

OFFICE OF  
JUDGE ADVOCATE  
GENERAL  
OF THE ARMY

---

BOARD OF REVIEW  
AND  
JUDICIAL COUNCIL

HOLDINGS  
OPINIONS  
REVIEWS

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VOL. 1

1949

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JUDGE ADVOCATE GENERAL'S CORPS

# BOARD OF REVIEW AND JUDICIAL COUNCIL

HOLDINGS, OPINIONS AND REVIEWS



VOLUME 1

Including

CM 333202 - CM 334978

Also

SP CM 110

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

1949

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LAW OFFICER  
JUDGE ADVOCATE GENERAL  
NAVY DEPARTMENT

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## FOREWORD

The present compilation constitutes a new series containing the holdings, opinions and reviews of the Boards of Review and the holdings and opinions of the Judicial Council rendered after 31 January 1949. Each volume of the compilation will contain a separate index and tables covering the materials collected therein. Continuation volumes will follow from time to time as the materials accumulate. These indexes and tables will be cumulated periodically.

THOMAS H. GREEN  
Major General  
The Judge Advocate General

## EXPLANATORY NOTES

1. References in the Tables and Index are to the pages of this volume. These page numbers are indicated within parentheses at the upper corner of the page.

2. Tables III and IV cover only the specific references to the Articles of War and Manual for Courts-Martial, respectively.

3. Items relating to the subject of lesser included offenses are covered under the heading LESSER INCLUDED OFFENSES rather than under the headings of the specific offenses involved.

4. Citator notations (Table V) - The letter in ( ) following reference to case in which basic case is cited means the following:

- (a) Basic case merely cited as authority, without comment.
- (b) Basic case cited and quoted.
- (c) Basic case cited and discussed.
- (d) Basic case cited and distinguished.
- (j) Digest of case in Dig. Op. JAG or Bull. JAG only is cited, not case itself.
- (N) Basic case not followed (but no specific statement that it should no longer be followed).
- (O) Specific statement that basic case should no longer be followed (in part or in entirety).

5. There is a footnote at the end of the case to indicate the GCMO reference, if any.

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Canta	334978	387			
Christian	333202	1			
Christman	334908	359			
Cohan	334904	329			
Corpus	334978	387			
Costas	334573	219			
Crandall	334754	267			
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233766	44(a)	312356	388(a)
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325757	293(a)		
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329093	385(a)		
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IX



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(1)

CSJAGK - CM 333202

4 FEB 1949

UNITED STATES )

HEADQUARTERS KOBE BASE

v. )

) Trial by G.C.M., convened  
) at Kobe, Honshu, Japan, 24  
) August 1948. EACH: Dis-  
) honorable discharge (sus-  
) pended), confinement for ten  
) (10) years. Disciplinary  
) Barracks.

) Master Sergeant JAMES P. BOOKER  
) (RA 6298372) and Private DARRYL  
) A. CHRISTIAN (RA 15210845), both  
) 553rd Transportation Truck Company,  
) APO 317, and Privates ARTHUR O.  
) BURNSIDE (RA 44166029) and ELBERT  
) L. TOLLETTE (RA 39762432), both of  
) Headquarters and Headquarters Company,  
) 3rd Battalion, 24th Infantry, APO 317.)

-----  
HOLDING by the BOARD OF REVIEW

SILVERS, SHULL and LANNING,

Officers of The Judge Advocate General's Corps  
-----

1. The record of trial in the case of the above named soldiers has been examined in the Office of The Judge Advocate General and there found legally insufficient, in part, as to the accused Booker, to support the findings of guilty and the sentence. The record has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

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

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

Specification: In that First Sergeant James P. Booker and Private First Class Darryal A. Christian, 553rd Transportation Truck Company APO 317, and Private First Class Arthur O. Burnside and Private First Class Elbert L. Tollette, Headquarters Company 3rd Battalion, 24th Infantry Regiment, APO 317, acting jointly and in pursuance of a common intent, did, at Kobe, Honshu, Japan, on or about 13 July 1948, with intent to do him bodily harm, commit an assault upon Mr. Stanley J. Palka by shooting him in the body with a dangerous weapon to wit, a rifle.

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

Specification: In that First Sergeant James P. Booker and Private First Class Darryal A. Christian, 553rd Transportation Truck Company, APO 317, and Private First Class Arthur

O. Burnside and Private First Class Elbert L. Tollette, Headquarters Company 3rd Battalion, 24th Infantry Regiment, APO 317, acting jointly and in pursuance of a common intent, did, at Kobe, Honshu, Japan, on or about 13 July 1948, feloniously take, steal, and carry away approximately 403 pair Wool OD Trousers, \$8.63 each, 41 pair Cotton Khaki Trousers, \$2.91 each, 15 M-1943 Field Jackets \$10.28 each, and 1 Laundry Bag \$0.68, of the value of about \$3,752.08, property of the United States furnished and intended for the Military Service thereof.

Each accused pleaded not guilty to and was found guilty of all charges and specifications. One previous conviction was considered as to accused Tollette. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for a period of ten years. The reviewing authority approved the sentences and ordered them executed but, as to each accused, suspended the execution of the dishonorable discharge until the soldier's release from confinement. The Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army might direct was designated as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 29, Headquarters Kobe Base, APO 317, 16 September 1948.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused Burnside, Tollette and Christian and legally sufficient to support the findings of guilty of Charge II and its specification as to the accused Booker.

#### 4. Evidence for the Prosecution

In view of the above holding only so much of the evidence as is deemed necessary to show accused Booker's connection with the alleged offenses will be set forth herein.

About 7 p.m. on 12 July 1948 the accused Booker and Christian were at the home of a Japanese girl named "Kubo" who resided at "Kusunaki, 2-chome, Ikuta-ku, Kobe, Japan." Three Japanese in addition to Kubo were also present at this time. One of the Japanese stated that a "man who works on Pier 7 had been putting out stuff at night on this pier and that the fellows from the 24th Infantry, after they had posted the twelve o'clock relief, would take the stuff off the pier." He wanted to know if Booker knew someone in the 24th Infantry who would drive a truck for this purpose. Booker asked Christian if he knew a truck driver in the 24th Infantry who would drive a truck for this purpose and Christian replied that he did. Booker stated that "he had to make a bed check" at

10:30, but for Christian to accompany him to camp and to then contact the soldier he had mentioned and bring him to "the office" after bed check. Booker instructed the Japanese present to wait at Pier 7 until the truck left and to follow it in a taxicab to a designated place where the property could be delivered. He also instructed one of the Japanese named "Emiko" to count the cargo on the truck and collect the money "the next morning" (R 72,81).

About 1:20 a.m. on 13 July 1948 a truck driven by accused Tollette arrived at Post 4 located at the main entrance to Pier 7. Accused Burnside, armed as a guard with helmet liner, rifle and cartridge belt was seated in the cab of the truck with Tollette. At the entrance to the pier Tollette told the guard that he was "going to post the guard" (R 23). Accused Christian and several Japanese laborers were concealed in the bed of the truck. The truck proceeded to "Takehama Warehouse" at Pier 7 where it was loaded with the Government property described in the specification of Charge II (R 8-40, Pros Ex 1). With respect to accused Burnside, the record shows that shortly after 2300 hours on 12 July 1948, he had procured an M1 rifle from Private Clarence L. Willis, the company armorer. In his pretrial statement Burnside asserted that he obtained the rifle after he had posted the "2400 relief" and just prior to the time he got into the truck with Tollette. Christian, in his pre-trial statement, asserted that he did not request Burnside to procure a rifle (R 27,28, Pros Exs 2,3).

The truck was loaded with the described property and driven away from the pier in the direction of a "bombed out place" where delivery was to be effected. Several "CID" agents, including Mr. Stanley J. Palka, who were riding in a jeep, noticed the truck leave Pier 7. They gave chase and sounded a siren in an effort to stop the truck, but the truck gained speed and made no effort to stop. Agent Palka then fired several shots in a further but futile effort to halt the vehicle. The chase continued for about three-quarters of a mile and several shots were fired from the truck in the direction of the jeep. One of these shots struck Palka in the left side of his chest about three inches below the arm pit. The agents then abandoned the chase. The evidence shows that Burnside did the firing from the truck. The parties in the truck proceeded to the "bombed out place" where the property was unloaded and Tollette, Burnside and Christian returned the truck to the military area. Civilian police arrested the Japanese who were implicated in the transaction, confiscated the property, and turned it over to military authorities (R 9-18, Pros Exs 2,3).

5. In view of the foregoing holding by the Board of Review the only question requiring discussion is whether accused Booker can be legally convicted of the assault alleged in the specification of Charge I, although he was not present either at the pier when the

(4)

other parties, including Burnside, who was armed, loaded the truck, or when agent Palka was fired upon from the fleeing vehicle. Booker laid the plans for and made some of the arrangements for procuring the truck, delivering of the property and collecting the money for the sale thereof, but there is not the slightest indication from the record that Booker knew or had reason to believe that any of the parties would be armed in effectuating the larceny.

Wharton's Criminal Law, Vol. 1, Twelfth Edition, in discussing "accessoryship, agency, misprision", states in part:

"Sec. 251: Confederacy with constructive presence may constitute one a principal. Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree, as to any crime committed in execution of the plan."

"Sec. 268. Accessories not liable for collateral crimes. While an accessory before the fact (or instigator) is responsible for all crimes incidental to the criminal misconduct he counsels, or which are among its probable consequences, it is otherwise as to collateral crimes not among such incidental and probable consequences."

In Lamb v. The People, 96 Illinois Reports 73, the defendant in the lower court was found guilty of murder which had been committed while certain stolen property was being delivered at a pawn shop in Chicago, Illinois. The defendant was not present when the homicide was committed, but it was conceded that the evidence implicated him in the prior arrangements of certain parties to burglarize the building from which the property had been stolen and the general plan to take, conceal and dispose of the property. Upon appeal the Supreme Court of Illinois reversed the conviction on the ground of erroneous instructions given the jury by the lower court, and propounded the law as follows:

"If, in point of fact, the accused was not present at the homicide, and had neither aided nor abetted, advised or encouraged its perpetration; nor had before its commission advised the persons in charge of the stolen goods to oppose and resist all persons who should attempt to seize the same, or interrupt them in secreting or disposing of them, as is assumed by the instruction, upon what principle could a conviction be sustained?

"It may be stated as a general proposition, that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent. To hold otherwise would be contrary to natural right, and shocking to every sense of justice and humanity.

"Where the accused is present and commits a crime with his own hands, or aids and abets another in its commission, he may, in either case, be considered as expressly assenting thereto. So, where he has entered into a conspiracy with others to commit a felony or other crime, under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go. For if the accused in such case has not expressly assented to the commission of the crime, and the unlawful enterprise is not of such a character as will probably involve the necessity of taking life in carrying it into execution, there can be no implied assent, and consequently no criminal liability.

\* \* \*

"The principle which underlies and controls cases of this character is the elementary and very familiar doctrine, applicable alike to crimes and mere civil injuries, that every person must be presumed to intend, and is accordingly held responsible for the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act, he impliedly assents to the use of such means by his co-conspirators as is necessary, ordinary or usual in the accomplishment of an act of that character. But beyond this his implied liability can not be extended. So, if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not.

"But where the unlawful act agreed to be done is not of a dangerous or homicidal character, and its accomplishment does not necessarily or probably require the use of force or violence, which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such an agreement. The views here expressed are fully sustained by the following authorities: 1 Bish. Crim. L. (6th ed.) sec. 641; Hawkins' P.C. Book 2, chap. 29, secs. 19, 20, 21; Foster 369, 370; Regina v. Franz, 2 F. & F. 580; Regina v. Horsey, 3 id. 287; Regina v. Luck, id. 443; Roscoe's Crim. Ev. 673, 655; Regina v. Tyler, 8 C. & P. 616; Regina v. Lee et al. F. & F. 63; Regina v. Turner et al. 4 id. 339; Rex v. Hawkins, 3 C. & P. 392; Watts v. The State, 5 W. Va. 532; Rex v. Howell, 9 C. & P. 437." (Underscoring supplied.)

(6)

The foregoing opinion was cited with approval in United States v. Boyd et al, 45 Federal 851, 865. See also Ruloff v. People, 45 N.Y. 213.

In the instant case there is no evidence which indicates that Booker participated in an agreement with the other accused to use any force in committing the larceny or that Booker conspired with the other accused to resist to the utmost any attempt by proper officers to apprehend them in the commission of the larceny.

The commission of a larceny does not ordinarily require the use of force and violence which may result in an assault with intent to do bodily harm and as the accused Booker was not present during the commission of this assault and had not counselled it, he cannot be held criminally liable for it. The maximum authorized punishment for larceny of property furnished and intended for the military service of a value of more than \$50.00 is dishonorable discharge, total forfeitures and confinement at hard labor for five years (par 104c, MCM, 1928).

6. For the reasons stated, the Board of Review holds that, with respect to accused Booker, the evidence is legally insufficient to support the findings of guilty of Charge I and its specification, and legally sufficient to support only so much of the sentence, as to Booker, as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years.

Charles D. Silvers J.A.G.C.  
Lewis D. Hull J.A.G.C.  
Harley A. Lanning J.A.G.C.

(7)

CSJAGK - CM 333202

1st Ind

10 FEB 1949

JAGC, Department of the Army, Washington 25, D. C.

TO: Commanding General, Kobe Base, APO 317, c/o Postmaster, San Francisco, California

1. In the case of Master Sergeant James P. Booker (RA 6298372) and Private Darryal A. Christian (RA 15210845), both of 553rd Transportation Truck Company, APO 317, and Privates Arthur O. Burnside (RA 44166029) and Elbert L. Tollette (RA 39762432), both of Headquarters and Headquarters Company, 3rd Battalion, 24th Infantry, APO 317, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to accused Christian, Burnside and Tollette. Confirming action in the cases of Christian, Burnside and Tollette is not by the Board of Review or The Judge Advocate General deemed necessary. I also concur in the foregoing holding by the Board of Review that with respect to accused Booker the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification, but legally insufficient to support the findings of guilty of Charge I and its Specification and legally insufficient to support so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. Under Article of War 50e(3) this holding and my concurrence therein vacate the finding of guilty of Charge I and its specification as to accused Booker and so much of the sentence of accused Booker as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years.

2. It is requested that you publish a general court-martial order in accordance with this holding and indorsement restoring all rights, privileges and property of which accused Booker has been deprived by virtue of the findings and the portion of the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing request is attached.

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

(CM 333202).

2 Incls

1. Record of trial
2. Draft GCMO

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

CSJAGH CM 333525

27 DEC 1948

UNITED STATES )  
 )  
 v. )  
 )  
 Private First Class DORTIA C. )  
 ABSTON, RA 32648284, Company C, )  
 371st Infantry Battalion, APO )  
 696. )

NURNBERG MILITARY POST  
  
Trial by G.C.M., convened at  
Nurnberg, Germany, 8, 9 and  
10 September 1948. To be  
hanged by the neck until dead.

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HOLDING by the BOARD OF REVIEW  
WOLFE, BERKOWITZ, and LYNCH, Judge Advocates

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class Dortia C. Abston, Company "C", 371st Infantry Battalion (Sep) did, at Nurnberg, Germany, on or about 1 July 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Lilli Veit, a human being, by strangling her with a rope.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of one previous conviction by summary court-martial for failure to repair for guard mount was introduced. He was sentenced to be hanged by the neck until dead, all members present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows: On 1 July 1948 accused was a member of Company C, 371st Infantry, located at Furth Air Base (R 41). At about the end of March 1948 Mrs. Eleanor Frances Baker, wife of Captain James T. Baker, moved to 5 Lerchenstrasse, Nurnberg. Prior to the time Mrs. Baker and her husband

moved to this address accused was guarding the premises, and after their arrival accused stayed on taking care of the fires and cooking. Accused did not have a regular room in the home but was there on an average of three or four days a week. When Mrs. Baker moved to Nurnberg, she needed a maid and accused mentioned Lilli Veit. Lilli started to work for Mrs Baker in April. Mrs. Baker had occasion to observe Lilli and accused when they were together in Mrs. Baker's home and testified that in her presence "They were lady and gentleman". They were friendly toward one another and Mrs. Baker did not observe any difference in their behavior in the week preceeding 1 July (R 31, 32).

Mrs. Baker also testified that Lilli was going to her home on 2 July "to get her papers straight" and was to return and work for Mrs. Baker "from the Labor Office" (R 33).

Hans Nagel whose address was Lerchenstrasse 55, Nurnberg, used to come to the garden appurtenant to the Baker house almost every day. He had known accused and Lilli, from the time that the Bakers had taken up residence in the home. When he first met them each told him that they were very much in love with each other, had gone together for a year and a half, and had been together in Kassel and in Würzburg. They acted "very much in love and kissed each other". After a lapse of a month or six weeks, Nagel observed a change in their relationship. They shouted at each other or did not speak at all. Nagel often observed that they were "mad" at each other. Whenever Nagel came to the house and accused and Lilli were in the kitchen Nagel would knock at the window. Around 1 June they were very serious and Nagel assumed they had a "row" once more. At other times they were friendly, would laugh and would come to the window. In the week prior to 1 July, Nagel observed them as they sat together on a bench on the terrace, silent, and Nagel again assumed that there was another "row". At other times they were nice to each other. On occasions not specified as to time, accused told Nagel that Lilli always wanted money.

Nagel saw accused under the influence of liquor some three, four, or five times in the course of their acquaintance. At such times Accused "had a funny and malicious look in his eye," which scared Nagel so that he would take his garden hose and hurry away (R 52-56).

Nagel also testified that the door to the washhouse was usually locked and expressed the belief that accused had possession of the key inasmuch as he could not on previous occasions gain entrance to the washhouse in the absence of accused (R 56).

In March 1948, Anni Sandner, who resided at 24 Lerchenstrasse, became acquainted with Lilli Veit and accused and thereafter saw them in each other's company. At first, during March and April, they were always friendly but later on they were always fighting about something. In a conversation with accused, had on or about the first of June, Anni was told by accused that Lilli was a "devil" and that he did not want to marry her as he could not be happy with her (R 57-59).

On 1 July 1948, accused appeared at the Baker house about seven or seven-thirty in the morning and at the time Mrs. Baker thought that accused had been drinking (R 33). Later on, Private Percell Jackson of accused's unit, appeared at the Baker house to take Captain Baker to camp. Captain Baker had left but Jackson was accompanied back to camp by accused. Jackson "could smell that he [accused] had been drinking a little". (R 41) Shortly before noon accused visited Georg E. Messer, who resided at Denisstrasse 2, Nurnberg. The garden of Messer's house was contiguous to the garden of the Baker house. After a few minutes of conversation, accused asked and received Messer's permission to telephone Lilli. In the telephone conversation which followed, accused used the name Lilli and told the person to whom he was talking "he would meet her at her house within ten minutes." To Messer, accused seemed to be slightly nervous and excited. Accused "curtsied" when he said, "Hallo, Lilli", and smiled at the telephone. His attitude and expression were friendly (R. 49-51). At about noon, accused again reappeared at the Baker home accompanied by Jackson (R 34, 42). Later at approximately twelve-thirty Mrs. Baker accompanied by Jackson left the house to go to the commissary (R. 34, 42). When they left, accused, Lilli, Mrs. Baker's daughter, Sandra, age five, and a German woman were in the house. Mrs. Baker testified that although she had bought eggs from the German woman, she did not know her name. She described her as a short, heavy-set woman of 40 or 45 years of age (R 34). Between three and four o'clock in the afternoon accused, accompanied by Sandra Baker, visited Anni Sandner at the latter's house. Anni came out to the gate and conversed with accused. She asked him how Lilli was and accused replied that Lilli was "mad." Accused showed Anni some money, told her about it, claimed that he had a lot of it, and that he "needed it for something." While he was talking, a few German marks, which he had taken from his pocket, fell to the ground. Sandra wanted to pick them up but accused told her to leave them there. Anni testified that accused staggered as he walked, that during their conversation he leaned "to the gate" because he could not stand straight and that he did not speak clearly. Anni was of the opinion that accused was drunk. Prior to leaving Anni, accused told Sandra to say "Goodbye" several times. At about "a quarter to four o'clock", accused and Sandra left in the direction of Captain Baker's house (R 59-61).

Mrs. Baker testified that between four and four-thirty, she and Jackson returned to the house. The windows were closed, the front door locked, and it appeared "as though there were not anybody there." She stated that, "The shades were drawn; the windows closed. My kitchen window was always open; it was never closed except at night." There were only two keys to the front door, Mrs. Baker having one, and accused the other. When Mrs. Baker entered the house she had a conversation with her daughter following which she went to a closet on the first floor and found a saw which was usually kept in the basement. It was the first time she had seen the saw in the closet. She had had occasion to go into the closet only a short time earlier (R 35, 36).

Following the discovery of the saw, Mrs. Baker went to the laundry room in the basement where she discovered Lilli with a rope around her neck. Concerning Lilli's position Mrs. Baker testified:

"Q. If you observed it; what was the general position of her body?

"A. She was sitting against the wall.

"Q. Sitting against the wall?

"A. Yes.

"Q. Did you have occasion to notice her hands, or head; in what position they were?

"A. Her head was in front of it.

"PROS: Let the record reflect that the witness inclined her head slightly forward and straight in front of her.

"Q. And did you notice her hands?

"A. Her hands were down." (R 36)

"Q. When you were in the basement the first time; did you have occasion to notice how this rope or line was suspended?

"A. Do you mean -----

"Q. How it was suspended?

"A. It had been attached to the door and to a wire on the opposite side.

"Q. And to a wire?

"A. Yes.

"Q. Did you make any examination of that at that time?

"A. No.

"Q. Did you notice how this wire was suspended?

"A. It was from one side of the wall to the other side of the wall.

"Q. Are you sure of that?

"A. Yes.

"Q. Now; I realize that your testimony is probably bringing up some unpleasant memories to you, but isn't it true that yesterday you told me that you didn't exactly know how the wire was suspended?

"A. It had been suspended from one side of the wall to the other.

"Q. Is it not true, Mrs. Baker, that you told me yesterday that you really didn't know exactly how it was suspended?

"A. Yes; if you mean in the way I found the body, but I asked you if it was before ----

"Q. I was talking about the wire.

"A. You mean after I found the body? No, I didn't know how the wire was suspended.

"Q. I thought you misunderstood me. \* \* \*" (R 38)

"Q. Did you say that ordinarily that wire stretched across the room with two ropes attached to the wire, and the ropes were used for holding laundry?

"A. Yes.

"Q. Did you find laundry on this occasion hanging up on these ropes?

"A. Yes." (R 38)

"Q. Mrs. Baker, was this rope, or any portion of it, around the body of the girl, Lilli?

"A. It was just around her neck.

"Q. Did you observe in what way it was around her neck: the way it was fastened, or how many times it was round, or anything of that nature?

"A. It was around and crossed.

"Q. Just one wrapping, and the twist? Is that right?

"A. Yes; it was around her neck like this. The twist was in the front.

(The witness demonstrated with her hands).

"Q. Was the girl clothed?

"A. Yes.

"Q. Fully clothed?

"A. Yes." (R 40)

"Q. Were the ends of this rope fastened to something?

"A. One was attached to the door and the other was attached to the wire.

"Q. Was the rope taut or slack?

"A. I don't know.

"Q. Was the body supported by the rope, or was it against the wall?

"A. The rope was around the girl's neck. She was sitting against the wall; in a sitting position against the wall." (R 40)

Mrs. Baker ran to the kitchen, got a knife, and returned to the basement. She did not recall if the driver accompanied her or not. She cut the rope and ran to find a doctor. She went to the house opposite hers where a doctor lived but no one answered the bell. She returned to her house where she found Jackson on the steps and sent him to a doctor living up the street. She remained outside until Jackson returned with the doctor. She accompanied the doctor to the basement. The doctor tried to revive Lilli and gave her some shots. He asked Mrs. Baker for a blanket. She secured one from the bathroom but was told another was needed. She went to Lilli's room on the second floor to get an additional blanket. When she entered the room she found accused lying on the bed with a blanket around him (R 37).

Jackson testified that he returned to the house with Mrs. Baker at about four-thirty. Mrs. Baker rang the doorbell but when nobody answered, she took out her keys, opened the door and entered the house. Jackson remained outside taking groceries from the jeep to the door. A few minutes later Mrs. Baker reappeared and summoned Jackson into the house. He accompanied Mrs. Baker to the basement where he saw Lilli. Her body was over against the wall. It was sitting on the floor, the back to the wall, the legs straight out in front, and a rope around her neck (R 43). Concerning the position of the rope Jackson testified as follows:

"Q. Now, you say you saw Lilli with a rope around her neck. Will you please describe that rope that you saw about Lilli's neck, and the manner in which it was suspended.

"A. It had a loop around her neck and it was suspended from one end to the next end of the wall.

"Q. One end to the next end of the wall; and you say it was looped around her neck?

"A. Yes.

"Q. Did you have occasion, Jackson, to notice the condition of this rope, as to whether it was loose, or tight, or what?

"A. When I first went in I had to stoop a little to go under the rope and I walked around in front of her and I noticed the rope was kind of slack and there was slack in the neck -- -- from her neck part to the wall.

"Q. You say you noticed it was kind of slack?

"A. Yes, sir.

"Q. Did you touch the rope at all while it was still suspended from either end of the room?

"A. Well, when I was fixing to take the rope from around her neck I was fixing to get some slack in the rope and I think that is when Mrs. Baker cut the rope.

"Q. Did you touch the rope before it was cut?

"A. No more than I ran my hand ---- was running my fingers to put it over.

"Q. When you were running your fingers to pull it over her neck? Now, was it loose or tight around her neck?

"A. Slightly loose; it was not too tight.

"Q. About how loose was it?

"A. When I was there the rope was approximately ---- well, in the end of the rope from the wall to her neck ---- I would say it was slack enough to pull ---- enough slack in it to pull over her head after I pulled the slack in each side of the rope.

"Q. Do you think that rope was loose enough to take off Lilli's head before it had been cut?

"A. The slack in the end of the rope ---- I would say there was enough slack to get enough in the loop to pull over her head.

"Q. That was before it was cut?

"A. Yes.

"Q. How was this rope fixed around Lilli's neck? By that, I mean was it tied around Lilli's neck, or was it merely looped around her neck without being tied?

"A. It was not a tied knot; it was a loop.

"Q. I want you to show the court. Please come here where the court can see you, and will you place yourself -- if that were the wall there; that desk the reporter is writing on - will you place yourself just like you found Lilli sitting.

"(The witness sat on the floor with his back against the reporter's table and his legs out straight in front of him).

"Q. Now, keep your place; will you take this and show the court approximately - as close as you can - how it was fixed around her neck.

"A. To my remembrance the rope was running like this.

"(The witness demonstrated by placing the rope around his neck).

"Q. Approximately how was this end here?

"A. It was in an angle.

"Q. You describe it to the court.

"A. You could pull the rope; it was slack like that.

"Q. Was it looped like that?

"A. It was something like that.

"Q. How was Lilli's head? What was the position of her head?

"A. Her head was like this.

"(The witness leaned his head forward).

"Q. Was it straight forward?

"A. Yes, sir; like this.

"Q. That is the way the rope was looped?

"A. Yes, sir.

"Q. In other words, how did you take it off of her neck? Let me put it around my neck, and you show me if this is the way it was.

"(The witness demonstrated on the trial judge advocate).

"A. After the rope was cut I just got enough slack to take it off; I pulled it over her head.

"Q. Had you started pulling the rope over her head before it had been cut?

"A. I was running my finger under the rope to try to get some slack in it.

"Q. You have testified that you noticed that the rope going this way was slack?

"(The trial judge advocate indicated the left side of the rope).

"A. Yes.

"Q. Did you notice the rope running out this way?

"(The trial judge advocate indicated the right side of the rope).

"A. No, I didn't notice that.

"Q. The rope that went to Lilli's left; where was that attached?

"A. To her left? That was up towards the door.

"Q. Which door was that?

"A. That was the back end." (R 48 - 49)

Jackson noticed a cut on Lilli's left arm and observed that she had been foaming at the mouth but that the foam had ceased moving, that her face was real blue, and that her eyes were open. After putting Lilli on the floor he went for a doctor about two blocks away. Twenty minutes later he had returned with the doctor and while looking for a comforter with which to cover Lilli, he walked into a room on the second floor where he saw accused lying on the bed. At the time Jackson was unable to determine whether accused was asleep or drunk. Accused had his clothes on. Jackson got a comforter and left the room without having any conversation with accused. At a later time Jackson accompanied by Captain Baker returned to the room in which he had previously found accused and took him to Captain Baker's room and laid him on the bed. Accused was staggering and Jackson thought he was drunk. Captain Baker told Jackson to remain with the accused which he did until ten or ten-thirty when Captain Baker returned and told Jackson to put accused into the jeep. (R 46, 47)

Dr. Leonhard Schenk, a licensed homeopathic physician who had practiced medicine since 1927 and who resided at Lerchenstrasse 48, Nurnberg, was called to the Baker house by a colored soldier at approximately a quarter to five on the afternoon of 1 July 1948. Mrs. Baker who was in an excited mood led him to the basement where he saw a female body on the floor. He saw "some pieces of rope attached from one wall to the other wall. It was cut in the middle and the colored soldier pointed constantly at the two loose ends." He examined the body and found that death had occurred. There was no pulse; "nothing to be heard at oscillation; no reflex of the eyes". The eyes had, however, not "been broken", and the body was still warm. Death had occurred approximately "three quarters or half an hour" earlier. He found a red stripe around the neck and a bloody abrasion in the vicinity of the elbow on the left arm. The abrasion was "a spot the size of an egg, which was covered with blood". Judging from sight, Dr. Schenk was of the opinion that the wound was not older than an hour or three-quarters of an hour. Dr. Schenk administered adrenalin in an effort to restore life and then telephoned the police. He identified Prosecution's Exhibits 1, 2 and 3 as pictures of the dead person he examined in the cellar of the Baker house (R 8 - 10).

Rudolf Dorn, a police officer of the Nurnberg Police Department, accompanied by a Sergeant Kramer, arrived at the Baker house at five minutes or ten minutes past five o'clock. When he arrived he saw Captain and Mrs. Baker and another police officer, Sergeant King. Dorn went to a room in the cellar where he noticed a rope which had been cut and also a body lying on the floor. Dorn did not make any inspection of the room but locked it until Dreschler, the responsible officer, arrived. From the time Dorn arrived until 7:30 nothing was touched in the room. Some American personnel entered the room where deceased was lying before Dreschler arrived and Dorn observed one of them lift one of deceased's arms (R 63 - 65).

Franz Dreschler of the Homicide Department of the Nurnberg Criminal Police testified that he arrived at the Baker home at approximately 1900 hours. He went to a room in the cellar to which he was directed and saw the body of a girl lying on the floor. There were several persons, American and German police, in the room at the time. Dreschler estimated that the room was five meters long, two meters wide, and 2.10 meters high. There were two doors to the room, one leading from the cellar and the other affording egress and ingress from the garden. There was furniture and other articles in the room. Near one door there was a little cabinet. There were two trunks, a pedestal for sawing wood, a stove which had been overturned, a wardrobe and other items. There were two lines hanging in the room, one of which had been cut (R 21,22).

Concerning the lines Dreschler testified as follows:

"Q. What sort of line?

"A. As a matter of fact, there was more than one line attached to the wall. Opposite to the entrance door there was ----

"Q. What sort of line do you refer to?

"A. It was a wire attached to a hook in the wall.

"Q. And what other kind of line?

"A. It was a wire; a cable.

"Q. And what other line, if any, did you see, Mr. Drechsler?

"A. Attached to this wire - cable - there was a line which was running from the top of the wardrobe and led to the outside door, and it was attached to the outside door.

"Q. Mr. Drechsler, I show you this line here: have you ever seen that line before?

"A. Yes; it is the line that comes from that room.

"Q. Please go on, Mr. Drechsler.

"A. Affixed to that wire there was another line, but that latter line had been cut. The other end of the line that was cut off was attached to a nail in the center of the door leading to outside."

\* \* \* \* \*

"A. On the line which had not been cut laundry was hanging. On the line that was cut - on the long end of the cut line - near to the attachment to the door there was a shirt hung up.  
\* \* \*

"Q. Now, Mr. Drechsler, you have testified that there was a piece of wire, to which a line that you described as being Prosecution Exhibit No. 6, was attached: did you have occasion to examine the attachment of the line to the wire?

"A. I did.

"Q. Will you kindly demonstrate to the court, using the assistant trial judge advocate and myself, how the line was attached to the wire.

"(The witness demonstrated as requested).

"A. This hook was fixed in the wall about two meters from the ground - 1.8 meters to be exact; this line here was attached to the outer door. It was running over the wardrobe. Next to the door there was some laundry hung on the line. This end of the line was fixed to a nail in the middle of the outer door. It was slack on the floor. On the inner door there was another hook and this piece of wire was fixed to that hook. I don't think that the two were connected. When I came they were slack; they were hanging down and this piece was still connected to the door.

"Q. Did you have occasion to examine the way that the line was attached to the wire at that time?

"A. As I showed it now.

"Q. Will you please then examine that, and see if that is the way it was.

"A. It was roughly like this, but not exactly like it: no, that is not how it was. It was like this; like I show it now. If I pulled this end the knot would come unfastened.

"Q. Will you please pull it now.

"(The witness complied with the request).

"Q. Did you have occasion to examine the other knot on the wire?

"A. I did not. I only examined this one on the side it was cut off.

"Q. Now, Mr. Drechsler, you stated that this end of the wire was not attached to the door when you first saw it. Is that correct?

"A. No, it was not.

"Q. Will you please show the court the position of this wire and the rope when you first discovered it?

"A. This hook was a little higher up and it was hanging slack like it is hanging now."

\* \* \*  
"Q. Mr. Drechsler, you have testified that you tested the line where it was attached to the wire, and I believe you stated that a slip knot was used - as you demonstrated to the court?

"A. It was a slip knot.

"Q. In your opinion, Mr. Drechsler, would that knot have supported a one hundred pound weight?

"A. Impossible. The way I found the knot it was impossible." (R 22, 23, 24)

Dreschler admitted that the knots shown to him by the prosecution were not as he found them, and that it was impossible to reconstruct them in the fashion he found them. He claimed, however, that the knots shown to him were a "reasonable replica" of the knots which he saw at the scene. He tested the knots at the time and found that they were too loose, that "by pulling just a little the slip knot would come unfastened". It was possible to put a wooden wedge between the knot to prevent a change in its position (R 25, 26).

Dreschler observed on the floor near one of the doors "quite a lot" of bloodstains. Under a chair near the upturned stove there were more bloodstains, and under the stove lid about ten inches from the stove there were additional bloodstains (R 22).

Dreschler examined the body in the cellar and found that it was still rather warm (R 25).

Ernest Werner, police photographer, arrived at the Baker house at about 9:00 p.m. and took pictures of the room in the cellar. He identified Prosecution Exhibits 7, 8, 9 and 10 as the pictures he took in the room. Prosecution Exhibit 7 portrayed the outer door leading to the yard, and showed two nails on the frame of the door to which the lines were fixed. Werner testified the nail to the right of one viewing the door was rather loose. Prosecution Exhibit 8 represented a view of the wall opposite the outer door. Prosecution Exhibit 9 was a view of a portion of the floor showing forty to sixty bloodstains. Werner had examined the stains and found that they were still sticky. Prosecution Exhibit 10 was a view of the floor before the outer door showing a stove, a chair, garden utensils, and a line hanging down from the door (R 27, 29). Deschler testified that the pictures with the exception of Prosecution Exhibit 8 were true and accurate representations of the room as he had found it (R 24). Concerning Prosecution Exhibit 8 Dreschler testified as follows:

"A. The picture shows the narrow side of the cellar room. It shows the way the wire was fixed. When I first came, however, it was hung differently.

\* \* \*

"A. The wire was only fixed to that hook further down and in the distance from the hook on the wire the lines were attached." (R24)

The line was not hung on that hook (R 24). Werner identified Prosecution Exhibits 1-4, inclusive, as pictures of Leonilla Veit which he took at the Pathological Institute the following day (R 29, 30).

Doctor Gutflied Kolb testified that he was a licensed physician, had practiced medicine since 1937, was a member of the staff of the Pathological Institute, and that during his career he had performed approximately three or four thousand autopsies. At 8:00 a.m., 2 July 1948, Doctor Kolb performed

an autopsy upon the body of Leqilla Veit. He found that the body weighed 57.5 Kilograms and was 155 centimeters in length (R 11, 12). He testified that his examination further disclosed that:

"There was a strangulation mark on the neck - a strangulation furrow; scratches - superficial scratches on the left chest; a jagged wound on the left elbow - outside of the left elbow; an abrasion on the chin which had dried up and had a brownish appearance. On the left outside of the left palm two parallel abrasions of the skin of the length of one centimeter (half an inch); outside of the left knee joint some dried blood." (R 12)

In Dr. Kolb's autopsy report, which was admitted without objection, appears the following description of the marks on the deceased's neck:

"2. On the neck a horizontal stripe, which measures  $\phi$ , 2 to 0,7 cm in width, is visible. This stripe is ascending towards the head in the back of the neck and both ends meet in an oblique angle. The regions surrounding this stripe are grey-whitish and sunk in. The front part of the neck located between the two platysma looks brownish, dried up, is firm and somewhat swollen. On the right side of the neck between the larynx and the platysma, the stripe reaches its most width. From the middle of this stripe, a 0,4 cm wide and 1,6 cm long second stripe descends. At the front edge of the platysma, at the same side, the stripe is measuring 1,2 cm in width. For a short distance, a sunk in grey-whitish strip runs parallel to the swollen brownish firm stripe. The area of the described marks is blueish discolored. Further, point-shaped hemorrhages are visible on the front of the neck and partially on the skin of the eyelids." (R 14, Pros 5)

Dr. Kolb stated that Prosecution Exhibit 4 accurately reflected the mark around the neck of deceased. Dr. Kolb testified that Prosecution Exhibit 3 accurately portrayed the wound which he found on the left elbow of deceased. Prosecution Exhibit 3 shows a jagged cut to the left of the left elbow which were the deceased to be placed in a standing position would run almost vertically. Dr. Kolb, upon being shown a saw, expressed the opinion that such an instrument could have inflicted the wound. Other findings made as a result of the autopsy were that the deceased was in the first, or at the latest, the second month of pregnancy, and that there was an increased content of alcohol in the blood. The concentration was "1.573 per mil," which would indicate a slight intoxication. With reference to the blood alcohol content, the autopsy report has the following additional comment: "It is to be taken into consideration that the blood alcohol of a body is being reduced and that the actual blood alcohol is higher."

On cross-examination Dr. Kolb testified that other than the neck injuries he found no other wounds or injuries which would have caused deceased to lose consciousness. On redirect examination he testified that a sharp blow at the point on the chin of the deceased where he had found an abrasion could have resulted in unconsciousness.

With further reference to the cause of death he testified as follows:

"Q. Thank you. I show you again Prosecution Exhibit 1 for identification. Are you qualified, Dr. Kolb, to testify as to certain marks upon the neck of the victim?

"A. The marks are extraordinary in cases of death by hanging.

"Q. Doctor, will you please examine that picture and tell the court; if any knot were employed, where that knot would appear on the neck of the victim: at what point it would appear on the neck of the victim.

"A. If a knot would have been used, then the knot would have to be placed on the largest spot of the furrow; that is, in the center.

"Q. Now, Doctor, where, in relation to the mid-line of the chin and trachea, is that largest part which you presumed to be the knot?

"A. I did not say there was a knot.

"Q. No; I said, if there were one?

"A. In that case, it would have to be placed right off that central line.

"Q. Will you please point at my neck and show the court approximately where the thickest part of that mark is?

"LAW MEMBER: The witness points to the right-hand side of the trial judge advocate's neck, just off center.

"Q. I have one more question to ask you. Again showing you this picture, you see there a descending mark. In your opinion, was that caused by the same rope, or other instrument, that caused the other burn or ring around the neck of the deceased?

"A. It is to be assumed.

"PROS: No further questions. On the question put to the witness to point on the neck of the trial judge advocate approximately where the thickest portion of that mark on the neck of the deceased was, let the record reflect that the witness pointed to a portion of the neck of the trial judge advocate half way between the mid-line of the chin and the ear.

"WITNESS: Always assuming that the witness stated there was a knot, but there is no typical mark which would signify a knot.

"PROS: I think the question was, where did the thickest portion of that ring appear. Does that meet with the pleasure of the court: the way the trial judge advocate described it?

"LAW MEMBER: That is the place that he pointed in response to the question that you asked him at that time."

\* \* \*

"Q. Now, Doctor, during the questioning this morning by the prosecution, I asked you this question: 'I show you Prosecution Exhibit 1 for identification. Are you qualified to testify as to certain marks upon the neck of the victim'. I believe that your answer to that question was: 'The marks are extraordinary in cases of death by hanging.' Is that correct?

"A. That was my answer.

"Q. I show you Prosecution Exhibit 1 for identification. Is that mark the type of mark you would expect to find when death was a result of hanging?"

\* \* \*

"A. In a case of death by hanging; meaning that a person tried to hang himself or herself- this sort of mark is unusual."

\* \* \*

"Q. Did you give an answer to that?

"A. I would not expect this mark in a case of death by hanging; in a case of suicidal hanging I would not expect that sort of mark.

"Q. Doctor, would you care to clarify your answer any further to the court?

"A. The unusual thing about this mark consists in the following: there are two deviations from the main furrow, to the side; one upward, and one in a downward diagonal direction." (R 18, 20, 21)

On re-cross-examination, Dr. Kolb was unable to express an opinion as to whether the chin abrasion was caused by a blow sharp enough to render a person unconscious. With reference to a possible explanation for the chin abrasion Dr. Kolb testified:

"Q. Do you think the wound could have been caused in this fashion?

"(The defense demonstrated by placing the rope around his neck and knotting it in the front).

"A. I don't think so, because the rope went around the neck and the two ends met.

"Q. I shall clarify the question. We will presume that a hypothetical person suddenly jumps off a pedestal and hits the rope with the area of her face indicated by this wound. Now, could the rope have caused that wound?

"A. If it is rough enough; the rope - it could.

"Q. Here is a sample rope. Is that rope rough enough?

"A. Maybe, but I have to know how wide the wound was.

"DEFENSE: For the purpose of the record, may I describe the position of the rope? The rope was wrapped around the neck of the defense counsel, crossing somewhat to the right front of his neck, with the two ends of the rope held outwardly in opposite directions, and a demonstration was made of the face - left side of the face - falling against that part of the rope stretched out to the left." (R 19, 20)

On the afternoon of 2 July and again on 6 July, accused was interviewed by Paul J. Ashlock, a criminal investigator of the Criminal Investigation Division, with reference to his "actions and whereabouts on the 1st July". At the first interview, accused stated that he had been at the educational building all morning; that he had not eaten mess in the regular mess but ate a can of sardines in his quarters; and that he had gambled all afternoon in the basement of the barracks. Accused, however, could not recall with whom he had gambled (R 66, 67). In detail, Ashlock related his conversations with accused as follows:

"Q. Did you have further conversation with him on the 2nd July about his whereabouts on the afternoon of 1st July?

"A. I did. I asked him about the morning; what he did. Then he said he gambled all afternoon. I asked him where. He said in the gambling room in the basement of the barracks. I asked him who he gambled with. He didn't recall. I told him surely he must have known someone there. He answered there was only a German there. I asked if he stayed there all afternoon by himself. He stated, no, he went to the snack bar. I asked him if there were people in the snack bar. He said, yes. I asked him if he recognized anyone in the snack bar. He said, no. I asked him how long he had been in the organization. He said, better than a year. I asked him, why, in a year's time didn't he know enough people to recognize some people in the snack bar who could say he was there. He said then, he didn't go into the snack bar where they serve food; he went through a basement passage. I asked him where he was going to through the basement passage. He said he didn't know. Finally, he stated he went back to Captain Baker's house.

"Q. When did he tell you ---- in what conversation, and approximately on what date, did he tell you that he had, in fact, returned to Captain Baker's house on the afternoon of the 1st?

"A. That, I believe, was on the 6th.

"Q. Was it, or was it not, on the 2nd, Mr. Ashlock?

"A. Some admissions were on the 2nd and some were on the 6th, but I think on the 2nd he admitted he had gone back to the Baker's house but he hadn't remained there. But then on the 6th, he said that he had been there in the afternoon and that he had been drinking before he went to Captain Baker's house, and after Mrs. Baker went to the Commissary he went walking with Sandra - Mrs. Baker's daughter. He came back and didn't see Veit. He went into the living room, sat down on the sofa and that is the last he remembered." (R 68)

#### 4. Evidence for the defense.

Accused after being apprised of his rights to testify, make an unsworn statement, or remain silent, elected to testify.

He testified that he was a member of Company "C", 371st Infantry Battalion. He had known Lilli Veit for two years and three months. On the Sunday prior to 1 July, accused brought a saw from the basement to saw a ham bone for Mrs. Baker. After using the saw, he hung it on a nail alongside the stairs leading to the basement. On the morning of 1 July at about seven or seven-thirty, he came to the Baker house bringing with him a bag containing some schnapps and "FX" articles. A short time later, Jackson arrived and accused told him to wait until he had fixed the fire and he would accompany him back to camp. Lilli queried accused as to why he wanted to go back to camp and later in the basement surprised him as he was locking his trunk. She demanded to know what he was putting in the trunk and became irate. She kicked the lock of the trunk and threw some barber tools of accused to the floor. While accused was fixing the fire, she came over to him and exclaimed "you pig". Accused laughed, went upstairs, secured his bag, and returned to camp with Jackson. He later returned to the house from camp with Jackson, stopping en route at a house to call Lilli that he was coming. Upon their arrival, Mrs. Baker spoke to Jackson about going to the commissary. At the time, there was another lady in the kitchen speaking to Lilli. Accused went to the basement to fix the fire and also to look for some "stuff" which he had hidden. He found one bottle which was three-quarters full, but was unable to find his full bottle. He asked Lilli where the full bottle was but she would not tell where it was. He then locked the other bottle in his trunk and came back upstairs. Sandra said to him "Lilli's bad. I don't like her any more". Sandra suggested that she and accused go for a walk. Accused replied, "O.K." At that time, Lilli came into the kitchen. She had been in the basement. She had blood on her left elbow and was holding it. She ran water on her arm. She was staggering because she had been drinking.

Sandra came into the kitchen then and accused left the house with her. Accused did not know what time it was when they left. Up until that time he had consumed about one-third of a bottle. They went up the street about six or seven houses where they spoke to Anni Sandner. Accused had some candy and gum which he gave to Anni for herself and her brother Peter. He did not recall telling Anni that he had been paid that day but did recall dropping some money and picking it up. When they left and started down the street Sandra said, "You catch me". Accused chased her and they were laughing and playing on their way to the house. Accused opened the door with his key, took off his jacket, went upstairs, and went to sleep. He was awakened by Captain Baker who told him that Lilli was almost dead and that the doctor was working over her. Accused asked what was wrong but Captain Baker told him to remain quiet. Accused recalled that she had been drinking and also that she had cut her arm. Accused told Captain Baker about Lilli's drinking but Captain Baker again told him to be quiet, took accused to his room and said "Be quiet, they are now working on her". Accused went to sleep and was later awakened when Captain Baker and Jackson came to the room. They took him back to camp and accused went to sleep in a room at the Officers' Club. He did not remember distinctly, but it seemed that while in the jeep he was told that Lilli was dead. He recalled that after arriving at camp he spoke to a fellow named Bledsoe and told him that the Captain had said Lilli was dead. The following morning Captain Baker told accused to report to the "CID". He turned aside accused's questions concerning Lilli and merely told him that all would be explained to him. Accused went to the CID, waited awhile and then went to the Military Police station. At one o'clock, he returned to the "CID" and was questioned by Ashlock. Accused stated that Ashlock first inquired of accused's movements on the 31st, and after accused had accounted for his movements on that date, interrogated him concerning 1 July. Accused testified that he told Ashlock that on the 31st he went to camp in the morning with Captain Baker. Since it was pay day, he stayed around the company until he was paid. He then went to the basement where there was gambling and he lost ten dollars. He believed that at the time it was after twelve o'clock. The participants in the game were strange to him except the fellow who was running the game. He could not recall the latter's name. He then drifted around camp and later went to the photo shop in the basement of the Service Club but found it closed. Later on he had some sardines and crackers. He could not recall that he related anything else about the 31st. The version of his movements on 1 July, which he testified he related to the CID, was in accord with his prior testimony as to how he spent that day. At the conclusion of his direct testimony in response to a question propounded to him by defense counsel, accused admitted that after he had learned of Lilli's death he became worried that it might be decided the death was murder and that he would be charged with it (R 78-85).

On cross-examination he testified that he was worried because of prejudice. When he was questioned at the CID office, the remark was made "being a negro, did her mother know she was going with you?" Accused stated that he replied, "She certainly did". Other things were said which

were not right to say "\* \* \* it was prejudice" and accused was worried. One man at the CID told accused "I know you didn't do it, but who did?" Accused believed she did it herself (R 85-86). Concerning the saw accused testified:

"Q. Now, again, did you say this saw was hanging this way?

"A. It was hanging this way in the basement on the wall.

"(The witness demonstrated the way the saw was hanging).

"Q. It was not on the right-hand side?

"A. On the left.

"Q. Going down the stairs?

"A. Yes.

"Q. So it sort of stands to reason that if a person were going downstairs; that a cut on the arm could not be inflicted because they were moving with the teeth of the saw - if they were going down. Now, if a person were coming up - possibly ascending the stairs - and threw the arm up; it would cut.

"A. She was staggering and she was drunk. I presume she staggered.

"Q. Did you see her go down the stairs?

"A. No.

"Q. How do you know she was staggering?

"A. She staggered when she came to the kitchen.

"Q. So you presume she was staggering down the stairs?

"A. Yes, sir.

"Q. This was against the wall, let us say; crossways ----

"A. It would not be like that, sir. It was a little above her head, I think."

\* \* \*

"Q. Now, the saw was hanging in this manner, was it, Abston: On the lefthand side of the steps as you went down?

"A. That is straight down, sir. The saw was hanging out.

"Q. About how far was it hanging out? Do you remember?

"A. I don't remember.

"Q. But you do know it was hanging out?

"A. Yes, that's right. Exactly how far it was, I don't know.

"Q. Did you ever move that saw?

"A. No.

"Q. You are sure?

"A. I am positive.

"Q. Was it hanging there when you came back from the walk with Sandra?

"A. I didn't go in the basement; I went upstairs.

"Q. You didn't take it in the closet upstairs?

"A. No, sir.

"Q. You didn't?

"A. No, sir.

"Q. Did Lilli have it when she came upstairs; when you saw her with the cut on her arm?

"A. No, she came in the kitchen like this.

"(The witness demonstrated by holding his left elbow with his right hand).

"Q. Did she bring the saw up?

"A. I didn't see; I was in the kitchen.

"Q. Did she come straight in the kitchen?

"A. As far as I know, she did. I was standing by the table."  
(R 86, 87).

He denied that Lilli lent him money and that he had told Anni Sandner that Lilli was a devil. He admitted that Lilli had told him that she was going home to Minningen, "to get her papers straight about this conversion, and things". She was to return later. Around 1 July he did not have knowledge that his company was to move. He admitted, however, that the company was presently at Grofenwohr and prior to that at Kitzingen. He did not respond to the assertion that he had known the company was moving to Kitzingen but asserted that he did not know he was going to move with the company (R 87, 88).

He testified that he thought there were but two keys to the front door of the Baker house, one which Mrs. Baker had, and the other which he had. On "this particular day" he had one key and Mrs. Baker, the other (R 88, 89).

He kept his belongings in the basement room where Lilli's body was found. He had photos there which he did not want Lilli to see as she was very jealous. He had a number of friends but did not know if Lilli was jealous of them. She was terribly jealous, but accused did not give her any particular cause to be so. Lilli had come to Nurnberg in March to be with accused and at that time they were friendly. Upon being asked if their relations were more than friendly, accused reiterated that they were friendly and he denied knowing that Lilli was pregnant. He stated it was not true that Lilli had hocked her wrist watch in order to get money to give him. Accused did not tell Nagel that Lilli was always asking him for money and claimed that Nagel did not tell the truth. Accused explained that Mrs. Baker wanted Nagel kept out of the house and that Nagel probably blamed him for not being allowed in the house. Anni Sandner was a casual friend of accused to whom he might

have remarked that Lilli was a devil, but not that he did not want to marry her. On but one occasion had he struck the deceased. They were at the Club at the time and she was drunk and he slapped her. He denied that he knocked her down or struck her with the saw on the afternoon of 1 July. He recalled that after coming back from his walk with Sandra he took off his jacket and went upstairs and fell asleep. Later he was awakened by Captain Baker and Jackson and told that Lilli was almost dead. Accused thought of the cut arm and of the circumstance that Lilli had been drinking, and then went back to sleep. Although he was in love with Lilli, he made no attempt to go to see her. He did not know that police and investigators were in the house at the time, nor did he become aware of their presence when he went from Lilli's room to Captain Baker's room. He had been up all night the previous night and had been drinking. He was not drunk when he returned from his walk with Sandra but had been drinking. He did not know what time it was when he was awakened in Captain Baker's room. On his way out to camp, he was unable to elicit any information from Captain Baker as to what had happened to Lilli. On 1 July, he was last in the cellar room, where Lilli's body had been found, at about 1:30. He did not have a key to the door affording entrance to that room from the cellar and that door was not locked on 1 July, and the key to the back door was in the lock of that door (R 89-86). Concerning the appearance of the room at the time he last saw it he testified:

"Q. Describe to the court exactly - insofar as your recollection is concerned - how that room looked and what was in it when you left.

"A. There was clothes hanging on the line.

"Q. How many clothes?

"A. I don't know how many; it was full of clothes. By the trunk - there was an opening for the trunk - and there was clothes to the right of the trunk and on the line going to the back of the wash room.

"Q. Clothes on the right of the trunk?

"A. That's right.

"Q. Your foot locker?

"A. Yes. And there was fatigues.

"Q. How was this rope attached?

"A. I didn't examine the rope.

"Q. Did you put the rope up?

"A. I put the rope up myself when I made the laundry line for Mrs. Baker. It had been up about two or three weeks, because it had been raining and they hung the clothes in the basement.

"Q. How much slack did that rope have? In other words, you say there was laundry on it. Did it sag much?

"A. Yes, it sagged.

"Q. A great deal?

"A. It sagged; not so much the clothes touched the floor, but almost touching the floor.

"Q. Was there any other rope down in that basement: in that cellar?

"A. I don't remember if there was: only the line - only the rope that made the line.

"Q. Any neckties hanging on that line?

"A. I don't remember. I didn't hang up the clothes.

"Q. You do remember that they were fatigues?

"A. Yes.

"Q. What happened to those fatigues?

"A. I don't know.

"Q. Why weren't they down there at seven o'clock that night?

"A. I don't know.

"Q. Why weren't they down there at five o'clock that night?

"A. I don't know. Maybe she taken them up that morning." (R 96,97)

The lines were about four feet above the floor. When the door opening from the cellar was opened, it opened into the room and would hit the rope going across the room. The open door tended to slacken the rope. This inside door was not kept locked (R 105).

He denied that on 2 September in the presence of Jackson he stated that he had put a slip knot on the wire after Lilli was dead (R 97).

He could not recall how long after he had been in the cellar he and Sandra went for a walk. The duration of the walk was probably forty-five minutes, maybe less (R 98).

Accused again denied that he had struck Lilli with the saw. He could not account for the absence of blood on the saw, nor could he explain how it got into the closet (R 99).

On redirect examination, he testified that the saw was hung so that the teeth were pointing down. He reiterated that except for the face slapping incident he could not remember having a physical fight with Lilli (R 100).

Upon examination by the court accused stated that the reason he did not lock his liquor in his trunk and thus keep it from Lilli was that he did not have enough time. Although he did not make a habit of it he knew it was all right for him to go to sleep in Lilli's room. When he awakened, Captain Baker told him that Lilli was almost dead and the doctors were working on her. Captain Baker told Jackson "You keep him accused in here." Accused did not leave the room. He answered

"No", to the question, "Do you think that is the natural reaction of a man who has just heard that the woman he loves is dying?" When he finally left the house he was prevented from going to the kitchen by Captain Baker and Jackson. When he left the house in the afternoon with Sandra, no one else but Lilli was in the house to his knowledge. At that time, other than he and Mrs. Baker, no one could enter the house unless admitted (R 100-103).

Upon further redirect examination, he stated he had hid the whiskey when he first came to the house in the morning to start the fire. He was putting "FX" things in the trunk when Lilli came down and berated him for not taking her to the club the evening before. When he returned around eleven-thirty or twelve, he went for the bottles to put them in his trunk, and found one bottle missing (R 103-104).

Subsequent to the arrival of the Bakers at the house, accused used to stay at the house one or three nights a week. On these occasions, he would sleep in on the couch, sometimes in the dining room, and if Lilli had gone to her home in Menningen would sleep in her room. He had stayed overnight on occasions when Lilli was at the house (R 106).

Prior to the pretrial investigation the last he had seen of Sandra was when he returned from the walk (R107).

Hans Nagel recalled as a witness for the defense testified that the door which as a prosecution witness he had stated was always locked was the door leading from the workroom outside (R 108).

Franz Drechsler recalled as a witness for the defense testified that he examined the deceased and found she was clothed in a summer dress with short sleeves. She had on a slip and a pair of shoes. Her clothing made an "orderly appearance", there was nothing torn. On the lower part of the dress there were three small blood stains (R 109).

On the line which was not cut there were a pair of trousers and another piece of laundry. On the "cut-off" rope close to the garden door there was a shirt hanging. On the line near the door, he found a bloodstain. Most of the bloodstains which he found in the room were on the floor near the door leading outside, there were a few around the upturned stove, under the stove lid, underneath the chair, and there were also some on the stove (R 109-110).

The wound on the elbow was in the shape of a bow; the wound itself did not go "all the way through", the tissue had been separated in parts. There was not much blood over the elbow but it was smeared. The right hand was covered with blood. There was blood on the left hand also but not as much as on the right (R 110).

Drechsler was again recalled to the stand by the defense. He identified a stove in the courtroom as the stove which he had seen in the basement room. He identified a knot shown to him by the defense counsel as a knot which he had made and testified that he had patterned it after a knot he had seen on the rope in the room. It was not, however,

an exact replica of that knot. The following demonstration then took place in the courtroom:

"DEFENSE: Let the record show that defense counsel was holding one end of a slender wire rod; the interpreter the other end, and that one end of the rope is in the hand of the defense counsel and the other end is attached to the iron rod.

"Q. Now, I request the witness to make a slip knot with this rope on that iron rod.

"DEFENSE: Let the record show that the end of the rope held by the defense counsel has not been freed; nor the ends of the iron rod. " (R 123)

At the conclusion of the demonstration the witness testified as follows:

"WITNESS: That is a slip knot.

"Q. All right. Did the knot you found there in any form or fashion resemble this knot?

"A. I could not recall it that exactly, but the knots there were a little tighter than these.

"Q. Was the general shape, and contours of the knot, anything like this knot?

"A. The resemblance was that the knot would come unfastened by pulling the loose end.

"Q. Would any of these loops resemble anything you found there?

"A. I remember that it was bound a few times round the line and the end was the slip.

"Q. Would those turns you described, and so on, resemble this in any form or fashion?

"A. That I could not say any more. I left the knots in the condition in which I found them. We made our tests and put wedges between the knots so we would not loosen the knots.

"Q. Do you remember me asking you to make a slip knot a few minutes ago in the court room, and did I ask you if this knot in any way resembled or looked similar to the one you found at the scene?

"A. It was not like this.

"Q. The knot you found was not like this.

"DEFENSE: I wish to introduce this as Exhibit A for identification of the defense, retaining the original slip knot which the witness made, and the one he made under the conditions described and shown to the court.

"LAW MEMBER: Which he testified to, I understand, were not like the one he found?

"DEFENSE: ---- which he testified to were not like the one he found.

"PROS: Mr. Drechsler, the rope and knot that you found, I believe you said, would come loose when a small amount of force was exerted against them?

"WITNESS: That is correct." (R 123, 124)

Corporal Floyd P. Luper, 385th Station Hospital testified that he was a Clinical Laboratory Technician and that one of his duties was the analysis of blood. He identified Prosecution Exhibits 7 and 10 as pictures of a small storeroom in the basement of the house in which he conducted blood test experiments on 7 September. The test which he used was the "Benzidine" test used for discovering the presence of blood (R 111-113).

Concerning the bloodstains which were found he testified:

"Walking down the stairway to the basement, on the left-hand side, I found approximately four or five spots of blood. I would say it was half way between the top of the wall and the basement steps. At the bottom of the basement steps on the right-hand side of the wall I found two spots of blood. On the floor between the basement steps and the room - the storeroom - I found one spot of blood. In the store-room I found very much blood on the outside door, that is, the door leading to the outside. There was a small iron stove that had very much blood on it and one spot of blood on the floor right by the door." (R 113).

This was the door leading to the stairway. The spots on the left hand wall of the stairway were spaced and were about three feet above the steps. Blood was also found in the kitchen, in the kitchen sink on the right hand side, and approximately five or six spots on the kitchen floor. (R 113-114)

Upon cross-examination he testified that he did not find any spots on the stairs as distinguished from the wall of the stairway. He found a great deal of blood on the door leading to the garden from the basement, about one-third of the way up the door. He did not determine if the blood stains were animal or human blood (R 114-115).

Upon examination by the court, he testified that he found but one blood spot on the floor of the basement room. That spot was near the door leading to the stairway. There was no blood on the floor near the garden door. He did not recognize the scene depicted by Prosecution Exhibit 9. He identified Prosecution Exhibit 7 as the door upon which he found bloodstains but testified that the stains were not visible in the picture. They were, however, visible when he viewed the door itself. In making the tests, he applied the Benzidine solution only where he suspected there was blood. On the top of the stairs near the kitchen, he did not find any blood at all (R 115-117).

On redirect examination, he testified that the floors, halls, and stairways were very dirty and appeared to have been walked on a lot and had not been cleaned. He placed Benzidine in many places in the house and obtained a very small percentage of positive reactions. Concerning the efficiency of the Benzidine test on surfaces upon which there was considerable traffic and where dirt had been ground upon the spots, the witness stated in re-cross-examination that he was not qualified to give an opinion (R 118-119).

After being excused as a witness, Corporal Luper again examined Captain Baker's house. Concerning the latter examination he testified that there was one pool of blood on the floor near the garden door and upon again viewing Prosecution Exhibit 9 identified it as a picture of the room (R 125).

Dr. Emil Weinig testified that he was a Professor for Forensic Medicine, Doctor of Medicine and Doctor of Chemistry. His principle field was legal medicine and he had experience in criminal investigation since 1930. He had used the Benzidine test frequently in his work. If a positive reaction was obtained from the use of the Benzidine test he would conduce the presence of blood. In cases where the blood spots were subject to much walking and having dirt ground upon them for a period of two months the Benzidine test would still show a positive reaction (R 120-121).

Dr. Weinig also testified that he had been in attendance on 200 cases of suicide by hanging and that in 150 of these cases some part of the body of the deceased would be touching the floor and in 50 of these cases the deceased would be "more or less lying" or in a sitting position to the front. The latter cases are illustrated by a picture contained on page 343, "Technique for Court and Police Medicine" edited by Professor Lochte (R 167).

On cross-examination the prosecution attempted to elicit an opinion as to the cause of death as reflected by Prosecution Exhibit 1. The defense objected to the question as being beyond the scope of the direct examination whereupon the prosecution took the witness on direct examination (R 167-169).

Doctor Weinig testified that the strangulation mark illustrated in Prosecution Exhibits 1 and 4 was "signified by something extraordinary on the right side of the neck which is termed an 'Atypical strangulation mark'." On the right side of the neck there were deviations from the main track which would indicate that the instrument used in strangulation had some extension. Strangulation by the hand of a third person was a possibility. Doctor Weinig added "In very rare instances, however, where the slip can be closed on the side of the neck and death may occur by hanging." (R 169)

Concerning the rare instances Doctor Weinig testified as follows on cross-examination:

"Q. Did you say in very rare instances? Let me see if I first understood what you said. You said, I believe, when one burn goes downward in relation to the main burn around the neck and another one goes upward, that generally indicates that the person was strangled by someone. Is that right?

"A. Yes.

"Q. But you did say; in rare instances such marks do occur when there is a hanging?

"A. Yes.

"Q. Now, in the course of your activity and your work - these hangings you investigated; was the body suspended from a point more-or-less directed above the body; a single point?

"A. No, it was not. In those exceptional cases, the conditions of suspending the body were exceptional too.

"Q. He misunderstood my question. I was just referring to his general experience and not referring to any particular unusual experience, and I ask the witness, in his experience generally, does he find that the person who is hanging hangs from one point somewhere above the person's head?

"A. Generally, this would be the case.

"Q. Have you ever come across a case where a person hung themselves on a rope which was attached to two points perpendicular or at right-angles to the force of the person's body?

"A. I have found those cases.

"Q. How many have you found?

"A. Four or five.

"Q. All right. Then, in your broad experience, would you say that is a very rare instance of hanging?

"A. It is.

"Q. And you also said that this kind of mark does occur rarely in some forms of hangings?

"A. They could, in exceptional cases.

"Q. I want to demonstrate a certain type of case. This rope is attached to one end; this at the other end at right-angles to the person. Now, the points of attachment are around the person's neck or below - in line with the neck or below.

"A. In which cases?

"Q. I am demonstrating a hanging now. I am showing one. Fortunately there is a doctor present, so I don't mind demonstrating. There is one point against the wall at right-angles to another point and the rope is perhaps in line with the neck or slightly below the neck. This person wraps the rope around the neck, as I have just

done, and the record can show that the defense counsel has placed the rope around his neck crossing in front of his neck somewhat to the right. Now, the person is standing on something like this stool here and the person falls to the sideways. Now, is it possible, in those circumstances that the person will get a quick burn more-or-less at this angle? Is it possible?

"A. It is possible.

"Q. All right. Then the person, having fallen sideways quickly at this angle, suddenly has her body straightened up and falls backwards. Is it possible for the person's chin - in view of that backward movement; is it not possible for the person's face to fall forward, and, now, of course, the body is below the point of attachment of the ropes; is it possible for the person's chin to hit the rope hard?

"A. It is possible.

"Q. Would that kind of blow to the cheek or face cause a mark something like you can see in Prosecution Exhibit 1?

"A. Yes, it could." (R 170, 171)

The hypothetical situation was not, however, a probability, but may occur once in a hundred cases (R 171, 172).

Rudolph Dorn, recalled as a witness for the defense, testified that in the room which he was guarding, he remembered that one piece of clothing was hanging from the rope which was stretched out across the room. Not connected to the first line was a second line upon which at a point close to the garden door were hanging three dresses belonging to the victim. Two of the dresses were dry and one was partly wet. The line from which the dresses were hanging was uncut and was two meters in length (R 122).

Edith Kuhl testified that on the Wednesday or Thursday of the week preceeding her appearance in court she visited the CID office and examined two pieces of rope which had been cut apart. One of the pieces of rope was attached to a wire. She had made a drawing of what she had seen. She testified as follows concerning the results of her examination:

"Q. I show you this paper: do you recognize it?

"A. Yes, sir. That is my sketch.

"Q. Will you mark an 'R' on the right side of that paper, and an 'L' on the left side of that paper, indicating right and left. That knot, or drawing of a knot on the right-hand side of that paper; do you recognize it?

"A. Yes, sir. It was on the wire.

"Q. On the wire?

"A. On the wire; more-or-less hung around the wire.

"Q. The knot on the left side; do you recognize that?

"A. Yes, sir. It was also on the wire.

"Q. All right. Now, which was the longer cord leading from the knots; the cord on the left-hand side, or the cord on the right-hand side?

"A. The rope here through the knot on the right-hand side is the one which has been cut and it has been ----

"Q. Just say which is the shorter.

"A. That has been the shorter end.

"Q. Were the knots on the rope on the left side connected with each other in any way?

"A. Yes, sir. The rope was once connected at the wire with the right-hand side knot and then the rope was put along the wire and again tightened at the wire with another knot.

"Q. And this is the knot you drew in the CID office?

"A. Yes, sir." (R 127, 128)

The drawing was not offered into evidence by the defense.

Mrs. Baker recalled as a witness for the defense testified that when she entered the room where she found Lilli's body there was a clothes line and at the far side of the clothes line there were clothes. Her testimony as to which line she meant is set forth:

"Q. Do you mean by that; the side near the garden door?

"A. No; the line was made this way. Lilli was on the first side of the room.

"(The witness demonstrated with her hands).

"Q. You mean the second line? What kind of clothes were on this line?

"A. Her dresses were on the side towards the door and there were fatigues on the far end.

"Q. The dresses were on the side toward the door. Do you mean by that, the garden door?

"A. Yes." (R 129)

The clothing consisted of three dresses belonging to Lilli. Mrs. Baker had known accused since about the end of March. She had seen him under the influence of liquor but had never seen him misbehave himself in any way. He was always a gentleman in her presence (R 129, 130).

Accused used to remain at the Baker house one or two times a week when the Bakers were going out. On those occasions he would sleep on a couch in the downstairs living room, or in a chair, and sometimes in the breakfast bench. During the entire period in which she knew accused and Lilli they were friendly. She did not know, however, whether they were engaged to be married (R 130-131).

Mrs. Baker did not know of the presence of the saw in the house until it was used to cut a ham and did not know of a special place for it. When she was leaving for the commissary, she had occasion to go to the closet where she subsequently found the saw and at that time the saw was not in the closet, nor was it upstairs at all as she had been all over the upstairs. After her return from the commissary a conversation with her daughter caused her to go to the closet to look for the saw (R 131-132).

The doctor did not wash up in the kitchen sink after he finished (R 132).

Private First Class Wade Boswell testified that he had known accused for a year and a half, and had gone out with him socially. He also knew Lilli Veit and had seen her and accused together in clubs. On many occasions, he had observed accused under the influence of alcohol and on such occasions accused's behavior was sociable. Lilli on the other hand became nervous and excited. On one occasion as she was leaving the club at the Engadine Air Base, she made an attempt to jump out the window and the witness grabbed her and pulled her back (R 132-134).

Anni Marie Sturm testified that she had known accused since February. She had subsequently seen him quite often as she worked at Mrs. Baker's place every Friday, and had worked there for a week prior to the time Mrs. Baker moved in. She had observed accused when he had been drinking but he was never antagonistic. She was with accused alone in the Baker house on occasion and he never tried to molest her. She also became acquainted with Lilli Veit and saw her in accused's company very often. They were a typical loving couple. Lilli, however, was quick tempered when she was drinking and would have some scenes with accused when she would try to take a bottle from him. Accused liked children but if he gave them chocolate when Lilli was around she would make a scene and say, "Those children don't need any chocolate" (R 134-136).

The witness testified on cross-examination that accused had told her niece that Lilli was a devil and that he was not going to marry her. Upon refreshing her memory from her pretrial statement, the witness testified that accused and Lilli had frequent quarrels over trifles and that although their quarrels did not become violent it looked sometimes as though something could happen. She also testified that in her pre-trial statement she had stated she never knew whether he was under the influence of liquor or not, he always seemed the same to her (R 177-179).

She testified on re-direct examination that it was her impression that Lilli started the quarrels by trying to make accused jealous. She never saw accused use violence in any of the quarrels. Otherwise accused was very good to Lilli, he did anything for her, scrubbed floors for her and assisted her in her work (R 139-140).

Sergeant Clarence Gardner testified that he had known accused for a year and had been with him socially. At social events Gardner had frequently observed accused under the influence of alcohol and noticed at such times that accused was very friendly. The witness had never seen the accused angry (R 141).

Captain James T. Baker testified that he was accused's Commanding Officer and that accused was never too much of a disciplinary problem. He had seen accused when he had been drinking but accused did not react abnormally to drink (R 142-143).

In the evening of 1 July, Captain Baker was summoned to his home and on arrival there found in the basement a girl who had been employed in his home. Also present were his wife, daughter, Jackson, and two German policemen. Subsequently, he found accused asleep in the girl's room when he went there to get her effects. He awakened accused and told him to get up and go to another room. When accused got out of bed, Captain Baker did not notice anything unusual in his appearance and did not see any blood on his person. Jackson went to the other room with accused. Captain Baker made no mention to accused at that time of what had happened downstairs, although later he told accused that Lilli would probably have to go to the hospital (R 143-144).

Captain Baker testified on cross-examination that accused was fully clothed and that he believed accused had on his jacket (R 144-145).

Upon examination by the court Captain Baker testified that when he first saw accused he did not know whether Lilli was dead or not. He had arrived home at approximately five o'clock and had gone to the cellar. In the cellar room were two German policemen, and his wife. He noticed a broken piece of glass and some gauze and was told that a Doctor Schenk who had been present had administered adrenalin. After he was there for about five or ten minutes, a German doctor came. After the doctor had made his examination and report, Captain Baker knew that Lilli was dead. It was not until after the report was made that Captain Baker saw accused. He went upstairs to get the girl's effects and found accused lying across the bed. To the best of Captain Baker's knowledge accused was asleep. When accused awakened, Captain Baker told him to go to the other room. Accused said nothing at all. Captain Baker told Jackson to remain in the room with accused. Captain Baker then returned downstairs. Approximately four hours later at ten o'clock Captain Baker went upstairs again and told accused to go to Camp with him. It was not until after they had started for camp that Captain Baker told accused that Lilli was dead. Accused made an emotional response. Concerning accused's reaction Captain Baker testified: "He asked me how --- he said, 'No, no. How?', and just went off like that." (R 145-149). For the remainder of the ride back to camp accused held his head in his hand and mumbled to himself (R 182).

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Captain Baker had seen Lilli in accused's company prior to her coming to Nurnberg. After she came to Nurnberg he observed that they were "girl friend and boy friend". He had last seen them together on the 29th or 30th of June (R 149-150)

Captain Baker identified Prosecution Exhibit 1, as a saw similar to one at the house and stated that the saw at his house was usually kept in the basement (R 152-153).

It was noted by the president of the court that Captain Baker had originally testified that he did not know Lilli was dead when he awakened accused and subsequently had testified that he knew she was dead when he awakened him. After the testimony was read back to him Captain Baker testified that he knew Lilli was dead when he had awakened him. Although the relationship between accused and Lilli was very close, Captain Baker did not tell accused of what had happened as the doctor had stated that the death had resulted from suicide (R 153-154)

On the way out to camp accused did not express any desire to go to Lilli. Captain Baker did not have any conversation with accused at camp and left camp at about two o'clock. On the morning of 2 July, he saw accused in camp and told him to report to the CID immediately; that he was wanted there relevant to Lilli's death (R 154-156).

Captain Baker testified that accused kept a footlocker in the basement and also some clothing in the wardrobe. He did not see the clothing that night or subsequently (R 157).

On re-cross-examination Captain Baker testified that he did not know that the German doctor whom he admitted to the house was the coroner. No one had told him that the doctor who had been at the house previously had pronounced the girl dead (R 158). As to accused's whereabouts on 1 July, Captain Baker testified that he had left accused at the house at seven-thirty in the morning (R 159). Accused was not intoxicated when Captain Baker saw him that day but may have been drinking (R 159).

Accused was assigned as a cook in the company but also worked at Captain Baker's house. The latter was not his duty. Captain Baker then stated, however, that accused's work at his house was an authorized duty. Captain Baker was of the opinion that it was not contrary to Army Regulations to have a soldier perform personal duties for him as long as the service was voluntary (R 159-161).

Although Captain Baker knew that accused was at his house in the morning of 1 July and again that evening, he did not volunteer that evidence to the investigator as he had been told that the girl's death was due to suicide. In the interim between the time he last saw accused in the morning until he saw him that night Captain Baker did not know where he was (R 162).

Captain Baker did not think it unusual that accused should have a key to the house whereas he did not have one. It did not indicate that he was on intimate terms with accused but rather that he trusted accused (R 164).

Accused was not in the habit of sleeping in Lilli's room but at the time Captain Baker found him in her room Captain Baker gave the matter no thought (R 165).

Doctor Kolb recalled as a witness for the defense testified that prior to starting his autopsy he examined the deceased's dress. Her body was clothed in a summer dress which was not damaged or torn and he did not find any bloodstains on it. There were no positive signs of a struggle. He could not state that the dress with which deceased was clothed and which he examined was the dress she had on when she met her death but did state it was the dress in which she was clothed when she was brought to him (R 165-166).

