotous assembly nor was he present at the time and place of the murders. Inasmuch as the murders and assaults were simultaneous incidents, it follows he was not present at nor did he participate in the assaults. * * * Having had its opportunity * * * to prove accused's presence at the place and during the time of the commission of the crime and having failed in sustaining the burden imposed upon it by law in the Lilly case, it cannot, upon discovering or obtaining other and additional evidence, litigate that fact. It was judicially determined adverse to it in another case wherein that fact was also the vital issue in the case." (CM ETO 15080 Lewton 18 Aug 45).

451(2) (2) Assault with Intent to Commit a Felony: Proof

Intent to Murder: Accused officer was found guilty of assault to murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "The accused contended that he was under the influence of liquor at the time, and, being a constitutional psychopath could not entertain the specific intent which must exist in order to sustain the charge * * *." "The distinction between a psychotic - one who is insane - and one who has a psychopathic personality is well defined in law * * *. The inability of a psychotic to adhere to the right constitutes a defense to misconduct, for 'a person is not mentally responsible for an offense unless he was at the time so far free from mental defects, disease or derangement as to be able concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right'* * *. On the other hand 'the inability of a constitutional psychopath who is without psychosis to adhere to the right is not mental irresponsibility and does not constitute a defense for wrong doing' * * *. Applying the foregoing principles of law to the case * * * the fact that the accused was a constitutional psychopath constituted no defense. The question of whether his drunkenness destroyed his ability to entertain the specific intent to murder was, under the circumstances shown, a question of fact * * *." (CM ETO 16887 Chaddock, 9 Oct 45).

Intent to Rape: Accused enlisted man and officer were found guilty of assault to rape in violation of AW 93. The officer was additionally found guilty of indecently assaulting the same girl, and of failing to prevent the enlisted man's assault upon her, in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) Investigation: "The investigation was conducted without either accused being present; neither was given opportunity to cross-examine any witness nor to offer testimony in his own behalf. Such action is in direct violation of the provisions of AW 70 and is open to criticism. However, it has been held that the investigation of charges under the 70th AW is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional * * *. If complete lack of an investigation is without jurisdictional effect, a fortiori, procedural flaws in an investigation will not vitiate the results of trial." (2) Joint Charge: "While it was unnecessary to charge Reed both jointly and singly, his rights were not prejudiced in view of his sentence. (3) AW 95: The acts charged against the officer as violations of AW 95 were established, and constituted violations of that AW. (CM ETO 17056 Boger, et al 3 Nov 45).

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(6). Assault With Intent to do Bodily Harm: Proof 451(6)

Not Digested:

10759 Houle (point pistol)
11970 Manko, et al (German)
12056 Reyes
16307 Bryant(girl; choke and strike with hands)
16620 Tanver
16835 Snyder
17167 Dyal

Cross References:

454(56b) 12869 DeWar (tear woman's private parts; rape)
450(4) 15774 Kennedy (woman's genitals; tear; with rape)
450(1) 16772 Chutnicutt (choke girl)

Intent to do Bodily Harm: Accused was found guilty of two rapes of a German woman in violation of AW 92; of housebreaking and of assaults with intent to do bodily harm, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The rapes and the housebreaking were adequately proved. (2) Assault to do Bodily Harm: "Under the circumstances, the wisdom of encumbering the case with these charges may well be questioned * * *. (a) Duplicity: The possible duplicity in the two assault specifications "may properly be regarded as cured by accused's failure to object and by the court's elimination of the assault upon P** in the finding of guilty. Under the circumstances, therefore, it cannot be said that the duplicitous character of the pleading misled accused in the preparation of his defense or prejudiced any of his substantial rights." (b) Specifications: Each specification "omits the words 'feloniously and wilfully' contained in the model form provided in the MCM * * *." However, "inasmuch as there is an allegation of assault coupled with the specific intent to do bodily harm, the omission although irregular is not fatal. The word 'assault' is defined * * * as 'an attempt or offer with unlawful force or violence to do a corporal hurt to another' * * *. Hence the use of the word assault combined with the allegation of intent is sufficient to imply that the acts charged were willful and felonious." (c) The evidence supported the findings of guilt. (CM ETO 11004 Evans 16 Jun 45).

Intent to do Bodily Harm: Among other things, Accused was found guilty of assault with intent to do bodily harm by striking his victim with his fists, in violation of AW 93; of simple assault of another in violation of AW 96; and of destroying described glasses and property, in violation of AW 96. HELD: LEGALLY SUFFICIENT IN PART. (1) AW 93 Assault: "The evidence * * * shows that * * * the accused and L**, a civilian police inspector, were 'holding each other', 'wrestling', 'fighting', or exchanging blows in the Bellevue Cafe * * * and that L** later ran from the cafe * * *. There is also testimony that accused 'hit', or struck blows at, L**, and that another soldier held accused's arm and took a bottle from him. It does not appear that accused attempted to strike L** with the bottle, nor that the latter sustained any injuries as a result of the encounter. The evidence fails to show any acts committed by the accused, or any circumstances, which warrant

451(6) (6) Assault with Intent to do Bodily Harm: Proof

the legal inference that accused intended to do bodily harm to L**. Such intent is essential to show a felonious assault under AW 93 * * *. The evidence at most supports a finding of guilty of the lesser included offense of simple assault and battery, in violation of AW 96 * * *. (2) Multiplication: The balance of the offenses of which accused was found guilty indicate a multiplication of charges concerning accused's acts in the Bellevue Cafe (MCM, 1928, par. 27, p. 17). "However, since he was found guilty of another Specification alleging AWOL, the sentence was supported. Accused cannot be said to have been substantially injured. (CM ETO 11729 Held 17 Jul 45).

Intent to do Bodily Harm: Accused was charged with assault with intent to do bodily harm on a Polish refugee girl by willfully and feloniously grabbing her on the neck with his hands, in violation of AW 93. He was found guilty of willfully grabbing her on the neck with hands, in violation of AW 96. HELD: LEGALLY INSUFFICIENT. "The court, by exceptions and substitutions, apparently intending to find accused guilty of a simple assault because of his drunken condition, found nothing more than that accused, at the time and place alleged, did 'willfully grab on the neck with the hands', in violation of AW 96. But such substituted specification clearly fails to state any offense under AW 96, or under any other article of war. It does not appear therefrom that accused grabbed or otherwise assaulted any named or desribed person, an essential element of the offense * * *. Even if the name or description of an assaulted person did appear, there still would be nothing in the finding to indicate that the grabbing was wrongful, felonious or unlawful, and the legal presumption would arise that the act was lawful or innocent * * *. Accused was acquitted of all material allegations excepted by the court in its findings * * *. Since the substituted specification of which accused was found guilty does not state an offense, the findings of guilty cannot be sustained." (CM ETO 17586 Skinner, 3 Nov 45).

Intent to do Bodily Harm: Among other things, accused was found guilty of the assault of two German civilians with intent to do bodily harm by striking them with his first, in violation of AW 93. HELD: LEGALLY SUFFICIENT ONLY FOR AW 96 ASSAULT. The evidence showed merely that accused struck the Germans with his fist. One of the persons assaulted testified he was not injured, and there is no evidence that the other suffered any injuries. There was only a simple assault and battery, in violation of AW 96. CM ETO 17707 Hawkins 22 Oct 45).

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(9) Assault With Intent to do Bodily Harm: Dangerous Weapon

(9) Proof in General:

Not Digested

7702	Shropshire	10957	Turner (German)
10759	Houle (point pistol)	11950	Abbott
10780	Olsen (carbine; shooting)		
11556	Houston		
11845	Stark (lesser AW 96)		
11970	Manko, et al		
12056	Reyes		
13255	Gonzales		
13285	Faught		
14587	Teachey (strike on head with carbine)		
16688	Kramer (aid and abet; no weapon)		
17275	Galmon (hammer)		

Cross References:

450(4) 15870 Harris (pistol used as "billy" a dangerous weapon.

Intent to do Bodily Harm: Accused officer was found guilty of assault with a dangerous weapon with intent to do bodily harm, in violation of AW 93; and also of being drunk and disorderly in quarters on the same occasion, in violation of AW 95. HELD: LEGALLY SUFFICIENT. The evidence supported the findings of guilt. "There was no fatal inconsistency in the court's findings that accused was grossly drunk so as to be guilty of a violation of AW 95, and at the same time capable of harboring the specific intent to do bodily harm required to establish the alleged violation of AW 93 * * *." (Detail evidence of drunkenness). (CM ETO 12480 Buck 3 Aug 45).

Intent to do Bodily Harm: Accused was found guilty of a violation of AW 93, in that, with intent to do bodily harm, he assaulted Fish by shooting him in the right shoulder with a dangerous weapon, to wit, a pistol. He was also found guilty of a violation of AW 96, in that, in violation of standing orders, he wrongfully failed to turn in a foreign pistol to the unit supply room for safekeeping. HELD: LEGALLY INSUFFICIENT ON THE AW 93 SPECIFICATION. (1) Assault: AW 93: "All the evidence shows that Fish was the aggressor, that he had a reputation as a very good fighter, a dangerous fighter and a bully, that accused left after the preliminary skirmish outside his tent but remained in the vicinity of his tent where he saw Fish in a rage and heard him threaten his life. Accused then went into his tent, armed himself against eventualities and then started to leave the neighborhood. But, as accused was going away, Fish broke loose and started after him. Accused turned around, warned Fish not to advance, supplemented his warning by firing a shot into the ground, retreated a couple of steps and then as Fish continued to advance shot him in the shoulder from a distance of six feet or less. The circumstances proven show a complete defense" on the ground of self-defense. "There is not a scintilla of

(9) Assault With Intent to do Bodily Harm: Dangerous Weapon
451(9-14) (14) Burglary
(16-17) (16) Embezzlement
(17) Embezzlement

evidence that accused intended to take Fish's life. This accused, a soldier for over three years, an experienced combat man should have killed Fish at six feet if he so desired. * * * Here Fish's known ability as a mean fighter, his very threats (admitted), to kill accused, excused accused's conduct; and in any event the pistol in accused's hands was not used as a lethal weapon. He used it just as he would have used a club, to disable not to kill. He repelled accused's threats upon his life by using such force as to him seemed reasonably necessary to defend himself against being killed or of suffering serious bodily injuries. The self defensive measures as herein shown are legally justified * * *." (2) Order: Turn in Weapons: AW 96: Accused was properly found guilty of this charge. "Accused testified he was not present when the order to turn in foreign weapons was read to his company. He said he did not read the bulletin on the company bulletin board. This defense removed the willful element from accused's failure to turn in his weapon. However, it was accused's duty to read the bulletin board and to be posted with respect to all matters appearing thereon which imposed on him a military duty. Since the offense here is charged under AW 96" proof of specific intent was unnecessary. Accused's offence "most closely resembles that of failing to obey a lawful order of a superior officer in violation of AW 96, "for which offense the maximum punishment is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months * * *". (CM ETO 16512 Rowland 12 Oct 45).

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(14) Burglary

Not Digested:
8450 Garries 17057 Taylor 16640 Willet, et al
Cross References:
450(1) 16005 Jones et al (with murder, etc.)

(16) Embezzlement

Not Digested: 15154 Sohn 16479 Johnston, Jr. (exchange funds)
Cross References: 399 16804 Bradley (pen. confinement)

(17) Embezzlement: Proof in General:

Accused officer was found guilty of violation of AW 93, in that he embezzled described property by wrongfully converting to his own use that which had been entrusted to him as inventory officer of his organization. He was found guilty of a violation of AW 96 in that he wrongfully suggested to another officer that the latter make false official statements about certain matters. And lastly, he was found guilty of a violation of AW 95, in that he unlawfully, falsely, and fraudulently executed inventories of the property of officers missing in action. HELD: LEGALLY SUFFICIENT. (1) Ownership: "Ownership was alleged and proved in officers /named/ missing in action. This was tantamount to alleging ownership in them, if living, and if dead, their successors in ownership. * * * Ownership may be alleged as unknown in larceny * * *; so also in embezzlement * * *. Even had there been no allegations of ownership, the remaining allegations were 'in sufficient detail to enable accused to prepare his defense and to avoid the risks of being charged with the same offenses at a later date'". (2) Judicial notice of the value of the Belgian franc was properly taken. (3) Evidence Embezzlement:

"It was shown that accused received funds as alleged; that he failed to account for them and that they were not listed on the inventory which he furnished the quartermaster. An officer who is entrusted with the funds and who fails to account for them on proper demand cannot complain if the natural presumption that he embezzled them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting * * *. (Detail evidence, particularly re confusion in an item of two trench coats, and a "short-snorter"). (4) Evidence: Suggest Official Statement: "All solicitations to wrongful conduct are not indictable at common law * * *. Solicitations are 'indictable where their object is interference with public justice, as where * * * perjury is advised; * * * or the corruption of a * * * witness is sought * * *'. The evidence compels the inference that accused's activities as inventory officer were under scrutiny, if not investigation. Even if accused's suggestion to H** fell short of a solicitation to perjury, it remained an evasion of duty cognizable under AW 96 * * *." (CM ETO 11546 Clarke 10 Aug 45).

Accused officer was found guilty of three embezzlements of money entrusted to him by an officer and men of the command for the purchase of war bonds and for transmission home. HELD: LEGALLY SUFFICIENT. (1) Confession: Take Stand: "While accused had no right to take the stand for the sole purpose of repudiating his confession, the record indicates that defense counsel may have used the term inartfully. If he intended to raise an issue merely as to the voluntary character of accused's confession, it was accused's right to take the stand for the sole purpose of testifying, concerning the circumstances under which it was made, without subjecting himself to cross-examination on the issues of his guilt or innocence of the offenses therein admitted * * *. Assuming defence's request constituted an attempt to exercise this right, the law member's refusal to permit accused so to do was error and the confession improperly admitted." However, no prejudice resulted because, excluding the confession from consideration, the compelling evidence rule requires the conclusion that accused was guilty. (2) Evidence: "While there was no direct evidence that accused received either W**'s or K**'s money, his receipts therefor compel the inference that he did, in fact, receive the money. This money should have been deposited without delay in the nearest finance office. According to the records of the station finance office it was not deposited there. While it was tacit in the evidence that the finance office would have had no record should the Form 38 have been lost prior to posting, the likelihood of such losses occurring on three separate occasions * * * is so improbable as to fail to support any inference that they were lost and to compel the inference that they were not posted because they, together with the money represented thereby, were not received. Moreover, the finance officer testified there had been no losses since he took office * * *. True, there were other finance offices nearby at which it appears probable the money

451(17-27-32) (17) Embezzlement
(27) Forgery
(32) Housebreaking

would have been accepted. But deposits and acceptances there would have been contrary to the provisions of the circulars * * *, and no reason is suggested by the evidence why it would have been easier or more convenient or practicable to deposit any of the three amounts in question. Moreover, violations of the circulars are not to be inferred * * *." (CM ETO 11905 Howse 2 Aug 45).

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(27) Forgery; Proof in General:

Not Digested: 14683 Wilson, Jr.
Cross References: 454(96) 14632 Lang (AW 96 offenses)

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(32) Housebreaking; Proof in General:

Not Digested:

4979	Ashley	15105	Davis
11608	Hutchinson	15619	Capps, et al (rape)
12070	Mistler (Rape after entry)	16340	Dameso
12096	Amlaner	16342	Wiseman
13286	Uribe, et al	16405	Zimmerman, Jr.
14066	Heishman	16835	Snyder, Jr.
14206	Platta (to rape)	16971	Brinley

Cross References:
451(6) 11004 Evans
450(4) 15929 Anderson, et al (with rape)
416(9) 16342 Wiseman
451(36a) 16516 Saeffer, et al (with larceny)

"It was alleged that accused broke and entered the 'dwelling of Frau Anna Hack'. The evidence showed that the dwelling house was owned by Frau Anna Prester. Frau Hack was an evacuee guest. According to the modern rule this variance does not affect the merits of the case and is non-prejudicial (9 Am. Jur. sec.54, p.269). However, there is evidence that Frau Hack was more than a guest, invitee, or lodger and that her rooms were in truth a permanent place of abode. Under such constructions of the evidence the allegations of the Specification were proved (2 Wharton's Criminal Law - 12th Ed. sec. 1001, p. 1295)." (CM ETO 13812 Howe 6 Jul 45).

Accused was found guilty of AWOL in violation of AW 61, of the rape of a German girl in violation of AW 92, and of housebreaking with intent to rape in violation of AW 93. HELD: LEGALLY SUFFICIENT.
(1) Cross-examination of Accused: Error resulted when, in advising accused of his rights to testify, the law-member stated that cross-examination could cover not only things about which he had testified but also every other matter in the case. This conflicted with MCM,1928, par.121b,

p. 127. Further error resulted when, although accused made no reference to his AWOL in his direct testimony, he was cross-examined, over objection, in this regard. But no prejudice resulted "since, excluding all of accused's testimony in this regard, his absence * * * was clearly established by other compelling evidence * * *." (2) The rape and the AWOL were adequately established. (3) Housebreaking: "Accused entered the dwelling house through a window that was opened at his request by a resident thereof, following his inability to open the door with the key which had been delivered to him. *** * There is a constructive breaking when the entry is gained by intimidating the inmates through violence or threats into opening the door * * *. The question then arises * * * whether or not the inmates were intimidated by violence into opening the door. The evidence shows that no threats were made by accused before he entered the dwelling. Regarding the violence used, accused and his companion 'hit on the door', they 'were hitting on the door, hard, with a carbine, I think, because they broke the door so much so that the whole house was awakened'. Evidence of the force used was further supplied by the fact that the lock would not thereafter function either for Mrs. S** when she tried to open the door with the key nor for accused when he tried the key after it had been passed out to him. Accused and his companion were armed with carbines. She testified she could see 'how the door was all smashed up and we were all in fear'. It was the first time in her life she had seen a colored person. She 'wasn't scared because he was colored but he was kind of drunk and he insisted on getting in'. She 'had to' open the window, because if she 'didn't he would have broken down the window'". This evidence sufficiently showed that the householder "was intimidated by accused's violence into opening the window and granting him entrance into the dwelling. That he intended to commit the crime of rape was demonstrated by his subsequent conduct. The evidence supports the court's findings of guilty." (CM ETO 13126 Green 31 Aug 45).

Among other things, accused was found guilty of housebreaking in violation of AW 93 (unlawful entry with intent to rape). HELD: LEGALLY INSUFFICIENT: "The accused * * * has been found guilty of intending at the time he entered the dwelling of F** to commit rape therein. The evidence shows that he entered her dwelling at 7 pm on the day and at the place alleged, asked for and drank wine, tried to get familiar with her, then went over into the kitchen of a separate apartment of a Mrs. G**, sat around there 'fraternizing' for over two hours, left the house and then returned to her apartment and then attempted to rape F**. From these facts, the court has inferred that at the time he entered the dwelling of F** at 7 pm he intended to rape her in her dwelling. Intentions, when not expressed, may be inferred from acts. * * * When, however, the act is separated from the required intent by time, such as in this case by three hours, the probative value of the act to show the existence of the intent at a previous time lessens with the length of time. It eventually becomes a matter of speculation.

"The intent to rape, assuming, but not deciding, that it did exist as of the time of the attack between 10 and 11 o'clock, was not shown to exist at 7 o'clock, the time of entry, to the exclusion of all other reasonable intents that might have existed at that time." "The fact finding body may not pick and choose at random in arriving at its decision in determining intent in such cases. It may infer a criminal intent to exist only when the facts are sufficiently conclusive to exclude all other inferences * * *." (CM ETO 13255 Gonzales 12 Sep 45).

Accused were found guilty of rape in violation of AW 92, and of housebreaking in violation of AW 93. HELD: LEGALLY INSUFFICIENT ON THE HOUSEBREAKING CHARGE. (1) The rapes were established. (2) Housebreaking: Accused were charged with an unlawful entry to commit the criminal offense of rape, assault and trespass. (a) Unlawful Entry: "Accused locked on the door of a well lighted house about midnight and an occupant * * * opened the door. They entered without opposition. No one requested them to stay out, or after they were inside to get out. Consent to enter may reasonably be implied from these circumstances. The accused were armed soldiers of a victorious army entering the home of one of the vanquished and it might be argued that that circumstances destroys this implication." However, this question need not be decided herein. (b) Intent at Entry: "The 'trespass' can be ignored because every unlawful entry is a trespass and to say that one who unlawfully enters another's house for the purpose of unlawfully entering is guilty of housebreaking would do away with the second element of proof so universally recognized. As there were several assaults and three alleged rapes the 'assault' and the 'rape' intended by the specification must be determined as a matter of law to be the first offense committed by either accused * * *." "The burden was "on the prosecution to show that both accused intended at the time that they entered the building to commit that assault and that rape in the building. The evidence adduced by the prosecution showed that the accused were in the building before they knew of the existence of M** who was in bed on the second floor (assault and rape victim) and came down into their presence only when summoned by her parents. Such being the case it would be contrary to the evidence to find that either of both of the accused intended at the time that they entered to assault and to rape a woman whose existence was unknown to them at that time. The assault was effected with a knife found in the house. Neither of the accused were shown to know of its existence before they entered the house. Ordinarily the intent of an accused at a given time may be inferred from his acts at that time without much difficulty, but when the problem is to determine the existence of an intent previous to the act, care must be exercised to avoid speculation. In criminal jurisprudence the law seems universally to be that if under a set of undisputed facts several intentions can be reasonably inferred and the criminal intent sought to be proved is only one of

(32) Housebreaking 451(32-35-36a)
(35) Larceny
(36a) Larceny; Proof in General

them, the fact finding body may not legally speculate and choose the criminal intent. It may infer the criminal intent only when the facts are sufficiently conclusive to exclude all other inferences * * *." In the instant case, it would appear that accuseds' original intent in entering the house was to obtain a bottle of wine. (CM ETO 15090 Duval et al, 14 Sep 45).

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(35) Larceny:

Not Digested: 4979 Ashley 13445 Yeomans, et al 14212 Healan
15074 Sutherland 15734 Kendrick

Cross References:
452(18) 13406 Weiskopf (same property covered in AW 94 specification)
433(2) 11725 Whitfield (larceny vs. pillaging and plundering)
454(18a) 8555 Kenney (charge owner; fatal variance)

(36a) Larceny; Proof in General:

Accused was found guilty of larceny of money, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused "knew where the money had been placed, probably the only one other than the owner, he had the opportunity to take it and was not only seen in a suspicious position but when questioned, was halting and evasive in his answers. The money, part of which was marked so it was easily identified, was found concealed in his clothing and at first he denied knowing where it came from * * *." (CM ETO 11504 Mason 27 July 45).