Accused was recalled as a witness by the court and again examined as to his reactions at the time Captain Baker awakened him and told him that Lilli was almost dead. Captain Baker had told him after taking him to the other room. Captain Baker then told Jackson to remain in the room with accused. Accused asked "What happened. What happened. What is wrong?" Captain Baker told him to be quiet, that Lilli was almost dead, and told Jackson to keep accused in the room. Accused believed that Lilli was probably drunk. Captain Baker first informed accused that Lilli was dead when they were pulling away from the house in the jeep (R 177-178).

Accused did not know who put the saw in the closet. He had put it on the stairs on the Sunday prior to 1 July but had seen it in the same place on the morning of 1 July (R 178).

Lilli had hurt her elbow after Mrs. Baker had left the house (R 178). With reference to seeing any blood on the cellar floor he testified: "No, sir. I hadn't been in the cellar - - - I had been in the cellar but didn't go right in behind her then." (R 179) Lilli entered the kitchen from the hall. Accused could not state whether she had come from the basement or not (R 177).

The fatigues which were hanging in the basement belonged to accused. He denied, however, that he had washed them, and stated that he did not believe they were washed that day. The member of the court who was examining accused thereupon stated: "It was brought out by one witness that they were soaking wet that day." (R 179)

Accused was wearing O.D's that day, the same uniform which he was wearing in court. He again denied that he had washed any clothing that day and stated that he did not see Lilli wash any clothing that day (R 179-180).

Sandra Baker, the five year old daughter of Captain and Mrs. Baker, was called as a witness and examined upon voir dire as to her competency as a witness. At the conclusion of the examination it was held that she was incompetent to testify (R 174-176).

5. Accused was found guilty of the murder of Lilli Veit. The evidence shows that at approximately 1630 hours, 1 July 1948, Lilli Veit was found dead in a washroom in the basement of Captain James T. Baker's quarters, Lerchenstrasse 5, Nurnberg, Germany, under conditions

suggestive of suicide but which the prosecution's testimony tended to show were consistent only with homicide. In determining if the record of trial is legally sufficient to sustain the findings of guilty of murder, we find it unnecessary to determine if the evidence excludes every reasonable hypothesis of suicide, but assuming that the record sustains only a hypothesis of homicide, find that the record does not have the sufficiency of evidence required to sustain a finding that accused was the perpetrator of the homicide.

Accused, a soldier serving under Captain James T. Baker, appeared at Lerchenstrasse 5, Nurnberg, in March 1948. At that time he was guarding the premises and readying them for the occupancy of Captain Baker and his family. After the Baker family arrived, accused recommended to Mrs. Baker that she obtain Lilli Veit as a maid. He and Lilli had been keeping company for approximately two years. Lilli started to work for Mrs. Baker in April. There was testimony by some neighbors that at first accused and Lilli seemed very much in love but that in the period from April to 1 July there was a cooling of their affection for one another.

To digress, there is no evidence pertaining to the physical plan of the Baker quarters. It may, however, be inferred that the house is a two story structure and in addition has a basement. There is a front door, and a door in the rear of the house affording entry to the basement washroom in which deceased was found. It is not shown that these were all the normal entrances to the house. There was evidence that the door to the washroom from the outside was usually locked and that accused had possession of the key. Whether the door was locked on the day in question is not shown. There were two keys to the front door, one kept by Mrs. Baker and the other by accused. There was no testimony as to the number of windows in the house and their accessibility from the ground.

At approximately 1230 hours, 1 July, Mrs. Baker left her house accompanied by Private First Class Percell Jackson to go to the commissary. In the house when she left were accused, Lilli, Mrs. Baker's daughter, Sandra, and a German woman whose name is not disclosed in the record. Between 1500 and 1600 hours accused, accompanied by Sandra Baker, visited Anni Sandner outside her house at Lerchenstrasse 24. At the time, accused staggered as he walked, and leaned against the gate post as he was unable to stand straight. In Anni's opinion, accused was drunk. Accused spoke about the large amount of money he had and dropped some German marks on the ground. At approximately 1545 hours, accused and Sandra left and went off in the direction of the Baker house. At approximately 1630 hours Mrs. Baker and Jackson returned to the Baker house from the commissary. Mrs. Baker observed that the windows were closed and shades drawn. Whether the windows were locked is not shown. It appeared as though no one were in the house. The front door was locked. Mrs. Baker entered the house and following a conversation with her daughter went to the closet and found a saw. She had been to the closet prior to going to the commissary and the saw was not in the closet at that time. After discovering the saw, Mrs. Baker went to the cellar and in the washroom discovered Lilli with a rope around her neck. She was in a sitting position against the wall, her head inclined slightly. Mrs. Baker ran upstairs and across the street to summon the doctor who lived there. He was not in.

She returned to the basement accompanied by Jackson, and cut the rope as Jackson was lifting the rope over deceased's head. Jackson left and went up the street to get Dr. Schenk who resided at Lerchenstrasse 48. Dr. Schenk went to the Baker house at approximately 1645 hours. He examined Lilli and found that she was dead. There was "No pulse, nothing to be heard at oscillation, no reflex of the eyes - the eyes had not broken yet --- the body was still warm". Dr. Schenk stated that the body had been dead "three quarters or half an hour". There was a wound on the left arm in close proximity to the elbow which could have been inflicted by a saw. Dr. Schenk stated that "judging from sight" the wound was not older than an hour or three-quarters of an hour. Death was due to strangulation.

During his examination of the deceased, Dr. Schenk had Mrs. Baker and Jackson procure blankets. It was while doing this errand that accused was found on the bed in Lilli's room asleep or drunk.

German police investigators discovered a large number of bloodstains on the floor of the basement room where deceased was found. A picture taken of the room shows about 40 to 60 bloodstains. There were clothes lines suspended across the room, one of which was cut, and there was some laundry suspended from the lines. Hanging on the lines were three dresses belonging to the deceased, two dry and one partly wet, and some fatigues belonging to accused.

There was no evidence presented showing the presence of bloodstains upon any clothing belonging to accused.

An autopsy performed upon deceased on 2 July showed that she was one or possibly two months pregnant and also showed that the blood content of alcohol then present in the body was sufficient to produce moderate intoxication.

Other testimony established that accused, when interrogated as to his movements on the date of the alleged offense, at first denied his presence at the Baker's house on that date and later retracted and admitted his presence in the house on the day in question.

Murder is the killing of a human being with malice aforethought and without legal justification or excuse. Presupposing as we do that the deceased met her death as a result of strangulation at the hands of a third person, malice may be presumed, from such a cruel and deliberate act manifesting an utter disregard for human life (CM 330963, Armistead).

Proof of the identification of accused as the perpetrator of the assumed murder rests entirely upon circumstantial evidence. In such case the rule to which Boards of Review have uniformly adhered is enunciated in Buntain v. State (15 Tex App 490):

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"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions \* \* \*. It would be dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens" (CM 233766, Nicholl, 20 BR 121 (1943) at p. 123-124, and authorities therein cited; II Bull JAG 238; CM ETO 3200, Price; Cm ETO 2867, Westfield; CM 312205, Wells, 26 BR (ETO) 344).

More closely appropriate, perhaps, to the circumstances of this case is the following language from Commonwealth v. Woong Knee New (47 A2d 450; 468):

"When two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a jury must not be permitted to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty. When a party on whom rests the burden of proof in either a criminal or civil case, offers evidence consistent with two opposing propositions, he proves neither."

The evidence in this case at best shows that accused had an opportunity to commit the offense, that possibly he had a motive to commit the offense, and that he had made inconsistent statements concerning his whereabouts on the date of the alleged offense.

The following rules are applicable to such circumstances:

a. Opportunity:

"The principal infirmative supposition applicable to the circumstances of opportunity to commit a crime, is that, admitting it proved to have existed, it does not necessarily follow that it was actually taken advantage of by the party shown to have possessed it; or that it was not taken advantage of by another person. In order to give it this effect, where it is solely or chiefly relied on, the circumstances tending to show its existence must be exclusive in their operation, by demonstrating that no other person had, or could have had the opportunity possessed by the accused, and that, therefore, by a necessary consequence, none but he could have committed the crime. Its tendency is merely to show a possibility that the act might have been committed by the person supposed to be indicated; without any of that quality of positive probability in which the essence of the force of presumptive evidence resides \* \* \*" (Com v. Woong Knee New, supra, p 457, citing Burrill's "A Treatise on Circumstantial Evidence"; (Underscoring supplied)

## b. Motives:

"Proof which establishes guilt beyond a reasonable doubt is sufficient, without proof of motive, but proof of motive, though competent, is not sufficient to sustain a conviction, unless a consideration of all the evidence convinces of the truth of the charge beyond a reasonable doubt" (People v. Holtz, 128 NE 345).

## c. Inconsistent statements:

"\* \* \* The fabrication of false and contradictory accounts by an accused is a circumstance that militates against him. See Com. v. Lettrich, 346 Pa. 497, 31 A. 2d 155. But this is not equivalent to saying that such evidence is sufficient in itself to prove the guilt of an accused. Those experienced in the administration of criminal justice know that sometimes an accused person will, although innocent, make statements contrary to the facts about his whereabouts at the time the crime was committed because the jury might believe that the connection between his whereabouts and the crime were not merely coincidental. This human trait has received recognition from jurists whose eminence was attributable as much to their common sense and their knowledge of the working of the human mind as it was to their legal learning." (Com. v. Woong Knee New, supra, page 460)

We conclude from these rules that if it is not shown that accused had an exclusive opportunity to commit the alleged homicide, the other circumstances, possible motive and his contradictory statements, will not serve by themselves as an adequate substitute therefor nor is it possible by adding motive and contradictory statements to non-exclusive opportunity to obtain the legal equivalent of exclusive opportunity.

It is necessary, therefore, to examine the evidence with a view to determining the type of opportunity, if any, accused had to commit the offense alleged, and that evidence is again set forth.

Lilli Veit's body was discovered in the basement of the premises at Lerchenstrasse 5, Nurnberg, at approximately 1630 hours. At approximately 1645 hours, a physician examined the body and determined that death had occurred 30 to 45 minutes previously, and that a wound on the left arm had been inflicted not more than an hour to forty-five minutes previously. The physician's testimony, therefore, places the time of death at approximately 1600 hours to 1615 hours and the time the wound was inflicted at 1545 hours to 1600 hours. Other testimony establishes that at approximately 1545 hours accused was departing from the premises at Lerchenstrasse 24 going in the direction of the Baker house, Lerchenstrasse 5. There was no testimony adduced by the prosecution as to the time at which accused entered the Baker house. The prosecution's evidence fails to place accused in the Baker house at the time death occurred and thus merely places accused in a category of apparent opportunity. It by no means

excludes the possibility that another person was admitted or otherwise gained entrance to the Baker house during accused's absence and caused the death of Lilli Veit.

We must, however, also consider the prosecution's evidence against the background of accused's testimony, but in so doing must assay the prosecution's evidence with reference to the element of time. While we perhaps may consider as definite and fixed that death occurred 30 to 45 minutes prior to the time of the physician's examination, and that the wound on deceased's left arm was inflicted not more than an hour prior to the time of examination, we cannot consider as fixed and definite the time of examination and thereby fix definitely the period within which death occurred. Accused testified that while he was in the kitchen of the Baker house Lilli Veit entered the kitchen holding her left arm from which blood was flowing. She staggered to the sink and washed the arm. He then left the house accompanied by Sandra Baker, went up the street six or seven houses where he spoke with Anni Sandner. After some conversation with Anni, he returned to the Baker house with Sandra. He and Sandra played on the way back. He was gone "probably forty-five minutes, maybe less.". Accused was unable to give the time at which he left the house. Accused's testimony is consistent with the evidence that death occurred 30 to 45 minutes prior to the physician's examination and that the time the wound was inflicted preceded the time of examination by not more than an hour, and in view of the circumstance that all other times given by the various witnesses are approximations, it is entirely possible that accused left the house after Lilli had incurred the wound on her left arm at approximately 1545 hours, visited Anni Sandner and left her at approximately 1545 hours, and was not in the house at the time of death at approximately 1600 to 1615 hours.

Even if it be supposed that accused were in the house at the time of death the record otherwise fails to show that he, to the exclusion of all other persons, had the opportunity to kill Lilli Veit. As previously noted, the record does not show the physical plan of the house, does not show that the windows were locked, and does not show that the entrance doors mentioned in the record were all the normal means of entrance and exit. It may be inferred that the house was a two-story house with cellar. The record does show that deceased was found in the cellar and that accused after the discovery of the deceased was found apparently asleep in a second story room. The record does not exclude the hypothesis that accused was in the second story room at the time of death and that a person who was admitted to the house by Lilli, or who otherwise gained admission to the house, killed Lilli in the cellar while accused was innocuously whiling away his time in the upper portion of the house.

The record shows other circumstances which are consistent with accused's innocence and which are not consistent with his guilt. From

the evidence, it appears that the deceased at or about the time of death sustained a wound on the left arm which bled quite copiously. It would appear that had accused killed Lilli, blood would have adhered to his clothing. There was no testimony adduced which showed a single bloodstain on any clothing of accused. This is a circumstance which "speak(s) loudly" in support of his innocence (Com. v. Woong Knee New, supra).

It is axiomatic that flight is an indication of guilt; conversely, the circumstance that accused was found apparently asleep in the house where murder was allegedly committed should be considered as inconsistent with guilt (Sec 293, Vol 1, Wigmore on Evidence, 2d Edition).

We conclude that even if it be assumed that Lilli Veit's death was homicide, the evidence of record merely shows that accused had a non-exclusive opportunity to commit the offense, and for that reason the record of trial is legally insufficient to support the findings of guilty and the sentence.

6. Although we find the evidence legally insufficient to sustain the findings of guilty and the sentence, thus requiring disapproval of the sentence, we deem it appropriate to comment upon grievous error in the record, which, had the evidence been legally sufficient, might, nevertheless, have required a reversal of the conviction.

Upon cross-examination of accused, the trial judge advocate asked accused questions which if answered by him in the affirmative would have tended to impute motive for the crime and to contradict accused's testimony in chief. Accused's answers were, however, in the negative and the prosecution failed to present evidence which would refute the denials which he did not subsequently introduce evidence in refutation of accused's. The questions to which we refer are as follows:

- a. "Is it not true that you knew that Lilli had hocked her wrist watch in order to get money for your?" (R 90)
- b. "Is it not true that you took a photo to Mr. Hans Nagel and this photo was of a girl who was not Lilli Veit and you asked him to color it or process it in some way for your, but not to tell Lilli or show it to her. Is that correct?" (R 89)
- c. "Didn't you say, in the presence of Jackson, on or about the 2nd of September, that you put a slip-knot on that wire after Lilli was dead?" (R 97)

The record shows that as to each of the enumerated questions the trial judge advocate failed, upon receiving the accused's denials, to introduce any evidence supporting the innuendos insinuated in his questions. With

reference to questions b and c, supra, the record shows that the persons alleged to be auditors of accused's purported statements had testified for the prosecution but that no testimony had been elicited from them as to accused's purported statements as insinuated in the examination of the accused by the trial judge advocate. The cross-examination of accused by the trial judge advocate is the subject of the following rule:

"It is a well-established rule that impeaching questions should not be propounded to a witness unless they are based upon facts that the interrogator intends to present in refutation of adverse answering of questions propounded; such line of questioning should be done in good faith, and not for the purpose of prejudicing and arousing suspicion of the jury against the defendant". (Kizer v. State (Ok), 93 P. 2d 58,88)

Violation of the rule may result in reversal of a conviction. We have particular reference to question c, supra. Accused had denied that he had killed Lilli Veit as alleged and the general tenor of his testimony was that he had not been in the basement room where the alleged homicide had taken place since a time antecedent to the alleged homicide. Additionally, the theory of the prosecution was that an attempt had been made to make the alleged homicide appear as suicide. Had accused made the statement attributed to him by the trial judge advocate in his question, it would have constituted a most damaging admission. Although Jackson, the person to whom the statement was purportedly made, testified for the prosecution, he was not examined as to the insinuated admission. A similar factual situation was considered in Jones v. Commonwealth (231 SW 31, 33), and the court stated:

"These supposed impeaching witnesses who were named in the question were present at the trial, and none of them were introduced or offered to be introduced to prove the impeaching statement, and the record is silent as to the reason, if any, why they were not introduced. If counsel was deceived by them as to what they would testify, he made no effort to manifest that fact by anything appearing in the record. This furnished grounds for the suspicion that the purpose of the question was to damage the credibility of Miss Worley and to weaken her testimony in the minds of the jury by means of this wholly unwarranted 'smoke screen', under the belief that they would conclude that 'where there was smoke there must be some fire'.  
 "\*\*\* Attorneys are officers of the court and constitute as much a part of its machinery for administering right and justice in the conduct of trials as does his honor upon the bench, and it would certainly be an unheard-of proceeding for the latter to engage in an effort to create a false impression upon the minds of that part of the judicial machinery whose duty it is to pass upon the facts. Cases are not wanting where similar conduct of counsel has been held prejudicial, even to the extent of authorizing a reversal of the judgment."

In State v. Guagliardo (84 So 216,221), the court stated:

"\* \* \* Hence, if as in this case, a defendant in a criminal prosecution takes the stand as a witness in his own behalf, and is to be regarded as any other witness, statements which (if it be shown and believed that he made them) may cost him his life, may be attributed to him in questions propounded for the ostensible and announced purpose of impeaching his veracity. It may be that \* \* \* jury would understand that the asking of such questions is not the equivalent of proving the statements which they carry, and that on the failure of such proof the defendant should stand unimpeached. On the other hand, it may happen that the jury \* \* \* knowing and respecting the district attorney, find it impossible to understand and difficult to believe that he would formally announce that he intended to show (and, inferentially, by a person whom he produces, and whom perhaps they also know and respect) that defendant had testified falsely, unless he had at least the assurance of the person produced that he would testify to that effect; and hence if he fails to offer such testimony, and gives as a reason for his failure, not that he was unable to do so, but that he considered it unnecessary, the jurors may be left with the impression that he could have made good his assurance had he so chosen, and particularly may that be true where, as in this case, the court gives the jury no instructions upon the subject."

In Commonwealth v. Homer (127 N.E. 517), accused was convicted of robbery. He had testified in his own behalf and on cross-examination was questioned as to whether he had filed a petition in bankruptcy, or whether such had been filed in his behalf. Accused's answers were in the negative. Defense counsel asked, when the line of questioning was started, if proof were to be offered and the reply was made that the "information will be forthcoming in due time." No record of any bankruptcy proceeding was at any time offered. The court stated:

"As the defendant's exceptions must be sustained, for the reasons already stated we do not deem it essential to decide whether it was reversible error to admit this evidence. It is proper to say, however, that we consider this method of cross-examination highly prejudicial to the defendant. If the district attorney knew that a petition in bankruptcy had not been filed, the suggestion of its filing implied in the question was an attempt by unfair means to discredit the accused, to unjustly prejudice the jury against him and to deprive him of his right to a fair and impartial trial."

The propounding of accusatory questions to an accused despite their subsequent withdrawal has been held to be prejudicial error where the

evidence was otherwise legally sufficient to sustain a finding of guilty. (Richardson v. United States, 150 F 2d 58,64).

We likewise conclude that the propounding to an accused by the prosecution, by way of impeachment or otherwise, of questions, which if answered in the affirmative by accused would be inculpatory or would attribute to him damaging admissions without judicially refuting accused's denial thereof, or if by reason of inability so to refute, failing to take all steps possible to erase from the minds of the court the effect of the inculpatory matter or of the purported admissions, may result in the reversal of a conviction.

7. The court was legally constituted and had jurisdiction of the person and the offense. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

On Leave

\_\_\_\_\_, Judge Advocate

L. J. Berkowitz, Judge Advocate

[Signature], Judge Advocate

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

CSJAGU - CM 333525

May 12, 1949

UNITED STATES )  
 )  
 v. )  
 )  
 Private First Class )  
 DORTIA C. ABSTON, RA )  
 32648284, Company C, )  
 371st Infantry Battalion, )  
 APO 696 )

NURNBERG MILITARY POST  
  
Trial by G.C.M., convened at  
Nurnberg, Germany, 8, 9 and  
10 September 1948. To be  
hanged by the neck until dead.

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HOLDING BY THE JUDICIAL COUNCIL

BRANNON, SHAW and MICKELWAIT

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1. Pursuant to Article of War 50d(4) the record of trial by general-court martial in this case has been transmitted to the Judicial Council which submits this holding to The Judge Advocate General as required by Article of War 50d(1).

2. The accused was tried at Nurnberg, Germany, on 8, 9 and 10 September 1948, and found guilty of the murder, by strangling, on or about 1 July 1948, of Leonilla Veit. He was sentenced to be hanged by the neck until dead. The reviewing authority, Brigadier General David L. Ruffner, Commanding Officer, Nurnberg Military Post, approved the sentence and forwarded the record of trial for action under Article of War 48, with the recommendation that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the accused's natural life.

3. The Council has examined the record and the opinion of the Board of Review. The Council finds the statement of the evidence as set forth in considerable detail in paragraphs 3 and 4 of the opinion of the Board of Review to be accurate in substance and adequate.

4. The evidence is circumstantial, both as to whether or not the deceased died from criminal violence at the hands of another, and as to the connection of the accused with the crime, if one was committed.

The findings of guilty cannot be sustained unless there be in the evidence a showing of facts and circumstances which are not only consistent with an answer in the affirmative under each of these issues, but which are also inconsistent with any reasonable hypothesis other than that the crime alleged was committed, and that this accused committed it. The burden of proof in each instance is on the prosecution. It is not incumbent on the defense to supply the answer to either of these questions or to supply solutions. That the theories of the prosecution may be reasonable, and that their rejection may leave the death unexplained, or leave a crime unsolved, cannot shift the burden or dispense with the necessity of proof. Nothing short of a showing by competent evidence of facts and circumstances which, of their own force, exclude any reasonable inferences other than that the deceased in this case was strangled at the hands of another, as alleged, and that such other was this accused can meet the requirements of proof.

5. The following facts and circumstances are clearly shown by the evidence:

Captain James T. Baker, Infantry, with his family, consisting of his wife and their infant daughter, Sandra (five years of age at the time of the trial), occupied a house at Number 5, Lerchenstrasse, Nurnberg, Germany, from the latter part of March 1948, until the night of 1 July 1948. The accused had stayed at the house, acting as a guard, for a short period immediately before the Bakers occupied it. Thereafter, until 1 July, the accused continued to spend much of his time at the Baker house during the day (an average of three or four days per week) and spent the night there from time to time. He tended fires, cooked and otherwise assisted in the work of the household. He had the full confidence of Captain Baker and his wife, and habitually carried one of the two keys to the front door, the other being kept by Mrs. Baker.

A young German woman, Leonilla Veit, generally known as "Lilli", with whom the accused then had been acquainted for about two years came to Nurnberg in March 1948 to be near the accused. For a short time she resided at another house in the neighborhood of the Baker house. She met the Bakers through the accused, was mentioned by the accused in connection with Mrs. Baker's expressed need of a maid, and moved into the Baker house sometime during April 1948. Thereafter, until the day of her death, the deceased acted as a domestic servant to the Bakers, occupying a bedroom on the second floor of their house. The relations between her and the accused remained intimate during all this period.

The accused had been at the Baker house for a short period during the morning of 1 July, departing for camp about 8 a.m., and had returned to the house about noon. He, the deceased, a German woman who had sold eggs to the Bakers, and Sandra Baker were at the house when Private Jackson and Mrs. Baker left it to go to the commissary at about 12:30 p.m. From that time until Captain Baker and Jackson took him to camp about 10 or 11 o'clock that night the accused was continuously at the Baker house, except for a period, estimated by the accused at "forty-five minutes or less", during

which he and Sandra Baker went for a walk in the neighborhood and spoke to a neighbor (Anni Sandner) who resided at 24 Lerchenstrasse.

The body of the deceased was found by Mrs. Baker when she and Private Jackson returned from the commissary, about 4:30 p.m. It was in a room in the basement, hereinafter for convenience referred to as the "washroom". The body was in a sitting position, with its weight resting on the floor, the back against the wall, the head inclined forward and down, and a rope (a clothesline suspended at one end from a nail on the rear, or garden, door, and at the other end from a wire which extended across the end of the laundry opposite to the garden door) was looped about the neck. There was some slack in the rope, and Jackson was attempting to remove it by raising it over the head of the deceased, when it was cut by Mrs. Baker. The position of the body was not affected by the cutting of the rope.

After placing the body in the middle of the room, Jackson summoned a neighboring physician, Dr. Schenk, who arrived at the house at approximately 4:45 p.m. Dr. Schenk estimated the time of death as approximately "three-quarters or a half hour" before he saw the body. He observed "a red stripe around the neck and \*\*\* a bloody abrasion on the left elbow \* \* \* a spot the size of an egg", which he estimated to be "not older than three-quarters of an hour or an hour". Dr Schenk administered adrenalin, to restore life, if possible, and then notified the police.

The accused was found, apparently asleep, in the bedroom of the deceased on the second floor of the house at about 5 p.m. He was removed by Private Jackson at the direction of Captain Baker to the latter's room on the same floor shortly after his presence was discovered, and remained there continuously thereafter until the German Police, Military Police and CID personnel who were conducting the investigation in the lower part of the house had departed, and Captain Baker and Jackson took him to camp.

An autopsy performed about 8 a.m. on 2 July 1948 showed that the deceased had died from strangulation. Various wounds and abrasions were found on the body. These included a strangulation mark or furrow; a jagged wound on the left arm near the elbow; an abrasion on the chin; three scratches on the upper portion of the chest, and two superficial wounds on the outer edge of the right hand. There is no evidence as to the age of any of these except the wound on the left arm. This was described in the report of autopsy as follows:

"On the ulnar side of the left lower arm a skin rupture runs towards the elbow, which is interrupted several times and measures 9 cm in length. On the outer parts, this injury is merely superficial. In the middle, however, the entire skin is ruptured. In the middle the widest gaping spot measures 0,6 cm. This rupture is interrupted by small bridges of skin. The edges of this wound are irregular and arch-shaped. At about the end beside the deep gaping wound are three small, arch-shaped incrustated scratches."

The autopsy also disclosed a recent pregnancy, not later than the first or second month. A blood test showed an alcoholic content of "1.573 per mil," indicating a slight intoxication. The autopsy physician stated in this connection that it must be "taken into consideration that the blood alcohol of a body is being reduced and that the actual blood alcohol is higher".

The witnesses, Jackson, Mrs. Baker, Dr. Schenk and the Police Officer Dorn, who observed the scene during the period from approximately 4:30 to 5 p.m. provided little information as to the condition and the contents of the washroom at that time, except as hereinbefore stated. Dreschler of the Nurnberg Criminal Police, who arrived about 7 or 7:30 p.m. and the police photographer, Ernest Werner, who arrived about 9 p.m., gave more detailed testimony, which was supplemented by photographic exhibits. According to Dreschler the washroom was about 5 meters long, 2 meters wide and 2.10 meters high. He found the body clothed in a short summer dress, a slip and a pair of shoes. The clothes were orderly in appearance and untorn. There were three small bloodstains on the lower part of the dress. Smears of blood were found on the left elbow and on the right palm, and a lesser amount on the left hand of the deceased. The washroom contained several pieces of furniture, two trunks, a pedestal for sawing wood, an overturned stove, the lid from which was lying on the floor, a stool or chair, and other miscellaneous articles.

Extending lengthwise of the room was a clothesline on which some clothes were hanging. There was another such line, which had been cut and had apparently hung parallel to the former. On the longer section of the latter line, suspended from the garden door, a shirt was hanging. There was blood on this section and on the garden door; and there was a considerable quantity of blood on the floor immediately in front of the garden door. Drops of blood were found on the floor under the stovelid. A second examination of the Baker house on 7 September 1948, and a third one made during the trial, in both of which the benzidine test was used, confirmed the presence of blood in the washroom as previously indicated and traces of blood elsewhere in the house. The latter included four or five spots on the left side of the wall of the stairway descending into the basement, some spots on the opposite side of the wall near the foot of the stairway, one spot on the floor between the foot of the basement steps and the laundry, and five or six spots in the kitchen (presumably on the floor). The benzidine test showed a positive reaction for blood on one of the two sinks in the kitchen.

6. The fact that the line which strangled the accused was horizontally suspended, and according to the accused who had installed it, at a height barely sufficient to prevent clothes hanging on it from touching the floor, plus the strong indication that the combination of clothesline, wires twisted together, nails, etc., was insufficient to support the weight of the body of the deceased tend so strongly to indicate the contrary that hanging in the sense of the suspension of the body above the floor is excluded as a reasonable explanation of the death in this case.

It is well established that in many cases of suicidal hanging some part of the body may be found resting on the ground. In this connection, the witness, Dr. Waring, testified that in about two hundred cases of

suicidal hanging investigated by him the feet were resting on the ground; that in fifty cases the suicides were found in a lying or sitting position; and that in only four or five of the cases was there a horizontal suspension of the rope. The expert evidence in this case to the effect that such marks as those found on the neck of the deceased are rare in cases of suicide and usually are indicative of strangling by hand, rather than hanging, must be read in connection with this testimony and with the statement by the witness that although they are unusual they are not impossible in suicide. In other words the evidence shows an unusual suspension with an unusual strangulation mark, normally connected with strangulation by hand, but which does not exclude the possibility of suicide.

The possibility of suicide by ligature must be considered. The following extract from "Legal Medicine and Toxicology", Gonzalez, Vance and Hepburn, pp 265-6, is pertinent:

"Strangulation by ligature may be used as a means of suicide. A ligature can be tied or pulled tight around the neck as though it were a noose, by the hand of the suicide himself. In other instances, according to Puppe, the end of the ligature will be fastened around the neck. The deceased can put traction on the ligature by sliding on the floor, in a supine position, away from the point of attachment, or he can push himself away with his leg; in these instances the method is not unlike hanging.

"Accidental deaths by ligature are quite rare, but they may occur in an individual who has become entangled in a rope while at work, or has been strangled as the result of a practical joke. If the deceased has a large amount of alcohol in his system it will take a comparatively slight force to cause fatal asphyxia. \* \* \*

"Among the strangulation cases in the Medical Examiner's Office was an example of slow asphyxiation. Here the individual, while profoundly alcoholic, had had a necktie snugly but not tightly around his neck. He was found on his back in bed, his face cyanotic with foam coming from his mouth. \* \* \* The pressure was sufficient to cause a certain amount of asphyxia, without absolutely closing the respiratory passages and this added to the depressing effect of the alcohol, finally caused a slow paralysis of the respiratory center and a gradual failure of the circulation."

Opposed to this possible explanation of the death is the instance case is the testimony of witness Dreschler to the effect that the rope was so insecurely fastened to the wire (by a slip knot) that light pressure on the rope would cause it to become detached. On the other hand the record shows that Jackson and Mrs. Baker both handled the rope and Mrs. Baker cut it, apparently without causing it to part from the wire. Whether Dreschler's opinion was based on visual examination or in an actual

test by applying force to the rope does not appear.

Giving full effect to the testimony of Dreschler, the possibility of suicide by ligature, with pressure from that end of the line fastened to the garden door is not excluded. As to whether or not the slack found in the rope by Jackson existed in the line on both sides of the body, the evidence is not clear. His testimony, in part, tends to indicate that the slack was in that part of the line between the deceased and the wire at the inner end of the room. Even if the evidence be considered as showing the existence of slack in both sections of the line when the body was found, the possibility of suicidal death is not excluded. An involuntary movement of the body after the loss of consciousness by the deceased might well result in a loosening on the side from which force had previously been exerted.

The wound on the left arm of the deceased, the only one on the body of such a nature as to cause any appreciable bleeding, was doubtless the source of the blood found in the basement. The theory of the prosecution appears to have been that the accused first attacked the deceased with the bucksaw and then strangled her. There is ample evidence to support the conclusion that the fresh blood found in the washroom on 1 July came from the wound on the left arm of the deceased, and that this wound was caused by contact with the bucksaw found in the closet on the first floor. How the contact occurred is left principally to inference from the facts and circumstances. The only witness professing direct knowledge of any circumstance connected with that wound was the accused. He testified that shortly before his departure for the walk with Sandra the deceased came into the kitchen holding her left elbow, which had blood on it, and was running water on it when they left the house. He testified that he had hung the saw, with the blade down, on a nail in the wall of the basement stairway (the wall to the left of one descending) after its use in the kitchen on the Sunday preceding the death. The defense advanced the theory that the deceased, who was drunk, had stumbled against the saw in the stairway. The manner in which the saw was hung would tend to indicate the improbability that the wound was so incurred. However, the finding of blood on the palm of the right hand of the deceased and, in the later examination of the premises, in the basement stairway and in the kitchen tends to support the testimony of the accused and the theory of the defense.

On the question of violence the evidence of the superficial abrasions on the body hereinbefore mentioned is not of great value. In neither the testimony nor the report of the autopsy is there any statement concerning the time at which these were sustained nor how they were caused, and it can hardly be said that any of them is inconsistent with suicide.

The overturning of the stove, especially in view of the presence of blood on it, must be considered as having been connected with incidents leading up to the death. That there was a close connection in time between the overturning of the stove and the strangling of the deceased, at least that the stove was overturned after the wound on the left elbow was suffered, is shown by the fact that drops of blood were found on the floor under the stovelid. It does not follow, however, that a

struggle between the deceased and another person must have occurred. The limited area of the washroom and the number of articles, some of considerable bulk, which it contained indicate that, not only a struggle between two persons, but any careless movement by one in the washroom might well involve contact with some of these articles. It appears that the stove was found in a position somewhere between the body and the garden door. The stove was a very light one, easy to overturn, and the possibility that it was upset during some voluntary or involuntary movement incident to suicide is as reasonable as the inference that it was overturned in the course of a struggle between the deceased and an assailant.

As indication of the lack of any direct connection between the wound on the left arm and the subsequent strangulation of the deceased is found in the condition of the washroom floor. The area immediately in front of the garden door showed the greatest concentration of blood (from 40 to 60 drops). These were accompanied by splash marks from which it must be inferred that they had fallen from a height rather than from the arm of a body in the position in which that of the deceased was found. There is nothing in the photographic exhibits showing this area to indicate that it had been walked upon or otherwise disturbed as it is reasonable to assume it would have been in the event of a struggle.

Another circumstance tending to negative violence is that the orderly condition of the clothing of the deceased, with but three drops of blood on the lower part of the dress, a condition not likely to exist had the facts been as suggested by the prosecution.

That the bucksaw found in the closet on the first floor was moved by someone between the time of the departure of Mrs. Baker and Jackson about 12:30 p.m. and their return about 4:30 p.m. may be considered as proven. That it was placed there by an assailant after striking the deceased with it is conjectural at best. The assumption made in the course of the interrogation of the accused that no blood was on the saw when it was found, and that someone, therefore, must have cleaned it before it was placed in the closet, is not supported by anything in the evidence.

The action of the accused in remaining on the second floor, avoiding the disclosure of his presence to the investigators after the body was found, and his subsequent denials of his presence at the Baker house on the afternoon of the death, under other circumstances might bear considerable weight as evidence of guilty knowledge. However, the testimony of Jackson and Captain Baker shows that the accused was kept on the second floor of the house at the direction of Captain Baker, who instructed Jackson to keep him there. The conduct of Captain Baker is singular, to say the least; and his explanation is far from impressive. In fact there is strong ground for the inference that Captain Baker deliberately acted to conceal the presence of the accused in the house and that, but for the conduct of Captain Baker the investigation of this death would have been facilitated. There is a strong showing that the accused on 2 July, and possibly thereafter until 6 July, denied his

presence at the Baker house on the afternoon of 1 July. Here again is a circumstance, normally tending to show guilty knowledge. However, the well recognized human tendency of many persons, notwithstanding their innocence, to conceal facts which they fear may tend to incriminate them, coupled in this case with the example set by the military superior to whom the accused ought to have been able to look for guidance and example strongly impairs the probative force which otherwise might attach to the action of the accused.

That the accused remained on the premises after the wounding and death of the deceased has a tendency to negative guilty knowledge (Wigmore on Evidence, 2nd., Vol 1, Sec 293).

The evidence of presence of the German woman, name apparently unknown, who had sold eggs to Mrs. Baker, in the house at 12:30 p.m. is not considered by the Council as having any appreciable significance, in view of the testimony of the accused that, so far as he knew, the deceased was the only person remaining in the house at the time he and Sandra departed.

That the accused had an exclusive opportunity to commit the crime is not established. The degree of accuracy of estimates of death depends upon many factors, and it is impossible from the evidence in this case to determine with any reasonable certainty at what time the strangulation started or how long thereafter death resulted. The testimony of Schenk would place the death at around 4 or 4:15 p.m. The witness Sandner placed the accused in front of her house at approximately 3:45 p.m. How long it took the accused and Sandra to return to the Baker house does not appear. The estimation of the time of events given by the accused are of little value. The most that can be said is that evidence shows the accused may or may not have been present at either of the times mentioned.

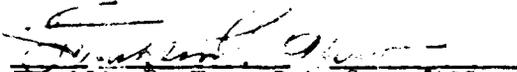
The evidence of motive, in the opinion of the Council, is not of great weight. The intimacy of the accused and the deceased clearly appears. That their relationship was the ideal one depicted by Mrs. Baker and some of the other witnesses is exceedingly doubtful. It is reasonable to infer that neither of the parties had the highest standards of sex morality. The situation was hardly one in which occasional spats and quarrels over liquor between these two, both apparently addicted to the excessive use of alcohol, can be considered of great significance. The testimony as to the uniformly pleasant attitude of the accused in his cups may well be considered with reservations. It is not a necessary inference that this accused would have been greatly exercised by knowledge of the pregnancy of the deceased, if he had known it. It may be that the previously felicitous and affectionate companionship had begun to deteriorate before the death, but all of this hardly adds up to proof of a strong motive in the accused to kill the deceased. That she was pregnant by a colored American soldier might well be expected to cause much greater anxiety in her than a prospective illegitimate birth would engender in him.

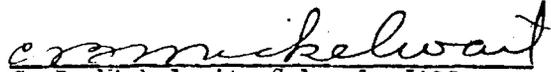
A circumstance tending strongly to indicate the innocence of the accused is the absence of any showing that there was blood on his person or his clothing. Although there was an implication that some fatigue clothing of the accused hanging in the washroom when the body was discovered had been washed on 1 July and subsequently disposed of by the accused, there is no satisfactory evidence to support that implication. The effect of the evidence as a whole is that there was no blood on the person or clothing of the accused. Had there been an attack on the deceased by the accused, first with the saw, inflicting a wound which bled profusely, followed by his strangling her it almost certainly would have caused the accused and his clothing to be smeared with blood.

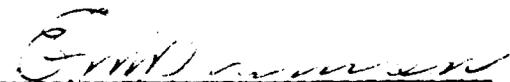
7. On the basis of careful consideration of the evidence as a whole the Council feels compelled to concur in the opinion of the Board of Review that the evidence is legally insufficient to support the findings and sentence.

8. The Council has reached this conclusion independently of any question of possible prejudice to the accused incident to his cross-examination which is the subject of paragraph 6 of the opinion of the Board of Review. With respect to two of these questions those involving the implication that the deceased had "hocked" a wrist watch in order to obtain money for the accused, and that in which it was implied that the accused had asked that no information concerning the photograph of a girl be disclosed to the deceased, respectively. It is not probable that a court-martial would be so affected as to result in prejudice to the accused. The connection of these supposed incidents with the crime alleged is remote, and the latter of the two questions appears to have had some support in the evidence. As to the third question, however, namely that in which the accused was asked whether or not he had said in the presence of Jackson, on 2 September, that he had put a slip knot on the wire after the death of Lilli, the Council is inclined to concur in the opinion of the Board of Review. We are not unmindful of the fact that in the trial of a lengthy and vigorously contested case, it is neither unusual nor unnatural for counsel in his zeal inadvertently to overstep the bounds of propriety. We do not impute bad faith to counsel, but believe that such a statement as was attributed to the accused in this connection, if made, would have been so strong an indication of the guilt of the accused that prejudicial error might well have been involved.

9. For the reasons stated, the Judicial Council holds the record of trial legally insufficient to support the findings of guilty and the sentence.

  
Franklin P. Shaw, Brig Gen, JAGC

  
C. B. Mickelwait, Colonel, JAGC

  
E. M. Brannon, Brig Gen, JAGC

Chairman

(60)

CSJAGH CM 333525

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Nurnberg Military Post, APO 696, c/o Postmaster  
New York, New York

1. In the case of Private First Class Dortia C. Abston, RA 32648284, Company C, 371st Infantry Battalion, APO 696, I concur in the foregoing holding by the Judicial Council that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 the findings of guilty and the sentence are hereby vacated. You have authority to direct a rehearing.

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

(CM 333525).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Record of trial
2. Holding by B/R

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(61)

CSJACK - CM 333543

2 FEB 1949

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

UNITED STATES ARMY, EUROPE )

v. )

Trial by G.C.M., convened at Heidelberg,  
Germany, 19 October 1948. Dismissal.

Captain FRANK Y. STREET, JR. )  
(O-403165), 7809th Station )  
Complement Unit, APO 403, U.S. )  
Army. )

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OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING,  
Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General and the Judicial Council.

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

CHARGE I and Specification: (Finding of not guilty).

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

Specification: In that Captain Frank Y. Street, Jr. 7809th Station Complement Unit, did, at Mannheim, Germany, on or about 6 September 1948, with intent to commit a felony, to wit, rape, commit an assault upon Johanna Mohnen, by wrongfully and feloniously slapping her, choking her, and placing various parts of his body on and against various parts of the body of said Johanna Mohnen, against her will and without her consent.

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specification, but guilty of Charge II and its specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

During the evening of 5 September 1948, Johanna Elga Mohnen, Hedwig

Mohnen (Johanna's mother), Werner Hess (Johanna's uncle), and Mr. Behr, a friend, visited a night club known as Tusculum Bar in Mannheim, Germany. At about midnight the accused and a male friend entered the bar and sat at a table situated near that of the aforementioned group. Subsequently, the accused went to the table at which Johanna was sitting, and became friendly with her and the others in her group. He conversed with them from time to time, and danced with Johanna. While at the club Johanna drank one cocktail and two or three glasses of Champagne. When Johanna, her mother and Mr. Behr indicated that they would depart, the accused offered to take them to their home in his car. They accepted his invitation, and entered his automobile, Johanna and accused riding in the front seat, and Johanna's mother and Mr. Behr in the rear seat. Upon arriving at the Mohnen home, at about 3 a.m. in the morning, the parties entered the house and had a light lunch including sandwiches and wine. Shortly after having partaken of these refreshments, the accused stated that he would return to the bar to pick up his friend and Mr. Hess, and asked Mrs. Mohnen if her daughter could accompany him. Mrs. Mohnen, believing the accused to be a "sober man," consented, and instructed them to return in twenty minutes. The accused and Johanna entered the automobile, and instead of going towards the Tusculum Bar, he drove the car in a different direction (R 9-11,16,22-25).

In response to questions propounded by the prosecution, Johanna testified in pertinent part as follows:

"I asked him why he didn't go to the Tusculum, and he said he had to go to the club to look for his friend, and after that we were going to pick up my uncle. I didn't know whether there was a club or not, and so I consented. \*\*\* He went to the Oberen Luisenpark, turned to a side street, stopped the car, locked the door, and closed the window \*\*\* I tried to open it, but I couldn't do it. \*\*\* He told me to keep quiet because I was calling. \*\*\* I was calling for help. \*\*\* He stepped across me, so he was sitting on the right side. He got a hold of my shoulders and pushed me down \*\*\* on the front seat \*\*\* I reached behind me in order to open the door. I succeeded in opening it. \*\*\* Then he grabbed me on my throat and pressed my head between the seat and the door. \*\*\* Anytime I wanted to say something or I tried to defend myself he slapped my face. \*\*\* And he said it wasn't good for me that I had opened the door, but it was good for him. \*\*\* Then he lifted my head and closed the door, and then I defended myself with my hands. \*\*\* I wanted to push him away. I tried everything with my hands, and by doing so I scratched his face. \*\*\* Then he said that I had to pay for it, that I scratched an American officer. \*\*\* Then he told me to go to the back seat. But I did not do it. I held fast \*\*\* to the steering wheel. \*\*\* Then he knelt and wanted to push me to the back seat, by my legs. \*\*\* And after he did not succeed in doing so, he threw

himself on top of me. \*\*\* Then with one hand he held both of my hands and he pulled up my dress. \*\*\* I was defending myself continuously and he placed my right leg on the front seat. \*\*\* Then he unbuttoned his trousers and he was laying on top of me with his body, \*\*\* and with one hand he moved my pants' leg aside. \*\*\* I blew the horn several times and he slapped me. Then several times he tried to penetrate me. And several times he succeeded in doing so, but only for a short time because I was moving constantly. \*\*\* How long this lasted I don't know. He got up and opened the right door. He was standing in the door and buttoned his trousers. I wanted to get out, but he pushed me back. \*\*\* I noticed that the front seat was damp. \*\*\* Then he took me home. \*\*\* On the way home he told me I should tell my mother that we had been at the club to look for his friend, and then I said I was going to tell everything to my mother."  
(R 10-14)

Johanna testified further that she knew that the accused's male organ penetrated her vagina because she "felt it" and "had pains." (R 27).

Upon cross-examination Johanna stated that she sat in the middle of the seat in front of the broken windshield so that she could "look out the window." The place where the acts occurred was a three or four minutes drive from her home. Her clothes were not torn during the alleged assault (R 16-17).

Mrs. Mohnen testified that she waited for her daughter and the accused to return to her home and that:

"I was standing at the window, because twenty minutes were over. I looked for her. I saw the car arrive. My daughter immediately jumped out of the car, slammed the door, and ran up the stairs. In the meantime I went to the door, opened the door, and she ran past me and almost screaming into her room and threw herself on the bed, and she was terribly crying and always said, 'He beat me up, he choked me, this rascal.' I had difficulty to find out what had happened. I had to question her, 'Did he do something to you, did he do something to you?' and she said, 'Yes.'" (R 24)

Mrs. Mohnen stated further that her daughter had been with accused about 30 or 35 minutes and when she returned she complained of a terrific headache. She observed bruises on Johanna's neck (R 25).

It was stipulated by the parties, accused expressly joining therein, that if Douglas A. Caywood, 27th Criminal Investigation Division, were present and sworn as a witness he would testify that on 11 September 1948 he received from Agent Heihorn of the 481st Criminal Investigation

(64)

Division an automobile seat with the request that it be examined to determine the presence of seminal stain. As a result the following report was made:

"Examination under ultra-violet light revealed a slightly fluorescent stain oval in shape and two (2) inches in length, located near the center of the horizontal part of seat. This stain appeared to have aged slightly from its original form. The above stain was extracted in saline solution, and gave positive seminal type fluorescence under ultra-violet light. Florence tests identified the stain as being a human secretion, and anti-semen tests positively identified the stain as being HUMAN SEMEN." (R 28)

It was further stipulated that if Lavo L. Vagina, chemist of the 27th Criminal Investigation Division, were present and sworn as a witness he would testify that on 13 September 1948 he received from Agent Heihorn a woman's dress with the request that an examination be made to determine whether or not seminal stain was present. His examination revealed the following:

"Preliminary examinations indicated that seminal stains were once present but a conclusion of absolute certainty was not possible because spermatazoa could not be detected microscopically. It is the opinion of the undersigned that too much time elapsed from the time of alleged rape until the time of laboratory examination. We can only state here that ultra-violet and chemical tests indicated the probability of the presence of semen." (R 28-29)

Mr. Fred E. Heihorn, agent, 481st Criminal Investigation Division, was called as a witness and testified that the automobile seat which had been examined for seminal stain had been removed from the front seat of accused's Ford automobile, that he personally took the seat to the laboratory at Frankfort where he observed the stain under fluorescent light. It was also shown by Mr. Heihorn and other witnesses, including Johanna Mohnen, that the woman's dress which was the subject of laboratory examination was the same dress worn by Johanna on the night in question (R 29-34).

At the close of the case for the prosecution, defense counsel moved for a finding of not guilty as to all charges and specifications on the ground that the corpus delicti of the alleged offenses had not been sufficiently proven. The motion was overruled by the law member, no member of the court objecting thereto (R 36).

For the defense

First Lieutenant Donald Knowlden testified that he was with the accused from 1:30 o'clock until 4 o'clock in the afternoon of September 6

and that there were no scratches or marks on the face of the accused (R 37).

Doctor Kurt Laemmle, staff member of a hospital at Mannheim, testified that on 6 September he made an examination of Johanna's abdomen, heart and blood pressure. He determined that there were no bruises on her abdomen and that her hymen was not ruptured; that her hymen was the elastic type and one that would probably not be ruptured until she had her first child. Dr. Laemmle found no indication of any injury about the vagina nor anything which might indicate that sexual intercourse occurred. He testified that he had carefully inserted a mirror, approximately ten centimeters long and 1-1/2 to two centimeters in diameter, at distances of five centimeters into her vagina, which caused no injury to the hymen. On 7 September he again examined Johanna, and noticed two bruise marks, "very trifling, but clearly visible, about the size of a thumb print," on her neck, one on the left side of the throat and the other on the right. Upon cross-examination by the prosecution, Dr. Laemmle testified that the presence of spermatozoa, the male reproductive cell, deposited on the seat of an automobile or on a dress could be detected for a period of one or two weeks, and that semen so deposited could be detected "a very long time." (R 38-46).

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

#### 4. Discussion

The testimony of Mrs. Hedwig Mohnen as to the statements made to her by her daughter Johanna when the daughter returned home on the night in question appears to have been properly admitted in evidence. Such testimony is excepted from the limitations of the hearsay rule, not only on the ground of being in the nature of a complaint made by the prosecutrix shortly after the outrage, but also on the ground that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since the utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy." This latter rule is generally described as the "spontaneous exclamation" exception to the hearsay rule and is well recognized in the law (Wigmore on Evidence, 2nd Ed. Sec. 1747; Beausoliel v. U.S., 107 Fed. 2d, 292, 294; CM 329971, Hallett, 78 BR 211, 217). According to Mrs. Mohnen, her daughter ran into the house from accused's automobile crying and "almost screaming," threw herself upon the bed, saying, "He beat me up, he choked me, this rascal." This evidence, together with that showing

that there were contusions on the girl's neck, give verity to Johanna's testimony showing that accused assaulted her in the manner alleged on the night in question. With respect to the intent required for a finding of guilty of the Specification and Charge II it is said that:

"Intent to commit rape. This must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape. It must be inferable from all the circumstances that the design of the assailant, in the battery, was to gratify his passions at all events and notwithstanding the opposition offered - to overpower resistance by all the force necessary to the successful accomplishment of his purpose" (Winthrop's Mil. Law and Prec., Reprint, p. 688).

There is no evidence or circumstance shown by the record which tends to contradict Johanna's account of the forceful advances made upon her by accused, and her physical resistance thereto. Such evidence together with the findings of seminal stain on the seat of the automobile tend most convincingly to establish the court's finding that the assault was with the intent to have carnal knowledge of her notwithstanding the opposition offered, that is to say, with intent to rape her.

It appears to us that upon the entire record the court, in determining the credibility of the witness and the weight and tendency of the evidence, has by its findings afforded to the accused the benefit of every reasonable doubt.

5. Records of the Department of the Army show that accused is 30 years of age and married. His wife and young son have resided with him in the European Theater of Operations since July 1946. Accused attended college for two years and enlisted in the Texas National Guard in 1939. He was appointed second lieutenant, Infantry (N.G.) in October 1940 and entered Federal service on 25 November 1940. His adjectival efficiency ratings have been generally "Excellent."

6. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Robert D. Tibbitts, J.A.G.C.  
Lewis F. Shull, J.A.G.C.  
Harley A. Lanning, J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Young, and Connally  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
Captain Frank Y. Street, Jr. (O-403165),  
7809th Station Complement Unit, the  
sentence is confirmed and will be  
carried into execution upon the concur-  
rence of The Judge Advocate General.

Signed

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Edward H. Young, Col., JAGC

Signed

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William P. Connally, Jr., JAGC

Signed

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Ernest M. Brannon, Brig. Gen., JAGC  
Chairman

I concur in the foregoing action.

Thomas H. Green

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THOMAS H. GREEN  
Major General  
The Judge Advocate General



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

CSJACK - CM 333793

UNITED STATES )

v. )

Recruit ROLAND D. ROBINSON )  
(RA 44181644), Medical Detach- )  
ment, 16th Infantry Regiment, )  
Grafenwohr, Germany )

HEADQUARTERS 1ST U.S. INFANTRY DIVISION

Trial by G.C.M., convened at Grafenwohr,  
Germany, 8 October 1948. Dishonor-  
able discharge (suspended) and con-  
finement for one (1) year and four  
(4) months. Disciplinary bar-  
racks.

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HOLDING by the BOARD OF REVIEW  
SILVERS, SHULL, and LANNING,  
Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General, under the provisions of Article of War, 50e.

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

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

Specification: In that Recruit Roland D. Robinson, Medical Detachment, 16th Infantry Regiment, did, at or near Grafenwohr, Germany, or or about 3 September 1948, through gross and culpable negligence, unlawfully kill Recruit Clifford G. Shipman, by driving a motor vehicle into a tree thereby causing fatal injuries to the said Recruit Clifford G. Shipman, who was a passenger in said vehicle.

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

Specification: In that Recruit Roland D. Robinson, \*\*\*, did, at or near Grafenwohr, Germany, on or about 2 September 1948, wilfully, unlawfully, and feloniously take and use for his own use and benefit and without lawful authority, a certain automobile; to wit, a 3/4 ton weapon carrier, value of more than \$50.00, property of the United States, with the intent to so deprive said owner temporarily of its property.

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

guilty of Charge II and its specification, and guilty of the specification of Charge I except for the words "gross and culpable," of the expected words not guilty, and not guilty of Charge I, but guilty of a violation of the 96th Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. Evidence of one previous conviction was introduced. The reviewing authority approved and ordered executed only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for one year and four months, but suspended the execution of the dishonorable discharge until the soldier's release from confinement. The Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army might direct was designated as the place of confinement. The results of the trial were published in General Court-Martial Orders No. 266, Headquarters 1st U.S. Infantry Division, APO 1, U.S. Army, dated 20 October 1948.

3. Inasmuch as the Board holds that error prejudicial to accused's substantial rights occurred at the trial, the evidence will not be summarized in detail.

4. The prosecution established by the testimony of Mr. William Tosco, a Special Agent for the CID that on 3 September 1948 the accused, after being duly warned of his rights under Article of War 24, had signed and sworn to a typewritten statement which was offered in evidence as Prosecution's Exhibit 4. The defense challenged the admissibility of the document, which appears to be a confession to acts constituting the offenses charged, and requested that before the court ruled on the admissibility of the document the accused be permitted to take the stand, be sworn and "testify only as to whether the statement was voluntarily made".

The law member thereupon duly explained to accused his rights respecting the giving of evidence and concluded with the following:

"In addition to that, let me tell you that you may now take the stand and testify concerning the matters surrounding the taking of the statement and testify only with respect to those matters. The trial judge advocate and the court can cross examine you with respect to the statements you make, and such other matters which concern the taking of that statement." (R 49).

Accused took the stand and was asked by Defense Counsel if he made a statement to Mr. Tosco. He replied "No, sir, I didn't. I did not make that statement (Pros. Ex. 4) myself." He stated that he signed the statement because Mr. Tosco told him that it would "Be better for both he and myself if I would sign a statement and tell the whole thing, and clear the whole thing". In response to further questioning on direct examination

accused stated that he did not answer more than a "half dozen questions in it" and that Mr. Tosco "practically made it himself" from statements taken from one of the other witnesses. (R 50-51)

On cross-examination the trial judge advocate interrogated accused with respect to matters preliminary to his signing the statement and then questioned him as follows:

"Q Have you read that statement since that time?

A Yes, I have, Sir.

Q Is the statement true?

DEFENSE: If the court please, this witness has taken the stand solely for the purpose of testifying as to whether or not this statement was voluntarily given. As to whether there is any truth in the statement - I submit that is objectionable.

LAW MEMBER: Objection is over-ruled.

QUESTIONS BY THE PROSECUTION:

Q Will you answer the question? Is that statement true?

A I don't know, Sir.

Q Have you read the statement?

A Yes, Sir, I have.

Q Can you explain your answer that you don't know whether they are true or not?

A I don't know if they are true or not, I can't explain my answer, no, Sir.

PROSECUTION: I have no further questions.

DEFENSE: I would like the question read back where the defense made its objection a moment ago.

(The reporter then read the portion requested as follows:)

"Q Have you read that statement since that time?

A Yes I have, sir.

Q Is the statement true?

DEFENSE: If the court please, if the accused takes the stand solely for the purpose of testifying as to whether a statement that he is alleged to have made was made voluntarily, then he can't be questioned on anything else; and whether or not any statement in that document is true or false goes beyond the scope of his taking the stand.

LAW MEMBER: The court has ruled on that.

DEFENSE: Request the answer relative to that question be stricken from the record.

LAW MEMBER: Request denied."

EXAMINATION BY THE COURT

QUESTIONS BY THE PRESIDENT

Q Robinson, were you told not to read that statement before you signed it?

A No, sir, I was not, Sir.

Q Did you know what was in the statement when you signed it?

A Not all of it, no.

Q Were you given opportunity to read it before you signed it?

A Yes, Sir, I was.

Q And you didn't read it?

A No, Sir, I assumed it was the same as what was on the scratch pad, Sir." (R 53-55)

After argument by counsel as to the voluntary nature of the confession, Prosecution's Exhibit 4 was admitted in evidence. (R 56)

5. It will be conceded for the purpose of this discussion that the evidence was such as to justify the court in concluding as a fact that the two page typewritten statement or confession of accused (Pros. Ex. 4) was voluntarily given and therefore admissible. We consider only the question of whether it was prejudicial error for the court, under the circumstances shown, to compel accused to answer a question as to whether or not the matters recited therein were true. It is clear that after advice by the law member, and a preliminary statement by his counsel, the accused took the stand solely for the limited purpose of testifying as to whether his statement was voluntarily made. On direct examination he denied dictating the statement, or any substantial portion thereof, asserting that it was taken from another and he merely signed upon advice of Mr. Tosco that it would be better for both parties for him to sign. Over objection by the defense he was compelled to answer a question by the prosecution as to whether the declarations contained in the exhibit, which he had attempted to repudiate as not being his own, were true or false. It is fundamental that:

"No witness before a military court \* \* \* shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him\*\*\*". (Article of War 24) (Under-scoring supplied).

and Paragraph 122 (e), page 129, Manual for Courts-Martial, 1928, provides that:

"(b) Compulsory self-incrimination. The fifth amendment to the Constitution of the United States provides that in a criminal case no person shall be compelled 'to be a witness against himself.' The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness. \*\*\*"

The history of the privilege against self-incrimination or what is frequently called compulsory self-disclosure, and the various views which the Anglo Saxon courts have adopted in the application of the rule are ably and exhaustively discussed by Professor Wigmore in his monumental work on Evidence, 3rd Edition, Sections 2250 to 2284, inclusive. Although there

appears to be a very considerable divergence of opinion in the American courts concerning the application of the constitutional privilege, it appears never to have been doubted that the privilege may be waived by a voluntary abandonment of it made in advance of the time when it could otherwise be claimed. Although it is said in the Manual for Courts-Martial (1928), as a general proposition that "An accused person taking the stand as a witness becomes subject to cross-examination like any other witness", it is only "when the accused testifies in denial or explanation of any offense, (that) the cross examination may cover the whole subject of his guilt or innocence of that offense" and "where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified". (Par. 121 (b), p. 127, MCM 1928)(Underlining supplied). From what has been quoted above it will appear that in a military court, even though an accused voluntarily takes the witness stand, no inference as to his waiver of the privilege can be drawn which extends beyond matters relative to the offense or offenses, if any, about which he had voluntarily testified on direct examination and matters affecting his credibility as a witness. Accordingly, in a case where the accused voluntarily took the stand as a witness, expressing no reservations whatsoever preliminary thereto, but testified only as to the period and nature of his military service, and was on cross-examination compelled to testify as to whether he had in fact written certain checks which he was charged with having forged, the ruling of the law member in compelling the accused to so testify on the issue of his guilt of forgery was held to be an invasion of accused's privilege against self-incrimination and voided the findings of guilty and sentence as to the offense or offenses about which the accused was compelled to testify (CM 331360, Teaff, 80 BR 29, 33).

In CM 326450, Baez, 75 BR 231, the accused took the stand expressly limiting his testimony to the circumstances under which his alleged confession has been procured. After being interrogated within the confines of the expressed limitation the law member ruled that accused was subject to cross-examination upon the merits of the case or as it was stated, "on the whole offense". Accused was thereupon subjected to examination regarding his whereabouts, companions and conduct on the night of the offense. The opinion recites at page 233 that "During this examination accused did not make any incriminating statements and did not testify concerning any other facts which had not previously been testified to by other witnesses. Consequently, this holding is not based in any degree upon whether the evidence elicited from accused was necessary to support the findings of guilty. In fact the offense charged was proved by competent evidence without any consideration being given to accused's testimony regarding his guilt or innocence". In holding the record legally insufficient the Board stated further at page 234:

"\*\*\* It must be remembered that accused in this case desired to exercise his right to testify concerning the manner in which his alleged confession was procured without

subjecting himself to cross-examination on the merits. Any ruling of the court-martial which circumvented his right to so limit his testimony would jeopardize his constitutional guarantee against self-incrimination, a right which the courts are under a solemn obligation to guard."

In the same case (CM Baez supra) the Board noted that in CM 282871, Marquez, 11 BR (ETO) 105, a contrary decision was reached on identical facts on the theory that the evidence other than that erroneously elicited from accused was of such probative force as virtually to compel a finding of guilty. It was therein concluded that the error in requiring accused to answer questions pertaining to the general issue (CM Marquez supra) was not prejudicial within the meaning of Article of War 37. It was stated, however, in the Baez case, (supra), with the concurrence of The Judge Advocate General, that the principle enunciated in the Marquez case should no longer be followed. In CM 330452, Brown, 79 BR 45 the Board of Review stated at page 50:

"Since the actions of the trial judge advocate and the rulings of the court denied to accused the right to limit his testimony to facts showing the manner in which his confession was procured without being compelled to testify regarding his guilt or innocence, his fundamental right against self-incrimination as distinguished from a mere error of procedure was violated." (See also CM 275738 Kidder 48 BR 145 and CM 330132 Trease, 78 BR 267.)

From what has been said there may be deduced the proposition that the privilege of an accused against compulsory self-incrimination is more than a mere rule of evidence or procedure, the violation of which might be subject to the curative provisions of Article of War 37, it is a fundamental right, firmly anchored in the Constitution and applicable to trials by courts-martial. A violation thereof will require the disapproval of any finding of guilty and sentence as to any offense or offenses concerning which the accused has been compelled to testify. In the present case the accused elected to testify solely as to the manner in which his alleged written confession as to the offenses charged was obtained. He did not voluntarily go beyond the expressed limitations. He was required on cross-examination, over strenuous objections thereto, to make answer as to whether the statements were true. It is unnecessary for the purposes herein to decide whether the answer he gave did in fact incriminate him. It is enough that one of any of the possible answers to this question might have tended to incriminate him. Accused's right to give evidence solely as to the issue of the voluntary or involuntary nature of his confession without subjecting himself to cross-examination on the merits of the case was clearly violated.

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

of guilty and the sentence.

Robert D. Silver, J.A.G.C.  
Lewis D. Shull, J.A.G.C.  
Harley B. Lanning, J.A.G.C.

(74)

CSJACK - CM 333793

1st Ind

FEB 1949

JAGO, Department of the Army, Washington 25, D.C.

TO: Commanding General, Headquarters 1st U.S. Infantry Division,  
APO 1, c/o Postmaster, New York, New York.

1. In the case of Recruit Roland D. Robinson (RA 44181644), Medical Detachment, 16th Infantry Regiment, Grafenwohr, Germany, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) the holding, together with my concurrence, vacates the findings of guilty and the sentence. A rehearing is not authorized in this case.

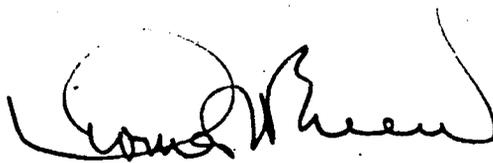
2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 333793)

2 Incl

1. Record of trial
2. Draft GCMO



THOMAS H. GREEN  
Major General  
The Judge Advocate General

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General's Corps  
Washington 25, D.C.

(75)

CSJAGH CM 333839

3 February 1949

UNITED STATES )

FRANKFURT MILITARY POST

v. )

Trial by G.C.M., convened at  
Frankfurt-am-Main, Germany,  
26 October 1948. Dismissal  
and total forfeitures.

Captain REYNOLD L. PATTERSON,  
O-1325617, 521st Labor Super-  
vision Company. )

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Reynold L. Patterson, 521 Labor Supervision Company, then a member of 528th Military Police Service Company, and Sergeant First Class Harold L. Dooley, 480th Criminal Investigation Detachment, acting in conjunction, did, at Bad Nauheim, Germany, on or about 6 August 1948, feloniously embezzle by fraudulently converting to their own use nine hundred dollars (\$900.00) in Military Payment Certificates, the property of Moniek Kaczka, entrusted to the said Captain Reynold L. Patterson by the said Moniek Kaczka.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to pay a fine of twelve hundred (\$1200.00) dollars, and to be confined until said fine is paid, but for not more than one year. The reviewing authority approved only so much of the sentence as provided for dismissal and total forfeitures and forwarded the record of trial for action pursuant to Article of War 48.

3. The pertinent evidence of record is summarized as follows:

a. For the prosecution.

Accused is in the military service of the United States (R 19,50). He is a Captain of Infantry (R 45) and a member of the 521st Labor Supervision Company (R 50). On 6 August 1948, he was Provost Marshal at Bad Nauheim, Germany (R 19,45).

Moniek Kaczka was a displaced Polish National who was also known as "Fritz" (R 6,12; Pros Ex 5). On 5 August 1948, he was working for the "CIC" at Bad Nauheim, Germany (R 7). He testified that when he was asked by another displaced person named Sobol to effect the exchange of \$963.00 (Military Payment Certificates) into \$900.00 of traveller's checks, he, on 6 August 1948, brought this information to accused. Accused told him to get the money, bring it to him and he would take it to the "CID." He did as accused instructed. He obtained the money and turned it over to accused who upon receipt of it directed him "to keep an eye" on Sobol and dismissed him. Kaczka further stated to the court that Sobol desired "traveller's checks in the amount of \$900.00 only"; that the \$63.00 was a "reward" for accused's services; and that if the transaction was successfully consummated, he, Kaczka, was to receive a Kodak "Retina" camera from Sobol (R 7,8,10).

During the trial, in response to interrogation concerning his "agreement" with accused under which the money was turned over, the testimony was as follows:

- "Q. What agreement was made between you and the captain [accused] there when you gave him the money, the \$900?
- A. When I gave the money to the captain, the captain told me to keep an eye on the person who gave me the money, and I don't know what the captain's intention was at the time, but he just told me to keep the eye on that person who brought the money.
- Q. What did you tell the captain to do with the money?
- A. I told him that some man brought \$963 and wanted to exchange it for traveller's checks, and he wants back only \$900.
- \* \* \*
- Q. What was your understanding of the agreement between you and Captain Patterson about the \$900?
- A. I thought the captain would confine me because the captain told me he would go to the CID with the money." (R 8,9).

Later, at 1300 hours, Kaczka saw and conversed with accused at accused's office in the Military Police Station. Concerning this meeting, Kaczka testified that in the presence of "Mr." Farchmin (Sergeant Gustav A. Farchmin) and "Mr." Agen (Private First Class Edward J. Agen), accused told him that part of the money was counterfeit and that all of it had been confiscated by the "CID." Accused also then and there

advised him "to forget about the whole story" and to do "nothing" with respect to Sobol (R 8,9). Kaczka then left accused and went to the other side of the street where Sobol was waiting. He informed Sobol about the money being counterfeit and told him to go home and not to stand around. Then he, too, went to his home (R 10).

Kaczka further testified that the money which he gave accused was never returned to him nor had he received any traveller's checks from accused (R 9).

At 1700 hours the German police came to Kaczka's home and escorted him to the "CID" where "Mr" Kelly (Edward H. Kelly, Agent, CID) asked him if he had any military payment certificates in his possession. Kaczka admitted to Kelly that he possessed \$13.00 in military payment certificates and signed a statement to that effect (R 10,11).

On cross-examination, Kaczka admitted that he was not authorized to possess military payment certificates and stated that he had obtained them from Sobol. Further, Kaczka maintained that Sobol, and not he, was the sole owner of the money which he had turned over to accused (R 12). He denied having had any conversation with accused wherein he asserted ownership to the money or that his giving of testimony was induced by a promise of gain, reward, or immunity from prosecution, or that he had been threatened with arrest in the event that he should fail to testify (R 13,14,15).

Sergeant Gustav A. Farchmin was with accused in the investigating room at noon on 6 August 1948. Accused at that time told Farchmin that he had \$900.00 which he wanted to exchange into traveller's checks for a Jewish displaced person and that he could make a profit of "sixty-odd" dollars on the transaction. Farchmin advised accused, "I wouldn't do that," and then went to dinner.

At about 1500 hours, Farchmin walked into the investigating room where accused was present with "Fritz," a Jewish displaced person, and Private Agen. Accused was seated on the table and was "kind of sweating" (R 16,17). In reply to Farchmin's query of "what's up," accused stated that because several of the ten dollar bills which he had received from "Fritz" for conversion into traveller's checks were fake and counterfeit, he had to go to the "CID" and make a statement and that his career was at stake (R 18).

That evening between 2330 and 2400 hours, accused invited Farchmin to walk home with him and while they were together accused stated to Farchmin "Them \$900 I split with two C.I.D. Agents, Mr. Dooley and Mr. Kelly." (R 18)

A stipulation as to testimony which Edward J. Agen, Private First Class, would give if he were present, was entered into between all parties in interest with the expressed consent of the accused. It corroborated the accounts of the meeting between accused and Kaczka at the military police station previously furnished by the witnesses Farchmin and Kaczka. In addition, it revealed that accused had on 6 August 1948 displayed to Agen a wad of one-dollar bills which he announced amounted to sixty-five dollars and represented his "cut" for converting the Military Payment Certificates into traveller's checks and also that accused had admitted to Agen in the presence of Technician Fourth Grade Clevenger that he had accepted about \$1000.00 from "Fritz" to buy traveller's checks at the American Express (R 19).

After Sergeant First Class Harold L. Dooley of the 480th CID was sworn as a witness for the prosecution (R 19) he declined to give testimony on the grounds that it might tend to incriminate him and was thereupon excused (R 20, 21). Subsequently, having been given verbal assurance of immunity (R 40), he was recalled and testified that on 6 August 1948, at Bad Nauheim, he and Agent Kelly had a conversation with accused concerning the purchase of money orders for a displaced person with "scrip" received from the displaced person for that purpose. Accused displayed to them some "scrip," stated that it amounted to \$1000.00 and asked Dooley what he would do if somebody gave him that amount of money. After jocosely remarking that he would pat the donor on the back and "ask for another thousand," Sergeant Dooley suggested that if a statement was obtained in which the displaced person swore that he did not possess any money, accused could keep the \$1000.00. Later, accused told Dooley that Kelly had called him and said that he had gotten a statement from the displaced person (R 36,37). Dooley further testified that on the following evening he and accused met and had a few drinks and that although there had been no conversation about sharing the money, accused placed \$400.00 in his hand and left. Dooley arranged a meeting with Kelly and gave him \$200.00. Dooley stated that Kelly did not want to accept the money and they talked it over as he, Dooley, too, was reluctant to accept it. They finally decided to return the money to accused the next day. Kelly eventually turned his money over to his Chief Agent, and Dooley, in response to a telephone call from his Chief Agent requesting the money which he had received from accused, turned over \$142.90 (R 38,39).

On cross-examination, Dooley admitted that accused came to the "CID" office as a law enforcement officer and reported his possession of the money and its source, and that it was he who had suggested that accused keep it if a statement of denial of ownership of the money was obtained from the displaced person (R 40).

On examination by the court, Dooley stated that, although he recognized the transaction as a "shady deal," he did not know and accused

gave no indication that he intended to do anything wrongful with reference to it (R 40).

On 9 August 1948, at approximately 1600 hours, Chief Agent Earl B. Milburn accompanied by Agents Walter N. Israel and Arthur H. Knudsen, all of the 11th CID, came to see accused at his office. At their request, accused went with them to the CID office at the Grand Hotel in Bad Nauheim (R 22,29) where, upon arrival, he was informed by Agent Israel that an investigation was being conducted and of the facts surrounding it. Accused was then warned of his rights under Article of War 24 and asked by Agent Israel whether he wanted "to put the cards on the table." (R 22,31) Accused replied in the affirmative and made an oral "confession" in the presence of Agent Israel, Chief Agent Milburn and others (R 22,23,29), to the effect that he had received about \$1000.00 from Kaczka to be converted into traveller's checks; that he was to receive about \$7.00 for each \$100.00 he so converted; that he had decided to keep the money and had spoken with Dooley and Kelly of the CID about it; that he later gave Dooley \$400.00 of the money by passing it to Dooley as they shook hands; that Dooley had no knowledge of why he was given the money; that he had used some of the money to pay for his wedding; and that the portion he had left of the money was at his home and he would be glad to turn it over to the CID agents (R 30,31).

After making this statement, accused handed Agent Israel about \$65.00 in Military Payment Certificates of \$1.00 denomination and in lieu of the CID agents obtaining a search warrant, signed the following consent search:

"Consent Search

9 August 1948

"I hereby give my permission for Agents Milburn, Knudsen and Israel to conduct a search of my home this date and in my presence to retrieve approximately \$250.00; proceeds from an illegal transaction.

/s/ Reynold L. Patterson  
Reynold L. Patterson  
Capt. CMP

#2 Bahnhofallee, Bad Nauheim." (R.23;

Pros Ex 3).

Accused then accompanied the agents to his home where he obtained and gave them approximately \$200.00 more in Military Payment Certificates thereby obviating the necessity of a search. Accused stated to the agents as he turned the money over to them that it was the money concerned in the investigation and part of the \$900.00 he had received from Kaczka (R 23, 24,31). Accused further stated that he would remain at home all evening

and would make his statement at any time that the CID wished to take it as he realized he was wrong and wanted to take his medicine like a man (R 31).

Between 1900 hours and 2000 hours, 9 August 1948, Chief Agent Milburn and Agent Israel returned to accused's home. At their request, for the expressed purpose of making a statement, accused accompanied them to the CID office-billet outside Friedburg, Germany. There, after being warned of his rights under Article of War 24 and without in any way being maltreated, physically mistreated, intimidated or promised anything in return for making a statement, he made a holographic confession. Accused's hand-written confession was then transcribed on a typewriter by a stenographer of the CID. On the following day, 10 August 1948, at approximately 1800 hours, accused's said confession in typewritten form was brought to him at his home where, after first reading it and making such corrections as he deemed necessary, he subscribed and swore to it without objection or complaint in the presence of Chief Agent Milburn, a person authorized to administer oaths, and Agent Israel (R 22,24,25,28,31,32,35).

The cross-examination of prosecution's witnesses Milburn and Israel was undertaken by the defense counsel prior to the offer of accused's statement in evidence, but after it had been marked for identification (R 24,35). The cross-examination of Agent Israel revealed that the statement of accused which was dated 9 August 1948 was in fact not signed and sworn to by him until 10 August 1948. Israel explained this discrepancy by stating that the statement was actually made on the date it bore (R 25). His further cross-examination elicited that accused made his statement at an isolated house at the end of an unpaved side-road where a CID office-billet had previously been established, and that he was taken there, a distance of about seven miles, even though the CID maintained an office right in Bad Nauheim (R 25,26). However, Israel denied that accused had been kept at the office-billet until 0530 hours of the following morning but insisted that accused had been returned to his home in Bad Nauheim at approximately midnight of the same day. Israel also stated that the statement obtained from accused had not been dictated but had been copied word for word from the statement which accused had previously made in his own handwriting, and that accused was not in arrest when he was taken to the isolated office-billet but went there without compulsion and was free to leave whenever he chose (R 27,28).

Upon the completion of Chief Agent Milburn's examination-in-chief, the prosecution offered the purported sworn statement of accused in evidence, to which offer the defense objected and proceeded to cross-examine Milburn. This cross-examination established that the witness

was a person authorized to administer oaths and corroborated the isolated character of the place where accused was taken for the purpose of making his statement (R 33). It also brought forth a denial similar to that of Israel's, that accused's journey to the place of final interrogation was not wholly voluntary, as well as a denial that accused was returned to his home at about 0500 hours the following morning (R 33,34,35). The court thereupon, without further objection from the defense, admitted into evidence as Prosecution Exhibit 5 a typewritten document purporting to be a statement under oath signed by accused (R 35).

Accused's statement shows that after he was fully warned of his rights, he, without threat or promise of reward, voluntarily furnished the investigators with information in writing under oath to the effect that at approximately 1000 hours on 6 August 1948, "Fritz" approached him in front of the military police station at Bad Nauheim with a "big deal" in which he could make some money. He was to receive approximately \$900.00 in United States scrip money from "Fritz," which he was to convert into traveller's checks in denominations of \$100.00 and was to be paid \$50.00 in United States scrip for accomplishing the conversion. When he agreed to convert the money, "Fritz" left and returned an hour later with a package of currency containing about \$900.00. "Fritz" gave him the package of currency and in addition paid him \$50.00 in bills of \$1.00 denomination, at which time he told "Fritz" to return after lunch for the traveller's checks. He pocketed the money, and subsequently, after returning from lunch at home, went to the post office. Here it was determined for him that the package contained \$900.00 in genuine bills.

Having previously made up his mind not to convert the money into traveller's checks but to keep part or all of it for himself, he left the post office and crossed the street to the CID office in search of a method or scheme that would enable him to carry into execution his premeditated plan to keep the money. At the CID office he found agents Dooley and Kelly and inquired of them what they would do if a displaced person was to give them \$900.00 and request that it be turned into traveller's checks. After informing Dooley and Kelly that he had possession of the money and had received it from "Fritz" and that it had been tested for genuineness, Dooley stated that "it looked like a chance in a lifetime, infallible" if "Fritz" was to deny everything concerning the currency. He then left Dooley and Kelly with the understanding that they were to question "Fritz" as to his part in the transaction and were to advise him of their progress with "Fritz", and returned to his office. At no time was any arrangement made or spoken about between him, Kelly, and Dooley, with reference to a "split" or "pay-off" from him to them.

Later that same evening at the Kaiserhof Hotel Bar, he met Dooley. As they were discussing the matter concerning "Fritz" and the scrip

turned over for conversion into traveller's checks, he received a telephone call from Kelly who advised him that "Fritz" had been grilled and had signed a statement "that he knew nothing of any scrip transactions whatsoever." He told Dooley of Kelly's report and Dooley indicated that the transaction was finished.

He left the hotel, went to his home to dinner and returned some hours later. Dooley, who was present at the hotel, came toward him and as they greeted each other, he passed to Dooley, without a word, the sum of \$400.00 in scrip. This payment was not made by virtue of a prearranged agreement between them and he did not explain to Dooley why he was giving him the money. He did not tell Dooley that he should share the money with Kelly although he expected him to do so, and had no knowledge whether or not Kelly received any of it.

On the morning of 7 August 1948, "Fritz" called him at his office and said that he was going to the CID and "talk." That evening Mr. Mark (Anthony Markusiewicz), a CID agent, came to see him to talk over the "situation." Mark told him that he had the entire story from "Fritz," that the whole thing stank, and that some of the money belonged to a few "people." Mark then left him and he heard no more about the matter until he was visited by the CID agents on 9 August 1948 (Pros Ex 5).

Accused ended his statement with the following concluding paragraph:

"In closing I wish to say that I admit my guilt, I know I have done wrong, I gambled the first time on what I thought was the 'sure thing' and lost. I am ready, without dramatics to accept my punishment as an officer." (Pros Ex 5).

Henry P. Allie, a CID agent, who had occasion to participate in the investigation of accused with respect to the incident which is the basis of the charge against him, testified that on 3 September 1948 he and Agent Knudsen, after warning accused of his rights and without making him any promises, took an additional statement from him (R 41). This statement was admitted in evidence without objection and read to the court after the defense counsel had afforded himself opportunity to examine the witness as to the circumstances under which the agents had taken it. Accused therein stated that on 6 August 1948 he had paid his bill for his wedding reception held on 24 July 1948 to the Mess and Club Section of the Bad Nauheim Sub-Post with \$240.00 to \$250.00 of the money which had been given to him by "Fritz." (Pros Ex 7).

b. For the defense.

Captain (Chaplain) Barnabus E. MacAlrney, after the defense had waived its right to object to his testimony on the ground of privilege between priest and parishioner, testified that accused had come to him and told him that he had gotten into a little trouble. The witness stated that he had advised accused "to return everything and wash his hands of the case." The witness further related that accused later told him the "while story"; that he had gone to the CID to return the money; that he was advised to keep the money because it was unlawful for the person who had given it to accused to have it and nothing could be done concerning it; and that since nothing could be done about it, it was his to do with as he liked (R 44).

Chaplain MacAlrney further stated that, based on his discussions with accused, he had formed an opinion of accused's character. In the witness' opinion, accused was everything an officer should be. He had good character, was well liked by those he worked for as well as those who worked for him (R 44).

Colonel Richard B. Wheeler, Commanding Officer of Bad Nauheim Sub-Post, who had known accused for six months, during which time he had heard accused discussed by other persons, testified that in his opinion accused was an outstanding officer whose character was "way above average-outstanding" and that he would believe him under oath (R 45). Several other high ranking officers similarly characterized accused and stated that he possessed excellent character. All were in agreement that accused bore a good reputation for truth, veracity (R 44-47) and integrity (Def Ex A).

Accused, after being fully apprised by the court of his rights to testify under oath, make an unsworn statement or remain silent, elected to testify under oath in his own behalf.

He stated that he was twenty-eight years of age and had served in the Army as an enlisted man and officer for almost ten years. He had been commissioned in November 1943, since which time his service as a commissioned officer had been continuous. His basic branch was Infantry but after attending Paratrooper School, he had joined the 82d Airborne Division and had gone overseas to the European Theater with it. He had been in combat in Holland for approximately eight weeks in the Nimejen Campaign and had made one combat jump. He is entitled to wear one battle star (R 50,51).

In defense of the Charge and Specification, accused testified that he had started out to do the "right thing"; that he had gone to the CID

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office to turn over the money; and that after arriving there he had been influenced by Kelly and Dooley who had told him that he would be "crazy" and "foolish" to turn in the money (R 51,52). He further testified that he had visited the Chaplain and had been advised to make a "clean breast of it" but that it was then too late. On the following day the CID agents came to his office and he had accompanied them to the CID office at the Grand Hotel and there had spoken to them on that evening at 2000 hours, the CID agents came to his home and told him to get his hat and go with them. They would not divulge their destination when he inquired about it. He was returned to his home between 0430 and 0500 hours on the following morning after having made his statement. He could not recall entirely what was in the statement nor did he know exactly what was in it when he made it as he was "pretty well upset" at that time. He did not read it at the time he made it but merely "glanced over it." (R 52,53).

On cross-examination accused admitted making the false statement to Kaczka that some of the bills he had received were counterfeit. He alleged that he made the statement at the suggestion of the CID agents. He also admitted that he made no effort to return the money to "Fritz" (R 53,54).

4. The accused was found guilty of a specification which alleges that "Captain Reynold L. Patterson accused and Sergeant First Class Harold L. Dooley, acting in conjunction did \* \* \* feloniously embezzle by fraudulently converting to their own use nine hundred dollars (\$900.00) in Military Payment Certificates, the property of Moniek Kaczka, entrusted to the said Captain Reynold L. Patterson by the said Moniek Kaczka."

The offense of embezzlement is defined and discussed in the Manual for Courts-Martial, U. S. Army (1928) as follows:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists where the property has been taken or received by virtue of such relationship.

"Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value.

"Proof.--(a) That accused was intrusted with certain money or property of value by or for a certain person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent." (pp 173-174)

The competent proof of record shows that accused accepted from Moniek Kaczka, Military Payment Certificates belonging to a displaced person named Sobol in the amount of \$900.00 under an agreement to exchange them for traveller's checks, and that neither Sobol nor Kaczka were persons who were authorized to possess this medium of exchange. Kaczka, at the time he delivered the said certificates to accused, gave accused an additional sum in certificates in payment for accused's services in effecting the exchange. Accused, however, did not exchange or cause the military payment certificates to be exchanged into traveller's checks. Instead, he had the certificates examined and their genuineness verified. He then went to the CID office and sought advice as to how to go about retaining the certificates for himself. Obliging, CID Agents Kelly and Dooley suggested a method, namely, that of obtaining from Kaczka a denial of ever owning military payment certificates. Having accomplished his desired purpose, accused returned to his office. Here, during a later visit from Kaczka, he falsely announced in the presence of others that some of the certificates had been found to be counterfeit, that all had been confiscated by the CID and that his career was at stake. When, subsequently, Kelly informed accused by telephone that the desired statement had been obtained from Kaczka, accused presented part of the money he had received from Kaczka to Dooley, used another part of it to liquidate a previously incurred personal debt and retained the balance for himself.

The foregoing evidence was fully corroborated by accused's confession, by his additional statement and by his own testimony. The question of whether or not accused's confession was voluntary was placed in issue by the evidence adduced at the trial and after it was properly admitted in evidence by the ruling of the law member, it became the court's function to determine whether or not it was voluntarily made and the weight to be given to it. Thus it is clear that the competent evidence of record, standing as it does, uncontroverted and undenied, constitutes a sufficient showing beyond reasonable doubt of accused's guilt of the offense charged.

5. It is noted that the Specification of the Charge alleges ownership of the Military Payment Certificates, the subject matter of the embezzlement, in Kaczka. The proof of record shows that Sobol was then legal owner, and that Kaczka had possession of them as Sobol's agent. Also to be observed is that neither Sobol nor Kaczka were authorized

to possess the Military Payment Certificates and that the purpose for which they were entrusted to accused by Kaczka was unlawful (paragraphs 11c and 15, Part II, War Department Circular 247, 6 September 1947). However, these noted circumstances provide no basis for disturbing the findings. Neither the illegality of the possession of Sobol and Kaczka nor of the manner of acquisition of the property embezzled by either of them, nor the illegal or unlawful purpose for which the embezzled property was entrusted to the accused, constitutes a defense for accused to the offense of embezzlement (CM 313165, Hunter, 63 BR 39,42, citing Wharton's Criminal Law, 12th Ed, p.1599; CM 325523, Hanni, 74 BR 285, 303; U.S. v. Hoback, 284 F.529; State v. Wollacott, 251 P.826). With regard to the allegation in the specification that Kaczka was the owner of the subject matter of the embezzlement when the proof showed him to be an agent of another, the Board of Review has had the following to say in CM 325523, Hanni, supra:

"\* \* \* The allegation of ownership has only to do with the identification of the property made the subject of the larceny or embezzlement charge, the pleadings and proof being sufficient in this respect if it is shown that the alleged owner had the merest and most temporary form of special interest in the property in question (CM 319858, Corrella, and cases there cited)."

Thus it is clear that in a specification alleging embezzlement the person named therein as the owner of the property involved need not have absolute title to said property (CM 331628, Jeffers (Sept 1948); CM 317327, Durant, 66 BR 227,310; 29 CJS 712).

6. We deem it appropriate to examine for error and to comment on the procedural and interlocutory matters which, during the course of accused's trial, were disposed of adversely to him. These consisted of the following:

a. The request of the defense by way of special plea immediately after accused's arraignment "to have the other accused" (Dooley) present.

b. The request of the defense that the trial be postponed and the investigation provided for by Article of War 70 reopened on the ground that the witness, Moniek Kaczka, had at the pretrial investigation held pursuant to Article of War 70 invoked his right under Article of War 24 and had declined to make a statement for the reason that it might tend to incriminate him thereby depriving the accused of his rights to thoroughly cross-examine the witness.

c. The objection of the defense to testimony being adduced by the prosecution from its witness, Chief Agent Milburn, as to identical facts contained in a pretrial statement which had been taken from accused by the witness and which statement had been marked for identification but had not yet been offered in evidence.

d. The motion by the defense at the end of the prosecution's case for a directed verdict of not guilty on the grounds:

- (1) That the specification, alleging as it did, that accused and Dooley "acting in conjunction \* \* \* did feloniously embezzle \* \* \*" instead of that accused "acting in conjunction with Dooley did feloniously embezzle" was not sustained by the proof of record; and
- (2) That the specification incorrectly alleged the value of the subject matter of the embezzlement to be \$900.00 when in fact their value was merely that of "the paper they are written on, and no more."

With reference to the matter set out in sub-paragraph a, supra, we treat defense counsel's request "to have the other accused here" as a motion by the defense that accused and Dooley stand a joint or common trial. We are concluded from interpreting the "special plea" as a request that the prosecution make Dooley available merely as a witness since he was in fact available at the trial and gave testimony in behalf of the prosecution. Thus is raised the question of whether an accused, as a matter of right, may demand and require the trial of a co-accused simultaneously with his own by the identical court under the circumstances presented by the instant case. We are constrained to resolve this proposition in the negative despite the absence of specific provision on the matter in the Manual for Courts-Martial. In 70 American Law Reports, at page 1177, the general rule is stated in the following language:

"Neither the common law nor any statute gives to a person who has been indicted jointly with others the right to be tried jointly with them."

and again in the recent case of United States v. Bronson, 145 F.2d 939, Mr. Justice Learned Hand, speaking for the United States Circuit Court of Appeals (2nd Circuit) at page 943 states:

"No accused person has any recognizable legal interest in being tried without another accused with him, though he often has an interest in not being so tried; but he may of course have a lively interest in securing the attendance at the trial as a witness of another accused."

Thus, it is clear from the foregoing that accused was not legally entitled to be tried in joint or common trial with Dooley and inasmuch as the

record shows that Dooley was available as a witness and does not show that accused was denied Dooley's services in that capacity, it must be held that the denial of defense's "special plea" was not error.

As to the matter contained in sub-paragraph b, supra, it is the opinion of the Board of Review that the denial of defense's request for a continuance in order that the pretrial investigation pursuant to Article of War 70 might be reopened was proper. The claim by an accused of irregularity during the pretrial investigation held pursuant to Article of War 70, even if substantiated, will not deprive a trial court of jurisdiction over the person of the accused and the offense alleged since it has been held that the provisions of Article of War 70 are entirely administrative in character and in no wise affect the jurisdiction of general courts-martial (CM 307119, Fabbricatore, 60 BR 265,290 and cases therein cited). However, accused's request was dual in nature in that it requested a continuance as well as the reopening of the pretrial investigation. The matter of the granting of the continuance was within the province of the trial court if reasonable cause was shown therefor (Par 52a, MCM 1928). Since it appears from the record of trial and allied papers thereto attached that Kaczka's name appeared on the charge sheet, and that a statement previously made by him to the CID had been furnished to accused and defense counsel, it is clear that the accused and defense knew of Kaczka's availability as a witness as well as the substance of his probable testimony. Upon such a conclusive showing that accused was fully aware of Kaczka's potentialities as a witness and in the absence of a showing that accused was intentionally misled by the prosecution, thereby hampering the proper pretrial preparation of his defense, no reasonable ground for a continuance was made to appear by the defense and its request was properly denied.

With respect to the matter set forth in sub-paragraph c, supra, the record of trial shows that on 9 August 1948, accused orally and holographically confessed to agents of the CID the commission of the offense alleged; that accused's holographic confession was reduced to typewritten form by a stenographer of the CID after which it was signed and sworn to by accused; and that at the trial, after accused's typewritten confession had been marked for identification, Chief Agent Milburn was permitted to testify over objection by defense as to statements made by accused during this oral confession even though these matters had been reduced to writing and were incorporated in accused's confession then before the court as an exhibit marked for identification. This constituted a violation of the rule that when a confession has been reduced to a writing signed by the accused, this writing is considered to be the best evidence of the confession. In this connection the term "best evidence" is not used within the sense of the "best evidence rule"

but rather to characterize the competency of the evidence following the merger of the oral statement into accused's signed confession (Paras 127b, 129a, MCM 1949). However, this error in permitting parole testimony as to matters contained in the confession of accused which had been reduced to writing and signed by him and was before the court was not prejudicial to accused's substantial rights, since the parole testimony was merely cumulative to the otherwise copious, competent and convincing evidence of accused's guilt of the offense charged contained in the record of his trial.

With respect to the matter set forth in sub-paragraph d (1), supra, we are of the opinion that the denial of the motion of defense for a directed verdict of not guilty, if it was error, does not constitute a basis for disapproval of the finding of guilty of the specification.

"The theory of the defense appears to be that the specification which alleged that " \* \* \* Patterson and \* \* \* Dooley \* \* \* acting in conjunction did \* \* \* feloniously embezzle by fraudulently converting to their own use \* \* \*" required that the proof show the embezzlement to have been committed jointly by accused and Dooley in order to be sufficient to sustain it. The defense further contended the proof as adduced was only sufficient to support a specification which read " \* \* \* Patterson acting in conjunction with \* \* \* Dooley, did \* \* \* feloniously embezzle by fraudulently converting to his own use \* \* \*." (Underscoring supplied)

We agree that the latter form is the artful, desirable and proper form in which the specification should have been pleaded but we are also of the opinion that the specification as it was pleaded amply apprised accused with sufficient particularity of the offense with which he was being charged. If the specification, as alleged, was at all defective, the defect was in form only. The facts alleged therein and reasonably implied therefrom spell out the offense of embezzlement by accused, and unless it appears from the record, and it does not, that accused was in fact misled by such defect or that his substantial rights were in fact otherwise injuriously affected thereby, the error must be considered harmless (MCM 1928, para 87b).

With respect to the matter set forth in sub-paragraph d (2), supra, it is the opinion of the Board of Review that the motion interposed by the defense, namely, that the Military Payment Certificates were of nominal value only, is so clearly untenable and manifestly without foundation that it approaches being a frivolous pleading. By taking notice of War Department Circular 237, dated 6 September 1947, it is at once seen that the subject matter of the embezzlement alleged is officially designated as the exclusive medium of exchange to be used by the Occupation Forces of which accused was a member and further evidence of the

frivolity of the motion is evidenced by the undenied testimony of record that accused used these self-same Military Payment Certificates to liquidate a personal monetary obligation which he previously incurred.

7. The records of the Department of the Army show that accused is 29 years of age and married. He is a high school graduate. He was inducted on 12 September 1940 prior to establishing a civilian occupation and had enlisted service from said date to 23 November 1943 when he was commissioned a second lieutenant. On 12 January 1945, he was promoted to first lieutenant and subsequently on 28 February 1947 was promoted to captain. He had service in the European Theater from 26 January 1945 to 22 August 1945. It is indicated that he has been an infantry instructor, a paratrooper and that he made one combat jump with the 82d Airborne Division. He is entitled to wear the Combat Infantry Badge, the European-African-Middle East Ribbon with one Bronze Star, and the Asiatic-Pacific Ribbon. In addition, he is authorized to wear the Good Conduct Ribbon, the American Defense Service Medal, the American Theater Ribbon, and the Army of Occupation Ribbon (Germany). He has had additional foreign service with the Occupation Forces in Germany from 26 May 1946 to the date of the offense. His efficiency reports of record show ten ratings of "Excellent" and six of "Superior."

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to dismissal and total forfeitures is authorized upon conviction of a violation of Article of War 93.

Wilmot T. Bangma J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Young, and Connally  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
Captain Reynold L. Patterson, O-1325617,  
531st Labor Supervision Company, the sentence  
is confirmed and will be carried into  
execution upon the concurrence of The Judge  
Advocate General.

Signed

Signed

-----  
Edward H. Young, Col., JAGC

-----  
William P. Connally, Jr., Col., JAGC

Signed

-----  
Ernest M. Brannon, Brig. Gen., JAGC  
Chairman

I concur in the foregoing action.

-----  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

17 Feb 1949

-----  
( GOMO 12, Feb 3, 1949)?



DEPARTMENT OF THE ARMY

(93)

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

CSJAGK - CM 333927

8 FEB 1949

UNITED STATES )

HEADQUARTERS THE ARTILLERY CENTER

v. )

Trial by G.C.M., convened at Fort Sill,  
Oklahoma, 12,19,22 October 1948. To  
be reduced to 7th grade, forfeiture  
of thirty-five dollars (\$35.00) per  
month for six months and confinement  
for six (6) months. Post Guardhouse.

Sergeant First Class HARRY  
SEIRING (RA 18316971), 4011th )  
Area Service Unit, 2d Detach- )  
ment, The Artillery School. )

-----  
HOLDING by the BOARD OF REVIEW  
SILVERS, SHULL and LANNING,

Officers of The Judge Advocate General's Corps  
-----

1. The record of trial in the case of the above named soldier, having been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentence, has been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Sergeant First Class Harry Seiring, 4011th Area Service Unit, 2d Detachment, The Artillery School, did, at Lawton, Oklahoma, on or about 19 July 1948, with intent to deceive wrongfully and unlawfully make and utter to J. C. Penny Company a certain check in words and figures as follows; to wit:

	TOWN	Lawton, Oklahoma	DATE	July 19 1948
Pay TO THE ORDER OF				\$10.00
J. C. Penny Co		Ten and no/100		Dollars

To Forbes National Bank For value received I represent that there are sufficient Funds on Deposit in said Bank or Trust Company to my Credit, free from Claims and upon which I am entitled to draw for said amount.

Bank Address Pittsburgh,  
Pennsylvania

Name Harry Seiring  
P.O. Address 1203 Dearborn Street  
Phone 3118-W

and by means thereof did fraudulently obtain from J. C. Penny Company ten dollars, he the said Sergeant First Class Harry Seiring, then well knowing that he did not have and not intending that he should have any account with the Forbes National Bank for the payment of said check.

NOTE: Specifications 2 and 4 are identical, in all material respects, with Specification 1 with the exception of the dates, name of the person to whom the check was issued and the amount of the check which are as follows:

	<u>Date</u>	<u>Name of Payee</u>	<u>Amount</u>
Spec 2:	10 Aug 48	J. C. Riddle	\$5.00
Spec 4:	6 Aug 48	House Grocery	\$10.00

Specifications 3 and 5: (Finding of guilty disapproved by reviewing authority).

He pleaded not guilty to the charge and all specifications. He was found guilty of all specifications except the words "with intent to deceive" and "fraudulently" and "he the said Sergeant First Class Harry Seiring, then well knowing that he did not have and not intending that he should have any account with the Forbes National Bank for payment of said check" substituting for the last phrase "under such circumstances as to bring discredit upon the military service," of the excepted words, not guilty, of the substituted words, guilty, and guilty of the charge. Evidence of one previous conviction was considered. He was sentenced to be reduced to the seventh grade, to be confined at hard labor at such place as the reviewing authority might direct for six (6) months, and to forfeit thirty-five dollars (\$35.00) per month for six (6) months. The reviewing authority disapproved the findings of guilty of Specifications 3 and 5, approved the sentence, and ordered it executed. The Post Guardhouse, Fort Sill, Oklahoma, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 125, Headquarters The Artillery Center, Fort Sill, Oklahoma, 18 November 1948.

3. In view of the opinion hereinafter expressed the evidence need not be summarized.

4. It is noted that when the court first convened accused stated through counsel that he "has no challenges." Major Alexander B. Welcher, F.A., a member of the court, was absent at this session. A continuance was granted on motion of accused and when the court reconvened Major Welcher was present and was duly sworn, but the record fails to affirmatively disclose that accused was afforded an opportunity to exercise his right of peremptory challenge or challenge for cause with respect to Major Welcher. But the effect of this omission need not be considered in this case because as will hereinafter appear we are of the opinion that, by its exceptions

and substitutions to the specifications pleaded, the court acquitted accused of any offense pleaded or necessarily contained therein.

By exceptions and substitutions, the court found the accused guilty of the specifications so as to read as follows:

(Spec 1) "In that Sergeant First Class Harry Seiring, 4011th Area Service Unit, 2nd Detachment, The Artillery School, did, at Lawton, Oklahoma, on or about 19 July 1948, wrongfully and unlawfully make and utter to J. C. Penny Company a certain check in words and figures as follows, to wit:

	TOWN Lawton, Oklahoma	DATE July 19 1948
Pay TO THE ORDER OF		
J. C. PENNY CO.		\$10.00
	Ten and no/100	Dollars

To Forbes National Bank For value received I represent that there are sufficient funds on Deposit in said Bank or Trust Company to my Credit, free from Claims and upon which I am entitled to draw for said amount.

Bank Address	Pittsburgh	Name	Harry Seiring
	Pennsylvania	P.O. Address	1203 Dearborn Street
			Phone 3118-W

and by means thereof did obtain from J. C. Penny Company ten dollars, under such circumstances as to bring discredit upon the military service."

In order to form the basis of a valid sentence, it has been said that -

"A specification must exclude every reasonable hypothesis of innocence-- must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent -- may be regarded as the settled law of this office as well as the law of the land." (CM 187548, Burke, 1 BR 56; CM 316886, Chaffin, 66 BR 97,101.)

Reduced to its simplest terms, the accused herein has been found guilty of "wrongfully and unlawfully under such circumstances as to bring discredit upon the military service," making and uttering the checks described in Specifications 1, 2 and 4 of the Charge. Inasmuch as the mere making and uttering of a check is not a criminal or wrongful act, is neither malum in se nor malum prohibitum, what, if any, can be the offense inherent in the pleading as amended and found by the court? The answer appears to have been left entirely to conjecture because the court has acquitted



DEPARTMENT OF THE ARMY  
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON 25, D.C.

3 FEB 1949

CSJAGK - 333927

UNITED STATES

v.

Sergeant First Class HARRY  
SEIRING (RA 18316971), 4011th  
Area Service Unit, 2d Detach-  
ment, The Artillery School.

HEADQUARTERS THE ARTILLERY CENTER

Trial by G.C.M., convened at Fort  
Sill, Oklahoma, 12,19,22, October  
1948. To be reduced to 7th Grade,  
forfeiture of thirty-five dollars  
(\$35.00) per month for six months  
and confinement for six (6) months.  
Post Guardhouse.

-----  
DISSENT

by

LANNING,

Officer of The Judge Advocate General's Corps  
-----

1. I am unable to agree with the majority holding in this case.

2. The record discloses that when the court met originally on 12 October 1948 that accused was given the opportunity to exercise his right to challenge the members. The court was duly organized and sworn. Following the arraignment of accused, the court adjourned upon request of accused for a continuance. Major Alexander B. Welcher, who was detailed as a member of the court by the special order appointing it, was reported as absent at the first session of the court. When the court reconvened on 19 October 1948, however, the prosecution announced that all members present at the first session were then present and in addition thereto, Major Alexander B. Welcher was also present. He was sworn and apparently sat as a member of the court. The prosecution then proceeded to ask the accused how he wished to plead to the charges and the specifications thereunder. After a request by defense for another continuance was denied, the accused pleaded "not guilty to all Specifications and to the Charge." The court then proceeded to hear the first witness.

3. The record is completely silent on the subject as to whether the accused was afforded an opportunity to challenge the new member, Major Welcher, either peremptorily or for cause. As there is no affirmative showing in the record that the right to challenge Major Welcher was given to accused, it is only reasonable to assume that he was never actually afforded such right.

The following extracts from the Manual for Courts-Martial, 1928, clearly point out that the opportunity to exercise the right to challenge by accused is a fundamental and substantial right and must be preserved:

"b. Proceedings in each case to be complete. - In each case the proceedings must be complete without reference to any other case. For example, in each case tried opportunity to challenge must be given and the required oaths administered." (par 49b; underscoring supplied.)

"c. \*\*\*  
"\*\*\* Full and timely opportunity will be given to challenge every new member." (Par 58c; underscoring supplied.)

"f. Procedure. - After the challenges, if any, presented by the trial judge advocate have been disposed of, he will, after complying with any request made by the accused to be permitted to examine the papers and orders referred to in 4le, give the accused an opportunity to exercise his rights as to challenge. The accused thereupon challenges in turn each member to whom he objects. As to peremptory challenges, see 58d. Full and timely opportunity will be given to the accused, including each accused in a joint trial, to exercise his rights of challenge." (par 58f; underscoring supplied.)

"b. New member. - If after the trial has begun a new member is sworn (opportunity to challenge him having been given), the substance of all proceedings had and evidence taken in the case will be made known to him in open court before the trial proceeds." (par 38b; underscoring supplied.)

The language of the Manual above quoted appears to be mandatory in nature and therefore should be followed with exactitude.

The fact that the accused was silent concerning his right to challenge the new member should not be construed as a waiver or a desire not to challenge. The waiver of such a fundamental and substantial right, in the light of the language used in the Manual for Courts-Martial, 1928, should be expressly made. An analogous situation was presented in a case in which it was held that mere "consent to a common trial cannot of itself be construed in reason as a waiver of the right to challenge in the absence of a clear indication of a desire to waive the right." (CM 287210, Reynolds, 6 BR (NATO-MTO) 85,89.) Attention is directed to Appendix 6 of the Manual for Courts-Martial, 1928, at page 262 where it is stated, "If the defense does not desire to challenge, the

record will so state." (Underscoring supplied.) Such statement is a clear indication that it was intended that the record of trial should affirmatively show accused expressly waived his right to challenge. Mere acquiescence or silence on the part of the accused was not intended to be construed as a waiver.

A failure to afford the accused the right to challenge each member of the court, or a denial to the accused of the right to exercise a peremptory challenge to any member except the law member have been held to void the jurisdiction of the court (CM 124926, Cook (1919); CM Reynolds, supra; CM 333032, Beckoff; see also Winthrop's Military Law and Precedents, 2d Ed, p 205).

In CM Cook, supra, the facts were practically identical with the instant case. There accused was not advised of his right to challenge a member who joined the court after it had been duly organized and had proceeded to try accused. The Board of Review stated:

"The opportunity to challenge every member of the court is jurisdictional.

"The record will show affirmatively that the right has been accorded the accused to challenge every member of the court. If opportunity is not so accorded the proceedings are void." (Underscoring supplied.)

In CM Reynolds, supra, where right of accused to exercise his peremptory challenge was denied to him, the Board of Review at page 91 held:

"Because of the denial of the peremptory challenge and the consequent participation in the trial by Colonel Gasiorowski, it is the opinion of the Board of Review that the court was not legally constituted and that its proceedings were null and void." (Underscoring supplied.)

Paragraph 61, Manual for Courts-Martial, 1928, states:

"After the proceedings as to challenges are concluded the members of the court, trial judge advocate, and each assistant trial judge advocate are sworn (See 95 as to oaths.) The organization of the court is then complete and it may proceed with the trial of the charges in the case then before the court." (Underscoring supplied.)

It is also pointed out in paragraph 7, Manual for Courts-Martial, 1928, that the jurisdiction of the court is conditioned upon three indispensable requisites, one of which is that "the membership of the court was in

accordance with law with respect to number and competency." The "competency" of a member to sit upon a court cannot be definitely determined unless the accused has had the opportunity to exercise his right to challenge each member and has either exercised the right or has waived it.

I conclude that the right of accused to challenge members of the court for cause or to challenge any member except the law member peremptorily is so fundamental and substantial, that a failure to give accused an opportunity to exercise that right, in the absence of an express waiver thereof, deprives the court of jurisdiction. It necessarily follows that the proceedings in this case are null and void and that the findings and sentence herein have no legal effect.

Harley A. Lenning .J.A.G.C.

LAW LIBRARY  
JUDGE ADVOCATE GENERAL  
NAVY DEPARTMENT

FEB 24 1949

CSJAGK - CM 333927

1st Ind

JAGO, Dept. of the Army, Washington 25, D.C.

TO: Commanding General, The Artillery Center, Fort Sill, Oklahoma.

1. In the case of Sergeant First Class Harry Seiring (RA 18316971), 4011th Area Service Unit, 2d Detachment, The Artillery School, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50 e(3) this holding, and my concurrence therein, vacate the findings of guilty and the sentence. A rehearing is not authorized.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 333927)



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

- 1. Record of trial
- 2. Draft GCMO

12200



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(103)

CSJAGK - CM 334071

8 FEB 1949

UNITED STATES )

9TH INFANTRY DIVISION

v. )

Trial by G.C.M., convened at Fort  
Dix, New Jersey, 17 August 1948.  
Dismissal, total forfeitures and  
confinement for five (5) years.

Second Lieutenant JACK C.  
HABERSTICK (O-1998080), Infantry, )  
assigned to Detachment of Patients, )  
9958 TSU-SGO, Tilton General Hos- )  
pital, Fort Dix, New Jersey. )

-----  
OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING,  
Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General and the Judicial Council.

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

CHARGE I and Specification: (Plea in bar of trial sustained).

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

Specification 1: In that Second Lieutenant Jack C. Haberstick, assigned to Detachment of Patients, Tilton General Hospital, did, at Fort Dix, New Jersey, on or about 30 September 1945, in contravention to Section 80, Chapter 4, Title 18, Criminal Code of the United States, present a false and fraudulent claim in the amount of \$782.13 for pay and allowances for the period from 1 May 1945 to 30 September 1945, to First Lieutenant J.L. Williams, an officer in the military service of the United States duly authorized to pay such claims, he, the said Second Lieutenant Jack C. Haberstick well knowing that he was absent without leave at all times from 5 September 1945 through 30 September 1945 and that said claim was false, fictitious and fraudulent.

NOTE: Specifications 2-23, inclusive, vary materially from Specification 1 only as to the date the alleged claim was presented, the amount claimed, which varied from

\$196.38 to \$235.15, the period covered, the officer to whom presented and the period of absence without leave.

The court, acting through the law member, sustained accused's plea in bar of trial by reason of the statute of limitations with respect to Charge I and its specification (AW 39). Accused pleaded not guilty to and was found guilty of Charge II and all specifications thereunder. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five (5) years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial pursuant to Articles of War 48 and 50 $\frac{1}{2}$ .

### 3. Evidence

#### For the Prosecution

A duly authenticated extract copy of a morning report of the Detachment of Patients, 1257 SCU, Tilton General Hospital, Fort Dix, New Jersey, for 9 September 1945 was offered in evidence by the prosecution showing the following entry concerning the accused:

"9 Sept 45

Harberstick Jack C Inf 01998080 2d Lt  
Dy to AWOL eff 5 Sept 45

/s/ F. Anderson  
/t/ F. Anderson

2nd Lt MAC"

The prosecution stated that the purpose of introducing the morning report was to show accused was not on a duty status and therefore was not entitled to pay and allowances for the period from 5 September 1945 to 31 July 1947. Defense counsel objected to the morning report being received for such purpose inasmuch as a plea in bar of trial of Charge I and its specification had been sustained. He contended that accused had thus been acquitted of being absent without leave from 5 September 1945 to 2 September 1947 as alleged in Specification 1 of Charge I. After extended argument the objection was overruled (R 8-12).

Defense counsel also objected to acceptance of the morning report on the ground that it was not the best evidence of accused's absence without

leave. This objection was overruled by the law member and counsel made further objection on the ground that the entry contained in the morning report was "not based upon the knowledge of the person who signed it." In support thereof a deposition of Francis W. Anderson was offered in evidence and was received as Defense Exhibit "A" without objection by prosecution (R 12,13). The deposition disclosed that Francis W. Anderson had been on duty as a second lieutenant at Tilton General Hospital, Fort Dix, New Jersey, at which time he was Assistant Receiving and Disposition Officer and Assistant Commanding Officer, Detachment of Patients. As such he had signed morning reports and "A & D sheets." He could not say whether the information contained in the morning report in question had been based upon his personal knowledge. Lieutenant Anderson stated further that "AWOL entries" on the "A & D sheets" were based upon reports made by the ward nurse and that the "A & D sheets" were in turn used as a basis for preparation of the morning reports. He had immediate charge of the Enlisted men's Section of the Hospital, but not of the Officers' Section. The morning report for the Officers' Section was prepared in the office of the Hospital Personnel Officer. The two were combined in the witness' office and he signed the consolidated report. After reading the deposition of Lieutenant Anderson, the law member sustained the objection of the defense to the morning report, stating, however, that if the prosecution could show that the original documents upon which the morning report was based were not available, the admission of the morning report would be reconsidered (R 14).

The prosecution then offered an extract copy of the "A & D sheet" of Tilton General Hospital dated 7 September 1945 certified as a true copy by Lester C. Dill, Capt., MSC (R 14). Captain Dill, the Commanding Officer of the Detachment of Patients at the Tilton General Hospital, was called as a witness and testified that "The A & D sheet itself is a record of all changes and transactions in the hospital for a 24 hour period, consolidated into one sheet." It was an official record prepared in accordance with the Technical Manual. The information contained therein was compiled from ward morning reports, ward transfers, discharges from the hospital and many other papers. The "A & D sheet" was prepared each day in the "R & D" office of the hospital between midnight and 6:00 a.m. It was mimeographed and distributed to all departments of the hospital. The Registrar kept a file of "A & D sheets" although they were not required to be kept as a permanent record. They could be destroyed after they had been distributed and the morning report had been prepared. The witness stated that as the commanding officer of the Detachment of Patients he ordinarily prepared charge sheets against military personnel. He obtained the pertinent "A & D sheets" from the Registrar's Office and attached them together with the morning report to the charge sheet when he forwarded it. Such procedure was followed in this case. Captain Dill was shown the extract copy of the "A & D sheet" in question and identified it as a true extract copy of the "A & D sheet" of Tilton General Hospital for 7 September 1945. He had personally prepared the extract copy from

one of the mimeographed records which he had obtained from the office of the Registrar. The original "A & D sheet" had been prepared a year prior to the time witness came to Tilton General Hospital, but he had reason to believe the information therein was true because he found it on file with the registrar and it corresponded with an admission card he had kept for his own information (R 14-20).

The law member ruled that the extract copy of the morning report was admissible in evidence as being an official document. The document was received and marked "Prosecution Exhibit 1". The "A & D sheet" of Tilton General Hospital for 7 September 1945 was also received in evidence and marked "Prosecution Exhibit 2" over objection of defense who contended that it was not duly authenticated and even if offered under the "Shop Book Rule" it was not the best evidence inasmuch as the original should have been produced (R 20-22).

It was stipulated that if W. G. Reaves, Captain, MSC, Tilton General Hospital, were present he would testify that he prepared a morning report for 3 September 1947 stating that accused was transferred from status of "AWOL and dropped from rolls to assigned and joined 1445 2 September 1947." Accused personally joined in the stipulation, stating, "Yes, sir, but I don't understand September 3rd, I returned on September 2."

William A. Haendiges, Captain, MSC, Registrar of Tilton General Hospital since 16 December 1945, testified that he was custodian of all medical records, including the clinical records of accused. He received the clinical records for each patient after he had left the hospital. Upon cross-examination he testified that entries on the clinical records were made by several persons other than himself and that he had no personal knowledge thereof. Upon examination by the court the witness stated that the clinical records came into his possession in the "normal manner in which similar records of the hospital" came into his possession. The defense objected to the admission of the clinical records in evidence, contending that the entries thereon were not within the personal knowledge of the witness. The prosecution asserted that the proof showed that the entries were made in the usual course of business and that they were admissible under the "Federal Shop Book Rule." These records were received in evidence and contained the following entries:

"PROGRESS NOTES

Name HABERSTICK Grade 2ND LT Ward 53

4 Sept 45. This officer was undergoing treatment for bilateral otitis externa when he went AWOL from the ward 31 Aug 45.

13 Oct 45. Chart completed AWOL.

S/D Bernstein Capt MC

initialed/DB

\*\*\*\*\*

## TEMPERATURE--TREATMENT--NURSES NOTES

Name HABERSTICK, JACK Grade 2ND LT Ward 53

25 Aug - 0700 - VOCO  
 26 Aug - 0700 - VOCO  
 27 Aug - 0700 - Not on Ward  
 28 Aug - 0700 - Not on Ward  
 29 Aug - 0700 - Not on Ward  
 30 Aug - 0700 - Not on Ward  
 31 Aug - 0700 - Not on Ward  
 1 Sept - 0700 - Not on Ward  
 2 Sept - 0700 - Not on Ward

\*  
TGH Form #31a\*  
TILTON GENERAL HOSPITAL  
DIAGNOSIS SLIP\*  
Date of Report 20 Aug 1945

Diagnosis: a. Otitis externa

## Disposition:

-1. Soldier will be returned to FULL duty.

Disposition will be made in approximately 21 days

s/D Bernstein  
Ward Officer" (Pros Ex 3)

The prosecution offered in evidence twenty-three documents purporting to be photostatic copies of Army pay vouchers, each of which bore the signature of accused and a certificate signed by R. C. Pickering as custodian averring that the originals thereof were on file in his office, the General Accounting Office, Army Audit Branch, Reconciliation and Clearance Subdivision, St. Louis, Missouri. These documents were received without objection by the defense and were marked Prosecution Exhibits 4 to 26, inclusive. Prosecution Exhibit 4 was a photostatic copy of a pay voucher signed by accused for pay and allowances from 1 May 1945 to 30 September 1945. The remaining exhibits (Pros Exs 5-26, incl.) were photostatic copies of pay vouchers for pay and allowances for monthly periods from October 1945 to July 1947, inclusive. Defense counsel pleaded the statute of limitations as to Specifications 1 to 11, inclusive, asserting that the dates on the vouchers described therein showed that the offenses occurred "more than two years before the arraignment of such person." He also objected to the admission in evidence of the "first eleven vouchers" (Pros Exs 4 to 14, incl.). The law member ruled adversely to the defense with respect to both questions raised (R 27).

The prosecution rested and defense made a motion to dismiss Charge

II and all specifications thereunder on the ground that the prosecution had failed to prove that accused had knowledge that he was absent without leave even if such status had been established. The law member denied this motion (R 28-29).

For the Defense

The rights of accused as a witness were duly explained to him and he elected to be sworn and testified in substance as follows:

He was born 1 May 1921, graduated from grammar school at the age of 17 years, and entered the military service in 1939 where he attained the grade of technical sergeant. He served about 13 months in the European Theater of Operations and was commissioned a second lieutenant. Upon returning to the Zone of Interior the latter part of July 1945, he was first assigned to Stark General Hospital, Charleston, South Carolina, but was soon transferred to Tilton General Hospital at Fort Dix, New Jersey, where he was assigned to Ward 53 as an ambulatory patient. He was treated by a Captain Bernstein, his commanding officer, who permitted him to visit his home in Belmar, New Jersey, a distance of about 35 miles from the hospital. One day Captain Bernstein told him, "There is nothing more I can do for you, you may as well go home and we will notify you when to come back." Accused signed out "VOCO", although he did not know what it meant, and put down as the reason, "Leave." He thought "VOCO" was the same as "Leave" and supposed that he was at all times thereafter on a convalescent furlough as his nerves were always "shot." He knew, however, that if he had been an enlisted man he would not have left the hospital without a furlough, but assumed that as an officer it was all right. During the period from 5 September 1945 to 2 September 1947 he reported to the clinic at the hospital where he was treated by Captain Bernstein. The last treatment he received was about a year before he was arrested by the Military Police. He wrote a letter to the father of a friend of his, who had been killed in action, to the effect that he (accused) was still under treatment and had not yet been discharged. A copy of the letter printed in a newspaper was introduced in evidence as Defense Exhibit "E". He told the Selective Service Board he was on convalescent leave and remained in Belmar all the time. Accused asserted that he always wore either his uniform or fatigues. The defense offered and there was received in evidence as Exhibit "B", a certificate for a lost automobile license plate, and Defense Exhibit "C", an automobile driver's license, upon each of which his name appeared as a "Lieutenant." Accused was married on about 10 May 1947. Defense Exhibit "D" was a picture of accused and his wife slicing their wedding cake. It appeared from the picture that accused was wearing an Army shirt and trousers.

Accused stated that he returned to Fort Dix each month for his pay and allowances. About the fourth month a lady behind the counter questioned him, but after she had made a telephone call she prepared his voucher. He received his pay for that month and for each month thereafter

without any further trouble. He knew, however, that if he had been an enlisted man his pay would have been "stopped." He had never applied for rental and subsistence allowances as a married man because he did not know he was entitled to it (R 29-40).

Reverend Allan N. Nettleman, the pastor of a Baptist Church in Belmar, New Jersey, testified that he officiated at the marriage of accused on 10 May 1947. The marriage license revealed that accused had given his occupation as "soldier." The marriage certificate was received in evidence as Defense Exhibit "F." Reverend Nettleman asserted that accused had a good reputation in the community for "veracity and honesty" (R 40-41).

John A. Maloney had been a police officer at Belmar, New Jersey, for about twenty-five years. During the period from July 1945 to September 1947 no request had been received at the police department from either the military authorities or the Federal Bureau of Investigation for the arrest of the accused. Accused's reputation in the community had always been the best (R 41-42).

Mr. Patrick Breslin and Mrs. Beatrice Breslin operated the "Pat and Sandy Fishing Association" at Belmar, New Jersey. Accused came to their place three or four times a week. He was never dressed in civilian clothes. He told them he was in the Army and that he did not know when he would be discharged. He seemed to be in poor health and complained of headaches and of his ears. Mr. Breslin testified that accused's reputation for truth and veracity was good (R 42-47).

It was stipulated that if Grace Jacobi were present she would have testified that she prepared a pay voucher for accused monthly from 1945 to August 1947. She did not recall that the Finance Office ever received any notification from anyone, including Francis W. Anderson, Second Lieutenant, MAC, at any time during 1945 or 1946 that accused was absent without leave (R 47-48).

It was further stipulated that if William P. Sax, First Lieutenant, MC, neuropsychiatrist, were present he would testify that he had examined accused and found him to be of average intelligence. He showed no evidence of neurosis or psychosis, nor of any delusion or hallucination. His insight and judgment were adequate, though not highly developed. At the time of the offense he was able to distinguish right from wrong and adhere to the right and was able to assist in his own defense (R 48).

#### 4. Discussion

##### Preliminary Matters

Inasmuch as accused was not arraigned until 17 August 1948, a lapse of more than two years after his initial unauthorized absence, the plea

in bar of trial by reason of the statute of limitations was properly sustained as to Charge I and its specification (AW 39).

Under Charge II and its specifications accused was found guilty of having presented 23 false and fraudulent claims for pay and allowances, for the period from 1 May 1945 through 31 July 1947, to an officer in the military service of the United States duly authorized to pay such claims, knowing that he was absent without leave from 5 September 1945 through 31 July 1947, in violation of Section 80, Chapter 4, Title 18, Criminal Code of the United States.

Accused objected strenuously when the prosecution offered proof to show he was absent without leave from 5 September 1945 until 2 September 1947 upon the ground that as his plea in bar of trial by reason of the statute of limitations had been sustained, he had been acquitted of being absent without leave. There are authorities which hold that a plea in bar of trial by reason of the statute of limitations is tantamount to a finding of not guilty (CM 332514, Mattingly), but such finding always carries with it the connotation that it is by reason of the statute of limitations. It is stated in 15 American Jurisprudence, page 32 (Criminal Law, Sec 342):

"A plea of the statute of limitations raises a question which, legally speaking, goes to the merits of the case. Technically, it does not go to the question of the guilt or innocence of the defendant, but it does go to the merits of his claim of right to an acquittal or discharge."  
(Underscoring supplied.)

A statute limiting the time within which an accused may be prosecuted for a crime or offense is regarded merely as a bar of the right to prosecute (15 American Jurisprudence, p 32; 22 CJS, p 349). It necessarily follows that in the instant case the fact that the accused's plea of the statute was sustained affected only the right of the Government to proceed to try him upon a charge of being absent without leave for the period alleged. It did not amount to a judicial determination that he was not actually absent without leave for the period alleged. It was not error, therefore, for the law member to permit the prosecution to show accused's absence without leave as being material to the question of whether the alleged claims were false and fraudulent.

Accused also entered a plea in bar as to Specifications 1-11 of Charge II upon the ground that the claims therein described were presented more than two years prior to arraignment. Inasmuch as these specifications were laid under Article of War 96 it was contended that the two year limitation provided in Article of War 39 applied. But the offenses alleged in these specifications were properly chargeable under Article of

War 94 for which the limitation, as provided in Article of War 39, is three years. Paragraph 67, Manual for Courts-Martial, 1928, states:

"In applying this statute the court will be guided by the crime or offense as described in the specification, and not by the Article of War stated in the charge under which the specification is placed. Thus, where an offense properly chargeable under A.W. 93 is erroneously charged under A.W. 96, the limitation is three instead of two years."

#### CHARGE II and its Specifications

The prosecution introduced a duly authenticated extract copy of the morning report of the Detachment of Patients, 1257 SCU, Tilton General Hospital, Fort Dix, New Jersey, to show that accused was absent without leave 5 September 1945. The defense objected on the ground that the officer signing the morning report did not have personal knowledge of facts stated therein. The evidence showed, however, that the entry on the morning report was made by an officer whose duty it was to prepare the morning reports. It also showed that he obtained the information for the entry on the morning report from an "A & D sheet" prepared daily in another office of the hospital from reports of ward nurses, ward transfers, etc. When prepared it was mimeographed and copies distributed to all departments of the hospital. It is the opinion of the Board of Review that the morning report was competent to show that the accused was absent without leave on 5 September 1945. As was stated in CM 320957, Boone, 70 ER 223,

"\*\*\* There is no requirement that the person by whom the entry is actually made have himself personal knowledge of the facts recorded, it being sufficient that he had the duty to ascertain such facts through the personal knowledge of his subordinates or informants. It is in this manner that his entry is based on personal knowledge, the observations of his agents in the matter being legally attributable to him."

The evidence showed by stipulated testimony and by admissions of accused that he returned to military control on 2 September 1947. It thus follows that it was shown by competent evidence that accused was absent without leave from 5 September 1945 to 2 September 1947.

Accused contended that he did not know that he was absent without leave during the period alleged and proven. It would appear to be inconceivable that an officer who had served as an enlisted man for approximately six years could be so naive as to believe, under the circumstances here shown, that he was on authorized leave for a period of nearly two years and thus entitled to receive pay. This is particularly true in view of accused's testimony that he knew that had he been an enlisted man his pay would have been "stopped." And it will be borne in mind that although

accused asserted that he remained at all times but a short distance from the Tilton General Hospital yet he never made any inquiries as to his status. The court, having before it for their consideration all of the evidence adduced by the defense in finding the accused guilty, resolved the question of his knowledge that he was absent without leave against him. The Board of Review is also of the opinion that accused had sufficient reason to believe and in fact knew that he was absent without leave for the period shown and, a fortiori, not entitled to pay.

The prosecution introduced photostatic copies of the pay vouchers referred to in Specifications 1-23 of Charge II, which were received in evidence without any objection being made thereto by the defense. The defense thereby waived any objection that they were not the best evidence or that they were not duly authenticated or that the genuineness of the documents had not been shown (par 116, MCM, 1928). Each of the photostatic copies of the pay vouchers contained two signatures purporting to be those of accused, one on line 16 and one on line 18. No objection having been made by the defense to the reception of the documents in evidence the court could regard the signatures as in fact those of accused. The court, therefore, had before it duplicate originals of each of the pay vouchers referred to in Specifications 1-23, Charge II. The signature of accused on line 16 indicated that accused adopted the claim for pay and allowances appearing above his signature on each voucher. His signature on line 18 shows that he received payment in cash of the amount claimed in the voucher. The court therefore was warranted in inferring that accused must have presented for approval and payment the claims as alleged (CM 324725, Blakeley, 73 BR 307, and cases cited therein).

The accused having been on an absent without leave status for the period from 5 September 1945 to 31 July 1947 he was not entitled to any pay and allowances for such period because he had rendered no services to the Government for which remuneration was due him. A voucher claiming pay and allowances under such conditions is a false and fraudulent claim against the United States (par 3a, AR 35-1420, 15 Dec 1939; par 9a(1), AR 605-300, 14 Sep 1944; CM 318507, Hayes, 71 BR 391, CM Blakeley, supra).

For the reasons stated above we are of the opinion that the findings of guilty of Charge II and its specifications were established beyond a reasonable doubt.

5. The record of trial and accompanying papers show accused is 28 years of age; that he is married and has one child. He completed his formal education at the age of 18 years after having attended high school for two years. He enlisted on 7 July 1939, serving continuously as an enlisted man until he was commissioned as a second lieutenant on 11 December 1944. Accused served in the European Theater of Operations and participated in active combat, receiving the Silver Star, Bronze Star with cluster, Purple Heart, Good Conduct Medal and Presidential Unit Citation.

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

Charles D. Gibbs, J.A.G.C.  
Lewis D. Hull, J.A.G.C.  
Harley L. Lanning, J.A.G.C.

(114)

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Young, and Connally  
OFFICERS OF THE JUDGE ADVOCATE GENERAL'S CORPS

In the foregoing case of  
Second Lieutenant Jack C. Haberstick (O-1928080),  
Infantry, assigned to Detachment of Patients,  
9958 TSU-SGO, Tilton General Hospital, Fort Dix,  
New Jersey, the sentence is confirmed and will be  
carried into execution upon the concurrence of  
The Judge Advocate General.

Edward H. Young

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Edward H. Young, Col., HACC

W.P. Connally, Jr

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William P. Connally, Jr., JAGC

E.M. Brannon

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Ernest M. Brannon, Brig. Gen., JAGC

28 Februar 1949

I concur in the foregoing action.  
Under the direction of the Secretary  
of the Army, the confinement adjudged  
is remitted.

Thomas H. Green

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THOMAS H. GREEN  
Major General  
The Judge Advocate General

28 March 1949.

~~CGMO, 18, 7 April 1949)~~

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

(115)

FEB 2 1 1949

CSJAGQ - CM 334105

UNITED STATES

YOKOHAMA COMMAND

v.

Recruit ROBERT L. GARNER  
(RA 19254369), 736th  
Engineer Heavy Shop  
Company, APO 503.

Trial by G.C.M., convened at  
Headquarters Yokohama Command,  
Yokohama, Honshu, Japan, APO  
503, 5 November 1948. Dis-  
honorable discharge and confine-  
ment for five (5) years.  
Penitentiary.

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HOLDING by the BOARD OF REVIEW  
GOFF, BOROM and SKINNER  
Officers of The Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding to The Judge Advocate General, under the provisions of Article of War 50a

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

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

Specification: In that Recruit Robert L Garner, 736th Engineer Heavy Shop Company, APO 503, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 30 September 1948, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Policeman Yasuo Yamashita, one pistol, the property of the Japanese Government, value of less than \$20.00.

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

Specification 1: In that Recruit Robert L Garner, 736th Engineer Heavy Shop Company, APO 503, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 30 September 1948, wrongfully strike Policeman Koshio Shimazaki on the body with a policeman's night stick.

Specification 2: In that Recruit Robert L Garner, 736th Engineer Heavy Shop Company, APO 503, did, at or in the vicinity of

Yokohama, Honshu, Japan, on or about 30 September 1948, wrongfully strike Policeman Yasuo Yamashita on the body with a policeman's night stick.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of five previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army might direct as the place of confinement and forwarded the record of trial for appellate review under the provisions of Article of War 50 $\frac{1}{2}$ .

### 3. a. Evidence for the Prosecution.

The accused entered a Japanese police box in Yokohama, Japan, at 0130 hours, 30 September 1948, and asked Yasuo Yamashita, a Japanese policeman on duty there, the whereabouts of a house of prostitution. In response to accused's question Yamashita stated that he did not know the location of any place of ill-repute. When accused took Yamashita by the arm, however, the latter accompanied accused, ostensibly in an attempt to comply with his earlier request. Being unable to locate a house of prostitution the accused went to a sake house, awakened the proprietor, and purchased some intoxicants. The accused and Yamashita returned to the police station where accused poured two cups of the sake he had purchased and instructed Yamashita to drink some of it. Yamashita at first refused but accused forced him to drink by striking him with his fist. Thereafter the accused drank sake to such an extent he appeared to be intoxicated. While in this condition he asked Yamashita to show him his pistol and Yamashita complied (R. 13, 14). Sometime later the accused again asked to see the pistol. Yamashita refused at first but later took the pistol out of the holster and accused grabbed it (R. 15, 23). In explaining the manner of the taking Yamashita stated that the accused had poked him about the chest and shoulders, prior to the time he relinquished possession of the weapon. Once accused had obtained the pistol he and Yamashita proceeded to a room in the rear of the police station where the accused awakened two other policemen by striking them with a police stick. Accused then ordered the three policemen to stand in a line with their hands out in front of them so that he could secure their hands (R. 14, 17, 25, 26). When Yamashita told the accused that there were no ropes in the office, accused and the three Japanese policemen returned to the front office. The accused then forced the other two Japanese policemen to join in the drinking party (R. 14, 15). When the four had consumed the remainder of the sake the accused had purchased earlier, accused attempted to induce the policemen to procure more sake. When they refused accused fired one shot from the pistol. All three of the policemen then accompanied

the accused on a second venture to purchase more sake. Upon procuring more sake, the accused and the three policemen returned to the police station and continued to drink (R. 14, 25).

At approximately 0500 hours when the last of the sake was gone the accused left and proceeded to a nearby barber shop. There he placed the pistol upon the shelf and sat down in the barber chair. While seated in the barber shop, a sergeant from the military police arrived and apprehended the accused who offered no resistance to the arrest (R. 11-15, 25). The military policeman recovered the pistol which was subsequently identified as the weapon carried by Policeman Yamashita and owned by the Yokohama Police Department (Pros. Ex. 1; R. 16).

In response to questions of defense counsel as to why he did not shoot to protect himself against the assaults committed by accused with the night stick, Yamashita testified that he did not think that he should shoot a member of the occupation force. Yamashita also explained that there was a cord attached from the shoulder to the pistol which he did not release, but which he felt had been cut by the accused with a knife or something after he grabbed the pistol (R. 15, 22). In addition, Yamashita testified that during the four hours of "forcings" by accused, he did not attempt to call headquarters because his telephone was out of order. Yamashita was unable to explain why he did not attempt to speak in the Japanese language to the storekeeper from whom the sake was purchased in an effort to obtain assistance (R. 21-23). Toshio Shimazaki, one of the policemen awakened by accused likewise could not explain why he did not report accused's conduct to the proprietor of the sake shop while making purchases.

b. Evidence for the Defense.

The military policeman who arrested accused testified upon recall that the pistol taken from accused's possession in the barber shop was an automatic pistol and that when he unloaded the weapon there were four rounds in the magazine but none in the chamber. He also stated that when an automatic pistol is fired the round is automatically put in the chamber of the gun. There were no signs of abuse or bruises found upon the three policemen when they were examined at the Yokohama Command police station nor did any of these Japanese complain at that time that they had been abused by the accused (R. 30).

Haru Nakayama, the proprietor of the wine shop, testified that he was awakened by a soldier during the early morning hours of 30 September and that the soldier purchased wine. About an hour later the soldier returned to the shop with a Japanese policeman who had a gun on his hip and they bought some more wine. About an hour later, the soldier, in

the company of a different Japanese policeman, again awakened him and bought some more wine. This policeman did not have a pistol on his hip and he did not see the soldier with a pistol. About an hour and a half later, the soldier returned by himself and wanted some more wine and this time the soldier had a pistol in his pocket. On this occasion Nakayama was out of wine and when he informed the soldier of that fact the soldier asked him to take him to a barber whereupon Nakayama complied with the soldier's request (R. 32, 33).

After being advised of his rights the accused elected to remain silent (R. 37).

4. The evidence adduced is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge II. The only question presented for determination by the Board of Review concerns the legal sufficiency of the evidence to support the findings of guilty of the Specification of Charge I and Charge I and the sentence. Robbery is defined in paragraph 149 of the Manual for Courts-Martial, 1928, as the:

"taking with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."

It is further provided:

"The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking."

and that:

"Where an article is merely snatched out of another's hand \* \* \* and no other force is used and the owner is not put in fear, the offense is not robbery."

Of similar import is the recent case of CM 328009, Boldon, May, Hayes, McCray and Sneed, 76 BR 255, wherein the Board of Review stated:

"In the instant case the accused 'snatched' the weapon from the guard. No other force was used to obtain the weapon and it was not until accused had obtained control of the carbine and placed a live round in the chamber that the guard was placed in fear. It thus appears that force and violence were not used in the taking and that accused was not put in fear until the taking was accomplished. The instrument subsequently used to put the guard in fear was the subject of the alleged robbery and its taking could not therefore be contemporaneous with placing the guard in 'fear'."

In deciding the above case the Board of Review set forth the following comment from the case of Rouff v State (Ark.), 34 S.W. 262, 263:

"\* \* \* We need not discuss the authorities further, for there are numerous cases holding that where the property is obtained by artifice, trick, or by merely snatching from the hand, and where the only display of force is used to prevent the retaking of the property by the owner, the crime is not robbery. *Thomas v. State*, 91 Ala. 36, 9 South. 81; *Shimm v. State*, 64 Ind. 423; *State v. John*, 5 Jones (N.C.) 163; *State v. McCune*, 70 Am. Dec. 176, and note; *Rex v. Harman*, 2 East. P.C. 736; 2 Bish. New Cr. Law, Sec. 1167; 1 Whart. Cr. Law, Sec. 854. In this case the money was obtained by snatching from the hand. There was no force, or display of force, or putting in fear, until Holt drew his pistol to prevent Morgan from leaving the car with the money. Morgan then drew his pistol, but this was done, not to force Holt to surrender the possession of the money, for he had already parted with it, but only to prevent him from regaining possession. The proof, we think, clearly shows that Routt and Morgan were guilty of larceny, but it is not sufficient to sustain a conviction of robbery." (CM326843, Hamilton, et al., 75 BR 331, 335; CM 328009, Boldon, et al., 76 BR 255; see also CM 209074, McCausland, Blankenship, 9 BR 63).

In the instant case the evidence shows that the victim lifted the flap of his holster and took the pistol out and showed it to the accused. The accused then grabbed the pistol. The victim was an armed policeman. Even though the victim is a member of a conquered race he either knew or should have known he had nothing to fear from the occupation authorities if he resisted or refused to surrender his pistol. He was fully aware of the prior disorderly action of the accused. Considered from reasonable and common experience, the intimidation was not of such character that it was likely to induce a peace officer to give up his weapon against his will. Satisfactory proof of the elements of force or fear is not found in the evidence. The testimony of the victim, as to his mere belief that the lanyard was cut, thereby severing the pistol from his person, was pure conjecture. After considering all of the evidence, the accused's intoxicated condition and the fact that accused spent nearly four hours with the policeman before he walked away at dawn, when all of the available sake was consumed, we conclude that the evidence is not convincing that accused committed the offense of robbery. Where the proof is uncertain and the legal ground is so highly technical, as in this case, that the margin is very narrow between the offenses of robbery and larceny the doubt should be resolved in favor of the accused by inclining to the lesser offense.

We are, therefore, of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of Charge I and its Specification, as involves a finding of guilty of the lesser included offense of larceny of property, less than \$20.00 in value.

5. The maximum sentence to confinement authorized by paragraph 104c of the Manual for Courts-Martial for the offenses of assault and battery involved in Specifications 1 and 2, Charge II is six months for each specification, and the maximum confinement authorized for the lesser included offense of larceny involved in the Specification of Charge I is six months, since the value of the property was not shown and it must be assumed that the property was of some value less than \$20. Neither of the offenses of which accused was found guilty or the lesser included offense of larceny of property of a value of less than \$20 being an offense of a civil nature and punishable by penitentiary confinement for more than one year by statutes of the United States of general application within the continental United States or by law of the District of Columbia, confinement in a penitentiary is not authorized.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Charge I and Specification thereunder as involves a finding that accused did, at the time and place alleged, feloniously take, steal and carry away one pistol, value of less than twenty dollars, the property of the Japanese Government, legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge II and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months at a place other than a United States penitentiary, reformatory or correctional institution.

Alfred H. Greger Staff, JAGC

L. L. Brown, JAGC

W. Skinner, JAGC

23 APR 1949

CSJAGQ - CM 334105

1st Ind

J.A.G.O., Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Yokohama Command, APO 503,  
c/o Postmaster, San Francisco, California

1. In the case of Recruit Robert L. Garner (RA 19254369), 736 Engineer Heavy Shop Company, APO 503, I concur in the foregoing holding by the Board of Review. Under Article of War 50<sup>a</sup>(3) this holding and my concurrence vacate so much of the finding of guilty of the Specification, Charge I as involves a finding of guilty of the words "by force and violence and by putting him in fear" and so much of the sentence as is in excess of dishonorable discharge, total forfeitures and confinement at hard labor for one year and six months at a place other than a United States penitentiary, reformatory or correctional institution.

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

(CM 334105).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl.  
R/T



DEPARTMENT OF THE ARMY  
In the Office of  
The Judge Advocate General's Corps

(123)

CSJAGK - CM 334145

2 FEB 1949

UNITED STATES )

HEADQUARTERS FIFTH ARMY

v. )

Private First Class ROBERT G.  
ANDERSON (37322204), 5012 Area  
Service Unit, Station Complement,  
Casual Detachment (Pipeline Army),  
Fort Sheridan, Illinois. )

Trial by G.C.M., convened at Fort  
Sheridan, Illinois, 3 June 1948  
and 17 September 1948. Dishonor-  
able discharge (suspended) and  
confinement for two (2) years.  
Disciplinary Barracks.

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HOLDING by the BOARD OF REVIEW

SILVERS, SHULL and LANNING,

Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the above named soldier has been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. Accused was tried on 3 June and 17 September 1948 upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Robert G. Anderson, Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline Army), then Company F, 165th Infantry Regiment, Okinawa, Ryukyu Islands, Private First Class, did, at Okinawa, Ryukyu Islands, on or about 11 April 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Minneapolis, Minnesota, on or about 7 April 1948.

The accused pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until

the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Milwaukee, Wisconsin, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 364, Headquarters Fifth Army, Chicago, Illinois, dated 2 December 1948.

3. The only question requiring discussion is whether the court was legally constituted.

4. By first indorsement dated 4 May 1948 the charges in this case were referred for trial to a general court-martial appointed by paragraph 4, Special Orders No. 86, Headquarters Fifth Army, Chicago, Illinois, 30 April 1948. On 3 June 1948, the court referred to convened at Fort Sheridan, Illinois, for the trial of the accused with the following members present:

"Col Frank A. Heywood 05201 QMC, Hq Fifth Army, Chicago, Ill  
Col Hubert B. Bramlet 010689 IGD, Hq Fifth Army, Chicago, Ill  
Col Eugene A. Kenny 018193 Sig C, Hq Fifth Army, Chicago, Ill  
Lt Col Israel B. Washburn 029493 FA, Hq Fifth Army, Chicago, Ill  
Maj James S. Carpenter 042622 AGD, Hq Fifth Army, Chicago, Ill  
Capt Jack B. Richmond 043519 CMP, Hq Fifth Army, Chicago, Ill  
Capt Robert L. Haines 039994 TC, Hq Fifth Army, Chicago, Ill  
Capt Lawrence W. Hunt 0522011 JAGD, Law Member, Hq Fifth  
Army, Chicago, Ill  
Capt Thomas S. Rankin 0534771 FA, Hq Fifth Army, Chicago, Ill."

After the court had been properly organized and the members thereof sworn, the accused was duly arraigned. Evidence was presented and during the course of the trial, upon motion of the defense counsel, the court granted the accused a continuance and adjourned to meet at the call of the President.

On 30 August 1948, a court was appointed by paragraph 15, Special Orders No. 170, Headquarters Fifth Army, which order was amended by paragraph 11, Special Orders No. 180, dated 14 September 1948. Special Orders No. 170 contained the following paragraph:

"All charges on which there has been no arraignment, now in the hands of the TJA of the GCM aptd to meet at Fort Sheridan, Ill, by par 4 SO 86, this hq cs, and par 9 SO 150, this hq cs, for trial, are withdrawn from said TJA and referred for trial to the TJA of the above-named court."

This court met on 17 September 1948 for the trial of the accused. The trial judge advocate announced that this case had been continued from an earlier date, and that this court was now convened pursuant to paragraph 15, Special Orders No. 170, Headquarters Fifth Army, dated 30 August 1948, as amended by paragraph 11, Special Orders No. 180, same headquarters, dated 14

September 1948.

The members present at the organization of this court were:

"Col James T. Watson, Jr. 07462 Sig C  
Col Eubert B. Bramlet 010689 CmlC  
 Col Ernest R. Brock 090289 FD  
 Maj Arthur W. Janklow 0230301 JAGD, Law Member  
 Maj Henry Byorum 0346585 Cav  
 Capt Anthony Greenhaw 0920347 TC  
 1st Lt Maurice B. Vaughn 01C10196 Inf"

After the accused was afforded the opportunity to challenge, the record of trial recites: "The members of the court, with the exception of Colonel Bramlet who was previously sworn, and the personnel of the prosecution were then sworn" (R 24,25).

#### 5. Discussion

The court-martial appointed by Special Orders No. 86, paragraph 4, Headquarters Fifth Army, Chicago, Illinois, dated 30 April 1948, is hereinafter referred to as Court No. 1. The court-martial appointed by Special Orders No. 170, paragraph 15, Headquarters Fifth Army, Chicago, Illinois, dated 30 August 1948, as amended by Special Orders No. 180, paragraph 11, same Headquarters, dated 14 September 1948, is hereinafter referred to as Court No. 2.

It is noted that the orders appointing Court No. 2 had incorporated therein a provision to the effect that all charges, on which there had been no arraignment, were withdrawn from courts appointed by "par 4 SO 86, this hq cs, and par 9 SO 150, this hq cs," and were referred for trial to the trial judge advocate of Court No. 2. Inasmuch as accused had already been arraigned before Court No. 1, it is apparent that the charges against accused were never properly withdrawn from Court No. 1 and referred for trial to Court No. 2. Such irregularity may not however, in itself, have been fatal to the proceedings, but it is noted that Colonel Hubert B. Bramlet, the only member who was appointed and served on both courts, although sworn as a member of Court No. 1, was not sworn as a member of Court No. 2 which completed the case. The Manual for Courts-Martial, 1928, provides:

"The prescribed oaths must be administered in and for each case and to each member \*\*\* before he functions in the case as such." (MCM, 1928, par 95)

Article of War 19 provides in part that the members of a general court-martial shall be sworn "before they proceed upon any trial."

It is apparent from an examination of the record that Colonel Bramlet

was not sworn as a member of Court No. 2 upon the theory that the latter proceedings were a continuation of those had before Court No. 1. The order appointing Court No. 2 however shows explicitly and in plain terms that the court-martial thereby appointed was a court de novo, complete and independent of Court No. 1.

It cannot justifiably be assumed, therefore, that the membership of Court No. 2 was a mere addition to the personnel of Court No. 1. Inasmuch as it is mandatory that each of the members of a general court-martial be sworn before they proceed upon any trial in and for each case, it follows that the failure to swear Colonel Bramlet as a member of Court No. 2 was error, the effect of which was to render Court No. 2 illegally constituted and its findings and sentence are without legal effect. (For similar holdings see CM 317630, Richey, 66 BR 397 and CM 317901, Jakrzewski, 67 BR 73.)

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

Christie D. Siloub, J.A.G.C.  
Lewis F. Hull, J.A.G.C.  
Harley A. Lanning, J.A.G.C.

CSJAGK - CM 334145

1st Ind

10 FEB 1949

JAGC, Department of the Army, Washington 25, D. C.

TO: Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Private First Class Robert G. Anderson (37322204), 5012 Area Service Unit, Station Complement, Casual Detachment (Pipeline Army), Fort Sheridan, Illinois, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding, together with my concurrence, vacates the findings of guilty and the sentence. Although there is a possibility that should the case now be returned to the original court to which it was first referred for trial, for completion of its proceedings, including findings and sentence, the record might be held legally sufficient, in view of the numerous legal questions that might arise, such action is not deemed advisable.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 334145).

2 Incls

1. Record of trial
2. Draft of GCMO



THOMAS H. GREEN  
Major General  
The Judge Advocate General



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(129)

APR 29 1949

CSJAGH CM 334233

UNITED STATES	)	TRIESTE UNITED STATES TROOPS
	)	
v.	)	Trial by G.C.M., convened at
	)	Trieste, Free Territory of
First Lieutenant ERIC L.	)	Trieste, 18 October, 8 and 9
GREENFIELD, O-436355, Head-	)	November 1948. Dismissal,
quarters Trieste United	)	total forfeitures, and confine-
States Troops.	)	ment for one (1) year.

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ, and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Eric L. Greenfield, 7899th School of Standards Detachment, then assigned 313th Engineer Combat Battalion, did, at Trieste, Italy, on or about 1 February 1947, wrongfully dispose of by selling about 17,500 board feet of used lumber, value of about \$875.00, property of the United States furnished and intended for the military service thereof.

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

3. Evidence for the prosecution.

Evidence adduced in support of the offense of which the accused has been found guilty shows that he is a member of the military service and had been assigned as Utilities Officer, 313d Engineer Combat Battalion, during the period 16 November 1946 to 25 May 1947 (R 79,80,133; Pros Ex 1).

In the spring months of 1947, the accused served as assistant to Major Victor C. Gray, CE, the Area Engineer and Trieste Engineer, in addition to performing his regularly assigned duties with his parent organization. In this capacity, the accused and a Lieutenant Robertson, the Commanding Officer of the Prisoner of War Barracks at Dolegnano, Italy, were given orders by Major Gray to remove to Trieste all materials suitable for use from the Dolegnano barracks which were to be dismantled. Included in such materials was an estimated 40,000 to 50,000 board feet of lumber, or about 13 to 17 Army 2½ ton truckloads, all the property of the United States (R 67,68,71,166). The lumber ordered transported to Trieste was to be sent to the Engineer Service Depot, to some specific project or to an installation known as the Roiano Barracks for storage. The latter installation, which was in or near Trieste, had been taken over from the British by the United States Army. German prisoners of war, otherwise known as "Surrendered Enemy Personnel," were quartered at Roiano Barracks and, for a time, were under the accused's command (R 68,77,134). Their vehicles, supplies, and equipment, as well as all material stored there, were the property of the United States (R 68,69, 76,134,166).

In February or March 1947, a female Italian civilian named Seniors Pia Ester Valloscuro Cimiotti, but commonly referred to simply as "Pia," conversed with the accused concerning the project of dismantling the barracks at Dolegnano, particularly with reference to the matter of disposing of the lumber therefrom (R 36,37,60).

As a result of this conversation with the accused, Pia had gone to the "Bar Italia" where she was introduced to a civilian by the name of Alfredo Trisolini. The latter indicated that he might purchase the lumber after he had the opportunity of seeing it (R 37).

With reference to the lumber transaction after Pia's conversation with Trisolini, and apparently after some of the lumber had been transported from Dolegnano, Pia testified:

"\* \* \* Then we went to the Roiano Barracks. He [Trisolini] saw the lumber there and he spoke to Lieutenant Greenfield. They agreed

upon the price. Then we stepped into a car. Myself, the Lieutenant and this gentleman stepped into a car. and we went to store the lumber on his place. Afterwards we went to an inn and there the money was given, I don't know how much -- I don't remember correctly how much it was." (R 37,38).

Concerning the same incident Trisolini testified:

"I know Lieutenant Greenfield through Miss Pia who introduced him to me in this bar in the center of the city, exactly in Piazza Goldoni. Miss Pia asked me if I wanted to buy some firewood. I asked her what kind of wood was it and she told me that it was old lumber coming from dismantled German military barracks. I went to a meeting and exactly at 3:00 o'clock we went all together to the Roiano Barracks, where Pia told me at that time Lieutenant Greenfield was the commanding officer of the barracks. When we arrived at the barracks Pia asked the sentry, the soldier on guard, for Lieutenant Greenfield, and he was called down. When Lieutenant Greenfield came we entered into the Barracks' grounds and inside the yard there were lying seven big GMC trucks loaded with lumber. When I saw the lumber I actually noticed that its origin was all dismantled barracks and I asked the lieutenant how much he wanted. We dealt a little bit about this transaction and we agreed I would pay around 54,000 - 56,000, and they in return would have accompanied me as far as the place where this lumber was going to be unloaded. Then myself, the lieutenant and the driver and Pia stepped into a jeep. We went in front of the column, crossed the city, went close to the place where I lived, and there we unloaded the lumber. After the lumber was unloaded I paid Lieutenant Greenfield the agreed price. I bought a drink for the drivers and I left the lumber outside because I didn't have a covered place where to store it." (R 60)

On the Sunday following the sale and delivery of the lumber to Trisolini another discussion took place at Dolegnano between Pia and accused. According to Pia, she and the accused observed lumber on the ground (R 37,44,51). At that time, the lieutenant in charge at Dolegnano who was also present stated to the accused and Pia that the lumber was to be sold and the sum of one million lire had been offered for it. Thereupon, the accused asked Pia if she could find a buyer in Trieste who would pay a better price "... like I [Pia] had got for a previous sale of lumber" (R 36,37,43,44).