Among other things, accused was found guilty of described larcenies in violation of AW 93. HELD: LEGALLY INSUFFICIENT IN PART AS DESCRIBED. (1) "Larceny of '41 English one-pound notes' is alleged in Specification 30 * * * and larceny of '47 one-pound notes' is alleged in Specification 31 * * *. The proof under Specification 30 shows larceny of either 4 or 5 five-pound notes and of only 20 one-pound notes." A similar discrepancy exists re the other specification. "While one-pound notes and five-pound notes are both denominations of British currency, they are nevertheless distinctly different entities, and an allegation of larceny of five one-pound notes is not sustained by proof of larceny of a five-pound note. There is * * * a fatal variance * * *." (2) Other personalty: The evidence failed to sustain the finding of guilt re two described items of personalty. While these items were not excepted by the court * * *, accused was not thereby prejudiced in any substantial right, because the other property found under these specifications to have been stolen by him was" adequately proved. (3) Another specification alleging the larceny of "11 English one-pound notes" was amended to read "11 English pounds". "The purpose * * * was to render admissible evidence that was otherwise inadmissible and to avoid a variance * * * It would seem to be a self-evident fact that an amendment to a specification alleging larceny which, as regards the subject matter * * *, renders compatible the pleading and the proof where otherwise and except for the amendment, a fatal variance would exist * * * must of necessity, to the extent of the change, allege an entirely different offense from the one originally alleged. The amendment * * * was improper since required authority was not obtained * * *. The matter, however, was procedural, and * * * accused was not thereby

injuriously affected in any substantial right. The finding of guilty will not, therefore, be disturbed (AW 37)." (4) Descriptions: "Various items * * *, particularly the wallets, alleged * * * to have been stolen were described in detail as to color and material of composition. In only one or two instances was evidence descriptive of the wallets introduced. The general rule is that where goods which are alleged to have been stolen are described in an indictment with unnecessary particularity, the charge in this respect must be proved as laid unless the unnecessary part of the description can be regarded and rejected as surplusage * * *. While, as indicated, proof of descriptive allegations was, in numerous instances , not made in the instant case, the particular descriptions as to color and material of composition were not essential to a proper charging of the offenses involved; and, since no descriptions inconsistent with those alleged were proved and accused does not appear to have been surprised or misled to his prejudice, the descriptive allegations * * * may be regarded and rejected as surplasage * * *." (5) Owner's Consent: "No proof was made by the direct evidence of any person affected that the property alleged in the specifications of Charge IV to have been stolen was taken without the owner's consent. The evidence, when considered as a whole, however, is legally sufficient to establish this want of consent in each instance." (6) Specific Dates when accused occupied a certain room were not adequately shown. "The specific dates, however, between which accused occupied the room were not material * * *. The hotel proprietor, through whom the objectionable evidence was introduced, knew of his own knowledge and testified therefrom that accused had occupied the room", and supplied various details in this regard. "The specific dates of occupancy added nothing * * *." "Furthermore, the same dates of occupancy supplied by the objectionable evidence were also supplied in two pre-trial statements which were voluntarily made by accused and which were introduced * * *. (7) Multiplicity: The rule against multiplicity was to some extent violated. "A number of the alleged larcenies were committed upon the same occasion, in the same manner, and in the same hut or barracks. The only manner, however, in which this form of pleading could affect accused adversely would be for it to make applicable a greater maximum penalty * * *. That it did not do so is evident, because in time of war the offense of desertion /of which accused was also found guilty/ and absence without leave may be punished by confinement * * * for life." (CM ETO 11972 Allison 28 Jun 45).

Five accused were found guilty of housebreaking and of larceny, in violation of AW 93. HELD: LEGALLY INSUFFICIENT. (1) Offenses: "The prosecution's evidence established that accused were in the vicinity of the apartment at about the time it was broken into and rifled; that shortly thereafter some of accused were in possession of some of the stolen articles; and that when accused saw the military police coming they attempted to hide. Unexplained

possession of recently stolen property in these circumstances raises a presumption that those who were in possession of it stole it.* * * Similarly, since the evidence showed that the property was stolen from an apartment which was burglarized, the possession of this property was sufficient to warrant a finding that the possessors of it were guilty of housebreaking * * *." (2) Trial Error: "In reviewing records of trial, the Board of Review in the ordinary case is limited to ascertaining whether the record contains substantial evidence as to the existence of each element of the offense charged, and in determining the substantiality of the evidence we do not judge of the credibility of witnesses or evaluate the weight to be accorded their testimony * * *. If, however, the court erroneously admits or excludes evidence of a vital character, or commits other vital error, not sufficient to require the proceedings to be set aside, then we require its findings of guilty to be supported by compelling evidence * * *. (a) Errors were committed by the court in permitting inquiry into the commission of other offenses by accused. Thus Parker and Shaffer were interrogated * * * as to their absence from camp without a pass. This was not relevant * * * and its only tendency was to create prejudice * * *. It was incompetent * * * and nonetheless so because it was elicited on cross-examination of accused * * *. For the same reasons inquiry * * * as to accused's bartering of 'G.I. soap' for cognac was improper. * * * Similarly, the * * * cross-examination of accused Humphreys in reference to his assault and battery upon a farmer, which was alleged to have occurred after the commission of the offense for which they were being tried, was improper. (b) "We do not decide whether reference to accused's failure to make an extra-judicial statement was wrong." (c) Drunk: Accuseds' offenses required specific intent. "Whenever in such a case the record reveals that an accused has been drinking at the time * * * it is always a question whether the drunkenness was so severe as to preclude his entertaining the requisite specific intent." This is ordinarily a fact question. (3) Prejudice: "We conclude * * * that absent compelling evidence of guilt, accused's substantial rights were prejudiced * * *. Whether or not accused committed these other offenses was totally irrelevant to any inquiry then before the court and evidence of, and reference to, their commission had a distinct tendency to bring about their conviction on the grounds that their conduct in general deserved punishment without much regard to whether they actually committed larceny or housebreaking. In this connection, we are considering the cumulative effect of these errors." (Detail reasons the evidence was not compelling. Also note the drunkenness issue again. "It can scarcely be said that the evidence as to accused's ability to formulate and retain the requisite specific intent has the 'robust quality of moral certainty and determinativeness which will sustain the findings' in the face of these vital errors." (CM ETO 16516 Shaffer, et al, 10 Oct 45).

51(36a-38-50) (36a) Larceny: Proof in General
(38) Larceny: Asportation or Trespass
(50) Manslaughter: Proof

Accused was found guilty of larceny in violation of AW 93. HELD: LEGALLY INSUFFICIENT. "The only evidence to establish that accused was the thief is his own confession made to his superior officer without a showing that he was first warned of his rights under AW 24.* * *."" No such inquiry as required by MCM, 1928, par. 114a, p. 116 "was made by the court and there is no other evidence to indicate that the statement was voluntarily made. In these circumstances we have held that the confession should not have been admitted in evidence * * *." This holding applies to the present situation "where the statement was made to accused's commanding officer, even though accused was not in custody at the time. Since there was no other evidence to connect accused with the crime, the conviction must fall * * *." (CM ETO 16922 Di Manero 30 Oct 45).

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(38) Larceny: Asportation or Trespass:

Cross References: 454(18a) 8555 Kenney (no trespass)

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(50) Manslaughter: Proof:

Cross References:

450(2) Manslaughter lesser offense to murder:
8365 Mendoza
9972 Christon
13090 Brynjolfsson
450(1) 14141 Pycko (drunk murderer)

Among other things, accused was found guilty of an involuntary manslaughter in violation of AW 93, in that he unlawfully and wrongfully killed a military passenger in a military motor vehicle operated by him by driving along a rough area on a public highway in a reckless and wanton manner, without due care and circumspection, while under the influence of intoxicating liquor, which resulted in his losing control of the vehicle. HELD: LEGALLY INSUFFICIENT. "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law * * *. The specification alleges that accused caused the death of the deceased by reason of the reckless and wanton manner in which he operated a motor vehicle, and it was incumbent upon the prosecution, therefore, to establish that his culpable negligence was the proximate cause of deceased's death. The evidence clearly shows that from approximately 1600 hours to 1930 hours, 20 March 1945, accused was in a drunken condition * * *, and that when he was last seen in the presence of the deceased at 1930 hours he was driving in a reckless and drunken manner. The record * * * is barren * * * as to the events occurring after 1930 hours and prior to the accident." "At about 2100 hours a medical officer was called to the scene of an accident and found two bodies lying in the road, and a wrecked ¼ ton army vehicle on the right side of the road. One of the bodies was that of deceased * * *. The accused was

standing nearby * * *. The windshield of the ¼ ton army vehicle was broken and its right side was pushed in approximately six or eight inches." There were no other vehicles there. "The record * * * being devoid of any substantial competent direct evidence bearing on the issue of culpable negligence, the probative value of the circumstantial evidence must be considered. Findings of guilty may be supported by circumstantial evidence * * *, but such evidence, if standing alone, must be of such strength as to exclude every reasonable and fair hypothesis of innocence * * *. Circumstantial evidence giving rise to suspicion or showing of opportunity, but not excluding a reasonable hypothesis of innocence, is of course, insufficient to support findings of guilty. The circumstantial evidence here may exhibit an opportunity to commit the offense, or give rise to the suspicion that accused was culpably negligent and that his culpable negligence was the proximate cause of deceased's death, but it is not sufficiently persuasive to exclude a fair and reasonable hypothesis that other agencies were the proximate cause thereof. This is particularly true in view of the definite probability that the accident occurred approximately an hour and a half after accused was last seen. The negligence of the driver of another vehicle, faulty road construction, or, indeed, the negligent driving of deceased himself, or of the other deceased person, may severally have been the proximate cause of deceased's death. The evidence not being sufficiently compelling to exclude such other fair and reasonable inferences, it fails to support a finding that the culpable negligence of accused was the proximate cause of deceased's death." (CM ETO 14845 Gerringer 30 Aug 45).

Accused was found guilty of a violation of AW 93 in that, by his gross negligence in handling a pistol, he feloniously and unlawfully killed another soldier by shooting him in the abdomen. HELD: LEGALLY INSUFFICIENT. (1) Evidence: While awaiting orders to resume an attack against the enemy, accused, three other soldiers (including deceased) and a civilian were in a room together. Accused displayed a French caliber pistol to the others. "As he began to place it in his hip pocket, it discharged and wounded his hand. The bullet was thereby deflected and entered deceased's abdomen. The pistol was not aimed at deceased, but when accused brought it back 'it just naturally pointed in that direction'. Deceased died. (2) Here it was neither alleged nor proved that an unlawful act was committed." Accused's was properly carrying the weapon. "It is uniformly held that the degree of negligence required to impose criminal liability is higher than that needed to establish negligence upon a mere civil issue * * *. Whether negligence is culpable, that is, of a sort which is a crime and which authorizes penal punishment * * *, is ordinarily a question for a court-martial in its capacity as a fact-finding body; however, it may become a question of law when it is so slight as not to meet the required standard * * *. In the present case, the cause of the discharge is entirely unexplained. No evidence of negligence in any

degree is contained * * * except such as may be inferred from the discharge itself." The finding of guilt was unsupported as a matter of law. (CM ETO 15217 Nolan 15 Sep 45).

Accused was found guilty of a violation of AW 93, in that, with culpable negligence, he killed another soldier by shooting him in the chest with an automatic pistol. HELD: LEGALLY INSUFFICIENT. "The sole question * * * is whether any act or actions of accused constituted culpable negligence. Involuntary manslaughter, the offense charged, can only have occurred if culpable negligence were present or if death resulted from the commission of an unlawful act * * *, and commission of an unlawful act is neither alleged nor proved. Ordinarily, the presence of culpable negligence is a matter for * * * the court-martial as the fact finding body, but it becomes a proper subject of appellate inquiry as a question of law when the negligence is so slight as not to meet the required standard * * *." "'Culpable negligence' is synonomous with 'criminal negligence', and encompasses a reckless and wanton disregard for the safety of life or limb * * *. 'Culpable' is equivalent to criminal, reckless, gross, such negligence as is worthy of punishment and means disregard of consequences which may ensue from an act and indifference to the rights of others * * *. 'Culpable' means criminal, deserving punishment; guilty; blameworthy, or in popular meaning, deserving blame or censure * * *." In the instant case, "there being no direct evidence of negligence, consideration must be given such inferences as may be legitimately drawn from the competent evidence adduced. No inference of even ordinary negligence can be made from the evidence of accused's handling of the weapon. The only evidence which could possibly bear on this point is that immediately prior to the discharge it lay flat on the palm of his open hand, not pointing toward deceased. Indeed, the more legitimate inference is that the discharge was actually caused by deceased's seizing the gun, since it did not go off until he touched it. Accused's negligence, if any, must thus be inferred from his possession and display of a weapon which he did not know to be loaded or cocked, and from the fact that such display was between three and four in the morning to a soldier whom he knew to have been drinking. While this may constitute a lack of foresight or ordinary negligence, which need not here be determined, it has been held: 'Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not constitute 'culpable negligence', but for culpable negligence there muse exist in the mind of accused, at the time of act or omission, a consciousness of probable consequences of act and a wanton disregard of them' * * *. Judged by those tests it becomes apparent that the record * * * does not contain any substantial competent evidence of culpable negligence, nor of any facts from which it can legitimately be inferred, and that the death of deceased falls within the classification of accidental * * *." (CM ETO 15346 Fondren 15 Sep 45).

(50) Manslaughter: Proof 451(50)

Accused was found guilty of a violation of AW 93, in that, he did, by his culpable negligence in handling, while scuffling, a revolver, * * * unlawfully, and wrongfully kill another enlisted man by shooting him in the chest, HELD: LEGALLY SUFFICIENT. (1) Specification: The original specification included the word "feloniously". "At comman law manslaughter is a felony * * *, and an indictment therefor which omits the adverb 'feloniously' is fatally defective * * *. Under Federal Law, manslaughter is a felony (18 USCA, sec. 453-454, 541). However, since Congress defined manslaughter without using the adverb 'feloniously (18 USCA, sec. 453), a manlaughter specification which omits the adverb 'feloniously' is valid if the allegations, in fact, allege felonious conduct * * *. Here the court deleted the adverb. If, in so doing, it meant to acquit accused of felonious conduct, then, in effect, it would have acquitted accused of an unlawful homicide for all unlawful homicides are felonious (18 USCA, sec. 452-454, 541). However, the court's deletion cannot be so construed for the remaining allegations of which accused was found guilty allege a felonious homicide--involuntary manslaughter--and the court imposed the maximum sentence for involuntary manslaughter. The effect of the deletion need not be considered other than to say it did not operate to acquit accused of involuntary manslaughter." (2) Facts: "Accused had on his person a foreign revolver which he knew to be fully loaded and without a safety device. Deceased came upon and engaged in a friendly scuffle with accused. Though deceased initiated the scuffle, the evidence discloses that accused voluntarily participated therein. According to the prosecution testimony, after the scuffle had lasted for a few minutes accused reached for the revolver and 'yanked it out'. Thereupon, without being pointed or aimed, the revolver exploded and deceased sank to his knees. Thus the prosecution's evidence shows that accused chose to inject into their friendly horseplay a revolver which was fully loaded and without a safety device. Scuffling as he was with deceased, accused's control of the revolver was limited. Only a minute or two before, he had been disarmed of a sword. Accused should have known that at any instant forces not of his volition might come into operation. In drawing the revolver accused created a situation charged with danger and of which he was not and could not be the complete master. From the evidence, the court could infer that accused knew the probable consequences of his act but was recklessly indifferent to the results. To draw a fully loaded revolver, without safety, under such circumstances constituted culpable negligence." (Distinguish cases). (CM ETO 15419 Green, 10 Oct 45).

Accused was found guilty of manslaughter, in violation of AW 93. HELD: LEGALLY INSUFFICIENT. On the evening of 17 June 45, accused, deceased and two others were gathered around a bed in accused's barracks "discussing M**'s proposed purchase of a .32 caliber automatic pistol belonging to accused. When the gun was first produced, M** removed the clip and pulled the trigger. Thereafter the others each

handled it, one of them reinserting the clip and putting the pistol on the bed, whence accused picked it up. He was then engaged in undertaking to again remove the clip, and thus render the weapon harmless, when it discharged, killing deceased." "Accused's picking up the pistol and undertaking to remove the clip indicated a concern rather than a disregard of the safety of his companions. What caused the gun to fire is not shown. But it is far more consistent than inconsistent with all the facts which are shown, to conclude that it was not any wanton, gross or reckless negligence on the part of the accused. Moreover, the court's unanimous petition for clemency on the basis, inter alia, that 'the evidence and the circumstances of the case indicate that the killing was effected in a purely accidental manner', is difficult to reconcile with findings of guilty necessarily bottomed upon an inference of culpable negligence on the part of the accused in handling the gun at the time of the pure accident. If his reckless handling of the gun, in wanton disregard of the safety of his companions, under circumstances charging him with knowledge of the probably consequences, had been regarded as the cause of the killing, it might indeed have been appropriately characterized as accidental but not as purely so. The only rational connotation of the language employed--the connotation practically compelled by the court's inclusion therein of the adverb 'purely'--would seem to absolve accused of the type of negligence essential to constitute him guilty of involuntary manslaughter. However, the language in the court's petition for clemency has relevancy only for the purpose of argument; it has no place in the consideration of the question whether there is substantial evidence that accused's acts constituted 'wanton', 'gross' or reckless' negligence." The record is insufficient to sustain the conviction. (CM ETO 16278 Adamcheck 22 Sep 45).

Accused was found guilty of a violation of AW 93 in that, through culpable negligence, he unlawfully killed Werner Gotz by shooting him with a pistol. HELD: LEGALLY INSUFFICIENT. The evidence "showed that at the time and place alleged * * *, the accused shot a boy in the chest or body with a pistol There was evidence that a boy of about the same age with a wound in his chest was received at a hospital in the same town and died almost instantly. There is nothing in the record to identify the boy who was shot and who died as a result of gunshot wounds as Werner Gotz, the person named in the Specification. * * * The identity of the person killed with the person alleged to have been killed must be fully established. While this may be accomplished by proof of circumstances 'found in the correspondence of peculiar physical characteristics, or in clothing or articles found in connection with the remains' * * *, such evidence is entirely absent in this case. Such failure in proof is fatal to prosecution's case. (CM ETO 17663 Taylor, 2 Nov 45).

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(51) Perjury 451(51-58)
(58) Robbery: Proof

(51) Perjury:

Cross References:
450(1) 16005 Jones, et al

Accused was found guilty of a violation of AW 93 in that, "having taken an oath in a trial by general court-martial of Private * * that he would testify truly, did in general court-martial * * * willfully, corruptly, and contrary to such oath testify in substance that he had seen Private * *" under described circumstances, "which testimony was a material matter which he did not then believe to be true." HELD: LEGALLY INSUFFICIENT. The evidence "is clear and undisputed that the accused was under oath and was testifying at the time and place before a general courts-martial as alleged. Likewise, it is undisputed that he testified before the court-martial in the manner alleged. To sustain this conviction there must be sufficient evidence that the testimony set forth in the Specification was false and material to the issue or matter of inquiry. (MCM, 1928, par. 149i, p. 175). Assuming, but not deciding, that his testimony was material, The Board of Review will consider only whether a person may be convicted of perjury solely by evidence of contradictory testimony given by him in the same trial with his assertion during that trial that the testimony, with which he is now charged as having falsely given, was false. The record discloses no other evidence introduced by the prosecution to show that the alleged false testimony was in fact false. Accused in his own trial steadfastly maintained that the testimony * * * was not given falsely and was true. It is obvious that he gave some false testimony at the trial but it must be noted that he is charged with perjury only as to his testimony of about 14 May 1945 which is not contradictory in itself. The Board has carefully considered the problem presented and, is of the opinion that the conviction may not legally be sustained." "In the instant case the prosecution attempted to prove the falsity of the testimony which is the basis of the perjury charge by proof of accused's contradictory testimony as a witness for the defense in the samecase where in the alleged perjured testimony was given. With the introduction of such proof, it stopped. Under the settled principle of law * * *, the proof was wholly inadequate and will not support the findings of guilty." (CM ETO 16044 Jamerson 22 Oct 45).

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(58) Robbery: Proof:

Not Digested:

12056	Reyes	14128	Brandon, et al
12120	Campbell	14764	Collins, et al
12650	Combs, et al (German victim)	15252	Lambert

451(58-64) (58) Robbery: Proof:
(64) Sodomy

Cross References:
450(4) 9301 Flackman (German; force)
452(19a)15851 Wolfe (Wrongfully charged under AW 94)
450(4) 15393 Dale, et al

"Specification, Charge 1, alleges that accused robbed G***, while specification, Charge II, alleges that accused committed an assault upon G** by pointing a pistol at him with intent to wrongfully take and carry away certain items of wearing apparel. The record of trial disclosed that the assault charged * * * constituted the force involved in the robbery charged * * *, and it should not have been separately pleaded (Dig. Op. JAG 1912-40, par. 428(5), pp. 294-295; MCM, 1928, par. 27, p. 17). However, as the sentence is sustained by the finding of guilty of robbery, the error is not prejudicial." (1st Ind; CM ETO 15941 Fuller 18 Aug 45).

Among other things, accused were found guilty of robbing certain Germans of described property, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Value: It was obvious that the stolen property had some value to its owners. "Proof of pecuniary value was unnecessary * * *." (2) Permission to Steal: "The fact, if it were a fact, that the accused's company commanderinformed /accused/ that it was all right to steal the property of German subjects did not constitute a defense. While evidence of such fact might explain their conduct it neither excused nor exculpated them from the crime of robbery." (CM ETO 13369 McMillon, et al 11 Aug 45).

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(64) Sodomy:

Not Digested:

11589	Sokolowski	14066	Fishman, Jr.
11590	Nelson	14128	Brandon, et al
12056	Reyes	16640	Willet, et al
14032	Andrews, et al	17275	Salmon

Cross References:
399 17279 Castillo

Among other things, accused was found guilty of sodomy per os in violation of AW 93. HELD: LEGALLY SUFFICIENT. "The question whether the perverted act was with consent of the woman is immaterial. Sodomy per os is a crime under" AW 93. (CM ETO 8837 Wilson 5 Jun 45).

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(7) Proof:

Cross References: 454(19) 11758 Vollmer (salary claim; voucher)

Accused officer was found guilty of violation of AW 94 and AW 95 for the same presentation of a false claim for $249.70 July pay, despite the fact that he had already been paid. HELD: LEGALLY SUFFICIENT. (1) The evidence (detailed) supported the findings of guilt. Although accused claimed he had never received his pay at the time he made the claim, the court could have believed otherwise. He had admittedly signed a receipt therefor. "While a receipt is not conclusive, as to the one who signs, it is very strong evidence and difficult to overcome. "A fraud of this nature practiced upon the government by one in military service constitutes a violation of AW 94 * * *." (2) AW 95: Likewise, accused's conduct violates AW 95. No multiplicity resulted. "It was entirely proper for the court to consider the same acts under this charge as it did under the charge of presenting a false claim under AW 94. 'This article includes acts made punishable by any other AW, provided such acts amount to conduct unbecoming an officer and a gentleman * * *'. While the offense is ordinarily charged as violative of AW 94 (punishable as the court sees fit), it is also violative of AW 95 (punishable by dismissal only) since it is a crime involving moral turpitude and amounts to conduct unbecoming an officer and gentleman * * *." (CM ETO 12451 Kaplan 11 Aug 45).