Pia further related that eight or nine loads of the lumber were sold to Trisolini in her presence and two or three loads were sold

when she was not present (R 38,42). Further, the accused was paid 50,000 or 60,000 lire for the lumber she assisted in delivering, and probably 20,000 or 30,000 for that subsequently sold to Trisolini (R 39). Trisolini testified that he paid the accused the sum of 24,000 lire for the four truckloads of lumber last mentioned. There are about 3000 board feet of lumber in a  $2\frac{1}{2}$  ton Army truckload (R 68).

On 4 or 5 March 1947, Antonio Grubissa, Via Sette Fontaine No. 97, Trieste, a coal dealer, purchased eighty one (81) quintals and a twenty-five (25) kilos (or 17,912 pounds) of lumber from his family acquaintance, Alfredo Trisolini, who lived near him in Trieste. Grubissa paid Trisolini the sum of 62,000 or 63,000 lire for the lumber, which appeared to be from a dismantled barracks (R 54,55,57,62,63). Grubissa kept the lumber for several months. Most of it was cut up for firewood (R 58).

First Lieutenant Robert H. Allen assumed the duties of "Trust" Engineer Supply Officer on 18 January 1947. In that capacity he was in charge of the Engineer Supply Depot in Trieste. According to Lieutenant Allen, the lumber from the dismantled barracks at Dolegnano was sent to either the carpenter shop at Warehouse 17 in the old dock area, or to the Roiano Barracks area. None of this lumber, however, was delivered to the engineer lumber yard under his charge (R 82,83). On one occasion Lieutenant Allen had dispatched ten  $2\frac{1}{2}$  ton trucks to Dolegnano at Lieutenant Robertson's request, ostensibly for the purpose of transporting some of the material (R 85). It was not until the Spring of 1948 that Major Gray learned that some of the lumber from the dismantled barracks at Dolegnano had been misplaced, lost or stolen (R 74).

According to Lieutenant Allen new lumber of the type used in the Dolegnano project was worth .05 cents per board foot in September of 1945 and 11.1 cents in 1947. The value of the used lumber was apparently one-half that of new lumber but reclaimed lumber or dunnage is generally accounted for at the basic price of new lumber (R 81,86).

#### 4. Evidence for the defense.

Elena Miserca, an Italian civilian residing in Trieste, testified that in the Spring of 1947 she had received the sum of approximately 25,000 lire from Captain Von Rott, her German fiance, who was in charge of the other Germans at Roiano then under the accused's command. This money was for the purpose of purchasing dye in Milan for the prisoners at Roiano barracks (R 88,89,92,95,101). Actually, these prisoners of war or surrendered enemy personnel were not permitted to have any money (R 105). Miss Miserca further narrated her version of a meeting at

at Miramare Castle between the accused, Boscolo, Pomorrici, and Pia shortly before the trial (R 10,91,93,94-96,98). At such meeting Pomorrici, an attorney, purportedly demanded 50,000 lire from the accused on behalf of Boscolo (R 91,92).

Gino Boscolo, the Italian civilian mentioned by Miss Miserca testified that Captain Von Rott purchased about three truckloads of lumber from him, which was transported from his warehouse in a truck of United States Army type (R 102-104,106,108,110). Boscolo similarly related his version of the meeting with the accused at Miramare Castle. This meeting allegedly resulted from a statement by the accused to the effect "that Boscolo should be fixed up" because of expenses Boscolo had incurred for meals, "spirits," and race track losses while waiting to be called as a witness for accused. Pomorrici, according to Boscolo, advanced him the money for these expenses (R 112-114,116). It was for the purpose of collecting this money that the four Italian civilians had made the trip to Miramare (R 112-117). Boscolo was not interested in a paper concerning payment of the 50,000 lire which Pomorrici had taken to the accused to sign (R 117).

In connection with the meeting between the accused and the four civilians at Miramare, Private Reynold E. Syx, Headquarters Trust, testified that he was requested to conceal himself and listen to the conversation at the Castle. In the words of this witness:

"I could hear two men speaking in Italian and I didn't understand. I wasn't close enough to hear what they were saying, and I heard Lieutenant Greenfield talking and the girl answering, but couldn't make out what she was answering. I heard Lieutenant Greenfield say once, 'No, I won't sign the paper,' and once more repeat, 'No, I can't sign the damned thing.'" (R 121)

Private Syx heard the sum of five hundred dollars mentioned and also the words, "tenente stupido" (translated "stupid lieutenant"), when the two men in the party were speaking together (R 121,122).

Alfredo Pomorrici, a defense witness, gave substantially the same account of the Miramare Castle incident as did the other Italian witness (R 124,125). Pomorrici volunteered the opinion that the accused was "absolutely innocent" and gave this as his reason for having made his alleged advances to Boscolo (R 126). Pomorrici testified further that Captain Von Rott purportedly owes Boscolo 20,000 - 30,000 lire (R 130, 131).

After being advised of his rights the accused elected to make a sworn statement. He testified that when he first came to Trieste on 23

January 1947 he was in charge of the German prisoners of war who were working at the 7th Station Hospital (R 133). These prisoners were moved into Roiano Caserma about 22 February 1947. There he was the motor officer and in charge of prisoners of war. Soon after his arrival some loads of lumber arrived from Dolegnano. The soldier in charge of the load told accused that he was told to bring the lumber to Roiano where accused would tell him what to do with it (R 134). Accused stated that he ordered the lumber to the Engineer Lumber Depot and that he had no reason to believe that it did not get there (R 135). Accused denied selling any lumber, more particularly the seven loads, or the four loads in issue (R 141,143,145). He specifically denied selling lumber to or collecting any money from Trisolini (R 145). The accused stated, however, that while Pia Cimiotti and he were having dinner one evening, she told him that the lumber had been sold to Trisolini and requested that he divide the proceeds of the sale of lumber with her (R 135). The accused and Pia then went to see Trisolini, who Pia claimed had the lumber. Accused saw some lumber and recognized it as some which had been on the trucks at Roiano (R 135). The lumber was United States government property and, in the ordinary course of events, it would have gone to the Engineer Depot for further use in the government service (R 166,167). Trisolini told him he bought it from some Germans (R 135). Accused ordered the lumber returned. Accused called the Roiano Caserma and talked with Captain Von Rott, the German in charge, and ordered him to pick up the lumber and bring it back (R 144). Later, the same evening, the accused returned to Trisolini's place and observed the lumber was gone (R 136). When the accused thereafter saw Von Rott, the latter informed him that the lumber had been transported to the Engineer Depot (R 144). The accused denied that he ever sold any lumber, or that Trisolini had ever given him 54,000 or 56,000 lire for seven truckloads of lumber (R 143). He further denied that he had ever loaned Von Rott 80,000 lire or any money to pay for lumber (R 150). He did admit he had given Von Rott several hundred lire and that he had been with Von Rott during the intermission of an Italian opera (R 151). The accused further testified that one Boscolo, an Italian civilian, had demanded 35,000 lire from him shortly after 18 October 1948 and stated that he would testify against accused if not paid (R 162). Again on 8 November 1948, he had a meeting with Boscolo who demanded money for testifying for accused, which was refused (R 163).

In a deposition taken by the defense, but introduced by the prosecution in rebuttal, Albrecht Von Rott stated that he had known the accused since October 1946, and about the end of February of 1947 he had purchased eight or ten tons of lumber from an Italian named "Bosco" for about 60,000 lire. The accused furnished him the money to pay "Bosco." Two or three Germans loaded the lumber and a German driver transported it.

The lumber, three or four truckloads in all, was hauled to Roiano Barracks and dumped there outside the camp limits, ostensibly to impress buyers. The accused sold this lumber to a middle-aged Italian for the sum of approximately seventy thousand lire. Either the accused or Pia received the money from the sale (R 169; Pros Ex 2).

5. The specification of which the accused has been found guilty alleges that on or about 1 February 1947, he wrongfully disposed of by selling about 17,500 board feet of used lumber, value about eight hundred seventy-five dollars (\$875.00), property of the United States, furnished and intended for the military service thereof. The offense is charged under the 94th Article of War.

Proof required in support of this offense includes:

"(a) That the accused sold or disposed of certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof; (c) the facts and circumstances of the case indicating that the act of the accused was wrongfully or knowingly done, as alleged; and (d) the value of the property, as alleged." (Par 150i, MCM 1928, p.185. See also par 181i, MCM 1949, p.253).

Evidence adduced to establish the offense in the instant case as above defined, shows that during the early months of 1947, the United States Army engineer for the Trieste area issued an order that the barracks at Dolegnano be dismantled. The accused and another American lieutenant were given the assignment of having transported to Trieste from Dolegnano whatever material from the barracks was usable. In the month of February of 1947, Pia Cimiotti, a friend of the accused, obtained at the accused's request, a buyer for some of the lumber from the barracks in the person of one Trisolini, an Italian civilian. Trisolini, Pia and the accused met at the Roiano Barracks in or near Trieste, where the used lumber from the Dolegnano Barracks was observed loaded on some seven Army type trucks. Following Trisolini's agreement to pay the accused 54,000 - 56,000 lire for the lumber, the accused, Pia and Trisolini accompanied the truck convoy to premises designated by Trisolini. There the lumber was unloaded. Trisolini paid the accused between 50,000 and 60,000 lire for this lumber. Later, Trisolini gave the accused about 24,000 lire in payment for an additional four loads of used lumber.

The testimony of Major Gray and Lieutenant Allen, together with the accused's own admissions before the court, clearly establishes that

the lumber obtained from dismantling the barracks was the property of the United States. Their testimony, and particularly that of the accused, shows that the used lumber was to be employed by the Army primarily for building purposes. It follows that the lumber was furnished and intended for the military service. The use to which the civilian purchaser subsequently put the property is of no legal consequence.

Considered in the light of accused's rank and military assignment, the facts and circumstances relating to the sale of the lumber to Trisolini clearly negate any reasonable hypothesis that the accused's acts were not wrongfully and knowingly done, as alleged. "In assuming to dispose of Government property without authorization accused acted at his peril. \* \* As an Army officer of considerable experience, he must have known he had no right to dispose of Government property." (CM 302887, Garner, 59 BR 143).

In so far as relates to the value of the lumber, computed at the minimum figure permitted by the evidence, namely .025 cents per board foot, we find the 17,500 board feet involved to have had a value of approximately six hundred thirty-seven dollars (\$637.00).

Having thus determined that the record contains competent evidence establishing every element of the offense of which the court-martial has found the accused guilty, it is equally the duty of the Board of Review in its adjudication of the case to weigh the evidence, to judge the credibility of the witnesses, and to determine controverted questions of fact (CM 328279, MacLeod, 77 BR 43; CM 330733, Moran, 79 BR 151; AW 50(g), Public Law 759, 80th Congress). In performing this function in connection with the instant case, it appears that the only real controversy relates to whether the accused actually participated in the sale. The weight of the evidence undisputably establishes that Trisolini had procured, and was in possession of, a substantial amount of used lumber, which had been furnished for use in the military service. The controversy presented by the record in this regard, then, centers around the questions of, from whom and in what manner did Trisolini obtain this lumber. To establish that the lumber, in the amount alleged, was sold to Trisolini by the accused, the prosecution introduced the alleged purchaser, Trisolini and another Italian civilian, Pia. These witnesses testify that they were physically present and actually participated with the accused in the sale and the delivery of the lumber. Both testify as to the payment to the accused of 50,000 to 60,000 lire following the delivery of the first lot of the lumber, and also as to the sale and payment to the accused for the second lot of three or four loads of used lumber. All of this was vehemently denied by the accused while testifying in his own defense. Mindful that the witness Trisolini and Pia likewise appear to share criminality in the

venture along with the accused, according to their own testimony, and fully cognizant of precedents holding that testimony from such persons should " \* \* \* be considered very carefully and should be scrutinized with the utmost circumspection" (United States v. Wilson, 154 F2d 802; see also Caminetti v. United States, 242 U.S. 470), we are, nevertheless, impressed with the similarity of Pia's and Trisolini's version of the sale, yet the seemingly unrehearsed character thereof. To lend support to the corroborative accounts of these two principal witnesses relative to the transaction, the record contains the unchallenged testimony of Grubissa, the fuel dealer, to the effect that he purchased from Trisolini, the same approximate amount and kind of lumber Trisolini claims to have purchased from the accused. Also corroborative of the physical facts testified to by Pia and Trisolini are the judicial admissions of the accused. These relate to his admittedly observing the lumber in Trisolini's possession upon investigating statements made to him by Pia concerning Trisolini's alleged purchase of lumber. From the accused's own testimony also, we must conclude that the lumber in Trisolini's possession had been delivered to the latter in United States Army type trucks operated by surrendered enemy personnel.

Although the accused insists he had no knowledge of the sale to Trisolini, as has been previously stated, he admitted seeing what he concedes to be a substantial amount of property of the United States in the possession of an Italian civilian. Notwithstanding this discovery which allegedly resulted from his investigation of an irregularity, the accused made no report to law enforcement officials. In lieu of making a report he claims to have reprimanded the German under his charge at Roiano Barracks, and the German drivers, for transporting the lumber to Trisolini. Accused's profession of such inadequate action is not credible, but less worthy of credence is his professed inaction in recovering the lumber for the government. Also, accused's version of the transaction is contradicted in most all material details by Captain Von Rott's deposition which had been solicited by the defense. Consideration of the circumstance that the property involved was taken to its purchaser by government transportation from a government installation under the charge of accused leads us to the conclusion implicit in the court's findings of guilty, that accused's testimony is fiction improvised for the occasion upon which it was given.

6. Records on file in the Department of the Army show that the accused is 29 years of age, married, and the father of one child. He was graduated from the Ware High School, Ware, Massachusetts, in 1938 and from the Massachusetts State College with a Bachelor of Science degree in Engineering in 1942. As a result of R.O.T.C. he was appointed a second lieutenant, Cavalry Reserve, on 17 May 1942, and he entered on active duty on 27 May 1942. He was promoted to first lieutenant 27 April 1945. He served with the Corps of Engineers in the Mediterranean Theater of Operations for 34 months prior to reverting to inactive

status on 19 February 1946. He is authorized the FAME Service Ribbon with one Bronze Service Star for the Rome-Arno Campaign. He was recalled to active duty on 31 July 1946 and has served overseas on his present tour of duty since 22 October 1946. His efficiency ratings include eight (8) ratings of "Excellent," and three (3) of "Very Satisfactory."

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal, total forfeitures and confinement at hard labor for one year is authorized upon conviction of a violation of Article of War 94.

Wilbert T. Baughman, J.A.G.C.  
Charles J. Berkowitz, J.A.G.C.  
J. J. Davis, J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

CM 334233

THE JUDICIAL COUNCIL

Brannon, Shaw, and Harbaugh  
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant

Eric L. Greenfield, O-436355, Headquarters Trieste  
United States Troops, with the concurrence of The  
Judge Advocate General the sentence is confirmed  
and will be carried into execution. The United  
States Disciplinary Barracks or one of its branches  
is designated as the place of confinement.

Franklin P. Shaw

J.L. Harbaugh, Jr.

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Franklin P. Shaw, Brig. Gen. JAGC

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J.L. Harbaugh Jr., Brig. Gen. JAGC

E.M. Brannon

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E.M. Brannon Brig. Gen. JAGC  
Chairman

15 June 1949

I concur in the foregoing action.

Thomas H. Green

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THOMAS H. GREEN  
Major General  
The Judge Advocate General

17 June 1949.



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(141)

10 FEB 1949

CSJAGH CM 334270

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

v.

Captain RICHARD STRICKLIN,  
O-450317, Finance Department,  
6103 Army Service Unit, Branch  
United States Disciplinary  
Barracks, Camp Cooke, California.

HEADQUARTERS FORT ORD CALIFORNIA

Trial by G.C.M., convened at  
Fort Ord, California, 15-18  
November 1948. Dismissal,  
total forfeitures, and confine-  
ment for ten (10) years.

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

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

Specification: In that Captain Richard Stricklin, 6103 Army Service Unit, Branch United States Disciplinary Barracks, Camp Cooke, California, being at the time the Class "B" Agent Finance Officer at Camp Cooke, California for Colonel J. Harris, Finance Officer, United States Army, Los Angeles, California, did, at Camp Cooke, California on or about 8 October 1948, with intent to deceive the said Colonel J. Harris, made an official written report to the said Colonel J. Harris to the effect that on or about 8 October 1948 he, the said Captain Richard Stricklin, had returned and deposited to the official credit of the United States money in the amount of fifty-eight thousand nine hundred ninety-six dollars and four cents (\$58,996.04) with the Bank of America National Trust and Savings Association, Lompoc Branch, Lompoc, California, an authorized United States depository, which report was known by the said Captain Richard Stricklin to be untrue.

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

Specification: In that Captain Richard Stricklin, 6103 Army Service Unit, Branch United States Disciplinary Barracks, Camp Cooke, California, being at the time the Class "B" Agent Finance Officer at Camp Cooke, California for Colonel J. Harris, Finance Officer, United States Army, Los Angeles, California, did, at Camp Cooke, California from on or about 20 Sep. 48 to 8 October 1948, feloniously embezzle by fraudulently converting to his own use approximately thirty-nine thousand four hundred and sixty dollars and four cents (\$39,460.04), the property of the United States furnished and intended for the military service thereof, intrusted to him, the said Captain Richard Stricklin, by the said Colonel J. Harris.

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

Specification: In that Captain Richard Stricklin, 6103 Army Service Unit, Branch United States Disciplinary Barracks, Camp Cooke, California, being at the time the Class "B" Agent Finance Officer at Camp Cooke, California for Colonel J. Harris, Finance Officer, United States Army, Los Angeles, California, did, at Camp Cooke, California on or about 8 October 1948, with intent to defraud, falsely sign a certain certificate of deposit in the following words and figures, to wit:

"CERTIFICATE OF DEPOSIT FOR CHECKING ACCOUNT  
Camp Cooke, Calif. 8 Oct. 1948 Deposit No. 12  
(Address of depositor and date sent) (To be filled in by depositor)  
RICHARD STRICKLIN, Capt., F.D. CL"B" Agt. for J. HARRIS, Col., F.D.  
(Name of depositor) (Title including name of Department, or Agency)  
has deposited with BANK OF AMERICA, Lompoc, Branch, Lompoc, Calif.  
(Name of depository bank, or U.S. Treasurer's office) (Place)  
\*\*\*FIFTY EIGHT THOUSAND NINE HUNDRED NINETY SIX AND\*\*\*04 Dollars  
100

For Credit, subject to check, in the Regular disbursing account of  
J. HARRIS, Col., F.D. Symbol No. 212838 \$58,996.04  
(Name of officer to be credited)  
FOUSA, Los Angeles, Calif. SPACE BELOW TO BE USED BY DEPOSITARY ONLY  
(Address)

I certify that the above amount was received  
on \_\_\_\_\_ and subject to verifica-  
tion, will be credited in the account of the  
Treasurer of the United States on the date  
shown below. Amount credited is subject to  
deduction for uncollectible items included therein.  
/s/ Russell J. Johansen  
(Signature and title)

Asst Cash

\_\_\_\_\_  
(Date of credit in U. S. Treasurer's account)

(left side of above form)

TRIPPLICATE

Form 6599 (Revised March 1941)

Treasury Department, Fiscal Service, Treasurer, U. S.

DEPOSITARY WILL DATE, SIGN, AND DELIVER THIS TO THE OFFICER  
WHOSE ACCOUNT IS TO BE CREDITED, OR TO THE DEPOSITOR FOR  
FORWARDING TO THE OFFICER WHOSE ACCOUNT IS TO BE CREDITED"

by forging the name of one Russell J. Johansen as Assistant Cashier of the Bank of America National Trust and Savings Association, Lompoc Branch, Lompoc, California, an authorized United States depository, thereto, a writing of a public nature which might operate to the prejudice of the United States.

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

Specification: In that Captain Richard Stricklin, 6103 Army Service Unit, Branch United States Disciplinary Barracks, Camp Cooke, California, being at the time the Class "B" Agent Finance Officer at Camp Cooke, California for Colonel J. Harris, Finance Officer, United States Army, Los Angeles, California, did, at Camp Cooke, California, on or about 8 October 1948, with intent to defraud, wilfully, unlawfully and feloniously utter as true and genuine an official report in words and figures, to wit:

(Same instrument as set forth in Specification of Charge III).

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

3. a. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Accused is in the military service and is assigned to the Branch United States Disciplinary Barracks, Camp Cooke, California (R 12,13).

On 1 June 1948, Colonel Joseph Harris relieved Lieutenant Colonel A. A. Mozley as United States Army Finance Officer at Los Angeles (R 31, 44). The Finance Officer at Los Angeles disbursed public funds pertaining

to the Army and Air Force in parts of California, Nevada, Arizona, Texas, Oregon, and Washington. Disbursements at Camp Cooke, California, were made by a Class B Agent Finance Officer of the Finance Officer at Los Angeles. Coincidental to Colonel Mozley's relief by Colonel Harris, accused, he had been the former's Class B Agent at Camp Cooke, was appointed Class B Agent for Colonel Harris by verbal order of the Commandant, Branch United States Disciplinary Barracks, Camp Cooke (R 13; Pros Ex 1). At that time accountability for funds in the possession of accused was transferred from Colonel Mozley to Colonel Harris and a receipt in the amount chargeable to him was executed by accused in favor of Colonel Harris (R 44,205).

Fund disbursed by the Finance Officer at Los Angeles were received from the United States Treasury, from transfers from other accountable officers, and from deposits to his account by agent officers. All funds belonged to the United States (R 87,88).

The Finance Officer's Class B Agents are appointed by the Commanding Officer of the military installation they service, but are agents of the Finance Officer (R 88). The Class B Finance Officer makes payments to the troops of the Command to which he belongs. The funds for such payments by the agent officers are received by him from his Finance Officer and from collections which the Agent Officer makes in the name of the Finance Officer, including such collections as those made from sales officers. The funds secured through such collections belong to the United States and the Agent Officer accounts to the Finance Officer for such collections (R 88-90).

The procedures followed in the Los Angeles Finance Office are outlined in War Department Technical Manual 14-500, and Department of the Army Technical Manual 14-505, of which the court took judicial notice. The court's attention was specifically directed to the following provisions of TM 14-505:

"a. RETURNS TO ACCOUNTABLE DISBURSING OFFICER. Class B agent officers will make the necessary returns to the accountable disbursing officer on WD AGO Form 14-49, accompanied by WD AGO Form R-5170 (Letter of Transmittal (fig. 6)) and all paid vouchers, on the 20th day of each month and at such other times as the accountable disbursing officer may direct.

\* \* \*

"c. FAILURE TO MAKE RETURN. Failure of a class B agent officer to render a closing statement and turn over funds and vouchers to the accountable disbursing officer will be promptly reported to the commanding officer of the station where the agent officer operates.

\* \* \*

"f. CLEARANCE OF CLASS B AGENT OFFICER'S ACCOUNT. Accountable disbursing officers will make every effort to clear vouchers paid

by their former class B agent officers through action initiated in the parent office, and will utilize the services of the current incumbent in the class B agent office in cases where personal contact is necessary. Accountable disbursing officers will not attempt to contact their former class B agent officers, after the latter's relief from duty at the stations where they acted as agents, in connection with correction of vouchers, except in those cases where the former class B agent officer's own certificate is all that is required.

### "32. FORMS REQUIRED IN MAKING RETURNS

"a. FORMS PREPARED BY AGENT OFFICERS: When cash and paid vouchers are transmitted to the accountable disbursing officer by the agent officer, he will furnish the accountable disbursing officer an agent's Return of Funds and Statement of Agent Officer's Balance on WD AGO Form 14-49. This form, rendered in duplicate, will be used by all agents in each transaction involving the return of cash, checks, or paid vouchers to accountable disbursing officers. Each transaction will be supported by a true and correct statement, entered in proper columns on the face thereof, of the status of the funds intrusted. Each class B agent will accomplish and render this form as a 'Statement of Balance' on the 20th day of each month, and whenever called upon to do so by the accountable disbursing officer. (AR 35-320)

"b. RECEIPT GIVEN BY ACCOUNTABLE DISBURSING OFFICER. The accountable disbursing officer will receipt to the agent officer for all correctly stated and properly receipted vouchers and cash received from him by an acknowledgment of return of funds and statement of balance on WD AGO Form 14-50. This receipt will be filed with the agent officer's copy of his receipt (WD AGO Form 14-48) to the accountable disbursing officer, so that a complete record of all transactions and cash balances of the agent officer will always be shown. This form will be used by all accountable disbursing officers for each transaction involving the return of cash, check, or paid vouchers and statement of balance. If the immediate issuance of WD AGO Form 14-50 is impracticable, the agent officer will be furnished an advance informal receipt by letter stating that the official receipt will be issued upon completion of audit." (Secs 31a,31c,31f, Sec 32, a, b, TM 14-505) (R 91-96)

The accountable disbursing officer named in these publications is the officer previously referred to in the case as Finance Officer (R 89).

The transactions between the Finance Officer at Los Angeles and his agent officers, and those transactions which affected the agent officers'

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accountability for funds received from and for the Finance Officer, were entered in the cash blotter and agent's subsidiary ledger account maintained in the Finance Office at Los Angeles. The cash blotter was maintained by the cashier of the office under the supervision of First Lieutenant William J. Little, the Deputy Finance Officer of the Los Angeles Office, and was the entire record involving cash disbursed and otherwise accountable. The current blotter was started 1 June 1948 coincident to the assumption by Colonel Harris of the duties of Finance Officer at Los Angeles.

In the course of a workday, documents pertaining to the various cash transactions were entered on a work sheet by the cashier and then sent to the accounting section. At the end of the day the accounting section would furnish Lieutenant Little with a figure which would reflect the office balance at the end of the day. Lieutenant Little would then check to see whether the same balance had been struck on the cashier's work sheet and also count the cashier's cash and documents held as cash. The entries and verified balance for the day would be made in the cash blotter on the following day. The cash blotter reflected the total amount of cash in the hands of the Finance Officer and also in the hands of the Agent Officers. The maintenance of the cash blotter was routine office procedure (R 97-100; Pros Ex 10).

An agent's subsidiary ledger account was maintained for each of the Finance Officer's Agent Officers including accused. In the ledger account were five columns, the first column showing the dates of entry, a second column for identifying the transactions, the third column for recording transactions increasing accused's accountability to the Finance Officer, the fourth column for transactions decreasing that accountability, and the fifth column reflecting the difference existing between the totals of columns three and four (R 102-108). The first entry on the subsidiary ledger reflects the transfer of accountability of accused from Colonel Mozley to Colonel Harris by a debiting to accused of the sum of \$147,634.17 (R 106; Pros Ex 10a).

On 1 October 1948 accused was relieved by Major John T. Wanat, as fiscal director at Camp Cooke by Special Orders No. 204, Headquarters, Branch United States Disciplinary Barracks. This order was amended by Special Orders No. 205, same Headquarters, 4 October 1948, to include the phrase "Eff 5 October 1948." (R 14-16; Pros Ex 2,3). Actually Major Wanat, did not begin to function as Finance Officer at Camp Cooke until 6 October 1948. On the latter date he received \$4,000.00 in cash from accused; on 8 October accused turned over to Major Wanat \$6,738.32 in vouchers. The total accountability which Major Wanat had assumed on 8 October was \$10,738.32, and on that date he actually relieved accused as agent finance officer (R 231-233,238).

On 9 October Corporal Eugene F. Feller and another soldier who worked at the Finance Office, Camp Cooke, arrived at the office at

about 10:00 a.m. and started to insert vouchers into envelopes to be sent to Los Angeles. They filled and sealed ten envelopes but left an eleventh unsealed at accused's request. At the time, accused informed them that he would put in a deposit slip after he went to the bank (R 245-247). Corporal Feller was shown Prosecution Exhibits 5, 6, 7 and 8, and after he had examined them stated he had not typed them (R 245). On cross-examination he testified that while it was possible for a false certificate of deposit to have been inserted in the sealed envelopes, such had not been done to his knowledge. The contents of the unsealed envelope were a collection voucher and a letter of transmittal therefor (R 248,249). Subsequently at 11:00 a.m. accused appeared at the Post Office, Lompoc, California, and gave eleven large brown envelopes to Mrs. Leath M. Kalin for registration, and stated that it was important that they be mailed that day. All the envelopes were addressed to "Finance Office, U.S. Army, 824 South Western Avenue, Los Angeles, California." The several envelopes were assigned registry numbers 7-55 to 7-65 inclusive, and were placed in a mail pouch billed to "Post Master, Los Angeles, California." (R 275; Pros Ex 23)

The incoming registered mail record book of the Los Angeles Finance Office under date of 11 October 1948 shows the receipt on that date of registered packages, numbers 7-55 to 7-65, inclusive, from Camp Cooke which were turned over to the office cashier who initialed the entry. Lieutenant Little was present in the cashier's cage when the envelopes were opened and found to contain a WD AGO Form 14-49, "Return of Funds and Statement of Agent Officer's Balance," purportedly representing accused's closing statement, and supporting documents. The closing statement reflected debits totaling \$243,039.79, and credits in the same amount resulting in a zero balance. One of the credit items on the statement, "Cash returned and deposits to official credit" was in the amount of \$58,996.04. This entry was supported by duplicate and triplicate copies of Treasury Department Form 6588, "Certificate of Deposit for Checking Account." These copies reflected the receipt by the Bank of America, Lompoc Branch, Lompoc, California, from accused of \$58,996.04, for credit, subject to check, in the regular disbursing account of "J. Harris, Col., F.D." The copies of the certificate of deposit were numbered "12" and dated 8 October 1948 and bore the purported signature of Russell J. Johansen with the designation, "assistant cashier." That portion of the receipt used for acknowledgment by the depository was undated (R 111,112; Pros Ex 11; R 113,114; Pros Ex 7,8).

Lieutenant Little testified that Treasury Forms 6599 are executed in sextuplicate and are used to cover deposits of cash and negotiable instruments to the credit of an official disbursing account. The depositor would make up all six of the blanks, and would indicate thereon

his address, the date the deposit was forwarded, the number of the deposit (Note: deposits are numbered consecutively within each fiscal year), his name, title, and official capacity in making the deposit, the name of the depository, the type of disbursing account to which the deposit was being credited, the officer being credited, together with the symbol number of that officer, the amount of the deposit, and in case the deposit included negotiable instruments the latter would be listed on the reverse side of the forms, or on affixed sheets (R 115-117).

Lieutenant Little immediately started to reconcile the closing statement with accused's subsidiary ledger and effected a zero balance as to all items for which accused had claimed credit. In the subsidiary ledger, however, Lieutenant Little discovered two entries reflecting certificates of deposit for which accused had never claimed credit. When these two entries were considered with the other credit items accused's account showed an overage. Since one of the deposits for which credit was not claimed by accused bore deposit number 12, Lieutenant Little renumbered as "12a" the duplicate and triplicate of certificate of deposit received by him on 11 October. At the time of the receipt of the closing statement, all credit items claimed by accused therein were entered on his subsidiary ledger (R 119-125).

It was decided to investigate the discrepancy and Lieutenant Little was ordered to Camp Cooke, and en route to Camp Cooke Lieutenant Little stopped at Lompoc to verify the certificate of deposit designated as Prosecution Exhibit 11. He found out at the bank that a deposit in the amount of \$58,996.04 had not been received by the bank from the Agent Finance Officer under date of 8 October but that another deposit in the amount of \$11,804.92, also numbered 12 had been made. Subsequently there were entered upon the accused's subsidiary ledger entries reflecting the deposit of \$11,804.92, and the rejection of the purported deposit of \$58,996.04. A computation of accused's account including the last two entries shows a shortage of \$39,460.04 for which there is no accounting (R 126-132).

Russell J. Johansen testified that since 28 September 1948 he was continuously employed by the Bank of America, Lompoc Branch, Lompoc, California, as assistant cashier. He testified that he was in charge of bookkeeping at the bank and also supervised teller work, in-flows and out-flows of money, deposits, and cash (R 48-50). The United States Government had an account in the bank which was designated "Account Number 246, Treasurer of the United States." Johansen identified Prosecution Exhibit 4 as the official ledger sheet for the account and testified that it was a true record of the account and the Exhibit was admitted in evidence without objection (R 53). The practice of the bank on receiving a deposit to the account was to remit the deposit the

same day to the Federal Reserve Bank, San Francisco Branch, and to record the two transactions in the account ledger (R 50-53). Johansen identified Prosecution Exhibits 5 and 6 as certificates of deposit covering deposits made to the government's account at the bank by accused to the credit of Colonel Harris on 28 September 1948 and 5 October 1948, and stated that the signatures appearing on the certificates acknowledging receipt of the deposits were his, and further pointed out the record of the deposits as they appear on Prosecution Exhibit 4 (R 54-58). He also identified Prosecution Exhibits 7 and 8 as being duplicate and triplicate copies of a certificate of deposit. He denied that the signature "Russell J. Johansen" appearing upon the two forms was his. He added that he always dated a certificate of deposit to which he affixed his signature. No other officers or employees of the bank were authorized to sign his name. Further, the account ledger failed to show that any deposit was made in the account on 8 October and more particularly failed to show the deposit evidenced by Prosecution Exhibit 7 (R 58-60,75). The ledger did, however, indicate that a deposit in the amount of \$11,804.92 was made on 9 October 1948 (R 226). Johansen had independent recollection of the deposit and testified that it was made by accused personally at approximately 11:00 o'clock on 9 October. Accused presented a certificate of deposit in the usual form in which the teller found a minor error which was adjusted at the time. Johansen did not personally count the money in the deposit but signed the certificate of deposit for the bank (R 224-226).

Johansen first saw Prosecution Exhibit 7 (duplicate certificate of deposit for \$58,996.04) on Tuesday, 12 October, when it was shown to him at his home by Lieutenant Little for the purpose of having Johansen verify as his the signature on the form; this, Johansen was unable to do. Lieutenant Little also requested Johansen to make an investigation of the records of the bank with reference to the purported certificate of deposit. Subsequently after receiving substantially the same request from Colonel Harris, by letter, Johansen made an investigation and forwarded his findings by letter to Colonel Harris. He identified Prosecution Exhibit 15 as the letter which he sent to Colonel Harris (R 226,227). In pertinent part the letter stated:

"In response to your letter of 14 October 1948 we verify the dates and amounts of the following deposits made by Captain Richard Stricklin for the account of the Treasurer of the United States;

<u>C.D. Number</u>	<u>Date of Deposit</u>	<u>Amount</u>
4	July 30, 1948	\$2,207.68
5	Aug 4, 1948	\$2,299.25
6	Aug 12, 1948	\$3,473.27
7	Aug 19, 1948	\$1,794.93

<u>C.D. Number</u>	<u>Date of Deposit</u>	<u>Amount</u>
8	Sept. 1, 1948	\$5,983.32
9	Sept. 10, 1948	\$4,826.04
10	Sept. 20, 1948	\$2,465.25
11	Sept. 28, 1948	\$3,702.13
12	Oct. 5, 1948	\$4,018.45
12	October 9, 1948	\$11,804.92" (R 131;Pros Ex 15)

Concerning the letter Johansen testified as follows:

"Q. And the deposits set out under CD Number, date of deposit, and amounts that you verified under the date of that letter; and does your ledger sheet reflect those deposits?

A. Yes.

Q. This has been previously introduced as Prosecution's Exhibit No. 15. As of October 15, 1948, were any deposits made by your bank, not reflected on the ledger sheet to the credit of the United States?

A. As of October 15th?

Q. Yes.

A. There was another deposit made after that by the next Finance Officer.

Q. What was the last deposit, if you know, made by Captain Stricklin, as evidenced by your ledger account?

A. Deposit of October 9.

Q. What amount?

A. \$11,804.92." (R 223,224)

Lieutenant Colonel Arthur Salinger identified Prosecution Exhibits 22, 22a, and 22b as Letter Orders, Headquarters Camp Cook, appointing a Board of Officers and the Exhibits were admitted in evidence. The orders show that the purpose of the Board was to investigate a discrepancy in the accounts of accused (R 260). Colonel Salinger testified that he was president of the Board which convened on 15 October and recounted that prior to the time accused offered evidence to the Board, the 24th Article of War was read and explained to him (R 262,265). Prosecution Exhibits 7 and 8 were the subject of evidence taken by the Board. Photostatic copies of the two Exhibits were shown to accused and he was asked if he recognized them. With reference to accused's answer Colonel Salinger testified as follows: "He said that he recognized the form and title, as he had typed them himself. He was asked if he recognized both letters and figures on the two forms, and he stated that he recognized the letter and figures,

as he recalled typing them himself" (R 263). Upon examining Prosecution Exhibits 7 and 8 in court, Colonel Salinger expressed the opinion that "the photostatic copy that was presented to his board" was the same as the Exhibits (R 268).

Major Thomas D. Montgomery identified Prosecution Exhibit 20 as a request for defense counsel written and signed by accused in his presence on 23 October 1948 (R 155,158).

Lieutenant Little identified Prosecution Exhibit 12 as War Department Form No. 35, a signature card purportedly executed by accused as a specimen signature to be used for receipt of his personal pay and travel allowance, which was on file in the Los Angeles Finance Office pursuant to paragraph 76, War Department Technical Manual 14-500, and the Exhibit was admitted in evidence (R 111,113).

Johansen identified Prosecution Exhibit 9 as samples of his signature made on 23 October (R 61).

Walter F. Slusser, by occupation an examiner of questioned documents, after being qualified as an expert in such occupation testified he had examined Prosecution Exhibits 5 and 6 (certificates of deposit signed by Johansen), 9 (Specimens of Johansen's signature), Prosecution's Exhibits 7 and 8 (duplicate and triplicate of certificate of deposit purportedly bearing Johansen's signature), 11 (purported closing statement of accused), 12 (accused's signature card), and 20 (request for defense counsel in accused's handwriting). In his examination Slusser utilized photographic enlargements of the exhibits which were admitted in evidence ((Prosecution Exhibits 5a; R 167; 6a, R 163; 7a, R 165; 8a, R 165; 9a, R 164; 9b, R 165; 11a, R 166; 12a, R 167; 20a, b, c, and d, R 170). It will be noted that these Exhibits are distinguished from their respective originals by the addition of letters). As a result of his examination Slusser came to the conclusion that the signature "Russell J. Johansen" on Prosecution Exhibits 7 and 8 were not written by Johansen, and that the signatures appearing in Prosecution Exhibits 7a and 7b were in the same handwriting which appears in Prosecution Exhibits 11, 12, 12a, 20, 20a, 20b, 20c, and 20d. He explained that his comparison of the standard writing of Johansen with the questioned signatures in Prosecution Exhibits 7 and 8 showed that the latter had divergencies from the former so marked that he could come to no conclusion other than that Johansen was not the author. On the other hand his comparison of the accused's standard writing with the questioned signatures as they appear in the Prosecution Exhibits 7a and 7b showed so many instances of similarity that he concluded they were in the same handwriting (R 159).

On cross-examination Slusser testified that he found similarities in the specimens of accused's handwriting and the questioned signatures

in sixteen of the twenty basic characteristics considered in the examination of handwriting (R 188).

b. Evidence for the defense.

Accused after being apprised of his rights elected to remain silent.

Corporal Eugene F. Feller, recalled as a witness for the defense, testified that although it was normal for him to handle Prosecution Exhibit 11 prior to accused's signing it, he did not always do so, and that he was not the only one who would file Prosecution Exhibit 11. A file copy of Prosecution Exhibit 11 in question is in the files of the Finance Office at Camp Cooke (R 297-298). Corporal Feller further testified that he had known accused for approximately two years and that accused's reputation for honesty, truth, and veracity was very good, especially with the enlisted men and the people who worked in the Administration Building (R 298-299).

Lieutenant Colonel W. A. Wallace, recalled as a witness for the defense, testified that general prisoners are used for janitor work after hours at Camp Cooke, and that four to ten prisoners might be under a single guard. These prisoners worked in all the offices including the Finance Office, and due to their dispersion it would not be possible for their supervisor to keep them in sight at all times. There had been several instances of pilfering (R 300-301).

Although Colonel Wallace was executive officer he did not know if the Commandant had notified the Bank of America of the change of Class B Agent Finance Officers (R 301).

4. Accused has been found guilty of embezzlement of \$39,460.04, property of the United States furnished and intended for the military service, in violation of Article of War 94; of making a false official statement in violation of Article of War 95; forgery of a certificate of deposit in violation of Article of War 93; and the uttering of the forged certificate of deposit in violation of Article of War 96. Parenthetically, it is observed that the latter three offenses were devices for concealing the embezzlement.

The evidence shows that following 1 June 1948 accused was the Class B Agent Finance Officer, United States Disciplinary Barracks, Camp Cooke, California, for Colonel J. Harris, the United States Army Finance Officer at Los Angeles. Accused's principal duties were to pay the troops at Camp Cooke, and to receive payments to the United States which would be credited to the account of Colonel Harris. In making payments, accused utilized funds received by him from Colonel Harris and funds received by him for the account of Colonel Harris. A record

of the several transactions whereby accused received and disbursed funds, was maintained in the Finance Office at Los Angeles. Transactions whereby the accused received funds were debited to him and transactions whereby he transferred cash or cash equivalents to the Finance Office were credited to him. Monthly returns entered on War Department Form 14-49 are required of all agent officers showing funds in their possession, and the source thereof, and likewise showing transactions decreasing their accountability for funds. Documents supporting the latter transactions accompany the form 14-49. Closing statements are accomplished in the same manner and are to be forwarded to his finance officer within three days after the agent officer ceases to function as such (Par 22, Dept of Army Technical Manual 14-505). Accused was to be relieved as agent officer at Camp Cooke on 5 October 1948. His successor, however, did not begin to function in the office until 8 October 1948. On 9 October accused at Lompoc, California, sent by registered mail to the Finance Office, Los Angeles, California, eleven envelopes bearing registry numbers 7-55 to 7-65, inclusive. They were received in the Los Angeles Finance Office from Camp Cooke on 11 October 1948 and upon being opened in the cashier's cage accused's closing statement and supporting documents were found therein. The form of entry thereon "cash returned and deposits to official credit" was completed by the inclusion of the amount of \$58,996.04. Supporting the entry were the duplicate and triplicate of a certificate of deposit reflecting the deposit of \$58,996.04 in the Bank of America, Lompoc Branch, Lompoc, California, by accused and purportedly receipted by the signature of Russell J. Johansen, assistant cashier. From the admitted specimens of accused's handwriting in evidence the court could find that the signature, "Richard Stricklin," appearing on the closing statement belonged to accused (CM 325112, Halbert, 74 BR 89), and it must be concluded that the contents of the envelopes were placed therein by accused. Inclusion of the transactions reflected in the closing statement in the subsidiary ledger pertaining to accused's account resulted in the account showing a balance in favor of accused. An investigation was thereupon conducted at the conclusion of which, on 14 October, a debiting entry was entered in the subsidiary account based upon the rejection of the above-mentioned certificate of deposit. Russell J. Johansen, assistant cashier of the Bank of America, Lompoc Branch, denied that the signatures "Russell J. Johansen" appearing upon the duplicate and triplicate of the certificate of deposit were his. His testimony in this respect was corroborated by the testimony of a handwriting expert, who stated that in his opinion the signature was written by the same hand which wrote the proven specimens of accused's handwriting. Additionally, admitted specimens of Johansen's signature were in evidence and the court could find, as implicitly it did, that in fact the questioned signature was not his. Computation of all credit and debit entries on the subsidiary ledger, including the debit entry of 14 October, shows a shortage in accused's account of \$39,460.04.

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The competency of the agent's subsidiary ledger and the entries thereon is based upon the Federal Shopbook Rule as enunciated in 28 U.S.C. 695 (1946 edition) as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind. (June 20, 1936, ch. 640, § 1, 49 Stat. 1561)."

All entries in the subsidiary ledger with the exception of the debiting entry of 14 October are clearly admissible under the foregoing rule since the entries were made in the regular course of business, and it was shown to be the regular course of business to make such entries.

We find it unnecessary to decide the competency of the debit entry of 14 October but merely suggest as a ground for exclusion that the entry was as the result of investigation occasioned by a discrepancy in accused's accounts as required by Section 15, TM 14-505 (Par 130d, MCM 1949). We find that even if the entry were erroneously admitted the evidence otherwise compels the conclusion that accused was short \$39,460.04. Our reason therefor is that the uncontradicted evidence of record shows the credit entry in the ledger in the amount \$58,996.04 does not speak the truth, based as it is on the spurious duplicate and triplicate of the certificate of deposit. Thus it has been stated:

"But, where other evidence relative to the matters referred to in the account is presented for the consideration of the court or jury, they are not required to give equal effect to all parts of the account--to the admissions against interest and to the self-serving statements; but it is their province and their duty to consider each side of the account, together with all the other evidence germane to it, and to give to each part of it such credit as they believe it to be fairly entitled to receive. Neither side of the account in such a case is conclusive evidence of the facts which it discloses. The evidence presented by either

side may be rebutted and overcome by testimony aliunde, and the triors of the fact may and should determine the question at issue for or against the evidence contained in the account as in their opinion the preponderance of all the evidence in the case and the rules of law require." (Simpson v. First National Bank, 129 Fed 257 at 265).

Exclusion of both the credit and debit entries of \$58,996.04, results in a shortage of \$39,460.04.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come." (Moore v. U.S., 160 U.S. 268) (Par 149h, MCM 1928).

The elements of proof of embezzlement in violation of Article of War 94 are:

"(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent, and \* that the property belonged to the United States and that it was furnished, or intended for the military service thereof, as alleged." (Par 149h, and 150i, MCM 1928).

The evidence fully shows each such element. Accused received from and collected for the account of Colonel J. Harris, United States Finance Officer, funds belonging to the United States. When he was relieved as agent officer, a shortage in the amount alleged existed and he attempted to conceal such shortage by forgery and false statement.

The following statements of law are applicable to the factual situation:

"\* \* There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with the proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined in the first instance at least by the court (CM 276435, Meyer, 48 BR 331,338; CM 301840, Clarke, 24 BR (ETO), 203,210; CM 262750, Splain, 4 BR (ETO) 197,204; CM 320308, Harnack). \* \* A person in charge of trust funds who fails to

respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177,181; CM 251409, Clark, supra). (CM 323764, Mangum, 72 BR 403)

"The fact of fraudulent conversion in embezzlement may be evidenced by \*\*\* a deliberate falsification \*\*\* by rendering a false return or account \*\*\* in which a fictitious balance is made to appear or which is otherwise falsified or purposely misstated." (Winthrop's Military Law and Precedents, Reprint 1920, page 705)

The uncontradicted evidence of record supports the findings of guilty of forgery of a triplicate of the certificate of deposit as alleged, and the utterance thereof.

"Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice". (Par 180i, MCM 1949).

The passing or offer of an instrument knowing it to be forged together with an intent to defraud constitutes uttering (Par 183c, MCM 1949, p.259).

The triplicate of the certificate of deposit, in that it is signed as is the original, by the person acknowledging the receipt of funds, is equally as efficacious as a receipt as is the original. As a receipt, the triplicate of certificate of deposit was an instrument which on its face might operate to the prejudice of another within the definition of forgery (Par 180i, MCM 1949).

The evidence hereinbefore narrated similarly shows, clearly and convincingly, that accused mailed a closing statement signed by him, and supporting documents including the duplicate and triplicate of certificate of deposit dated 8 October 1948 in the amount of \$58,996.04, to his Finance Officer. It is not contradicted that the signatures "Russell J. Johansen" appearing on the duplicate and triplicate of the certificate of deposit were forged. That accused was the author of the forgery may be presumed from the circumstances above recited (CM 209449, Campbell, 45 BR 33,43). An excellent statement of the effect of evidence of possession or utterance of a forged instrument is contained in State v. Early, 119 Kan. 446, 239 P. 981 as follows:

"Possession of a forged instrument by one who utters or seeks to utter it or otherwise to realize on it or profit by it, without a reasonable explanation of how the possessor acquired it, warrants an inference that the possessor himself committed the forgery or was a guilty accessory to its commission."

An accessory to the commission of a felony would be properly charged as a principal (CM 273817, Johnson, et al, 6 BR (ETO) 291,295).

The evidence compels the conclusion that accused forged and uttered the triplicate of certificate of deposit; an instrument which, if genuine, might operate to prejudice the depository named therein, for the fraudulent purpose of concealing a shortage in his accounts, and warrants the findings of guilty of forgery and uttering.

As hereinbefore stated, it was required that an agent officer upon his relief submit to his Finance Officer a closing statement on WD AGO Form 14-49. Accused submitted to his Finance Officer such a closing statement showing a deposit in the sum of \$58,996.04, supported by the forged duplicate and triplicate of certificate of deposit which purported to acknowledge receipt of that sum by the depository. There was introduced into evidence a ledger of the depository showing the status of the government's account therein. There was testimony by the assistant cashier of the depository that the ledger was a true record of the government's account and that the ledger failed to show any entry which would reflect that accused had made any deposit as reflected in the forged duplicate and triplicate. The ledger in and of itself would not be evidence that the deposit in question was not made unless it was shown that by law the ledger was required to be kept (Shreve v. United States, 77 F.2d 2, 7). There is evidence that the Bank of America, Lompoc Branch, was a Federal Depository and therefore, by law, it was required to keep an accurate entry of each sum of public monies received (31 U.S.C. 525, 1946 Ed.). The ledger was, therefore, an official record. The testimony of the assistant cashier, Johansen, under whose supervision the bookkeeping records of the bank were kept, that the ledger contained no entry showing the deposit, subject of the forged duplicate and triplicate of certificate of deposit, was competent evidence that such deposit was not made (CM 262042, Pepper, 5 BR (ETO) 125 at 150). The evidence supports the finding of the court that accused did falsely report to Colonel J. Harris that he had made a deposit in the Bank of America, Lompoc Branch, at the time, place, and in the amount alleged. A false official report under the circumstances shown in this case constitutes a violation of Article of War 95 (CM 278971, Talbott, 52 BR 79,84).

5. Records of the Department of the Army show that accused is 35 years of age, married and has one child. He is a high school graduate

and attended Southern Illinois Teachers College for one year. He has had enlisted service in the Army from 2 October 1936 until he was commissioned a second lieutenant on 27 September 1941. He was promoted to first lieutenant 9 May 1943, and to captain on 31 May 1944. He had foreign service in the Pacific Theater from 11 April 1942 to 5 January 1945. His efficiency ratings of record are Excellent (9) and Superior (7).

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to be dismissed the service is mandatory upon conviction of a violation of Article of War 95, and a sentence to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years is authorized upon conviction of violations of Articles of War 93, 94 and 96.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

J. W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

CM 334270

THE JUDICIAL COUNCIL

Brannon, Shaw, and Young  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
Captain Richard Stricklin (O-450317), Finance  
Department, 6103 Army Service Unit, Branch  
United States Disciplinary Barracks, Camp Cooke,  
California, the sentence is confirmed and will  
be carried into execution upon the concurrence  
of The Judge Advocate General.

Franklin P. Shaw

Edward H. Young

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Franklin P. Shaw, Brig Gen., JAGC

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Edward H. Young, Col., JAGC

E.M. Brannon

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Ernest M. Brannon, Brig Gen, JAGD  
Chairman

I concur in the foregoing action.

Thomas H. Green

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THOMAS H. GREEN  
Major General  
The Judge Advocate General

18 March 1949

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( GCMO 17, , April 4, 1949)



findings of guilty, except as to the value of the property described in the Specification of the Charge. The only matters requiring consideration, therefore, are the legal sufficiency of the record of trial to support the findings of guilty of the Specification of the Charge as to value, and the legality of the sentence. For this reason, only so much of the evidence in the record as is pertinent to value will be summarized.

4. The Specification of which accused was found guilty alleges the larceny on or about 21 October 1948 of a watch, value about \$80.00, the property of Private First Class John A. Brown. A "Chalet" 17 jewel watch was introduced in evidence (R. 6; Pros. Ex. 2) and identified by Private First Class John A. Brown as his watch, one which he purchased "off an individual" (R. 7). The only testimony relating to value contained in the record of trial is the statement of the owner that he paid \$80.00 for the watch (R. 7).

5. It is well established that, except as to distinctive articles of Government issue, or other chattels, which because of their character have readily determinable value, the value of personal property to be considered in determining the authorized punishment for larceny is the worth of the property in the open market at the time and place of the offense (CM 330999, Garcia (1948); CM 217051, Barton et al, 11 BR 193; TM 27-255, par. 100b). Such value is properly established by the testimony of some person, who by virtue of knowledge and experience knows what that value is (CM 321970, Bouyea, 70 BR 430).

The fact that the watch was physically in evidence before the court does not cure the deficiency in proof. The market value of such an article is not a matter of fixed and common knowledge of which the court would be justified in taking judicial notice, and to permit the members of the court, by inspection alone, to find such value would be to attribute to them technical and expert trade knowledge which it cannot be legally assumed they possessed (CM 324747, Van Dyne et al, 73 BR 354; CM 213952, Myer, 10 BR 296). Therefore, although under the provisions of paragraph 149g, Manual for Courts-Martial, 1928, the court might take judicial notice that the watch was of some value, it was not authorized to find a value in excess of \$20.00. It follows that so much of the finding of value of the stolen article as exceeds \$20.00 cannot be sustained.

The maximum confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the offense of larceny of property of a value of \$20.00 or less is six months.

6. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support only so much of the

(160B)

finding of guilty of the Specification as to value as finds a value not in excess of \$20.00; legally sufficient to support the findings of guilty of the Charge; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

\_\_\_\_\_, Judge Advocate.

\_\_\_\_\_, Judge Advocate.

\_\_\_\_\_, Judge Advocate.

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(1600)

CSJAGN-CM 334305

1st Ind

7 Jan 1949

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General 2D Armored Division, Camp Hood, Texas.

1. In the case of Recruit Eugene Gholston, Jr. (RA 17235410), Company C, 73rd Engineer Combat Battalion, Camp Hood, Texas, I concur in the holding of the Board of Review and recommend that only so much of the finding of guilty of the Specification as to value be approved as finds some value not in excess of \$20.00, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 334305).

1 Incl  
Record of trial

THOMAS H. GREEN  
Major General  
The Judge Advocate General



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(161)

CSJAGK - CM 334323

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

28 MAR 1949

v. )

FIFTH ARMY

Major HARTMAN REIGLER )  
(O-259043), CE, 5620 )  
Area Service Unit, Station )  
Complement, Detroit Arsenal, )  
Detroit, Michigan. )

Trial by G.C.M., convened at Fort  
Sheridan, Illinois, 13 October 1948.  
Dismissal.

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OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING  
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Major Hartman Reigler, 5620 Area Service Unit, Station Complement, Detroit Arsenal, then of 5609 Area Service Unit, Black Hills Ordnance Depot, Igloo, South Dakota, for the purpose of obtaining allowance and payment of a claim against the United States, did, at Igloo, South Dakota, on or about 31 December 1947, present to Major Michael Cohen, Finance Department, Finance Officer at Omaha, Nebraska, an officer of the United States duly authorized to allow and pay such claim, a certain writing, as he, the said Major Hartman Reigler then knew, contained a certification by him that the income of his mother Mrs. Mary H. Reigler, for the month of December 1947, was \$42.00, which certification was false and then known by the said Major Hartman Reigler to be false in that the income of the said Mrs. Mary H. Reigler for the said month of December 1947 was \$70.00 or more.

Specification 2: In that Major Hartman Reigler, 5620 Area Service Unit, Station Complement, Detroit Arsenal, then of 5609 Area Service Unit, Black Hills Ordnance Depot, Igloo, South Dakota, for the purpose of obtaining allowance and payment of a claim against the United States, did, at Igloo, South Dakota, on or about 31 January 1948, present to Major Michael Cohen,

Finance Department, Finance Officer at Omaha, Nebraska, an officer of the United States duly authorized to allow and pay such claim, a certain writing, to wit: an Officer's pay and Allowance Account (WD Form 336), which said writing, as he, the said Major Hartman Reigler then knew, contained a certification by him that the income of his mother, Mrs. Mary H. Reigler, for the month of January 1948, was \$42.00, which certification was false and then known by the said Major Hartman Reigler to be false in that the income of the said Mrs. Mary H. Reigler for the said month of January 1948 was \$70.00 or more.

Specification 3: In that Major Hartman Reigler, 5620 Area Service Unit, Station Complement, Detroit Arsenal, then of 5609 Area Service Unit, Black Hills Ordnance Depot, Igloo, South Dakota, for the purpose of obtaining allowance and payment of a claim against the United States, did, at Igloo, South Dakota, on or about 29 February 1948, present to Colonel J. H. Doherty, Finance Department, Finance Officer at Omaha, Nebraska, an officer of the United States duly authorized to allow and pay such claim, a certain writing, to wit: an Officer's Pay and Allowance Account (WD Form 336), which said writing, as he, the said Major Hartman Reigler then knew, contained a certification by him that the income of his mother, Mrs. Mary H. Reigler, for the month of February 1948, was \$42.00, which certification was false and then known by the said Major Hartman Reigler to be false in that the income of the said Mrs. Mary H. Reigler for the said month of February 1948 was \$70.00 or more.

He pleaded not guilty to and was found guilty of the charge and its three specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but recommended that it be commuted to a reprimand and a forfeiture of one hundred (\$100.00) dollars per month for six (6) months and forwarded the record of trial for action under Article of War 48.

### 3. Evidence.

#### For the Prosecution.

Accused reported for duty at Fifth Army Headquarters in June 1946. He held various assignments including that of Post Engineer at Black Hills Ordnance Depot, Igloo, South Dakota and Detroit Arsenal, Detroit,

Michigan (R. 68-70). Photostatic copies of officers pay vouchers (WD Form 336) for the months of December 1947, January 1948 and February 1948 were accepted in evidence without objection by the defense as Prosecution's Exhibits 1, 2 and 3 (R. 8, 9). Three written stipulations signed by the trial judge advocate, defense counsel and accused were accepted in evidence as Prosecution's Exhibits 4, 5 and 6. These stipulations declare that the signature appearing on each of the original pay vouchers for December 1947, January 1948 and February 1948, and the duly authenticated photostatic copies, prosecution's exhibits 1, 2 and 3 respectively, was that of accused (R. 9, 10). Mrs. Mary H. Reigler, 1511 Rock Street, Little Rock, Arkansas, was named upon each of the foregoing pay vouchers as a dependent of accused. The following certificate appears upon the reverse side of each of the pay vouchers:

DEPENDENT FATHER		MOTHER <input checked="" type="checkbox"/>		HUSBAND		(Check one)		(Item 6)	
NAME AND ADDRESS									
Mrs. Mary H. Rigler, 1511 Rock St., Little Rock, Ark.									
AMOUNT REQUIRED PER MONTH FOR DEPENDENT'S LIVING EXPENSES					TOTAL GROSS INCOME OF DEPENDENT FOR PERIOD SHOWN IN ITEM 18				
From \$ 100.00 To: \$ 120.00					PER MONTH \$ 42.00 Per Year \$ 504.00				
AMOUNT CONTRIBUTED BY ME FOR THE PERIOD SHOWN IN ITEM 18					LIVING EXPENSES ACTUALLY INCURRED EACH MONTH DURING THE PERIOD SHOWN IN ITEM 18 ARE				
\$ 150.00					FROM \$ 100.00 TO \$ 120.00				

For the purpose of obtaining payment of certain allowances from the Government, and in support of my contention that the above-named person is in fact dependent on me for his or her chief support, I certify that the information shown above is true and correct; that the amount required for reasonable and proper living expenses per month is as stated; that I have contributed to his or her support without any consideration therefor or hope or expectation of return therefrom the sum stated above; that the total gross income of my dependent from all sources (including in such income any payment or contributions of others toward his or her proportionate share of household living expenses) other than my contributions has not or does not exceed the amount shown for the period stated."

The following statement appears under "Item 31" of each of the pay vouchers:

"I certify that the foregoing statement and account are true and correct; that payment therefor has not been received; and that payment to me as stated on the within voucher is not prohibited by any provisions of law limiting the availability of appropriation(s) involved. (Applicable certificates on reverse made a part hereof.)"

The signature "Hartman Reigler" stipulated (Pros. Exs. 4, 5 and 6) as that of accused appeared just below the statement (Item 31) quoted above.

Lieutenant Colonel William S. Middleton on or about 4 May 1948 interrogated accused at the Detroit Arsenal concerning the statements made in certain pay vouchers to support accused's claim of dependency. Prior to proceeding with the questioning of accused, Colonel Middleton advised him of his rights as a witness under Article of War 24. Accused was then asked if he understood his rights and he replied in the affirmative. He told Colonel Middleton that he had made the statement in each of his pay vouchers for December 1947, and January to March 1948 that his mother's total income from other sources amounted to the sum of \$42.00 per month. The witness asked accused if he had learned prior to preparing the said pay vouchers that his mother's income had been increased to approximately \$70.00 per month. Accused said he had been so informed by his mother in casual conversation during December 1947. Accused further stated that he had received increased allowances by reason of his mother's dependency for December 1947, January 1948 and February 1948 but not for March 1948. The prosecution showed the pay vouchers (Pros. Exs. 1, 2 and 3) to the witness and requested him to read the certificate appearing on the reverse side thereof to the court. Colonel Middleton stated he had not seen Prosecution's Exhibits 1, 2 and 3 before the trial and that he did not have them at the time he conducted the investigation. At the request of the prosecution Colonel Middleton read to the court from the record of his investigation showing the exact questions propounded to accused and the answers he had given concerning the question of his mother's dependency. The quotations read were substantially the same as Colonel Middleton had previously testified to. On cross-examination it was brought out that accused appeared to have had numerous personal matters preying on his mind at the time of the investigation (R. 12-22).

Charles F. Allen, Secretary of the Arkansas Teacher Retirement System, Little Rock, Arkansas, testified that Mrs. Mary H. Reigler, 1511 Rock Street, Little Rock, Arkansas was the mother of Major Hartman Reigler and that she had received as a pension from the Arkansas Teacher Retirement System the sum of \$73.09 for the month of July 1947 and each month thereafter. Mrs. Reigler had no assurance, however, from one month to the next that she would continue to receive the sum of \$73.09 or anything at all as the amount of the monthly payments were determined solely by the Board of Trustees of the Retirement System (R. 25-32).

The prosecution rested and the defense made a motion that the court find the accused not guilty of the charge and the specifications thereunder (R. 32). The court, after hearing argument of counsel, requested that the Post Finance Officer, Fort Sheridan, Illinois, be called as a witness. Subsequently Major John J. Murray, F.D., Fort Sheridan, Illinois,

appeared as a witness and in answer to pertinent questions testified that dependency was determined by taking into consideration all of the figures called for by the certificate on the reverse side of the officer's pay voucher. In other words the income of the dependent from all sources other than the officer's contribution must be less than 50% and the contribution of the officer must be more than 50% of the living expenses of the dependent in order to constitute the officer as the chief support of the dependent and thus entitle him to receive the increased allowances. An unmarried major not living in Government quarters and having a dependent as heretofore defined would receive additional allowances of \$1.40 per day for subsistence and \$15 per month for rental allowance, however, if the same officer were living in Government quarters determined by the commandant as inadequate for occupancy with his dependent he would receive \$1.40 per day for subsistence and \$105.00 per month as a rental allowance (R. 45-67). The court overruled the defense motion for a finding of not guilty.

For the defense.

Colonel Leverett G. Yoder, Engineer, Fifth Army, testified that accused was the Post Engineer at the Mayo General Hospital, Galesburg, Illinois and at Fort Francis E. Warren, Wyoming. When the stations were declared surplus he closed out the engineer property. The witness stated that from his own personal knowledge accused's integrity and honesty had never been questioned (R. 68-71).

Arthur J. Frankel, attorney-at-law, Little Rock, Arkansas, testified he had known accused since he was a young school boy and that his reputation in the community for truth, veracity and integrity was good (R. 118, 119).

Mrs. Mary H. Reigler, mother of accused testified she was a widow and that accused was her only son. She taught school in Little Rock, Arkansas until November 1942 a period of about 35 years. Her brother, a medical doctor, came to live with her about November 1942. He was a dope addict and an alcoholic as a result of which she had to support him. As his condition became progressively worse he was taken to the State Hospital. In 1943 she had received a pension of about \$42.00 per month which was later increased to \$50.00 per month. She visited her son in South Dakota in December 1947. She discussed many personal things with him at that time but did not recall discussing the amount of her pension with him or telling him it had been increased to \$70.00 per month. In answer to a question by a member of the court as to what her expenses were she said that from the fall of 1947 through spring and summer of 1948, her monthly expenses varied from \$190.00 to over \$300.00. These amounts included the cost of insurance premiums, trips, Christmas presents, amusements, clothing and food. She had received from her son a regular

allotment of \$100 per month plus additional sums from time to time. She opened a joint account with accused which he had encouraged her to draw checks against. She gave accused at his request an account of her actual living expenses for July 1946. Her average expense then ran about \$120.00 per month. The house she lived in had been owned by her son for some little time (R. 107-118).

The rights of accused as a witness were explained to him whereupon he elected to be sworn and testified in substance that he could not remember telling Colonel Middleton at the investigation that he knew his mother was receiving a pension of \$70.00 per month although he might have done so. Neither could he recall telling Colonel Middleton that the certificates on his pay voucher since December 1947, as to his mother's income, were in error. His mother had visited him in December 1947 but he could not recall that any reference was made to her pension because he had never discussed that with her. The latter part of June 1948 while on leave he had discussed with his mother the question of dependency and "tried to get an understanding of what it was all about". That was the first time he had learned of the fact that his mother was receiving \$73.00 per month. He categorically denied having any knowledge that his mother's income exceeded \$42.00 per month at the time of filing his pay vouchers for December 1947, January 1948 or February 1948. He never had any intent at any time to file a misleading or fraudulent claim against the Government. He claimed to have been troubled with personal matters while at the Black Hills Ordnance Depot, South Dakota, consisting of a broken engagement to marry a certain girl and the suicide of his uncle. At the time of the investigation conducted by Colonel Middleton he was upset over a personnel problem which existed at the Arsenal. A transcript of witness' military record was received in evidence without objection as Defense Exhibit "A". (R. 73-84).

On cross-examination accused testified that his answers to the questions put by Colonel Middleton were the truth to the best of his "knowledge and ability". He did not recall that he had stated to Colonel Middleton that his mother told him in December 1947 she was getting \$73.00 per month but "in the confusion" he may have made such statement to him" (R. 86).

Upon examination of accused by members of the court it was brought out that he provided for a Class E allotment of \$100 to his mother each month and sent her additional money from time to time. He did not know what his mother's expenses were for December 1947, January 1948 and February 1948 although he certified they were from \$100 - \$120 per month. It was while he was overseas in 1942 that he obtained from his mother the figures he used in the certificates on his pay vouchers. In 1944 when he arrived home he verified the figures with her and found them to be substantially correct. Due to numerous personal problems he did not give further consideration to the figures. Accused stated that when he was questioned by Colonel Middleton

he was very busy and was working under pressure therefore he could not be sure of what he had told him. A stenographer had taken the testimony but he did not see the transcript thereof until September 1948 at the pre-trial investigation. He was never asked to sign the transcript. His mother worked until the latter part of 1942 and first received a pension in 1943, however, he had helped support her since early 1942. In 1946, while he was at the Mayo General Hospital, the "final accounting office" wrote asking him to "reimburse the government if his mother was not a dependent but if she were then he was requested to furnish a statement of her expenses". He sent the office a statement signed by her covering a period of four or five months showing her expenses to be from \$120 - \$150 per month which he said "is about what they are now." He knew that his mother deposited a part of the \$150.00 he sent her every month in a joint bank account established by her. While he was overseas he had executed a signature card for the bank account. He had returned to the Government under protest, \$884.80 which amount was a part of the total sum claimed as having been overpaid to him. He had "claimed" his mother as a dependent on his income tax return for 1947 (R. 86-106).

#### 4. Discussion

The accused was found guilty of three separate but similar offenses of making and using false certificates in connection with his claim for pay and allowances for the months of December 1947, January 1948, and February 1948 in violation of Article of War 94 as alleged. It is clear from the evidence presented that the accused certified on his pay vouchers for December 1947, January and February 1948 that his mother, whom he certified as his dependent, received a total gross income of \$42.00 for each of the specified months as alleged. The falsity of the certification was established by the Secretary of the Arkansas Teacher Retirement System who testified that accused's mother had actually received the sum of \$73.09 as a pension each month since July 1947, which fact was not controverted by the defense. There was competent evidence that accused stated to Colonel Middleton that his mother had told him in December 1947 that her pension had been increased to \$70.00 per month. If that were true he was bound to have known that his certificates on the vouchers for the months alleged were false. In his testimony accused asserted merely that he did not remember making the statement to Colonel Middleton and denied knowledge that her pension was \$70.00 per month. Thus, a controverted issue of fact was created which was to be determined in the first instance, at least, by the court (CM 234711, Sandlin, 21 BR 131, 137; CM 320308 Warnack, 69 BR 323, 329). It is obvious that in finding accused guilty, the court must have determined beyond a reasonable doubt that accused knew at the time he signed the certificates that the statements therein were false. We are of the opinion that the evidence adequately supports the court's conclusions. The accused admitted having signed the pay vouchers and having received the amount of pay and allowances shown thereon for each month in question. It may, therefore be reasonably inferred that he presented the pay vouchers as

alleged. All of the essential elements of proof of the offenses as alleged appear to have been established beyond any reasonable doubt (par. 150d, MCM 1928).

The Manual for Courts-Martial provides that the alleged false statement must be material. We believe that the accused's certificate concerning his mother's reasonable and proper living expenses, her total income from sources other than his contributions and the amount of his contribution to her was material in that it was necessary for the finance officer to know the true amounts thereof in order to determine the validity of his claim. An officer may be paid increased allowances for a dependent only if he is the source of the said dependent's chief support. If the dependent's income from all other sources is less than 50% and the contribution of the officer is more than 50% of the reasonable and proper living expenses of the dependent, then the officer is the source of such dependent's chief support (AR 35-4220). The finance officer in making a determination concerning the claim is entitled to rely upon the figures in the certificate as being substantially true and accurate. It is of no importance to the determination of the offenses here charged that other figures in the certificate were also false, or that if all were corrected, the accused's claim might be valid. The gist of the offense here denounced is the falsity of any material statement submitted in connection with a claim. It is not necessary or essential that the claim for pay and allowances be either false or fraudulent or that the Government actually suffer any monetary loss (CM 283737 Macintyre, 55 BR 151; CM 296107, Savini, 58 BR 79; CM 325636, Devine, 74 BR 387). Even though accused might be able to prove that he was in fact the source of chief support of his mother, and thus entitled to the increased allowances, such proof would not excuse or relieve him from the offenses of which he has been found guilty.

5. Department of the Army records show accused is about 41 years of age and single. He was appointed as a Second Lieutenant, ORC, 23 May 1929, and was in due course promoted to Lieutenant Colonel, ORC, 26 May 1947. He was graduated from Oklahoma A & M in 1929 as a mechanical engineer and pursued his profession as a civilian until he reported for active duty in February 1941. For meritorious service with the Chinese Army, while on duty in the CBI Theatre of Operations he was awarded the Special Breast Order of Yun Hui with Ribbon by the Chinese Government in August 1946. The majority of his adjectival efficiency ratings have been "excellent".

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient

to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94.

Charles W. Silvers, JAGC  
Lewis S. Skull, JAGC  
Harley Lanning, JAGC

(170)

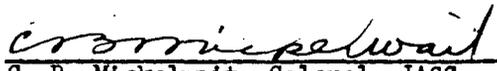
DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

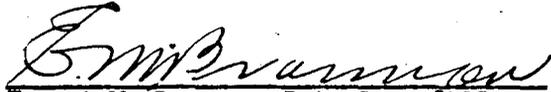
Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
Major Hartman Reigler (O-259043), Corps of  
Engineers, 5620 Area Service Unit, Station  
Complement, Detroit Arsenal, Detroit, Michigan,  
the sentence is confirmed but is commuted to a  
reprimand and a forfeiture of \$150.00 of his pay  
per month for six (6) months. Upon the concurrence  
of The Judge Advocate General the sentence, as  
commuted, will be carried into execution.

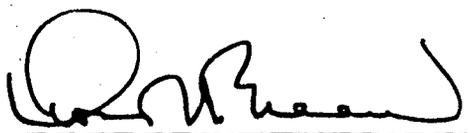
  
Franklin P. Shaw, Brig Gen, JAGC

  
C. B. Mickelwait, Colonel, JAGC

2 May 1949

  
Ernest M. Brannon, Brig Gen, JAGC  
Chairman

I concur in the foregoing action.

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

17 May 1949.

CM -334323

( GCMO 31, May 20, 1949)

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(171)

CSJAGH CM 334409

FEB 28 1949

UNITED STATES )

2D ARMORED DIVISION

v. )

) Trial by G.C.M., convened at  
) Camp Hood, Texas, 28 October  
) 1948. Confinement for four (4)  
) months and forfeiture of fifty  
) (\$50.00) dollars per month for  
) a like period. The Post Stockade,  
) Camp Hood, Texas.

) Corporal DULIE HUNT, RA  
) 34678767, Company B, 41st  
) Armored Infantry Battalion,  
) Camp Hood, Texas.

---

HOLDING by the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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1. The record of trial in the case of the above named soldier has been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal Dulie Hunt, Company B, 41st Armored Infantry Battalion, did, at Camp Hood, Texas, on or about 3 October 1948, wrongfully and willfully act as a procurer for one Louise McCumby, in that he did solicit illicit sexual intercourse for her with Recruit Robert T. Adams, such conduct being of a nature as to bring discredit upon the military service.

Specification 2: In that Corporal Dulie Hunt, Company B, 41st Armored Infantry Battalion, did, at Camp Hood, Texas, on or about 3 October 1948, wrongfully and willfully act as a procurer for one Louise McCumby, in that he did solicit illicit sexual intercourse for her with Recruit Sidney Klein, such conduct being of a nature as to bring discredit upon the military service.

The accused pleaded not guilty to the Charge and Specifications. The court made the following findings: "Guilty of the charge; of the specifications as written, not guilty, but guilty of the following

specification; in that Cpl Dulie Hunt, Company B, 41st Armored Infantry Battalion, did at Camp Hood, Texas, on or about 3 October 1948, wrongfully and willfully act as a driver and aide for a prostitute, name unknown, on government reservation, materially aiding her in exposing Recruits Robert T. Adams and Sidney Klein to sexual intercourse, such conduct being of a nature as to bring discredit upon the military service." He was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for four (4) months, and to forfeit fifty (\$50.00) dollars per month for a like period. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and ordered it executed, and designated The Post Stockade, Camp Hood, Texas, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 118, Headquarters 2d Armored Division, Camp Hood, Texas, dated 20 December 1948.

3. Evidence for the prosecution, briefly summarized, shows that the accused was seen in the company of an unidentified prostitute parked in accused's automobile near the orderly room of the 66th Tank Battalion, Camp Hood, Texas, on the night of 3 October 1948 (R 12,13,16,24,25). Accompanied by another individual and the prostitute, the accused thereafter drove Recruit Sidney Klein of the 66th Tank Battalion to the "transition range" at Camp Hood, Texas. There, after the accused had provided a blanket at Recruit Klein's request, the latter paid the prostitute the sum of five dollars and had sexual intercourse with her (R 19-23). The same night following bed-check, the accused drove the prostitute and Recruit Robert Tolbert Adams to the "transition range." There, for a similar monetary consideration, Recruit Adams also had sexual intercourse with the prostitute (R 11-18). The accused made no solicitations to either Recruit Klein or Recruit Adams and the evidence does not show that he received any part of the consideration paid the prostitute (R 13,15,20,22,24,25).

4. Evidence for the defense.

Corporal Jessie A. Arnold, Military Police Department, Camp Hood, Texas, testified that he and accused were in Temple, Texas, drinking beer and whiskey from approximately 1:30 until 7:30 p.m. on 3 October 1949 and when they parted company, the accused was "pretty well drunk" (R 26,27).

First Lieutenant Orval Belcher, 41st Armored Infantry Battalion, also of Camp Hood, testified that he had known the accused for approximately two years during which period he had found accused's character to be excellent and his efficiency to be superior (R 28,29).

Upon recall by the defense, Recruit Klein testified that he observed the accused to be "kinda drunk" on the night in question (R 30,31).

After having been advised of his rights by the law member, the accused elected to remain silent (R 29).

5. The accused has been charged with two offenses of wrongfully and willfully acting as a procurer for one Louise McCumby by soliciting, on her behalf, illicit sexual intercourse with two specifically named recruits, to the discredit of the military service, in violation of Article of War 96, and found guilty of one combined offense of wrongfully and unlawfully acting as driver and aide for a prostitute, name unknown, on a government reservation, materially aiding her thereby in exposing the same two recruits to sexual intercourse, to the discredit of the military service and violative of the same Article of War. Any question concerning the legal sufficiency of the evidence adduced to support the specifications upon which the accused was arraigned appears to have been resolved by the court-martial, as evidenced by their findings of the accused not guilty thereof but guilty of the afore-mentioned offense of acting as driver and aide for a prostitute on the same occasion. There is presented for determination by the Board of Review, however, the question of whether the single offense of which the accused was found guilty is an offense lesser than and included in either or both of the offenses upon which accused was arraigned.

Since the Board concludes, as hereinafter set forth, that the offense recited in the findings fails to meet the legal requisite of being lesser included to either or both of the offenses charged, no consideration will be given the question of whether the evidence adduced supports the adjudged findings. For the same reason, the legal effect of merging two offenses into one will not be considered, although it requires no more than a cursory comparison of the arraignment and the findings in the instant case to observe that there is clearly a legal question posed because of this procedure.

With respect to the question herein presented for decision by the court's findings, the Board of Review in CM 198657, Green, Klebing, and Beatty, 3 BR 239, has stated the issue, as follows:

"\* \* \* Where a court by exceptions and substitutions finds an accused not guilty of the offense charged but guilty of another offense, the legal effect of the action of the court is an acquittal unless all elements of the offense found were necessarily included in the offense charged \* \* \*."

Relative to an analogous application of the same principle, the Board has stated in CM 218667, Johns, 12 BR 133 at page 134:

"Under the long recognized doctrine that an accused is acquitted of all material allegations which were excepted by a court-martial in its finding (par. 2, sec. 1560, Dig. Ops. J.A.G., 1912-30), the accused herein was acquitted by the court of all the material allegations which are excepted by its finding, namely, assault with intent to do bodily harm with a dangerous weapon, in violation of the 93rd Article of War. By excepting in its finding the word assault and any other word or words stating or implying that the action was wrongful, unlawful and felonious, the legal presumption arises that the act was lawful and innocent (par. 4, sec. 1471, and pars. 4,5, sec. 1559, Dig. Ops. J.A.G., 1912-30). However, the court thereupon substituted a finding of guilty of an attempt to strike a non-commissioned officer with his fist while the latter was in the execution of his office, in violation of the 65th Article of War. This finding cannot be sustained for the obvious reason that accused was not charged with this offense, which is not included in and is totally different from the offense with which he is charged. This variance is a fatal error (CM 164042, Rodden)."

In the application of these principles, it is necessary at the outset to analyse the two specifications upon which the accused was arraigned. Briefly, accused has been charged with wrongfully and willfully acting as a procurer for a named individual by soliciting illicit sexual intercourse for her with two recruits. But for the absence of an allegation that the acts were committed for a monetary consideration, the two offenses appear to be similar to the offense denounced by Section 22:2707 [6:181] District of Columbia Code, viz:

"Procurer--Punishment for receiving money or valuable thing for arranging assignation or debauchery--Penalty.

"Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of arranging for or causing any female to have sexual intercourse with any other person or to engage in prostitution, debauchery, or any other immoral act, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than five years and a fine of not more than \$1,000. (June 25, 1910, 36 Stat. 833, ch. 404, § 3; Jan 3, 1941, 54 Stat. 1226, ch 936, § 3)." (Underscoring supplied)

Notwithstanding the absence of the element of valuable consideration in the indictments in the instant case, it is clear that the gravamen of the two offenses for which accused was tried likewise is that of acting as a procurer of prostitution for a female. In considering the legal import of the word procure, following is an excerpt from

the recent opinion of the Board of Review in CM 327866, Hill, 76 BR 205 at page 216:

"According to Webster's New International Dictionary, Second Edition, the word 'procure' is generically derived from the Latin word 'procurare,' which is interpreted as (pro) for, and (curare) to take care. Its simple definition is, 'To bring into possession; to obtain by any means.' According to the same authority, the prefix pro, is interpreted as meaning for, but in the English language it is also interpreted to denote the meaning for, before, in behalf of, in place of, etc., depending in greater part, upon the principal word to which it is attached and the manner in which it is used, 'as in procure, to gain, literally, to care for.' Thus the foregoing interpretation carries the general implication or presupposes that the object of the procurement was gained, obtained or reduced to possession by the procurer for or on behalf of another (at his request, suggestion or direction).

"In Black's Law Dictionary, Third Edition, the word 'procure' is defined as follows:

'In criminal law, and in analogous uses elsewhere, to "procure" is to initiate a proceeding to cause a thing to be done; to instigate; to contrive, bring out, effect or cause.

'To persuade, induce, prevail upon, or cause.

'To obtain, as intoxicating liquor, for another.

'To "procure" an act to be done is not synonymous with to "suffer" it to be done. (See cases cited)

'To find or introduce;- said of a broker who obtains a customer.

'To bring the seller and the buyer together so that the seller has an opportunity to sell.'" (Underscoring supplied).

From an examination of the specifications found in the arraignment in the light of the definitions above set forth, it can only reasonably be concluded that the accused was charged with actively initiating a procedure which was to cause or to result in illicit sexual intercourse. Otherwise stated, the allegations that accused acted as a procurer on two occasions affirmatively charges him with being the direct and motivating cause of the commission of the acts of illicit intercourse proper, and not with such collateral acts as serving as driver and aide to a prostitute. With reference to the offenses charged, the Board of

Review must agree with the conclusions of the court that there was no proof the accused instigated the specific grievance complained of in each instance by soliciting patrons for the unidentified female of ill-repute or by actively causing the debauchery in some other manner. Insofar as concerns the evidence of record, he concededly provided her and her hirer with transportation and on one occasion he furnished a blanket to one of the male participants. While it is therefore clear what the court had in mind by the use of the word "driver" in its findings, the Board can only speculate as to the intended connotation of the word "aide", especially when followed by the descriptive phrase " \* \* for a prostitute." It is not necessary in the instant case, however, to consider in detail the legal meaning of the word "aide" since it is manifest that the accused has been charged with causing /or initiating or instigating, as above/ acts of illicit sexual intercourse by procuring for a certain named person and found guilty of serving an unnamed prostitute and thereby materially aiding her in exposing several recruits to sexual intercourse. Otherwise stated, the accused herein has been charged with having been personally and directly responsible for the perpetration of illegal acts of sexual intercourse or as an actor in his own right and has been found guilty of having been but an assistant to the actual actor or offender. That an accused charged with direct responsibility for the commission of a certain unlawful act or class should be required to defend against having taken but a collateral and indirect part in the commission of an offense only incidentally related thereto and committed by some other person is wholly unreasonable. A variance of this character cannot be permitted in our system of military jurisprudence. With reference to a comparable situation, the Board of Review has recently stated in CM 323728, Wester, 72 BR 383,384:

" \* \* \* Charged with having committed a felonious assault upon Private Morris, accused was found guilty of having been disorderly in a public place under such circumstances as to bring discredit upon the military service. Although it may be said that every assault is a breach of the peace and thus a disorder, it certainly does not follow that every disorder involves an assault. Hence, under the specification as redrafted by the court, even if we exclude therefrom the words 'in a public place,' accused may have been found guilty of some disorder not necessarily extending to or included in an assault.

"From this case may be derived the rule that the particular offense found in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense. It is not within the power of either the court or the reviewing

authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 78c).

"Moreover, the redrafted specification herein is not worded in such a way that the Board of Review may cut down the offense there found to one which would be necessarily included in the felonious assault charged, for, since we may not resort to the proof for this purpose but must stay within the terms of the specification, we have no means of determining the type or kind of disorder of which the court may have intended to find accused guilty (CM 316182, DeMoss, dissent, 1st Ind.; see for converse of this proposition, CM 316193, Holstein). \* \* \*."

Approaching the problem still more directly, the test as to whether an offense found is included in that charged, a test which has been traditionally applied in courts-martial, is succinctly stated in paragraph 78c of the Manual for Courts-Martial, U.S. Army, 1949, as follows:

"The test as to whether an offense found is necessarily included in that charged is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found."

Applying the test it is manifest that it was not necessary in proving the solicitations charged to prove that accused acted as a driver or "aide" for a prostitute or that he aided the prostitute in exposing the recruits to intercourse.

Indeed, to serve as a driver and an aide for a prostitute would appear to constitute prejudicial conduct far more closely related to that of associating with a prostitute (CM 121380 (1918), Sec 454 (12) Dig. Ops 1912-1940, p.349) than to the offense of pandering or procuring for a prostitute. Conceivably, in defending against the latter offense, an accused might well introduce proof that he had associated with such woman of ill-repute, but for some other purpose.

In view of the foregoing considerations and in the language of the precedents hereinbefore set forth, the Board of Review is impelled to the conclusion that the court-martial in the instant case has in effect, by exceptions and substitutions, acquitted the accused of the material allegations in the charges upon which he was tried, and found him guilty of one combined offense totally different from and not lesser included in either of the offenses alleged. The Board further concludes that this variance constitutes error of such prejudicial character as to require that the conviction be set aside.

(178)

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

Wilmot T. Bangham, J.A.G.C.

Charles J. Berkoutz, J.A.G.C.

J. W. Lynch, J.A.G.C.

22 MAR 1949

CSJAGH CM 334409

1st Ind

JAGO, Department of the Army, Washington 25, D. C.

TO: Commanding General, 2d Armored Division, Camp Hood, Texas.

1. In the case of Corporal Dulie Hunt, RA 34678767, Company B, 41st Armored Infantry Battalion, Camp Hood, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. It is requested that you publish a general court-martial order in accordance with this holding and indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 334409).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1 Record of trial

2 Draft GCMO



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D.C.

(181)

CSJAGQ - CM 334452

FEB 28 1949

UNITED STATES )

FIRST ARMY

v. )

Private JOSEPH C. FOSCOLO  
(RA 12014255), Headquarters  
and Headquarters Detach-  
ment, 1201st Area Service  
Unit, Fort Jay, New York )

Trial by G.C.M., convened at  
Fort Jay, Governors Island,  
New York, 9 December 1948. Dis-  
honorable discharge and con-  
finement for four (4) years and  
nine (9) months. Disciplinary  
Barracks.

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HOLDING by the BOARD OF REVIEW  
GOFF, BOROM and SKINNER  
Officers of The Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification 1: In that Private Joseph C. Foscolo, Headquarters and Headquarters Detachment 1201st Area Service Unit, Fort Jay, New York, did, at 5103 Junction Boulevard, Elmhurst, Long Island, New York on or about 23 August 1948, wrongfully and unlawfully impersonate an officer of the Army of the United States by publicly wearing the uniform and insignia of rank of First Lieutenant.

Specification 2: Same form as Specification 1, but date is 7 September 1948.

Specification 3: Same form as Specification 1, but date is 14 September 1948 and \*\*\* wearing the uniform and insignia of rank of a Second Lieutenant.

Specification 4: In that Private Joseph C. Foscolo, Headquarters and Headquarters Detachment 1201st Area Service Unit, Fort Jay, New York, with intent to defraud Amel Ferraro, Father, Josephine Ferraro, Wife, and Mary Castellano, Sister, of Recruit Francesco A. Ferraro, did, at 5103 Junction Boulevard,

Elmhurst, Long Island, New York on or about 23 August 1948, unlawfully pretend to them that he was a First Lieutenant in the Army of the United States and that he was in position to accomplish the liberation of Recruit Francesco A. Ferraro, then in confinement in the Post Guardhouse at Fort Jay, New York, awaiting trial, by disposing of certain records of the said Recruit Francesco A. Ferraro, well knowing that the said pretenses were false, and by means thereof, did, fraudulently obtain from the said Mary Castellano, the Sum of One Hundred and Fifty (\$150.00) Dollars.

Specifications 5-9, inclusive: Identical with Specification 4, except as to dates and amounts, which are as follows:

	<u>Date</u>	<u>Amount</u>
Specification 5:	28 Aug. 1948	\$350.00
Specification 6:	3 Sept. 1948	\$500.00
Specification 7:	7 Sept. 1948	\$200.00
Specification 8:	14 Sept. 1948	\$100.00
Specification 9:	17 Sept. 1948	\$ 50.00

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

Specification: In that Private Joseph C. Foscolo, Headquarters and Headquarters Detachment 1201st Area Service Unit, Fort Jay, New York, did, without proper leave absent himself from his organization at Governors Island, Fort Jay, New York from about 0630 6 September 1948 to about 1730 11 October 1948.

Prior to pleading to each charge and specification, accused moved to consolidate Specifications 1, 2 and 3 of Charge I into one specification and specifications numbered 4 through 9 of Charge I as one specification. The court reserved passing upon the motion until after the evidence was presented, thereupon accused pleaded "Not guilty" to each specification and charge. Upon the completion of presentation of evidence by the prosecution, the defense renewed its motions for consolidation. The motion to consolidate Specifications 1, 2 and 3, Charge I was overruled. The motion to consolidate Specifications 4 through 9 of Charge I was granted. The trial proceeded on the specification and Charge II, Specifications 1, 2 and 3, Charge I, each of which alleged that accused impersonated an officer, without charging intent to defraud, on three of the dates specified in Specification 4 of the same charge, as amended, and on the amended specification which includes the total of the sums of money obtained on the various dates alleged originally in Specifications 5 to 9, inclusive, Charge I. There is no evidence of previous convictions.

Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for four years and nine months. The reviewing authority approved the sentence, designated Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50<sup>1</sup>/<sub>2</sub>.

3. Accused absented himself without proper leave from his proper organization and station from about 6 September 1948 to about 11 October 1948 (R. 40; Pros. Ex. 1). On 23 August 1948 accused appeared at the home of Amel Ferraro wearing the uniform of a First Lieutenant, with silver bars on his shoulders. He said to Amel "You have a son locked up here and if you want to help him, if you give me fifteen hundred dollars, I'll get him out for you" (R. 18, 25). Amel then took the accused to his daughter's home because he did not understand English very well. Accused told Mrs. Mary Castellano, Amel's daughter, that he would help to get her brother out of prison and get him "a legal deserter's release", but that she and her father would have to pay him fifteen hundred dollars. He did not want the money all at once and he would accept a little bit at a time. He said that he had to get all of her brother's records and destroy them. Amel and Mrs. Castellano gave the accused \$150 on 23 August 1948; \$350 on 28 August 1948; \$500 on 3 September 1948; \$200 on 8 September 1948; \$100 on 14 September 1948, and \$50 on 17 September 1948 (R. 24, 31, 35). Accused was wearing the uniform of a First Lieutenant on two of the occasions when he received payments but he was wearing gold bars on 14 September when he obtained the payment made on that date (R. 25, 28, 30). Mrs. Castellano identified an officer's blouse as having been worn by the accused on 8 September 1948 and again on 14 September 1948 (R. 30).

Accused's confessions written in his own handwriting dated 12 October 1948 and 14 October 1948 were properly admitted in evidence (R. 61, 62; Pros. Exs. 2, 3). The accused in his confessions related facts in regard to his talking with Recruit Francesco Ferraro, a prisoner at Castle William, Governor's Island, New York, in regard to destroying the papers in connection with Francesco's case. Francesco told accused that he would see that accused received \$1500 if he was successful in destroying the papers. Francesco gave accused the address of his father, Amel Ferraro and his home address. He admits wearing the uniform of an officer on the three dates alleged and of receiving the amounts of money on the several dates alleged in the specifications.

The accused, after being advised of his rights by the president of the court, elected to remain silent (R. 68).

4. The court found the accused guilty of the offense alleged in the amended specification. The court also found the accused guilty of the first three specifications, each of which alleged that the accused impersonated an officer without charging the intent to defraud. Each of these acts were, however, aspects of the offense alleged in Specification 4, as amended. The most important aspect of a criminal act or omission is that for which the most severe punishment is authorized. This is in accordance with the interpretation uniformly placed on paragraph 80a of the Manual for Courts-Martial, 1928, in numerous holdings of the Boards of Review (CM 232656, Brinkerhoff, 19 BR 151; CM 246523, Cardella, 30 BR 59; CM 261341, Wallace, 40 BR 182; CM 330619, Pettway, 79 BR 107).

The maximum confinement authorized by the Table of Maximum Punishments, MCM 1928 for obtaining money or other property under false pretenses, where the value is over \$50, is three years. There is no maximum provided in the 1928 Manual for Courts-Martial for the offense of impersonating an officer. The willful and illegal impersonation of an officer of the Army of the United States has been held to be a military offense within the scope of Article of War 96 as a "disorder \*\*\* to the prejudice of good order and military discipline" and as "conduct of a nature to bring discredit upon the military service" (CM 266137, Miller, 43 BR 136; CM 316932, Yaroslawski, 66 BR 126). It has been held that the maximum confinement at hard labor authorized upon a conviction of such an offense is six months. The maximum authorized confinement, without substitutions for absence without leave from command, station, or camp for not more than sixty days is confinement at hard labor for not to exceed three days for each day's absence (Par. 104b, 104c, MCM 1928). The total number of days of confinement authorized under the specification of Charge II and Charge II, therefore, is 105 days or three months and fifteen days. Therefore, the maximum sentence that may be imposed against accused for all the offenses of which he was found guilty is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years, three months and fifteen days.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of all charges and specifications, as amended, legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for three years, three months and fifteen days.

Wm. H. G. Goff, JAGC  
J. L. Brown, JAGC  
W. H. Skinner, JAGC

15 MAR 1949

CSJAGQ - CM 334452

1st Ind

J.A.G.O., Dept. of the Army, Washington 25, D. C.

TO: Commanding General, First Army, Governors Island, New York  
4, New York

1. In the case of Private Joseph C. Foscolo (RA 12014255), Headquarters and Headquarters Detachment, 1201st Area Service Unit, Fort Jay, New York, I concur in the foregoing holding by the Board of Review. Under Article of War 50e(3), this holding and my concurrence vacates so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, three months and fifteen days. Under Article of War 50 you now have authority to order execution of the sentence as modified in accordance with this holding.

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

(CM 334452).

THOMAS H. GREEN  
Major General  
The Judge Advocate General1 Incl  
Record of Trial



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

CSJAGN-CM 334541

14 FEB 1949

UNITED STATES )

82D AIRBORNE DIVISION

v. )

Trial by G.C.M., convened at  
Fort Bragg, North Carolina, 3  
December 1948. Dishonorable  
discharge and confinement for  
five (5) years. Federal Re-  
formatory.

Recruit DONALD C. WOODS  
(RA 13261638), 82d Anti-  
Tank Platoon, 82d Airborne  
Division, Fort Bragg,  
North Carolina. )

-----  
HOLDING by the BOARD OF REVIEW  
YOUNG, FITZER and STEVENS  
Officers of the Judge Advocate General's Corps  
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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50g.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Recruit Donald C. Woods, 82d Anti-Tank Platoon, 82d Airborne Division, did, at Fort Bragg, North Carolina, on or about 26 October 1948, feloniously take, steal, and carry away one wrist watch, Elgin, value of more than \$50.00, the property of Private Emil F Krupp, 82d Airborne Military Police Company, 82d Airborne Division, Fort Bragg, North Carolina.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor

for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$ .

3. The record of trial is legally sufficient to support the findings of guilty, except as to the value of the property described in the Specification of the Charge. The only matters requiring consideration, therefore, are the legal sufficiency of the record of trial to support the findings of guilty of the Specification of the Charge as to value, and the legality of the sentence. For this reason only so much of the evidence in the record as is pertinent to value will be summarized.

4. The Specification of which accused was found guilty alleges the theft on or about 26 October 1948 of a wrist watch, value of more than \$50.00, the property of Private Emil F. Krupp. An Elgin DeLuxe wrist watch referred to as Prosecution's Exhibit No. 1 was marked for identification. Private Krupp testified that he was able to identify the watch (R. 6). The only evidence of value contained in the record of trial is the following testimony of Private Krupp:

"Q. Whose watch is that?

A. Mine.

Q. When did you receive it?

A. It was in August, while I was at jump school at Fort Benning.

Q. From whom did you receive it?

A. My wife now - she was my fiancee at the time.

Q. Do you know what value this watch has?

A. Yes, sir, the watch itself was seventy-five dollars, plus a five-dollar tax and a new band which was twelve dollars" (R. 7).

5. It is well established that, except as to distinctive articles of Government issue, or other chattels, which because of their character have readily determinable value, the value of personal property to be considered in determining the authorized punishment for larceny is the worth of the property in the open market at the time and place of the offense (CM 330899, Garcia (1948); CM 217051, Barton et al., 11 ER 193; TM 27-255, par. 100b). Such value is properly established by the testimony of some person, who by virtue of knowledge and experience knows what that value is (CM 321970, Bouyea, 70 ER 430; CM 334305, Gholston, (1949)).

The testimony of Private Krupp establishes only that he received the watch in question sometime in August as a gift from his then fiancée. The statement of value by Private Krupp has no probative value for any purpose.

The fact that the watch was physically before the court does not cure the deficiency in proof. The market value of such an article is not a matter of fixed and common knowledge of which the court would be justified in taking judicial notice, and to permit the members of the court, by inspection alone, to find such value would be to attribute to them technical and expert trade knowledge which it cannot be legally assumed they possessed (CM 324747, Van Dyne et al, 73 BR 354; CM 213952, Myer, 10 BR 296). Therefore, although under the provisions of paragraph 149g, Manual for Courts-Martial, 1928, the court might take judicial notice that the watch was of some value, it was not authorized to find a value in excess of \$20.00. It follows that so much of the finding of value of the stolen article as exceeds \$20.00 cannot be sustained.

The maximum confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the offense of larceny of property of a value of \$20.00 or less is six months.

6. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as to value as finds a value not in excess of \$20.00; legally sufficient to support the finding of guilty of the Charge; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months in a place other than a United States penitentiary, Federal reformatory or correctional institution.

Charles E. Spring, J. A. G. C.  
J. M. Litz, J. A. G. C.  
Edward L. Stearns, J. A. G. C.

(190).

17 FEB 1949

CSJAGN-CM 334541

1st Ind

JAGC, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, 82D Airborne Division, Fort Bragg, North Carolina.

1. In the case of Recruit Donald C. Woods (RA 13261638), 82d Anti-Tank Platoon, 82d Airborne Division, Fort Bragg, North Carolina, I concur in the foregoing holding by the Board of Review. Under Article of War 50a(3) this holding and my concurrence vacate so much of the finding of guilty of the Specification of the Charge as involves a finding of guilty of value in excess of \$20.00, and vacate so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months in a place other than a United States penitentiary, Federal reformatory or correctional institution. Under Article of War 50 you now have authority to order execution of the sentence modified in accordance with this holding.

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

(CM 334541).

1 Incl  
Record of trial



THOMAS H. GREEN  
Major General  
The Judge Advocate General

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(191)

CSJAGK - CM 334542

8 FEB 1949

UNITED STATES )

v. )

Second Lieutenant JACK  
EDWARD APPERSON (O-2035913),  
82d Replacement Company, 82d  
Airborne Division, Fort Bragg,  
North Carolina. )

HEADQUARTERS 82D AIRBORNE DIVISION

Trial by G.C.M., convened at Fort  
Bragg, North Carolina, 14 December  
1948. Dismissal.

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OPINION OF THE BOARD OF REVIEW  
SILVERS, SHULL and LANNING,  
Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General and the Judicial Council.
2. The accused was tried upon the following charges and specifications:

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

Specification: In that Second Lieutenant Jack Edward Apperson, 82d Replacement Company, 82d Airborne Division, was at Fort Bragg, North Carolina, on or about 1400 hours, 12 November 1948, drunk in station, to wit, the office of the Assistant Chief of Staff, G-1, 82d Airborne Division, Fort Bragg, North Carolina.

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty.)

Specification: (Identical with that alleged under Specification of Charge I.) (Finding of not guilty.)

Accused pleaded not guilty to both charges and their specifications. He was found guilty of Charge I and its specification but not guilty of Charge II and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

Incl # 2

3. Evidence

For the Prosecution

By paragraph 20, Special Orders No. 216, Department of the Army, dated 28 October 1948, the accused, a reserve officer, was ordered to extended active duty, effective 11 November 1948, and assigned to the 82nd Airborne Division at Fort Bragg, North Carolina. On 12 November 1948 at about 0845 hours, he reported to the office of the Assistant Chief of Staff, G-1, and was assigned to the 504th Air Regiment. Shortly thereafter, it was learned that the accused had formerly served in that regiment as an enlisted soldier. It being contrary to the Division's policy to assign an officer to a unit in which he had formerly served as an enlisted man, he was instructed to return to the G-1 office for reassignment. Accused complied with these instructions, having returned to that office at about 1125 hours. Nothing unusual regarding the accused's conduct or physical bearing was noticed at this time. He was told that the G-1 was not in his office, and was instructed to return at 1300 hours. The accused returned to the office at 1350 hours where, according to Captain Richard H. Kelly, the following occurred:

"At about ten minutes to two, Lt. Apperson appeared in front of my desk in a hunched over position, wavering at the knees, his face was flushed and his eyes all bloodshot, and he appeared to have been drinking. He said something, but I couldn't distinguish what it was. I got up and stood in front of him, and the smell of his breath almost knocked me over, the liquor smell was so strong. I realized he had been drinking and in my opinion he was intoxicated. \*\*\* He had reached the degree of intoxication just short of where he would not be able to perambulate \*\*\* He had to be assisted in order to walk a fairly straight line. \*\*\* Yes, he did things like leaving the davenport and sitting on one of the clerk's desks, picking up the telephone and trying to make a call, then leaving the receiver off. Then he walked to the latrine and vomitted. \*\*\* I took Lt. Apperson by the arm and asked him to come with me where I could guide him to the leather davenport in the outer office. \*\*\*

"After I had assisted Lt. Apperson to the davenport, where I asked him to wait until I could talk to Colonel Taber, I returned to the office of Colonel Taber and reported to him that Lt. Apperson, who was to have come to him at one o'clock was now in a drunken condition. \*\*\*

"Just as I had finished reporting to Colonel Taber about Lt. Apperson's drunken condition. I had just finished making that statement, when I heard a loud noise. He said, Colonel Westmoreland, only very loud, so that anyone in the building downstairs could hear it." (R 6-13)

The Chief of Staff of the 82nd Airborne Division testified in part as follows:

"I merely heard my name, Colonel Westmoreland; whereupon I turned around and saw Lt. Apperson standing immediately outside the door housing the G-1 Section and Chief of Staff. \*\*\* Immediately on observing the accused, I saw that he was not in a normal state because of his posture which was slouched, and because of his clothing, which was in a state of disorder. His eyes which were bloodshot and starey and his speech, which was thick. On approaching I could smell alcohol on his breath. \*\*\* Without question, he was in my opinion, drunk. \*\*\*" (R 18-19)

Colonel Westmoreland directed Captain Kelly to remove accused's insignia of rank, which was accomplished. He stated further that accused was not disrespectful, but that he was so intoxicated he was obnoxious (R 19).

First Lieutenant Lory McCullough, 82nd Replacement Company, 82nd Airborne Division, testified in regard to the accused's condition, as follows: "When he reported back at 1350 hours, his speech was blurred and his uniform was untidy and there was a strong odor of liquor on his breath \*\*\*. I would say he was drunk" (R 15).

The Provost Marshal took the accused to the dispensary for an examination, after which he was taken to one of the bachelor officers' quarters (R 12).

#### For the Defense

Private Albert Copeland, assigned to duty in the Bachelor Officers' Quarters, testified that he saw the accused at some time between 1130 and 1200 hours in the Bachelor Officers' Quarters, at which time he noticed nothing unusual about his demeanor. He stated further that after he returned from "chow" in the afternoon he began playing ping pong with the accused and they continued "until about one o'clock that night." Upon cross-examination by the prosecution, this witness testified he did not remember if he saw the accused between 1400 and 1915 hours (R 20-23).

Private William T. Skinner, also assigned to duty in the Bachelor Officers' Quarters, testified that he noticed nothing unusual about the accused when he first saw him between 1130 and 1200 hours in the Bachelor Officers' Quarters, and that he saw the accused playing ping pong during the afternoon with Private Copeland, at which time he did not appear to be drunk. Upon cross-examination this witness testified that he did not recall what time it was in the afternoon when he saw accused and Copeland playing ping pong (R 23-26).

After having been advised of his rights as a witness, accused elected to remain silent (R 26).

4. Discussion

The specifications under Article of War 95 and 96 herein are identical and cover the same act or transaction. But the action of the court in acquitting accused of such act alleged as a violation of Article of War 95 does not impugn its finding of guilty thereof in violation of Article of War 96. Offenses under Article of War 95 and 96 are separate and distinct although such offenses may stem from the same act (CM 191990, Brady, 1 BR 328; CM 281663, Hindmarch, 22 BR (ETO) 223,229).

The evidence shows that when accused appeared at the office of the Assistant Chief of Staff, G-1, on the afternoon of 12 November 1948 his eyes were bloodshot, face flushed, and his speech incoherent. His breath contained a strong odor of liquor, and, although his manner was not disrespectful, he was boisterous and his manner was otherwise contrary to proper office decorum.

Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness under the military law (MCM, 1928, p 160; CM 194563, Ondrick, 2 BR 161,167).

The Board of Review is, therefore, of the opinion that the proof establishes to the exclusion of any reasonable doubt that the accused was drunk at the time and place alleged.

5. Department of the Army records show that the accused is 26 years of age. He had four years of enlisted service and was commissioned a second lieutenant of Infantry on 25 January 1945, served as a platoon leader in three campaigns, and was relieved from active duty on 3 December 1945. He later reenlisted and served as a master sergeant for 18 months prior to being called to active duty as a reserve officer.

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

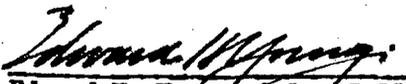
Robert D. Sifers, J.A.G.C.  
Lewis J. Phull, J.A.G.C.  
Harley A. Lanning, J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

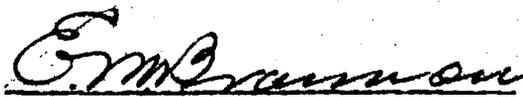
THE JUDICIAL COUNCIL

Brannon, Young, and Connally  
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Jack Edward Apperson (O-2035913), 82d Replacement Company, 82d Airborne Division, Fort Bragg, North Carolina, the sentence is confirmed but commuted to a reprimand and forfeiture of \$150.00 of accused's pay. As thus commuted the sentence will be carried into execution upon the concurrence of The Judge Advocate General.

  
Edward H. Young, Col., JAGC

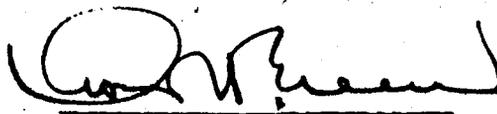
  
William P. Connally, Jr., Col., JAGC

  
Ernest M. Brannon, Brig. Gen., JAGC  
Chairman

28 February 1949

CM 334542

I concur in the foregoing action.

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

28 March 1949

Incl # 1

(GCMO 23 April 20, 1949).



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

MAR 10 1949

CSJAGK - CM 334570

UNITED STATES

11th AIRBORNE DIVISION

v.

Private ALBERT A. MORALES  
(RA 19243286) Detachment  
408th Airborne Quartermaster  
Company, 11th Airborne  
Division, APO 468

Trial by G.C.M. convened at Camp  
Crawford, Hokkaido, Japan, 17  
December 1948. Death by hanging.

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Opinion of the Board of Review  
SILVERS, SHULL and LANNING  
Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, through the Judicial Council to The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Albert A. Morales, Detachment 408th Airborne Quartermaster Company, 11th Airborne Division, APO 468, did, at Sapporo, Hokkaido, Japan, on or about 18 October 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hideo Kobayashi, Japanese National, a human being by kicking him on the body and striking him on the body with his fists.

He pleaded not guilty to and was found guilty of the Charge and its specification. Evidence of one previous conviction by Summary Courts-Martial was introduced. All the members present at the time the vote was taken concurring, he was sentenced "To be hanged by the neck until dead". The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 50 $\frac{1}{2}$ .

3. Evidence:

For the Prosecution:

During the times hereinafter mentioned the accused had charge of the bar at the Sapporo (Japan) Enlisted Men's Club, under the

*Ince # 4*

supervision of Sergeant William P. Archuleta, the club manager. Hideo Kobayashi (the alleged murder victim), a Japanese civilian about fifty (50) years of age, was employed as a laborer at the Club (R 7,30). Hiromitsu Ota, an interpreter also employed at the club, testified that at about 0200 hours on the morning of 18 October 1948, he and other Japanese employees, including Hideo Kobayashi were in the basement of the club drinking beer when the accused came into the room and gave one or more cans of beer to Kobayashi insisting that he drink the beer. Ota asserted that "Kobayashi is not a drinker and he refused at which time the accused beat Kobayashi with his fist". After being struck several blows on the head, Kobayashi fell to the floor whereupon accused began kicking him in the face with his boots. Accused stated that if any of the other Japanese interfered he would "bust" their noses. While Kobayashi was prone upon the floor Ota lifted his head and told him in accused's presence to at least make believe that he was drinking the beer or he would "get beat up more by the accused." The victim made no response at any time while accused continued to kick him. Ota saw accused kick Kobayashi in the face and head "over ten times" and observed blood "oozing" from the victim's face. The "beating" lasted approximately one and one-half hours after which time the "MP's" arrived at the scene. On cross-examination Ota admitted signing a statement wherein it was said that Kobayashi was a drinker and was becoming drunk at the time accused entered the room. Witness asserted that this statement was true and he had not intended to testify that Kobayashi did not drink. He believed the victim to have been drunk at the time of the beating because he would not answer when being questioned (R 18-22).

Kozaburo Sugita, a room boy at the club for more than two years prior to the time in question was in the basement of the club at about midnight of 17 October 1948 and for some time thereafter. He stated that accused entered the room and gave Kobayashi a can of beer "but it looked as though he (Kobayashi) had been drinking already prior to drinking in the basement, so it didn't look as though he wanted to drink". Kobayashi drank the first can of beer given him by accused but slid to the floor and sat against the wall. He refused to drink the next can of beer offered to him. Accused thereupon "punched Kobayashi in the nose two or three times," and kicked him in the face with his boots. Witness stated that accused continued to punch and kick Kobayashi about 15 times in all until about 0410 hours when the military police arrived. The victim was lying prone upon the floor and "his face was all bloody and messy". On further examination the witness stated that he thought both accused and Kobayashi were drunk and that accused was trying to scare the victim. No other person or persons were involved in the altercation. Accused's actions were normal prior to the time he started beating Kobayashi (R 22-29).

Junichi Wada, an interpreter for the occupation forces, testified that in response to a report that he had received at about 0330 hours on 18 October 1948, he went to the "Japanese Personnel Office" in the Sapporo Enlisted Men's Club where he saw a Japanese whom he believed to be Hideo Kobayashi lying on the floor with his face in a bloody condition and one American soldier whom he recognized as the accused standing nearby. The witness stated that accused "kicked and punched Kobayashi in the face more than ten times" and then told him (witness) to take the body to the ponds in the prefectural grounds and "throw it away". Kobayashi appeared to be unconscious. At about 0420 hours the military police arrived and the victim was taken away. (R 29-32)

Shiro Kikuchi, a Japanese interpreter for the military police at Sapporo, testified that at about 0400 hours on the morning of 18 October 1948, in response to a call which he had received at the "RTO Police box", he and Sergeant Washburn went to the Japanese laborer's room at the Enlisted Men's Club where the witness stated that he saw the "one soldier" whom he identified as the accused, standing by the "victim" who was lying on the floor. Blood was flowing from the head and face of the "victim" who was unconscious. Kikuchi stated that he procured a jeep at the MP station and took the victim to the Hokushin Hospital, North 1, West 4. He then reported the incident to Sergeant McIntyre at the Camp Crawford, MP Barracks (R 15, 17).

Sergeant 1st Class Willis McIntyre, Military Police Platoon, 11th Airborne Division, testified that he knew the accused "Albert Morales" and identified him in the courtroom. He had seen the accused in the Sapporo Military Police Station at about 0430 hours on the morning of 18 October 1948. Sergeant McIntyre described accused as follows:

"His condition at that time was, he appeared to have been drinking and his clothes were bloody in that his shirt had blood on the arms. His pants had blood splattered all over them and his boots were bloody." (R 33)

Sergeant McIntyre made an investigation of the incident, procured the names of the alleged witnesses and visited the Hokushin Hospital where the sergeant of the guard pointed out a body as being that of the "victim" who was then dead. He ordered the body removed to the Hokkaido University for a post-mortem examination. Sergeant McIntyre stated that he was present about three days later when accused, after being advised of his rights under Article of War 24, wrote in his own handwriting and signed a four page statement which was produced in court and identified by the witness. No duress, threats or promises were employed in obtaining the statement. On motion of the prosecution, and without objection on the part of the defense, there was received in evidence as Prosecution Exhibit 2 his statement which was as follows:

"HEADQUARTERS 11TH AIRBORNE DIVISION  
Criminal Investigation Section  
Office of the Provost Marshal  
APO 468

20 Oct. 1948

(Date)

"STATEMENT OF Morales, Albert A.	Pvt	19243286
(Name)	(Rank)	(ASN)
Det. 408 Abn QM Co. APO 468	Sapporo, Hokkaido, Japan	
(Organization)	(Location)	

"I, Albert A. Morales, prior to making the statement hereinafter following have had read and explained to me the 24th Article of War by Willis M. McIntyre, who has identified himself to me as an Agent of the 11th Airborne Division Criminal Investigation Section. I understand that I cannot be compelled to incriminate myself or to answer any question the answer to which may tend to incriminate me or to answer any question not material to the issue when such answer might tend to degrade me. With such understanding I make the following statement of my own free will and accord, under no threat or fear of punishment and without inducement or promise or immunity or reward.

"On or about 18 Oct. 1948, I, Albert A. Morales, Pvt, 19243286, at approximately 2215 hours, was watching the laborers and bar tenders cleaning up prior to turning out the lights and going home. Prior to that, I had been with some of the 408 boys in the corner to which they had invited me for a shot of Nikka. They had about four fifths of it.

"I drank some of it, and then walked around the room (Beer Hall) of which I was in charge at the time. I was a little high, but managed to walk straight, as I was in charge and had to set a good example. I walked around seeing that everyone had their caps off, and their feet off the furniture, after which I took off back to the corner and had a couple more drinks of nikka. I can drink it like water and it doesn't bother me at all for a while, but when it hits me, that's all!! Well, it was finally time to go, so I went around telling everyone to finish a can or two of beer and move out.

"After that the Japanese laborers cleaned up and went downstairs. There were five or six boys down there, and I couldn't figure out why, as Sgt. Archuleta, the manager of the club, had told me he had given strict orders for everyone to go home after they had finished cleaning up. Anyway, we drank some left over beer from the tables which the guys upstairs hadn't had time to finish. There was about half a fifth of either Schenley's or Calvert's, I can't remember which, that I had, and killed off. Sheppard was down there and I think Kousczuk, the club Mess Sgt. was down there also. Sgt Archuleta was asleep in his room. Well, this man, a Japanese

National, was down there. I had never seen him before and didn't know what he was doing there but I didn't care as long as he didn't bother me. Sheppard and Kousczuk were down there for a while and took off to bed before it happened. I don't know exactly how or why it happened as I have a mean temper and will lose control of myself almost immediately especially when drinking.

"I remember now that I struck him in the face with my fist, and must have kicked him also as there was blood on my boots.

"I must have been in a daze or something as I don't remember how many times I hit him or why. The boys started to clean up the mess, and I walked out and the Military Police walked in. They took the man out and brought me to the Military Police Station.

"This is my own statement consisting of four hand written pages in my own hand writing. No threats, promises or duress were used in obtaining this statement.

FURTHER DEPONENT SAYETH NOT

S/ ALBERT A. MORALES  
t/ Albert A. Morales

"Sworn and subscribed before me, an officer authorized to administer oaths this 20 day of October 1948, at Hokkaido Military Government District APO 468, Sapporo, Hokkaido, Japan

S/ FRANK DUANTE Jr  
t/ Frank Duante Jr.  
Major FA  
Hokkaido Milt.  
Gov. Dist. APO 468  
Summery Court

"This is a certified true copy

JOHN A COULTER  
Capt. Infantry  
Provost Marshal

"CERTIFIED TRUE COPY:

S/ Clarence W. Senser  
1st Lt. CMP  
Sum. Ct. Office"

Dr. Hideo Nakane testified that he was a graduate of the Hokkaido Imperial University and had been engaged in the practice of medicine for about seven years. At about 0500 hours in the morning one day in "November or October" the witness was called to the Hokushin Hospital to treat an injured Japanese national who was about fifty years old. This person had been identified as Kobayashi by a member of his family who "came on to the hospital crying". The witness stated that the Japanese national died while he was examining him. Dr. Nakane was not sure but was of the opinion that death was caused by "fracture of the bones in the facial area and the profuse bleeding." He sent the body to Hokkaido University for a post mortem examination. No death of any other Japanese male person occurred in the Hokushin hospital on that morning. The court ruled that the testimony of the doctor as to the identification of the body was hearsay and would be "stricken" from the record (R 11-14).

Dr. Shokichi Ueno, Sapporo City, Hokkaido, Japan, a professor at Hokkaido University testified that he had been engaged in forensic medical work for sixteen years during which time he had performed several hundred autopsies. He could read and write English. There was shown to the witness a document purporting to be a certified true copy of a report of a post-mortem examination or autopsy made on the "victim" by the witness at the Medical Legal Laboratory, Hokkaido University. The prosecution stated the original was not available. Dr. Ueno read the document and after making a few corrections signed it in court stating that it was the report he made on the victim Hideo Kobayashi. The body which was the subject of the report had been brought to the hospital by the military police. No other body was brought to the University by the Military Police on that particular night. The autopsy report was received in evidence, without objection, Prosecution Exhibit 1 and is as follows:

"AUTOPSY

"I have performed an autopsy on the body of Hideo Kobayashi at the Medico-legal Laboratory, Medical Faculty, Hokkaido University, on October 18, 1948, and said autopsy revealed.

"Anatomical Findings:

"It is the body of a Japanese male, aged apparently about 51 years, 165 cm, weight approximately 55 kg.

"Post-mortem lividity is well developed on the posterior and dependent portions. Post-mortem rigidity is very marked on legs and less marked on arms and neck.

"The following external marks of violence are noted:

"Five to six lacerated wounds, 4 to 7 cm in length and situated over the centre of the face, extending from the orbit to the lips. They, especially that of situated over the eye-brow and cheek-bone, resemble strongly incised wounds. But the edges of these wounds are somewhat irregular, their extremities torn, the deeper tissues unevenly divided, with tags of tissue showing in the wounds. The edges and surrounding parts are bruised, and longitudinal parallel scratches on the right cheek were found. Nasal and cheek bones are strongly fractured.

"Head: Careful inspection of the head is practically negative except for arteriosclerosis of small degree of the basal arteries and oedema of brain. No ruptures of blood vessels either between the dura mater and the bone, between the dura mater and the brain, or in the brain substance.

"Thorax: The right auricle and ventricle of the heart are distended with dark fluid blood, the left side is contracted and empty. Valves and myocard are negative. The large veins are full of blood. The lungs are engorged with dark blood, and on section the bronchus and bronchioles are seen impacted with clotted blood and semi-fluid blood.

"Abdomen: The abdominal viscera are engorged with blood, and the stomach are filled with brown coloured partially clotted blood.

"Cause of Death: Asphyxia from choking by the impaction of blood in bronchioles, caused by the inhalation of blood, following the haemorrhage in the nasal region. .

"Nature of the weapon: All the wounds found on the body (face) are lacerated and not incised wounds. So they were caused by blows from blunt instruments, especially hard instruments, for instance sticks, iron bars, or stones. Combined bruises and longitudinal parallel scratches are very near to show that they were caused by blows from the heel of a boot or shoes.

S/ SHOKICHI UENO M.D. Ph.D.  
 t/ Shokichi Ueno M.D. Ph.D.  
 Regius Professor of Forensic  
 Medicine, Medico-legal Laboratory  
 Medical Faculty, Hokkaido University

"This is a certified  
 true copy

S/ John A Coulter  
 t/ JOHN A. COULTER  
 Capt. Infantry  
 Provost Marshal"

In response to questioning by the law member, Dr. Ueno stated that when the body was brought to him for post mortem examination the military police told him that "this is the body of Kobayashi that was brought from the EM Club". This information was the basis for his identification of the body in the autopsy report. The law member thereupon ruled, "That was hearsay and will be stricken from the record and not considered by the court". (R 8 -10)

The prosecution rested and the defense moved for a finding of not guilty asserting that the evidence failed to show that the person assaulted in the basement of the club was the same individual who later died in a hospital. The court closed and upon being opened the law member announced that the motion was denied.

For the Defense

Private First Class Alvin W. Obar, Detachment 408th Quartermaster, Camp Crawford, Hokkaido, Japan, testified that he was with the accused and other enlisted men in the Sapporo Club from about 1830 to 2200 hours on the evening of 17 October 1948; that the group had about three bottles of "Nikka" whiskey and a couple cases of beer which was being consumed and that the accused was drunk (R 38).

Sergeant William P. Archuleta, Headquarters Special Troops 11th Airborne Division, whom the record discloses was the manager of the Sapporo Enlisted Men's Club testified that he left accused at the club at about 2130 hours on 17 October 1948 and at that time, "Well, I would say he was intoxicated. How you describe that I don't know. The man knew who he was and knew who I was, but he was drunk. I mean, in other words, he could stagger a little." (R 39)

Private First Class Charles William Kosczuk, 511th Airborne Signal Company, stated that he was drinking with accused from about "ten o'clock on the 17th until about one forty-five on the 18th of October 1948" in the Japanese labor office at the Sapporo Enlisted Men's Club. In the group were privates Sheppard, Morales, the witness and some Japanese including "Kobayashi". Private Kosczuk stated that Kobayashi had been drunk all day but Morales appeared "pretty sober" to him (R 39-41).

Private John Sitko, Third Quartermaster Sales Detachment, stated that he had a few drinks with accused at the club on the evening of 17 October 1948, and that at about 2000 hours he gave accused "a half of a fifth" of whiskey and left (R 42).

On motion of the defense there was received in evidence, without objection, a "Report of Sobriety Examination" of accused which had been made by a medical officer at the 161st Medical Station Hospital at 0600 hours on 18 October 1948. The report states that subject possessed "3 mgs. per cc of serum". Explanatory notes therein state that "at 3 to 3.5 mgm the individual is quite seriously intoxicated". (R 43 Defense Ex A.)

4. The court recalled Dr. Ueno who stated that the autopsy report which he had submitted in this case was not the "official sheet" he usually furnished the Japanese Government when a death occurred because it was "signed out for Willis McIntyre". After a colloquy between the defense counsel and the president of the court the president stated "The law member has ruled that the name placed on this report is hearsay evidence and cannot be considered as evidence. Any further questions? The witness may be excused." Dr. Hideo Nakane was also recalled and stated that no Japanese national other than the one he had previously described had been brought to his hospital on the same night (R 44). No further evidence was presented for either side.

#### 5. Discussion

The specification alleges that the accused did at the time and place alleged "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hideo Kobayashi, Japanese National, a human being by kicking him on the body and striking him on the body with his fist". It will be noted that this case was tried on 17 December 1948, under the provisions of Article of War 92 and the Manual for Courts-Martial, 1928. Murder is defined both in the Manual for Courts-Martial 1928 and the Manual for Courts-Martial 1949 as "the unlawful killing of a human being with malice aforethought". Although a form of specification for murder under Article of War 92 appearing at page 249 of the 1928 Manual contains the phrase "and with premeditation", the Board of Review pointed out in CM 319168 Poe, 68 BR 141, 168, that premeditation was not an element of murder either at common law or under Article of War 92. We note that by the provisions of Article of War 92, as amended and reenacted by the Act of 19 June 1948 (Public Law 759, 80th Congress) and the Manual for Courts-Martial 1949, both of which became effective on 1 February 1949, murder not premeditated is punishable as a court-martial may direct, thereby excepting the death penalty. From the foregoing it will be concluded that, for the purposes of this case, the allegation of and the finding of guilty of "premeditation", as such, is unnecessary to support the sentence but inasmuch as the injuries shown to have caused the victim's death were inflicted by accused at intervals extending over a period of more than one hour, we are of the opinion that the court was justified in inferring premeditation.

The evidence clearly established that accused committed a brutal assault upon Hideo Kobayashi by striking him in the face with his fists and kicking him in the face with his boots. The question first presented is whether or not the prosecution proved that Hideo Kobayashi died from the wounds inflicted by accused. The autopsy report was admitted in evidence without objection by defense but the court thereafter refused to consider, as evidence, the name shown thereon. This document was admissible as a record made in the regular course of business and the name shown was competent to identify the body upon which the autopsy was performed as being that of Hideo Kobayashi. The fact that Dr. Ueno did not have personal

knowledge as to the identity of the person described therein and the entry was probably based on hearsay does not affect its admissibility. Such circumstance goes merely to the weight to be given such evidence (Sec 695 Title 28 USC; CM 323197 Abney 72 BR 149, 157; CM 324519 Davis 73 BR 251, 262). We therefore believe the court erred in excluding the name "Hideo Kobayashi" from the autopsy report. All evidence identifying the body at the hospital and the university with the name, Hideo Kobayashi, was stricken from the record by the law maker and the court instructed not to consider it as evidence. This we think was also error. The evidence as to the name by which a person is known is not objectionable as hearsay (Sec 469, Vol 1 Whartons Crim Evidence, 11th Ed; CM 312088 Allen 4 BR (A-P) 381, 383). Other evidence in the record must, therefore, have been relied upon by the court to establish the death of Hideo Kobayashi. We believe that there is sufficient circumstantial evidence in the record to establish beyond a reasonable doubt that the person alleged to have been murdered actually died. The evidence showed that Hideo Kobayashi, in an unconscious condition at about 0430 hours, 18 October 1948, was taken to the Hokushin Hospital by the military police and that he was left there. Dr. Nakane was summoned to the hospital at about 0500 hours on 18 "October or November" 1948 where he found a Japanese male who was unconscious and almost beyond the hope of recovery and who died while being examined. Dr. Nakane was of the opinion that death was caused by fractures in the facial area and from profuse bleeding. He ordered the body sent to Hokkaido University for a post mortem examination. No other Japanese male had been admitted to the hospital that night. Sergeant McIntyre visited the hospital where he saw the body of a Japanese male which he ordered taken to the Hokkaido University for an autopsy. The body upon which Dr. Ueno performed an autopsy on 18 October 1948 was that of a Japanese male and no other body was brought to the university that day. The autopsy report disclosed the body had several lacerated wounds on the face and fractures of the nasal and cheek bones, death was caused by asphyxia as a result of the inhalation of blood following a haemorrhage in the nasal region. Such a chain of circumstances could not reasonably be assumed to have been the result of mere coincidence and we believe the court was warranted in finding that it was the body of Hideo Kobayashi which was the subject of the autopsy report (CM 300953 Herbert 25 BR (ETO) 223, 225; CM 296909 Rollins 30 BR (ETO) 235). Other entries in the autopsy report showing the physical condition of the corpse and the cause of death together with the corroborating evidence convincingly established that the death of Hideo Kobayashi was caused by the injuries inflicted upon him by the accused as alleged (CM Abney; CM Davis, supra).

We have heretofore stated that malice aforethought is an indispensable requisite to murder. It is stated in paragraph 148(a), page 163 Manual for Courts-Martial 1928 that:

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. \* \* \* It may mean any one or more of the following states of mind preceding or coexisting with the act or mission by which death is caused:

An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; \* \* \* (Underscoring supplied)

The court-martial was therefore warranted in inferring that accused's acts were accompanied by malice aforethought if the court believed from the evidence that at the time accused repeatedly kicked Kobayashi with his boots (no adequate provocation being shown) accused possessed knowledge that his violent acts would probably cause either grievous bodily harm or the death of Kobayashi. The vicious and repeated kicking of a human being in the head and face by use of one's boots is such an act or acts as would reasonably be calculated to cause grievous bodily harm to the victim, irrespective of whether death resulted therefrom. (Acers v. United States, 164 U.S. 391; CM 251546 Burleson, 33 BR 287, 293.) As affecting accused's state of mind, the defense has shown by substantial evidence that at the time of the offense accused was drunk. Although voluntary drunkenness is no excuse for crime committed while in that condition, it is admissible as bearing upon the question of whether accused was capable of entertaining a criminal intent or malice aforethought when he killed the deceased. Specifically such evidence is relevant and material in determining the subordinate question of whether the accused's deliberative faculties and power of reasoning had been dethroned and replaced by passion or unreasoning hysteria so as to negative the existence of "knowledge" inherent in malice as defined above. It will be recalled that Hiromitsu Ota testified that during the assaults accused told the witness and other bystanders that if they intervened he would "bust" their noses, and the witness Junichi Wada asserted that when he arrived at the scene accused told him to take the body and throw it away. Such statements negative the existence of a mind devoid of the power of reason and deliberation and we conclude, as did the court, that accused's drunkenness was not of such degree as to deprive him of the knowledge inherent in malice. It has been held that the fact that cruelty or brutality was manifested in a killing will raise an inference of malice (Evans v. United States, 122 Fed 2nd 461, 466, 311 U.S. 635), and if an unlawful act, dangerous to, and indicating disregard of human life, causes the death of another, the perpetrator is guilty of murder, although he did not intend to kill (40 Corpus Juris Secundum, pp 866-867; Hill v. Comm 239 Ky 646, 40 SW 2nd 261).

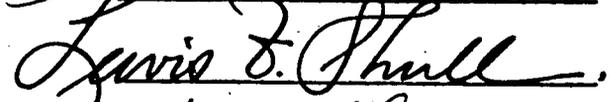
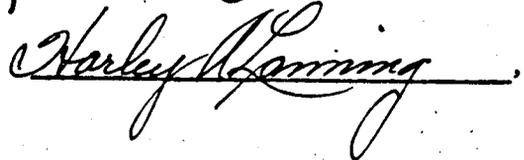
Even if it were assumed that the killing was the result of accused's heat of passion engendered by the deceased's refusal to drink the beer offered him, yet,

"Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been adequate provocation." (1 Wharton's Criminal Law, 12th Ed, Sec 426, pp 655-656; CM 284389 Creech, 16 BR (ETO) 249, 260; CM 325492 Mosely 74 BR 263, 270)

Finally, it may be stated that the apparent lack of any substantial motive for the killing is immaterial as respecting accused guilt of the offense charged. Motive may frequently explain the commission of a homicide, and, in an appropriate case, assist in the determination of whether it constitutes murder or manslaughter, but a motive is not an essential element of the crime of murder. (Wharton's Criminal Law 12th Ed., Sec 420; Underhill's Criminal Evidence, 4th Ed., Sec 559; CM 302897 Hicswa, 59 BR 167, 186).

6. The record discloses that at the time of the offense accused was 19½ years of age. He enlisted on 24 June 1946 for three years and has no allotment to dependents. Papers accompanying the record of trial show that during the period 27 October to 30 November 1948 accused was given a neuropsychiatric examination at the 361st Station Hospital and found to be free from mental defect, disease or derangement.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon a conviction of murder in violation of Article of War 92.

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DEPARTMENT OF THE ARMY  
 In the Office of The Judge Advocate General  
 Washington 25, D. C.

CSJAGU - CM 334570

12 May 1949

U N I T E D S T A T E S	)	11th AIRBORNE DIVISION
	)	Trial by G.C.M. convened
v.	)	at Camp Crawford, Hokkaido,
	)	Japan, 17 December 1948.
Private ALBERT A. MORALES	)	Death by hanging.
(RA 19243286) Detachment	)	
408th Airborne Quartermaster	)	
Company, 11th Airborne	)	
Division, APO 468	)	

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OPINION OF THE JUDICIAL COUNCIL

BRANNON, SHAW and MICKELWAIT

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1. The record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council pursuant to Article of War 50(d)(1). The Judicial Council submits this, its opinion, to The Judge Advocate General.

2. Upon trial by general court-martial convened at Camp Crawford, Hokkaido, Japan, on 17 December 1948 the accused was found guilty of the murder of Hideo Kobayashi at Sapporo, Hokkaido, Japan, on 18 October 1948 by striking and kicking him on his body, in violation of Article of War 92. Evidence of one previous conviction by summary court-martial was introduced. All members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The Judicial Council has examined the record and finds the evidence to be as stated in the opinion of the Board of Review.

Briefly summarized, the evidence shows that on 17-18 October 1948 the accused was in charge of the bar in the Enlisted men's Club at Sapporo, Hokkaido, Japan. The deceased was one of several Japanese laborers employed at the club. During the evening of 17 October accused drank heavily and at 0200 the following morning he entered the Japanese laborers' room in the basement and gave Hideo Kobayashi one or more cans of beer directing him to drink the contents. Kobayashi had been drinking before the accused entered the room, drank some of the beer offered to him by the accused but declined to continue. This apparently incensed the accused, who struck the deceased with his fist, knocking him from a sitting position to the floor. The accused then kicked the deceased about the

*Shaw*

face and head with his boots. Kobayashi offered no resistance whatsoever at this time or at any time thereafter. The accused remained in the room drinking and from time to time resumed the kicking of the deceased who lay on the floor. Other Japanese were present while this was going on, but were threatened with violence if they interfered. There was no evidence of any act on the part of the deceased to provoke the initial assault, and the evidence shows that the kicking of the deceased was repeated to a total of ten or fifteen times during a period of approximately one and one-half hours. A Japanese interpreter employed by the military police arrived at the scene about 0400 hours and accused ordered him to take Kobayashi's body to a place in the prefectural grounds where there were some ponds and "throw it away". A sergeant of the military police caused Kobayashi to be taken to the Hokushin Hospital where he died shortly thereafter and the body was then removed to the Hokkaido University for a post-mortem examination. The testimony of a doctor who examined Kobayashi at the hospital, and the autopsy report show that Kobayashi died as a result of "Asphyxia from choking by the impaction of blood in bronchioles, caused by the inhalation of blood, following the haemorrhage in the nasal region". The nature of the wounds on the victim's face and head indicated that they were caused by blows from a blunt object such as a boot or shoe.

In a pre-trial confession, which is shown to have been voluntarily made, accused admitted striking and kicking a Japanese at the time and place shown by the evidence, stating in part:

"\* \* \* I don't know exactly how or why it happened as I have a mean temper and will lose control of myself almost immediately especially when drinking.

"I remember now that I struck him in the face with my fist, and must have kicked him also as there was blood on my boots.

"I must have been in a daze or something as I don't remember how many times I hit him or why. The boys started to clean up the mess, and I walked out and the Military Police walked in. They took the man out and brought me to the Military Police Station." (Prox. Ex 2)

A test of the blood of the accused showed "3 mgs. [alcohol] per cc. of serum", evidence of quite serious intoxication.

4. The record shows that at the time of the offense the accused was 19-5/12 years of age. He enlisted on 24 June 1946 for three years. Papers accompanying the record of trial show that during the period 27 October to 30 November 1948, the accused was given a neuropsychiatric examination at 361st Station Hospital and found to be free from mental defect, disease or derangement.

5. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Judicial Council concurs in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and

to warrant confirmation thereof. A sentence to death or life imprisonment is mandatory upon a conviction of murder in violation of Article of War 92 tried prior to 1 February 1949.

Franklin P. Shaw      C. E. Mickelwait  
Franklin P. Shaw, Brig Gen, JAGC      C. E. Mickelwait, Colonel, JAGC

E. M. Brannon  
E. M. Brannon, Brig Gen, JAGC  
Chairman

(212)

CSJAGK - CM 334570

1st Ind

JAGC, Dept. of the Army, Washington 25, D. C. , 24 June 1949

TO: Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review, and the opinion of the Judicial Council in the case of Private Albert A. Morales (RA 19243286), Detachment 408th Airborne Quartermaster Company, 11th Airborne Division.

2. I concur in the opinions of the Board of Review and the Judicial Council that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Upon trial by general court-martial the accused was found guilty of the murder of Hideo Kobayashi at Sapporo, Hokkaido, Japan, on 18 October 1948, by striking and kicking him on his body, in violation of Article of War 92. Evidence of one previous conviction by summary court-martial was introduced. All the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Accused enlisted in the Army on 24 June 1946 and was 19-5/12 years of age at the time he committed the offense herein. Although the evidence shows a total lack of adequate provocation, it conclusively establishes that the deceased was drunk at the time the offense was committed. In view of the circumstances I am of the opinion that the execution of the death penalty is not required. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, that a U.S. penitentiary be designated as the place of confinement, and as thus commuted carried into execution.

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

4 Incls

1. Record of trial
2. Op Judicial Council
3. Drft ltr sig S/A
4. Form of action

( GCKO 43, July 1949 ).

CM 334,570

In the foregoing case of Private Albert A. Morales (RA 19243286), Detachment 408th Airborne Quartermaster Company, 11th Airborne Division, the sentence is confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused. As thus commuted the sentence will be carried into execution. A U.S. penitentiary is designated as the place of confinement.

The White House



Jan 29, 1949





DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(215)

CSJAGH CM 334572

18 February 1949

UNITED STATES )

HEADQUARTERS  
ZONE COMMAND AUSTRIA

v. )

First Lieutenant EMIL T. BYKE )  
(O-2005943), Headquarters, 4th )  
Constabulary Squadron. )

) Trial by G.C.M., convened at  
) Camp McCauley, Austria, 17  
) December 1948. Dishonorable  
) discharge, total forfeitures,  
) and confinement for one (1) year.

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

CHARGE I: Violation of the 95th Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Emil T. Byke, Headquarters 4th Constabulary Squadron, did, at Neuhaus, Germany, on or about 27 November 1948, wrongfully export from the United States Zone of Austria, and wrongfully import into the United States Zone of Germany, nine hundred ninety-five (995) cartons of cigarettes, in violation of Circular 41, Headquarters European Command, dated 2 June 1947.

Specification 2: (Finding of not guilty).

He pleaded not guilty to Charge I and its Specification and to Specification 2 of Charge II, and guilty to Charge II and Specification 1 thereunder. He was found guilty of Charge II and Specification 1 thereunder and not guilty of the other Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged

*Incl. # 3*

the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence, but reduced the period of confinement to one year, and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Accused is in the military service and a member of the 4th Constabulary Squadron (R 22).

On the evening of 27 November 1948 (R 11) Heinrich Breit, a customs guard official, was on duty on the Scharding side of the bridge extending across the Inn River, from Scharding, Austria, to Germany (R 9-10). The line of demarcation between Germany and Austria was the middle of the river (R 10,15; Pros Ex 5; R 31). At 2105 hours accused drove up to where Breit was standing and showed his "card." Breit opened the bar, and then entered accused in the register. Breit identified Prosecution Exhibit 1 as the car which accused was driving (R 9-11).

At approximately 2100 hours the same evening Fred D. Avery, Joseph D. Schepis, Theo E. Bloam, "C.I.D." agents, and Lieutenant Colonel John R. Magnusson, were in Neuhaus, Germany, across the Inn River from Scharding, Austria (R 12,13,23,32,41). Avery observed accused driving up to the German border. He informed accused that he was from the C.I.D. and ordered him out of the car (R 19,20). Avery identified Prosecution Exhibit 1 as the car in which accused was riding (R 13). Avery, Schepis, Bloam, and Colonel Magnusson, searched accused's car and a number of cartons of Camel and Marvel cigarettes were found (R 14,24,33,41,42). Later, the cigarettes were inventoried and marked by Schepis (R 19,38). Prosecution Exhibit 6, 995 cartons of cigarettes, was identified by Bloam as the cartons of cigarettes found in accused's car (R 42).

The court took judicial notice of paragraph 1, Circular 41, Headquarters European Command, 2 June 1947, which is as follows:

"Effective 27 May 1947, the export or import of tobacco products from or to the US area of control, Germany, by US military personnel, War Department civilian personnel, and all other personnel subject to US military law, is prohibited."

4. Evidence for the defense.

Accused after being apprised of his rights elected to testify in his own behalf. He stated that he had enlisted service from 15 August 1940 until January 1945. He went overseas in 1942 with the Third Division and, except for 25 days while he was hospitalized, he participated in all combat which the Third Division had from 8 November 1942 until the end of the war, which combat began in North Africa and continued on through Sicily, Italy, Southern France, Germany, and Austria. He received the Bronze Star Medal, Purple Heart, the Croix de Guerre, and the Silver Star and two Oak Leaf Clusters thereto. He remained overseas until December 1946. He had started as a private in "I" Company, Third Division and ended up as unit commander. He returned overseas in 1948 and was assigned to "USFA, Vienna" in August 1948. He had not been previously court-martialed or given punishment under Article of War 104.

5. The uncontradicted evidence and the pleas of guilty of accused establish that on the evening of 27 November 1948 at Neuhaus, Germany, accused wrongfully imported 995 cartons of cigarettes into the United States Zone of Germany from Austria and that such act was in violation of the directive as alleged. The conduct of accused constituted disobedience of a standing order and as such was violative of Article of War 96 (CM 260157, Culver, 39 BR 145).

6. Accused was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. Since accused is an officer his punitive separation from the service should be accomplished by dismissal. "However, 'dishonorable discharge' and 'dismissal' are legal equivalents and the sentence although inartful is in legal effect a sentence to dismissal and was properly approved as such by the reviewing authority (CM 249921, Maurer, 32 B.R. 229." (CM 271153, Karsanoff, 46 BR 61,68). The irregularity in form may be cured by the action of the confirming authority (CM 271119, Simpson, 46 BR 53,58).

7. Records of the Department of the Army show that accused is 25 years of age and single. He attended high school for three years. He had no record of civilian employment. His military record as recounted by him in his testimony is substantiated by the records on file in the Department of the Army. It is further shown that accused's efficiency ratings of record include six (6) ratings of "Excellent", and three (3) ratings of "Superior."

8. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial

(218)

rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority and to warrant confirmation of the sentence. A sentence to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year, is authorized upon conviction of a violation of Article of War 96.

Wilbert T. Baughm, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

J. W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

(218A)

THE JUDICIAL COUNCIL

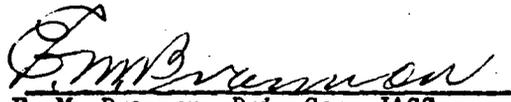
Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant  
Emil T. Byke (O-2005943), Headquarters, 4th Constabulary  
Squadron, the sentence is confirmed and will be carried  
into execution upon the concurrence of The Judge Advocate  
General. The United States Disciplinary Barracks or one of  
its branches is designated as the place of confinement.

  
Franklin P. Shaw, Brig Gen, JAGC

  
C. B. Mickelwait, Col, JAGC

8 April 1949

  
E. M. Bramon, Brig Gen, JAGC  
Chairman

CM 334572

( GCMO 27, Apr 29 1949)

I concur in the foregoing action.  
Under the direction of the Secretary  
of the Army, the confinement adjudged  
is remitted.

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

4/26/49



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(219)

CSJAGK - CM 334573

15 FEB 1949

UNITED STATES )

THE ARTILLERY CENTER  
Fort Sill, Oklahoma

v. )

Trial by G.C.M., convened at Fort  
Sill, Oklahoma, 6 December 1948.  
Dismissal and total forfeitures.

Captain GEORGE C. COSTAS )  
(O-451681), Headquarters and )  
Headquarters Battery, 1st Field )  
Artillery Observation Battalion, )  
Fort Sill, Oklahoma. )

-----  
OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING,  
Officers of The Judge Advocate General's Corps  
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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General and the Judicial Council.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Captain George C. Costas, Headquarters and Headquarters Battery, 1st Field Artillery Observation Battalion, Fort Sill Oklahoma, did, without proper leave, absent himself from his organization at Fort Sill, Oklahoma from about 31 July 1948 to about 31 October 1948.

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

Specification 1: In that Captain George C. Costas, \*\*\*, did, at Fort Sill, Oklahoma, on or about 17 May 1948, with intent to deceive wrongfully and unlawfully make and utter to Fort Sill Officers Club a certain check in words and figures as follows, to wit.

CAPT. or MRS. GEO. C. COSTAS No. 108  
Hq. 5th FA Group  
Ft. Sill, Okla. Lawton, Okla. May 17 1948

Pay  
To The  
Order of Ft Sill Officers Club \$ 5.00

Five and no/100 ----- DOLLARS

THE SECURITY BANK & TRUST CO.  
86-78 Lawton, Okla. 86-78

/s/ Geo C. Costas

and by means thereof, did fraudulently obtain from Fort Sill Officers Club Merchandise and/or cash of the value of about five dollars (\$5.00) he the said Captain George C. Costas then well knowing that he did not have and not intending that he should have sufficient funds in The Security Bank and Trust Company for the payment of said check.

Specification 2: In that Captain George C. Costas, \*\*\*, did, at Fort Sill, Oklahoma, on or about 3 May 1948, with intent to deceive wrongfully and unlawfully make and utter to Fort Sill Officers Club, a certain check, in words and figures as follows, to wit:

LAWTON, OKLA. May 3 1948 86-78  
1031

THE SECURITY BANK AND TRUST CO.  
of Lawton

Pay To The  
Order Of Ft. Sill Officers Club \$5.00

Five and no/100 ----- Dollars

/s/ Geo C. Costas

Know your endorser Require identification

and by means thereof, did fraudulently obtain from Fort Sill Officers Club Merchandise and/or cash of the value of about five dollars (\$5.00), he the said Captain George C. Costas then well knowing that he did not have and not intending that he should have sufficient funds in The Security Bank and Trust Company for the payment of said check.

Specification 3: In that Captain George C. Costas, \*\*\*, did, at Fort Sill, Oklahoma, on or about 11 May 1948, with intent to deceive, wrongfully and unlawfully make and utter to Fort Sill Officers Club, a certain check, in words and figures as follows, to wit:

CAPT or MRS. GEO. C. COSTAS  
Hq. 5th F.A. Group  
Ft. Sill, Okla.

No. 101

Lawton, Okla. May 11 1948

Pay  
To The  
Order Of Ft. Sill Officers Club \$ 69.77

Sixty-nine & 77/100 ----- Dollars

THE SECURITY BANK & TRUST CO.

86-78 Lawton, Okla      86-78

/s/ Geo C Costas

amounting to sixty-nine dollars and seventy-seven cents (\$69.77) in payment of an Officers Club bill, he the said Captain George C. Costas then well knowing that he did not have and not intending that he should have sufficient funds in the Security Bank and Trust Company for the payment of said check.

He pleaded guilty to Charge I and its specification but not guilty to Charge II and its specifications. He was found guilty of Charge I and its specification, and guilty of Specifications 1, 2 and 3 of Charge II, "except the words 'with intent to deceive' and 'fraudulently' and 'he the said Captain George C. Costas then well knowing that he did not have and not intending that he should have sufficient funds in the Security Bank and Trust Company for the payment of said check,' substituting for the last phrase, 'under such circumstances as to bring discredit upon the military service,' of the excepted words, not guilty, of the substituted words, guilty." He was found not guilty of Charge II but guilty of a violation of Article of War 96. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

### 3. Evidence

Because of the view we take of the findings of the court as to Charge II and its specification, it is not necessary to summarize the evidence relative thereto.

#### For the Prosecution

##### Charge I and its Specification

Captain John O. McDonnell, S-4, 5th Field Artillery Group, Fort Sill, Oklahoma, testified that the accused worked under his supervision for about six months prior to 1 July 1948. The accused went on a thirty-day leave and was to return to duty 31 July 1948 but did not return nor did he see him again until the last Sunday in October (R 7,8). On cross-examination Captain McDonnell stated that the accused's job consisted of inspecting twenty-six messes three times a month. The inspections involved checking on the storage and handling of food and the keeping of prescribed records. On cross-examination the witness stated that accused performed his military duties in a highly efficient manner and that his retention in the Army would be of benefit to the service (R 8).

The prosecution offered, and there was received in evidence without objection, a duly authenticated copy of the morning report of Headquarters and Headquarters Battery, 1st Field Artillery Observation Battalion, for 1 August and 1 November 1948. This document established accused's status as absent without leave from 31 July to 1 November 1948 when he was placed in arrest of quarters at Fort Sill, Oklahoma (R 8).

For the Defense

Lieutenant Colonel Robert B. Partridge, Staff Officer of the Artillery School, Fort Sill, Oklahoma, testified as a character witness for the accused. He stated that he had been accused's battalion commander for about four and one-half months in 1946 during which time accused was a battery commander and did an excellent job. The witness stated that in his opinion accused would be an asset if retained in the Army (R 19-20).

The law member advised the accused of his rights and he elected to testify in his behalf. He stated that he enlisted in April 1939 and was married in December 1940. He did not see his wife again until May 1941. At that time he was a corporal and his wife informed him that she had been considering a divorce (R 22). After the accused completed Officers Candidate School in December 1941 he persuaded his wife to join him in February 1942 at Lawton, Oklahoma, where they established a home (R 24). In May 1942 she became dissatisfied and went to live with her sister in Oklahoma City. One child was born on 25 November 1942. The accused recounted a series of separations and reconciliations with his wife who apparently had difficulty in adjusting herself to the duties and responsibilities of marital life. He was overseas from 1943 until 1945. Although his wife was gainfully employed while he was overseas, she spent the allotment which he sent her and also an allotment which he had sent to a bank. Because of her mismanagement of their funds their financial status from January 1947 to April 1948 was such that they "were barely keeping going" (R 26). His wife visited her family in April and May and upon her return on each occasion she was dissatisfied, discussed obtaining a job and returning to Shawnee. Accused and his wife went to Shawnee on 6 July 1948, remaining there until the 22nd or 23rd. They returned to Lawton to sell their furniture. He was to take up bachelor quarters and she was to return and live with her parents. Accused drove her to Oklahoma City from where he was to return to Fort Sill by bus (R 28). Accused stated he had intended to return to Fort Sill, but while waiting for the bus the thought of "returning home to find that I had no house, no home, and these problems facing me, and I sat for five hours. I missed a couple of Fort Sill buses, and I finally just couldn't face the return here, so I took a bus to Amarillo, Texas" (R 28). He went to Los Angeles, obtained various jobs and after a period of time realized the only thing for him to do was to return, which he did on October 30th (R 35). His wife obtained a divorce from him on 30 October. His deepest and greatest desire is to remain in the service in any capacity (R 32). The domestic

situation which caused him to go absent without leave has been corrected (R 33).

#### 4. Discussion

The record shows that accused was absent without leave from about 31 July 1948 to about 31 October 1948, and in view of his plea of guilty thereto no further comment is necessary except that the domestic difficulties recounted by accused by way of extenuation may serve as cogent mitigating circumstances with respect to the punishment to be imposed.

The court by its exceptions and substitutions found the accused guilty of Specifications 1, 2 and 3 of Charge II reading substantially as follows:

"In that Captain George C. Costas \*\*\* did, at Fort Sill, Oklahoma, on or about 17 May 1948, wrongfully and unlawfully make and utter to Fort Sill Officers' Club a certain check in words and figures as follows \*\*\* and by means thereof did obtain from Fort Sill Officers Club merchandise and/or cash of the value of about five dollars (\$5.00) under such circumstances as to bring discredit upon the military service."

In order to form the basis of a valid sentence, it has been held that -

"A specification must exclude every reasonable hypothesis of innocence - must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent - may be regarded as the settled law of this office as well as the law of the land." (CM 187548, Burke, 1 BR 56; CM 316886, Chaffin, 66 BR 97,101.)

In CM 315215, Ressell, 64 BR 371,372, the Board of Review held that a specification reciting that accused "\*\*\* did \*\*\* wrongfully have in his possession, one 1937 Ford, property of Mr. Alphonse Wesselman," and no more, failed to allege any criminal offense cognizable by military or civil law." The Board stated further: "This conclusion is impelled for the sole reason that the specification, as drawn, does not state an offense and does not inform the accused of the nature of the offense with which he is charged."