Among other things, accused officer was found guilty of described false pay claims in violation of AW 94 and AW 96. HELD: LEGALLY SUFFICIENT. (1) Multiplicity: "The accused was charged in four specifications with presenting false claims against the U. S. and in four other specifications with fraudulently obtaining money on the same claims. While all of the eight offenses were proven, it appears that the provision against multiplicity of charges in the MCM, 1928, par. 27, p. 17, may have been disregarded. Any irregularity resulting * * * is not prejudicial since it could only affect the quantity of the sentence which, in this case, is less than the legal maximum for the offense of desertion", of which accused was also found guilty," an offense to which these multiple charges do not relate * * *." (2) Cross-examination of accused covered too great a scope, i.e. covered all the offenses, despite the fact that he testified on direct examination only re the desertion charged against him. No prejudice resulted, however, because "of the compelling nature of the competent evidence otherwise to support the findings beyond any reasonable doubt." (CM ETO 15154 Sohn 29 Aug 45).

452(7-9-18) (7) False Claims Against
(9) Larceny; Proof
(18) Misappropriation

Accused officer was found guilty of an AWOL in violation of AW 61, and of violations of AW 94 resulting from a series of collections of pay in excess of the amounts then due. HELD: LEGALLY SUFFICIENT. False Pay Claims: "The findings now under review are sustained only because of the accused's admission on the stand that he was not entitled to receive the money for which he presented claims during February. Army Regulations of which the court could and did take judicial notice support this admission (AR 35-1420, par. 3a; AR 35-1360, par. 7a). From them it may properly be deduced that a First Lieutenant in an AWOL status, if not entitled to pay on 1 February 1945, would not be entitled to any pay during the remainder of the month as long as he continued in an AWOL status * * *." (CM ETO 15749 Seder 1 Sep 45).

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(9) Larceny; Proof in General:

Not Digested:
10898 Williams, et al (gas)
11233 Melis
15868 Connolly (Government bicycle)

Cross References: 454(18a) 11936 Tharpe (Black market; fines)
454(18a) 11075 Chesak (Unserviceable property)
416(9) 16104 Blanchette (jeep)

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(18) Misappropriation; Proof:

Not Digested:
9272 Hayes, et al (Govt vehicle)
9292 Chiles, et al (misapprop. and misapply truck; taken from convoy; accused's burden to go forward with evidence)
9470 Safford (govt vehicle)
9541 Onofreo, et al (misapply Govt vehicle)
11775 Porter (truck)
11830 Green, Jr. et al
11838 Austin, Jr. (missapply truck. Deviate from regular route to rape a girl)
13154 Furman, et al
15154 Sohn (vehicle)
15851 Wolfe

Cross References: 454(18a) See in General; black market.
454(65a) 9986 Goldberg
416(9) 10842 Ramey (misapply jeep; fatal variance)

(18) Misappropriation: Proof 452(18)

Cross References: 454(21) (truck) See in General 13575 Lamb et al

Accused officer was found guilty of the larceny of one case of cigarettes, value about $25.00, the property of the U. S., in violation of AW 93; and of the misappropriation of the same property, in violation of AW 94. HELD: LEGALLY SUFFICIENT. (1) Entrapment: "inasmuch as there is substantial evidence that the felonious design originated in the mind of accused and that Lieutenant F** simply facilitated the theft of the cigarettes," the implied finding that there was no entrapment will not be disturbed. (2) Similar Fact Evidence: "Evidence was introduced over accused's objection as to his planned black market dealings in lipstick. Ordinarily so-called similar fact evidence is inadmissible, except in those cases where original intent, motive, or guilty knowledge is an important element * * *. Accused raised the defense of entrapment. In effect, he claimed that he had a mind devoid of any intent to profit in the black market until he was corrupted by the agents of the government. While the act of selling privately owned property in the 'black markets' of European cities is not related to the crime of stealing or misappropriating property of the U.S., it is apparent in this case that the ultimate purpose of accused was to sell the stolen property in the 'black market' of Antwerp. Evidence of his potential illicit dealings in other commodities therefore had a direct relevancy in determining the verity of his defense that he was entrapped into stealing the cigarettes for 'black market' sales. The questioned evidence bore directly upon the issue as to whether he was innocent of the design to deal in the 'black market' and this design in turn related itself to the ultimate question whether he or Lieutenant F** originated the scheme. (3) Cross-Examination: On cross-examination of Lieutenant F**, objection to defense's question, "Did you ever do business with him /accused/", should not have been sustained. "It was a proper question to test the credibility of the witness and bore on the question whether he originated the idea of the theft of the cigarettes." However, no AW 37 prejudice resulted because accused testified at length in this regard (detail). (4) Ownership in the U. S. of the cigarettes was admitted as well as established. (4) Multiplicity: "The charging of larceny under AW 93 and misappropriation under AW 94 of the same property is an unreasonable multiplication of charges * * *, but since the sentence was not increased thereby no prejudice resulted to accused * * *." (CM ETO 13406 Weiskopf 17 Jul 45).

The three accused herein were found guilty of desertion in violation of AW 58, and of the misapplication of a government truck in violation of AW 94. HELD: LEGALLY INSUFFICIENT IN PART. (1) The desertions were adequately established. (2) Misapply Truck: The date and place of the alleged misapplication of the truck "were the same as those which marked the initial absence of each accused. And on that

date and at that place such a truck * * * was missing from the area of the company to which accused belonged and from which they took off. The absence of this truck was unaccounted for. It would have been misapplied to an unauthorized use, otherwise it would not have been 'missing'. Accused N** confessed that he took the truck. He was properly found guilty of misapplication * * *. The corpus delicti, the misapplication of the truck, was sufficiently established to support the confession of N**. * * * The situation is different with respect to accused M** and P**. They did not admit the taking or misapplication * * *. Moreover, N** in his confession definitely implicated these two in the taking. This confession was admitted in evidence and the law member failed to instruct the court that this admission could 'not be considered as evidence against the others'. This was error * * *. This error was prejudicial * * *, since the remaining competent evidence as to their guilt of this offense cannot be said to have been compelling * * *.". The evidence therefore failed to show the guilt of these two accused of the charged AW 94 offense. (CM ETO 15272 Nichols, et al 20 Aug 45).

"The sentence of CHL for five years is supported equally by the finding of guilty of indecent assault * * * and by that of wrongfully taking and using a government vehicle, in the latter case by analogy either to the offense described in the District of Columbia 'joyriding statute' * * * or to misapplication in violation of AW 94. Neither offense, however, justifies penitentiary confinement, which is authorized, not on any basis of analogy as in the matter of maximum punishments, but only for offenses specifically enumerated in AW 42 or falling within the category described therein as 'so punishable * * * by some statute of the U. S. of general application within the U. S. * * * or by the law of the District of Columbia' *.* *. Indecent assault is not such an offense * * *. The wrongful taking and using of a government vehicle may be, provided that it is alleged and proved, among other things, that the vehicle taken was 'furnished or intended for the military service' of the U.S. (sec 36, Fed Crim C, 18 USCA 87) or provided that the taking was of a character proscribed by sec 22-2204 (6:62) District of Columbia Code * * *. In the instant case, it is not alleged that the vehicle was furnished or intended for the military service of the U. S. nor is it shown that the taking was effected under the circumstances or from the kind of place contemplated by the District of Columbia statute. Hence the designation of the U.S. Penitentiary as the place of confinement was unauthorized. (CM ETO 14925 Bullock 2 Aug 45).

(19a) Robbery 452(19a-21)
(21) Wrongful Sale or Disposition

Among other things, accused was found guilty of the robbery of government property from another, in violation of AW 94. HELD: LEGALLY SUFFICIENT. "The evidence is undisputed that accused took the army pistol as alleged * * *. The Specification alleges and the proof clearly shows the offense of robbery * * *, which is not an offense denounced by AW 94, but by AW 93. However, the error in laying the charge under the wrong AW did not injuriously affect accused's substantial rights, and the finding will be modified to show a violation of AW 93 * * *." (CM ETO 15851 Wolfe, 21 Sep 45).

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(21) Wrongful Sale or Disposition; Proof in General:

Not Digested:
8556 Garrison (gasoline; charged under AW 96; reduced to AW 94 lesser)
9406 Sullivan (direct charge; also, a lesser to AW 96)
10898 Williams, et al (charged under AW 96; reduced to AW 94 lesser)
11830 Green, Jr. et al
13276 Clower, et al (gasoline; charged under AW 96; reduced to AW 94 lesser)
15666 Wilson (gasoline; charged under AW 96; reduced to AW 94 lesser)
15868 Connolly (govt bicycle)
17664 Wianick (Penicillin)

Cross References:
416(9) 9978 Green (tires and gasoline; corpus delicti)
454(18a) 9779 Stanley (gasoline and jerricans)
454(18a)11936 Thorne, Jr. (black market; fines)
454(18a) 9288 Mills (black market)
454(18a)12203 Bruce (black market)
454(18a)11076 Wade (black market gasoline)
454(18a)11075 Chesak black market gasoline)
453(11) 10027 Wetherford (apply to own use)
442 14408 Griffin, et al, (charged under AW 84; penitentiary confinement)
454(18a) 9643 Haymer (AW 96 specification)
454(18a)13402 Green (AW 96; AW 83)
454(18a)10864 Smith (AW 96 Black market)
454(18a)13155 Busby, et al (AW 96 black market)
454(18a)15197 Blackburn (AW 96 black market)

"The maximum punishment for the wrongful disposition of property of the U.S. furnished and intended for the military service not in excess of $20.00 in value is DD, TF and confinement at hard laborr for six months (MCM 1928, par 104c, p 100) and the included offense of attempting to make such disposition is subject to the same maximum limits of punishment (MCM, 1928, par 104c, p 96) CM 212056,

Smith, 10 BR 199, 209(1939); CM 218818, Artibee and Barrow 12 BR 153, 155 (1941)." (CM ETO 10898 Williams, et al 2 Jul 45).

Accused officer was found guilty of a violation of AW 94, in that he wrongfully and knowingly sold to a civilian two tires, property of the U. S., furnished and intended for the military service thereof, valued at about $58.00. HELD: LEGALLY SUFFICIENT. (1) Ownership: The only substantial question herein is whether the evidence supported the finding of ownership. It "showed that the two tires involved were 'pretty new' large tires with civilian tread and marked with the words 'military' and 'Firestone' in English. Captain S***, who was charged with the duty of keeping 15 to 20 trucks running in accused's regiment, testified that all the tires he had seen with civilian tread that had been purchased by the military were marked 'military'. In addition, accused in his written confession stated that he had received the sum of 10,000 francs for two tires 900 x 20 property of the U. S. government', although at the trial he testified that he had never delivered the tires and that he had two 30 x 20 tires which he had taken from a piece of German salvage equipment." The court was "warranted in inferring that the tires * * * were 'property of the U. S., furnished and intended for the military service thereof' * * *." (CM ETO 11497 Boyd 22 Jun 45).

Accused Lamb, Crump and Robins were found guilty of the larceny of government gasoline and the misapplication of a government truck on about 28 January 1945, in violation of AW 94. Accused Robins was found guilty of an AWOL in violation of AW 61. He was also found guilty of two separate AW 94 specifications (a) of stealing government gasoline and containers on about 23 January 1945, and of similar thefts on about 25 January. Accused Williams was found guilty of AW 94 specifications (a) of stealing government gasoline and containers on about 21 December 1944, and (b) of similar thefts on about 28 January 1945. HELD: LEGALLY INSUFFICIENT FOR THE SEPARATE AW 94 SPECIFICATIONS AGAINST ROBINS AND WILLIAMS. (1) The Joint AW 94 Offense was established, i.e. that the three named accused, "in the operation of a joint illegal enterprise stole the gasoline and containers and wrongfully misapplied to their own use and benefit the government truck * * *. The misuse of the truck was within the scope of the enterprise." The AWOL charged against Robins was also established. (2) Robins; AW 94 Separate Specifications: This accused "in his voluntary extra-judicial statement admitted his procurement of 31 containers and 1643 gallons of gasoline on 23 January 45 and the same number of containers and same amount of gasoline on 25 January by use of false and fraudulent requisitions. However, the corpus delicti was insufficiently established. Omitting the confession, "the requisitions stand unquestioned and unimpeached", but "there is not even a suggestion * * * that the transactions were other than normal * * *. There is not even

a suspicious circumstance or inference * * *. True, there is evidence that Robins was not authorized to transport gasoline or assigned a vehicle for the purpose of obtaining gasoline, but such evidence is of no value * * * because there is no proof" that accused was in fact the person who signed other names to described delivery sheets. It is impossible herein "to discover * * * or infer * * * the slightest suggestion of misfeasance or malfeasance." This conviction, based solely on a confession which should have been excluded, was improper. (3) Williams: AW 94 Separate Specifications: The alleged Williams offenses were completely independent of the offenses charged against the other accused herein. "The fact that Williams was charged with and was tried for crimes independent of of those committed by the Lamb-Robins combination and by Robins operating alone is a highly important factor in determining the legal sufficiency of the record of trial with respect to Williams". (a) First Specification: Williams' conviction hereon rested basically upon the testimony of an accomplice, a self-admitted forger and an utterer of fraudulent requisitions. (See MCM, 1928, par. 124a, p 132 and 9 A. Jur., sec. 72, p. 276 for the caution with which such testimony must be received.) The evidence was weak and disconnected; was of suspicious circumstances In CM ETO 6397 Butler, it was stated "Although it is generally recognized that a conviction may be supported by circumstantial evidence alone * * *, 'circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt' * * *. A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence * * ." "The only valid substantial evidence tending to establish that Williams actually received the gasoline upon the basis of the fraudulent requisition is that the requisition was found in the files of the battalion commander sometime subsequent to 21 December. This is a suspicious circumstance but it is certainly not sufficient to exclude every reasonable hypothesis except the one of William's guilt * * *." The record was insufficient to support the finding of guilt hereunder. (b) Second Specification: The finding of guilt of larceny of gasoline and containers herein depended "upon circumstantial evidence. The prosecution based its case primarily on the forged requisition and the issue sheet of POL Dump * * * of 28 January 1945, supplemented by evidence that the signature of 'J. Williams' thereon was that of accused. * * * It is important to note that the issue sheet does not disclose that gasoline or any other article was delivered to 'J. Williams.'". The issue sheet of the issuing dump failed to show the alleged items to have been delivered. (Distinguish CM ETO 12793 Crump, et al). There was no confession in the instant case). "There is no direct evidence that /accused/ did present the requisition at the dump or that he secured delivery of the gasoline." The evidence was too weak (detail) to support an inference of guilt. (4) Joint and Common Trial: "No military exigency or necessity is revealed by the record * * * which compelled the consolidation for trial of the charges against Williams with those against" the others. "The Williams' charges were

unconnected * * *. The practice followed is a dangerous one and the present case is an illustration of the prejudice which may result. * * * The evidence against Williams * * * was without doubt colored * * * by the highly inculpatory evidence against the other accused." Fundamental federal principles are applicable (except as modified). (CM ETO 13575 Lamb, et al 20 Aug 45).

Among other things, accused was found guilty of (a) misappropriating and selling 8 cases of roast beef, property of the U.S., and (b) attempting to utter a counterfeit $500 American Green Seal Note. HELD: LEGALLY INSUFFICIENT IN PART. (1) AW 94; Misappropriation and Sale: The specification herein alleged both the misappropriation and sale of the roast beef. The ninth paragraph of AW 94 is relevant. It "denounces two separate and distinct offenses: (a) a misappropriation and (b) a wrongful sale * * *. The specification is obviously duplicitous * * *." However, "although it was charged that accused did 'knowingly and willfully misappropriate and sell', the gravamen of the offense alleged was the unlawful transaction. The misappropriation and the sale constituted substantially a single offense. While the pleading is not to be commended as a model or as a precedent, it is not open to the objection that it did not inform accused of the nature of the offense which he was required to answer. Moreover, the failure of the defense to object to the specification may be regarded as a waiver of any defect." Also, "the case * * * was tried upon the theory that /accused/ was guilty of an unlawful sale." Accused's rights were not prejudiced. The evidence supported the finding of his guilt on this issue. (Winthrop, Reprint, 1920, pp. 143, 144; 278 Fed. 849, 853). (2) Attempt to Utter Counterfeit: Fed Crim C. sec 151 (18 USCA 265) denounces as crimes: "(a) An attempt to utter, with intent to defraud, a counterfeit obligation or security of the United States, and (b) the possession of such obligation and security with intent to defraud. They are separate and distinct offenses, not one continuous offense." Sec 163 of that code (18 USCA 277) is a companion stat., which provides that "'whoever shall pass, utter, publish, or sell, or attempt to pass, utter, publish or sell, * * * or who shall have in his possession any * * * counterfeit coin or bars, knowing the same to be * * * counterfeited with intent to defraud * * * shall be fined'". "The specification here considered charged that accused did 'with intent to defraud willfully, unlawfully and feloniously attempt to utter as true and genuine a certain counterfeit American Green Seal Note'. It is obvious that he was not charged with the fraudulent possession of the counterfeit note." Accused's extrajudicial statement showed that he "attempted to utter this counterfeit note." However, as corpus delicti, the prosecution "proved merely that accused was in possession of the counterfeit note at the time he was taken into custody by the military police. At that point the evidence stopped. There is not even a scintilla of evidence that someone attempted to utter the note. The evidence before the court and accused's statement would have

sustained a conviction of the charge of possession of a counterfeit note with intent to defraud, and the case against accused should have been so laid. However, when consideration is given to the fact that Congress specifically and particularly denounced as a separate crime the possession of a counterfeit obligation and security of the U. S. with intent to defraud, and to the essential differences in the elements of the two crimes, it is manifest that proof of that offense cannot form the corpus delicti of the separate crime of attempting to utter such obligations and securities. The prosecution, therefore, failed to prove the corpus delicti of the offense * * *." The confession was inadmissible. Proof was insufficient to show accused's guilt of this specification. (CM ETO 13707 Housel 28 Jul 45).

Accused was found guilty of various black market offenses, in violation of AW 94. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) Confession: On 16 May 1945, accused was in the custody of the military police for the instant offenses. Both on that date and on 22 May, "he was subjected to inquisitorial treatment * * *. He was incarcerated in a Belgian jail for three or four days between the two interviews. During the course of the second interview two written statements were prepared for his signature but were never signed by him. They were destroyed by the police and no attempt was made to present their substance at the trial." Thereafter, on 23 May, accused was returned to his company and interviewed by a company officer who explained AW 24 to him. Accused then signed a written statement prepared at this latter time, which was subsequently admitted in evidence over objection as a confession. For the purposes of this opinion, it is assumed that the earlier destroyed confession was involuntary. However, the evidence shows that the final confession was voluntary. In determining whether due process under the 5th Amendment was violated, Lyons v. Oklahoma, Sup. Ct. Rep. 1208, 5 June 1944 (14th Amendment) is to be followed, and CM ETO 1486 MacDonald, et al. III Bull. JAG 227 (1944) distinguished. "The facts of the instant case place it well within the ambit of those cases where the legal duty is upon the triers of fact (in this instance, the court) to determine whether the second confession was given under continuing duress, coercion or compulsion visited upon the accused which produced an invalid first confession and that the finding of the triers of fact should be accepted as final upon judicial appellate review. There are no conceded facts in the instant case which are irreconcilable with accused's mental freedom when he gave the confession admitted in evidence." (CM ETO 15843 Dickerson Jr., 24 Aug 45).

Accused officer was found guilty of a violation of AW 94, in that he wrongfully disposed of a flying jacket, property of the U. S., by mailing the same to an addressee in New York through the U. S. mail; of a violation of AW 95, in that he had made a false official statement

AW 95, 453(2a-4a-5aa-9)

(21) Wrongful Sale or Disposition
(2a) Assaults
(4a) Bigamy
(5aa) Bribery
(9) Drinking With or in Presence of Enlisted Men:

to an officer when he stated that said flying jacket had been returned; and of a violation of AW 96, in that he mailed intoxicating liquors (champagne, benedictine, cognac) to an addressee in the U. S. in violation of Section 340, Title 18, USC. HELD: LEGALLY SUFFICIENT. (CM ETO 16555 Kneeter 24 Sep 45).

(2a) Assaults:

Not Digested:
17167 Dyal (cut inferior with a knife)

Cross References: 451(2) 17056 Boger (indecent assault on girl)
453(6a3) 12759 Traynor (AW 96 as lesser; push civilian)

(4a) Bigamy:

Not digested:
9988 Stout (Identity; wife; wrong middle initial; name)

(5aa) Bribery:

Cross References: 454(196) 15794 Ruf (Also under AW 96)

Accused officer was found guilty of a violation of AW 95. HELD: LEGALLY SUFFICIENT. "The wrongful and gratuitous acceptance of money for personal profit from a 17-year old youth, a displaced person, who had been committed to the care and custody of accused in his capacity as a Military Government officer, is clearly repugnant to basic concepts of justice, morality and honor as to constitute a plain case of conduct unbecoming an officer and a gentleman * * *." (CM ETO 17914 Hardwick 27 Oct 45).

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(9) Drinking with or in Presence of Enlisted Men:

Not Digested: 10719 Patton, Jr.

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(10) Drunk and Disorderly: Proof:

Not Digested:
10759 Houle
11271 O'Hara (in uniform)
15062 Finigan (in uniform)
16307 Bryant (possible inconsistency with offense requiring intent)
16835 Snyder, Jr.

Cross References: 453(11) (See in General)
451(9) 12480 Buck (with AW 93 assault, intent)
453(23a3) 12759 Traynor (guilty of lesser AW 96 offense)

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(11) Drunk in Uniform: Proof:

Accused officer was found guilty of being found drunk on duty in violation of AW 85, of knowingly and willfully applying to his own use and benefit one quart of U. S. whiskey, in violation of AW 94; of being drunk in uniform in violation of AW 95; and of violations of AW 95, to wit: drinking with EM, and carrying a weapon in violation of Cir 35, ETO 194-. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) Allegations: Under the allegations, described offenses occurred on or about 15 September 1944. "It was permissible to show they occurred about the second week of September 1944." As to the AW 95 specification, "while it does not affirmatively appear that accused was in uniform, the circumstances support the court's inference and finding that accused was, in fact, in uniform. Though Specification 2 of Charge II failed to allege the place of the offense, defense did not object thereto until prosecution had rested. Under the circumstances this irregularity" was not material. (3) Judicial notice was properly taken of Cir. 35, ETO, 1944, of which accused was charged with notice. (CM ETO 10027 Wetherford 19 Jul 45).

Accused officer was found guilty of rape of a German girl in violation of AW 92, and of being drunk and disorderly while in uniform in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) The rape was adequately established. (2) Drunk and Disorderly; AW 95: There is little evidence that accused B** "was drunk in uniform, but such testimony as was offered stands entirely unrefuted. Frau S** testified that he was 'very drunk', and even without further explanation, in the absence of evidence to the contrary, that justified a finding that he was drunk (MCM, 1928, par. 112b, p.111). The general requisite to cause drunkenness to be a sufficient ground for conviction under AW 95

is that it be of a gross character (of which there is no evidence here). Winthrop, however, deemed it a sufficient alternative when the drunkenness is 'characterized by some peculiarly shameful conduct' (Winthrop's Military Law and Precedents, Reprint 1920, p. 717). It is difficult to picture more shameful conduct than that of the accused who stands convicted of rape, and most of whose disorderly conduct took place in the presence of military inferiors. It is prescribed that a specification must allege all of the elements of an offense (MCM 1928, par. 29a, p. 18)." The AW 95 charge herein merely alleged accused to have been "drunk and disorderly while in uniform", and was deficient in this respect. "However, findings of guilty to the same charge have been upheld on similar specifications * * *, and in the absence of a showing that accused has been misled by a defect in a specification or his substantial rights otherwise prejudiced thereby, no finding or sentence need be disapproved on this ground * * *. There is no evidence as to his clothing, but the wearing of a uniform is a legitimate inference from the presence of gold bars on his shoulders * * * and the fact that he was recognized as an American officer * * *. His conduct was disorderly to a high degree and was clearly unbecoming an officer and a gentleman." (CM ETO 14596 Peterson, et al 5 Sep 45).

(12a) Extortionate Sales to Prisoners:

Accused prisoner interrogation officer was found guilty of violations of AW 95, in that, in conjunction with others, he wrongfully, unlawfully and knowingly aided, abetted, conducted, supervised, sanctioned, condoned, and engaged in, for personal gain and profit, commercial and financial trafficking in cigarettes, cigars, candy, gum, matches and other supplies, and in money exchange transactions, with various German prisoners of war in pursuance of which said supplies were sold to and said money exchange transactions made with German prisoners of war at unreasonable, unconscionable and disproportionate prices. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) The Offense: "The conduct of accused was a military offense. He abused his official position. He had charge of the interrogation of prisoners of war. This brought him and his team inside the stockade, in direct touch with the prisoners. While there, his men sold merchandise and had financial dealings with the prisoners, with the permission of accused and with profit to him and his men. It is obvious that such transactions could easily impair the proper relationships and disciplinary requirements involved in such a situation. * * * In addition, it requires little reflection to decide that this practice, by American standards, was discreditable to the service." (CM ETO 10361 Schinhan 3 Aug 45).

(13a) Failure to prevent EM from Assaulting a Girl
(18) False Official Certificates or Statements 453(13a
(19b) Fraternization 18-1
(20a) Immoral Conduct 20a-
(26a2) Unlawful Discharge of Firearms

(13a) Failure to Prevent EM from Assaulting a Girl:

Cross References: 451(2) 17056 Boser

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(18) False Official Certificates or Statements:

Not Digested: 10364 Evans

Cross References: 451(51) 16254 Stordeur
452(21) 16555 Kneeter (re mailing U. S. property)
451(17) 11546 Clarke (false inventory)
452(7) 12451 Kaplan (pay claim; AW 94-95; multiplicity)

(19b) Fraternization:

Cross References: 454(56b) 10419 Blankenship (fraternization; lesser of AW 96)

(20a) Immoral Conduct:

Accused officer was found guilty of a violation of AW 95, in that, on or about 30 April 1945, he wrongfully, and in the presence of enlisted men, caused a German girl to remove her clothing. He was dismissed. HELD: LEGALLY SUFFICIENT. "The allegations * * * were competently proved. Regardless of accused's resentment of German atrocities, the conduct shown exhibits individual standards of decency and decorum falling below the limit of tolerance authoritatively prescribed for officers and gentlemen (MCM, 1928, par. 151, p. 186). (CM ETO 16888 Thompson, 28 Sep 45).

(26a2) Unlawful Discharge of Firearms:

Cross References: 453(26a3) 12759 Traynor (lesser under AW 96)

453(26a3-26aa-26aaa) (26a3) Unlawful Release of Civilian Prisoner
(26aa) Unconscionable Profits
(26aaa) Usury

(26a3) Unlawful Release of Civilian Prisoner:

Accused officer was found guilty of the following violations of AW 95: (a) drunk in uniform in a public place; (b) drunk in camp; (c) pushing a civilian with a loaded pistol in a public place; (d) wrongfully and recklessly discharging his pistol in a public place, without regard for those present; and (e) wrongfully and without proper authority effecting the release of a civilian prisoner, then under arrest in the custody of local Belgian police. The confirming authority reduced the two drunkenness specifications to guilt under AW 96. HELD: LEGALLY INSUFFICIENT IN PART. (1) The drunkenness of accused constituted violations of AW 96. (2) Reckless Discharge of Firearm; and Pushing Civilian with Pistol: "The defense showed * * * that these offenses were committed during the last German counter-offensive and after instructions had been issued regarding the necessity for checking identification cards of persons in the vicinity by reason of the presence of German parachutists nearby. He is shown to have acted at the request of the cafe owner. Under such circumstances, it can hardly be said that accused's conduct was such as offends so seriously against morality or decorum as to expose him to social disgrace or that his actions were of such a nature as to bring dishonor or disrepute upon the military service, as condemned by AW 95." Only the lesser offenses in violation of AW 96 were proved. (3) Release of Civilian Prisoner: The record fails to show that accused had any authority to effect the release of civilian prisoners. Nor did he have any related duties. "However, by virtue of his position as an officer in the U.S. Army, and acting only upon the request of the wife of the prisoner, he exercised an authority which he did not possess and effected the release of the prisoner. Inherent in his conduct was misrepresentation, imposition upon the Belgian prison officials under color of his American uniform which resulted in the unauthorized release of a civilian prisoner. * * * His conviction of this offense alone is sufficient to support the sentence of dismissal." (CM ETO 12759 Traynor 18 Aug 45).

(26aa) Unconscionable Profits:

Cross References: 454(54a) 12453 Marshall

(26aaa) Usury:

Cross References: 454(54a) 12453 Marshall

(5a) Army Regulations Violate:

Cross References: 454(49) 10718 Cabbell (re deceased inventory)

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(7) Assault and Battery Proof:

Not Digested:

8837 Wilson (hold woman around neck)
10360 Gailey (Officer throws sleeping EM out of bed)
11845 Stark (as lesser to AW 64 "lift" weapon and AW 93 assault)
14174 Hitchcock (place hands on girl's neck; single assault)
15252 Lambert
16581 Atencio (place girl's hands on his penis)
16018 Augustine (threaten with carbine)
16891 Marrs, Jr. (battery, assaults sentinal by pointing gun at him)

Cross References:

As lesser offenses to:

451(6) 11729 Held (assault to do bodily harm)
451(6) 17707 Hawkins (assault to do bodily harm)

Indecent Liberties; Minors etc.,
451(6) 11729 Held
454(38) 17339 Gunning (Multiplicity)
454(6) 17586 Skinner (lesser to AW 93; insufficient finding of only grabbing girl)

Accused was found guilty of an indecent assault in violation of AW 96. HELD: LEGALLY SUFFICIENT. "The specification alleged and the proof shows a veritable assault and battery accompanied by aggravating indecencies upon a female of ten years of age, and confinement at hard labor for not more than five years is authorized thereof (CM ETO 4028 Moreno) (CM ETO 12711 Olley 15 Jun 45)

Among other things, accused was found guilty of an assault on an 11 year old German girl, in violation of AW 96. HELD: LEGALLY SUFFICIENT. "It is an assault and battery to fondle a woman against her will ***. The accused's unwarranted and unwanted conduct of inserting his finger into the child's privates was clearly an assault" in violation of AW 96. (CM ETO 10445, Keffer 20 Aug 45)

454 (8. 13) (8) Assault with dangerous weapon
(13) Attempts in general

(8) Assault With Dangerous Weapon:

Not Digested:
15062 Finigan (threat to shoot MPs)
15091 Gallahan (point gun)

Cross References:
454(45a) 17483 Murdock (assault M.P. officer)

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(13) Attempts in General:

Not Digested:
9681 Bennett (Attempt to escape from confinement)
9272 Hayes (Attempt to escape from confinement)
12381 Porter (Attempt to dispose of gasoline; lesser)

Cross References:

416(9)	9976	Green (attempted larceny, government rations)
454(54a)	12453	Marshall (mere words as "attempt")
454(96)	14632	Lang (attempt to utter forged instrument; as lesser)
452(21)	13707	Heusel (attempt to utter counterfeit)
399	17279	Castillo (sodomy; pen.conf.)
399	16554	Gipson (rape, no pen.conf.for)
416(9)	16104	Blanchette (to sell government vehicle)
450(5)	10446	Ward (fraternize, punishment)
454(18a)	15197	Blackburn, (black market)

Among other things, accused was found guilty of an attempt to escape, in violation of AW 96. HELD: LEGALLY SUFFICIENT. Defense Counsel moved for a finding of not guilty, "upon the ground that the evidence showed that even if accused's actions had not been interrupted and he had escaped from his cell, he still could not have escaped from his confinement in the stockade because of the locked door and armed guards remaining between him and freedom, and he was therefore not guilty of an attempt.*** It does not appear from the evidence that accused knew about, or could see the locked door and guard or guards, and for aught that appears he may have had means of completing his escape which was unknown to the jailer. Speculation as to the probabilities of his final escape is unnecessary, since it is only required that there be apparent to him a mere possibility of escape. The determination of his guilt is made solely from the condition of his mind and his conduct at the time *** It was not inherently impossible for him to escape.***; and conceding that, for some reason unknown to accused, it was actually impossible for him to have escaped from the stockade, such fact would not preclude the commission by him of the offense ***. The act of accused in physically damaging a portion of the cell in which he was lawfully confined with intent to escape therefrom

(13) Attempts in General 454(13,18,18a)
(13) Bigamy
(18a) Black Market

is of such a character as to constitute a substantial infringement of the law prohibiting such escape, and sufficiently establishes the corpus delicti of the crime alleged. The findings of guilty are supported by the evidence. "(CM ETO 15157 Wooten 7 Aug 45)

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(13) Bigamy:

Cross References: 454(4a) As AW 95 offense;

(18a) Black Market:

Not Digested

14575 Dugger (gasoline; reduced to AW 94 by R/A)
14683 Wilson Jr. et al (conspiracy; other charges)
6556 Garrison (reduced to AW 94 offense; gasoline)
9406 Sullivan (reduced to AW 94 offense; Gasoline and jerricans)
10398 Williams et al (reduced to AW 94 offense)
12381 Porter (attempt to dispose of gasoline)
13276 Clower et al (reduced to AW 94 offense; gasoline)
15666 Wilson (reduced to AW 94 offense; gasoline)

Cross References;
416(9) 9973 Green (oxygen)
453(18)765 Clavos (post exchange supplies)

Accused were found guilty of violations of AW 96, in that they wrongfully and unlawfully converted to their own used and sold described cartons of cigarettes valued over $50, property of the British Government, in Italy. The reviewing authority modified the findings, to show that the ownership of the cigarettes was unknown. HELD: LEGALLY INSUFFICIENT. (1) Conversion; Fatal Variance: The first specification against Kenny charged the conversion of the cigarettes to his own use. "In view of the absence of any evidence of trespass, it was proper not to charge larceny under AW 93. In unlawful conversion it is immaterial whether the converter acquired possession * * * by trespass or otherwise, trespass not being an essential element of proof.* * *"However, the finding of guilt as modified must be declared to be insufficiently supported by the record. The reviewing authority "effected a fatal variance when it changed the alleged ownership of the cigarettes from the"British Government" as charged to "the ownership of which is unknown"," and thus found accused guilty of an entirely separate and

distinct offense from that charged." (2) Improper Sale; Fatal Variance: The specification against each accused describing their joint wrongful and improper sale of cigarettes, also alleged that the property belonged to the British Government. "Where such conduct is charged involving property belonging to the U.S. and furnished and intended for the military service thereof its ownership must be alleged and proved ***. Similarly, in accordance with the law concerning the allegation and proof of an indictment the action of the reviewing authority effected a fatal variance *** in changing the ownership *** to 'the ownership of which is unknown' ***." "The reviewing authority's action also did not eliminate the possibility that the ownership *** might have been in accused, which would have rendered their alleged conduct no offense. Had these alleged offenses occurred after 4 April 1945 in the ETO the modified findings of guilty *** could be upheld in that in each instance a lesser included offense would have been committed in violation of letter of the CG,ETO. dated 4 April 1945, AG 004 OpGA, Subject: Prohibition against 'Engaging in Business' which reads in part: '1. It is the policy of the Theater Commander that personnel subject to military law in this theater shall not, so far as can be avoided, disturb the economy of the liberated countries nor use their presence here in order to obtain or to lay plans to obtain any commercial advantages for themselves or for others. 2. Pursuant to this policy, all personnel subject to military law are prohibited from 'engaging in business' in this theater. 3. The term 'engaging in business' is defined to include: a. Buying, selling or dealing in securities, except savings bonds regularly purchased from the issuing government; postage stamps; real estate; or any kind of property in this theater for present or future personal profit or investment.'". (CM ETO 8555 Kenney, et al 25 Jun 45)

Accused was found guilty of (a) desertion from about 9 September to 16 November 1944, in violation of AW 58; (b) in conjunction with another, wrongfully disposing of described gasoline cans, 55-gallon drums, and about 1417 gallons of gasoline, property of the U.S. furnished and intended for the military service, thus diverting said gasoline and containers from use in military operations in violation of AW 96; and (c) in conjunction with another, misappropriating to his own use and benefit, a described Army truck valued over $50, in violation of AW 94. HELD: LEGALLY SUFFICIENT ONLY FOR VIOLATIONS OF AW 58 and 94. (1) Confession: The question of the voluntariness of accused's extrajudicial statement, repudiated by him on the witness stand, was a question of fact (detail). (2) The desertion was adequately proved. (3) The misappropriation of the Army truck was also adequately proved. The truck "was used by accused *** to effect delivery of Government gasoline to the receivers of stolen Government property. The fact that accused did not actually drive the truck is an immaterial circumstance in face of the proof that he was an active participant in its use. While the prosecution failed to prove that the truck bore the number" alleged, "the evidence is substantial and uncontroverted that accused was in unauthorized possession of and did use without authority a '2½ ton 6x6 truck *** property of the U.S. furnished and intended for

the military service thereof". The gravamen of the offense was therefore proved. It was unnecessary to allege the number *** and such part of the Specification may be disregarded as surplusage. ***. The court was authorized to take judicial notice that the truck possessed a value of more than $50.00." (4) AW 94 -- Black Market: (a) Specification: The AW 94 black market specification fundamentally follows MCM, 1928, Form 112, Art 4, sp 252, with the addition of the phrase, "thus diverting said gasoline and containers from use in military operations." However, it is unnecessary to consider whether the more serious AW 96 Black Market offense of interfering with or obstructing the prosecution of the War was alleged, because there is absent the necessary proof which would have supported such a specification. "An offense under the ninth paragraph of AW 94 is a lesser included offense of the greater offense under AW 94 and it will be so considered. The fact that it was laid under AW 96 is immaterial." "The specification herein alleged the wrongful disposal of the described items. It is concluded that such allegation falls within the ninth paragraph of AW 94 referring to one who "sells or disposes of". Accused did not object to the pleading. "He thereby might properly be regarded as waiving any objection to the form of the pleading." CM 162158 may therefore be distinguished, although insofar as it might be in conflict with the opinion herein, it is not believed that it should be followed. (b) Evidence: "While there was no 'sale' in the strict legal meaning of the word because the accused and companion had no authority to pass title to Government property and in fact no title passed, there was however the exact kind of transaction Congress contemplated when it denounced the sale of Government property as a crime. Accused directly violated the statute." He was guilty of an AW 94 violation. (c) "Confinement in a penitentiary is authorized *** upon conviction of unlawful disposition and knowingly applying to one's own use of property of the U.S. furnished or to be used by the military service ***." (CM ETO 9288 Mills 8 Jun 45)

Accused was found guilty of a black market offense in violation of AW 96, in that he did in Belgium about 2 January 1945 "unlawfully and feloniously prejudice the success of the U.S. forces by wrongfully disposing of 115 gallons of aviation oil, military property of the U.S., vitally needed in combat operations, in that he *** did cause said aviation engine oil to be removed from AAF Strip ***, and to be delivered to a Belgian civilian*** who had wrongfully and illegally agreed to purchase the same from "him. HELD: LEGALLY INSUFFICIENT. (1) The Specification may be considered to have sufficiently stated an offense under the ninth paragraph of AW 94. "The fact that it was laid under the 96th AW is immaterial *** The further fact that the Specification also failed to allege the value of the property *** is not material." Judicial notice of price lists may be taken. In "Stock List, Class .06-B Fuels and Lubricants, published by authority of the

Commanding General, Army Air Forces", dated 15 December 1944, shows that the cost per gallon of the particular oil (described) involved herein was 34 cents, to make the total value of the oil involved $39.10. (2) Evidence: "The evidence is undisputed that accused originated the idea of stealing the oil and selling it to the Belgian civilian ***. He also attempted to implement the scheme by soliciting the aid of the soldiers, Ziegler and Dolan in its execution, and thereafter he supposed he directed the methods and means of procuring the oil and delivering it to the prospective purchaser. The two soldiers after reporting accused's solicitation to superior authority, acted under direction of Captain H** and the military police. They simulated their participation in the criminal transaction and carried out and performed what accused assumed where his orders and directions. Accused himself was under restriction and did not leave his company area." (a) The specification "confined the wrongful disposition of the oil to causing the removal of the same *** and delivery at the garage of the Belgian civilian. It did not encompass the ultimate sale and delivery of the oil *** Such wrongful removal" is within the prohibitions of AW 94, par. 9. (b) "The allegation *** that accused 'did cause said *** oil to be removed *** and to be delivered' is a statement of fact which also served to describe the method ***. Had this specific averment been omitted, nevertheless the Specification would" still have been sufficient under AW 94, par. 9. (c) Absence of Accused From Place of Offense: "Although under section 332, Fed Crim C (18 USCA 550), an accessory before the fact may be charged and convicted as a principal, it is still necessary to ascertain and apply the common law rules in order to determine whether a person who is absent when the crime is committed by another is guilty as a principal ***." "At common law accused, if guilty at all, was an accessory before the fact and not a principal. He did not participate in the physical removal of the oil, but was in his company area and was not present when it occurred ***." "Ziegler's and Dolan's removal of the oil *** was performed under the orders and directions of the military police. *** Their acts were free from criminal intent, a vital element of a criminal act ***. They committed no offense. "It follows *** that inasmuch as Ziegler and Dolan committed no offense accused was not guilty as accessory before the fact of the offense charged. (d) Possible Other Offense: "Nor may he properly be held guilty of conduct to the prejudice of good order and military discipline in soliciting the removal of the oil as such offense is not a lesser included one within that charged." (3) Entrapment: An accused's acts in themselves must be unlawful and criminal and they must be performed with criminal intent in order to sustain a verdict of guilty. *** All of the acts constituting the offense charged, to wit, the wrongful disposition of the oil by causing it to be removed from the air strip t the civilian garage were performed by the police through their decoys Ziegler and Dolan. In order to hold accused, these acts must be imputed to him. Under the rule above quoted such situation is fatal to prosecution's case." (CM ETO 9643 Haymer 15 Aug 45).

(18a) Black Market 454(18a)

After their pleas of guilty and independent evidence, accused were found guilty of black market operation involving gasoline and jerricans, in violation of AW 96. HELD: LEGALLY SUFFICIENT ONLY FOR FOR THE AW 94 OFFENSE INVOLVING PROPERTY VALUED AT $39.28. (1) The specification to which each accused pleaded guilty alleged that accused prejudiced the success of the U.S. Forces by a wrongful disposition of 14 jerricans of gasoline, military property of the U.S., 'vitally needed for combat operations'. For the purposes of this opinion, it will be assumed that the specification stated an AW 96 offense, as distinguished from an offense under Par 9 of AW 94. (2) Guilty Pleas: Although the law member erroneously explained that the maximum punishment which could be imposed was confinement for life, this did not prejudice accused inasmuch as he erred on the side of severity. The effect of the guilty pleas was adequately explained. After they were received, there was no requirement that prosecution had to prove its case against accused. "The finding of guilty may be supported solely on the plea of guilty ***." "The effect *** is that of a confession in open court of the offense charged. It is desirable that some evidence *** be shown so that the reviewing and clemency authorities may each intelligently function ***. (3) Unsworn Statement: Rebuttal: It is to be noted that no irregularity resulted when, despite objection, the prosecution produced rebuttal evidence after accused's unsworn statement had been made. (MCM, 1928, par. 76, p.61) (4) Evidence Adequacy, Despite Guilty Plea: "The *** offense of diverting military supplies from the usual and ordinary channels of distribution which would ultimately deliver the same to combat troops *** includes the lesser offense of unlawfully and wrongfully disposing of Government property furnished and intended for the military service denounced by" Par 9, AW 94. "The assertion of defense counsel that accused were not informed by anyone that there was a shortage of gasoline' was not a defense to the greater charge, because the prosecution was under no duty to prove that at the time accused diverted the 14 jerricans of gasoline *** they knew that there existed a shortage of gasoline. However, it is apparent from the unsworn statement including the last before-mentioned assertion, that the defense by implication denied the guilt of accused of the greater offense in spite of *** their pleas of guilty thereto, while simultaneously it admitted an unlawful disposition" in violation of Par 9, AW 94. "There was at least sufficient notice to the court that the defense had made a statement which if not inconsistent with the pleas was certainly indicative of their improvident entry and of a lack of complete understanding of their meaning and effect, and that protective action under paragraph 70 of the MCM, 1928 *** was required." This situation was prejudicial. The record will therefore be considered as through the guilty plea had been changed to one of not guilty, with the burden placed upon the prosecution to prove beyond reasonable doubt that accused committed the offense. (5) Black Market: The prosecution failed to meet the requirements set forth in CM ETO 8234 Young et al to prove the AW 96 offense. The prosecution did show that, at the time of the offense, "the gasoline in storage at *** amounted to 42% of the storage capacity; that it was the low point of gasoline supply and was the cause of the concern to the military authorities charged with the duty of supplying

gasoline to the American Armed Forces, *** But it was only the commencement of the required proof. It stopped far short of the proof that accused, when at the place alleged they diverted the gasoline, 'prejudiced the success of the American arms' ***" "There is not a scintilla of evidence that there had been wholesale and repeated unlawful and irregular diversions of gasoline from the regular channels of distribution at the time and place alleged." (6) The Offense Proved: "The evidence clearly established accused's guilt of wrongfully and unlawfully disposing of 14 jerricans of gasoline, property of the U.S., furnished and intended for the military service thereof in violation of "Par 9, AW 94. (7) Maximum Punishment; Value: By reference to the quarter-annual report of the QM ETO, to the QM for the period 1 October to 31 December 1944 submitted under the provisions of the 'Lend-Lease' Act (Act March 11, 1941, c.11; 55 Stat. 31; 22 USCA secs. 411-419) it is seen that both 73 and 80 octane petrol (gasoline)is valued at .1934 cents per Imperial Gallon. The price per U.S. gallon will be 5/6 of the price per Imperial Gallon (Websters New International Dictionary (2d Ed). p.1029). Therefore the gallon value of gasoline involved in this case on 2 December 1944 was .16117 cents and the total value of the gasoline disposed of by accused (70 gallons at .16117) was $11.28. By means of the same report the value of the jerricans at the time and place alleged was $2.00 each or a total of $28.00. "The authorized sentence for wrongfully and unlawfully disposing of property of the U.S. furnished and intended for the military service thereof, of a value of more than $50.00 and less than $50, is dishonorable discharge, total forfeiture and confinement at hard labor for one year." (CM ETO 9779 Stanley, et al, 26 Jun 45)