CM 260398, Gallagher, 39 BR 225,229, is a case directly in-point with the instant case. There the Board of Review stated:

"All of the Specifications of Charge II and the Additional Charge originally alleged by appropriate words of art and factual

allegations offenses under Article of War 96. Such offenses originally alleged the wrongful, unlawful and fraudulent making and utterance to named parties of certain described checks whereby the accused fraudulently obtained value therefor when he knew that he did not have and without intending that he should have sufficient funds in the drawee bank for the payment thereof. The court by exceptions and substitutions found the accused not guilty of fraudulently making and uttering the described checks, not guilty of fraudulently obtaining value therefor, and not guilty of 'well knowing that he did not have and not intending that he should have sufficient funds' in the drawee bank for the payment of the checks. By so finding the court emasculated the Specifications of essential elements upon which the accused's alleged offenses were predicated. The making and utterance of a check is wrongful and unlawful not because the drawee bank does not pay it upon presentation but because the maker knows at the time of its execution that he does not have and does not intend to have sufficient funds on deposit with the drawee bank to pay the check when presented. By finding the accused not guilty of such essential elements without finding him guilty by substituting other words of like or similar import therefor the court destroyed the factual basis upon which its findings that the checks were wrongfully and unlawfully made and uttered were based. The substituted words of which the accused was found guilty merely state that the accused did 'wrongfully and unlawfully make and utter to [named parties certain described checks] which when presented for payment at the [drawee bank] [were] not paid.' Such substituted words wholly fail to state any offense because they do not include facts or elements necessary to constitute an offense (CM 133625 (1919); CM 195323 (1931); CM 202601 (1935), Dig. Op. JAG., 1912-40, Secs. 452 (15) and 454 (66)). The court's findings therefore amounted to findings of not guilty of the original Specifications of Charge II and the Additional Charge."

Inasmuch as the mere making and uttering of a check is not a criminal or wrongful act, is neither malum per se nor malum prohibitum, what, if any, can be the offense inherent in the pleadings as amended and found by the court? The answer appears to have been left entirely to speculation and conjecture because the court has acquitted accused of the allegations that he made and issued the checks "with intent to deceive," that he "fraudulently" obtained any value therefor, and that "he - then well knowing that he did not have and not intending that he should have sufficient funds in the Security Bank and Trust Company for the payment of said check." The words of criminality, "wrongfully," "unlawfully," and "under such circumstances as to bring discredit upon the military service" remaining in the specifications are but empty conclusions when no specific fact or circumstance has

been found by the court which could be construed as rendering the making and uttering of the check wrongful or unlawful. (CM 333927, Seiring) It follows that the findings of guilty of Charge II and its specifications cannot be sustained.

5. Department of the Army records show the accused to be 31-1/2 years of age and single. He enlisted in the service 20 April 1939. Upon completion of Officers Candidate School on 20 December 1941 he was appointed and commissioned a second lieutenant, Army of the United States. He served overseas from April 1943 to December 1946. He has been awarded the Silver Star, the Bronze Star Medal, the Air Medal with two oak leaf clusters, the French Fourragere, and five campaign stars. The accused's efficiency reports varied from "Very Satisfactory" to "Superior" but the majority of them were either "Excellent" or "Superior."

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and its three specifications, but legally sufficient to support the findings of guilty of Charge I and its specifications and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Robert D. Silvers, J.A.G.C.  
Lewis F. Shull, J.A.G.C.  
Harley H. Lanning, J.A.G.C.

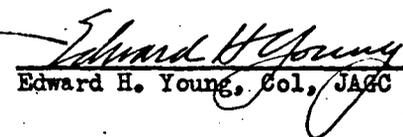
DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

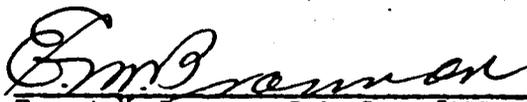
THE JUDICIAL COUNCIL

Brannon, Shaw, and Young  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
Captain George C. Costas (O-451681), Headquarters and  
Headquarters Battery, 1st Field Artillery Observation  
Battalion, the findings of guilty of Specifications  
1, 2 and 3 of Charge II and of violation of the 96th  
Article of War under Charge II are disapproved and the  
sentence is confirmed and will be carried into execution  
upon the concurrence of The Judge Advocate General.

  
Franklin P. Shaw, Brig Gen, JAGC

  
Edward H. Young, Col, JAGC

  
Ernest M. Brannon, Brig Gen, JAGC  
Chairman

CM 334573

I concur in the foregoing action.

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THOMAS H. GREEN  
Major General  
The Judge Advocate General

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DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

CSJAGH CM 334635

9 FEB 1949

UNITED STATES	)	NURNBERG MILITARY POST
	)	
v.	)	Trial by G.C.M., convened at
	)	Nurnberg, Germany, 4 January
First Lieutenant ROBERT D.	)	1949. Dismissal.
SIMPSON, O-132864, 513th	)	
Labor Supervision Company,	)	
APO 139.	)	

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

Specification: In that First Lieutenant Robert D. Simpson, 513th Labor Supervision Company, did, at Bamberg, Germany on or about 4 December 1948, with intent to deceive Captain John J. Mackel, officially state to the said Captain Mackel, that "I have given the 528th Labor Supervision Company a thorough inspection and just got back", or words to that effect, which statement was known by the said Lieutenant Simpson to be untrue.

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

Specification: (Finding of not guilty).

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

3. Evidence for the prosecution pertinent to the finding of guilty may be summarized as follows:

The accused, a member of the military service, was the commanding officer of the 513th Labor Supervision Company, Bamberg, Germany (R 6). On 3 December 1948, during the course of a telephone conversation with Captain John J. Mackel, operations officer of the Labor Supervision Section, Nurnberg Military Post, the accused was informed that he was to make an inspection of the 528th Labor Supervision Company at Bayreuth on the following day (R 7). The call was originally placed by the accused but Captain Mackel recognized the accused's voice (R 7,9).

At approximately 1120 hours on 4 December 1948 Captain Mackel conversed by telephone with a party at Bamberg, Germany, who identified himself as the accused. In reply to Captain Mackel's question "Have you inspected the 528th Labor Supervision Company at Bayreuth?" the accused replied "I gave them a very thorough inspection." (R 7,12,15, 16) When Captain Mackel indicated that he had information to the contrary, the accused questioned the source of the information by saying "Who did you speak to, some German?" (R 7) At approximately 1145 hours on the same day, after receiving word once more that the inspection had not been made, Captain Mackel conversed again by telephone with accused at his organization in Bamberg and said, "Lieutenant Simpson, this is getting serious. Did you or did you not inspect the 528th Labor Supervision Company?" To this inquiry, the accused replied "No sir, I did not." (R 8,10,11,13,16). Karl Heinz Zeidler, a civilian clerk-interpreter, overheard this conversation with Captain Mackel through the employment of an extension telephone at the latter's headquarters. According to witness, the accused admitted to Captain Mackel that he had not made the inspection although he had stated to Captain Mackel in their first conversation that the inspection had been made (R 10,11).

Sergeant Walter W. Skillings, the First Sergeant of accused's company, was present with accused and Lieutenant Bengé in the company orderly room in Bamberg on the morning of 4 December during these telephone conversations. According to Sergeant Skillings, there were two telephone calls, one at 1120 hours and another a few minutes later. In each instance the party on the wire identified himself as Captain Mackel and asked to speak to accused. In the first conversation Sergeant Skillings heard accused say that he had made an inspection. In the second conversation Sergeant Skillings heard accused state that he had not made an inspection (R 16). Immediately after the second conversation, the accused told Sergeant Skillings that he was going to Bayreuth and instructed him to call off the "hunt." In the latter connection, Sergeant Skillings testified that the "hunt" to which accused made reference was a hunting party which was scheduled to assemble in Aberg, twenty kilometers away from Bamberg, at 1230 hours (R 16,17).

First Lieutenant Vascoe A. Bengé, of the 528th Labor Supervision Company of Bayreuth, while present at the 513th Labor Supervision Company in Bamberg, the morning of 4 December 1948, heard the accused state over the telephone, at approximately 1120 hours, "Yes, I have inspected the 528th Labor Supervision Company, and just got back" (R 12,14). In the second telephone conversation a few minutes later, Lieutenant Bengé heard the accused state "No, I did not inspect the 528th. The reason I told you I had was because I was already out the door on my way." (R 12,13) When Lieutenant Bengé left Bamberg to return to his organization in Bayreuth at approximately 1145 hours, the accused was in the orderly room of the 528th Labor Supervision Company (R 13).

Sergeant First Class Al W. Madar, of the 528th Labor Supervision Company, Bayreuth, was present in the orderly room of his organization between 0800 and 1140 hours on 4 December 1948, awaiting inspection. No officer arrived to make the scheduled inspection of the organization during that period, although the inspecting officer was expected between 1000 and 1030 hours (R 19,20). As a result of Captain Mackel's second telephone conversation, however, the accused, accompanied by Lieutenant Bengé, made the required inspection of the 528th Labor Supervision Company in Bayreuth between 0115 and 0215 hours, 4 December 1948 (R 23,24).

4. The defense offered no evidence but recalled Captain Mackel and Lieutenant Bengé for further cross-examination (R 21-24). After being advised of his rights, the accused elected to remain silent (R 24).

5. The accused has been found guilty of making a false official statement, knowingly and with intent to deceive, at Bamberg, Germany, on 4 December 1948, in violation of Article of War 95. In view of the express allegations contained in the specification to the effect that the untrue statement was made knowingly and with intent to deceive and was official in character, the offense charged is clearly violative of Article of War 95 and not an offense of lesser culpability in violation of Article of War 96 (Par 151, MCM 1928, p.186 and Par 182, MCM 1949, p.254; CM 202027, McElroy, 5 BR 347; CM 275353, Garris, 48 BR 42).

Insofar as concerns the required proof of the offense, it is clear and undisputed from the evidence adduced that the accused was directed by competent higher authority to make an inspection of a Labor Supervision Company, a unit similar to that which he commanded, on the morning of 4 December 1948. The proposition that an officer's inspection of a camp, garrison, or other military installation constitutes a military duty is strongly supported by historical precedent and so well settled as to require no further discussion. It follows that a statement made by a member of the military establishment to another person concerning such duty would clearly be official in character if the person to whom the

statement was made was one who could require it in the course of military administration. In this regard it is undisputed in the instant case that Captain Mackel was talking to the accused in the course of his official duties as a representative of the Labor Supervision Section, Nurnberg Military Post, when he inquired as to whether the accused had inspected the 528th Labor Supervision Company in Bayreuth on the morning of 4 December 1948. That the accused thereupon falsely stated to Captain Mackel he had made the inspection is established by clear and convincing evidence including accused's admission in his second conversation with Captain Mackel that he had uttered this untruth during the course of their first conversation. Consideration of the physical facts in the case relative to the accused's statement that he had made the required inspection likewise points to the correctness of the conclusion of accused's guilt. At 1120 hours when the accused stated to Captain Mackel that he had completed the inspection, for example, he was in the orderly room of his own organization in Bamberg, Germany. At that same time, however, Sergeant First Class Al W. Madar was in the orderly room of the 528th Labor Supervision Company at Bayreuth, Germany, awaiting the inspection. According to this witness, he remained in the orderly room of his organization from 0800 hours until 1140 hours and had been anticipating the arrival of the inspecting officer since 1000 or 1030 hours.

The conclusion that the accused made the statement with the intent to deceive Captain Mackel is inexorably impelled by the undisputed falsity of the statement (CM 275353, Garris, supra) and equally as forcefully, by the accused's attempt to discredit Captain Mackel's source of information by saying "Who did you speak to [at the 528th Labor Supervision Company], some German?", he well knowing that he had not made the inspection and that whatever information Captain Mackel had to that effect was true. The fact that the accused was required to cancel a previous hunting engagement in order to make the belated inspection furnishes some indication as to his motive for his falsification on the day in question.

It is thus manifest from the record that the evidence adduced clearly establishes every element of the offense beyond a reasonable doubt and consequently the accused's guilt of a violation of Article of War 95, as charged.

6. Accused is 34 years of age, married and the father of a 5 year old child. He completed high school in St. Louis, Missouri, in 1932. In civilian life he was employed as a steelworker and salesman. He enlisted in the Missouri National Guard 23 July 1930 and served therein until 22 July 1933. He entered the Army of the United States as a trainee on 6 January 1943, and served in the enlisted grades until

reporting for Officers Candidate School at Fort Benning, Georgia. While in the enlisted ranks he had served in Panama during the period October 1943 to February 1944. On 6 December 1944, he was commissioned a second lieutenant of Infantry. He was promoted to the rank of first lieutenant on 27 March 1946. He served overseas in the European Command from February 1945 to November 1945, participating in the campaigns of Northern France and Austria. After his return to the United States he was assigned to Camp Robinson, Arkansas, where he was on duty until his return to Europe in July 1946. He has served in the European Command since that time. He is authorized to wear the Combat Infantry Badge, Bronze Star, the European Theater Campaign Medal with two battle stars, and the American Theater Medal. His efficiency ratings consist of seven ratings of "Excellent" and nine ratings of "Superior."

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkoutz, J.A.G.C.

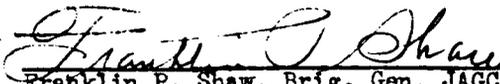
J. W. Byrnes, J.A.G.C.

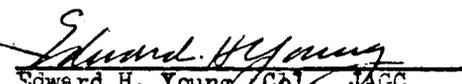
DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Shaw, and Young  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
First Lieutenant Robert D. Simpson (O-1328644),  
513th Labor Supervision Company, APO 139, the  
sentence is confirmed and will be carried into  
execution upon the concurrence of The Judge  
Advocate General.

  
Franklin P. Shaw, Brig. Gen., JAGC

  
Edward H. Young, Col., JAGC

  
Ernest M. Brannon, Brig. Gen., JAGC  
Chairman

The Judge Advocate General not having  
concurred in the foregoing action of the  
Judicial Council, the record of trial is  
forwarded to the Secretary of the Army  
for confirming action pursuant to Article  
of War 48b.

CM 334635

( GCMO 21, Apr 15, 1949)

  
THOMAS H. GREEN  
Major General

----- 29 March 1949 -----  
/ Compiler's note: The secretary of the Army confirmed the sentence above but  
commuted it to a reprimand and forfeiture. /

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(233)

CSJAGK CM 334658

FEB 2 5 1949

UNITED STATES	)	82D AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bragg, North Carolina, 10
Captain JAMES W. FLANAGAN	)	January 1949. Dismissal.
(O-1177797), Headquarters and	)	
Headquarters Battery, 456th Air-	)	
borne Field Artillery Battalion,	)	
Fort Bragg, North Carolina	)	

OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING  
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain James W. Flanagan, Hq Btry, 456th Airborne Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 28 October 1948, with intent to deceive Lt Col Samuel W. Horner II, officially state to the said Lt Col Samuel W Horner II, that a mistake in recording the account of James W Flanagan had been made by the First Citizens Bank and Trust Company, Fayetteville, North Carolina, in that this account had been recorded under the name of James M. Flanagan, which statement was known by the said Captain James W. Flanagan to be untrue.

He pleaded not guilty to and was found guilty of the charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

On 28 October 1948, Lieutenant Colonel Samuel W. Horner, II, the Executive Officer of accused's organization, called accused to his office to explain why certain checks, purportedly written by the captain had been returned to the payees marked "No Account." Accused stated by way of explanation that "the bank - the First Citizens Bank and Trust Company, Fayetteville - had made a mistake in recording his account - they had recorded it under the name 'James M. Flanagan' instead of 'James W. Flanagan', but that the matter had been straightened out with the bank."

Colonel Horner further testified that in questioning accused he was not conducting an official investigation. Accused was the coach of the Division football team and as such "he did a fine job." (R 6,7)

Two written stipulations were entered into between defense and prosecution stating that if the cashier of the First Citizens Bank and Trust Company located at Fayetteville, and the cashier of the same bank at Fort Bragg, North Carolina, were present, each of them would testify that "Captain James W. Flanagan" was not a depositor with the bank located at either place on 28 October 1948, "nor has he ever had an account which was erroneously recorded under the name of Captain James M. Flanagan" (R 8; Pros Exs 1 and 2).

Defense counsel, at the close of prosecution's case, made a motion for a finding of not guilty on the ground that the prosecution had presented no evidence tending to show that the statement of accused was official, as alleged. The motion was denied (R 8).

The rights of accused as a witness were explained to him and he elected to remain silent. No witnesses were called by the defense. (R 9).

The court closed and upon being opened recalled Colonel Horner, who testified as follows:

- "Q. Now, were you acting as Executive Officer of Division Artillery at the time you were inquiring into this matter?
- A. That's correct. It wasn't an official investigation of any charges - it was an investigation of the particular check in question given to Mr. Faucett. I was investigating it as Executive Officer of the 82d Airborne Division Artillery.
- Q. It was an informal investigation?
- A. That's right - that's what I should have said. I didn't warn Captain Flanagan of his rights in making this informal investigation. Actually after I made the informal investigation I then referred it to the Battalion Commander for a complete investigation, and that investigation was made by Major Jillson.
- Q. You were acting in your official capacity at the time Captain Flanagan made his statement to you?
- A. That is correct. I called him up to my office to find out the answers I desired." (R 10)

4. Discussion.

The accused was found guilty of making the alleged false official statement to Lieutenant Colonel Horner, with an intent to deceive him, knowing such statement was untrue, in violation of Article of War 96.

To support the conviction the evidence must show that the accused made the alleged statement, that it was official, that it was false, that he knew it to be false, and that the statement was made with an intent to deceive the person to whom it was made (CM 324352, Gaddis, 73 BR 181).

The evidence established conclusively that the statement was made by accused as alleged. The fact that Colonel Horner did not advise accused of the rights accorded him as a witness under Article of War 24, prior to requesting that he explain why certain of his checks had been returned to the payees named thereon, is immaterial under the circumstances shown in this case. The accused's explanatory statement was not received in evidence as a confession nor as an admission pertaining to the offense alleged. The statement itself constituted the basic element of the said offense. (CM 245724 Lawson 29 BR 257,261) It may also be reasonably inferred from the very nature of accused's statement that he intended to deceive Colonel Horner. The accused's statement, if true, would have been a complete defense to a charge against him that he had made and uttered the checks drawn upon a bank in which he had no account, an act which on its face would have constituted a military offense in violation of Article of War 96.

The only element of the alleged offense remaining to be discussed is whether the statement made by accused was of an official nature. Colonel Horner testified, that his interrogation of accused was not in the course of an official investigation, however, when recalled by the court, he stated that although he should have said that the investigation was of an informal nature, he was acting in his official capacity as executive officer of the command. In an analogous case, (CM 200207, Freeborn, 4 BR 253,260) it appeared that an accused was called before his adjutant to make an explanation concerning a certain written communication. Although the adjutant testified that the report made to him by accused was not "official" the Board of Review was of the opinion that "a report made to an adjutant with reference to a communication which the latter had just officially referred to the accused with a request for an explanation, must, under the circumstances shown, be regarded as an official report to him in his capacity as adjutant." Under the circumstances of the instant case the accused must have known that he was being called upon by his executive officer for an official explanation. In the present case the court concluded upon the evidence that the statement was officially made and we do not believe there is any reason for disturbing such findings. We are of the opinion that all of the elements of the offense charged have been established beyond any reasonable doubt.

5. Department of the Army records show that accused is 28 years of age and that he attended college for two years. He served eight months in an enlisted status and was commissioned a second lieutenant on 18 February 1943. Accused served in the Pacific Theater for 33 months and was awarded the Bronze Star Medal. He was promoted to the rank of temporary captain 15 July 1946. Adjectival efficiency ratings of accused have averaged "Excellent."

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

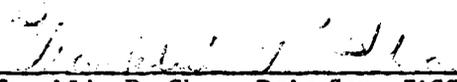
Robert D. Gilbert J.A.G.C.  
Lewis S. Shull J.A.G.C.  
Harley A. Lanning J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

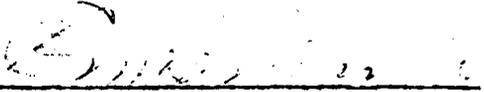
THE JUDICIAL COUNCIL

Brannon, Shaw, and Young  
Officers of The Judge Advocate General's Corps

In the foregoing case of  
Captain James W. Flanagan (O-1177797), 456th  
Airborne Field Artillery Battalion, the  
sentence is confirmed and will be carried  
into execution upon the concurrence of The  
Judge Advocate General.

  
Franklin P. Shaw, Brig Gen, JAGC

  
Edward H. Young, Col, JAGC

  
Ernest M. Brannon, Brig Gen, JAGC  
Chairman

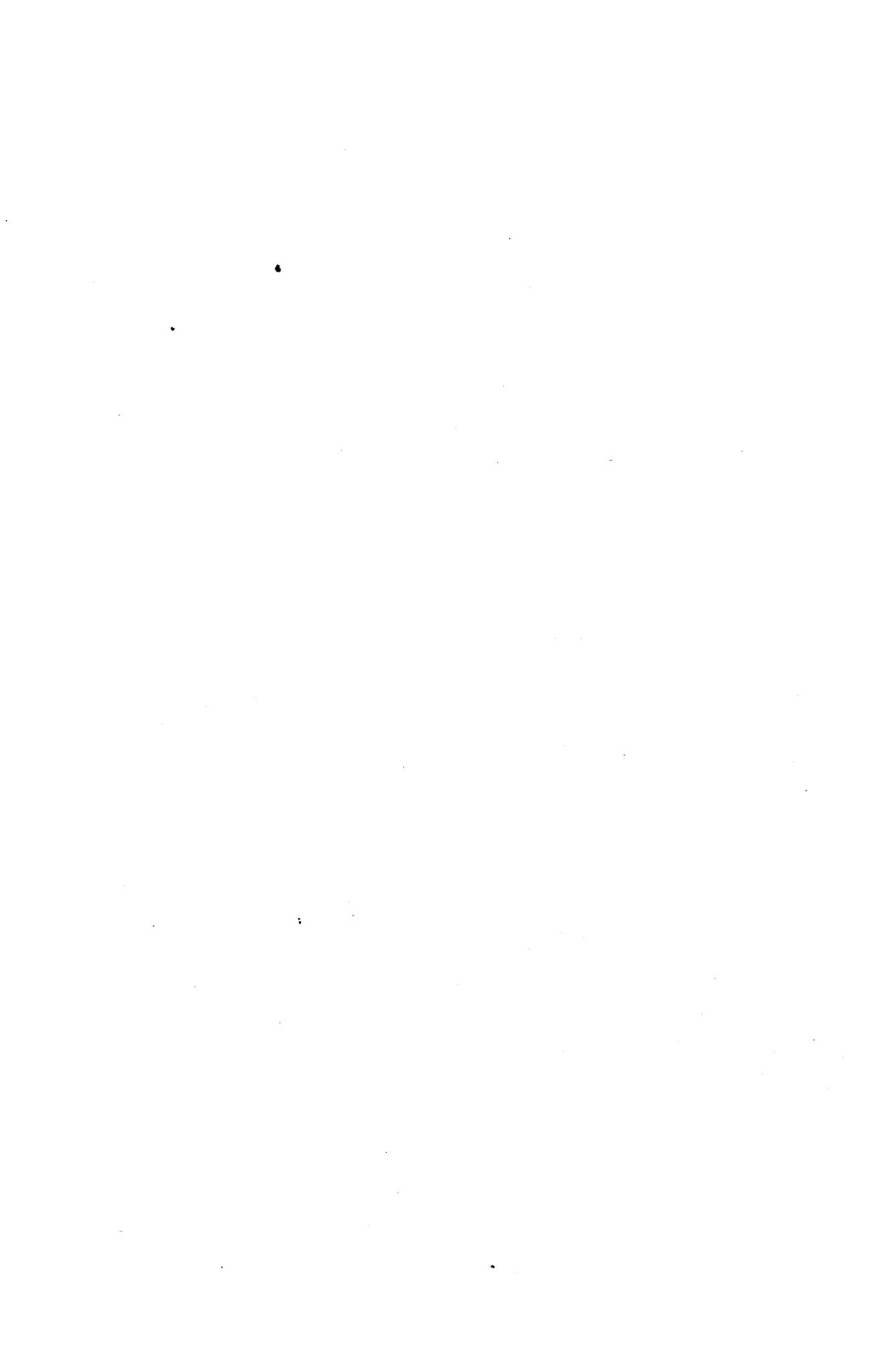
I concur in the foregoing action.

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

CM 334658

( GCMO 16, Mar 30, 1949)

March 24 1949.



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

CSJAGI CM 334698

FEB 1 7 1949

UNITED STATES )

2D ARMORED DIVISION

v. )

) Trial by G.C.M., convened at  
) Camp Hood, Texas, 13 December 1948.  
) Dishonorable discharge and confine-  
) ment for three (3) months. Post  
) Stockade.

)  
) Recruit H. P. PRICE  
) (RA 38786557), Company B,  
) 73d Engineer Combat  
) Battalion, Camp Hood, Texas.  
)

-----  
HOLDING by the BOARD OF REVIEW

JONES, ALFRED and SOLF

Officers of the Judge Advocate General's Corps  
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1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification: In that Recruit H. P. Price, Company B, 73d Engineer Combat Battalion, having been restricted to the limits of the Battalion Area, did, at Camp Hood, Texas, on or about 0630 hours, 15 November 1948, break said restriction by going absent without proper leave.

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

Specification: In that Recruit H. P. Price, Company B, 73d Engineer Combat Battalion, did, without proper leave, absent himself from his organization at Camp Hood, Texas, from about 0630 hours, 15 November 1948, to about 0630 hours, 18 November 1948.

He pleaded not guilty to, and was found guilty of, both charges and specifications. Evidence of five previous convictions was introduced and considered by the court in adjudging sentence. Accused was sentenced to be dishonorably discharged the

service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three months. The reviewing authority approved the sentence, designated The Post Stockade, Camp Hood, Texas, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification and the sentence, based on proof of five previous convictions (MCM, 1928, par. 104c, Sec. B). The only question to be determined is the legal sufficiency of the record of trial to support the findings of guilty of Charge I and its Specification, and only that part of the record of trial pertinent thereto will be considered.

4. On a charge of breach of restriction, the offense of which accused was found guilty under the Specification of Charge I, proof that he was duly restricted is a necessary element of the prosecution's case (CM 272589, SKIRWIN, 46 BR 315, 316). In the instant case, the only evidence introduced relating in any manner to the alleged restriction consisted of a duly certified extract copy of an entry in the service record of accused showing him restricted to the Battalion Area for sixty days by sentence of a summary court-martial adjudged and approved on 29 October 1948 (R. 7, Prog. Ex. 3). In the absence of objection to the admission of this document under the best evidence rule, it was competent to show the sentence to restriction and the approval thereof.

The Board of Review has held, however, that a summary court-martial sentence, when approved and ordered executed, constitutes merely an order to those directly charged with the enforcement of the sentence to give whatever orders may be necessary to execute it in fact (CM 329380, SUMMERS, 78 BR 33, 34). Even though the sentence thus adjudged and approved is considered to be tantamount to an order of restriction, nevertheless mere proof of the order of restriction is not sufficient to support the element of notice of the restriction. It must be shown that the order was brought home to the accused (CM 325457, McKINSTER, 74 BR 233, 243). In the absence of proof that the accused was placed in restriction by those charged with the enforcement of the sentence, and that he was informed of such restriction, it must be held that the record of trial fails to support the findings of guilty.

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification, legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support the sentence.

Wm. J. G. C. J.A.G.C.  
Frank A. Alfred, J.A.G.C.  
Waldemar A. Siff, J.A.G.C.

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CSJAGI CM 334698

1st Ind

1 MAR 1949

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Headquarters, 2D Armored Division, Camp Hood, Texas

1. In the foregoing case of Recruit H. P. Price (RA 38786557), Company B, 73d Engineer Combat Battalion, Camp Hood, Texas, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification, legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty of Charge I and its Specification. Under Article of War 50 you have authority to order the execution of the sentence. The order promulgating the findings should contain a recital substantially as follows: Pursuant to Article of War 50 the findings of guilty of Charge I and its specification are vacated.

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

(CM 334698).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Record of trial



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(243)

MAR 8 1949

CSJAGH CM 334703

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

v.

First Lieutenant HOWARD H.  
EASTER, 01692902, 4051st Area  
Service Unit, Headquarters  
Detachment, The Artillery  
School, Fort Sill, Oklahoma.

THE ARTILLERY CENTER

Trial by G.C.M., convened at  
Fort Sill, Oklahoma, 2 November  
and 22 December 1948. Dismissal.

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

CHARGE I: Violation of the 94th Article of War.  
(Disapproved by the reviewing authority).

Specification: (Disapproved by the reviewing authority).

CHARGE II: Violation of the 95th Article of War.  
(Disapproved by the reviewing authority).

Specification: (Disapproved by the reviewing authority).

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

Specification: In that First Lieutenant Howard H. Easter, Field Artillery, of the 4011 Area Service Unit, Headquarters Detachment, The Artillery School, Fort Sill, Oklahoma, did, without proper leave, absent himself from his organization at Fort Sill, Oklahoma, from about 8 December 1947, to about 23 December 1947.

He pleaded not guilty to Charges I and II and the Specifications thereunder, guilty to Charge III and its Specification, and was found guilty

Incl # 2

of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Charges I and II and the Specifications thereunder, approved only so much of the sentence as provided for dismissal, and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows: An extract copy of morning report of The Artillery School, Fort Sill, Oklahoma, containing the following entries pertaining to accused, was introduced in evidence without objection:

"10 December 1947

Easter, Howard H (FA) 01692902 1st Lt  
Fr 8 das ordinary lv to AWOL 0001 8 Dec  
47

12 December 1947

CORRECTION (10 December 1947)  
Easter, Howard H (FA) 01692902 1st Lt  
Fr 8 das  
SHOULD BE  
Easter, Howard H (FA) 01692902 1st Lt  
Fr 5 das" (Pros Ex K)

4. Evidence for the defense.

After being apprised of his rights, accused elected to testify in his own behalf. In pertinent part he stated that he was a member of the 4051st Area Service Unit, Fort Sill, Oklahoma. He was married in 1930, and divorced in the first part of January 1932, at which time he joined the Army. Subsequently, in May 1932 a child was born of the terminated union. He did not see his wife again until 1938. At that time he did not renew marital relations with her. Later in 1941 his wife and he established a home in Monterey, California. Their child was approximately ten years of age at the time. In April 1944 accused went overseas to Italy, and in October of the same year at Pietromala, Italy, received a battlefield commission. He returned to the Zone of the Interior and rejoined his wife in September 1945. In December 1945 at Camp Butner his wife left him. In June 1946 she rejoined him at Fort Benning, Georgia, but left him again for a short period in September. Finally,

on 2 December 1947, at Fort Sill, his wife left him again. Concerning the events of that day he testified as follows:

"\* \* On the 2nd of December she brought me out to the Post, let me off right in front of the Finance Office. I went out to the field to fire that day, and that's the last time I saw her. When I came back in that day, one of the boys told me a woman had been trying to call me all afternoon. It was Mrs. Harloff. He is in Air Training. Their son and my daughter had been keeping company quite a bit, going to school and parties together. I even let them have my car a couple of times to go to the show in. I talked to Mrs. Harloff, and she was worried. She said she went in Jimmy's room and his bed hadn't been slept in, and his clothes were all gone. She asked me if my daughter was in school. I said I thought she must be. I got Mr. Winston, a warrant officer, to drive me down to see. I asked the landlord, Mr. Brooks if he knew what had happened, and he said he didn't, that she came back and got her things and left. I came back and talked to my CO of the TAS Detachments, and he said just sit steady a day or two. He said don't worry about your daughter getting married. At that time she wasn't quite sixteen years old." (R 31)

According to the accused, Mrs. Harloff inquired at the school and found out that her son and accused's daughter had checked out of school the previous day. They had told the principal that their families were going overseas. On 5 December accused received a five-day leave to see what he could find out. He went to Texas and California in a fruitless effort to locate his wife. He made no effort to secure an extension of his leave but on either the 21st or 22d of December, having given up his search, turned himself in at Fort Rosencrans, California. The purpose of his search had been to find his daughter to prevent her being married (R 25-32).

5. The evidence, the pleas of guilty of accused, and in substantial measure the judicial admissions of accused, establish that on 8 December 1947 at the termination of an authorized leave, accused remained absent from his organization at Fort Sill, Oklahoma, for the period alleged. The findings of guilty of absence without leave in violation of Article of War 61 are warranted.

6. Records of the Army show that accused is 37 years of age, married and the father of one child. He attended high school for two years and in civilian life was employed as a glass worker. He had enlisted service from January 1932 until October 1944 when he received a combat appointment as second lieutenant. He was promoted to first lieutenant in May 1945. He had foreign service in the Mediterranean

(246)

Theatre from April 1944 until September 1945, participating in the Rome Arno, North Appennines and Po Valley campaigns. His efficiency ratings of record are "Superior" (5), "Excellent" (2), and "Very Satisfactory" (1).

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of a violation of Article of War 61.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkoutz, J.A.G.C.

W. Lynch, J.A.G.C.

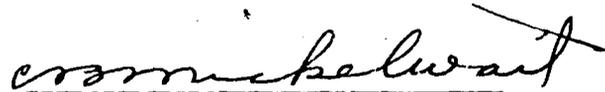
DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

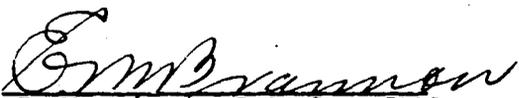
Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of First  
Lieutenant Howard H. Easter (01692902), 4051st  
Area Service Unit, Headquarters Detachment, The  
Artillery School, Fort Sill, Oklahoma, the sentence  
is confirmed but commuted to a reprimand and a  
fine of \$400.00. As thus commuted the sentence  
will be carried into execution upon the concurrence  
of The Judge Advocate General.

  
Franklin P. Shaw, Brig Gen, JAGC

  
C. B. Mickelwait, Colonel, JAGC

26 April 1949

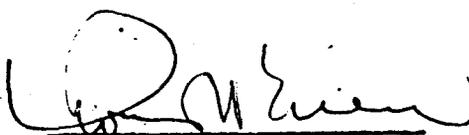
  
E. M. Brannon, Brig Gen, JAGC  
Chairman

CM 334703

I concur in the foregoing action.

( GCMC 25, Apr 29, 1949)

Incl # 1 4/27/49

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General  
01692902-02



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

(249)

FEB 11 1949

CSJAGI - CM 334748

UNITED STATES )

v. )

Recruit ROBERT W. MONTEITH )  
(RA 18297112), 220th Signal )  
Depot Company, APO 958. )

UNITED STATES ARMY, PACIFIC

) Trial by G.C.M., convened at  
) APO 958, 12 November 1948.  
) Dishonorable discharge and  
) confinement for one and one-half  
) (1½) years. Federal Reformatory.

-----  
HOLDING by the BOARD OF REVIEW  
JONES, ALFRED and SOLF  
Officers of the Judge Advocate General's Corps  
-----

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification: In that Recruit Robert W. Monteith, 220th Signal Depot Company, Fort Shafter, Oahu, T. H., APO 958, did, at Signal Corps Area, Fort Shafter, Oahu, T. H., APO 958, on or about 15 July 1948, feloniously take, steal, and carry away one (1) radio receiver R-100, serial number 8066, value about thirty-five dollars (\$35.00), property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Recruit Robert W. Monteith, 220th Signal Depot Company, Fort Shafter, Oahu, T. H., APO 958, did, at Signal Corps Area, Fort Shafter, Oahu, T. H., APO 958, on or about 15 July 1948, feloniously take, steal and carry away a wrist watch, of some value, the property of Major Herman J. Pomy.

AG JAGSAC REPORT  
# 3221

Specification 2: In that Recruit Robert W. Monteith, 220th Signal Depot Company, Fort Shafter, Oahu, T. H., APO 958, did, at Signal Corps Area, Fort Shafter, T. H., APO 958, on or about 12 August 1948, feloniously take, steal and carry away about thirty dollars (\$30.00), lawful money of the United States, property of Corporal Arthur R. McGlothlin.

He pleaded not guilty to, and was found guilty of, all charges and specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence but reduced the period of confinement to one year and six months, designating the Federal Reformatory, El Reno, Oklahoma, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$ .

3. The record of trial is legally sufficient to support the findings of guilty. The only question requiring consideration is whether the designation of a Federal reformatory as the place of confinement is authorized under Article of War 42.

The value of the property described in Specification 1 of Charge I is alleged to be about \$35. The property described in Specification 1 of Charge II is a wrist watch "of some value", and that described in Specification 2 of Charge II is \$30, lawful money of the United States.

Larceny of property of the United States furnished and intended for the military service thereof of a value of \$50 or less, and larceny of other property of a value of less than \$50 is not recognized by any statute of the United States or by the law of the District of Columbia as an offense of a civil nature punishable by penitentiary confinement for more than one year (see 18 U.S.C. 87 (1946 Ed.); D. C. Code, sec. 22-2202). Furthermore, where an accused is found guilty under more than one specification of larceny, the total value of such property under each specification may not be aggregated for the purpose of determining the appropriate place of confinement (par. 104c, MCM, 1928; CM 226579, Evans, 15 BR 125; CM 288588, Hawkins, 56 BR 397; CM 319950, ITO, 69 BR 210, 6 Bull. JAG 63; Cartwright v. United States, 146 F. (2d) 133).

It is apparent that none of the offenses of which the accused was convicted meet the requirement for a penitentiary confinement, as none of the specifications involve offenses punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States or by the law of the District of Columbia. It is clear, therefore, that penitentiary confinement is not authorized in the instant case under the provisions of Article of War 42.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and only so much of the sentence as approved by the reviewing authority as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months in a place other than a United States penitentiary, correctional institution or reformatory.

William H. Brown, J.A.G.C.

SICK IN HOSPITAL, J.A.G.C.

Waldemar A. Self, J.A.G.C.

(252)

23 FEB 1958

CSJAGI CM 334748

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, United States Army, Pacific, APO 958,  
c/o Postmaster, San Francisco, California.

1. In the case of Recruit Robert W. Monteith (RA 18297112), 220th Signal Depot Company, APO 958, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty but is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months in a place other than a United States penitentiary, reformatory or correctional institution. Under Article of War 50e(3), this holding, together with my concurrence, vacates so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor in a place other than a United States penitentiary, reformatory or correctional institution. Under the provisions of Article of War 50 you have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

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

(CM 334748).

1 Incl  
Record of trial



THOMAS H. GREEN  
Major General  
The Judge Advocate General

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(253)

CSJACK - CM 334752

8 APR 1949

UNITED STATES )

YOKOHAMA COMMAND

v. )

Trial by G.C.M., convened at APO 503,  
2,8,13,14,15,16,17 and 21 December 1948.

Recruits EUGENE K. WILSON )  
(RA 18297604) and ARTHUR D. )  
SMITH (RA 13161639), both )  
56th Quartermaster Supply )  
and Sales Company, APO 503. )

EACH: Dishonorable discharge and con-  
finement for life. Penitentiary. ✓

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OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING

Officers of The Judge Advocate General's Corps  
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1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its opinion, to the Judicial Council and The Judge Advocate General.

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

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

Specification 1: In that Recruit Eugene K. Wilson and Recruit Arthur D. Smith, 56th Quartermaster Supply and Sales Company, APO 503, acting jointly and in pursuance of a common intent, did at Tokyo, Honshu, Japan, on or about 4 August 1948, feloniously take, steal, and carry away one Humber automobile, License Number DC-1, value over Fifty Dollars (\$50.00), the property of the Commonwealth Government of Australia.

Specification 2: In that Recruit Eugene K. Wilson and Recruit Arthur D. Smith, \*\*\*, acting jointly and in pursuance of a common intent, did at Tokyo, Honshu, Japan, on or about 4 August 1948, willfully, feloniously, and unlawfully kill Tokutaro Yamauchi, a human being, by striking him on the body with an automobile.

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

Specification: In that Recruit Eugene K. Wilson and Recruit Arthur D. Smith, \*\*\*, acting jointly and in pursuance of a common intent, did at Tokyo, Honshu, Japan, on or about 4 August 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Akira Nagai, a human being, by beating and drowning him or by other means forcefully employed.

*Encl # 2*

Each accused pleaded not guilty to all charges and specifications and the court made the following findings with respect to each:

"Of Specification 1 of Charge I: Guilty, except the word 'feloniously' and the word 'steal'; substituting for the word 'feloniously' the words 'wrongfully and unlawfully'. Of the excepted words, not guilty; of the substituted words, guilty.

"Of the Charge as it pertains to Specification 1: Not guilty, but guilty of a violation of the 96th Article of War.

"Of Specification 2 of Charge I: Guilty, except the words 'willfully' and 'feloniously'; substituting therefor the word 'wrongfully'. Of the excepted words, not guilty; of the substituted word, guilty.

"Of the Charge: Guilty.

"Of the Specification of Charge II: Guilty.

"Of Charge II: Guilty." (R 361)

No evidence of any previous conviction was introduced as to accused Wilson. Evidence of one previous conviction was introduced as to accused Smith. Three-fourths of the members present when the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life.

The reviewing authority approved only so much of the findings of guilty of Specification 2 of Charge I as to each accused "as involves findings of guilty of negligent homicide at the time, place, and under the circumstances alleged, in violation of the 96th Article of War." He approved the sentence as to each, designated the U.S. Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record pursuant to Article of War 50 $\frac{1}{2}$ .

### 3. Evidence for the Prosecution

On 4 August 1948, Mr. Norman Hocking, the "Establishment Officer" at the Australian Mission in Tokyo, Japan, and two companions rode to the Cinema located in the Dai Dahi Building in Tokyo in a large, black Humber sedan, valued at about \$6,000, and owned by the Commonwealth of Australia. The automobile was chauffeured by Akira Nagai, a Japanese employee of the Australian Mission. Upon arriving at the Cinema at 2055 hours, Mr. Hocking and his companions left the automobile in the possession of Nagai with instructions for him to return in one hour. The automobile was not damaged and it had a rearview mirror on each of the front fenders. The automobile and chauffeur did not return to the theater. On the following day Mr. Hocking identified a dead body near a canal as being that of Nagai, and a day or two later he saw the Humber automobile in the possession of the Criminal Investigation Division. It then appeared to have been in a

wreck and certain parts were missing therefrom (R 28-39).

At approximately 2300 hours, on the evening the car and chauffeur disappeared, Osamu Ikeguchi, a Tokyo policeman, saw a "box style," black passenger car, in which there were two or three passengers who appeared to be dressed in Army uniforms. He stated that this car, which was traveling "at great speed" on the left side of the highway in the direction of Yokohama, struck a Japanese, subsequently identified as being Tokutaro Yamauchi, who was riding a bicycle, and continued without stopping. The white shirt of the bicyclist was visible to Ikeguchi in the light reflected from the headlights of the car. He observed that the car did not swerve, and that no other automobiles or bicyclists were near the scene at the time of the occurrence. The policeman examined Yamauchi shortly after he was struck by the automobile and found that he was dead (R 49-69).

Masao Yokose testified that he was near the scene at the time the bicyclist was struck and saw "a black car" going fast. He heard a "big noise" and saw the car skid about six feet. This witness observed that both the bicyclist and car were traveling in the same direction and that the bicyclist was about three meters from the curb on the left side of the highway, but he did not know which part of the car struck the bicycle because he "was standing on the left side" (R 80).

Corporal Jerome Mercer drove to the scene of the injured bicyclist and as he approached he noticed that the light from his jeep was sufficient to enable him to see a gathering of people who had previously arrived, from a distance of about one hundred yards. Broken parts of a rearview mirror which had been found near the body of the bicyclist were identified in court by this witness and admitted into evidence as Prosecution Exhibit 5. Other evidence in the record tended to show that this mirror was identical to the same equipment which had been on the aforementioned Humber automobile prior to its disappearance (R 37,83,97).

The dead body of the chauffeur, Akira Nagai, was found at about 1500 hours on 5 August 1948 beside a Tokyo canal (R 36,322). A Japanese doctor performed an autopsy on the body of Nagai between 1120 and 1230 hours on 6 August 1948. He discovered contusions and hemorrhages about the head, a fracture of the second rib, and dark fluid in the lungs. The doctor concluded that death was due to drowning. The condition of the body at the time of the autopsy indicated that one or two days had elapsed since death had occurred (R 41,44-47). The Humber automobile, heretofore described as the property of the Australian Mission, was recovered on 6 August 1948 on the outskirts of Tokyo. The right front fender and left door were damaged, and the rearview mirror was missing from the right front fender. Scrapings taken from the undercarriage of the automobile were examined and found to contain blood. It was not determined, however, whether this blood was that of a human being (R 33,313,287,294).

Recruit DelaRosa, 56th Quartermaster Supply Sales, testified that when he came to work at the Washington Heights grease rack on 5 August 1948 he noticed what appeared to be blood stains on the trousers worn by the accused Smith. Witness also stated that on the night of 5 August 1948, he, accused Wilson, and accused Smith rode to the "shack" of some girls near Yokohama in a "big," "black" automobile. During this evening Smith related to DelaRosa some of the events which had transpired the previous night. He told DelaRosa that they "pushed the Japanese chauffeur over" and he (Smith) got behind the wheel of the car and drove off; that they prevented the chauffeur from putting on the brakes and turning off the ignition; that they saw a Japanese bicyclist riding along the street, and that they ran over him inasmuch as they were going "pretty fast." Smith also told DelaRosa that they "punched" the chauffeur and then drove to a bridge where they pulled him out of the car, and that he (Smith) dragged him to the side of the bridge and threw him "over." DelaRosa further testified that the night of 5-6 August 1948 was "rainy" and that as the three proceeded to the Japanese "shack" they were smoking. They had abandoned the automobile in the vicinity of the house they visited (R 178-189).

Kazuhiko Utsuno, a Japanese night watchman, testified that the night of 5-6 August was "rainy and misty," and that as he proceeded over his route, which included the area visited by the accused on this night, he observed three soldiers at about 0130 hours. The soldiers attracted his attention because they were smoking. It was his duty to guard against fires (R 214-220).

On 10 August 1948 the accused Wilson was apprehended and taken to the Criminal Investigation Division office in Tokyo where Agent Walter L. Foster, after advising accused of his rights, interrogated him regarding his activities on the night of 4 August. After stating that he understood his rights, Wilson voluntarily dictated a statement concerning his implication in the alleged offenses (R 111,131,135). The defense objected to the admission of this statement on the ground that it was not shown to have been voluntarily given and accused Wilson elected to take the stand for the limited purpose of testifying as to the voluntariness of his alleged confession. He testified substantially as follows: That when asked by the Criminal Investigation Division agents to write a statement concerning his participation in the alleged offenses, he replied that he was too nervous; that another agent was then called who wrote what he (Wilson) dictated; that he signed the statement after reading only "part of the way down" and was never advised of his rights under the 24th Article of War until sometime later when he was "in jail." Upon cross-examination he testified that no one hit or threatened him during the course of the interrogation (R 117-119). Foster identified the statement and it was received in evidence as Prosecution Exhibit 13. The statement is as follows:

\* S T A T E M E N T \*DATE 10 August 1948

"I, Eugene K. Wilson, Pvt, RA 18297604, 56th QM S&S Co, Hq Troop, 8th Cav Regt, APO 503, Unit 2, the undersigned, having been advised of my rights under the 24th Article of War, make the following statement voluntarily without threats or promises of reward or immunity. I know that I need not make any statement if I so desire.

"On Wednesday evening, 4 August 1948, I went to the Ichiban Club and drank some beer. While I was there, I met a buddy who told me his name was "SMITTY" and that he was from the 511th Airborne. We drank a few beers together and during the course of the evening we got into an argument with a GHQ guard. The guard took us to the Finance Building to check whether or not we were AWOL. SMITTY was carrying Roberto R. DeLaROSA's pass and I had a pass to the GHQ guard let us go after checking the respective organizations. We then went to the Moonlit Gardens and drank some beer. We left there and when passing the Dai Ichi Building, we looked at all the jeeps parked there to see if they were locked. Finding all the jeeps locked, we noticed an English-make car with a Japanese man sitting behind the driver's wheel. We pushed him out of the driver's seat, SMITTY sat behind the wheel, and I walked around to the other side and got in. SMITTY drove off and the Japanese man attempted to turn off the ignition but I held his arms and prevented him from doing so. SMITTY hit the Japanese man with his elbow and I struck him with my fist several times, causing him to bleed. I don't remember how much he bled as I was pretty drunk. While driving around Tokyo, we struck a Japanese man on a bicycle who swerved into the right front fender of our car. We didn't stop but the Japanese man looked around and saw what happened. We drove a little farther and when we came to a bridge we told the Japanese man to get out of the car. When he refused, SMITTY and I pulled him out of the car, hit him with our fists five or six times, kicked him a few times, and then threw him over the bridge. After throwing him over the bridge, SMITTY and I got in the car, turned around, and drove back by the place where we had hit the man on the bicycle. There was a crowd of people gathered around but we didn't stop. We then drove to Washington Heights and parked the car in front of the commissary. SMITTY and I slept in the grease rack that night. The next morning, 5 August 1948, LOWMAN arrived with the grease rack money for making change for customers. DeLaROSA came in later and SMITTY and I asked him if he would like to go for a ride. We drove to the edge of Yokohama, back to Tokyo, and then

went to a Japanese village near our Japanese girl friend's house. We attempted to hide the car and, after parking it in an abandoned place, we went to our Japanese girl friend's house and spend the night there. The next morning, Friday, 6 August 1948, DeLaROSA and I went to work by a Japanese street car, leaving the English-make car which we had stolen parked where it was. SMITTY was still at the Japanese girl's house when we left. SMITTY was wearing a uniform with no rank, no patch, and Infantry insignia on his collar. He also had on paratrooper's boots. SMITTY is approximately 5'10" in height, weights about 140 lbs, has blond hair, blue eyes, and a slim face.

"FURTHER THE DEPONENT SAYETH NOT:

/s/ Eugene K. Wilson  
/t/ Eugene K. Wilson

"Subscribed and sworn to before me this 10th day of August 1948.

/s/ Jack D. Hansford  
/t/ JACK D. HANSFORD  
Capt., CMP  
Summary Court Officer

"WITNESS: /s/ Walter L. Foster  
/t/ Walter L. Foster  
Agent, 20th CID  
/s/ James E. McKenny  
/t/ James E. McKenny  
Agent, 20th CID  
/s/ Nelson H. Ensor  
/t/ Nelson H. Ensor  
Agent, 20th CID"

(R 141-143; Pros Ex 13)

The law member ruled that this statement could serve as evidence against the accused Wilson, but not against the accused Smith (R 143). Foster stated further that on 13 August 1948 he went to the grease rack where, with the assistance of Recruit DeLaRosa he found a pair of khaki trousers and a shirt in the bottom drawer of a desk in the grease rack office which appeared to be "stained." These items of clothing were produced in court, identified by the witness, and were admitted into evidence subject to their relevancy being subsequently shown. Also admitted into evidence, upon the same condition, were a khaki shirt and pair of khaki trousers, identified by Foster as being items of clothing he had obtained on 14 August 1948 from a Tokyo laundry, which accused Wilson admitted as being the one to which he had taken the clothing he wore on 4 August 1948. It was shown that the numbers 7604, which are the last four numbers of

Wilson's Army serial number, appeared inside the shirt (R 160-162,164). A serological examination made by Miss Mary Cassidy Carroll, serologist for the Criminal Investigation Division laboratory, disclosed that the stains which appeared on each item of the above mentioned clothing were blood (R 287-288).

Jack D. Hansford, 23rd Criminal Investigation Division, testified that he and Agent McKenny interrogated the accused Smith in the Criminal Investigation office at approximately 2300 hours on 13 August 1948. Early the following morning Smith signed and sworn to a statement concerning his involvement in the alleged offenses (R 248-260). This statement was identified by Hansford and offered in evidence. The defense objected thereto and Smith elected to take the witness stand for the limited purpose of testifying as to the method by which the statement was procured. Smith testified in effect as follows: That he was advised by Sergeant McKenny that he (McKenny) was a first lieutenant and that he thereafter afforded him the respect due a commissioned officer; that he complained that he had a severe case of gonorrhoea and was in pain; that he was refused medical attention and was led to believe he would be denied treatment until he signed a statement; that he finally signed the statement written by one of the agents, at which time he was "issued a slip to go down and get shots with" (R 227-230). Agent Hansford testified that prior to receiving the statement from Smith the following occurred:

"We then left the front office and went to one of the rooms. I took my coat off and met Agent McKenny and Interpreter Matsumoto and then we sat down, and I advised Smith of his rights under the 24th Article of War. Smith said he knew all about that; he didn't have to make any statements. So I asked him if he wanted to ask me any questions, and he waited awhile and said, 'Yes.' He said, 'Did the man who go in the drink, was he dead?' And I said, 'Yes, he is. Here is his picture,' and showed him the picture. He says, 'Jeez,' he says, 'That's murder.'" (R 200)

This officer further testified that accused Smith did not complain that he had a venereal disease until later in the morning, between 0300 and 0600 hours, and that he was not taken to the dispensary at that time because they were waiting for breakfast (R 210).

Sergeant McKenny stated that early in the morning "between 3 and 5" the accused Smith complained of having a venereal disease, to which Captain Hansford replied, "We'll get you treatment as soon as we can", or words to that effect." When the accused went to the latrine he was not observed to have had "any hard efforts or pain or anything like that." McKenny denied that he had referred to himself as a lieutenant or otherwise pretended to be a commissioned officer (R 250,258,254).

Captain Frank C. Palmer, MC, the Eighth Army Stockade surgeon, examined

the accused Smith at approximately 1900 hours on 13 August 1948, and found that he had acute gonorrhoea which had existed for at least three days. Captain Palmer stated that Smith was complaining of pain at the time and from his symptoms, which included swelling, redness, inflammation of the penis, and a yellow urethral discharge, he probably was experiencing pain (R 99-100). Captain William E. LaBarre, MC, 385th Medical General Dispensary, did not remember having treated accused Smith, but when Smith's symptoms, as related by Captain Palmer were reiterated hypothetically, he stated that such a condition may or may not be "associated with discomfort" (R 221-223).

Over objection of the defense, accused Smith's sworn statement was admitted into evidence and is as follows:

"I, ARTHUR D. SMITH, Recruit, 13161639, 511th PIR, APO 468-Unit 3, the undersigned, having been advised of my rights under the 24th Article of War, make the following statement voluntarily and of my own free will, without threats or promises of reward or immunity. I know that I need make no statement if I so desire:

"On Wednesday night at about 1930 hour 4 Aug, I was in the Ichiban bar room when a GI that I know as Gene Wilson called me over to his table where he was drinking with a friend whom I had never seen before. I went over to their table and sat down beside Wilson. During our conversation an argument came out about the jump boots Wilson was wearing. Wilson's friend was also wearing jump boots. I jokingly asked him (Wilson's friend) what airborne unit he served with and he didn't like my remark and got up and said he was going home. Instead he went to the GHQ guards that were standing near the entrance to the beer hall. Right after he left these guards came over to our table and asked us for our passes. I brought out a pass made out to De La Rosa who had given this pass to me sometime before this. The guards seemed suspicious and took us to the Sergeant on duty at the guard Co. The Sgt. checked our passes and let Wilson and I go. As the guard jeep was going to make a check of the Moonlit Gardens we went along with them. At the Moonlit Gardens Wilson met a Sgt. he knew and gave him a camera he had been carrying and we sat there talking and drank up the remainder of a case of beer the Sgt. had. We left the Moonlit gardens as they were starting to close and Wilson and I walked towards the Ichiban Club. I was intending to go to Shimbashi station nearby to find me a girl friend. When we were a short distance from the Ichiban Wilson suggested we take a streetcar to his girl's house. There were no street cars around so Wilson suggested we get a jeep. We looked at a few jeeps but they were all locked. At this time we saw a black sedan parked by a big bldg (with wide steps going up to the front entrance). There was a Japanese male sitting in the

front seat behind the steering wheel of this vehicle. We both walked up to this car together and I began talking to this Japanese telling him what a nice car he had. I tried to talk the driver into letting me drive the vehicle for a few blocks. He very flatly said 'No'. Wilson then entered the vehicle from the opposite side and began dragging him out from under the wheel. I edged in to the car from my side and I started the engine and drove off. I couldn't find the headlights and asked him where they were. The Japanese wouldn't show us where they were. I pulled over to the side of the road and parked. Wilson then struck the Jap in the head and I hit him with my right elbow in the face. He then turned the lights on and we drove off. We were travelling about 25 or 30 MPH down A street and Wilson gave me directions to go to his gal's house. The Jap kept trying to turn off the ignition and lights and blow the horn and I kept pushing his arms away and Wilson kept continually striking while I was driving. We arrived at a bridge and Wilson said "Stop on the bridge". I pulled the vehicle over to the curb on this bridge and cut the ignition. I got out of the vehicle on my side (left side) and asked the Jap to get out. He climbed out and I hit him in the jaw and knocked him out. Wilson came around from the side of the car and started kicking the Jap in the head. Wilson was wearing jump boots at this time and I was wearing combat boots. Wilson kept kicking this man until he rolled under the running board and I told Wilson to stop kicking him and pulled the Jap out onto the sidewalk. I then got into the car behind the steering wheel and started the engine. Wilson then threw the Jap into the water and got into the car with me. I kept arguing with Wilson about kicking the Jap. We continued straight on this highway and drove around for about a half an hour when Wilson asked to drive and I let him. I got into the back seat and went to sleep. I don't know where he drove to but he stopped under a bridge and we walked back to his girl friend's house. A girl friend whose name I do not know was there and said that Ann (Wilson's girl friend) was in the hospital. We went back to the vehicle and I noticed a bent fender on this car. I drove from there back to the parking lot at Wash. Heights and we parked it there and went to the grease rack where we went to sleep. A man named Lawman came into the grease rack at about 0830 hours 5 August 1948, with the cash box. We hung around the grease rack all day. Wilson asked De La Rosa if he wanted to go for a ride about 1300 that day. De La Rosa said that he did so that night about 2030 hours, Wilson, De La Rosa and myself went for a ride down towards Yokohama. On the way we parked the car and took the plates off.

FURTHER THE DEPONENT SAYETH NOT:

/s/ Arthur D. Smith  
/t/ Arthur D. Smith

"Subscribed and sworn to before me this 14th day of August 1948.

WITNESS:

/s/ James E. McKenny  
/t/ James E. McKenny  
Agent, Tokyo CID

/s/ Jack D. Hansford  
/t/ JACK D. HANSFORD  
Captain, CMP  
Summary Court Officer

/s/ Hiroshi Kajihara  
HIROSHI KAJIHARA  
Agent, Tokyo CID"

(R 273-274; Pros Ex 22)

On 17 August 1948, at the suggestion of Agent Foster, the accused Wilson conducted Foster to various points in Tokyo where photographs were taken showing the place where the Japanese chauffeur was accosted, the scene where Wilson believed the car struck a bicyclist, the location on the bridge where the chauffeur was kicked and beaten, the opening in the bridge through which the chauffeur was pushed into the river, and the place where he described Humber automobile was abandoned. On motion of the prosecution these photographs were admitted into evidence upon the condition that "the testimony of this witness on the stand presently applies to the accused Wilson only" (R 145-156; Pros Exs 14, 14a, 14b, 14c, 14d).

Captain R. V. Fitzgerald, MC, 361st Station Hospital, testified that he had conducted neuropsychiatric examinations of each accused and that he was of the opinion that at the time of the trial both knew the difference between right and wrong, could adhere to the right, and were competent to aid in the conduct of their defense. The neuropsychiatrist stated further that he found no indication that either accused was insane at the time of the commission of the alleged offenses (R 339-340).

4. For the Defense

Captain Edmundson, 56th Quartermaster Sales and Supply Company, testified that the accused Wilson had on occasion served under his supervision; that he had proved himself to be a trustworthy soldier, and that he would like to have him again under his command. The senior noncommissioned officer at the Army commissary stated that accused Wilson's general reputation for veracity and as a soldier was very good. Captain Carlton Nelson, the 8th Army Stockade Operations Officer, testified that both of the accused had been excellent prisoners since their confinement the latter part of August 1948. The noncommissioned officer assigned as blockmaster of Block 7 at the 8th Army Stockade stated that the accused Smith was cooperative and has never caused any trouble in the cell block (R 334).

Each accused, after being further advised of his rights as a

witness, elected to remain silent (R 330-336).

##### 5. Discussion

Briefly stated, by appropriate pleadings the accused were charged jointly with the larceny of the described Humber automobile, voluntary manslaughter of the bicyclist, Tokutaro Yamauchi, and murder of the chauffeur, Akira Nagai. As approved by the reviewing authority, they have been convicted of wrongfully and unlawfully taking and using the described automobile, negligent homicide with respect to Tokutaro Yamauchi, and the murder of Akira Nagai as alleged. The offenses found and approved as to the alleged larceny and voluntary manslaughter are legally authorized as being lesser to and necessarily included in the offenses charged (CM 221019, Goodman, 49 ER 123,129; CM 329832, Senek, 78 ER 175,178; MCM 1949, par 180a, p 234). We need not consider what may have been the reasons prompting the reduced findings.

Subsequent to the arraignment counsel for the accused moved that the trial be held in closed session. It was disclosed that a son of one of the victims mentioned in the pleadings was a spectator in the court room. Defense counsel contended that the presence of such person might tend to improperly influence the court and that he should be excluded. After hearing argument the court overruled the motion. The ruling was within the sound discretion of the court (MCM 1928, par 49e, p 38; CM 257165, Maple, 37 ER 73).

The defense objected strenuously to the admission in evidence of Prosecution Exhibits 13 and 22, being respectively the pre-trial statements or confessions of accused Wilson and Smith. Agent Foster testified that prior to receiving Wilson's statement he fully advised him of his rights under Article of War 24; that the latter stated he understood his rights and that the statement was voluntarily made. Wilson asserted at the trial that he was not "hit or threatened" prior to giving his statement but that he was nervous and signed after reading only a "part of the way down." Agent Hansford, who transcribed the statement of accused Smith, asserted that he advised Smith of his rights under Article of War 24 and Smith stated that he knew that he did not have to make a statement. After inquiring if the Japanese chauffeur was dead and when shown a picture of the body, Smith freely and voluntarily gave his statement. Hansford asserted that Smith did not complain of any pain or physical discomfort prior to making his statement. At the trial Smith asserted that prior to confessing he was suffering from gonorrhoea he was refused medical attention and led to believe he would be denied treatment until he signed a statement. Medical testimony indicates that Smith had an active case of gonorrhoea of about three days duration at the time he was apprehended and questioned, however, neither Smith's pain and discomfort nor Wilson's asserted nervous condition were considered by the court to have been of sufficient gravity as to render either of the

confessions involuntary. We find no justification, upon the facts presented, to seriously question the validity of the court's ruling that both confessions were in fact voluntary and legally admissible in evidence (Wilson v. United States, 162 U.S. 613; CM 313786, Howard, 63 ER 273,278; Winthrop's Mil. Law and Proc., 2d Ed., Sec. 497, p 328).

The law member properly ruled, in admitting the confession of each accused, that the admissions of the one could not be considered as evidence against the other (MCM 1928, par 76, p 61). It is also a fundamental requirement in law that a confession of an accused cannot be considered as evidence against him unless there be presented other competent evidence, either direct or circumstantial, that the offense charged has probably been committed. There must be other evidence, independent of the confession, tending to establish the corpus delicti. But it is not required that such independent evidence of the corpus delicti be sufficient in itself to convince beyond a reasonable doubt that the offense charged has been committed, or to cover every element of the offense or to connect the accused with the offense. In the case of a homicide the dead body with indicated criminality is sufficient evidence of the corpus delicti to justify the admission in evidence of a voluntary pre-trial confession of one charged with the offense (MCM 1928, par 114a, p 115). Independent of accused's confessions herein, the prosecution established that the Humber automobile and its chauffeur, Akira Nagai, disappeared under mysterious circumstances on the evening of 4 August in Tokyo. The car was undamaged and had rearview mirrors on each front fender. Shortly thereafter on the same night an automobile of a somewhat similar description with at least two soldiers therein was seen traveling at a high rate of speed on a street in Tokyo where it struck and killed a Japanese bicyclist named Tokutaro Yamauchi. A broken automobile mirror was found at the scene of this incident. The following day the dead body of the chauffeur, Akira Nagai, was found beside a canal in the general vicinity of the place where the bicyclist was killed. The death of the chauffeur, Nagai, was found to have been caused by drowning but his body showed signs of violence which apparently preceded the drowning. The automobile was found two days later in a damaged condition. The rearview mirror was missing from its right front fender. The undercarriage contained a substance found to have been blood, although it was not positively determined to be human blood. This evidence, direct and circumstantial, is amply sufficient to form the basis for the corpus delicti, viz., that the offenses of larceny, voluntary manslaughter and murder had probably been committed as alleged. Accuseds' admissions to DelaRosa, their voluntary confessions setting forth in detail their joint complicity in each of the acts pleaded, and the other corroborating evidence such as the blood stains found in their clothing, leave no doubt as to their guilt of the offenses found. Although the death of Nagai was determined to have been due to drowning, we have no difficulty in concluding, as did the court, that the drowning was the direct and proximate result of willful and malicious assaults of the accused.

Malice in murder may be inferred where the death results from the doing of a cruel, brutal and unlawful act, dangerous to, and indicating a disregard for human life. The beating of the chauffeur and throwing him in the canal was such an act (MCM 1928, par 148a, pp 163,164; CM 334570, Morales; Evans v. United States, 122 Fed 2d, 461, 466).

6. Records of the Department of the Army show that accused Wilson is 19 years of age and that he enlisted at Dallas, Texas, on 4 August 1947 for a period of three years. He completed grammar school and was employed as a welder's helper prior to enlisting. Accused Smith is shown to be 24 years of age and he enlisted at Fort Meade, Maryland, on 13 August 1947 for a period of three years. He completed high school and was employed as a seaman prior to enlisting.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused and to warrant confirmation of the sentence as to each. A sentence of death or life imprisonment is mandatory upon a conviction of premeditated murder in violation of Article of War 92.

Charles W. Silver, J.A.G.C.  
Lewis J. Hull, J.A.G.C.

(On leave of absence), J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruits Eugene  
K. Wilson (RA 18297604) and Arthur D. Smith (RA 13161639),  
both 56th Quartermaster Supply and Sales Company, APO 503,  
the sentence is confirmed and will be carried into execution  
upon the concurrence of the Judge Advocate General. A  
United States Penitentiary is designated as the place of  
confinement.

Franklin P. Shaw  
Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait  
C. B. Mickelwait, Colonel, JAGC

20 May 1949

E. M. Brannon  
E. M. Brannon, Brig Gen, JAGC  
Chairman

In concur in the foregoing action.

CM 334752

Thomas H. Green  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

GCMO 33, June 1, 1949

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(267)

CSJAGN-CM 334754

16 MAR 1949

UNITED STATES )

PHILIPPINES COMMAND )

v. )

) Trial by g.c.m., convened at  
) Hq. Stotsenberg Area Command, APO  
) 74, 7 December 1948. Dishonorable  
) discharge (suspended) and con-  
) finement for one (1) year. Dis-  
) ciplinary Barracks.

) Private WALTER B. CRANDALL  
) (RA 35529438), Headquarters  
) & Headquarters Detachment,  
) 47th Ordnance Group, APO  
) 74.

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HOLDING by the BOARD OF REVIEW  
YOUNG, FITZER and STEVENS  
Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50a.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: (Disapproved by Reviewing Authority).

Specification 3: In that Private Walter B. Crandall, Headquarters and Headquarters Detachment, 47th Ordnance Group, did, at the Philrycom Ordnance Depot, APO 74, on or about 30 June 1948, in an affidavit make under oath a statement to Captain James E. Johnson, Investigating Officer, an officer authorized to administer oaths for purposes of Military administration, in substance as follows: That he was separated on 10 January 1946 in the grade of Technical Sergeant and re-enlisted in the Army on 5 December 1946 in the grade of Technical Sergeant, which statement he did not then believe to be true.

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

Ind # 1

Specification: In that Private Walter B. Crandall, Headquarters and Headquarters Detachment, 47th Ordnance Group, for the purpose of obtaining the payment of a claim against the United States for pay and allowances due him for the months of January, February, March and April, 1948, in the respective amounts of ₱276.10, ₱289.30, ₱289.30 and ₱280.10, lawful currency of the Republic of the Philippines, for services alleged to have been rendered the United States in the Grade of Technical Sergeant with over three years service, did, at Luzon, Philippines, from about 5 December 1946 to about 31 January 1948, make a certain writing to wit: "T/Sgt" in section 12 of his, Private Walter B. Crandall's Service Record, which said writing was false and fraudulent in that Private Walter B. Crandall was not then a Technical Sergeant, and was then known by the said Private Walter B. Crandall to be false and fraudulent.

ADDITIONAL CHARGE II: (Violation of the 96th Article of War. (Disapproved by Reviewing Authority).

Specification 1: (Disapproved by Reviewing Authority).

In that Private Walter B. Crandall, Headquarters and Headquarters Detachment, 47th Ordnance Group, with intent to defraud the United States Government, did, at Luzon, Philippines, on or about 31 January 1948, unlawfully pretend to First Lieutenant Joseph T. Hollerbach, Infantry, that he, the said Walter B. Crandall, was a Technical Sergeant, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said First Lieutenant Joseph T. Hollerbach, the sum of ₱276.10, lawful currency of the Republic of the Philippines.

Specifications 2, 3 and 4 differ materially from Specification 1 only as to dates. These allege, respectively, offenses committed on 29 February, 31 March and 30 April 1948.

(Disapproved by Reviewing Authority).

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a year and a half. In addition to the disapprovals noted above, the reviewing authority approved only so much of the finding of guilty

of Specification 3 of the Charge as pertains to falsely swearing that accused was re-enlisted on 5 December 1946 in the grade of Technical Sergeant, in violation of Article of War 96, as alleged, and only so much of the Specification of Additional Charge I as finds that the accused, for the purpose of representing himself to be a Technical Sergeant of the United States Army and drawing the pay of a Technical Sergeant, did at the time and place alleged make the false writing alleged, in violation of Article of War 94. The reviewing authority approved the sentence but reduced the period of confinement to one year and, as thus modified, ordered the sentence executed but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 5, Headquarters Philippines Command, 15 January 1949.

3. The record of trial is legally sufficient to support the approved findings of guilty of the Charge and Specification 3 thereunder, and the sentence. The only question for consideration is the effect of the reviewing authority's action as to Additional Charge I and its Specification.

4. Arraignment and trial were on 7 December 1948. Proof of a purpose to obtain payment of a claim against the United States was essential to conviction for the offense of making a false writing in violation of Article of War 94 (par. 150d, MCM, 1928). Averment of that purpose, in a case such as this, could be in rather general terms, as "for the purpose of obtaining pay and allowances of a higher enlisted rating than that actually held by him" (see Spec. 1, Add. Chg. I, in CM 251348, Gaston, 33 BR 211, 212). However, in the instant case the allegation was decidedly particularized. It charged that the purpose was to obtain such higher pay and allowances merely for the months of January through April 1948. In reviewing the record the Staff Judge Advocate concluded it was not proven that accused was of lower rank than Technical Sergeant during those months, and the reviewing authority's action as to Additional Charges I and II is based on that conclusion. The effect is to substitute in Additional Charge I an entirely different purpose than that charged, a purpose having to do with pay claims for periods of time other than January-April 1948. Accused has had no opportunity to defend against the substituted purpose. Since the action of the reviewing authority in making this substitution was improper, it must be concluded that he has effectively eliminated the element of purpose from the offense charged. Elimination of this element leaves an allegation, in substance, that accused from about 5 December 1946 to about 31 January 1948 made a known false and fraudulent statement in his Service Record, a clear violation of Article of War 96 and a lesser, necessarily included offense within

that charged, within the principle applied in CM 316193, Holstein, 65 BR 271, 275-276.

5. Whether the evidence is legally sufficient to support the finding of guilty of the offense of making a false statement in violation of Article of War 96 need not be determined. The writing of "T/Sgt" in the service record is alleged to have been done "from about 5 December 1946 to about 31 January 1948." Manifestly, the writing was done at one time and is not such an offense as grew from a prolonged and continuous course of action, the very prolongation and continuation of which was the gravamen of the wrongdoing alleged (contrast CM 201563, Davis, 5 BR 255, 274; Winthrop, Military Law & Precedents, 2d Ed., 1920 Reprint, p. 255). Construed in the light most favorable to accused, the offense is charged as occurring on 5 December 1946, more than two years before arraignment, and the period of limitation prescribed in Article of War 39 for a violation of Article of War 96 had run.

6. The Board of Review holds that the record of trial is legally sufficient to support the approved findings of guilty of the Charge and Specification 3 thereunder, legally insufficient to support the findings of guilty of Additional Charge I and its Specification, and legally sufficient to support the sentence.

Edward L. Stearns, J. A. G. C.  
J. M. Pitger, J. A. G. C.  
Edward L. Stearns, J. A. G. C.

CSJAGN-CM 334754

1st Ind

MAR 25 1949

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Philippines Command, APO 707, c/o Postmaster, San Francisco, California.

1. In the case of Private Walter B. Crandall (RA 35529438), Headquarters & Headquarters Detachment, 47th Ordnance Group, APO 74, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Additional Charge I and its Specification. Under Article of War 50e(3) the holding together with my concurrence vacates the findings of guilty of Additional Charge I and its Specification.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which accused has been deprived by virtue of the findings so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 334754).

2 Incls

1-Record of trial  
2-Draft of GCMO



THOMAS H. GREEN  
Major General  
The Judge Advocate General





DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

(273)

CSJAGQ - CM 334772

MAR 7 1949

UNITED STATES )

PHILIPPINES COMMAND

v. )

Private REYNOLDS K. OHAI )  
(30115074), 8126th )  
Service Unit. )

Trial by G.C.M., convened at  
Headquarters, PHILCOM,  
APO 707, 28 December 1948.  
Dishonorable discharge  
(suspended) and confinement  
for six (6) months. Oahu  
Prison, Honolulu, Territory  
of Hawaii.

HOLDING by the BOARD OF REVIEW

GOFF, BOROM and SKINNER

Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding to The Judge Advocate General, under the provisions of Article of War 50e.

2. The only question requiring consideration is the propriety of the designation of Oahu Prison, Honolulu, as the place of confinement.

The confinement adjudged by the court, approved by the reviewing authority and promulgated in General Court-Martial Orders No. 8, Headquarters Philippines Command, APO 707, U. S. Army, dated 20 January 1949, is for a period of six (6) months. The offense of absence without leave is not recognized by any statute of the United States or by the law of the District of Columbia as an offense of a civil nature punishable by penitentiary confinement but is recognized only as a military offense and as such, is not punishable by confinement in a penitentiary (CM 248464, Adams, 31 BR 293). It is well settled that confinement in a Federal correctional institution or reformatory is authorized only when confinement in a penitentiary is authorized (CM 314729, Boykin, 64 BR 205). Under Article of War 42 confinement in a penitentiary is not authorized unless the period of confinement authorized and adjudged is more than one (1) year.

The Oahu Prison, Honolulu, Territory of Hawaii, is considered as a penitentiary by the Bureau of Prisons. It is understood that the Adjutant General's Office also officially considers Oahu Prison as a penitentiary type institution.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and only so much of the sentence as involves dishonorable discharge, forfeiture of all

(274)

pay and allowances due or to become due, and confinement at hard labor for six months in a place other than a penitentiary, Federal reformatory or correctional institution.

W. H. Goff, JAGC  
J. L. Brown, JAGC  
T. W. Kinney, JAGC

(275)

CSJAGQ - CM 334772

1st Ind

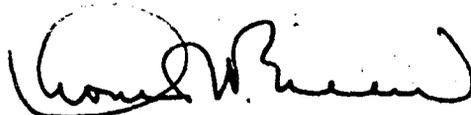
MAR 15 1949

J.A.G.O., Dept of the Army, Washington 25, D. C.