Among other things, accused was found guilty of wrongful sale of 16 drums of gasoline, property of the British Commonwealth. HELD: LEGALLY INSUFFICIENT. "There was a substantial variance ***. The Specification alleged that the gasoline was sold on or about 25 October; the proof showed that it was sold not later than 10 October. The Specification alleged that accused acted in conjunction with N.A.O** and others unknown, while the proof showed that he acted in conjunction with 'Frank' and 'Ted T**'." "Where a date is not of the essence of a crime considerable latitude is permitted in variance between allegations and proof ***." An examination of described cases wherein such variance was held not to be fatal "reveals the existence of allegations apart from dates in the specifications which accurately informed the accused of the offense ***. Here, however, there is no such meticulous description. The prosecution knew in advance that accused had participated on or about 25 October in numerous transactions of the character described in this Specification, yet it was content to give only a very general description of the offense with which it sought to charge him. There is no reason why the vendee could not have been named in the Specification. There is no reason why S** could not have been named. *** Until such time as accused is arraigned in court the

only way by which he can know with certainty with what he is charged is by examining the charge sheet. "Here, "virtually the ony way the accused could know from the charge sheet against which offense he was required to defend, was by referring to the date. Doubtless he could have moved for a bill of particulars or moved to strike the Specification as indefinite * * * but failure to do this is not equivalent to consent to have the government roam at large over a whole series of offenses and then take its stand wherever the proof indicates it is most prudent. Whereas here, the government appears to be secretive, not to say misleading, about the offense it seeks to prove, there must be some correspondence between the information it furnishes accused by way of specifications and the proof it produces. If a date is the only distinctive element which the accused can with certainty distinguish which among a number of offenses the government is pressing, then it must establish the that date with some exactness, certainly more than that show un this case. The record is legally insufficient" on this specification. (CM ETO 10189 Sluder 13 Sep 45)

Accused was found guilty of desertion in violation of AW 58, and of a black market offense in violation of AW 96. HELD: LEGALLY SUFFICIENT in part. (1) The desertion was adequately established. (2) Black Market: Accused and another "drove a U.S. Army truck containing 600 gallons of gasoline, property of the U.S. furnished and intended for the military service, into a garage in Paris and sold the gasoline to a French civilian for 75,000 francs. Accused * * * admitted complicity in the sale and the receipt of 45,000 francs of the proceeds. The Specification is insufficient to charge accused with impeding the war effort by diverting to his own use property furnished and intended for the military service under * * * CM ETO 8234, Young, et al. It does however charge and the proof sustains the offense of unlawful disposition of Government property furnished and intended for the military service in violation of the 9th paragraph of AW 94 * * *. The action of the confirming authority is consistent with this conclusion. The addition in his action of the phrase "thereby tending to impede the war effort' is harmless and may be treated as surplusage. The fact that the offense was laid and confirmed under the 96th AW is immaterial * * *. This situation is nonprejudicial to accused and requires no corrective action. The confirming authority in his action reduced the gravity of the offense of which accused was found guilty * * * by approving only so much of the findings as involved a finding that wrongfully disposed of 600 gallons of gasoline 'of some value! This was improper. Although the value of the gasoline was not proved the court was authorized to take judicial notice of the quarter annual reports made by the Qm. ETO to the Quartermaster General, Washington, D.C. * * *. By reference to that report, it can be seen that the value of the property wrongfully disposed of by accused was in excess of $50,00." (CM ETO 10864 Smith 1 Sept 45)

454 (18a) (18a) Black Market

Accused was found guilty of a black market offense involving gasoline, in violation of AW 96. HELD: LEGALLY SUFFICIENT ONLY FOR THE LESSER OFFENSE IN VIOLATION OF AW 94. (1) Specification: "The phrase *** '500 gallons of gasoline, military property of the U S., vitally needed for combat operations' is equivalent to the averment 'property of the U.S. furnished or intended for the military service thereof', the pertinent phrase in the 9th paragraph of the 94th AW. *** The clause of the Specification which charged that accused 'did *** prejudice the success of the U.S. forces by wrongfully and unlawfully disposing of 500 gallons of gasoline' in substance charged a wrongful and unlawful disposition of Government gasoline. Reconstructed, the Specification alleged that accused 'did wrongfully and unlawfully dispose of 500 gallons of gasoline *** /thereby/ prejudicing the success of the U.S. forces'. The Specification as above reformed *** states an offense under the 9th paragraph of the 94th AW ***." (2) Confession; Corpus Delicti: The corpus delicti was sufficiently established to permit the introduction of accused's confession. "The evidence showed two deliveries of gasoline by the POL dump at the relevant times to a truck driver named Wade /accused's name/ in the amount of 900 (180 cans) and 500 (100 cans) gallons respectively; that accused failed to deliver 100 jerricans (500 gallons) out of the 180 cans to his unit and represented to his commanding officer that there was a shortage of gasoline and that the dump owed the officer's unit 100 cans; that the officer failed to secure the 100 cans when he sent a third soldier to the dump; and when accused was ordered by the officer to secure the 100 cans accused thereafter appeared with 125 cans. The excess of 25 cans was not explained by accused. The inferences from this evidence justified the conclusion that accused disposed of the 100 cans (part of the 180 cans). This showing adequately meets the requirement as to proof of the corpus delicti." (3) The gasoline's value may be found by judicial notice of the appropriate QM quarter-annual report. (CM ETO 11076 Wade 3 Jul 45)

Accused was found guilty of violations of AW 94 and 96, respectively involving the stealing of a blouse and of gasoline. HELD: LEGALLY SUFFICIENT IN PART. (1) Blouse; AW 94: "Title to the blouse stolen by accused did not pass to T/Sgt ** by virtue of his act of reclaiming same from the supply sergeant of his Group as salvage and causing the same to be altered into a jacket. Unserviceable property remains property of the U S. and disposition of same must be made pursuant to the directions of ARs (AR 30-2145, 2 Sept 1942). *** Accused's guilt was clearly established ***." (2) Black Market Gasoline; AW 96-94: (a) The Corpus Delicti was adequately proved, to support the introduction of accused's confession. "The presence of Government-owned jerricans, one of which was filled with gasoline, colored red, in the house or on the property of a French civilian, and the presence of numerous jerrican marks on the dirt floor of his barn, was evidence that some irregular or wrongful disposition had been made of Government property.

It was not necessary for this preliminary evidence to connect accused with the offense ***." (b) The evidence established only the lesser offense of a violation of AW 94 rather than AW 96 (ETO 8234, Young; 11076, Wade.) (c) Judicial notice is taken of the price of gasoline as reported in the quarter-annual report *** of the QM, ETO to the QM General ***." (ETO 5539, Hufendick; 9288 Millig) (2) Sentence must be reduced as described. (CM ETO 11075 Chesak 4 Jul 45)

Accused four enlisted men were found guilty (a) of a conspiracy to take, steal, etc., military property of the U.S., thereby hindering impeding and obstructing the successful conduct of the war, in violation of AW 96; (b) of specifications charging them with stealing and selling described cartons of cigarettes, in violation of AW 94, and (c) of knowingly and willfully applying to their own use a described government vehicle. They were sentenced to confinement, and also to individual fines varying from $3,000 to $5,000. HELD: LEGALLY SUFFICIENT. (1) Fines: "Although AW 94 specifically authorizes the imposition of a fine in addition to all other punishments court-martial may direct, upon conviction of any accused thereof, the Table of maximum punishments prohibits the imposition of a fine in the case of an enlisted man convicted of a violation of the Article. The maximum punishment for larceny and wrongful and knowing sale of Government property furnished and intended for the use of the military is as to each offense dishonorable discharge, total forfeitures and confinement at hard labor for five years ***. However a fine may properly be included in the punishment in the case of an officer convicted of an offense under the 94th AW ***. Therefore, the fines imposed upon the accused *** may not be attributed to their conviction of the specifications under the 94th AW. Section 37, Federal Criminal Code (18 USCA 88), which denounces the crime of conspiracy to commit an offense against the U.S., prescribes as punishment that 'each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both'. The Table of maximum punishments does not list the crime of conspiracy. Hence it is punishable as authorized by statute or by the custom of the service ***.***By reference to section 37, Federal Criminal Code, the sentence in the case of enlisted men convicted of the crime of conspiracy against the U.S. may properly include, in addition to other penalties, a fine not exceeding $10,000. The fines imposed upon the several accused in the instant case are therefore valid." (Other points included herein not digested.) (CM ETO 11936, Tharpe, Sr., et al 5 Jun 45)

Accused were separately charged with violations of AW 96, in that each "did *** wrongfully dispose of *** 'PX' (Post Exchange) rations, property of the U.S. and intended for use in the military service thereof, thereby diverting vital supplies from use in the theater of operations and contributing to a shortage of supplies

during a critical period of combat operations' alleges an additional element which the prosecution must prove and there is thereby stated an offense of greater gravity than the offense under the 94th AW of wrongful disposing of Government military property. It is of the same degree of seriousness as the offense of destroying and injuring national defense materials as denounced by Congress in the Act of April 20, 1918, c. 59, sec. 5, as added by Act Nov. 30, 1940, c.926, 54 Stat. 1220 (50 USCA sec. 105). (2) The proof supported the findings of guilt on the specification (detail). (Note that "a sharp distinction must be made between the disposition contemplated by the 9th paragraph of the 94th AW and the disposition in the instant case." In CM ETO 8234 Young, et al, it was stated: "The allegation that accused wrongfully disposed of the cigarettes in effect specifies that accused wrongfully diverted them from the usual and proper channels of distribution." (CM ETO 12203 Bruce, et al, 27 Jun 45)

Four accused were found guilty of described black market offense, in violation of AW 96. HELD: LEGALLY INSUFFICIENT IN PART. (1) General: As in CM ETO 8234 Young et al, "each accused is alleged to have participated in a general 'black market' conspiracy to defraud the U.S. in violation of AW 96 ***, and incident to the conduct involved in such conspiracy, to have committed certain specific acts of wrongful disposition of government property, also in violation of AW 96, thereby diverting essential supplies from use in the theater of operations during a critical period of combat operations ***." (2) Accused Anthes and Busby: The evidence (detailed) "leaves no doubt of Busby's guilt***. As to Anthes, his admission relative to the purchase and sale of cartons of cigarettes, combined with the testimony of Lt. O'R**, are considered sufficient" for two of the specifications against him. But "with respect to the coffee transaction ***, accused's explanation of the manner and place in which he acquired the property, constituting *** the only evidence on the subject, is not considered sufficient to raise the necessary inference that the coffee was knowingly obtained under the circumstances contemplated in the Specifications. *** Although a theft and wrongful disposition of government property are shown, there is no satisfactory proof that the stolen property was diverted from the stream of supply to the theater of operations" necessary to sustain the AW 96 offense. "Nor will the record of trial support a finding of guilty of wrongful disposition of the property under AW 94. A conviction may not rest upon the unsupported confession of accused, some independent evidence tending to show that the 'offense charged has probably been committed' being necessary (MCM 1928, par. 114, P.115). The record in the present instance contains no independent evidence of the theft or wrongful disposition of any government property other than that pilfered from the trains; thence it cannot be said to supply evidence of the corpus delicti of wrongful disposition of property obtained from other sources. (3) Accused Fesler: In his statement, this accused "admits having received without payment 24 cartons of cigarettes from a military policeman who was guarding the trains at M** yards. He sold none of these, but distributed some of them

to various members of his mess crew. The military policeman gave him the cigarettes because he *** had previously told him that the men in the mess had none. The solicitation and receipt by accused of 24 cartons of cigarettes from a railway guard at a time when such a quantity was not legitimately obtainable and when the rifling of the railroad cars was a matter of common knowledge in the battalion, is sufficient to justify the inference that the property so obtained was pilfered from the train as alleged and that accused was aware of its source. The findings of guilty of the conspiracy *** and of the wrongful disposition of the cigarettes" was sufficiently proved. "Accused also admitted the wrongful disposition of the government property described in Specifications 3, 6 and 7*** but stated that he stole the supplies from the Hq and Hq. Company Mess. The property, therefore, according to the only evidence adduced, was not a part of the stream of supply constituting the subject of the conspiracy and hence *** the record of trial is legally insufficient" in this regard. (4) Accused Young: "This accused admitted receiving one carton of cigarettes from Fesler who told him he had gotten them from a military policeman in the railway yards and further stated that on several occasions, he received packages of cigarettes from 'different men that came in the mess hall' where he worked as a cook. He was also aware that various men of the battalion were engaged in theft of food stuffs from the trains. Accused was not charged with the wrongful disposition of these cigarettes and the only question is whether his receipt of them sufficiently identifies him as one of the conspirators to justify the finding of guilty of the conspiracy alleged ***. It does not. While there is some basis for inference that accused was aware that the relatively trivial amount of cigarettes he received was probably pilfered from the trains, there is nothing on which to base the conclusion that he had any connection with the theft or the thieves, nor is there anything to indicate that he solicited the cigarettes in advance or in any way conspired or induced their diversion or that of any other property from the legitimate channels of supply. At most, therefore, he was guilty of knowingly receiving stolen goods and should not have been convicted of conspiracy." This "accused was also charged with and convicted of the wrongful disposition of pork luncheon meat and Vienna sausage. While he admits participation with Fesler in this transaction, he obtained the property from Fesler whose statement shows that it was stolen from the company mess. *** The evidence of this theft is insufficient to justify the findings of guilty of conspiracy ***, or wrongful disposition either under AW 96 *** or under any other Article of War. (CM ETO 13155 Busby et al 1 Sep 45)

Five accused were found guilty of black market offenses, in violation of AW 96. HELD: LEGALLY SUFFICIENT ONLY AS TO THIE OF ACCUSED. Confessions formed the basis of the convictions. Extrajudicial statements of Tielemans and Tanella should have been excluded, because they were secured under circumstances which constituted violations of the due process of law clause of the Fifth Amendment to the Federal Constitution. "The Board of Review will

examine a record of trial to discover whether an accused's constitutional rights have been violated. "The Federal civil courts upon habeas corpus proceedings will undo convictions by courts-martial when violation of an accused's constitutional rights is shown or where the proceedings disclose the lack of 'due process of law' as guaranteed by the Fifth Amendment ***. Undoubtedly a conviction based upon a confession where the evidence is clear and uncontradicted that it was obtained by force and compulsion would be nullified for the reason that the proceedings would represent a departure from the 'fundamental principles of liberty and justice' *** which are indigenous in our judicial process. "While a court-martial is not a part of the judicial branch of the government, but is an agency of the executive, it is a legally constituted court and 'its judgments, when approved as required, rest on the same basis ***'." It is "consistent and logical to believe that the Federal civil courts, in examining into the regularity of a trial before a court-martial in the light of the due process clause of the Fifth Amendment, would apply the same rules as are applied in the examination of proceedings of State courts where the due process of the 14th Amendment is called into issue." "If it be concluded that the evidence created an issue of fact whether coercive acts occurred which resulted in the obtention of the confession, or if the total evidence permits the inference of non-coercion as logically and sequentially as the inference of coercion, the Board of Review will not substitute its views ***." The Board concludes: "That in its ultimate reach it showed without contradiction that Michaelson obtained the confessions by first obscuring his real purpose with the mask of friendship, and thereby gained the confidence of the accused. Having gained this advantage he used (a) Raubolt's accusation (although repudiated by Raubolt) and (b) Tielemans' and Tannella's admitted misuse of clothing requisitions as the means of pressing from accused the desired confessions concerning the theft and wrongful disposition of the cigarettes. The inference *** is almost irresistible that Michaelson did not concern himself with the extent of the criminality of the accused (if in truth there were criminality) nor with the crucial fact whether the accused told the truth in their statements so long as he received some kind of an inculpatory statement from them pertaining to cigarettes. He was perfectly willing to bargain with them if thereby he could attain his purpose." "There is indisputably exhibited in the instant case compulsion and coercion in a most subtle and poisonous form. Compulsion or coercion in whatever form or shape it may be exercised renders a confession involuntary. Whether it be by direct application of physical violence or through a long course of inquisitional persecution which eventually breaks the will of the suspect or whether it is applied by subtle or concealed means whereby the accused is put in fear and his will subjugated to the wishes of his inquisitor, the result upon the judicial process if the same. With perfect assurance it may be asserted that fear engendered in an accused through non-violent means may be as effective in producing desired results as the worst form of physical brutality." "The confessions were obtained not as the voluntary acts of accused, but as a result of the manipulation by Michaelson of a series of events in

such manner as to offer the accused no escape from their involvement except to agree to confessions formulated and devised by Michaelson. It would be a misuse of the terms to characterize them as voluntary, free-will offerings. The truth or falsity of the confessions and the guilt or innocence of accused are insignificant matters as compared with the necessity of keeping the military judicial process free from suspicion." The confessions were inadmissible. The findings of guilt in regard to these two accused were improper. (CM ETO 13279 Tielemans, et al, 29 Sep 45)

Accused were found guilty of black market, as well as other offenses (no details in this memorandum opinion). HELD: LEGALLY SUFFICIENT. "With respect to accused Green and Tanner, Charges II and specifications, although erroneously laid under AW 96, allege offenses of suffering military property of the U S. to be 'wrongfully disposed of' under AW 83. The designation of the wrong AW is immaterial ***, and the specifications will be considered as having been laid under the proper article. The evidence would have sustained the charge of wrongful sale of property of the U.S. of a value of more than $50 furnished and intended for the military service, a crime under the ninth paragraph of AW 94, and such offenses should have been so charged. However, there is also evidence *** which strongly suggests that colored American soldiers, other than accused, and certain French prostitutes were primarily concerned in the sale and delivery of the gasoline to M**. While the two accused *** actively participated in the illegal transactions the facet of the evidence last above indicated is sufficiently substantial to sustain the charges that accused 'suffered' the wrongful disposition of military property ***." (CM ETO 13402 Green, et al 7 Aug 45)

(1st Ind: CM ETO 13402 Green, et al 7 Aug 45): "The offense of 'suffering' military property of a value of more than $50 to be 'wrongfully disposed of' under AW 83 is punishable by a maximum confinement of two years at hard labor. Had the offenses been properly charged under the ninth paragraph of AW 94, five years confinement at hard labor would have been legal. The result is that the charges of AWOL (Green, 26 days; Tanner, 26 days) must carry eight years of the confinement. Ordinarily under such circumstances I would recommend a substantial reduction in the period of confinement. However, in this case the evidence would have supported a conviction for desertion as to both accused. During their absence they lived in the Paris underworld, cohabited with prostitutes and were manifestly members of a 'black-market' gang which sold U S. property. Under such circumstances, I am not inclined to make my usual recommendation."

Accused was found guilty of desertion in violation of AW 58, and of black market and conspiracy specification in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The desertion was established. (2) Black Market: It was alleged that accused wrongfully attempted to sell 18

drums of gasoline, property of the U.S., furnished and intended for the military service, thereby diverting the gasoline from military operations in a theater of war. Some evidence indicated that the attempted sale was to a person, subsequently identified as a French major who was cooperating with the American CID. "The accused raised the defense of entrapment. It is possible that an agent of the Government instigated the particular offense with which accused was charged. There is little doubt that accused was already engaged in the sale of black market gasoline on a wholesale scale prior to this deal. It is only when the agents implant in the mind of an innocent person a design to commit an offense that entrapment may be successfully pleaded as a defense ***." Nor does the fact that the government was attempting to purchase it own property constitute a defense. What was in effect charged here was an attempt to violate the 9th paragraph of AW 94, despite the existence of an allegation to the effect that accused diverted gasoline from military operations since *** that allegation is mere surplusage. This paragraph of AW 94 punishes any person subject to military law who 'knowingly sells' the type of property described therein. Manifestly, the word 'sell' as used therein is not intended to describe a sale as that word is used in the Uniform Sales Act. Since ex hypothesi the government owns the property in question passage of title is impossible. To hold, then, that the word 'sell' as used in AW 94 means a sale under the Uniform Sales Act would effectively emasculate that part of the Act. Congress scarcely could have intended that. What it did intend to punish was an act or series of acts which would result in a sale if the purported vendor had title ***. It consequently is immaterial that no true sale could have been effected here and there is no logical difficulty involved in finding accused guilty of the attempt as charged." "The allegation that accused diverted gasoline from 'military operations in a theater of war 'is surplusage." Accused was actually found guilty of an AW 94 offense, and the maximum punishments applicable thereto apply (use QM price lists; compute value of 990 gallons of gasoline to be over $50, for which sentence may be five years). (3) Conspiracy: This specification was ineptly drawn, but was sufficient to allege a violation of Fed. Crim. C. sec 37 (18 USCA, sec. 88). "While it contains the allegation that the conspiracy was 'previously entered into', ***** a reading of the entire specification makes it sufficiently clear that it also alleges the continuance of the conspiracy during the performance of the overt acts." "The corpus delicti of a conspiracy is 'the unlawful combination, confederacy and agreement between two or more persons' ***." The corpus delicti was proved, and a confession properly introduced. "Since *** the allegations that accused by his conduct diverted gasoline from 'military operations in a theater of war' is surplusage, all elements" were proved. "Neither the offense of conspiracy nor any closely related offense is listed in the table of maximum punishments ***. When such is the case the offense remains 'punishable as authorized by statute or by the customs of the service ***. The custom of the service where no limit is prescribed by the Executive Order is to follow Congressional expressions as to appropriate punishment ***; Sec. 37 of the Fed. Crim. C. (18 USCA 88) prescribes the punishment for the offense of conspiracy as imprisonment for two years." (CM ETO 15197 Blackburn 15 Sep 45)

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(19) Borrowing from Enlisted Men:

Not Digested:
12621 Nickerson, 1st Lt.
11775 Porter

Cross References: 454(75b) 9343 Stanley

Accused officer was found guilty of borrowing from an EM, of being drunk in camp, and of failing to make an EM deposit, in violation of AW 96; and of a false salary claim against the U.S., in violation of AW 94. HELD: LEGALLY SUFFICIENT. "Borrowing from enlisted men impairs discipline and is an offense in violation of AW 96 ***. There is substantial testimony as to drunkenness which falls within the technical definition of" MCM, 1928, par. 145, p. 160, "The accused was remiss in his duties in making the soldier's deposit. His legal relation was that of a fiduciary, and he will be held to the highest standard of care ***. The claim /for salary/ presented for November pay was patently false. Accused was responsible for its correctness. (sec. IV (3), WD, Cir. No. 315, 4 Dec. 1943; pars 1c, 7, AR 35-1360, 11 April 1944). The presentation of such false pay voucher with knowledge that it was false and fraudulent constituted a crime under the first paragraph of the 94th AW." (CM ETO 11758 Vollmer 26 Jun 45)

(19b) Bribery:

Not Digested:
12594 Lechinsky (bribery)
13169 MacDowell(accept money from French Civilian in suspicious circumstances)

Accused officer and enlisted man found guilty of specifications in violation of AW 96, after he wrongfully and fraudulently obtained the release from a Belgian internment camp of a Belgian citizen, for which he asked and accepted the sum of 50,000 Belgian francs, valued at about $1142.50. HELD: LEGALLY SUFFICIENT. "Each specification alleges a separate and distinct offense of a nature to bring discredit on the military service and each offense so alleged was established by competent evidence. In addition, Specification 1 alleges a conspiracy *** to commit an offense against the U.S. in violation of sec 37 of the Fed Crim C (18 USCA 88); Specification 3, acceptance of a bribe by accused *** in violation of sec 117 of the Federal Crim C (18 USC 207); and Specification 5, procurement of bribery of a U.S. officer by accused ***, in violation of sec 39, Fed Crim C (18 USCA 91)." (CM ETO 10016 Henry et al 9 Jun 45)

454(19b-21-22b-22c-23)

(19b) Bribery
(21) Breach of Restraint
(22b) Commercial Activities; Engage in Private Business
(22c) Concealed Weapons
(23) Conspiracy

Accused was found guilty of a number of specifications alleging violations of both AW 95 and 96, in that he had demanded and received money for civilians, in return for permitting them to operate slot machines at an officers' club. HELD: LEGALLY SUFFICIENT. "The offenses charged against accused are closely related to the crime of bribery under the civil law (3 Wharton's Criminal Law (12th Ed., 1932), sec. 2234, pp. 2522-2525). The evidence shows that accused, in effect, gave his official approval to retaining the slot machines at the officers club for a price, -- a 'cut' of £ 5.0.0 a week, which he received. Similar offenses have been held to constitute conduct unbecoming an officer and a gentleman ***. Accused's offenses were clearly violations of AW 96 *** and as they involved moral turpitude they were also offenses punishable under AW 95 ***." (CM ETO 15794 Ruf 8 Sep 45)

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(21) Breach of Restraint:

Not Digested:
17609 Wood

Cross References: 421 — 12428 Davis (fail to read order required to be read)
385 — 14905 Murtha
416(9) — 14735 Clark, et al

(22b) Commercial Activities; Engage in Private Business:

Cross References: 454(18a) — 8555 Kenney (lesser to black market)

(22c) Concealed Weapons:

Not Digested:
12120 Campbell

(23) Conspiracy:

Not Digested:
14683 Wilson Jr. (black market, etc.)