TO: Commanding General, Philippines Command, APO 707,  
c/o Postmaster, San Francisco, California

1. In the case of Private Reynolds K. Ghai (30115074), 8126th Service Unit, APO 900, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and that it is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months in a place other than a penitentiary, Federal reformatory or correctional institution. Under Article of War 50e(3), this holding, together with my concurrence, vacates so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months in a place other than a penitentiary, Federal reformatory or correctional institution.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, and dated subsequent thereto, announcing the vacation of the affected portion of the sentence, restoring all rights, privileges and property of which the accused has been deprived by virtue of the portion of the sentence so vacated, and designating as the place of confinement a post stockade or other appropriate military installation within your command. A draft of a general court-martial order designed to carry the foregoing recommendation into effect is attached. It is also requested that six copies of the order be forwarded to this office, together with the foregoing holding and this indorsement.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Draft GCMO



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

MAR 29 1949

CSJAGH CM 334790

UNITED STATES )

PHILIPPINES COMMAND )

v. )

Trial by G.C.M., convened at  
APO 707, 18, 23 and 26 November  
1948. Each: Dishonorable  
discharge and confinement for  
thirty (30) years. O'Donnell  
Division, PHILCOM General  
Prisoner Stockade, APO 613.

Sergeant First Class FEDERICO C.  
CRUZ, 10331881, Recruit CRISPINO  
CANDELARIO, 10308376, Private  
FLORENCIO R. dela CRUZ, 10323312,  
Private FLORENCIO MALONG, 10322074,  
Recruit MARCELO SARMIENTO, 10324641,  
Recruit BENJAMIN G. VILLAROSA,  
10321130, all of Company A, and  
Recruit BENIGNO S. REYES, 10322111,  
Company B, all of 45th Infantry  
(Philippine Scouts).

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HOLDING by the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

2. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences as to the accused Cruz, Malong, Sarmiento, Villarosa and Reyes.

3. The seven accused herein were tried upon the following Charges and Specifications:

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

Specification: In that Sergeant First Class Federico C. Cruz, Private Teodolfo Belen, Recruit Crispino Candelario, Private Florencio R dela Cruz, Private Florencio Malong, Recruit Marcelo Sarmiento, Recruit Benjamin G. Villarosa, all of Company "A", 45th Infantry, Philippine Scouts, and Recruit Benigno S. Reyes, of Company "B", 45th Infantry, Philippine Scouts, acting jointly and in pursuance of a common intent, did, at Quartermaster Interim Depot, Nichols Field, Rizal,

Philippines, on or about 29 October 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Private Silvestre P. Capoquian, Company "A", 45th Infantry, Philippine Scouts, a human being by shooting him with a gun.

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

Specification 1: In that Sergeant First Class Federico C Cruz, Private Teodolfo Belen, Private Florencio R dela Cruz, Private Florencio Malong, Recruit Crispino Candelario, Recruit Marcelo Sarmiento, Recruit Benjamin G Villarosa, all of Company "A", 45th Infantry, Philippine Scouts, and Recruit Benigno S Reyes, of Company "B", 45th Infantry, Philippine Scouts, acting jointly and in pursuance of a common intent, did, at Quartermaster Interim Depot, Nichols Field, Rizal, Philippines, on or about 29 October 1948, with intent to do him bodily harm, commit an assault upon First Lieutenant Otto P. Scharth, by shooting him in the left hand, with a dangerous weapon to wit, a gun.

Specification 2: In that Sergeant First Class Federico C Cruz, Private Teodolfo Belen, Private Florencio R dela Cruz, Private Florencio Malong, Recruit Crispino Candelario, Recruit Marcelo Sarmiento, Recruit Benjamin G. Villarosa, all of Company "A", 45th Infantry, Philippine Scouts, and Recruit Benigno S Reyes, of Company "B", 45th Infantry, Philippine Scouts, acting jointly and in pursuance of a common intent, did, at Quartermaster Interim Depot, Nichols Field, Rizal, Philippines, on or about 29 October 1948, with intent to do him bodily harm, commit an assault upon Private Guillermo O Rabara, Company "A", 45th Infantry, Philippine Scouts, by shooting him in the back, with a dangerous weapon to wit, a gun.

Specification 3: In that Sergeant First Class Federico C Cruz, Private Teodolfo Belen, Private Florencio R dela Cruz, Private Florencio Malong, Recruit Crispino Candelario, Recruit Marcelo Sarmiento, Recruit Benjamin G. Villarosa, all of Company "A", 45th Infantry, Philippine Scouts, and Recruit Benigno A Reyes, of Company "B", 45th Infantry, Philippine Scouts, acting jointly and in pursuance of a common intent, did, at Quartermaster Interim Depot, Nichols Field, Rizal, Philippines, on or about 29 October 1948, unlawfully enter Warehouse Number 814, with intent to commit a criminal offense, to wit, larceny therein.

(The above specifications were amended subsequent to arraignment by deleting the name "Private Teodolfo Belen," who was absent from the proceedings, and by inserting, following the word "did" in each specification, the phrase "in conjunction with Private Teodolfo Belen." (R 6)

The accused pleaded not guilty to and were found guilty of all Charges and specifications. Evidence of one previous conviction was introduced against accused Reyes. No evidence of previous convictions was introduced against the other accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for life. The reviewing authority approved the sentence but reduced the period of confinement as to each accused to thirty years, designated the O'Donnell Division, PHILCOM General Prisoner Stockade, APO 613, or elsewhere as the Secretary of the Army may direct, as the place of confinement as to each accused, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

### 3. Evidence for the prosecution.

The accused are in the military service of the United States (R 29).

The scene of the offenses herein is the Quartermaster Interim Depot, Nichols Field, Philippine Islands. It was stipulated that Prosecution Exhibit A represents "the lay out of certain buildings at Nichols Field as it would have been found on the night of 29 October 1948," and that Prosecution Exhibit B is a large scale reproduction of the same area. Both exhibits were accepted in evidence (R 13,14). Exhibit B shows two rows of warehouses bordering a street running in an east-west direction, warehouses 811 through 815 and warehouses 821 through 824 in a westerly direction, are respectively on the north and south sides of the street facing each other. The western end of the street terminates at a perpendicular street, the western side of which is fenced. The following sentinel posts are shown on Prosecution Exhibit B. Post Number 1 extends along both sides of the east-west street from warehouses 811 and 821 on the east to a line a short distance beyond the western end of warehouse 813. Post Number 12 runs in an east-westerly direction along the front of warehouse 814. Post Number 11 starting at the western end of warehouse 815 runs easterly about three-quarters of the frontage of warehouse 815 thence south-easterly to the eastern end of warehouse 823, thence westerly to the western end of warehouse 824, and thence perpendicularly north to starting place. Posts 13 and 14 are contiguous and run along the north-south street lateral to warehouses 824 and 815 and join at a point a little north of the east-west street.

Prosecution Exhibit B illustrates the area in front of warehouse 814.

On the night of 29 October 1948, between 1800 and 2400 hours, the accused Cruz was assigned as corporal of the guard for the above posts (R 40), the accused dela Cruz and a Corporal Agudon were assigned Post

Number 1 (R 20,73); Private Guillermo Cristobal, Post Number 11 (R 34); Private Belen, an alleged accomplice, Post Number 12 (R 20); Corporal Corpus, Post Number 13 (R 34,99) and accused Villarosa, Post Number 14 (R 34,98).

At approximately 2100 hours on the evening of 29 October 1948 accused Villarosa, guard on Post No. 14, approached Private Cristobal, guard on Post No. 11, and asked the time. When Cristobal replied "I got no watch" accused Villarosa returned to his post (R 97,98). Later at 2200 hours Private Cristobal observed Belen, the guard on Post 12, holding open the door of warehouse 814 and several men entering the warehouse through the open door (R 16). Cristobal went over and spoke of this to Belen, but the latter told Cristobal to "go away." Cristobal returned to his post and later saw five men proceeding from warehouse 814 toward the fence carrying bundles (R 17).

Inside warehouse 814 was stored U. S. Army clothing. The door to the warehouse was always locked at night, and not even the guard on duty had a right to enter the warehouse at night (R 95,99).

At approximately 2130 hours First Lieutenant Otto P. Scharth of Company D, 45th Infantry Battalion (PS), received information that a raid was progressing at the Quartermaster Interim Depot (R 47). Lieutenant Scharth then called Captain Jack E. McCrorie, Commanding Officer of Company A, 45th Infantry Battalion (PS), and notified him that he had reason to believe that a raid was in progress (R 29,47). At approximately the same time First Lieutenant Exequiel Gonzales, the acting officer of the day, received essentially the same information as that received by Lieutenant Scharth, and he dispatched his informer to notify the Post Security Officer (R 20). Lieutenant Gonzales ordered Sergeant First Class Jose V. Alipio to go to the barracks and assemble a contingent of men (R 20,71). Sergeant Alipio aroused Corporal Pastor Abaqueta, Private Bayani Rosales, Private Jose Naron, Private Ruperto Iraola, Private Tequico Albarado, Private Guillermo Rabara, and Private Silvestre P. Capoquian, all soldiers he found sleeping in the barracks (R 51,71,72,77,80,82,85). Sergeant Alipio led this contingent of men to the armory and each drew either a carbine or an M1 rifle (R 71,76). Sergeant Alipio then marched the men to the parking area where they mounted trucks and reported to Lieutenant Gonzales (R 20,71). By misadventure Private Naron became separated and was left behind (R 137). In the meantime Lieutenant Scharth had walked to Company D where he drew a carbine and three magazines of ammunition (R 47). While proceeding with his seven men to the Quartermaster Interim Depot, Lieutenant Gonzales encountered Lieutenant Scharth who informed him that Captain McCrorie had been notified and that he and Captain McCrorie would join

the Gonzales party at the Depot (R 47). Lieutenant Gonzales then proceeded on to the depot with his men, and Lieutenant Scharth proceeded to the 45th Infantry Battalion headquarters to await the arrival of Captain McCrorie (R 47).

Upon arrival at the depot area Lieutenant Gonzales and his men abandoned the trucks and proceeded on foot (R 71). Upon arriving at a place near a fire barrel just east of warehouse 814 on the street between the rows of warehouses, Lieutenant Gonzales ordered his men to deploy to the right of the street in a straight line (R 21). For a period of three minutes he had observed bundles being carried from the warehouse (R 74). In the meantime Captain McCrorie met Lieutenant Scharth at battalion headquarters and armed himself with a carbine and ammunition (R 29,47). Private Naron, who was one of the group of men alerted by Sergeant Alipio, having misunderstood the orders, had drawn a carbine and was standing in front of the company orderly room when he was seen by Captain McCrorie and Lieutenant Scharth (R 47,137). Captain McCrorie, Lieutenant Scharth and Private Naron then proceeded on together to the depot and arrived at the point where Lieutenant Gonzales had deployed his men (R 21,30,47,48). There was a light inside warehouse 814 and several persons were seen moving about in front of the warehouse, some of them carrying bundles and proceeding toward the fence (R 21,30,48,72). After Lieutenant Gonzales had deployed his men, he observed two men come out of the hangar and join two men outside; a conversation apparently ensued between the four. Gonzales recognized one of the four men as accused Cruz but stated that Cruz, as corporal of the guard, had a right to be there. After having observed Cruz, Gonzales instructed his men to fire only on his orders. "Meanwhile" Captain McCrorie and Lieutenant Scharth arrived and Lieutenant Gonzales informed them of what he had observed (R 21,23,24,40). The line of deployment of Lieutenant Gonzales' men, as illustrated by the Lieutenant, was a perpendicular line from the road which if extended beyond the eastern side of the warehouse would run laterally to the warehouse (Pros Ex B). The line terminated some distance short of what would be the front of the warehouse if it extended to the line of deployment and was generally sheltered from view from the warehouse by a pile of platforms, a stack of boxes, and a shed. Gonzales designated his own position on the exhibit from which it appears he had an unobstructed view of a large part of the front of the warehouse. Private Rabara and one Capoquian, who was subsequently killed in the fire fight as herein-after discussed, were at the end of the line of deployment closer to the warehouse. The position where Rabara last saw Capoquian was a sheltered one. As described by Rabara, he and Capoquian were west of the perpendicular line indicated by Lieutenant Gonzales (R 52,53,59,60).

After being at the scene for approximately five minutes, Captain McCrorie stepped into the middle of the road and called to the men in front of the warehouse telling them they were surrounded, and ordered them to surrender (R 22,31,48,73,100,187). Thereupon several shots were fired from somewhere in the vicinity of the

hangar, and Captain McCrorie immediately discharged two shots into the air. Firing then was taken up by Lieutenant Scharth and Lieutenant Gonzales (R 48,51). Captain McCrorie fired approximately 25 rounds (R 37). Lieutenant Scharth fired approximately 30 rounds from his carbine (R 49). Lieutenant Gonzales fired four shots in all (R 22). Private Rabara was at the end of the line of deployment, and the victim Capoquian was next to him. Rabara and Capoquian moved closer to the warehouse, Rabara finally pausing at the southeast corner thereof (R 53-55). Rabara fired two rounds (R 55). None of the other enlisted men, except the deceased, fired their weapons (R 73,78,81,83,87,90). Albarado was deployed to the left of the officers and he heard firing from his right rear (R 93). During the skirmish Private Rabara heard the victim Capoquian say "Very painful" (R 56). A bullet coming from the direction of the warehouse struck Lieutenant Scharth in his left hand, whereupon the latter called out, "Mac, I am hit." (R 31,49). Lieutenant Gonzales applied a tourniquet to Lieutenant Scharth's left arm but when the bleeding continued, Lieutenant Scharth announced that he was leaving and that he would notify the battalion commander. Lieutenant Scharth thereafter withdrew (R 22,33,49). Captain McCrorie then shouted an order to "cease firing." (R 31). The firing thereupon came to an end, and Captain McCrorie challenged the men in and about warehouse 814 to surrender and to lie on the ground with their hands above their heads (R 31). Belen answered "Sir, I am coming out," whereupon he moved to the front of the warehouse and laid down (R 32). Shortly thereafter Cruz announced "I am coming out" and, at the direction of Captain McCrorie, he laid down on the ground next to Belen (R 32). Captain McCrorie approached the two men and upon discovering that Cruz was armed, relieved him of his pistol. The pistol had not been fired (R 100). He again demanded the surrender of the men inside the warehouse, and voices within the warehouse replied that they wanted to give up but could not get out. Captain McCrorie approached the warehouse door and called again but received no reply. He found the carbine of dela Cruz on a fire barrel near the entrance to the warehouse and accused Belen's rifle against a pile of lumber near the entrance to the warehouse (R 33). Capoquian was found at the northern end of the pile of boxes fatally wounded (R 34,73). Rabara was discovered to have suffered a flesh wound on the left side of his back (R 56,73). Medical personnel arrived on the scene and removed Belen who was wounded in the leg. After his examination of Capoquian, Captain McCrorie had him taken away in an ambulance (R 34). Capoquian's weapon was lying beside him and an examination indicated that it had been fired (R 99).

Captain McCrorie then inspected the guards. He found Private Cristobal at his Post No. 12. He could not find Private Corpus who was assigned as the sentinel on Post No. 13. Accused Villarosa was

found at his assigned Post (No. 14) but he was bareheaded. When Captain McCrorie approached and came to a point some five yards from him Villarosa said "Yes, sir, I admit that I was in the hangar." (R 34). Thereafter, in response to Captain McCrorie's question he denied that his firearm had been fired, but when Captain McCrorie inspected his firearm, he admitted that he had fired his rifle three times (R 34). Captain McCrorie's examination of Villarosa's weapon verified Villarosa's admission. Villarosa was then placed under arrest (R 35). A sun helmet, which he identified as belonging to accused Villarosa, was found in front of warehouse 814 (R 38,43).

Shortly thereafter First Sergeant Adlaon arrived and spoke to the men inside the warehouse in Tagalog (R 35). In front of the warehouse Sergeant Adlaon picked up a khaki shirt, and underneath the shirt were found two expended carbine shells. An identification card belonging to accused Reyes was found inside the shirt. While Sergeant Adlaon was talking in Tagalog to the persons inside the hangar Captain McCrorie found a sun helmet and a flashlight in front of the warehouse. The sun helmet was identified as belonging to Belen.

After several hours accused Candelario came out of the warehouse and surrendered himself (R 36). Later accused Sarmiento, Reyes and Malong abandoned the warehouse and surrendered (R 37).

After daylight Captain McCrorie, Captain Aycock, Major Strom and two CID agents returned to the warehouse. They found six empty shells behind some lister bags in front of the warehouse (R 37,45).

On the morning of 30 October 1948, Louis Korcheck, Jr., CID Special Agent, performed a "crime search" of the area in and about warehouse 814. Korcheck found bloodstains on the ground in three places near the warehouse. A bullet hole was found in the lister barrel stand in front of warehouse 814. The axis of the hole indicated that the bullet was traveling in a north-westerly direction. On the fence adjacent to Posts No. 13 and 14 were found jute fibers. A bullet hole was found in warehouse 822 approximately twelve feet above the ground. The angle of incidence of this hole indicated that the bullet traveled in a line from the front of warehouse 814. Three bullet holes were found on the easterly side of warehouse 814. Two of these holes indicated that the bullets were fired on a line which, if extended from the holes, would pass approximately over the place where Capoquian was found and slightly behind the platforms where the officers and accompanying enlisted men were deployed. The third hole indicated that the bullet was fired from a place in line with the lister barrels in front of the entrance of warehouse 814 (R 70,71,131,132).

An autopsy performed on the body of Capoquian revealed that the fatal wound was inflicted by a bullet entering the body on the right rear hip and passing through the body making exit at the upper left front of the abdomen. Two other bullet holes were found in the right thigh. The first indicated that the bullet entered the front surface in the middle of the thigh and passed through making exit at the inside of the leg. The second indicated that the bullet entered the outer side of the thigh and left through the back side. Another wound was found on the left leg which indicated that a bullet had lacerated the skin and superficial part of the back of the left thigh. If Capoquian were standing, the bullets would have been traveling approximately parallel to the ground. The fatal wound through the abdomen inclined slightly upward. Had Capoquian been standing, the bullet would have entered the body approximately 37 inches above the ground and would leave the body 39 inches above the ground. In the opinion of the surgeon performing the autopsy, death was not instantaneous, but that the victim lived from twenty to thirty minutes after being hit. It was also his opinion that Capoquian was not prevented from moving by the wounds he received, but that he was able to motivate himself for five or ten minutes after being shot (R 63,64).

At approximately ten or eleven o'clock on the morning of 4 November 1948, accused Reyes and Sarmiento were brought to CID headquarters for questioning by Agents Korchek and Roach. Reyes was interviewed first. At the inception of the interview he was warned of his rights under Article of War 24. Korchek identified Prosecution Exhibit O as the statement which Reyes made and testified that it was not induced by force, threat, or promise of reward. When Reyes was brought to the "CID" he was handcuffed but he was not so restrained during the interview. At no time did Korchek strike Reyes. At about three-thirty in the afternoon Reyes was given lunch and at about four he was taken to Captain Scott before whom he swore to his statement. Prior to swearing Reyes, Captain Scott had Reyes identify himself, was told by Reyes that he had been warned of his rights under the 24th Article of War, and that he had read the statement. Captain Scott was not sure if the statement had been signed when it was brought to him, but Reyes' signature appearing in the right hand margin of three of the pages of the statement were placed thereon by Reyes while in Captain Scott's presence. Captain Scott could not recall the exact time in the afternoon that the incident took place.

Reyes, after being apprised of his rights, elected to testify concerning the circumstances under which he made his pretrial statement. He testified that he was taken to the CID quarters at eight o'clock in the morning and was held there until four-thirty in the afternoon when

he had finished his statement. In the interim he was in chains, was beaten, and was not fed until after he had made his statement. The first blow given was a "box of the right hand in [his] stomach" and he fell to the floor. When he regained his feet he told them he had already made a statement. Thereafter he was struck three times with a club. Finally, in the afternoon, he could not resist the "hardship" given to him so he made the statement.

The statement, Prosecution Exhibit O, was admitted in evidence (R 112).

Concerning the interview with Sarmiento, Korchek testified that Sarmiento was warned of his rights under Article of War 24, and that no duress or violence was used on him. Korchek identified Prosecution Exhibit K as the statement made by Sarmiento (R 120). Korchek added that Sarmiento voluntarily signed the statement in his presence. Sarmiento subsequently swore to the statement before Captain Scott (R 120-121).

Sarmiento after being apprised of his rights elected to testify concerning the circumstances under which he made his statement. He testified he had been in chains from 0800 of the day he made his statement until after he made his statement in the afternoon. Likewise, his lunch was withheld from him until 4:30 in the afternoon after he had made his statement. In the interim he was hit by a club and boxed. Otherwise he would not have made the statement. He identified the "CID" Agent who mistreated him as "The one sitting here." On cross-examination he admitted that after he returned to the stockade he did not go on sick call (R 123-126).

Sarmiento's statement, Prosecution Exhibit K, was admitted in evidence (R 127).

On 5 November 1948, Korchek interviewed accused Candelario and after advising him of his rights under Article of War 24 secured a statement from him. He identified Prosecution Exhibit N as the statement he secured and he testified that the statement was not secured by promise, threat, or duress (R 112,113). After the statement was made, Korchek brought Candelario to Captain Scott. The latter, after receiving assurance from Candelario that he had made the statement voluntarily, that the statement was the truth, and that he had been advised of his rights under Article of War 24, administered the oath to Candelario. Candelario also admitted to Captain Scott that the signature appearing on the last page of the statement was his. The signatures appearing on the other pages of the statement were affixed by Candelario in

Captain Scott's presence. Captain Scott placed the time of the foregoing incident at 0950 hours (R 117-118).

Candelario testified that he was in the CID area from 0800 to 1100 hours on the day he made the statement, and during that time he was "boxed" three times, once with a club. In fact he was "boxed" before he was questioned. If he had not been maltreated he would not have made the statement "because he had previously made one which had been extorted from him."

The prior statement was the subject of the following testimony and colloquy:

"Q. You made a first statement?

A. I got a first statement on October 30, sir.

Q. Who took your first statement?

A. ....

TJA. Objection on the ground that it is immaterial.

LM. Overruled. Proceed.

Q. Who took your first statement?

A. The CID who was here sitting.

LM. (To DC) You introduced this witness for the purpose of attacking the voluntary nature of a particular statement. I am warning you now that once you open up another matter I am going to throw it wide open. Do you understand?

DC. I understand. \* \*." (R 115)

Concerning the effect of the blows he received during the interrogation in which he made the statement in issue he testified on cross-examination:

"Q. After you were boxed in the stomach and hit with a club, how did you feel?

A. When I already awaken up another CID was pressing my stomach and then I was sitting down.....

Q. How did you feel?

A. I feel hurtly.

Q. Did you feel sick?

A. No, sir, but I was fell down on the floor and then I was ...

Q. How did you feel? Were you sick?

A. Yes, I was sick here.

Q. Did you go on sick call?

A. No, sir." (R 115,116)

Candelario's pretrial statement, Prosecution Exhibit N, was admitted in evidence (R 119).

The same day Korchek interviewed accused Malong at the prison division guardhouse and advised him of his rights under the 24th Article of War. Korchek identified Prosecution Exhibit M as the statement he secured from Malong and testified that the statement was made voluntarily and was not induced by force, violence, or promise of reward (R 127).

Malong testified that prior to making the statement the "CID" agent slapped him with a club and kicked him once. Malong added, however, that even if he had not been maltreated he would have made the statement (R 130).

Malong's statement, Prosecution Exhibit M, was admitted in evidence (R 130).

In rebuttal Sergeant Jeste Sutito testified that on 4 November 1948 he was commander of the guard at the Prison Division Stockade. On that day the CID took from the stockade for interrogation accused Reyes, Sarmiento, Malong, and Candelario, who were confined there, and returned them between four-thirty and five in the afternoon. Sutito observed the four accused on their return and stated that they appeared physically fit, and in excellent condition (R 148). None of them made any complaints to Sutito (R 150).

Prosecution Exhibits I, L, J, and P, were identified as voluntary pre-trial statements of accused Cruz, Malong, Villarosa, and dela Cruz, respectively, and they were admitted in evidence without objection (R 132-136)

Reyes, Candelario, Sarmiento and Malong each admitted in his pre-trial statement that he entered warehouse 814 on the night in question to steal government property (Pros Exs O,N,K,M,L; R 102,113,120,127,133).

In his pretrial statement accused Cruz stated that he was corporal of the guard at the depot, Nichols Field, for the first relief from 1800 to 2400 hours 29 October 1948. He was making his second inspection of the guard and when he approached Hangar 814 he noticed a group of men in front of it. As he approached the men he found a shirt and upon inspecting it found a fountain pen with a name on it, leading him to the belief that the person so named was within the warehouse. There were five men outside of the warehouse. Cruz was surprised at the

number of men on Post 12. He knew their purpose and yelled to them to stop. Next, Cruz heard a voice call, "Put your hands up or else I will shoot." As to the ensuing incident Cruz related:

"\* \* After this I heard firing and I took cover. I do not know who fired first. Then the firing stopped and I saw a man by my feet lying down who said that he was wounded. His name is Pvt Belen. Belen is one of the guard relief at Post #12. When the firing stopped I heard again a voice saying, 'You better surrender or we will shot again,' so we started to crawl towards the light with our hands in front of us. The OD, Lt Gonzales, placed me under arrest and brought me to the Bn Hqs.\* \*." (Pros Ex I)

When Cruz was arrested his pistol was cocked but he explained it was his practice to keep his pistol cocked when on duty, especially at night (Pros Ex I; R 132).

Villarosa, in his pretrial statement, related that he was the guard on duty at Post No. 14, "QM Area, Nichols Field, from 1800 to 2400 hours, 29 October 1948." Warehouse 814 was about 100 yards from his post. At 2105 hours Villarosa left his post and visited the guard on Post No. 11, Private Cristobal, who gave him some food. Villarosa also inquired of Cristobal what time it was. Villarosa returned to his post and remained there until 2109 hours when he again went to Post No. 11 where he was unable to find the guard. While at Post No. 11 he heard footsteps on Post No. 12. He ran to Post No. 12 where he met the guard and saw two men trying to enter warehouse 814. Villarosa described what ensued as follows:

"\* \* I loaded my carbine. Then Post #14 approached me. When post guard #12 and I were together we heard a voice say, 'Halt.' When I turned around my tropical hat fell down and I started to pick it up and I saw the men who were attempting to enter. Whse #814 run away from the whse and then I heard the men who halted us to fire. I hit the ground to escape bullets flying around. I fired 3 rounds into the air. After firing 3 rounds I ran to my post." (Pros Ex J)

Sometime after returning to his post his "CO" and an "MP" sought him out. Concerning his meeting with his "CO" Villarosa stated:

"\* \* My CO asked me where the guard of post #13 was and I told him I did not know because I did not see him. My CO asked me where my tropical hat was. I told him where it was. He then took my carbine, smelled it and then told me if I was the one who fired

at them. He then disarmed me - he took away my bayonet and ammunition. He walked me ahead about five paces with the carbine pointed at me to posts #16, 15 and 17. We went back to post #13 and my CO shouted for post #13 but guard post #13 was not there but we found guard #11 there.\* \*." (Pros Ex J)

He stated that he had been five paces from the men in front of warehouse 814 but was unable to recognize them as the place was dark and he did not see their faces (Pros Ex J; R 135).

Accused dela Cruz stated that at 2130 hours, 29 October 1948, he was on Post No. 1, Nichols Field, patrolling around the hangars. When the shooting started he was between hangars 813 and 814, patrolling. He claimed this area was part of his post. He was unable to explain how four men got inside of "hangar 814" as "hangar 814" was not a part of his post. When the shooting started he hit the ground behind a "stock of boxes" in front of "hangar 814." The firing was coming from the direction of Post No. 1. He felt that he was not safe where he was and ran behind "hangar 815," leaving his carbine behind. He was behind hangar 815 when the firing ceased, and remained there until he was picked up by the guard truck. He did not fire his carbine (Pros Ex P; R 136).

4. Evidence for the defense.

After being apprised of his rights, accused Cruz elected to testify in his own behalf. In pertinent part he testified that on the night in question he was detailed as corporal of the guard of the first relief. As such it was his duty to post his relief and inspect it twice during his tour. He was making his second inspection when he saw a group of men in front of hangar 814. As he approached the hangar he saw a shirt which he picked up and inspected. His testimony concerning what his investigation disclosed to him was interrupted by the following colloquy:

- "TJA. Objection. Prosecution feels that the defense counsel is going to make this man a prosecution witness.
- DC. An explanation of his statement.
- LM. The defense counsel is advised that he is bringing forth certain matters in evidence which he himself is responsible for and may affect the rights of the other defendants. Any evidence as brought forth is the responsibility of the Defense Counsel and will be considered by the court as evidence and may the other accused.
- DC. This accused will only explain the reason why he was there on the night of 29 October 1948 and that if he knew or

learned from anybody what was to happen on that night. That was the only object of the defense in presenting Federico Cruz on the stand, if the court, please.

LM. Don't misunderstand me. You are at liberty to present any evidence for your case. I am only warning you to proceed cautiously. Incidentally the defense in bringing his own witnesses forward is bound by the same rule of evidence as the trial judge advocate and may not lead the witness. Proceed." (R 140-141)

Nobody had told him what was to occur that evening. Nothing unusual had been reported to him during his first inspection. His presence at the warehouse at the time of the shooting had been necessitated by his duty to inspect the guard. He had not been at the warehouse a minute when he heard a voice from his rear demanding that arms be put down, and hands up, and then firing broke out. After the firing was over he gave himself up. Captain McCrorie ordered him to lie down with his hands up and then inquired of him who he was. Captain McCrorie thereafter ordered Lieutenant Gonzales to put him under arrest. While the firing was going on he heard a voice call "Sir, you are firing at me." He could not identify the voice but indicated on Prosecution Exhibit 1 the place from which the voice emanated. It was the same position which Captain McCrorie had indicated in his testimony as the place where he found the deceased, Private Capoquian (R 143).

On cross-examination, Cruz stated he did not answer the initial surrender call because of the firing which started almost immediately thereafter. When he first drew near to the warehouse in his inspection he saw five men, three outside and two inside. He saw a man right near the door and shouted "stop." He did not know what the three guards were doing but was sure that the ones inside had an "intention" to do something. The presence of the three guards caused him to wonder. He did not draw his pistol because he heard the voice, and the firing started. He had not been there a minute when the firing started. He picked up the shirt to inspect it, rather than talk with the men, because during his first tour of inspection he had not seen the shirt. He also had an idea that the men outside might be connected "in that loot." Only one guard was supposed to be there. To obtain the shirt he had to walk around Belen and the others who were outside.

Upon examination by the court he testified as follows concerning his pretrial statement:

"Q. Read your statement here - Pros. Exh. 14 '....I already knew what their intention was, so I told them to stop what they are doing....' What do you mean?"

A. I mean when I discovered a shirt that there was a pen inside the pocket and saw a name engraved on it....

Q. How did you know what their intention was before that time?

A. ....

Q. I ask you: How did you know their intention with respect to the warehouse?

A. Because Reyes was not a member of the guard." (R 146a,146b)

Upon motion by the trial judge advocate the last answer was stricken on the ground that it might be prejudicial to one of the accused.

Cruz disclaimed knowledge of who fired first, the party in the warehouse, or the investigating party. Most of the shooting came from the spot where he heard the first voice, but there was some shooting from within the warehouse. He, himself, did not fire at all.

After being apprised of their rights, the other accused remained silent as to the merits of the case.

5. The accused have been found guilty of housebreaking and assault with intent to do bodily harm with a dangerous weapon upon two persons, in violation of Article of War 93, and of murder, in violation of Article of War 92. Evidence adduced in support of these charges shows that on the night of 28 October 1948 at Nichols Field, Philippine Islands, information was received by Lieutenant Exequiel Gonzales and Captain Jack E. McCrorie that a raid was in progress in the depot area of Nichols Field. Lieutenant Gonzales took a group of eight armed men to the Depot area and on arriving at a point just east of warehouse 814 deployed his group of men in a line perpendicular to the road in front of the warehouse, and if sufficiently extended, lateral to the east side of warehouse 814. Meanwhile he remained on the road where he was subsequently joined by Captain McCrorie and Lieutenant Scharth. They observed men carrying bundles from the warehouse and moving around in front of the warehouse. At night not even the guard patrolling the front of the warehouse, which contained United States Army property, was allowed inside. Lieutenant Gonzales observed two men emerge from the warehouse and engage in conversation with two men outside. One of the quartet was accused Cruz, who as corporal of the guard, had a right to be in the area. Subsequently Captain McCrorie arrived on the scene and was there for a period of five minutes before the firing broke out. By his own admissions, both judicial and extrajudicial, Cruz was at the scene when the firing broke out. It is thus apparent that Cruz was present at the scene in the midst of the perpetrators of the housebreaking for a period in excess of five minutes and took no action to stop the progress of the housebreaking. After the surrender call, shots rang out from the direction of the warehouse. The fire was returned by the law enforcement group. The fire returned by the latter was much heavier than that emanating from the warehouse. Captain McCrorie gave a cease fire and again called for surrender. Belen, the alleged accomplice,

who was the sentinel at warehouse 814, was the first to surrender. He was wounded. Shortly thereafter, accused Cruz surrendered. Ultimately accused Candelario, Reyes, Sarmiento, and Malong emerged from the warehouse and gave themselves up. The latter four subsequently admitted that they were in the warehouse for the purpose of stealing government property. A carbine belonging to accused dela Cruz, who was posted as a sentinel on Post No. 1, was found in front of the warehouse. When Captain McCrorie inspected the guard after the fire fight, accused Villarosa, the sentinel on post 14, told him that he had been in the warehouse.

Private Silvestre P. Capoquian, one of Lieutenant Gonzales' detachment, was found mortally wounded near the southeast corner of the warehouse and a short time later died, his death being caused by gunshot wound. The fatal wound was occasioned by a bullet entering the right rear hip and emerging from the left front abdomen. Had the deceased been facing the warehouse when he was hit it is difficult to see how the fatal bullet could have been fired therefrom. Recruit Rabara, who was in the law enforcement group, was wounded in the lower left back during the fire fight. His position at the time he received his wound cannot be determined from his testimony. Lieutenant Scharth of the law enforcement group was wounded in the hand by a bullet which came from the direction of the warehouse.

For the purposes of this portion of the discussion, we by-pass the question, hereinafter decided, as to the competency of the pretrial statement of accused Candelario. In our view of the evidence there cannot be any question as to the findings of guilty of housebreaking as to accused Reyes, Sarmiento, Malong and Candelario. The proof shows that at the time and place alleged, warehouse 814, a government building, was entered by unauthorized persons for the purpose of larceny; that subsequent to the fire fight hereinbefore described, the presence of Reyes, Sarmiento, Malong, and Candelario was discovered in the warehouse; and that prior to trial they admitted they had entered the warehouse to steal. The uncontradicted evidence thus compels the conclusion that these four were acting in concert as alleged and sustains the convictions of housebreaking of these four.

In the absence of self-incriminating written pretrial statements such as those introduced against Reyes, Sarmiento, Malong, and Candelario, the criminal liability of the accused Villarosa and Cruz for the offense of housebreaking must be assayed in the light of the circumstances shown in the record of trial.

Thus, as to Villarosa, it is shown that at 1800 hours on the night in question, he had been stationed as a sentinel on Post No. 14, Nichols Field, to serve as such until 2400 hours. Post No. 14 is approximately 100 yards from warehouse 814, and warehouse 815 intervenes between Post No. 14 and warehouse 814. After the housebreaking and fire fight hereinbefore detailed, and while Captain McCrorie was inspecting his post,

Villarosa spontaneously asserted to Captain McCrorie, "Yes, sir, I admit I was in the hangar." Following closely in point of time the housebreaking and fire fight, this assertion of Villarosa compels us to the conclusion that it was an admission that he was present at the warehouse with the perpetrators of the housebreaking while they were carrying out their joint felonious venture, and their mutual presence was known to each other. Villarosa's guilt of the offenses is similarly indicated by his denial that his rifle had been fired until confronted with the results of Captain McCrorie's inspection of the piece. This inspection showed that the weapon had been fired which fact was then immediately admitted by the accused. In his pretrial statement Villarosa stated that shortly after 2100 hours he left his post to visit the sentinel on Post No. 11. While at Post No. 11 he heard footsteps on Post No. 12, directly in front of warehouse 814, and went to investigate. He saw two men trying to enter warehouse 814 and he loaded his carbine. He met the sentinel on Post No. 12 and they were together when a voice called "halt." The two men who were trying to enter warehouse 814 turned and ran away, and then the men who called "Halt" started to fire. Villarosa hit the ground, fired three shots into the air and then ran back to his post. It may be seen that Villarosa's written pretrial statement is contradictory to the oral statement made by him to Captain McCrorie, and contradictory to the evidence adduced by the prosecution with reference to the scene being enacted in front of warehouse 814, just prior to the fire fight: i.e., lights from within the warehouse throwing partial illumination on the exterior, which revealed men moving to and from the warehouse carrying out government property which had been stored within. Indeed, under all the circumstances the court could infer that the discharge of Villarosa's firearm was not accomplished in the innocuous manner described by him, but that the discharge of the firearm was for the purpose of repelling opposition to the commission of the felonious enterprise then in progress. From all the evidence adduced the least that may be said is that Villarosa was present at the time of the housebreaking, had been within the warehouse, and that he took no action to prevent the housebreaking and larceny of government property. As a sentinel he was duty bound to prevent the consummation of the larceny, and his non-action in the presence of the perpetrators constituted assent to, and concurrence in the housebreaking and larceny (CM 202677, Norman, memorandum). Presence of one at the scene of the commission of a crime where, as in the instant case, the circumstances point to his consent thereto and his concurrence therein, is considered as an overt act of encouragement to the commission of the crime, and constitutes him an aider and abettor in the commission of the crime (CM 321915, McCarson, et al, 70 BR 411, 416-417). As an aider and abettor to Reyes, Sarmiento, Malong and Candelario, Villarosa is a principal equally liable in law (18 USC 2; CM 325757, Jester, 75 BR 25, 28).

The evidence pertaining to accused Cruz supports, as to him, the conclusion attained in Villarosa's case. More than five minutes before the law enforcement group made its presence known, Cruz, who was corporal of the guard, was observed in conference with three of the perpetrators of the housebreaking and at no time was it apparent that he was opposing the commission of the crime in progress. As corporal of the guard he had a paramount duty so to do. We find in his conduct the same assent and concurrence found in the conduct of Villarosa (CM 202677, Norman, supra), and displayed, as it was, in the midst of the perpetrators of the offense, effectively lent encouragement to them in their nefarious enterprise (CM 321915, McCarson, supra). The conclusion that Cruz aided and abetted in the commission of the crime in issue is likewise inescapable, and hence, he too, is liable as a principal (CM 325757, Jester, supra).

We are unable to find evidence sufficient in law to sustain the findings of guilty of housebreaking of accused dela Cruz, and this conclusion, as will hereinafter be made apparent, has as its necessary corollary that the other findings of guilty and the sentence insofar as they pertain to him are, likewise, not supported by the evidence.

The evidence upon which the prosecution places its reliance to support the findings of guilty of housebreaking as to dela Cruz appears to fall short of that required. At the time of the housebreaking, dela Cruz was a sentinel on Post No. 1, which post, as delineated on Prosecution Exhibit B, describes a rectangle, the western terminus of which overlaps the area in front of warehouse 813. After the surrender of the raiders in and about the warehouse, dela Cruz's carbine was found on a water barrel a short distance east of the entrance to warehouse 814. In his pretrial statement, which the prosecution introduced in evidence, dela Cruz stated that he was patrolling the area between warehouse 813 and 814 when the firing started. He took temporary refuge behind a "stock of barrels" in front of warehouse 814, decided that that place of refuge did not afford enough safety, and so fled to the rear of warehouse 815 where he remained until the guard truck picked him up. He denied knowing that warehouse 814 had been entered but explained that warehouse 814 was not on his post. Examination of Prosecution Exhibit A shows that the view of the entrance of warehouse 814 is obscured to a person on Post No. 1.

In the light of the circumstances disclosed by the record of trial, it is clear that the court had before it ample grounds suggestive that dela Cruz was not as innocent as he held himself to be in his pretrial statement. Indeed, the record supports an inference that he was well aware of what was transpiring in and about warehouse 814 and, if not sympathetic to the project being carried out there, was not inimical to it. If as to dela Cruz, there were any evidence of preconcert on his

part with the perpetrators of the housebreaking, such preconcert and non-action on his part would afford a sufficient basis for his conviction (State v. Poynier, 36 La. Ann. 577). There is, however, no evidence of a prior understanding between dela Cruz and the others. At most we find the presence of dela Cruz at or about the scene of the housebreaking at or about the time of its commission, and a well defined suspicion that he was aware of its commission. At first glance it would appear that his case is on all fours with the cases of Cruz and Villarosa. There is, nevertheless, one fatal omission in the case of dela Cruz, specifically, the absence of a showing that his sympathy to the perpetrators was transmitted to them (Hicks v. United States, 150 U.S. 442, 446-449). There is no evidence showing that the perpetrators of the housebreaking knew of the presence and non-action of dela Cruz, and in the absence of such knowledge on the part of the perpetrators it is axiomatic that the conduct of dela Cruz could not have operated as encouragement to them. The findings of guilty of housebreaking in violation of Article of War 93, insofar as they pertain to dela Cruz are not supported by the evidence.

The accused were also found guilty of assault with intent to commit bodily harm with a dangerous weapon upon Lieutenant Scharth, guilty of a similar assault upon Private Rabara, and guilty of the murder of Private Capoquian. In the case of Lieutenant Scharth, it is quite apparent that he was wounded by a bullet fired by one of the group engaged in raiding the warehouse. In the cases of Rabara and Capoquian the defense contended that the wound sustained by Rabara, and the wound causing Capoquian's death were caused by fire from the law enforcement group. For the purposes of this discussion the defense's contention will be conceded.

As we have hereinbefore determined, six of the accused were properly found guilty of jointly committing housebreaking. This, by no means, concedes that we find that these accused were the only participants in that offense, nor is it necessary that we should. The record is fairly susceptible to the conclusion that others were involved who were not detected, or being detected, escaped. Nevertheless, these persons, although uncharged, are principals in the joint enterprise equally with those who were charged and found guilty. The failure to charge these persons does not militate against the findings of guilty of the accused (CM 248793, Beyer, et al, 50 BR 21, 36-37). Even if it be shown that some of the accused in the instant case have no knowledge of the principals who are unknown to the record, they are liable for the acts of the principals unknown to them (Rudner v. United States, 281 Fed 516, 519-520). The record fails to show which of the various principals in the housebreaking fired the shot which struck Lieutenant Scharth, but the lack of such showing does not relieve any of the principals from the liability created by the act of the principal who is unknown to the

record (CM 314939, Greene, 64 BR 293,300). All the principals were acting in concert in an unlawful pursuit. It is evident, also, that some were armed. It must have been expected by each and all the principals, therefore, that detection and attempted arrest of them was to be met with deadly violence by some members of the group. Under these circumstances, all are equally liable for the results of the violence unleashed by any of them (CM 248793, Beyer, supra). The felonious act of housebreaking to which all had given their allegiance was the proximate cause of the assault upon Lieutenant Scharth. The evidence as to the assault upon Lieutenant Scharth shows that one of the accused, or a confederate, assaulted Lieutenant Scharth with a dangerous weapon which was used in a manner likely to produce death or great bodily harm.

The question is presented whether as to the assault upon Rabara and the homicide of Capoquian a different result should be attained by virtue of the circumstances that the wounding of Rabara and the homicide of Capoquian were the results of shots fired by the law enforcement group. We find it necessary to discuss the homicide, for if it be held that the homicide is murder chargeable to the six accused whose conviction of housebreaking we find is supported by the evidence, the assault upon Rabara is equally chargeable to them.

Murder as defined at the time of the instant alleged act and as defined at the time trial was had thereon, is the unlawful killing of another with malice aforethought (par 148a, MCM 1928). "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: \* \* \* intent to commit any felony (Par 148a, MCM 1928). Illustrative of malice aforethought of this category is the following:

"\* \* one who voluntarily associates himself with others in the execution of an unlawful design of so desperate a character that it must ordinarily be attended with great hazard to life is responsible for a murder committed by his companions in the perpetration of such design, even though neither he nor his confederates specifically intended to take life and even though he rendered no active assistance, was not an eye or ear witness to the criminal act or had forbidden his companions to kill (CM 248793, Beyer, 50 BR 21,26; CM 314939, Greene, 5 Bull, JAG 281; CM 302791, Kaukoreit, CM 259308, Hall, 3 BR (NATO-MTO) 119,125; CM 291497, Miller, 22 BR (ETO) 55,60; Commonwealth v. Lucas, 2 Allen (Mass.) 170; Commonwealth v. Devereaux, 256 Mass. 387). \* \*." (CM 321915, McGarson, supra)

It is thus apparent that participation in a felonious enterprise, of which homicide is a result, constitutes a basis upon which malice for

all the participants in the enterprise may be inferred, when the person committing the homicide is one of the participants, and all the participants bear a liability equal to the participant actually committing the homicide. We believe this to be almost universally accepted law and rightfully so, inasmuch as the felonious enterprise in which all participated is the proximate cause of the homicide.

There is, on the other hand, a majority view that when the unlawful enterprise is met by violence by persons authorized to exert violence in defense of law and order and as a result of that violence an innocent bystander is killed, the participants in the unlawful enterprise are not liable for the killing (Commonwealth v. Campbell, 7 Allen (Mass), 541 (1863), 83 Am Dec 705; Butler v. People, 125 Ill 641 (1888), 8 Am St Rep 423; Commonwealth v. Moore, 121 Ky 97, 88 S.W. 1085 (1905)). The latter two cases cited rest their result solely on the rationale of the Campbell case. The rule in the Campbell case was rendered by three judges of the Supreme Judicial Court of Massachusetts before whom the trial of Campbell was held. In that case the evidence showed that on 14 July 1863 at Boston, the defendant Campbell was one of a group of rioters demonstrating against the enforcement of a draft of men for the Army. A military force was called out to suppress the riot and was stationed in the Armory on Cooper Street. The mob was fired upon by the soldiers, and the soldiers by the mob. One Currier was killed. The Attorney General asked the court to instruct the jury as follows: "That whether Currier was killed by a shot from within or without the armory, all the parties unlawfully engaged in the transactions which resulted in the homicide were at common law guilty, at least of manslaughter." Bigelow, C.J. speaking for the court in refusing the instruction recognized that there was no doubt "that a person engaged in the commission of an unlawful act is legally responsible for all consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable criminaliter for the acts of each and all who participate with him in the execution of the unlawful design." The court, however, went on to say, in effect, that a homicide growing out of a joint unlawful act does not naturally or necessarily flow from the unlawful act unless the homicide be committed by one of the participants. "No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose" \* \* "Suppose, for example, a burglar attempts to break into a dwelling-house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent, nor was it a necessity or natural consequence of the commission of the offense in

which he was engaged. He could not therefore have contemplated or intended it."

Commonwealth v. Moore, supra, involved the factual situation of the illustrative case in Commonwealth v. Campbell, and on the authority of the Campbell case the convictions of the accused were set aside. The Butler case also was decided in accordance with the Campbell rule; we avoid discussing the Butler case as we are of the opinion that the result in that case could well be defended on other grounds.

Professor Joseph H. Beale in his "The Proximate Consequence of An Act," 33 H.L.R. 633,649, has criticized the three cases cited above on the ground that the unlawful act is the proximate cause of the ensuing homicide. We find ourselves in accord with this latter view, but, if the three cases cited comprised the sole view of the matter, we might be inclined not to give voice to our judgment. The entire question has, however, been considered anew, and a result which we consider correct attained in the recent case of Commonwealth v. Moyer, 357 Pa 181 (June 30, 1947), 53 A2d736,740-745).

In the latter case the evidence showed that on the night of 13 July 1946 the accused held up the attendant at a gasoline station located in Delaware County, Pennsylvania, and while backing the attendant toward a building located on the station, one of the accused observed the owner of the station standing in front of the building, and fired at the owner. The owner who had a revolver in his pocket returned the fire. A fire fight ensued and the attendant was killed. The trial judge instructed the jury that "Any of the participants in an attempted robbery are guilty of murder in the first degree if someone is killed in the course of the perpetration of the first-named crime." On appeal this instruction was challenged as error, the defense contending that, since the evidence showed the fatal shot to have been fired by the owner of the station, the instruction was not applicable. The court, assuming but not conceding the factual situation presented by the defense, held the instruction to be free of error. The court found that the unlawful act, the robbery, was the proximate cause of the homicide. Chief Justice Maxey, speaking for the court, stated in part:

"The doctrine that when malice is the mainspring of a criminal act the actor will be responsible for any consequence of his act though it was not the one intended was recognized centuries ago when it was held that, quoting from Blackstone, Book IV, page 1599, Sec. 201, 'if one shoots at A. and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other.' (Italics supplied). It is equally consistent with reason and

sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act. For any individual forcibly to defend himself or his family or his property from criminal aggression is a primal human instinct. It is the right and duty of both individuals and nations to meet criminal aggression with effective countermeasures. Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance. Any robber or burglar who carries deadly weapons (as most of them do and as these robbers did) thereby reveals that he expects to meet and overcome forcible opposition. What this court said in *Commonwealth v. LeGrand*, 336 Pa. 511, 518, 9 A.2d 896, 899, about burglars, applies equally to robbers: 'Every burglar is a potential assassin and when his felonious purpose encounters human opposition his intent to steal becomes an intent to kill and any weapon he finds at hand becomes a weapon of murder.' Every robber or burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible. \* \*.

"\* \* \* If, for example, a father sees his child being kidnaped and opens fire, as any normal father would be expected to do if he had a gun available, and if the bullet which he fires at the kidnapper inadvertently kills the child, the death of the child is properly attributable to the malicious act of the kidnapper. \* \*." (53 A2d 741-742) (Underscoring supplied)

The rule enunciated by the court is admittedly based ultimately on a civil case, the celebrated "Squib Case," *Scott v. Shepherd*, 2 Blackstone's Rep 892. We agree with the Pennsylvania court that the doctrine of proximate cause is the same in criminal cases as in civil cases, and that the "Squib Case" provides a proper rationale for the result attained by the Pennsylvania court.

We feel that the result and the rationale therefor, in the Moyer case, are correct and that we should be so guided in this case, if we find the factual situations sufficiently similar.

In the Moyer case both participants in the robbery must have been aware of the fact that the other was armed, and thus aware that if force opposed them it would be of a lethal quality equal to that employed

by them, rendering each of the robbers liable for the results of the force opposed to them.

If it be assumed for purposes of this discussion that in the instant case, the shots fired at the law enforcement group, when their leader called for the surrender of the accused and their confederates, were fired by an unidentified participant in the housebreaking, and the fact that this particular person was a participant and was armed, was not known to all who participated, nevertheless, all who participated in the original unlawful enterprise would be liable for the results of the shot fired by the unidentified participant (CM 314939, Greene, 64 BR 293,300; Beyer, supra; Spies et al. v. People (1887), 122 Ill. 1, 12 N.E. 865, 17 N.E. 898,974, 3 Am St Rep 320; Commonwealth v. Moyer, supra). The above presented situation would appear to pose the only possible substantial difference between the factual situation of the instant case and that of the Moyer case, and if the accused are liable, as we have demonstrated, for the firing under the above-discussed circumstances, then the rule in the Moyer case would be applicable.

Having concluded that the rule of the Moyer case is applicable to the factual situation in the instant case, and that, therefore, on the basis of the Moyer case, the findings of guilty of murder of six of the accused are supported by the evidence, we believe that we should indicate the reasons for our adherence, to the rule in the Moyer case rather than the rule in the Campbell case. For the most part, the basis of our preference may be found in the Moyer opinion which speaks for itself. Other than that, we turn to the opinion in the Campbell case, and find that against the background of present day crime, the Campbell opinion is singularly naive. When the court in that case asserted that it is not within the contemplation of a burglar that an innocent bystander might be killed by a person lawfully resisting the act of burglary, we feel that the court's assertion was belied by the facts of the case with which it was confronted.

To conclude, we are of the opinion that the findings of guilty of assault upon Lieutenant Scharth and upon Rabara and of the murder of Capoquian, insofar as they do not pertain to accused dela Cruz, are supported by the evidence. As to the latter, there being no evidence that he personally committed the assaults and murder, and having found that he was not a principal in the criminal act of housebreaking which was the effective cause of the assaults and murder, he may not be the subject of criminal liability for those offenses either directly or vicariously.

Our conclusions hereinbefore attained have been premised upon the absence of prejudicial error in the record. In the case of Candelario,

however, we find that prejudicial error was committed during the trial.

The prosecution offered in evidence against accused Candelario a pretrial statement made by him. There was evidence adduced by the prosecution that this statement was voluntarily made. Candelario took the witness stand for the limited purpose of showing that the statement was extorted from him by force and violence. In the course of his direct examination the defense counsel questioned him with reference to a statement made by accused prior to the statement which was the subject of prosecution's offer of proof. An objection to the line of inquiry by the trial judge advocate upon the ground of immateriality was overruled by the law member. The law member allowed the examination on the subject of the prior statement to continue for one question and answer and then stated the following to the defense counsel:

"You introduced this witness for the purpose of attacking the voluntary nature of a particular statement. I am warning you now that once you open up another matter I am going to throw it wide open. Do you understand?" (Underscoring supplied (R 115))

Although the statement of the law member could be construed as meaning that the subject of the prior statement would be thrown wide open, to our minds, it is equally susceptible to a construction that a continuance of the inquiry would subject accused, upon cross-examination, to examination on the merits of the entire case. That the defense counsel adopted the latter construction is apparent from his abandonment of his examination with reference to the prior statement and it is thus apparent that the law member's remarks effectively shut off the line of inquiry.

Inquiry into the circumstances of the making of the prior statement was pertinent and material to the issue of the voluntary character of the statement offered by the prosecution and subsequently admitted in evidence over objection by the defense. The law illustrative of the situation has been stated as follows:

"\* \* Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts. The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. The

determination of the extent of the influence persisting at the time the subsequent confession is made rests upon attendant circumstances, and the inquiry is whether, considering the degree of intelligence of the prisoner, the nature and degree of the influence, and the time intervening between the confessions, it can be said objectively that the confessor was not compelled to confess by reason of the pressure or inducement which motivated him to confess on the prior occasion. If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had been removed, the subsequent confession is admissible. It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to apprise the accused: (1) That anything that he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him, for it has been well said that 'for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate.'" (Wharton's Criminal Evidence, Vol 2, Sec 601, pp 998-1002)

While the court could believe that prior to the making of the statement admitted against him, the accused had been apprised of his rights under the 24th Article of War, there is no claim made that he was advised that his previous confession, if such it were, could not be used against him because of its improper inducement. Thus, had the defense established by competent testimony that the prior statement had been extorted from accused by force, violence and duress, the failure to advise him, prior to the taking of the later confession, that the first statement could not be used against him because of the manner in which it was obtained would render the second statement incompetent. It was, therefore, highly material to the issue of the competency of the statement introduced against the accused to determine what type of influence induced the first statement, and if it be determined the first statement was improperly induced, to consider whether the improper inducement tainted the statement introduced against him. The law member by his statement set forth above improperly forestalled the determination of these questions. Pertinent inquiry by the defense may have established that accused's first statement was extorted from him by force, and that the statement introduced against him resulted from the prior improper inducement. Had such circumstances been established by the defense, we would be compelled to hold that the second statement constituted compulsory self-incrimination rendering the proceedings void as to this accused (CM

329162, Sliger, 77 BR 361). By the law member's statement concerning the effect that further interrogation with regard to the prior statement might have on accused's offer of himself for limited purpose, the opportunity was not afforded the defense to establish these circumstances and we are not in a position to say they did not exist. (Hence, we must hold in accord with the Sliger case, that regardless of the other evidence against Candelario, the admission of his pretrial statement which amounted to a confession, without allowing inquiry into the circumstances of his prior statement, which circumstances might show force or duress in connection therewith, renders void the findings of guilty as to this accused.

The record shows that all the accused were represented by the same two individual defense counsel. Prior to pleading to the merits of the case, the individual counsel made a motion to sever the cases of Cruz, Villarosa, and dela Cruz, from the remaining four accused on the ground that the defense of the three named accused would be inconsistent with the defense of the other four accused. The motion was overruled. In the course of trial, pretrial statements of each accused were offered and admitted in evidence. With the exception of the statement of Villarosa, the law member instructed the court that the statements were being admitted in evidence solely for consideration as to the declarant. It is considered that the failure so to instruct with reference to Villarosa's statement was oversight which was cured by the instructions given when the other statements were admitted in evidence.

In their statement Reyes, Sarmiento, Candelario, and Malong, each admitted their respective participation in the raid on the warehouse, and the statements were not considered for any purpose other than the incrimination of the declarant thereof. The statements of each of the other accused, including Cruz, were wholly exculpatory. In our view of the case, the statements of Reyes, Sarmiento, Candelario, and Malong, if competent, and if credible to the court, as they evidently were, together with the other evidence adduced by the prosecution, divested these declarants of any defense on the merits. Their defense, therefore, must have rested on the issue raised by the individual defense counsel, the issue of the voluntary character of the statements.

Accused Villarosa is in the same position to all intents and purposes, for in addition to his written exculpatory statement, he had made a spontaneous oral admission to Captain McCrorie, which, if believed by the court, as evidently it was, would with the other evidence and circumstances shown by the prosecution, justify his conviction. Unless, Villarosa could successfully attack his oral admission, he too, had no defense on the merits of the case.

Accused Cruz and dela Cruz stand in a somewhat different position from the other accused, but in view of our holding as to dela Cruz we

need not consider his position. Cruz, therefore, was the only accused with the exception of dela Cruz, who could defend on the merits without being confronted by a confession or damaging admission, and was the only accused who defended on that basis. In his testimony Cruz denied any connection with the raid on the warehouse. In his resume concerning what he observed at the warehouse that night, he stated that when he approached the entrance to warehouse 814, he found a shirt with a pen in it. He inspected the pen and found engraving on it. Before he could finish his testimony as to what he found on the pen, the trial judge advocate objected to the testimony on the ground it might prejudice the other accused. Without sustaining the objection, the law member cautioned the defense counsel that the testimony might have the suggested effect. The defense counsel thereupon discontinued that line of inquiry. Subsequently, upon examination by the court with reference to an assertion in his pretrial statement concerning his knowledge of the intentions of the raiders, Cruz explained he had that knowledge "Because Reyes was not a member of the guard." On motion of the trial judge advocate this answer was stricken on the ground it might be prejudicial to one of the other accused.

Questions which are interwoven are presented by the foregoing resume of the case. Were the defenses of the several accused contradictory; more particularly was the defense of Cruz inconsistent with that of the rest of the accused, and if the latter was so, was the denial of severance error as to Cruz; or, alternatively, was Cruz denied a fair and impartial trial by reason of the fact that he was represented by the same counsel as the other accused. As shown before, Cruz defended on the merits of the case, and the other accused defended on the narrow ground of the incompetency of their pretrial statements. These two defenses are not to our minds contradictory and could be performed by the one defense counsel with equal diligence. In this connection, also, it is to be noted that the record of trial shows there were in fact two civilian defense counsel and two military defense counsel present during the entire proceedings. The discontinuance by the defense counsel on direct examination of a line of inquiry which could only result in incrimination of other accused is not an indication that counsel was not diligent in the Cruz defense. We are unable to find that had Cruz testified against all the other accused, his own cause would have been advanced in any way. Therefore, the discontinuance of the line of inquiry by the defense counsel, and the striking by the court of Cruz's answer incriminating Reyes, were not injurious to his cause, and any error thereby committed was inconsequential. Since the record shows that each of the accused was diligently and ably defended, and that the defense of each accused by the same counsel was not inimical one to the other, there was no error committed by the denial of the motion to sever.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence as to the accused Candelario and dela Cruz.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused Cruz, Malong, Sarmiento, Villarosa and Reyes, were committed during the trial. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences as approved by the reviewing authority as to the accused Cruz, Malong, Sarmiento, Villarosa and Reyes.

Wilnot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

J. W. [unclear], J.A.G.C.

CSJAGH CM 334790

1st Ind

JAGO, Department of the Army, Washington 25, D.C.

TO: Commanding General, Philippines Command, APO 707, c/o Postmaster,  
San Francisco, California.

1. In the case of Sergeant First Class Federico C. Cruz, 10331881, Recruit Crispino Candelario, 10308376, Private Florencio R. dela Cruz, 10323312, Private Florencio Malong, 10322074, Recruit Marcelo Sarmiento, 10324641, Recruit Benjamin G. Villarosa, 10321130, all of Company A, and Recruit Benigno S. Reyes, 10322111, Company B, all of 45th Infantry (Philippine Scouts), I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences as to accused Candelario and dela Cruz. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentences as to accused Candelario and dela Cruz.

With reference to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and the sentences, as approved by the reviewing authority, as to the accused Cruz, Malong, Sarmiento, Villarosa and Reyes, confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50, you now have authority to order the execution of the sentences as to the accused Cruz, Malong, Sarmiento, Villarosa, and Reyes.

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

(CM 334790)

1 Incl  
Record of trial



HUBERT D. HOOVER  
Major General, United States Army  
Acting The Judge Advocate General

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

FEB 1 7 1949

CSJAGI - CM 334806

UNITED STATES )

ZONE COMMAND AUSTRIA )

v. )

Recruit JACK D. SMITH  
(RA 44107780), 533rd  
Signal Service Company.

Trial by G.C.M., convened at  
Salzburg, Austria, 18-19 January  
1949. Dishonorable discharge  
(suspended) and confinement for  
one (1) year. Disciplinary  
Barracks.

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HOLDING by the BOARD OF REVIEW

JONES, ALFRED and SOLF

Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50a.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Recruit (then Corporal) Jack D. Smith, 533rd Signal Service Company, did, at Salzburg, Austria, on or about 18 November 1948, wrongfully and negligently kill George Eisl, an Austrian Civilian, by striking him with a 1/4-ton 4 x 4 truck, WD # 2173441.

The accused pleaded not guilty to, and was found guilty of, the charge and specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year at such place as the reviewing authority might direct. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The findings and sentence were promulgated in General Court-Martial Orders Number 3, Headquarters Zone Command Austria, APO 541, US Army, dated 27 January 1949.

3. The accused was convicted of wrongfully and negligently killing George Eisl, an Austrian civilian, by striking him with a 1/4-ton 4 x 4 truck, in violation of Article of War 93. Involuntary manslaughter, in violation of Article of War 93, is homicide unintentionally caused in the commission of an unlawful act not inherently dangerous to human life, or by culpable negligence in performing a lawful act or an act required by law.

The specification of which accused was found guilty fails to allege that the killing was unlawful or that the negligence was culpable. It is, therefore, insufficient to allege involuntary manslaughter (CM 252521, GROAT, 34 BR 67, 74; CM 329832, SENCK, 78 BR 175, 177). The specification is, however, legally sufficient to support a finding of guilty of negligent homicide, in violation of Article of War 96 (CM 252521, GROAT, supra; CM 329832, SENCK, supra).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and the Specification as finds the accused guilty of the specification, in violation of Article of War 96, and legally sufficient to support the sentence.

Waldemar A. Wolf, J.A.G.C.  
Frank C. Alford, J.A.G.C.  
Waldemar A. Wolf, J.A.G.C.

CSJAGI CM 334806

1st Ind

1 MAR 1949

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Zone Command Austria, APO 541, U. S. Army,  
c/o Postmaster, New York, New York.

1. In the foregoing case of Recruit Jack D. Smith (RA 44107780), 533rd Signal Service Company, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as finds the accused guilty of the specification in violation of Article of War 96. Under Article of War 50e, this holding and my concurrence therein vacate so much of the findings of guilty of the Charge and Specification as involves findings other than findings of guilty of the specification in violation of Article of War 96.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which accused has been deprived by virtue of the findings so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 334806).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Record of trial
2. Draft of GCMO



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

CSJAGI CM 334837

MAR 2 5 1949

U N I T E D   S T A T E S

82D AIRBORNE DIVISION

v.

Trial by G.C.M., convened at  
Fort Bragg, North Carolina,  
27 and 31 January 1949. Dis-  
honorable discharge and confinement  
for two (2) years. Federal  
Reformatory.

Recruit EARNEST RATLIFF, JR.  
(RA 14214968), Company K,  
505th Airborne Infantry.

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HOLDING by the BOARD OF REVIEW  
JONES, ALFRED and JUDY  
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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification: In that Recruit Earnest Ratliff, Company "K" 505th Airborne Infantry Regiment did, at Fort Bragg, North Carolina, on or about 3 January 1949, knowingly and wrongfully apply to <sup>his</sup> own use one one-quarter ton 4x4 Truck, value of about \$1400, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Recruit Earnest Ratliff, Company "K" 505th Airborne Infantry Regiment did, without proper leave, absent himself from his organization at Fort Bragg, North Carolina from 13 December 1948, to 30 December 1948.

Specification 2: In that Recruit Earnest Ratliff, Company "K" 505th Airborne Infantry Regiment did, without proper leave, absent himself from his organization at Fort Bragg, North Carolina from 1 January 1949, to 5 January 1949.

He pleaded not guilty to and was found guilty of all Charges and Specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50e.

3. The record of trial is legally sufficient to support the findings of guilty and the only question presented here is the propriety of the designation of a Federal Reformatory as the place of confinement.

4. The term "penitentiary" as used in the Articles of War with reference to the authorized place of confinement is construed to include the term "Federal reformatory." Thus, it follows that a Federal reformatory may be properly designated as a place of confinement only where penitentiary confinement is authorized under the provisions of Article of War 42 (CM 323136, Ligon, 72 BR 101, 102).

5. It is obvious that the offenses alleged under Charge II are military offenses for which penitentiary confinement is not authorized by Article of War 42. There remains for consideration whether the findings of guilty of misapplication, in violation of Article of War 94, alleged in Charge I and the Specification thereof, warrant confinement in a penitentiary.

Article of War 94 provides in part as follows:

"Any person subject to military law \* \* \*

"who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; \* \* \*

"shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. \* \* \*."

Prior to 1 September 1948, the offense of misapplication of government property denounced by Article of War 94 was one of the offenses denounced by 18 United States Code, 1946 Edition, Section 87, and was punishable by penitentiary confinement (CM 319499, Smith, 71 BR 409, 412). This section, however, was repealed by Public Law 772 of the 80th Congress, effective 1 September 1948, and replaced by Title 18, United States Code, Section 641, which in relevant part provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$10,000 or imprisoned not more than one year, or both."

Obviously the only part of the present statute which might be considered pertinent to the instant case is the clause "whoever \* \* \* knowingly converts to his own use." The courts have in effect distinguished between the offenses of misapplication and wrongful conversion by comparing each with the crime of embezzlement. With respect to "wrongful conversion", it has been said that the offense has a signification distinct from embezzlement only when the defendant's original possession of the property was unlawful (Hubbard v. United States, 79 Fed. 2d, 850, 854), while with reference to misapplication the following has been stated:

"Indictment for 'misapplication of public funds,' \* \* \* need not aver fraud, as misapplication of public funds by an officer under whose control they were placed by law may or may not be fraudulent, and it is distinguished from 'embezzlement,' which involves fraudulent conversion. Hooper v. State, 279, S.W. 449, 451, 102 Tex. Cr.R. 345." (Words and Phrases, Permanent Edition, Vol. 27, pp. 285, 286)

It therefore appears that, as a result of the omission of the words "knowingly apply to his own use" in the re-enactment of the statute, the offense of misapplication now falls in the same class as the offense of misappropriation, denounced by Article of War 94, which the Board of Review has consistently held is similar to but is not one of the offenses which was denounced by Title 18, United States Code, Section 87 (CM 319499, Smith, supra; CM 323136, Ligon, sup. . .

We are, therefore, constrained to hold that the offense of misapplication of government property, as denounced by Article of War 94, is similar to but is not one of the offenses denounced under Title 18, United States Code, Section 641, as enacted by the 80th Congress, and is not an offense of a civil nature made punishable by penitentiary confinement by any other statute of the United States of general application within the United States or by the law of the District of Columbia, and that the record of trial herein will not support penitentiary confinement.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as provides for

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dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution.

Wm. J. ..., J.A.G.C.

Frank C. Alfred, J.A.G.C.

Jackson P. ..., J.A.G.C.

CSJAGI CM 334837

1st Ind

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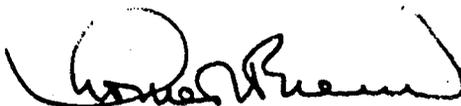
JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina

1. In the case of Recruit Earnest Ratliff, Jr. (RA 14214968), Company K, 505th Airborne Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, and is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution. Under Article of War 50e(3), this holding, together with my concurrence, vacates so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

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

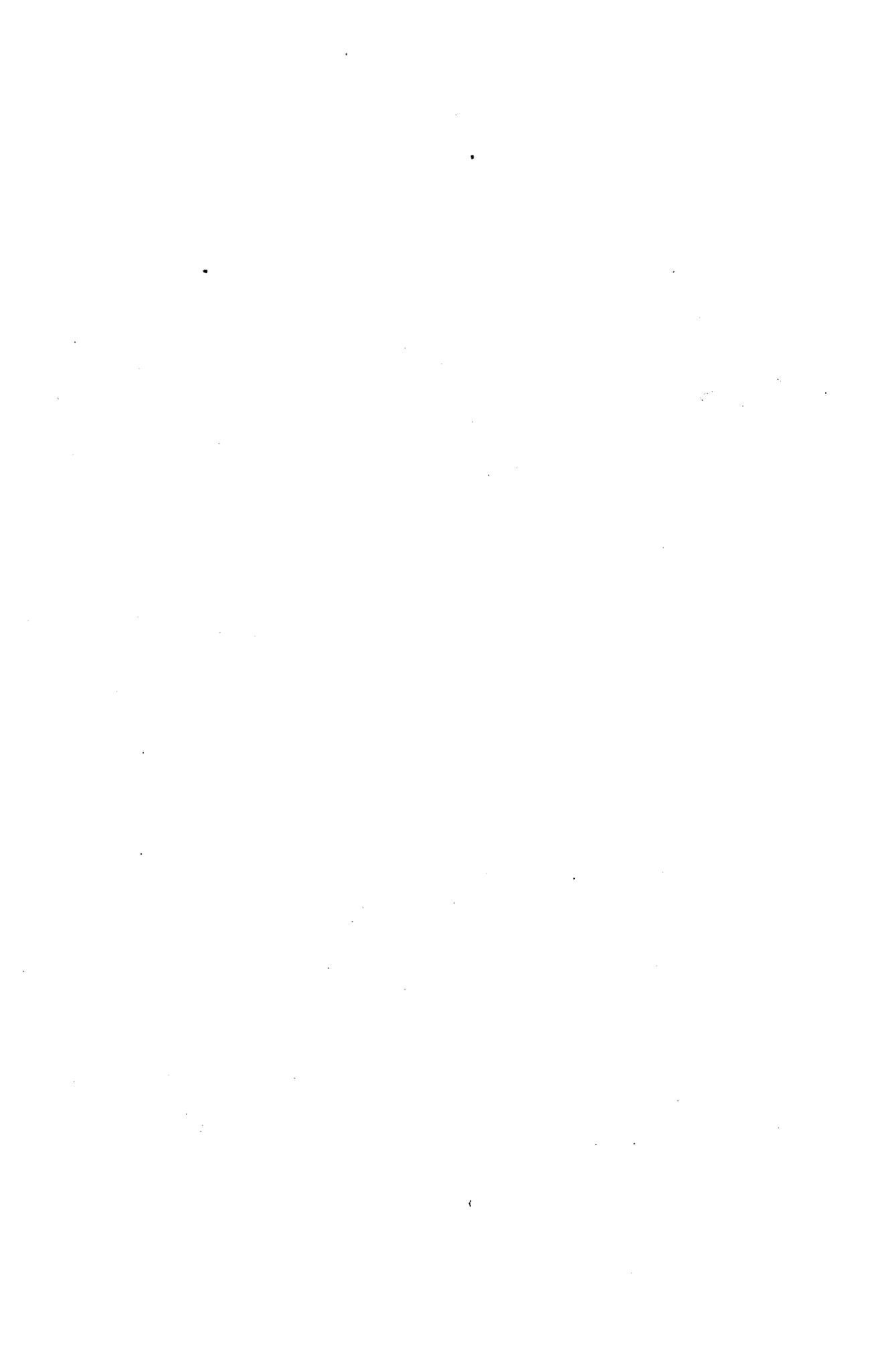
(CM 334837).



THOMAS H. GREEN  
Major General  
The Judge Advocate General



1 Incl  
Record of trial.



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

MAR 1 0 1949

CSJAGI CM 334863

UNITED STATES

v.

Corporal FRANK J. BUSZKIEWICZ  
(RA 16159085), 7801st Station  
Complement Unit.

WETZLAR MILITARY POST

Trial by G.C.M., convened at  
Wetzlar, Germany, 28 January 1949.  
Dishonorable discharge and confine-  
ment for three (3) years. Federal  
Reformatory.

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HOLDING by the BOARD OF REVIEW

JONES, ALFRED and JUDY

Officers of the Judge Advocate General's Corps  
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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

2. The record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, except the findings of guilty of Specification 1 of Charge I and Specification 1 of Charge II, and legally sufficient to support the sentence.

3. Accused was found guilty under Specification 1 of Charge I in that he did at the time and place alleged "wrongfully, unlawfully and feloniously and in violation of Section 194, United States Criminal Code, take, steal, abstract and obtain a Zenith radio from a package deposited in APO 171, Fritslar, Germany, an authorized depository for mail matter," in violation of Article of War 96. He was found guilty under Specification 1 of Charge II of larceny at the time and place alleged of a Zenith radio, of a value of twenty dollars or less, property of James C. Wright, in violation of Article of War 93. Both specifications referred to the same Zenith radio. The written pretrial statement of accused, introduced in evidence, contains a full confession of the offenses alleged (R. 12; Pros. Ex. 1, page 2). A Zenith radio was introduced in evidence and identified by CID agent, Edward L. Galvin, as a radio which the accused admitted he had taken from the mail (R. 13; Pros. Ex. 2). Aliunde the confession and admission of accused, however, the only testimony mentioning a Zenith radio is that of

Mr. James C. Wright; that in the month of June 1948 he ordered a Zenith radio from his sister, Miss Jean Wright, of Amarillo, Texas, and never received it, and that Prosecution's Exhibit 1 was the type of radio which he ordered. Obviously, there is nothing in this testimony to connect accused with a Zenith radio taken from the mail, or to even show that the radio described in the specifications had ever been placed in the mails. An accused cannot be convicted upon his unsupported confession (par. 114a, page 115, MCM, 1928); therefore, the findings of guilty of these specifications cannot be sustained.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge I and Specification 1 of Charge II; legally sufficient to support the findings of guilty of Specifications 2-5, inclusive, of Charge I, and Specifications 2-11, inclusive, of Charge II, and Charges I and II, and legally sufficient to support the sentence.

Mr. [Signature], J.A.G.C.

Frank C. Alfred, J.A.G.C.

Jackson K. Judy, J.A.G.C.

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MAR 25 1949

CSJAGI CM 334863

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding Officer, Wetzlar Military Post, APO 169, c/o Postmaster,  
New York, New York

1. In the case of Corporal Frank J. Buszkiewicz (RA 16159085), 7801st Station Complement Unit, I concur in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 1 of Charge I and Specification 1 of Charge II; legally sufficient to support the findings of guilty of Specifications 2-5, inclusive, Charge I, Specifications 2-11, inclusive, Charge II, and Charges I and II, and legally sufficient to support the sentence. Under Article of War 50e (3), this holding, together with my concurrence, vacates the findings of guilty of Specification 1, Charge I and Specification 1, Charge II. Under the provisions of Article of War 50, you now have authority to order the execution of the sentence. It is recommended that there be included in the published order in the case a statement that the findings of guilty of Specification 1, Charge I, and Specification 1, Charge II, are vacated pursuant to Article of War 50e (3).