Cross References: 454(18a) — 15197 Blackburn (punish black market)
454(18a) — 11936 Thorne (fine as punishment)
454(19b) — 10016 Henry (with bribery)
454(18a) — 13155 Bushy (black market)

(33a) Disobedience of Standing Orders
(36) Drinking; In General
(37) Drinking With or in Presence of Enlisted Men

(33a) Disobedience of Standing Orders:

Not Digested:
10760 Roberson (not to drink liquor)
11830 Green Jr., et al (carry weapon)

Cross References:	453(11)	10027 Wetherford (Ar 35, ETO; carry concealed weapon)
	422(5)	9886 Bowens (with AW 64 disobedience)
	454(54a)	6983 Carlson (violate money exchange letter; charges; possible exceptions)
	451(9)	16512 Lowland (fail to turn in pistol)

(36) Drinking; In General:

Accused officer was found guilty of violations of AW 96, in that (a) he wrongfully neglected his duty as officer in charge of boat unloading detail by permitting cargo to be pilfered; and (b) he drank intoxicating beverages while on duty to the prejudice of good order and military discipline. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) Drink Intoxicating Beverages: "The testimony of the two military police officers, describing accused's condition at the time alleged is corroborated by his admission that he had four drinks of whiskey with an American non-commissioned officer of the ship's crew. Accused's conduct in drinking such intoxicating liquor, while engaged in the serious mission of unloading critical supplies was clearly a disorder and neglect to the prejudice of good order and military discipline (MCM, 1928, par. 152a, p. 187)."
(CM ETO 10413 Shipley 28 Jul 45)

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(37) Drinking With or in Presence of Enlisted Men:

Not Digested:
16891 Harris, Jr.
10719 Patton, Jr.
10760 Roberson
15958 Ingham (in presence of; during attack)

Cross References:	453(11)	10027 Wetherford
	454(59)	12758 George

(38) Drunk and Disorderly:

Not Digested:
10760 Roberson (in camp)
11845 Stark (in camp)
11271 O'Hara (officer; public place)
11725 Whitfield (public place)
16891 Marrs, Jr. (in public)
19572 Dawson (officer drunk on duty)
Cross References: 454(19) 11758 Vollmer (break in camp)
453(26a3) 12759 Traymor (lesser to AW 95 charge)

Accused officer was found guilty of being drunk in station in violation of AW 96. His $400 fine was reduced to $100. HELD: LEGALLY INSUFFICIENT. (1) The evidence showed that accused officer drank numerous toasts prior to attending a V-E Day program conducted by the commanding officer of Seine Section (the appointing and reviewing authority herein). During the course of that meeting, accused made various indecent comments, etc. He was originally charged with AW 63, 64, 95 and 96 offenses but, pursuant to recommendation of the Staff Judge Advocate, these were crossed out on the original charge sheet and the instant charge added thereon. "The record shows that when the court closed to vote on the findings, the prosecution's file, including the charge sheet, were on the trial judge advocate's desk and that when it reopened, the file was on the court's bench. "Further facts with reference to this situation, of which the Board of Review will take judicial notice in the interest of securing to the accused due process of law *** came to light in the trial by the same court four days later of Pvt *** M** (CM ETO 15487, Madison). There defense challenged the law member (who was also the president) for cause on the ground that he should not sit, in the interest of having the trial 'free from substantial doubt as to legality, fairness and impartiality' (MCM, 1928, par.58a, p.45). In support of his challenge, he caused the law member to be sworn as a witness. He testified that in every case it was the duty of a law member to exclude from the court's consideration facts or physical exhibits not properly before the court. By additional witnesses, the defense in that case established the facts with reference to the transfer of the prosecution file of this case from the trial judge advocate's desk to the court's bench while the court was closed to vote on the guilt of this accused." The challenge was sustained. "That the court did in this case consider the prosecution file, including the charge sheet, is affirmatively indicated by the members of this same court, the only persons actually in a position to know this fact, by their action in the Madison case in sustaining the challenge ***. The charge sheet in this case contains statements not supported by any evidence presented to the court herein; for example, the Specification to original Charge II alleges that accused stated, "I suppose I should stand at attention for this one', or words to that effect, during the playing of "The Star Spangled Banner", but the record contains no testimony as to such a statement. Consideration of this

(38) Drunk and Disorderly 454(38-40a-44b-45a)
(40a) Drunk on Duty;--Endanger Safety of Outfit Before the Enemy
(44b) Failure to Make EM Deposit
(45a) Failure to Obey

file was prejudicial to the substantial rights of accused. While not essential to this conclusion ***, it may be noted that in sustaining the challenge in the Madison case the court itself inferentially admitted that it was influenced hereby consideration of matters improperly brought to its attention. The prejudice to accused was not cured by the reduction, based on a consideration of 'services previously rendered', of the amount of the forfeiture imposed ***." (CM ETO 15486 Richter 13 Sep 45)

Accused major was found guilty of the following offenses in violation of AW 96: (a) of being drunk and disorderly in uniform; (b) of wrongfully assaulting a German girl by forcing her to the floor and attempting to remove her clothing; and of wrongfully breaking a door and entering another girl's room--all on the same general occasion. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt. (2) Drunk: This AW 96 specification omitted the phrase "in a public place" or that accused was in command, quarters, station or camp. However, no prejudice resulted. Accused was not misled. "Any greater particularity desired *** should have been raised at the time of arraignment by special plea as 'a plea to the general issue may be regarded as waiving of any objection then known to the accused which is not asserted by a special plea'." (3) Multiplicity: "There can be no question of any unreasonable multiplication of charges based upon a single act since /accused's/ conduct at the dance, the assault and battery at the hotel and the breaking of the door, while all disorderly, were each separate offenses not necessarily involved in the other two ***. Moreover, accused could not be harmed thereby as the sentence imposed /dismissal/ was warranted upon conviction of any of the three offenses ***." (CM ETO 17339 Gunning 17 Oct 45)

(40a) Drunk When Reporting for Duty:

Not Digested:
16318 Hoefler (officer)

(44b) Failure to Make EM Deposit:

Cross References: 454(19) 11758 Vollmer (fiduciary)

(45a) Failure to Obey:

Not Digested:
17140 Loupus
16891 Marrs, Jr. (fail to obey; sentinel)

454(45a-46) (45a) Failure to Obey
(46) Failure to Pay Debts

Cross References: 385 10363 Mangiapane (distinguish from "refusal to fly")

Accused officer was found guilty of two violations of AW 96: (a) unlawfully and feloniously assaulting an MP officer with a dangerous weapon; and (b) after being ordered into arrest by an MP officer acting in the execution of his duty; refusing to obey the same. HELD: LEGALLY SUFFICIENT. (1) The first specification was supported. Accused's conduct constituted an AW 96 violation. (2) The second specification was also supported. The MP officer, "as the head of the local military police detachment where accused's offense was committed, had the duty of preserving order and discipline among military personnel. His action in ordering accused into a status of arrest was reasonable and proper under the circumstances. According to accused's testimony, he was never told he was under arrest. However, there was substantial evidence that A** ordered him into arrest whereupon he expressed his refusal both with words and actions." Accused's conduct constituted a violation of AW 96. (CM ETO 17483 Hardock 20 Oct 45)

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(46) Failure to Pay Debts:

Among other things, accused officer was found guilty of violations of AW 96, in that he had failed and neglected to pay described debts which he owed to enlisted men of his organization. HELD: LEGALLY SUFFICIENT. (1) Debts Overdue: Accused pleaded guilty to seven described specification in this regard, excepting the word "dishonorably" in each. The question "raised is whether the mere failure by an officer to pay a debt to an enlisted man of his organization on the due date, without more, is a 'dishonorable' failure and and neglect in violation of AW 96." "Each of the debts with which these specifications are concerned was overdue. The power and authority of an officer over an enlisted man of his own organization is such that the latter might well hesitate to demand that the officer pay what he owed. In such circumstances we think that an officer's failure to fulfill his obligation on the promised date is dishonorable." AW 96 guilt was properly found. (2) Debts With No Due Date: Another specification alleged the dishonorable failure and neglect of accused officer to pay a $12.00 debt owing by him to an enlisted man of his organization. "The evidence shows that the debt *** was contracted on 23 December 1944 and not repaid as of 28 January 1945, the date charges were preferred. Accused did not promise to repay it on any specific date. Despite the fact that the debt was not technically overdue, considering the person with whom accused was dealing and the amount involved, we think that there was an unreasonable delay in making repayment. Such conduct amounts to a dishonorable failure to pay a debt in violation of AW 96 ***." (CM ETO 11775 Porter 28 Jul 45)

(47bb) Failure to Repay Money in Custody
(47c) Failure to Report 454(47bb-47c-48a-49)
(48a) Fake Claim Against U.S.
(49) False Official Reports or Statements

(47bb) Failure to Repay Money in Custody:

Cross References: 454(49) 10718 Cabbell (deceased person)

(47c) Failure to Report:

Not Digested:
14683 Wilson, Jr. (fail to report improper liquor transaction)

(48a) Fake Claim Against U.S:

Cross References: 452(7) 15154 Sohn (also AW 94; multiplicity)

(49) False Official Reports or Statements:

Not Digested:
14683 Wilson, Jr.
15852 Casey (wr.represent self to be an M.P.)
10364 Evans

Cross References: 454(65a) 9986 Goldberg (mail censorship)
951(17) 11546 Clarke (suggest that another make)
454(54aa) 17469 Allen

Accused summary court officer was found guilty of two violations of AW 96, to wit: (a) he knowingly wrote a letter to the parents of a Sergeant, then missing in action, which contained false statements re the contents of the sergeant's wallet; and (b) he willfully and wrongfully made a false inventory of the sergeant's belongings, in that the sergeant had about $400 more than the $11 which he enlisted. HELD: LEGALLY SUFFICIENT. (1) Evidence: Accused admitted the acts charged against him. "He simply denies any wrongful intent in so doing and pleads negligence and poor judgment. His own statements indicate his intent to deceive and mislead the parents of Sergeant H** in his letter to them, written some eight months after their son's money had come into his hands and then only after he had received their letter showing they knew he had been given the money. Even then, he did not remit the entire amount but waited another eight months before sending them the balance. He admits signing the inventory of deceased's effects and intentionally listing $11.00 as the only money in the estate, knowing that it was not true. He claims the money was stolen from him and there is no evidence to the contrary, but he was not disturbed by the loss and claims to have forgotten the correct amount until unforeseen circumstances brought them to his attention and brought about an accounting that might not otherwise ever have occurred." (2) The offense: Accused's act in

454(49-50a-51-52a-54 (49) False Official Reports of Statements
(50a) False Papers Generally
(51) Perjury; False Swearing
(52a) False Pretenses; Obtain Property by:
(54) False Swearing

falsifying his inventory as a summary officer was clearly a neglect or disorder prejudicial to good order and military discipline, as was his deliberate misstatement to deceased's parents and his admitted neglect and failure to comply with the requirements of known Army Regulations" (Winthrop, 1920, pp.713, 722). Accused was guilty of violations of AW 96. (CM ETO 10718 Cabbell 27 Jul 45)

(50a) False Papers Generally:

Cross References: 454(49) 10718 Cabbell (false letter to a deceased's parents re his personal effects.)
454(54aa) 17469 Allen (use another's name on money order)

(51) Perjury; False Swearing:

Accused officer was charged with perjury in violation of AW 93; was found guilty (as approved) of false swearing in violation of AW 96. He was also found guilty of making a false official statement in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) Perjury; Lesser False Swearing: Accused was properly found guilty of false swearing in violation of AW 96, "since it is a lesser included offense of perjury *** The record *** discloses a failure of proof as to the materiality of accused's false testimony at the L** trial, and thus one element of the crime of perjury was not established ***." (2) AW 95: The determination herein "was based on the fact that in his sworn statement he stated that Lauritzen had never informed him that a certain cash credit was outstanding." "The falsity was proved. (3) Multiplicity: "While the statements forming the basis of the two charges are not identical, all arose out of one situation and concern the same subject matter. However, in a case where the identical misstatement was alleged under charges of violations of both AWs 95 and 96, no improper multiplication" resulted. "The conviction of an officer under both articles is legal ***." (CM ETO 16624 Stordeur 9 Oct 45)

(52a) False Pretenses; Obtain Property by:

Not Digested:
14683 Wilson, Jr. (black market; liquor)

(54) False Swearing:
Not Digested:
14683 Wilson, Jr.

Cross References: 451(51) 16254 Stordeur (lesser to AW 93 perjury)

(54a) Foreign Exchange, Illegal Profit From:

Not Digested:
15734 Kendrick
14683 Wilson

Cross References: 454(96) 14632 Lang II
454(9) 10499 Dintsch
454(54aa) 17469 Allen (send Money Order under another's name)

Accused finance officer was found guilty of violations of AW 96 resulting from his foreign exchange operations. HELD: LEGALLY SUFFICIENT. (1) Specifications: "Accused, an officer of an Army Finance Office located in Belgium, was charged *** with wrongfully exchanging large amounts of French francs for large amounts of Belgian francs on two separate occasions in November 1944, each of which took place at that Finance Office. The presence of the word 'wrongfully' in each specification was sufficient to put him on notice that the exchanges were alleged to have been effected under improper circumstances so as to be prejudicial to good order and military discipline or to constitute conduct of a nature to bring discredit upon the military service ***. It is common historical knowledge and thus a proper subject of judicial notice *** that at the time of these exchanges the currency situation in liberated and occupied countries in Europe was delicate, if not precarious, partially as a result of the fact that the U.S. Government, after the invasion of the continent, put into circulation millions of dollars worth of local currency for the payment of its military and other personnel. This was undoubtedly an important factor in the fixing of the official exchange rate ***. Accused was charged as an Army finance officer with the responsibility, among others, of effectuation of the Government and the Army policy which sought to aid in stabilizing local currencies and thus of effecting exchanges of currencies only under proper circumstances. He was also bound to use the facilities of the Finance Office only for authorized, official transactions. The word 'wrongfully' may reasonably be construed to mean under improper circumstances in the light of the general situation with regard to European currencies, of accused's position and of the place where the exchanges were made. The specifications thus state offenses in violation of AW 96. It was not essential to allege that accused profited by either exchange *** or that either violated any official directive ***." (2) Evidence: The evidence supported the finding of accused's guilt. "His awareness of the highly irregular nature of the transactions is made manifest *** by his acceptance of substantial amounts of the identical Belgian francs issued at his direction, as a reward or premium for effecting the exchanges. His conduct was of a pattern resembling that condemned by Section 89, Fed Crim C (18 USCA 175) ***." (See also, Sec 87, Fed Crim C (18 USCA 173). (3) Not Considered: "It is unnecessary *** to consider the effect of directives issued by the ETO (see Ltr., AG 121 Op GA, 23 Sept. 1944) or by SHAEF (see Admin. Memo No. 35, 25 Oct 1944)

and CM ETO 7553, Desdine ***), prohibiting participation in certain currency exchanges, and both WD (see Cir.364, WD, 8 Sept. 1944) and Theater (see S.O.P. No. 11, Hqs. ETO, 31 Aug.1944) directives regulating the exchange of foreign currencies on behalf of personnel attached to or representing the U.S. Government. Suffice it to hold that the evidence indisputably established that accused wrongfully effected the exchanges alleged whether or not they violated any specific War Department or Theater directives (Cf: CM ETO 4492, Shelton, et al)." (CM ETO 10418 Blacker 26 Jun 45)

Accused dental officer was found guilty of a violation of AW 96, in that he did, notwithstanding the provisions of First U.S. Army Cir 92, 13 July 1944, requiring that all commanders exercise special vigilance to prevent the transfer from the continent of funds obtained from unauthorized sources, offer, in the presence of EM, to transmit German money or captured enemy funds to any designated person in the U.S. for a percentage; and of a violation of AW 95, in that he wrongfully charged a First Sergeant the unconscionable amount of about $92 for transmitting $140 to his wife. HELD: LEGALLY SUFFICIENT. (1) The AW 96 Specification was inadequate. "While accused's offer was not specifically alleged to have been made 'unlawfully', 'illegally' or otherwise 'wrongfully', it was alleged to have been made 'notwithstanding' the provisions of the" described circular. "Though accused was not a 'commander' it was his duty to lend support to the policies required of his commander. The Specification therefore alleged not only a neglect to aid the commander in carrying out his responsibility but also affirmative conduct prejudicial to the fulfillment of that responsibility; and deleting the words 'or captured enemy property' as surplusage because of prosecution's failure to show that accused, in making his offer, said them, the Specification is nonetheless sufficient. There remained the alleged and proved offer to transmit 'German money'. This offer did not exclude money obtained from unauthorized sources. Rather, it included such money in fact as well as by implication. Nor is the Specification defective in that it merely alleged an offer. True, at common law mere words do not constitute an attempt. On the other hand, the allegation here of an offer to assist, for a consideration, enlisted men in the circumvention of a declared policy, was an allegation of a neglect, repudiation, and perversion of duty cognizable under AW 96" (Winthrop, 1920, p.722.) The evidence supported the finding of guilt. (2) The AW 95 Specification was supported. It was established "that the evil design originated in accused's mind, that the offense was not instigated by the Government's agents, and that they were afforded the opportunity and facilities for its commission in order to detect and apprehend accused. There was no entrapment ***." The 10,200 Belgian francs given accused have an exchange value slightly in excess of $232. The exchange rate is 43.7732 francs for $1.00. Of this the court could take judicial notice ***. Accused admitted to transmitting $140. That $92 was an unconscionable amount to charge for sending $140 is self-evident. 'An unconscionable bargain is one which *** no fair and honest man would accept ***' (Black's Law Dictionary (34 Ed.) p.773). The exaction of

usury from a soldier" constitutes a violation of AW 95. So also, accused's extraction. (Winthrop, 1920, p.716, fn.45.). (3) The sentence to 'dishonorable discharge', while inappropriate since accused was a commissioned officer, was legal and prejudiced no substantial rights ***." (CM ETO 12453 Marshall 13 Jul 45)

Accused was found guilty of a violation of AW 96, in that he 'did at Antwerp, Belgium, between the 10th of October 1944 and the 30th November 1944, wrongfully exchange about 740,000 French francs, lawful currency of the French nation, for 651,512 Belgian francs, lawful currency of the Kingdom of Belgium. HELD: LEGALLY INSUFFICIENT. (1) Motion to Strike: "The defense motion to quash or to strike out raised all objections to the Specifications which in civil criminal practice might be taken to an indictment by general or special demurrer, plea in abatement or motion in arrest of judgment ***. Although, at least in a doubtful case, the granting or denying of the motion is within the sound judicial discretion of the court and denial thereof will not necessarily affect the legality of the proceedings ***, nevertheless if the Specification does not meet the well established tests which guide the civil courts in their determination of motions attacking indictments, the denial of the motion will injuriously affect the accused's substantial rights and will thus require a conviction upon the Specification to be set aside (Cf: MCM, 1928, par. 66, p.52). (See U.S. v Hess, 124 U.S. 483, 31 L.Ed. 516, at 517-8.) (2) Foreign Exchange Specification: "The instant specification fails to identify the alleged exchange or exchanges other than to state that they occurred in Antwerp, Belgium, over a period in excess of seven weeks, were wrongful and involved 740,000 French francs and 651,512 Belgian francs. Innumerable exchanges under myriad types of conditions and involving as many different amounts of French and Belgian francs could have been proved by the prosecution ***. Accused was entitled to be informed with greater particularity as to the circumstances ***. Without such information, he would be obliged to defend against an offense of unknown quantity and quality. It is impossible to determine whether the exchanges intended to be charged were made at the Finance Office or with civilians. Thus in a subsequent prosecution for wrongful exchanges either at that office or with civilians accused could not successfully plead the instant conviction in bar because it cannot be determined upon which exchanges it was based." "The Specification was incomplete and ambiguous, neither the accused nor the court was adequately informed ***, and accused was not enabled to make his defense or to avail himself of his conviction (or acquittal) for protection against a further prosecution for the same offense. The motion *** to strike *** should, therefore, have been sustained; its denial" resulted in AW 37 prejudicial error. (Distinguish CM ETO 10418 Blacker. The specifications therein "charged that accused, an officer in an Army Finance Disbursing Section in Belgium, on two specific dates wrongfully exchanged large amounts of French francs for

large amounts of Belgian francs at his own Disbursing Section. The defense did not object to the specifications, which adequately apprised the accused that he was charged with a violation of the trust imposed in him by misusing the official exchange facilities available to him." (CM ETO 12594 Lechinsky 26 Jun 45)

(1st Ind; CM ETO 12594 Lechinsky 26 Jun 45: "The statement of accused herein and the record of trial in CM ETO 10418, Blacker, indicate that substantial sums of money were paid by accused to Lt. Blacker as consideration for effecting illegal exchanges of large amounts of French francs for large amounts of Belgian francs. I recommend that accused be charged with and tried for bribery of a U.S. officer in violation of Sec 39, Fed Crim C (18 USCA 91). He should also be charged in a specification setting forth with all the particularly possible the specific wrongful exchanges which the prosecution expects to prove and the circumstances under which they were effected, including the resultant gains to accused.")

Accused finance officer was found guilty of a violation of AW 96, in that on about 9 November 1944, he wrongfully obtained from an enlisted cashier a $100 bill, currency of the U.S., with intent to sell the same in France "at a profit in violation of that prohibition against dealing with U.S. currency in liberated territory which is set forth in paragraph 1 of letter Hq ETO, file AG 121 Op. Subject: 'Prohibition Against Circulating, Importing or Exporting U.S. and British Currencies in Liberated and Occupied Areas', dated 24 June 1944." HELD: LEGALLY SUFFICIENT. (1) Confession: Testimony showed "that accused was not advised of his rights under AW 24 prior to being questioned and was 'more or less scared into' giving the information which he gave orally. This testimony, taken together with Colonel M**'s testimony as a whole, must be accepted as showing that at least some duress or coercion was employed in questioning the accused. This being true, accused's oral statements, regarded as a confession, were inadmissible ***. The information given orally was then reduced to writing in the form of a statement and, after being advised that he was not required to sign such statement and that it could be used against him in the event of further proceedings, accused signed ***. If this statement is regarded merely as the formal consummation of accused's preliminary oral statements, the warning came too late to have any tendency to show that the statement was voluntarily made and *** it follows that the statement must be rejected. If regarded as a separate and subsequent confession ***, the warning given was not broad enough to render the written confession voluntary for the reason that accused was not informed that the prior oral confession could not be used against him. *** Thus, the warning given was not sufficient to insulate the written confession from the improper influence which induced the prior oral confession ***. Therefore, under any of

the analyses suggested above, accused's confession or confessions were improperly received in evidence." Nonetheless, excluding the confession, there still remains evidence of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. The error, therefore, was not prejudicial. (2) Specification: It was alleged that accused violated a 24 June 1944 letter. "Although it appears that this letter was rescinded and superseded by a similar letter dated 23 September 1944 (paragraph 2a of which reenacted paragraph 1 of the earlier letter), this fact did not, under the circumstances of this case, render the Specification fatally defective ***." While that paragraph "prohibits certain transactions and dealings in currency of the U S., authorized transactions are expressly excepted from its scope. Hence, on first examination, it might be thought that in order to prove a violation of the proviso, it would be necessary for the prosecution to show not only that a transaction of the prohibited type was consummated by the accused but that its consummation was unauthorized in the particular instance charged. However, it should be remembered that, in general, it is incumbent upon an accused to to bring himself within the operation of a provision or exception to a statute." "It was alleged that accused did wrongfully 'obtain' certain currency of the U S. from an enlisted cashier of a finance disbursing section. While it would have been better practice to allege a violation of the paragraph in the words of the paragraph itself, it is the conclusion of the Board of Review that to 'obtain' currency of the U S. constitutes a 'holding' or 'dealing in' such currency within the broad meaning of those terms as used in the paragraph here under discussion ***. Further, competent evidence *** compellingly shows that accused did in fact 'obtain' certain currency of the U S., as described ***, and that he had such currency in his personal possession on the day following its acquisition. A violation of the paragraph having been shown, it was for the accused, if he could, to bring himself within the exception noted by showing that he was authorized to make the transaction in question. Having failed to do so, and there being compelling evidence to show that he engaged in the prohibited activity, the findings of guilty may properly be upheld." (CM ETO 6983 Carlson 27 Jul 45)

Accused officer was found guilty of a violation of AW 96 which, as approved by the confirming authority, involved a "finding that accused ***, having custody and control of gold seal American currency of the value of about $1,000, property of a person or persons unknown, did, in conjunction with ***, wrongfully cause to be exchanged said $1,000 for French francs at the rate of 75 francs per dollar and did wrongfully convert therefrom the sum of about 12,500 francs, value about $250, to his own use and profit". HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt. Accused finance officer had custody of large amounts of funds belonging to enlisted men, on his personal receipt. During the period of such custody,

454(54a-54aa) (54a) Foreign Exchange, Illegal Profit From
(54aa) Forgery

he took advantage of a change in the exchange rate in French Morocco, and profited therefrom by using such funds in money exchange operations. (Evidence detailed.) (2) The Specification, although somewhat ambiguous and duplicitous, was not objected to. Accused was not misled thereby. "When considered as a whole, and when the various allegations thereof are considered as complementing each other, the Specification sufficiently charged an offense, the gravamen of which is the wrongful conversion or appropriation by accused to his own use and benefit of $1000 of American currency which he was holding in trust for others. Clearly he held the money in trust to be applied to a particular purpose, viz., the purchase of money orders in conformity with the directions of the owners of the money. He had no authority to use the money for his own personal purposes or benefits. When, without authority and with the intent and purpose of making a profit for himself, he delivered the $1000 to [illegible]ant *** and procured it to be exchanged for francs, he breached his trust and converted the $1000 to his own use and benefit ***. This is so despite the fact that, voluntarily and pursuant to his criminal plan, he replaced the $1000 with sufficient francs to purchase money orders in the same amount that could have been originally purchased with the $1000. By breaching the trust relationship which existed between him and Army personnel, he was guilty of conduct to the prejudice of good order and military discipline. This is not rendered any the less true by the fact that accused was holding the money in his individual capacity rather than in his official capacity ***." (CM ETO 10499 Dintsch 25 Jul 45)

(54aa) Forgery:

Cross References: 454(96) 14632 Lang II
451(25) See in general

Accused officer was found guilty of various violations of AW 96 involving his improper means of transporting extraordinarily-large sums of money home from Europe. HELD: LEGALLY SUFFICIENT. (1) Three Specifications: "Under the findings of guilty as confirmed, the only question presented is whether it was an offense under AW 96 for accused, during January and May 1945, in the ETO, to use another officer's name without authority in purchasing a U.S. money order. It is a matter of common knowledge that during this period of time, many opportunities existed within the theater for making large illegitimate profits through the exchange of American and British monies for the more unstable continental currencies, and through other so-called 'black market' activities. It is also common knowledge that as a result of such activities, rigid controls were instituted with respect to the transmission of funds to points outside the theater. One of such controls, for example, was a letter dated 14 November 1944, from Hq ETO (AC 123X250.1), which prohibited transmission of funds to points outside the theater through other than finance offices or army postal services, and which required transmitting officers to report attempts to transmit

amounts which possibly were derived from clandestine sources, to the commanding officer of the prospective sender for an explanation or other appropriate action. Aside from the common knowledge as to such matters, accused was charged with knowledge of important and general theater directives on the subject ***. Indeed, his statement that he 'was under the impression that we could not send but so much money home each month' leaves little doubt of his actual knowledge of the policy relative to sending large amounts of money to points outside the theater. Accused was thus aware of the fact that by using another officer's name he might divert possible suspicion from himself and that his acts might cast equal suspicion upon an innocent fellow officer whose name he used. Irrespective of whether the funds which accused transmitted were lawfully acquired by him, under the circumstances shown his conduct was clearly prejudicial to good order and military discipline, and constituted a violation of AW 96 ***." (2) A Fourth Specification: "The evidence clearly shows that accused ***, without authority, signed the name of another officer to a money order application and that he thereafter falsely stated to Cpl. **, an employee of the army post office at which the application was made, that he was making the money order out 'to' his brother-in-law. Since the payee of the money order was a woman, he obviously meant by his statement that he was making the application for his brother-in-law, or for Lt. **, whose name he used in making the application. In his statement accused in effect admitted his knowledge that he could not personally transmit so much money home. In the light of the circumstances heretofore discussed ***, accused's false statement clearly was made for the purpose of allaying any suspicions which might have arisen in the mind of the postal clerk from the fact that he had falsely impersonated Lt. ** in making the application, and for the ultimate purpose of insuring the transmission of the funds as alleged ***. Under the circumstances, such statement" constituted a violation of AW 96. (3) Sentence: Accused officer was sentenced to dismissal, total forfeitures, fine of $5,000, confinement at hard labor for one year and further confinement at hard labor until such fine is paid, but not foremore than five additional years, at a United States Disciplinary Barracks. The record of trial supports this sentence. (CM ETO 17469 Allen 25 Oct 45)

(56a) Fornication:

Not Digested:
11621 Trujillo

Cross References: 454(56b) 10419 Blankenship (sexual intercourse as fraternization)
450(5) 10446 Ward (lesser to rape)
454(56b) 13767 Allen (fraternization as lesser offense)

454(56a-56b) (56a) Fornication
(56b) Fraternization with Enemy

Among other things, accused were found guilty of described rapes, in violation of AW 92, and of wrongfully entering their home, wrongfully threatening them with a show of arms, and wrongfully having sexual intercourse with them, to the scandal and disgrace of the military service, in violation of AW 96. HELD: LEGALLY SUFFICIENT. The evidence supported the findings of guilt. "The scandalous conduct charged in violation of AW 96 is all part and parcel of the more serious offenses of which accused were also found guilty. In view of the lack of resistance and repeated acts of intercourse shown, it may well be that, when the charges were drawn and referred for trial, sufficient doubt existed as to the facts and the law to warrant charging the offenses also in a less serious aspect. In any event, since the sentence is well within the maximum limit of the more serious offense involved, no prejudice is shown." (CM ETO 13286 Uribe et al 12 Jul 45)

(56b) Fraternization with Enemy:

Not Digested:
9824 Hensing
8837 Wilson (fraternization inconsistent with rape)
12096 Amlauer
15252 Lambert
15249 Chutnicutt (inconsistent with rape charge)
14182 Malott (intercourse, etc., as such; acquitted of rape charge)
12592 Kolanko, et al (with rape)
11779 Bohn, et al (with rape; not fraternization-no showing of unlawfulness)
15091 Gallahan
17541 Fox

Cross References: 450(5) 10446 Ward (attempt; punishment)
450(4) 10700 Smalls (with rape)
450(4) 12604 Mendez (inconsistent with rape)
450(4) 10891 Murphy (inconsistent with rape)
450(4) 9301 Flackman (sexual intercourse)

Accused officer was found guilty of a violation of AW 95, in that he wrongfully fraternized with a German woman by having sexual intercourse with her, in violation of an 84th Infantry Division Memorandum. The confirming authority changed the finding of guilt from AW 95 to AW 96. HELD: LEGALLY SUFFICIENT. (1) Fraternization: "The testimony of the female involved *** indicates definitely that she engaged in the sexual act freely and voluntarily." "Sexual intercourse between an American soldier and a German female civilian, voluntarily engaged

in by both parties, is clearly an act of 'familiarity or intimacy' " prohibited by the Memorandum of the 84th Infantry Division. "It should be noted that accused was found guilty of an act which malum prohibitum only, to wit, wrongful fraternization. His sexual act constituted the unlawful fraternization. He was neither charged with nor convicted of an offense involving unlawful sexual intercourse." (2) The confirming authority properly approved only so much ofthe finding as involved guilt of a violation of AW 96. (CM ETO 10419 Blankenship, 14 Jun 45)

Amont other things, accused officer was found guilty of a violation of AW 96 in that he wrongfully fraternized with Dr. ***, a German, by giving him six cans of "C" rations and coffee. HELD: LEGALLY SUFFICIENT. "Even though not introduced into evidence, the court on its own initiative could properly take judicial notice of orders issued by higher authority forbidding fraternization with Germans ***. That accused was aware of of such orders is shown by his own testimony and, inferentially, by the 'special orders' read to the court in argument. The term 'fraternization' as used in connection with the relationship of American soldiers and German concerns friendly association and comradely social relationship ***. The conduct of accused as alleged and proved constituted fraternization ***. That Dr. ** was a cleric of the same religion, and not a Nazi, did not excuse the conduct of accused. Fraternization is prohibited with Germans - an inclusive term embracing all German nationals." (CM ETO 11903 Wofford 16 Jun 45)

Accused was found guilty of rape, in violation of AW 92; of assault by striking a woman with a carbine, in violation of AW 93; of assault with intent to do bodily harm by tearing a woman's private parts with his hand; and of wrongfully fraternizing,(in violation of standing orders), with German civilians, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The evidence (detailed) supported the findings of guilt. (2) Fraternization: "The specific act alleged to constitute fraternization is that of entering the Mathes home /in Germany/. The evidence shows that accused gained admission by knocking and calling at the door, whereupon Mathes opened it. Accused asked for and was given wine which he drank, and played with the baby. Thereafter he directed his attention to Frau Mathes, whom he eventually succeeded in raping. The court was justified in inferring from accused's amicable acts immediately following his entry into the house that that entry *** was not motivated solely by the purpose of committing a criminal offense, and that it therefore constituted fraternization ***. There is thus no inconsistency ***." (CM ETO 12869 Dewer 14 Jul 45)

454(56b) (56b) Fraternization with Enemy

Among other things, accused officers were found guilty of violations of AW 96, (a) in fraternizing with two German women and having sexual intercourse with one of them, and (b) of violating orders by transporting said women for unauthorized purposes. HELD: LEGALLY SUFFICIENT. (1) Fraternization: "The alleged orders prohibiting fraternization were not introduced in evidence. However, the specifications properly set forth offenses in violation of the theater policy in effect at the time alleged /20, 22 April 45/ as contained in Appendix A to letter, 12 September 1944, SHAEF ***." The evidence supported the finding of guilt. (2) Transport Civilians: "No evidence was introduced of the alleged order prohibiting the transportation of civilians in military vehicles. However, this was not necessary since the specifications describe a violation of Pamphlet, AG 451/2 Pub GC, Maintenance and Operation of Motor Vehicles, Hq., ETO, 24 January 1945, which was governing at the times alleged and which in effect prohibits the transporation of civilians except on official business." (CM ETO 15855 Wilson et al 6 Sept 45)

Accused was charged with a violation of AW 96, in that he wrongfully and by putting her in fear, induce a German girl to have sexual intercourse with him. By exceptions and substitutions, he was found guilty of wrongfully fraternizing with that German girl by having sexual intercourse with her. HELD: LEGALLY SUFFICIENT. (1) Accused's fraternization violated a directive "Policy, Relations between Allied Occupying Forces and Inhabitants of Germany" (12 Sept. 1944, SHAEF). (2) Lesser Offense: "It is established that voluntary intercourse, which the court found to have been here entered into, is certainly 'familiarity and intimacy' and is sufficient in and of itself to constitute *** fraternization ***. The instant Specification is not inherently incompatible with and includes the lesser offense of fraternization with a German civilian by voluntary sexual intercourse with her." The intercourse here was voluntary. (CM ETO 13767 Allen 28 Sep 45)

Among other things including rape and assault, accused was found guilty of a violation of AW 96, in that he wrongfully and unlawfully entered civilian German homes on about 8 March 1945, and did wrongfully and unlawfully associate therein with described German civilian nationals, in violation of Twelfth Army Group standing special orders. HELD: LEGALLY INSUFFICIENT IN THIS REGARD. "We take judicial notice of these orders as the court itself was authorized to do ***. The evidence shows that accused entered German homes, but that he associated, i.e., joined as a companion, with only Maria Pollmanns. His contacts with the Veikes, Obschruff, the Sybens and Bos were all of a violently criminal character. We have repeatedly held that such conduct is not fraternization. *** Nor is it association. His plea of guilty to association with Frau Veikes and Fraulein Obschruff is not controlling ***." (CM ETO 12056 Reyes 29 Sep 45)

(59)(Gamblinbling 454(59)
(62a) Impersonation 454(62a)
(63a) Indecent Liberties 454(63a)

(59) Gambling

Not Digested:

11775 Porter (officer and EM)

Cross References: 454(75b) 9343 Stanley (officer with EM)

Accused officer was found guilty of a number of AW 96 violations, including specifications setting forth (a) his wrongful use of government vehicles, (b) wrongful drinking intoxicating liquor in company with enlisted men, and (c) wrongfully compelling described subordinate officers to participate and gamble for money in a poker game. HELD: LEGALLY SUFFICIENT: (1) Impeachment: "While courts are not in agreement *** the federal circuit courts, at least a majority of them, hold that evidence of an arrest or pending indictment is not admissible to impeach a witness ***." Evidence herein of whether a witness was then under court-martial charges was properly excluded. (2) Compel Gambling: "Clearly, gambling is not normally a duty a superior may require of subordinates. Accused's novel test of the stamina and sportsmanship of his subordinates, conducted under the shown circumstances, constituted conduct prejudicial to good order and military discipline cognizable under AW 96." (3) President's Intemperate Remarks: During the cross-examination of accused, the President of the Court commented that it was "foreign to my experience to correct deficiencies in the company by private meetings with assembled non-coms, leaving the officers out of the picture." These remarks were improper. However, no prejudice resulted. (CM ETO 12758 George 1 Aug 45)

(62a) Impersonation:

Cross References: 454(54aa) 17469 Allen (use another's name on Money Orders)
416(9) 14456 Fowler

(63a) Indecent Liberties:

Cross References: 454(7) 12711 Cliley (aggravated assault; maximum punishment)
452(18) 14925 Bullock (indecent assault; punishment)
454(7) 10445 Keffer (fondle woman, an assault and battery)
453(20a) 16888 Thompson (compel German girl to strip)

454(63b,63c,64a,65a) (63b) Inflammatory Address to Military Personnel
(63c) Insubordinate Conduct
(64a) Interfere with Mails
(65a) Mail Censorship Violations

(63b) Inflammatory Address to Military Personnel:

Cross Reference: 448 10939 Gerner (re Nazi doctrines; AW 90 not lesser)

(63c) Insubordinate Conduct:

Accused officer was found guilty of behaving in an insubordinate manner in violation of AW 96, to wit: saying "'I can't do it,' or words to that effect, in answer to a lawful command given him by *** his superior officer, to fly on 24 Mar 45 as a pilot *** on a combat mission." HELD: LEGALLY SUFFICIENT. (CM ETO 16940 McCoy 6 Oct 45)

(64a) Interfere with Mails:

Among other things, accused was found guilty of a violation of AW 96, in that he had interfered with mail. HELD: LEGALLY SUFFICIENT. "There is no maximum limit stated in the Table of maximum punishments *** for the offenses alleged in Specifications 1, 2, 3 and 5, Charge II. The penalty prescribed in Sec.194, Fed Crim C (18 USCA 317) is not applicable. The most closely related offense is that of larceny. The maximum punishment for each offense alleged in Specifications 1 and 2 includes confinement at hard labor for five years; that for each offense alleged in Specifications 3 and 5 includes one year's confinement ***. The sentence imposed is therefore within legal limits." (CM ETO 11237 Moudy 1945)

(65a) Mail Censorship Violations:

Accused medical officer was found guilty (a) of misappropriating described binoculars, a dispatch case, three towels and a shovel, property of the U.S. furnished and intended for the military service, in violation of AW 94; and (b) of two violations of AW 96, to wit: (i) making a false official representation by affixing his censorship signature to the package in which he mailed the above items to an addressee at an APO; and (ii) violating mail censorship regulations by inclosing and posting the two maps above described, both U.S. Engineer Corps maps. HELD: LEGALLY SUFFICIENT. (1) Misappropriation: AW 94: "Misappropriation has not the strictly limited application of larceny or embezzlement. It is immaterial whether control of the property was obtained rightfully or wrongfully. The gist of the offense is knowingly and willfully to misappropriate government property furnished or intended for the military service

thereof (CM 243287, 3 Bull. JAG 236). Accused's act of mailing these items to his brother was clearly a misappropriation. He admitted to the misappropriation of the shovel and dispatch case. That he considered the of no value was no excuse. As to the binoculars and towels, it was within the court not to accept his explanation that they got into the packages inadvertently. The circumstantial evidence that the items were of the types issued for use in the military service, together with accused's admissions, warranted the inference that they were property of the U.S. furnished and intended for military service ***." (2) Censorship Violation False Certificate: "It was proper to take judicial notice of Circular #33, Hq, ETOUSA, dated 21 March 1944 ***. Par 3c thereof provides: "This signature certifies that the officer has read, understood and complied with military censorship regulations' ***. There was substantial evidence that the certification was false and the court could infer that its falsity was known to accused. Paragraph 9c thereof provides: 'The following items will not be included in personal letters or packages: (4) *** maps ***." (3) Multiplication: The two specifications under AW 96 did not constitute an unreasonable multiplication of charges. "The false certification was in and of itself an offense as was the act of including and posting the map." (4) Redrafted Charges: "The original specifications and charges were apparently redrafted on a separate sheet which was pasted over the originals in such a manner as to prevent comparison. There was no reinvestigation or re-execution. When arraigned accused did not object. While the practice *** was highly irregular and improper ***, accused's substantial rights were not injuriously affected ***." (4) Court Trying Case: The charges were originally referred to one court. Thereafter, before arraignment, accused requested and was granted a continuance. Next, the case was referred to another court. That court convened, and "the trial proceeded de novo after accused consented to proceeding without individual counsel. It was within the power of the appointing authority to withdraw the charges (MCM, 1928, par.5, p.4). Accused consented to proceeding without individual counsel." (CM ETO 9986 Goldberg 4 Jul 45)

(65b) Mail Wrongful Use Of:

Cross Reference: 452(21) 16555 Kneeter (mail liquor)

(69aa) Narcotic Drugs:

Cross Reference: 454(103) 17749 Major (possession of)

454(69aaa, 69bb) (69aaa) Neglect of Duty
(69bb) Negligent Safeguarding of Equipment

(69aaa) Neglect of Duty:

Cross References: 454(36) 10413 Shipley (unload ship; pilfering)

(69bb) Negligent Safeguarding of Equipment:

Accused Division Signal Officer was found guilty of two violations of AW 96, in that (a) he wrongfully and negligently failed to prescribe and properly supervise the enforcement of an adequate standing operating procedure for the security of secret cryptographic devices and codes used at his headquarters; and (b) he wrongfully and negligently failed to exercise and direct adequate measures for the security and safekeeping of those devices, codes and equipment, stored and transported in a 2½ ton truck, as a result of which the truck and contents were lost through theft by persons unknown. HELD: LEGALLY SUFFICIENT. (1) Neglect: "When consideration is given to the fact (of which both the court and Board of Review may take judicial notice ***), that the enemy had been but recently expelled from Colmar and that it was subject to the disorders and lawlessness which characterize territory newly freed from enemy control, the failure to post proper guards to secure the truck and contents against loss presents a picture of gross carelessness and neglect which is inexcusable and deserve most severe condemnation." Higher authority prior to the incidents here involved did prescribe a standard of care of cryptographic equipment while in course of transportation ***." (See letters, 14 March and 15 June 1944 from Chief Signal Officer, ETO, which it was shown that accused received.) "That it was the duty of some responsible officer to post or cause to be posted security guards to protect the truck and contents under the circumstances and conditions here shown there can be no doubt." (Also sed AR 105-5, WD, 1 Dec 1942, para 2d and 3.) "Upon accused as Division Signal Officer was imposed the ultimate duty of devising, promulgating and enforcing methods of safeguarding and protecting the cryptographic equipment. He was charged with the knowledge and did have knowledge of the contents of the highly important directives *** of his superior, the Chief Signal Officer, ETO, and it was his duty and obligation to see they were carried into execution." "The evidence is clear *** that accused issued no formal written orders to his command embracing the pertinent security provisions of the directives ***. In lieu thereof an informal "SOP" came into existence ***. This informal practice wholly ignored the mandates of the Chief Signal Officer, ETO. *** The facts of the instant case clearly demonstrate the inadequacy of such informal procedure ***. It should be noted particularly that these directions required that the equipment be attended at all times by an armed guard and prohibited casual passengers on the vehicle transporting the equipment. The placement of the vehicle in a parking lot or motor pool (even though the park or pool was guarded) obviously did not fulfill this requirement. The presence of armed soldiers on the vehicle while in motion when they rode in it for their own convenience and were not detailed as

guards constituted a violation of the higher mandate and was not a compliance therewith." (2) Specification 1: This Specification alleged a nonfeasance --the failure to perform a duty imposed upon him by law. (Define; cite Bouvier's Law Dictionary, Rawle's 3rd Rev., p.2356; Black's Law Dictionary, 3rd Ed., p.1255; and 46 CJ, p.490.) A violation of AW 96 was proved. Although a junior officer may have been division security officer and responsible for the security of the equipment (AR 380-5, WD, 15 March 1944, sec IV, par 43), his dereliction did not excuse accused's nonfeasance. Proof of the latter's offense was complete "without evidence of the loss of this specific equipment. The incident served only to reveal the fact that he had not performed his duty." Moreover, the failur or oversight of inspectors to discover the dereliction was no excuse. "The process of inspections in the Army is not for the purpose of absolvin personnel from responsibility for the non-performance of their duties ***. Strictly speaking, the evidence pertaining to these inspections and their results should have been excluded as being foreign to the issues ***." However, such error favored accused, so was not prejudicial. (3) Specification 2: "The theft of the cryptographic equipment was the direct result of the failure to post security guards on the truck which contained the same. A junior officer was directly responsible for the posting of guards, However, "accused had full knowledge that the mandate of the theater signal officer" provided that transportation of the equipment should never be without authorized armed officer courier and armed guard. The junior officer's default may be imputed to accused. "What the result would have been had accused specifically ordered Lt *** to carry out the procedure directed by superior authority" need not be decided. "It is enought that accused was fully apprised of the 'unwritten SOP ***' which violated superior orders and that he did not intervene and order" the junior officer to post guards. "The fault of his subordinate became his fault." (4) Motion to Strike either the first or the second specification, and to be more definite in the allegations, was denied. Denial thereof was proper (see discussion on the merits). (CM ETO 11500 Hulett 14 Jul 45)

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(75) Receiving Stolen Goods:

Not Digested:

17468 Hewett (Possession)

Cross Reference: 454(18a) 13155 Bosby

(75b) Refuse to Fly:

Cross Reference: 385 10363 Manziapane

454(75c,86a,86c) (75c) Resell PX Products To EM For Profit
(86a) Sentinel Offenses
(86c) Standard Operational Procedure

Accused officer was found guilty of specifications under AW 96, charging him with borrowing from enlisted men, gambling with enlisted men, and reselling Post Exchange items for profit to officers and enlisted men, HELD: LEGALLY SUFFICIENT. (1) Borrowing from EM: Properly construed, one specification charged the borrowing of 500 francs rather than 1000. "The variance in the amount, due to the nature of the offense, is under the circumstances, immaterial. Accused did not deny making these loans. The only explanation offered is his rather clear intimation that he was borrowing this money not for himself but for the 'slush fund' (which obviously was for the benefit of the enlisted personnel and not himself) ***" The evidence supports a contrary conclusion, "inescapable despite the fact that all borrowings were promptly repaid." Accused was guilty of all the borrowing specifications, as charged. (2) Gambling With EM was adequately proved, and constituted a violation of AW 96. (3) Resale of Post Exchange Merchandise: "Accused bought merchandise from the U.S. Exchange Service and resold it, to army personnel, at prices higher than that which he paid. *** He contended that the profit realized was not intended for his personal gain, but for the men of the company. In proof of his good faith he produced complete records of all transactions. It may also be assumed that he produced the money representing these profits. The resale of merchandise purchased at retail by military personnel is prohibited by par 13f, Changes No. 4, AR 210-65, 19 Nov. 1943. The only exception to the prohibition *** found therein is to permit military personnel to receive 'actual reimbursement without profit for merchandise purchased at an exchange as a matter of economy, convenience, or necessity as agent for other members of the military forces'. Accused here of course bought as agent for members of the military forces. It might at first be argued that if accused did not use any of the profit for himself but held it intact for the purchasers that he came within the permissive scope of the pertinent paragraph of this AR, inasmuch as he merely reimbursed himself without profit to himself. The language of the regulation in making this exception is flat in its declaration that the resale must not include profit. In any event this resale by accused at a price in excess of that paid constituted a violation of instructions given him by his commanding officer, a military offense prejudicial to good order and military discipline under AW 96." (CM ETO 9343 Stanley, 27 Jun 45)

(86a) Sentinel Offenses:

Not Digested:

16891 Marrs, Jr. (assault sentinel; failure to obey sentinel)

(86c) Standard Operational Procedure:

Cross Reference: 454(69bb) 11500 Hulett (fail to follow)

(88aa) Superior Officer's Responsibility for Act of Junior Officer
(88b) Trespass 454(88aa,88bb,91,92,9
(88bb) Solicitation; Wrongful Conduct
(91) Unfit Self for Duty
(92) Unlawful Discharge of Firearms
(94b) Urinate on Squadroom Floor

(88aa) Superior Officer's Responsibility for Acts of Junior Officer:

Cross Reference: 454(69bb) 11590 Hulett (safeguard equipment)

(88b) Trespass:

Not Digested:

11621 Trujillo 16835 Snyder (pvt.residence)

Cross References: 454(56a) 13286 Uribe
454(38) 17339 Gunning (multiplicity)

(88bb) Solicitation: Wrongful Conduct:

Cross Reference: 451(17) 11546 Clarke, et al
454(18a) 9643 Haymer

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(91) Unfit Self for Duty:

Not Digested:

16006 Crowder

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(92) Unlawful Discharge of Firearms:

Not Digested:

11845 Stark 12180 Everett 15252 Lambert 16391 Marr, Jr. (pistol)

Cross Reference: 453(26a3) 12759 Traymor (lesser to AW 95)

(94b) Urinate on Squadron Floor:

Not Digested:

11903 Wofford

454(96) (96) Uttering Forged Instrument

Accused civilian technician serving with the Army Exchange Service in the European Theater of Operations, was found guilty of a number of violations of AW 96, arising out of his activities in a large cognac transaction. Specifications 1, 4, 5 and 7 charged him with willfully, unlawfully and wrongfully, with intent to defraud, making (also forging in Specification 7) and uttering as true and genuine the instruments set forth, writings of a public nature, which might operate to the prejudice of another, then wellknown by accused to have been falsely made and signed (Specification 1), to be false, fraudulent and forged (Specifications 4, 5), to be falsely made and forged (Specification 7). He was charged in Specifications 3 and 6 with willfully, unlawfully (wrongfully in Specification 3) and feloniously, with intent to defraud, falsely making in their entirety the instruments therein set forth. Specification 3 further alleged that the instrument was a writing of a public nature, which might operate to the prejudice of another, then known by accused to be false, fraudulent and forged. Specification 6 omitted such allegation. Specification 2 alleged the violation of a theater directive arising from an unofficial money exchange transaction. HELD: LEGALLY SUFFICIENT IN PART. I.E. INSUFFICIENT AS TO SPECIFICATION 1: SUFFICIENT ONLY AS TO SPECIFICATION 7 FOR A FINDING OF ACCUSED'S GUILT OF MAKING, FORGING AND ATTEMPTING TO UTTER THE INSTRUMENT SET FORTH.

(1) Jurisdiction; Civilian: Accused held a contract of employment as an accountant with the Army Exchange Service, one paragraph of which provided that a person accompanying or serving with the armies of the U.S. in the field in time of war, either within or without the territorial jurisdiction of the U.S.A., should be subject to the provisions of the Articles of War, Accused was serving in Paris. The punitive AWs had been read and explained to him. "The Army Exchange Service is an instrumentality of the U.S., an integral part of the War Department, and is in all respects subject to military control and direction ***." The court was authorized, as is also the Board of Review, to take judicial notice of ARs and directives of Hq, ETO ***." (Note Gen.Order No. 16, 21 Mar 1943, Hq ETO, re Services of Supply (Now Theater Service Forces). Judicial notice may also be taken of the facts that at all relevant times the U.S. was at war with the Axis powers ***; that the U.S. maintained military establishments at Paris, France; that the office of the Army Exchange Service, 21 Avenue Kleber, was one of those establishments; that military personnel were on duty at said office; and that at such office was a detachment of civilian employees of which accused was a member, which was engaged in work directly connected with the furnishing of various types of supplies to U.S. Army forces." Jurisdiction over *** accused by military courts existed under" AW 2(d), which applies irrespective of whether or not a state of war exists. "The defense objection to the admission in evidence of the contract of employment on the ground that it failed to mention specifically the U.S. Army as the employer was not well taken and the contract was properly admitted ***. The failure to object to the document on the ground that its genuineness was not shown might properly be regarded by the court as a waiver of that objection ***. It must be observed, however, that although the execution and existence of the employment contract *** are relevant to his status as accompanying or serving

with the Army notwithstanding the failure of the contract to mention the Army, nevertheless military jurisdiction over accused would exist independent of such contract if such status were established without reference thereto. Jurisdiction over civilians under AW 2(d) is not dependent upon their agreement, as the test is solely an objective one, independent of their knowledge or ingent ***. The contract was evidence of, rather than the basis of, the court's jurisdiction. That basis was accused's assumption of duties with the Army, occasioned by and under the contract."

(2) Specifications: "Although the Charge is designated a violation of AW 96, Specifications 3 and 6 in substance follow the form of specification of common law forgery in violation of AW 93 ***. This irregularity, however, is immaterial, as offenses in violation of the latter article were stated ***. Each of Specifications 1, 4, 5 and 7, however, combines with the statement of such offense the allegation of uttering the forged instrument, which manifestly states an offense in violation of District of Columbia Code, sec. 22-1401 (6:86), and thus of AW 96 ***. At common law, forgery and uttering were different substantive crimes ***. Technically, therefore, each of the last mentioned specifications alleges two offenses: viz., forgery and uttering a forged instrument in violation respectively of AWs 93 and 96. While this is not strictly good pleading ***, the failure *** to object or move with respect thereto may be regarded as a waiver ***, particularly where the criminal acts alleged in the same specification form part of the same transaction ***. In any event, duplicity *** is cured by verdict and is not thereafter subject to attack ***.

(3) Evidence; Specifications 3-7: (a) The charged forgeries herein were adequately proved. Accused admitted that he composed the forms himself and placed fictitious names thereon to conceal his own identity.*** The signing of a fictitious name may constitute forgery ***. The instruments were clearly falsely made. (b) That they were made with intent to defraud *** might properly be inferred ***" from the evidence herein. "A general intent to defraud is sufficient; it is not necessary to show that the intent was directed at any particular person *** and the general intent may be inferred from an act in relation to the spurious instrument having capacity to defraud, viz., delivery to Madame J**" in order to obtain cognac. (c) "The instruments were such that they might apparently if genuine, be of legal efficacy or the foundation of a new or altered legal liability. ***Genuine documents, of the nature of which these purported to be, were required to be furnished by accused in order to obtain cognac at a certain price. Of necessity the seller of the cognac at that price and others would rely *** upon the genuineness of the documents. Their falsity *** was calculated to defraud or prejudice those persons. Moreover, the documents, taken all together, were such as to create an apparent liability on the part of accused's principal, the Army Exchange Service, to pay for the cognac. (d) "Neither the fact that accused intended no harm *** nor the fact that the letter of authorization set forth in Specification & *** was never actually used *** constitutes a defense."

(4) Evidence; Specification 1: "Accused also admitted making the instrument set forth in Specification 1 ***. The document shows that he signed his own name thereto, followed" by his description. "The letter bears the heading of the Army Exchange Service. It is fairly inferable *** that he realized by making the letter and delivering the same to DiR** he had left himself open to criticism and requested its return, that the letter was prepared and signed without authority and that the statement therein as to DiR**'s authority to purchase merchandise solely for the benefit of the U.S. Army may have been false. The letter was clearly what it purported to be, viz: a letter of authority to DiR** on the letterhead of the Army Exchange Service signed by accused as an employee or agent of that entity. Although it was prepared and executed without authority from that entity and may have contained a false statement, it was not *** a fake, fabrication or counterfeit. The serious question is presented whether the making and signing of the document constituted the offense of common law forgery." "Application of the majority and better rule to accused leads to the conclusion that the letter was not falsely made and signed as alleged and that he was not guilty of forgery when he prepared and signed the same or of uttering or attempting to utter a forged instrument when he delivered it to Madame Javelle. The finding of guilty of Specification 1 is therefore not supported by the record."

(5) Evidence; Specification 4, 5: "The offense of uttering a forged instrument is complete when the same is offered by one knowing it to be forged with a representation by words or actions that it is genuine and with an intent to defraud. It need not be actually passed or accepted as genuine, nor need anyone be actually prejudiced by it ***" The offense is specifically denounced by District of Columbia Code Sec 22-1401 (6:86). "That accused uttered the shipping ticket (Specification 4) and the informal routing slip (Specification 5), he admitted ***. The delivery of the documents to Madame J** with knowledge that they were ultimately to be used as genuine, even though with the reservation expressed to her that they were spurious and were to be returned, followed by her presentation of the documents to B**, constituted a sufficient uttering within the quoted statute and hence with AW 96. The fact that B** recognized them to be forgeries is immaterial. Uttering may be effected by means of an agent, where the instrument is delivered to the agent with intent to have it passed as genuine, and the agent offers the same as such ***. Accused's intent in delivering these two documents to her was precisely the same as it was in making them: to induce reliance, by whoever might be required to rely, upon the documents as genuine, for the purpose of selling cognac at a certain price."

(6) Evidence; Specification 7: "With respect to the letter purporting to authorize C** to purchase cognac for the Army, the proof fails to show that the document was ever presented to anyone as genuine. It is fairly to be inferred *** that Madame *** was made aware of the falsity of the letter. As agent of accused for the procurement of cognac, she never offered the letter to anyone as genuine or otherwise. Mere delivery of a forged instrument to an agent, whether the agent be innocent or not, with intent that he pass the same as genuine, is not uttering so long, at

least, as the agent has not offered it ***" "Accused's overt act in delivering the letter to her with fraudulent intent, however, went far enough to constitute an attempt to utter, which is a lesser included offense within that of uttering and is denounced by the same District of Columbia statute, supra (MCM, 1928, par.152c, p. 190)."

(7) Variances: Minor variances and typographical discrepancies were not prejudicial (detail, on p.23 of the opinion).

(8) Omission; Specification 6: "The omission from Specification 6 of the allegations that the requisition was a writing of a public nature which might operate to the prejudice of another, and was then known by accused to be false, fraudulent and forged, was immaterial ***. The elements of such allegations are sufficiently included in the qualifying words of the Specification, 'did *** willfully, unlawfully and feloniously, with intent to defraud, falsely make in its entirety a certain requisition', which as set forth was clearly a writing of a public nature calculated to operate to the prejudice of another."

(9) Evidence: Foreign Exchange Specification 2: It was established that accused violated a Theater directive by exchanging French francs outside official channels at a rate of exchange in excess of the official rate (see Letter AG 121 OpGA, Hq ETO, dated 23 September 1944; Par 2(b)). "Accused was aware *** that he was violating the directive. "The allegation and proof that he received an excessive rate, while matter in aggravation, was not essential to his guilt **."

(10) Punishment: (a) As accused is not a member of the armed forces of the U.S. he is not subject to dishonorable discharge or dismissal ***. To the extent that the court *** essayed to adjudge dismissal of accused from the service of the U.S. Government, as opposed to dismissal from the military service, it *** exceeded its authority ***." That portion of the sentence was illegal and void. (b) Nor do the authorities "require or justify a holding that accused's right under his contract with the Army Exchange Service, to a salary of $350.00 per month *** was subject to a sentence of forfeiture by court-martial." "As hereinbefore indicated ***, the Army Exchange Service is an instrumentality of the U.S., an integral part of the War Department and in all respects subject to military control and direction. In the European Theater it is the agency of the Theater Commander and as such under the supervision and direction of the Commanding General, Communications Zone, US Forces, European Theater. However, in its ownership of funds and other property and in its contractual relations with respect thereto, it is privately owned and operated. Its property and funds are not the property of the U.S. but are held in trust for the ultimate benefit of the military personnel, nor are its contracts and debts those of the U.S.***. It has been held that property of a post exchange ***, funds of a post exchange *** and Army Exchange Service property *** do not belong to the U.S. Government. Likewise contracts of the Army Exchange Service are not Government

454(96,99,100aa,102a) (96) Uttering Forged Instrument
(99) Violation of Standing Orders
(100aa) Willful destruction of Property
(102a) Wrongful Entry Into Home

contracts *** and its debts are not those of the Government nor are they guaranteed by the Government ***. The obligation to pay accused his salary was that of the Army Exchange Service and not that of the U.S. Army or of the U.S. Government. It even appears in the record that he was paid out of a revolving, nonappropriated fund under AR 210-65 ***, rather than from the War Department. It follows that the court-martial had no power to direct forfeiture of amounts due or to become due to him under the employment contract and that the portion of the sentence adjudging that he forfeit all pay and allowances due or to become due was also illegal and void." (c) "There is no legal objection, however, to that portion of the sentence adjudging confinement at hard labor and the same is legal. The sentence is separable and the void part may be disregarded." (e) "Confinement in a penitentiary for five years is authorized punishment for forgery and for uttering and attempting to utter a forged instrument (AW 42, 93, 96; Dist. of Col. Code, sec 22-1401 (6:86))." (CM ETO 14632 Lang II, 3 Aug 45)

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(99) Violation of Standing Orders:

Cross Reference: 451(9) 16512 Rowland

(100aa) Willful Destruction of Property:

Among other things, accused was found guilty of a violation of AW 96 in that he willfully and unlawfully destroyed the property of another. HELD: LEGALLY SUFFICIENT. "Such conduct is violative of AW 96 ***. There is no doubt *** that accused is guilty as charged. The gravamen of the offense is the willful destruction of property. Assuming, without deciding that the maximum punishment for such destruction is governed by the value of the property destroyed, we find it unnecessary to discuss that point because the sentence is sustained by the findings of guilt" on the other specifications. (CM ETO 14174 Hitchcock 14 Sep 45)

(102a) Wrongful Entry into Home

Not Digested:

11621 Trujillo (into "cortilage" - enclosed courtyard. Disorder; threats; sexual intercourse)

Cross Reference: 454(56a) 13286 Uribe

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(103) Wrongful Possession
(103a) Wrongful Possession of Pass Forms

Accused was found guilty of the wrongful possession of U.S.Government property valued over $50 furnished and intended for the military service thereof, and of the wrongful possession of marihuana - both in violation of AW 96. His sentence included confinement for four years in a Federal Reformatory. HELD: LEGALLY SUFFICIENT. (1) Maximum Punishment: "The Table of Maximum Punishment does not specifically prescribe the punishment for wrongfully possessing U.S. Government property, furnished and intended for the military service thereof, or for any offense in which it is necessarily included and, consequently, the punishment prescribed for related offenses, or, if there are none, the punishment authorized by statute or by the customs of the service will govern (MCM, 1928, par.104c p.96). The most clearly related offense for which a limit is prescribed is that of wrongfully disposing of property of the U.S. furnished and intended for the military service thereof in violation of AW 94. When the value of the property involved in such a case is in excess of $50, the maximum punishment is dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The offense involved in the instant case is analagous to that offense in that both involve dealing with the same sort of property and unlawful possession is merely a prelude to disposition. On the other hand there is some force in the argument that section 288 of the Fed Crim C (18 USCA 467) which punishes the possession of stolen property, knowing it to have been stolen, should govern. ***We think that the offense in the instant case is more nearly analagous to that denounced by AW 94 ***." "As for the unlawful possession of marihuana *** it is well settled that the maximum punishment" includes confinement at hard labor for one year. The punishment herein is legal. (2) Place of Confinement: "The unlawful possession of marihuana is not an offense of a civil nature punishable by penitentiary confinement for more than one year by some statute of the U.S. or law of the District of Columbia (AW 42) and, consequently, conviction of a specification alleging unlawful possession will not authorize penitentiary confinement. Neither, in our opinion, can a conviction of wrongfully possessing government property justify penitentiary confinement. There is no Federal Statute or law of the District of Columbia denouncing it as a crime and, while we may analogize it to a violation of AW 94 for the purpose of ascertaining the maximum limit of punishment, we may not do so for the purpose of ascertaining the place of confinement." The United States Disciplinary Barracks is the proper place of confinement. (CM ETO 17749 Major 30 Oct 45)

(103a) Wrongful Possession of Pass Forms:

Not Digested;

16666 Sherman (and use)

454(104,104c,105) (104) Wrongful Sale
(104c) Wrongfully Shoot Another
(105) Wrongful Taking; Vehicles, etc.

(104) Wrongful Sale:

Cross Reference: 416(9) 9978 Green (Oxygen)

(104c) Wrongfully Shoot Another:

Not Digested:

13452 Bellon (in foot; machine gun)

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(105) Wrongful Taking; Vehicles, etc.

Not Digested:

9406 Sullivan
10364 Evans
14202 Schmidt
14212 Healen
14603 Wilson Jr.
14045 Gerringer
15074 Sutherland (civilian vehicle)
16006 Crowder
16343 Cucolo

Cross References: 416(9) 9978 Green
452(18,21) See in General
419(2) 10721 Petroski (burden of explanation)
454(59) 12758 George
450(1) 16005 Jones, et al.

Among other things, accused were found guilty of the wrongful and unlawful application of a government truck to their own uses, in violation of AW 96. HELD: LEGALLY SUFFICIENT. "Accused were authorized to take this car out for a road test. While so doing they picked up a civilian woman and thereafter diverted the use of the car from the purpose for which it was authorized and employed it for an unauthorized and unlawful purpose, that of enabling them to have sexual intercourse. This was a violation of AW 96 ***." (CM ETO 9025 Clegg, et al, 26 Jun 45)

Confinement in a penitentiary is authorized upon conviction of unauthorized use of a US Government vehicle of a value in excess of $50 by AW 42 and section 22-22-4 (6:62), District of Columbia Code. In this instance, judicial notice of government price lists precludes the possibility that the value of the vehicle in question was $50 or less ***, and hence by analogy to the offense of misapplication of military property,

(105) Wrongful Taking; Vehicles, etc. 454(105,105a,105aa,
(105a) Wrongfully Transport Civilian 105aaa, 105b)
(105aa) Wrongful Threats
(105aaa) Wrongfully Throw EM Out Of Bed, Injuring Him
(105b) Wrongful Use of Quarters

a maximum punishment of confinement at hard labor for five years is authorized for the offense by the law of the District of Colombia, penitentiary confinement being provided (secs. 22-2204 (6:62), 24-401 (6:401) District of Colombia Code)." (CM ETO 12489 Atherton et al 12 Jun 45)

(105a) Wrongfully Transport Civilian

Cross Reference: 454(105) 9025 Cleary (intercourse with girl in car)
454(566) 15855 Wilson

(105aa) Wrongful Threats:

Not Digested:

10360 Gailey (wrongfully threaten EM with reduction in grade if he revealed certain information; officer)

Cross Reference: 454(56a) 13236 Uribe

(105aaa) Wrongfully Throw EM Out Of Bed, Injuring Him:

Not Digested:

10360 Gailey

(105b) Wrongful Use of Quarters:

Not Digested:

14183 Pfafferkuch (drunk officer takes Army nurse to his quarters in presence of EM, and gets in bed with her. Nude).

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