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

(CM 334863).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Record of trial



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

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CSJAGH CM 334866

MAR 8 1949

UNITED STATES )

HEADQUARTERS FORT KNOX KENTUCKY )

v. )

Trial by G.C.M., convened at  
Fort Knox, Kentucky, 21  
December 1948. Dismissal. )

Captain CARL G. SCHULTZ,  
O-406349, Infantry, Head-  
quarters, 3rd Armored Division, )  
Fort Knox, Kentucky. )

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Carl G. Schultz, Headquarters 3d Armored Division, did at Fort Knox, Kentucky on or about 4 February 1948, wrongfully solicit from Recruit Charles W. Loopey, Battery C 65th Armored Field Artillery Battalion 3d Armored Division, Fort Knox, Kentucky, then of Company A 37th Armored Infantry Battalion, 3d Armored Division, Fort Knox, Kentucky, the sum of one hundred dollars (\$100.00) for services rendered in the preparation for the defense and in the defense of the said Recruit Charles W. Loopey in a Court-Martial.

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

3. The evidence pertinent to the findings of guilty is summarized as follows:

*Acc # 2*

Accused is in the military service and presently is assigned to Headquarters, 45th Medical Battalion, 3rd Armored Division, Fort Knox, Kentucky. During the period of 1 December 1947 to 1 January 1948 accused was assigned to the Staff Judge Advocate Section, Headquarters 3rd Armored Division, Fort Knox, Kentucky. While on duty in this section accused was the regularly appointed defense counsel for general courts-martial and acted as defense counsel in numerous special courts-martial.

In December of 1947 or January of 1948 court-martial charges preferred against Recruit Charles W. Loopey, A-45, Fort Knox, Kentucky, were received in the Staff Judge Advocate Office, 3rd Armored Division. These charges, which included two specifications for writing "bad checks" and two specifications alleging absence without leave, were referred for trial to a general court-martial of which the accused was the regularly appointed defense counsel (R 7,8,13,14). When the accused first interviewed Recruit Loopey concerning the case, he said to Loopey "It ought to be worth one or two hundred dollars to get the case dismissed." Loopey believed that accused was joking and replied in a similar vein, "Yes, it ought to be." (R 15,21,22,24). Recruit Loopey had not met the accused prior to that time (R 16).

Arrangements were made to have restitution for the bad checks. Money for this purpose was obtained from Mrs. Paul King of Coral Ridge, Kentucky (R 23,27). Evidence was submitted to Lieutenant Colonel John A. Carrigan, The Staff Judge Advocate, that complete restitution had been made for the checks. Colonel Carrigan thereupon recommended to the Commanding General that the charge based upon the "bad checks" be dropped. Thereafter on the orders of the Commanding General these charges were dropped and the case withdrawn from the general court-martial. Loopey was tried by special court-martial, however, for absence without leave. At Recruit Loopey's request, he was represented by accused at the special court-martial (R 8).

Following the release of Recruit Loopey from the stockade, accused came to see him " \* \* about getting paid" (R 23). Accused further inquired of Loopey as to how he intended to pay the hundred dollar fee. Accused mentioned that he had incurred expenses of fifteen dollars for telephone calls and telegrams (R 15,23,24). At that time Loopey told accused that if he had known accused was serious about the \$100.00 fee he would have borrowed \$690.00 instead of the \$590.00 and paid accused (R 23). Later, while Loopey was in the motor pool, accused came to see him and told him he was being transferred to the Detroit Recruiting Office and would need forty dollars to have his car repaired and that he would like to have the matter between the two of them "straightened out". According to Recruit Loopey, this had reference to the fee for the court-martial (R 15). During the same period preceding accused's transfer from Fort Knox to Detroit, the accused accompanied Recruit Loopey to Service Club

Number 2 where the latter called his mother and requested five hundred dollars for the purpose of paying off his debts (R 16). In the course of the conversation, the accused also talked to Loopey's mother, informing her that the five hundred dollars would "help matters up here". Accused stated further to Mrs. Loopey, "I and Charlie have money matters between ourselves that we want to settle between ourselves" (R 16).

Mrs. King, who had met the accused in connection with making restitution on the checks, received a telephone call from accused who told her that Loopey owed him money for taking his case, and that he needed forty dollars to get his car repaired (R 27). Mrs. King testified that she recognized accused's voice on the telephone, as the party talking to her on the telephone addressed her as "Eileen" and accused was the only one who so addressed her (R 31). Subsequently she received a letter with accused's typed signature. The letter which bore a Detroit military address and was dated 6 March 1948 was unsigned. She identified Prosecution Exhibit 5 as the letter, and it was subsequently accepted in evidence. The letter recounted accused's efforts in behalf of Loopey, the expenses accused incurred, and Loopey's promise to pay accused \$100.00 if accused "got the general court-martial kicked off." The letter was concluded by an appeal to Mrs. King to prevail upon Loopey to pay accused (R 29; Pros Ex 5; R 42).

Loopey received a letter purportedly signed by accused and written on the stationery of the Hotel Wolverine, Detroit, Michigan, sometime between 21 March and 1 April 1948. Loopey identified Prosecution Exhibit 4 as the letter and it was received in evidence (R 16). The letter reminded Loopey of a small obligation and expressed the hope that Loopey was doing everything in his power "To repay an old friend who stuck his goddamned neck out for you." Loopey's attention was invited to the difference which might result from "the right word in the right place." The letter concluded by calling Loopey's attention to a letter written by the writer to Aileen (R 16; Pros Ex 4).

The deposition of Mrs. Bessie Loopey, Centralia, Illinois, mother of Charlie Loopey, was received in evidence over objection by the defense. Mrs. Loopey identified Prosecution Exhibits 4 and 5 for identification as letters received by her through the mails and these exhibits were received in evidence as Prosecution Exhibits 2 and 3 (R 11, 13). Both letters bore accused's purported signature and called Mrs. Loopey's attention to the debt owed to the writer for legal services furnished, and expenses incurred in her son's behalf, and solicited her aid in securing payment thereof to the writer.

On 12 April 1948 accused was interviewed by Lieutenant Colonel Joseph B. McDermott, IGD, Headquarters Fifth Army, at Chicago, where

he was ordered from Detroit. At the start of the interview Colonel McDermott informed accused that he had been directed to investigate irregular conduct on the part of accused in connection with his acting as defense counsel for Loopey, that the investigation was confidential and that accused was not to communicate what transpired at the interview to anyone. Colonel McDermott's first question to accused was "Do you clearly understand?" Upon receiving accused's affirmative reply, Colonel McDermott read the 24th Article of War to accused and the latter stated that he understood his rights thereunder (R 43,44). Over objection by the defense, Colonel McDermott testified as to the substance of the interview (R 39,40). He stated that accused admitted attempting to collect a hundred dollars fee from Loopey and that he wrote and sent the letters which were admitted in evidence as Prosecution Exhibits 4 and 5 (R 40-42).

It was stipulated that Prosecution Exhibits 6, 7 and 8, applications for passes, were signed by accused, and they were admitted in evidence without objection (R 47).

4. Evidence for the defense.

After being apprised of his rights accused remained silent.

It was stipulated that accused "entered the military service through the CMTC in 1937 at Fort Sheridan, Illinois, when he was 19 years of age; that he completed CMTC training in 1940; that he was commissioned a second lieutenant, 13 March 1941, and went overseas to Europe 21 August 1943 and served with the British Ninth Army in Syria in 1943 and served with the Army in England and France; that he served with Headquarters, 18th Airborne Corps; served with Headquarters, 12th Army Group in France and Germany, returning to the United States 24 June 1946." (R 47,48).

Major William C. Justice testified that he had known accused for twelve or fourteen months. The accused had formerly served as a company commander in the 67th Armored Field Artillery Battalion of which organization Major Justice was also a member. Accused's reputation in the battalion was as good as that of any other officer, and among his fellow officers accused's reputation for integrity was good (R 48,49).

Lieutenant Colonel Earl W. Kent testified that he had known accused since July of 1946 and that beginning at that time accused had served under him for a period of six weeks. Accused's reputation for general conduct, sobriety, and efficiency was good among the other officers and the enlisted men. The company which accused was training was above

average. He was well thought of and his reputation for integrity was perfect. Colonel Kent has never heard any adverse comment about accused and would be glad to have accused serve under his command (R 50-51).

It was stipulated that accused had received the following commendation:

"Fifth Army, U.S. Army and Air Force Recruiting Service, Michigan Recruiting District, Dearborn, Michigan, Detroit Recruiting Main Station, 7100 Lonyo Road, 31 August 1948, To Whom It May Concern: This is to certify that Carl G. Schultz, O-406349, Captain, Infantry, having been on duty at this station since 12 April 1948, as assistant Legal Officer, Assistant Adjutant and Transportation Officer, spared no time or energy in performing his duties. His loyalty to the unit and good character are unquestionable. I consider this officer an asset to the military service and would not hesitate to serve with him. signed Phillip W. Hurd, Captain, Infantry, Commanding" (R 52).

5. The evidence shows that accused during December 1947 was assigned to the Staff Judge Advocate's Section, 3rd Armored Division, Fort Knox, Kentucky, and that in addition to his assigned duties in that section, also was detailed as defense counsel of a general court-martial. A case involving charges of "bad checks" and "AWOL" against one Loopey was tentatively set for trial before the court-martial to which accused was detailed as defense counsel. Accused interviewed Loopey and remarked that it should be worth \$100.00 to \$200.00 to get the case dismissed. Loopey "jokingly" agreed. It was decided by Loopey and accused that restitution be made for the "bad checks" and money for that purpose was borrowed from Mrs. Paul King. Accused presented evidence of restitution to the Staff Judge Advocate, 3rd Armored Division, and subsequently the charges involving the checks were dismissed. Accused was tried by special court-martial for "AWOL" and was represented at the trial by accused. When Loopey was released from confinement accused asked of him a fee of \$100.00 and reimbursement in the amount of \$15.00 for expenses incurred. Subsequently accused by letter reminded Loopey of his obligation to accused. He also attempted by letter to enlist the aid of Mrs. King in having accused pay him a fee. Two letters in the same general tenor bearing accused's purported signature were received by Loopey's mother. Proven specimens of accused's handwriting were in evidence and the court could find that accused was the author of the letters received by Loopey's mother. Although the evidence merely shows that the offense charged was committed within the period extending through the first two and one half months of 1948, as opposed to the allegation that the offense was committed on 4 February 1948, there is nothing in the record which suggests that accused was misled, as for purposes of defense the offense charged was sufficiently identified (CM 235011, Goodman, 21 BR 243). This evidence supports the conclusion of the court that accused solicited a fee of \$100.00 for services rendered Loopey in the preparation of his defense and in his defense before a court-martial. We find as did the court that the conduct was wrongful and indeed may not

(326)

be considered as otherwise. We find the following statement by the Board of Review in GH 313891, Weintraub, 63 BR 331,332, applicable to the facts and circumstances shown herein:

"Accused in acting as Assistant Defense Counsel was unlike a private attorney in that he was carrying out the orders of superior military authority. His duty with respect to that order, as with any lawful order, was to execute it as faithfully and efficiently as he could. More specifically it was to 'guard the interests of the accused by all honorable and legitimate means known to the law' and to represent him 'with undivided fidelity.' HCM, 1928, pars 43b, 44a, and 45b. \* \* \* This duty was to be performed not for his own private advantage, financial or otherwise, but simply because he was an officer of the United States Army."

In the instant case accused suggested to his defendant that a dismissal of the charges involving the bad checks should be worth one or two hundred dollars, and after the defendant was released from confinement solicited him to pay a fee of \$100.00. In the Weintraub case, the conduct of accused in soliciting and receiving a fee conditioned upon his promise of a lenient sentence was subject to the following comment by the Board of Review:

"\* \* \* His conduct was in every way comparable to that of a medical officer of the Army who conditioned his treatment of a soldier on the payment of a fee, and just as reprehensible. The fairness and efficiency of the court-martial system is dependent to a large extent on the competency and integrity of the counsel appointed to defend persons accused of violations of the Articles of War. \* \* \* Nothing could dissipate confidence in the impartiality of the system more than a belief among accused that the vigor of their defense was proportionate to the amount of money they could pay their counsel."

The foregoing commentary is equally applicable to the factual situation in this case.

The solicitation of a fee from Loopey by accused for his services as defense counsel constitutes a violation of Article of War 95.

6. a. The defense objected to the introduction in evidence of the deposition of Mrs. Loopey on the ground that the use of depositions was a denial of accused's constitutional right of confrontation. The deposition appears to have been accomplished in compliance with Article

of War 25 and the provisions of the Manual for Courts-Martial, 1928, supplementing the Article. The issue raised by the defense has hitherto been resolved against the defense's contention in CM 329496, Deligero, 78 BR 43,46-49, and further comment on the issue would be superfluous in view of the excellent discussion contained therein.

b. The defense also objected to the testimony of Colonel McDermott with reference to the statement made to him by accused upon the ground that the interview was confidential. The evidence shows that at the start of the interview Colonel McDermott stated to accused that his investigation of accused was confidential and that accused was not to communicate what transpired at the interview to anyone. After accused signified that he understood, Colonel McDermott read to him the 24th Article of War. From the context of Colonel McDermott's language preliminary to his interrogation of accused it is apparent that accused was instructed not to talk about the interview and in that sense the interview was confidential. It is equally apparent, especially since Colonel McDermott read the 24th Article of War to accused, that the interview was not confidential in the sense that what accused said would not be used against him. The defense's objection to the testimony of Colonel McDermott was properly overruled.

7. Department of the Army records show that accused is 30 years of age, married, and the father of two children. He completed high school in 1938 and two years of Junior College /Concordia College/ at Fort Wayne, Indiana in 1940, and attended the Jefferson School of Law, Louisville, Kentucky, for one year. In civilian life he was employed as a tool crib attendant and shipping clerk.

He was appointed a second lieutenant, Infantry Reserve on 28 August 1941 and entered on active duty on 8 September 1941. He was promoted to first lieutenant 21 May 1942, and to Captain 24 February 1944. He had foreign service in the European Theatre from August 1943 until June 1946. He participated in the Rhineland, Central Europe, and Ardennes Campaigns. His efficiency ratings of record are as follows: "Excellent" (11), "Very Satisfactory" (1), "Satisfactory" (1).

8. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95.

Wilmot T. Baughman, J.A.G.C.  
Charles J. Berkowitz, J.A.G.C.  
John H. Huch, J.A.G.C.

(328)

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Carl G. Schultz (O-406349), Infantry, Headquarters, 3rd Armored Division, Fort Knox, Kentucky, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General.

Franklin P. Shaw  
Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait  
C. B. Mickelwait, Col, JAGC

8 April 1949

E. M. Brannon  
E. M. Brannon, Brig Gen, JAGC  
Chairman

I concur in the foregoing action.

CM 334866

Thomas H. Green

THOMAS H. GREEN  
Major General  
The Judge Advocate General

11 APR 1949

( GCMO 22, Apr 15, 1949)

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

CSJAGK-CM 334904

29 MAR 1949

UNITED STATES

AMERICAN GRAVES REGISTRATION COMMAND  
EUROPEAN AREA

v.

Trial by G.C.M., convened at  
Paris, France, 12 January 1949.  
Dismissal, total forfeitures and  
confinement for one (1) year.

First Lieutenant MAURICE H.  
COHAN (O-1589128), 7761st  
AGRC Depot Company, American  
Graves Registration Command,  
European Area; APO 58.

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OPINION of the BOARD OF REVIEW  
SILVERS, SHULL and LANNING  
Officers of the Judge Advocate General's Corps

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

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

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

Specification: In that First Lieutenant Maurice H. Cohan, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, did, in conjunction with Corporal Maurice E. French, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, en route from Frankfurt, Germany to Forbach, France, on or about 12 November 1948, knowingly and wilfully misappropriate a certain motor vehicle, to wit, one (1) tractor trailer, registration number 4772748, license number T 55870, of a value of more than fifty dollars (\$50.00), property of the United States, furnished and intended for the military service thereof.

*See # 2*

CHARGE II: Violation of the 95th Article of War.  
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

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

Specification 1: In that First Lieutenant Maurice H. Cohan, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, did, at or near Paris, France, between about 27 December 1947 and about 12 November 1948, wrongfully and unlawfully conspire with Louis Helfenbein, a civilian, Corporal Maurice E. French, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, and Corporal Frank F. Lagodich, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, to misappropriate certain government vehicles and devote them to the unauthorized purpose of transporting articles of tangible personal property, not owned by the Government of the United States, and not authorized to be transported at the expense of the Government of the United States, from Germany to France for personal gain, and in the execution of such conspiracy, did, between Frankfurt, Germany, and Forbach, France, on or about 12 November 1948, knowingly and wilfully misappropriate a certain Government vehicle, to wit, one (1) tractor trailer, registration number 4772748, license number T 55870, property of the United States, by transporting certain articles of non-government property, well knowing that said personal property was not authorized to be transported by said Government vehicle, from Germany to France.

Specification 2: In that First Lieutenant Maurice H. Cohan, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, did, at or near Paris, France, between about 27 November 1947 and about 12 November 1948, wrongfully and unlawfully conspire with Louis Helfenbein, a civilian, Corporal Maurice E. French, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, and Corporal Frank F. Lagodich, 7761st AGRC Depot Company, American Graves Registration Command, European Area, United States Army, to engage in

business in the European Command, United States Army, by transporting articles of tangible personal property from Germany to France for personal gain in violation of Circular 140, Headquarters, United States Forces, European Theater, dated 26 September 1946, and in the execution of such conspiracy did, at Frankfurt, Germany, on or about 11 November 1948, wrongfully acquire about twenty-eight (28) cases, containing approximately three hundred fifty-eight thousand six hundred thirty-seven (358,637) pencils, for the purpose of transporting said cases of pencils from Frankfurt, Germany, to Paris, France, for personal gain.

Specification 3: (Finding of Not Guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its Specification and not guilty of Specification 3 of Charge III but guilty of Charge I and its Specification and of Charge III and Specifications 1 and 2 thereof. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

On about 12 November 1948 First Lieutenant Harry H. Sheridan, CMP, Headquarters American Graves Registration Command, Paris, France, as a result of information he had received, detailed Corporal Arthur G. Dunning to go to the border town of Forbach, France, and make an inspection of all United States Army vehicles returning from Germany into France. Forbach was on the vehicle route between Frankfurt, Germany, and Paris, France (R. 45). Corporal Dunning testified that at about 2200 hours on 12 November he intercepted a United States Army tractor-trailer driven by Corporal Maurice E. French, 7761st AGRC Depot Company, and that he escorted this truck to Paris where Lieutenant Sheridan caused the trailer to be unloaded at the Provost Marshal's office. The witness examined one of the boxes in the truck and found that it contained pencils (R. 14-16). Certain written stipulations were entered into by the parties and introduced in evidence without objection. Those pertinent to the offenses of which accused was found guilty are stated below:

"It is hereby stipulated by and between the prosecution, the defense, and the accused, that the tractor

trailer combination driven by Corporal Maurice French on 12 November 1948, with registration number 4772748 and license number T 55870 is the property of the United States Government, and has a value in excess of Fifty Dollars (\$50.00)" (R. 13; Pros. Ex. 9).

"\* \* \* Corporal Maurice French was carrying Government property on his truck from France to Germany on or about 3d November 1948, and that Corporal Maurice French did have some United States Army property on his trip from Frankfurt, Germany, to Forbach, France, on the 11th and 12th of November 1948" (R. 9; Pros. Ex. 2).

"\* \* \* That if Corporal Robert P. Taylor were present in court he would testify substantially as follows:

'I was present when Corporal Maurice French was turned over to U. S. Military Police at 23 hours, 12 November 1948. When Corporal French and truck with merchandise returned to Paris, I caused an inventory to be made of the merchandise contained in twenty-eight (28) large boxes which were on Corporal French's truck, which large boxes are presently stored in the Provost Marshal's office, Headquarters, AGRC, Paris, France. My inventory disclosed that these twenty-eight (28) boxes contained three hundred thirty-two thousand, five hundred ninety-five (332,595) pencils, which were all either lead or crayon pencils'" (R. 10; Pros. Ex. 3).

"It is hereby stipulated by and between the prosecution, the defense, and the accused, that the 28 boxes of pencils which were on United States Army tractor trailer No. T55870, on 12 November 1948, said tractor trailer being driven by Corporal Maurice French, are not the property of the Government of the United States of America and that the true ownership thereof is unknown" (R. 10; Pros. Ex. 4).

Corporal Maurice French, 7761 AGRC Depot Company appeared as a witness for the prosecution and stated that he became acquainted with the accused in January 1948 when the latter became motor officer at Isle St. Germain. The prosecution offered in evidence what appears to have been a letter granting immunity to the witness but an objection thereto by the defense was sustained. The witness stated that he had consulted with his counsel and he elected to testify.

French asserted that he was a soldier assigned as a truck driver and had been stationed at Isle St. Germain, France, since 1946. His duties involved making official trips hauling government supplies to and from Paris and other cities such as Liege, Frankfurt, and Giessen. Prior to January 1948 Lieutenant Louis Helfenbein was transportation officer of the unit and the witness stated that he had transported "boxes" from Frankfurt to Paris at the request of Helfenbein. In the spring of 1948 accused Cohan had requested the witness to "pick up" some boxes at a "civilian place" in Frankfurt and bring them in his Army truck to Isle St. Germain. He loaded about 20 boxes and brought them to Isle St. Germain and then to a suburb of Paris where he delivered the boxes to "a couple of Frenchmen waiting, well at Port St. Cloud." The boxes were each about the size of an army field table and the Frenchmen paid witness 35,000 francs for his services. On seven or eight occasions, or about once a month since the spring of 1948, French had loaded similar boxes at the "civilian place" in Frankfurt and had brought them to Paris. All of this was done at the request of accused who was his motor officer. The last load was transported on 12 November 1948. Corporal French asserted that he never was required to declare the "boxes" with the French customs and that 70,000 francs was the maximum and 15,000 francs the minimum that he had received for each delivery. On cross-examination the witness stated that Lieutenant Helfenbein and a Frenchman had told him where to go in Frankfurt to get the boxes and that after the accused succeeded Helfenbein as motor officer he (French) wanted to "quit" but that "Helfenbein and Lt. Cohan" told him "not to be foolish" (R. 19-32). On motion of the defense there was received in evidence as Defense Exhibit A, a letter from the Commanding General, American Graves Registration Command, granting immunity to the witness from prosecution arising out of his transporting of non-United States Army property from Germany to France, at the request of Lieutenant Maurice H. Cohan or Louis Helfenbein, a former officer of the United States Army (R. 33).

On redirect examination Corporal French stated that on 3 November 1948 he and the accused, Lieutenant Cohan, had met with Helfenbein and a Frenchman at Helfenbein's apartment. Witness stated that "they made arrangements, well, for me to pick up the load" on the next trip to Germany. Helfenbein had done most of the talking and instructed accused "to get me ready to go up there." Accused followed Helfenbein's instructions. The witness had attended the meeting at the request of accused. On re-cross examination the witness stated that during the fifteen months that he "drove under Lieutenant Helfenbein's command" and made the trips hauling private merchandise, Lieutenant Helfenbein had paid him for the first trip, the amount being 20,000 francs. Subsequently the Frenchman had paid him. He knew the Frenchman as "Richard" and "There was a man up

there in Frankfurt which I was to meet." French knew this man only by sight and the latter always directed him to the location of the "boxes." French had orders for each trip from accused Cohan and was told to make room for the boxes even though he was required to haul government property on his return from Frankfurt. The boxes were always brought to the "Island" where accused would direct French to haul them away for the purpose of making delivery to the Frenchman (R. 34-43).

First Lieutenant Harry H. Sheridan, CMP, testified that on 15 November 1948 he caused accused to be brought to his office where accused, after having been advised of his rights under Article of War 24, signed two statements which were offered for identification as Prosecution Exhibits 11 and 12. The witness asserted that no threats or promises were made to accused and that the statements were entirely voluntary on his part. Prosecution Exhibit 11 had been written in its entirety and signed by accused. Prosecution Exhibit 12 was dictated by accused to Sergeant Husband who did the writing but the document was read and signed by accused. The witness was cross-examined at length concerning the circumstances under which these statements were given. A French police inspector had appeared at the office while accused was being questioned but this incident had not been prearranged. Accused had been told, however, by the witness that under the American-French agreement, the French would have priority in case of a violation of the French (customs) law (R. 43-48).

Captain Robert M. Ferrell, Q.M.C., testified that he was present at the Provost Marshal's section on 15 November 1948 when accused signed the two statements (Pros. Exs. 11, 12). He corroborated the testimony of Lieutenant Sheridan to the effect that these statements were made by the accused voluntarily and without any "duress or improper persuasion." The witness did not recall whether a French police inspector had been at the office while accused was being interrogated (R. 49-51).

Defense counsel announced that the accused understood his rights and desired to take the stand and testify respecting the circumstances under which the statements (Pros. Exs. 11, 12) had been procured. The law member made a detailed explanation to accused of his rights as a witness and he elected to testify only on the issue of the admissibility of his pre-trial statements. Accused stated that on "the 14th, Sunday afternoon" Corporal Dunning came to his house and told him that he was wanted in the Provost Marshal's office. He drove to the office and Lieutenant Sheridan told him that "by Command of General Peckham and Colonel Kellogg that I was placed under arrest, as a smuggler." Someone accompanied him "home" to get his val-pac and personal effects and when he returned Lieutenant

Sheridan took him to the Hotel Celtic for dinner and also to the bar for an apertif. After dinner they returned to "SIS Headquarters" where Lieutenant Sheridan assigned a room to him in a building which was located across the street. A cot, mattress, mattress cover and some blankets were procured for the room but no sheets. "Afterwards Lieutenant Sheridan said the room was very cold, 'come on down to my billet and I will give you a heater.' The heater consisted of an electric heater about eight inches in diameter for a room half the size of this - three quarters the size of this room." Accused spent the night in this room. On the following day he reported to Lieutenant Sheridan who began questioning him. Lieutenant Sheridan did not read the 24th Article of War from the Courts-Martial Manual. "He said: 'You know your rights.' I said, 'I do.'" Accused stated that during the questioning the following occurred:

- "Q. Now, tell the court what happened during the period of questioning. Who was in the room? Who came into the room, what was said, and so forth?
- A. There was Captain Ferrell, Lt. Sheridan, Sergeant Husband and myself. During the questioning in barged a French inspector; told Lt. Sheridan he wanted me to go up to see his superior; he wanted to take me up to French Headquarters and the French inspector and Lt. Sheridan was talking back and forth and that was just about it. Lt. Sheridan said, I believe: 'We have got priority over him now,' and that is about the same words he put it in.
- Q. Did the presence of this French inspector in any way at all, and if so state to the court in what way, effect the making of these statements?
- A. I felt that if I made a statement, any type of a statement, I would stay under the control of the American Army. As I know - I imagine and I was told how it was in being locked up in a French jail. As a matter of fact when Sergeant Husband took the second part of my statement he would say 'well, you say approximately eight or 10 or 12 times?' and I would say 'yes'" (R. 54-55).

On cross-examination accused stated that at about "12:30" Sergeant Wychoski "deliberately woke" him and gave him some sheets. He had three blankets but these did not keep him warm. When asked by the trial judge advocate if anybody threatened or made any promises to him accused replied "Well, it all depends on what you mean by 'threaten'". He referred to "The Frenchman. The way he barged into the office without knocking." Under further questioning accused admitted that he was informed of his right to remain silent before signing either statement and that he was both sober and conscious of what he was doing. On



given to me by the Frenchman, Helfenbein and some times the driver of the vehicle would give me a sealed envelope when he returned from delivering the load. The Frenchman would give me the money when he happened to pay me. When the drivers returned from Germany with a load for the Frenchman and Helfenbein and the load was brought to the Depot, the load would be transferred from the trailer to a 2½ ton 6 x 6 by members of the Polish Company and then the driver who brought the goods from Germany would make delivery to a place unknown to me. There was two drivers involved in these transactions. Frank Lagodich and Cpl French. Sometimes these two drivers would receive instructions concerning the load to be picked up in Germany to be delivered for Helfenbein and the Frenchman when I was present but sometimes the Frenchman would come on the Depot and speak directly to the drivers when I was not present at this time I received information that a load would be coming in from either the Frenchman or Helfenbein.

/s/ Maurice H. Cohan Witness: Robert M. Ferrell  
Capt. QMC

Subscribed to and sworn to before me this  
15th day of Nov. 1948 at Paris, France.

/s/ Harry H. Sheridan, 1st Lt. CMP, Summary Court officer  
(Pros. Ex. 11).

On motion of the prosecution the court took judicial notice of "Circular 140, Headquarters, USFET, dated 26 September 1946, and also of paragraph 2e, subparagraph 2 of AR 600-10, which Circular 140 as above cited states is in effect throughout the European Theater, now the European Command" (R. 61). After the parties had rested, counsel made extensive argument and read to the court certain provisions of the mentioned circular. In view of the finding of not guilty as to Charge II and its Specification and Specification 3 of Charge III the evidence relating thereto will not be summarized.

#### 4. Discussion.

The record discloses that Captain Richard F. Frank, JAGG, the trial judge advocate in the instant case, was also the investigating officer under the provisions of Article of War 70 and paragraph 35a, Manual for Courts-Martial, 1928. After becoming the investigating officer he re-drafted Specifications 2 and 3 of Charge III so as to allege an overt act in pursuance of each conspiracy pleaded and signed the revised charge sheet as the accuser. In a technical sense Captain Frank was thereby the accuser as well as the investigating

officer and trial judge advocate. There was no provision in the 1928 Manual for Courts-Martial nor any rule of law which, at the time these duties were performed, operated to disqualify Captain Frank from serving in the three separate capacities mentioned, but this unusual circumstance is open to the criticism that it might militate against an impartial investigation as directed by Article of War 70. This procedure should be avoided even though the investigation required under Article of War 70 is in effect directory rather than mandatory and a failure of strict compliance therewith does not, ipso facto, deprive the court of jurisdiction to hear and determine the issues (CM 229477, Floyd, 17 BR 149, 156; CM 323486, Ruckman, 72 BR 267, 274). No contention has been made, nor do we find any evidence tending to show that Captain Frank was actuated by any ulterior or illegal motive in the performance of his various duties. On the contrary, he appears to have been most thorough and impartial in his efforts to present only the facts to both the appointing authority and to the court.

In a brief which is attached to the record of trial, defense counsel contends that it was highly improper for the appointing authority to grant immunity to Corporal French, and also to state in his letter of immunity that French would not be prosecuted for his acts done "at the request of Lt. Maurice H. Cohan." But an accused cannot be heard legally to complain that another person, implicated with him in the commission of an offense, was granted immunity and offered as a witness against him. This may react to his misfortune but it is a risk he runs and such circumstance is not legally prejudicial to his rights. The practice is an ancient one and well recognized in all criminal jurisdictions (15 Am. Jur. 17-20, Crim. Law Secs. 321-324). Counsel contends that the letter granting immunity to Corporal French inferred the guilt of accused and that the letter had an improper influence on the court. As to this contention it will be recalled that the court refused to accept the letter of immunity in evidence when the same was offered by the prosecution but did allow the defense to put it in evidence. Counsel cannot now be heard to complain that his own proffered evidence improperly influenced the court. Furthermore, we think the letter falls short of being a declaration by the appointing authority as to accused's guilt of the offenses charged, but if it were otherwise the court was not bound thereby. It may be reasonably inferred in every case where charges are referred to trial that the referring or appointing authority has concluded that evidence exists sufficient to lead to the belief that the accused has committed the offense or offenses charged. The same inference might be drawn from the fact that a grand jury has returned an indictment in a state or Federal court, but this circumstance has never been deemed to cast a shadow of illegality over the judicial proceedings.

With respect to the admissibility of accused's confessions we find that the evidence shows with cogent force that both statements were voluntarily given. Accused's assertion that he was apprehensive about being turned over to the French officials and that he was compelled to suffer

some inconvenience at the hands of the arresting officers are not of sufficient importance as to raise any serious doubt as to this conclusion.

The Specification of Charge I alleges in substance that on or about 12 November 1948, the accused did, in conjunction with Corporal French, knowingly and willfully misappropriate the described Government vehicle en route from Frankfurt, Germany, to Forbach, France. Stipulations entered into show that on the date mentioned Corporal French was the driver of the described truck, that the vehicle was a United States Army tractor and that when intercepted at Forbach and unloaded near Paris it contained, in addition to certain Government property, twenty-eight (28) boxes or 332,595 lead or crayon pencils. The testimony of Corporal French and the incriminating admissions of accused leave no doubt but that Corporal French was acting on orders from accused; that the property (pencils) was other than Government property and that the transportation thereof was for personal gain of the parties. To misappropriate means simply "devoting to an unauthorized purpose." It is immaterial who may have benefited by the misappropriation so long as the purpose was unauthorized (MCM, 1928, par 150i, pp. 184-185). The record shows that Corporal French had proper orders authorizing him to use the truck in transporting Government property to and from Frankfurt and Paris. He was not authorized however to transport private property and in order to load the pencils he had to drive the truck to a "civilian place" where he contacted the civilians who were interested in exporting the pencils. This in itself amounted to a misappropriation of the vehicle sufficient to sustain the finding of guilty herein even though it be conceded that the mission was otherwise authorized. This case is to be distinguished from those holding that where the accused is on an official mission, an additional use of the vehicle, not requiring substantial deviation or departure from the authorized use, although possibly a violation of Article of War 96, is not a misappropriation of the vehicle in violation of Article of War 94 (see CM 296630, Siedentop, 58 BR 191, 197; CM 307018, Showalter, 60 BR 37,44).

Specification 1 of Charge III alleges that between 27 December 1947 and 12 November 1948 accused conspired with Louis Helfenbein, Corporal French and Corporal Lagodich "to misappropriate certain Government vehicles and devote them to the unauthorized purpose of transporting articles of tangible personal property not owned by the Government of the United States and not authorized to be transported at the expense of the Government \*\*\*." The evidence shows that on 3 November 1948 the accused, Mr. Helfenbein, Corporal French and a "Frenchman" met in Helfenbein's apartment and made plans for the "next trip to Germany." Many such trips, wherein private merchandise was being transported for civilians had been made and accused stated in his confession that both Corporal Frank Lagodich and Corporal French were the drivers of the trucks. It may be inferred from these facts that all of the acts of transporting private property were the result of prior concert and agreement between the parties involved and who shared

in the remuneration received therefor. Conspiracy, or an agreement to commit a criminal offense and the subsequent commission of the offense itself, even if done pursuant to the agreement, are each separate and distinct offenses. There was, therefore, no improper multiplicity in charging accused with having entered into an unlawful agreement to misappropriate the vehicle and with the actual misappropriation thereof (CM 320681, Watcke, 70 BR 125,134; U.S. v. Rubinowich, 238 U.S. 78; Heiki v. U.S., 227 U.S. 131).

Specification 2 of Charge III alleges a conspiracy between the accused, Helfenbein, French and Lagodich to "engage in business in the European Command \*\*\* by transporting articles of tangible personal property from Germany to France for personal gain in violation of Circular 140, Headquarters, United States Forces, European Theater, dated 26 September 1946, and in the execution of such conspiracy did, at Frankfurt, Germany, on or about 11 November 1948, wrongfully acquire about twenty-eight (28) cases, containing approximately three hundred fifty-eight thousand six hundred thirty-seven (358,637) pencils, for the purpose of transporting said cases of pencils from Frankfurt, Germany, to Paris, France, for personal gain." By a fair construction of this specification, we interpret the language employed to mean that pursuant to the conspiracy to engage in the transportation business, in violation of Circular 140, the accused wrongfully acquired or received the described property at Frankfurt, Germany, for transportation to Paris, France, for personal gain. The acceptance of the property is the overt act alleged to have been done in the execution of the conspiracy. It is elementary that the related overt act of any one of the conspirators is admissible in evidence against all (Bannon and Mulkey v. U.S., 156 U.S. 464, 469; Braverman v. U.S., 317 U.S. 49). The acts of Corporal French herein are shown to have been done pursuant to instructions from the accused and the overall agreement of the parties to use Government vehicles for private commercial transport for profit. Circular 140, Headquarters USFET, 26 September 1946, provides in part:

"2. Policy. It is the policy of the Theater Commander that all persons in the theater who are - a. US Military personnel \*\*\* shall not, insofar as can be avoided, disturb the economy of the occupied territories of Germany or Austria, nor use their presence here in order to obtain or to plan to obtain any commercial or monetary advantage for themselves or others.

\* \* \*  
"4. d. Engaging in Professions, Trade or Industry. No individual may engage in any profession, trade, business, transportation, mining or other industry, in any capacity in the United States occupied territories of Germany and Austria \*\*\*."

Although the conspiracy was proven to have been entered into in France, a country not mentioned in the circular, the object thereof contemplated

acts to be committed in Germany, and we think the evidence sufficiently established accused's guilt of conspiracy to engage in the business of transporting private property for gain as prohibited by the circular.

5. Accused is 27 years of age and married. He served in an enlisted status for approximately three years prior to 19 March 1943 when he graduated from The Quartermaster School, Camp Lee, Virginia, and was appointed a Second Lieutenant, Army of the United States. His adjectival efficiency ratings have averaged "Excellent."

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

Charles D. Silber, J.A.G.C.

Lewis D. Hull, J.A.G.C.

Harley A. Lanning, J.A.G.C.

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DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

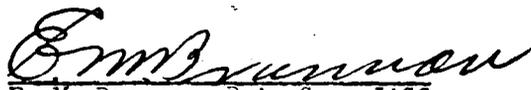
Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant  
Maurice H. Cohan (O-1589128), 7761st AGRC Depot  
Company, American Graves Registration Command,  
European Area, the sentence is confirmed and will  
be carried into execution upon the concurrence  
of The Judge Advocate General. The United States  
Disciplinary Barracks or one of its branches is  
designated as the place of confinement.

  
Franklin P. Shaw, Brig Gen, JAGC

  
C. B. Mickelwait, Colonel, JAGC

9 May 1949

  
E. M. Brannon, Brig Gen, JAGC  
Chairman

I concur in the foregoing action.

CM 334904

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

12 May 1949

GCMO 30, May 17, 1949)

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

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CSJAGH CM 334905

APR 6 1949

U N I T E D S T A T E S	)	TRIESTE UNITED STATES TROOPS
	)	
v.	)	Trial by G.C.M., convened at
	)	Trieste, Free Territory of
First Lieutenant ROBERT H.	)	Trieste, 6 and 7 January 1949.
JOHNSON, 02039413, Infantry,	)	Dismissal, total forfeitures,
Company M, 351st Infantry.	)	and confinement for three (3)
	)	years.

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OPINION of the BOARD OF REVIEW  
BAUGHN, BERKOWITZ, and LYNCH  
Officers of The Judge Advocate General's Corps

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

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

Specification 1: In that First Lieutenant Robert H. Johnson, Company M, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 2 October 1948, feloniously embezzle by fraudulently converting to his own use Military Payment Certificates of the value of \$270.00, the property of Sergeant Gerald Knapp, entrusted to him for deposit in Soldiers Deposits by First Lieutenant David O. Kramer.

Specification 2: In that First Lieutenant Robert H. Johnson, Company M, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 1 July 1948, feloniously embezzle by fraudulently converting to his own use Military Payment Certificates of a value of \$50.00, the property of Private James H. Mudd, entrusted to him by the said Private James H. Mudd.

Specification 3: In that First Lieutenant Robert H. Johnson, Company M, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 3 May 1948, feloniously embezzle by fraudulently converting to his own use Military Payment

Certificates of the value of \$30.00, the property of Private Howard L. Baker, entrusted to him by the said Private Howard L. Baker.

Specification 4: In that First Lieutenant Robert H. Johnson, Company M, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 1 October 1948, feloniously embezzle by fraudulently converting to his own use Military Payment Certificates of the value of \$75.00, the property of Private Cecil L. Grantham, entrusted to him by the said Private Cecil L. Grantham.

Specification 5: In that First Lieutenant Robert H. Johnson, Company M, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 3 May 1948, feloniously embezzle by fraudulently converting to his own use Military Payment certificates of the value of \$25.00, the property of Private First Class Edwin S. Richards, entrusted to him by the said Private First Class Edwin S. Richards.

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

Specification: In that First Lieutenant Robert H. Johnson, Company M, 351st Infantry, did, at Schmeltz, Austria, on or about 22 September 1948, wrongfully borrow \$200.00 from Private First Class Frederick G. Ward, an enlisted man, this to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction by general court-martial was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years, designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Accused is in the military service of the United States (R 15,76).

On 3 May, 1 July and 1 October 1948, one of accused's duties was that of paying the troops of his unit, Company M, 351st Infantry, Trieste, Free Territory of Trieste (R 12,15,19,22). At the aforementioned times and until December 1948, it was customary in Company M for the officer

paying the troops to accept from them, at the time he paid them, such sums of money as they desired to place in "Soldiers' Deposits." To those from whom he accepted money for "Soldiers' Deposits," he would furnish a signed receipt for the sum so received. Thereafter, a list would be prepared showing the name, grade and serial number of each enlisted man from whom money for "Soldiers' Deposits" was accepted, the amount accepted from each one for deposit, and the total sum of the monies thus collected. After being signed by either the Commanding Officer or the Pay Officer, this list and the total sum collected for "Soldiers' Deposits" would be taken by the pay officer to the personnel officer. Upon verification that the amount turned in coincided with the total amount shown on the list, the personnel officer would furnish the pay officer with a receipt for the money turned in, and thereafter, he would cause proper entries of deposit, as shown on the list, to be made on each enlisted man's records and the sum received by him deposited with the proper Finance Officer (R 30,48,49).

On 3 May 1948, when accused paid Private First Class Howard L. Baker, Company M, 351st Infantry, he accepted from Private Baker for deposit in "Soldiers' Deposits" the amount of \$30.00 in military payment certificates and gave Baker a signed receipt for the amount so received (Pros Ex 3; R 15,16). On 16 November 1948, Baker checked his records and discovered that the \$30.00 which he had given to accused on 3 May 1948 had not been credited to him on his "Soldiers' Deposits" account (R 16). Subsequently, Baker spoke with accused who voluntarily promised repayment and, on 1 December 1948, Lieutenant Kramer /1st Lt David O. Kramer/ gave Baker \$30.00 stating that it was from accused (R 17,18).

Private First Class Edwin S. Richards was also one of the enlisted men of Company M whom accused paid on 3 May 1948. Private Richards, at the time he was paid, deposited with accused the sum of \$25.00 in military payment certificates as a "Soldiers' Deposits" and accused gave him a signed receipt for said amount (R 22; Pros Ex 5). About the end of October 1948, Richards discovered that his "Soldiers' Deposits" account was short \$25.00. He went over his company records with Lieutenant Kramer and also examined his regimental records. From the latter source he verified that the shortage was occasioned by the failure of his account to reflect the deposit made by him in May 1948. Sometime in November, when Richards went to accused about the discovered shortage, accused told him that he would repay him. Lieutenant Kramer, on 1 December 1948, gave Richards \$25.00 "from" accused (R 23,24).

On 1 July 1948, accused went to the hospital and there paid Private First Class James H. Mudd of Company M, 351st Infantry. Private Mudd, upon being paid, gave accused the sum of \$50.00 in military payment certificates for deposit in "Soldiers' Deposits" and received a signed

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receipt from accused for said sum (R 12; Pros Ex 2). In November 1948 Mudd examined his records. He found that the \$50.00 which he had given to accused for "Soldiers' Deposits" on 1 July 1948 had not been entered in his "Soldiers' Deposits" account and that said failure to credit his account made it \$50.00 short. Mudd never discussed this shortage with accused after he discovered it, but nevertheless, on 1 December 1948, Lieutenant Kramer gave him \$50.00 stating that it was from accused as reimbursement for the \$50.00 shortage (R 13,14).

On 1 October 1948, Private Cecil L. Grantham, a member of Company M, 351st Infantry, gave accused \$75.00 in military payment certificates to be deposited for him in his "Soldiers' Deposits" account. Accused accepted the money and gave Private Grantham a signed receipt for the deposit (R 9; Pros Ex 4). On 16 November 1948, Grantham made a check of his records and discovered that the \$75.00 he had given to accused on 1 October 1948 had not been entered in his "Soldiers' Deposits" account and that the account was consequently short by that amount. Thereafter, when an investigation of the shortage was commenced, accused came to Grantham and said that he would refund the shortage. On 1 December 1948 Lieutenant Kramer paid Grantham \$75.00 which he stated had been sent by accused (R 20).

On 2 October 1948, Sergeant Gerald Knapp of Company M, 351st Infantry, gave Lieutenant David O. Kramer the sum of \$600.00 in military payment certificates for deposit in his, Knapp's "Soldiers' Deposit" account. Knapp received a signed receipt for that sum from Lieutenant Kramer (R 7,8; Pros Ex 1). Subsequently, when Sergeant Knapp learned that a shortage in the sum of \$270.00 existed in his "Soldiers' Deposits" he met with accused, discussed the discrepancy and received accused's assurances that a check of the regimental records would be made to determine the reason for the shortage. Thereafter, accused, without demand being made upon him, personally made repayment to Sergeant Knapp in installments totaling \$200.00 and on 1 December 1948, Lieutenant Kramer gave Knapp the balance of \$70.00 due him from accused (R 9,10).

Lieutenant David O. Kramer testified that he was commanding officer of Company M, in October 1948. He stated that when he accepted and receipted for Sergeant Knapp's \$600.00, he did so because accused was not present to accept and receipt for it. Later, he turned over to accused Sergeant Knapp's money together with an additional \$100.00 which he had accepted for "Soldiers' Deposits" from another enlisted man. Accused took this \$700.00 and placed it with \$770.00 previously collected by him for "Soldiers' Deposits" from other enlisted men. A list, which was signed by Lieutenant Kramer, was then prepared in duplicate and given to accused to take to the personnel officer. The list showed that a total of \$1470.00 in specified amounts had been accepted from certain enlisted men of Company M and requested that the amounts indicated as received

from each named enlisted man be entered in his respective "Soldiers' Deposits" account.

When accused did not thereafter present Lieutenant Kramer with the duplicate copy of the list and a receipt from the personnel officer showing that the "Soldiers' Deposits" money had been deposited, Lieutenant Kramer, on several occasions, asked accused for them. Accused, however, repeatedly stated as his reason for failing to produce the list and receipt "that he had them in his room and would bring it." (R 29-31)

Lieutenant Kramer identified Prosecution Exhibit 6 as the list signed by him which specified the names of enlisted men of Company M from whom money had been accepted for "Soldiers' Deposits," their ranks, serial numbers and the amounts that each turned in for deposit during the first week of October 1948 (R 32). He described the exhibit as the list which had been given to accused to take to the personnel officer together with the "Soldiers' Deposits." He stated, however, that the list had been altered since he gave it to accused in the following manner: Sergeant Knapp's deposit of \$600.00 had been changed to \$330.00 and initialed "RHJ"; and the total had been changed from \$1470.00 to \$1200.00 (R 32,33).

The witness further related that he had first become aware of the aforesaid alterations on 1 November 1948. On that date, while he was acting as pay officer of Company M and was making his turn-in of "Soldiers' Deposits," the personnel officer had shown him the altered exhibit for the previous month's "Soldiers' Deposits" and a receipt for \$1200.00. Sensing that something was wrong, Lieutenant Kramer returned to the company and asked accused why only \$1200.00 had been turned in to the personnel officer in October. Accused's answer to Lieutenant Kramer's query was that he believed the amount turned in by him had been \$1470.00. Accused, however, during later discussions with Lieutenant Kramer concerning this discrepancy in the October 1948 "Soldiers' Deposits" turn-in, was noncommittal and evasive (R 33).

These events caused Lieutenant Kramer to become suspicious of both the personnel officer and the accused, but he lacked sufficient evidence upon which to base an accusation. He reported the matter to the Battalion Commander when he found out from the first sergeant that other discrepancies in "Soldiers' Deposits" existed, and a complete investigation was then conducted. As a result of said investigation, accused was placed in arrest. Thereafter, on 1 December 1948, accused gave Lieutenant Kramer \$300.00 and a list containing the names of men with the amount that each was to be paid back. Lieutenant Kramer then made payments to Knapp (\$70.00); Baker (\$30.00); Grantham (\$75.00); Richards (\$25.00); Mudd (\$50.00); and

(348)

Ward (\$50.00), in accordance with accused's request and instructions (R 33-35).

On cross-examination, Lieutenant Kramer admitted that accused voluntarily made the repayments to those enlisted men in whose accounts discrepancies were discovered; that accused had never made any admission of guilt to him (R 36); and that it was only his opinion that the initials "appearing on Prosecution's Exhibit 6 were RHJ." He asserted, however, that his opinion was based on his having seen the initials "RHJ" previously "and having seen the initials written" (R 38). The witness further stated that he would not say that the "soldiers' deposit system," as employed in Company M, was a good system. He admitted that another shortage had been discovered in the past. In that instance, the officer involved had paid the shortage and had not been court-martialed (R 38,39). He also admitted knowledge that overages had occurred and that it was possible for overages and shortages to occur by reason of unintentional error (R 40).

On redirect examination, Lieutenant Kramer stated that the initials "RHJ" appearing on Prosecution Exhibit 6, were similar to those of the accused, whom he had seen write his initials several hundred times (R 41). He further testified that when money is received from an enlisted man for "Soldiers' Deposits," the enlisted man's name and the amount received from him would appear on the list which accompanied the money when deposited with the personnel officer and that the total amount of money indicated in the list had to correspond with the amount of money turned in before either would be accepted by the personnel officer (R 47).

Chief Warrant Officer William R. Thorn, Personnel Officer for the 351st Infantry, testified that he is in charge of the personnel records of all enlisted men of the 351st Infantry and attached units; that monies collected from enlisted men for deposit in "Soldiers' Deposits" are turned in to him by the officer collecting them; that the turn-in is accompanied by a "memorandum listing" showing the name, grade and serial number of each depositor and the amount deposited by him; that he verifies the amount turned in with the amount called for on the list; and that he, thereafter, makes the deposit with the Finance Department and causes the enlisted man's records to be credited with the amount of individual deposit (R 48,49). He further stated that accused brought Prosecution Exhibit 6 to him with the sum of \$1200.00 and requested and received a receipt in that amount made out to Lieutenant Kramer (R 50,52; (Pros Ex 7). Prosecution Exhibit 6, at the time accused brought it to Mr. Thorn, bore the alteration changing Sergeant Knapp's amount of deposit from \$600.00 to \$330.00 and was initialed "RHJ", and the amount which showed the total of the individual deposits had been changed from \$1470.00 to \$1200.00 (R 50). The witness further testified that the records of

Sergeant Knapp showed no soldier's deposit in the sum of \$600.00; that the only such deposit credited to his account during the month of October 1948 was one in the amount of \$330.00; and that no additional deposit in the sum of \$270.00 was ever made to his account on or after 2 October 1948 (R 53,54).

According to Mr. Thorn, the "Soldiers' Deposits" account and personnel records of Private James Mudd did not show a deposit for \$50.00 to have been made on or about 1 July 1948 nor did the list which accompanied the monies turned in to him by Company M for July 1948 contain Private Mudd's name and indicate that such a deposit had been made by him (R 55,58); that the records of Privates Baker and Richards showed no soldier's deposit to have been made by either of them during May 1948 in the amounts of \$30.00 and \$25.00, respectively, nor did the list which accompanied the monies turned in to him by Company M for May 1948 contain their names with the entries of said amounts of deposits (R 56,57,58,59); and that neither Private Grantham's records nor the list which accompanied Company M's "Soldiers' Deposits" for the month of October 1948, showed a deposit to have been made by him on or after 1 October 1948 (R 57,59).

In September 1948, Company M, 351st Infantry, was at Schmeltz, Austria. Accused was commanding the unit at this time. During the middle of the month, Acting Corporal Frederick G. Ward, came to accused and requested that accused "hold" \$240.00 in military payment certificates for him. Accused accepted the money from Ward. About a week later, accused, while walking with Ward, mentioned to Ward that he was "broke" and wanted some money "to go to town." Thereupon Ward offered accused the use of \$200.00 of the money accused was holding for him. Accused accepted and stated that he would "take it until pay day." On 1 December 1948, Ward received \$50.00 from Lieutenant Kramer in partial repayment of his loan to accused and prior to that date accused had given Ward \$40.00 on account. No other reimbursement on account of the \$240.00 had been made by accused to Corporal Ward at the time of trial (R 26-28).

Major Michael Gussie, Regimental Intelligence Officer, 351st Infantry, on 18 November 1948, conducted an investigation of discrepancies and shortages in Soldiers' Savings Deposits in Company M. After he had been fully warned by Major Gussie of his rights under the 24th Article of War, accused indicated that he understood these rights and voluntarily made a statement which was reduced to writing and subscribed and sworn to by him on the same day (R 71,72; Pros Ex 18). In this statement accused related that on 16 November 1948, when a check of the records disclosed discrepancies in "Soldiers' Deposits" accounts of Grantham, Mudd, Baker, Knapp and others, he told them that he would make good their shortages upon the presentation of their receipts to him, and that he had paid Sergeant Knapp \$200.00. With reference to his transaction with Acting Corporal Ward, which was alleged to have been a loan, accused's statement contains the following:

"\* \* \* Pfc Ward of 'M' Company gave me two-hundred and forty (\$240.00) to keep for him while the Company was at Schmelta, Austria, and he has since requested forty (\$40) dollars of the total amount. This I gave to him upon request.\* \*."

Accused further stated therein as follows:

"When shown the Soldier's Deposit: name and amount of each depositor and the initials 'RHJ', I identified the initials as mine." (R 72,73; Pros Ex 18).

4. Evidence for the defense.

The accused, having had his rights as a witness explained to him, elected to remain silent (R 84).

Private Loyd J. Barker, a member of Company M, 351st Infantry, testified that he had occasion to check his "Soldiers' Deposits" account during the period October-November 1948 (R 74) and when he did so he discovered that his total deposit was \$30.00 in excess of what it should have been. He further stated that he did not know the reason for the overage or what month the extra amount was credited to him and that two other soldiers in Company M, had names similar to his, namely, Private Baker and Private Baumer (R 75,76).

Lieutenant Colonel Dured E. Townsend, Commanding Officer of the 3rd Battalion, 351st Infantry, for more than twelve months last past, testified that he knew accused for about eleven months and had observed the superior manner in which accused performed his duties (R 76,77).

On cross-examination the witness admitted that on the occasion of a Saturday morning inspection of the battalion, he had had accused returned to quarters. He could not say that accused was drunk on this occasion "because it would be necessary to put him through some tests." (R 78). He considered, however, that the accused was "not fit to be in the company that morning." (R 79).

The S-3 of the 3d Battalion was of the opinion that accused conducted the training of Company M in an excellent manner and that during the joint exercise with the British, accused handled the Heavy Weapons Company in a superior manner. The witness conceded that his observations of the accused covered only a six weeks period (R 80).

Sergeant First Class James F. Bannister, First Sergeant of Company M, testified that during October 1948, after members of the unit had requested him to check their respective records with reference to their

"Soldiers' Deposits" (R 81), accused said to him when he was on his way to the "Personnel Section Regimental" "Be sure to get a roster of Soldiers' Deposits and we will post it on the bulletin board" (R 81,82). This statement by accused was made at a time prior to the commencement of any official investigation (R 84). Sergeant Bannister further stated that the pay officer left the "Soldiers' Deposits" money collected by him in the company safe to which there were two keys. The company commander kept one of these keys in his possession and the other was held by either the Executive Officer or the First Sergeant (R 82).

##### 5. Other evidence.

Chief Warrant Officer Thorn was recalled by the prosecution in rebuttal and testified that the records of Private Barker showed that the only deposit for \$30.00 credited to Barker was made in August 1948. He further stated that to his knowledge, accused was never in his office and never discussed the matter of "Soldiers' Deposits" with him (R 85).

Examination of Mr. Thorn by the court resulted in evidence to the effect that Private Barker had been credited with deposits during each month from May through October 1948 and that he was credited with a deposit of \$60.00 in May 1948 (R 86).

At the court's request, Private Barker was recalled and testified that he was not sure when the excess credit to his "Soldiers' Deposits" account occurred. He stated by consulting his receipts, that he had made the following deposits during 1948: 3 May, \$60.00; 1 June, \$70.00; 31 July, \$30.00; 31 August, \$20.00; and 11 September, \$20.00 (R 90).

The court then requested the recall of Chief Warrant Officer Thorn who testified that Private Barker's account showed deposits for the pertinent months as follows: May, \$60.00; June, \$70.00; July, \$50.00; August, \$30.00; and September, \$20.00. He also stated that Private Baker, for the months of July and August 1948 was credited with deposits of \$20.00 and \$30.00, respectively (R 92).

6.a. The five specifications of Charge I are set forth as violations of the 93rd Article of War. Specification 1 alleges that accused did on or about 2 October 1948 "feloniously embezzle by fraudulently converting to his own use Military Payment Certificates of a value of \$270.00, the property of Sergeant Gerald Knapp, entrusted to him for deposit in Soldier's Deposits by First Lieutenant David O. Kramer." Each of the remaining four specifications of Charge I allege that accused did on or about the dates respectively mentioned in said specifications "feloniously embezzle by fraudulently converting to his own use Military Payment Certificates" entrusted to him by various enlisted men, whose names and the dates and amounts of the alleged embezzlements are, by specifications, as follows:

	<u>Name</u>	<u>Date</u>	<u>Amount</u>
Spec 2	Pvt James H. Mudd	1 July 1948	\$50.00
Spec 3	Pvt Howard L. Baker	3 May 1948	30.00
Spec 4	Pvt Cecil L. Grantham	1 October 1948	75.00
Spec 5	Pfc Edwin S. Richards	3 May 1948	25.00

The offense of embezzlement is defined and discussed in the Manual for Courts-Martial, U. S. Army (1928) as follows:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists where the property has been taken or received by virtue of such relationship.

"Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value.

"Proof.--(a) That accused was intrusted with certain money or property of value by or for a certain person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent." (pp 173-174)

The competent evidence adduced by the prosecution in support of the specifications of Charge I and Charge I shows that accused, as pay officer of Company M, on the dates and at the places set forth in said specifications, was given and accepted certain sums of money by various named members of his organization for the expressed purpose of causing said monies to be turned in through channels for credit to the respective depositor's "Soldiers' Deposits" account; that in the case of Sergeant Knapp's deposit of \$600.00, accused caused to be deposited with the personnel officer only \$330.00 of said sum and used to accomplish the said deposit an altered memorandum list wherein the change from \$600.00 to \$330.00 had been initialed by him; that in the cases of Private First Class Richards and Privates Mudd, Baker, and Grantham, the monies which each gave to accused for deposit to their respective "Soldiers' Deposits" accounts and for which monies accused gave each a signed receipt, was never turned in to the Personnel Officer by the accused;

and that, thereafter, when investigation revealed a shortage in Sergeant Knapp's "Soldiers' Deposits" account in the amount of \$270.00 and shortages in the accounts of Mudd, Baker, Grantham and Richards of \$50.00, \$35.00, \$75.00, and \$25.00, respectively, accused personally, in several instances, and through Lieutenant Kramer in others, made full restitution to each of said enlisted men.

From the proof set out above, it is evident that a relationship of trust was created between accused and each of the enlisted men from whom he accepted money for "Soldiers' Deposits." Upon his acceptance of the monies from the enlisted men, it became accused's duty to cause these monies to be turned in to the personnel officer for credit to each depositor's account. The presence in the record of trial of competent evidence that accused turned over to Mr. Thorn \$270.00 less than the sum that Lieutenant Kramer had entrusted to him for the express purpose of being deposited in Sergeant Knapp's "Soldiers' Deposits" account and that the memorandum listing showed an alteration initialed by accused which changed the amount of Sergeant Knapp's deposit from \$600.00 to \$330.00, gives rise to the presumption, upon proof of such shortage in Sergeant Knapp's account, that accused feloniously embezzled \$270.00 belonging to Sergeant Knapp, entrusted to him by Lieutenant Kramer, by converting said amount of money to his own use. Similarly, the showing that the sums of money which enlisted men Mudd, Baker, Grantham, and Richards had entrusted to accused for deposit in "Soldiers' Deposits" accounts as alleged, had not been brought to the personnel officer by accused when he made his "Soldiers' Deposits" turn-in subsequent to his acceptance of the monies, raises the presumption that accused also embezzled said sums of money by fraudulently converting them to his own use. This presumption is fortified by the probative showing that the names of these enlisted men had not been placed on the memorandum listings which accompanied accused's several periodical turn-ins to the personnel officer of "Soldiers' Deposits" collections. In connection with this presumption the Board of Review stated in CM 323764, Mangum, 72 BR 397, at page 403, the following:

"\* \* There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with the proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined in the first instance at least by the court (CM 276435, Meyer, 48 BR 331,338; CM 301840, Clarke, 24 BR

(ETO), 203,210; CM 262750, Splain, 4 BR (ETO) 197,204; CM 320308, Harnack). \* \* \* A person in charge of trust funds who fails to respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177,181; CM 251409, Clark, supra)."

The evidence adduced as to the specifications of Charge I thus legally supports the court's findings of guilty thereof. That accused made full restitution to each enlisted man who discovered a shortage in his account is no defense to a subsequent prosecution for embezzlement since the offense becomes complete at the time of the conversion (Weinhandler v. U.S., 4 F2d 359 cited in CM 276435, Meyer, 48 BR 331,338). The only offer of a defense on the merits was the attempt to show that the method in use by the 351st Infantry when receiving and accounting for "Soldiers' Deposits" was susceptible to error. This it essayed to interject into the trial of the instant case by showing that a specific overage was then existent, the cause of which was probably due to similarity in the names of enlisted depositors and that a previously discovered shortage had been rectified without prosecution by permitting the officer who took the deposit from the enlisted man to make restitution. But when it was shown affirmatively by competent evidence that the offenses with which accused was charged were not in anywise the result of the error which caused the overage in Barker's "Soldiers' Deposits" account, the court was justified in regarding accused's said attempted defense as inapplicable.

b. The specification of Charge II is laid under the 96th Article of War. It alleges that accused did "on or about 22 September 1948 wrongfully borrow \$200.00 from Private First Class Frederick G. Ward, an enlisted man, this to the prejudice of good order and military discipline."

That the offense as alleged is recognized as violative of military law in that it is prejudicial to good order and military discipline has long been recognized and uniformly reiterated by the Board of Review and The Judge Advocate General. The rule and the inescapable basic reasons therefor are restated in CM 322067, Fears, 71 BR 37,44:

"\* \* In the language of the Board of Review in CM 275535, Wilson (48 BR 71,75):

'There are numerous precedents for the proposition that it is prejudicial to good order and military discipline

for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships (CM 230736, Delbrook (1943), 18 BR 29; 2 Bull. JAG (Apr. 1943), p.144). '\*."

To the same effect are CM 278054, Giardina, 51 BR 291,295; CM 283124, Phillips, 55 BR 31,33; CM 290025, Burbank, 57 BR 41,45; CM 302838, Zaleski, 58 BR 349,356, 59 BR 45,52; CM 315654, Thomas, 65 BR 57,61.

The competent evidence of record in support of Charge II and its specification shows that during September 1948 while Company M was at Schmeltz, Austria, under the command of accused, Private First Class Ward entrusted to accused for safekeeping the sum of \$240.00 in military payment certificates. About a week after accused had accepted the money from Ward, he had occasion to be walking with Ward. Upon his mentioning to Ward that he was "broke," Ward offered accused the use of \$200.00. Accused accepted Ward's offer stating that he would "take it until pay day." Sometime thereafter accused gave Ward \$40.00 and on 1 December 1948, Lieutenant Kramer gave Ward an additional \$50.00 from accused.

Accused's sole defense to Charge II and its specification is contained in his pretrial statement wherein he only admits that he received the sum of \$240.00, for the purpose of safekeeping, from Private First Class Ward and states that he returned \$40.00 to Ward upon request.

The foregoing evidence is sufficient to sustain the findings of guilty of Charge II and its specification even if we were to assume that accused's pretrial statement is tantamount to a denial by him that he borrowed \$200.00 from Ward as alleged. The prosecution was not bound by the contents of accused's statement by reason of having introduced it into evidence, nor was the prosecution precluded from contradicting it by the introduction of other evidence (Epps v. United States, 157 F2d 11,12). Since the record also contained competent evidence that accused accepted the "use" of \$200.00 belonging to Private First Class Ward which he had in his possession for safekeeping and expressly agreed that he "would take it until pay day," the court had before it what we find to be ample competent proof upon which to base its findings of guilty that accused did at the time and place alleged "wrongfully borrow \$200.00 from Private First Class Ward."

7. Records of the Department of the Army show that accused is 28 years of age and unmarried. He attended high school for two and one-half years and enlisted in the United States Army on 22 December 1937. He had enlisted service until 14 April 1945 when he was discharged in

the grade of staff sergeant to accept a combat appointment as a second lieutenant on 15 April 1945. He was promoted to first lieutenant on 14 August 1947. He has had three tours of foreign service: from 17 July 1941 to 10 September 1943 (Alaska); from 5 April 1944 to 2 September 1945 (North Africa and Italy); and from 27 August 1946 to date of trial on 6-7 January 1949 (ETO). He is entitled to wear the Bronze Star Medal ("for heroic achievement in action on 13 October 1944 \* \*" per paragraph 2, General Orders 3, 91st Infantry Division, dated 9 January 1945), two bronze service stars on his Asiatic Pacific Ribbon, three bronze service stars (Rome-Arno, North Apennines and Po Valley Campaigns) on his European, African, Middle East Ribbon, and the Combat Infantryman's Badge. He was previously tried by general court-martial on 25 May 1948 and was found guilty of two offenses of being drunk in uniform in a public place and one offense of being drunk in quarters, all in violation of Article of War 96. He was sentenced to forfeit \$100.00 of his pay per month for six months, which sentence was approved and ordered executed. His efficiency reports include five (5) ratings of "Excellent" and one (1) of "Very Satisfactory." He appears not to have been rated since 30 June 1947.

8. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence. Dismissal, total forfeitures and confinement at hard labor for three years is authorized upon conviction of an officer of a violation of Articles of War 93 and 96. The designation by the reviewing authority in the instant case of Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement, is ineffective. Confinement in a penitentiary is authorized by Article of War 42 upon conviction of the offense of embezzlement of property of a value of fifty (\$50.00) dollars or more.

Wilmot T. Baughm, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

John L. ..., J.A.G.C.

DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Shaw, and Mickelwait  
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Robert  
H. Johnson, O2039413, Infantry, Company M, 351st Infantry,  
the sentence is confirmed and will be carried into execution  
upon the concurrence of the Judge Advocate General. The  
United States Disciplinary Barracks, or one of its branches,  
is designated as the place of confinement.

Franklin P. Shaw  
Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait  
C. B. Mickelwait, Colonel, JAGC

2 May 1949

E. M. Brannon  
E. M. Brannon, Brig Gen, JAGC  
Chairman

CM 334905

Inconcur in the foregoing action.

Thomas H. Green  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

GCMO 28, May 12, 1949



DEPARTMENT OF THE ARMY  
 In the Office of The Judge Advocate General  
 Washington 25, D.C.

CSJAGK CM 334908

MAR 1 1949

UNITED STATES )

HEADQUARTERS FORT ORD

v. )

Trial by G.C.M., convened at  
 Fort Ord, California, 26  
 January 1949. Dismissal  
 total forfeitures, and hard  
 labor for two (2) years.

Second Lieutenant MILTON V.  
 CHRISTMAN (JR.) (O-1333432),  
 Headquarters Company, 6003 Army  
 Service Unit, Fort Ord,  
 California. )

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OPINION OF THE BOARD OF REVIEW  
 SILVERS, SHULL and LANNING  
 Officers of The Judge Advocate General's Corps

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following Charge and Specification:  
 CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Milton V. Christman, Jr., Headquarters Company, 6003 Army Service Unit, Fort Ord, California (formerly a member of the Headquarters Separation Center, War Department Personnel Center, 1907 Service Command Unit, Fort Lewis, Washington,) did, at Fort Lewis, Washington on or about 9 February 1946, desert the service of the United States, and did remain in desertion until he was apprehended at Salinas, California, on or about 19 January 1949 and returned to military control on 19 January 1949.

He pleaded guilty to the specification except the words "desert" and "in desertion", substituting therefor respectively the words, "absent himself without leave from" and "without leave"; of the excepted words not guilty, of the substituted words guilty; not guilty of the charge but guilty of a violation of Article of War 61. He was found guilty of the specification and the charge. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the prosecution

A duly authenticated extract copy of morning report entries of "Headquarters Separation Center WDPC 1907 SCU" for the dates 11 February 1946 and 11 March 1946 was received in evidence over the objection of defense as "Prosecution Ex 1". These entries showed accused absent without leave as of 9 February 1946, and dropped from the rolls as of 11 March 1946 (R 9).

Miss Kathleen G. Prewett, a hotel manager for the Pine Inn at Carmel, California, identified the accused as being a person known to her by the name of "Milton Randle" who had been in her employ as a bartender from February 1947 to March 1948. Accused had never admitted to her at any time that he was a member of the military service of the United States (R 15-17).

Lieutenant Lee V. Worthen, assistant Provost Marshall, Fort Ord, California, first met accused at the county jail, Salinas, California, where accused identified himself as Milton Valentine Christman, Jr. and gave his serial number which coincided with the number Lieutenant Worthen had previously obtained from the War Department (R 11,12).

Major Edward T. Devlin, Provost Marshall, Fort Ord, California testified that on 19 January 1949 he obtained the release of accused from the civilian authorities at the county jail, Salinas, California, and returned him to military control at Fort Ord (R 9,10).

An extract copy of the morning report of "Headquarters Company 6003 ASU" for 20 January 1949 was received in evidence without objection as Pros, Ex 2. Pertinent entries therein showed that accused had been apprehended and returned to military control on 19 January 1949 (R 17).

For Defense

Accused's rights as a witness were explained to him whereupon he testified as follows:

He was inducted on 9 June 1944 and upon graduation from Officers Candidate School at Fort Benning, Georgia was commissioned a Second Lieutenant. He was assigned to Fort Blanding, Florida and later to Fort Lewis, Washington where he performed duty as personnel officer from September 1945 to October 1945. Reclassification proceedings were taken against him in October 1945 which resulted in disapproval. He did, however, upon request submit his resignation but never heard whether it was accepted. While waiting for action to be taken on his resignation he performed no duties whatsoever. In December 1945 his wife died. One night in 1946, when he was in town drinking he "just decided to take off". He went away dressed in his army uniform leaving his civilian clothes in camp. He left

because he was disgusted at having nothing to do in the army. He had formed no intention not to return. He did not remember clearly the events which occurred while he was gone.

Accused testified upon cross-examination that he found a receipt for rent of an apartment, in which he was staying, made out to Milton Randle, and he "just kept that name from then on". He wore his uniform when he left but didn't know what had become of it. He married a girl in October 1946 under his assumed name. He lied to her about his military life. His father-in-law advised him of his wife's death and that her family wanted nothing further to do with him. Accused had three children by his first marriage. His mother had committed suicide in 1930 but his father lived in Orlando, Florida. Accused asserted that he voluntarily gave himself up to the district attorney of Monterey County but not because he was Absent Without Proper Leave. He was in a status of arrest for 19 days before he informed the civilian authorities he was in the military service (R 18-27).

Mrs. Alma Randle, Carmel, California, was called as a witness for the defense and testified that she was the wife of accused whom she had always known as Milton Randle. "He appeared to have something on his mind", and most of the time he had a highball in his hand. Accused told her that he had been in the army in Burma but she supposed he had been discharged (R 28-30).

#### 4. Discussion

The accused's initial absence without leave was established by his plea of guilty of absence without leave for the period alleged as well as by the duly authenticated extract copy of a morning report. The court was warranted in inferring accused did not intend to return to the service as he had submitted his resignation, was dissatisfied with the army, remained absent without authority for nearly three years, assumed a fictitious name and accepted civilian employment (par 130 a MCM 1928). The accused's guilt of desertion as charged was, in the opinion of the Board of Review, clearly established beyond any reasonable doubt.

It is noted that accused pleaded guilty to absence without leave for the period alleged terminated by apprehension. The evidence tended to show that he voluntarily turned himself over to civilian authorities for some reason and that while in civilian custody he admitted being absent without leave from the army. A report was apparently made to the military authorities which resulted in his being returned to military control. It thus appears that accused's plea of guilty, insofar as it amounted to an admission that he was apprehended, may have been improvidently entered. But the question of whether an unauthorized absence is terminated by surrender or by apprehension is material only as to the maximum punishment which may be imposed in the case of an enlisted soldier. Inasmuch as the accused was an officer, no prejudice to his rights has resulted by the plea and finding that he was apprehended (par 104 a MCM, 1928).

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4. Records of the Department of the Army show accused to be about 35 years of age, married and the father of three children. He was inducted into the army 9 June 1944 and commissioned a Second Lieutenant, AUS 28 March 1945. He received one adjectival efficiency rating of excellent and two of unsatisfactory.

5. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 58.

Charles D. Silber J.A.G.C.  
Lewis J. Hull J.A.G.C.  
Harley A. Lanning J.A.G.C.

CM 334908

DEPARTMENT OF THE ARMY  
Office of the Judge Advocate General

THE JUDICIAL COUNCIL

Brannon, Shaw, and Young  
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Milton V. Christman, Jr. (O-1333432), Headquarters Company, 6003 Army Service Unit, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement,

Franklin P. Shaw

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Franklin P. Shaw, Brig Gen, JAGC

Edward H. Young

-----  
Edward H. Young, Colonel, JAGC

E.M. Brannon

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E.M. Brannon, Brig Gen, JAGC  
Chairman

30 March 1949

I concur in the foregoing action.

Thomas H. Green

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THOMAS H. GREEN

Major General

-----  
The Judge Advocate General

1 April 1949

(GCMO 19, 11 April 1949).



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

MAR 9 1949

CSJAGI CM 334917

UNITED STATES )

YOKOHAMA COMMAND

v. )

Trial by G.C.M., convened at  
APO 503, 13-14 January 1949.

Recruit WILLIAM VERNON MCINTOSH )  
(RA 15072498), Battery "D", )  
76th Antiaircraft Artillery )  
Automatic Weapons Battalion )  
(Self Propelled), APO 503. )

Dishonorable discharge (suspended)  
and confinement for two (2) years.  
Disciplinary Barracks.

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HOLDING by the BOARD OF REVIEW

JONES, ALFRED and JUDY

Officers of the Judge Advocate General's Corps  
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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

2. Accused was tried for, and pleaded not guilty to, a violation of Article of War 93 in that he did at the time and place alleged "feloniously take, steal and carry away sixteen blankets, value about \* \* \* \$129.76, the property of the United States." He was found guilty of the Specification, substantially as charged except for the addition thereto of the words "furnished and intended for the military service thereof", and not guilty of the Charge but guilty of a violation of Article of War 94.

The evidence introduced by the prosecution sufficiently established the offense charged in the specification. However, the court erred in adding to its findings the words "furnished and intended for the military service thereof" and substituting a finding of guilty of a violation of Article of War 94 for the alleged violation of Article of War 93. It is obvious that larceny of government property, in violation of Article of War 94, is not necessarily included in a charge of larceny of the same government property, in violation of Article of War 93, because the larceny denounced under Article of War 94 includes an added element, namely that the stolen property is "furnished or intended for the military service" of the United States. It is, however, still larceny and necessarily includes such element of larceny under Article of War 93 (CM 316193, Holstein, 65 BR 271).

Since the offense charged is necessarily included in that found, the record is legally sufficient to support the findings of guilty of the offense charged (CM 191638, Giles, 1 BR 269; CM 316193, Holstein, supra).

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as finds the accused guilty of the specification except the words "furnished and intended for the military service thereof", and guilty of so much of the Charge as finds the accused guilty of a violation of Article of War 93 and legally sufficient to support the sentence.

Mr. [Signature], J.A.G.C.

Frank C. Alfred, J.A.G.C.

Jackson K. Judy, J.A.G.C.

CSJAGI CM 334917

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.

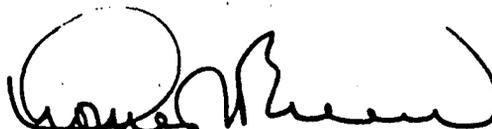
TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster,  
San Francisco, California.

1. In the case of Recruit William Vernon McIntosh (RA 15072498), Battery "D", 76th Antiaircraft Artillery Automatic Weapons Battalion (Self Propelled), APO 503, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as finds the accused guilty of the specification except the words "furnished and intended for the military service thereof" and guilty of only so much of the Charge as finds the accused guilty of a violation of Article of War 93 and legally sufficient to support the sentence. Under Article of War 50e, this holding and my concurrence therein vacate so much of the finding of guilty of the specification as involves the words "furnished and intended for the military service thereof" and so much of the finding of guilty of the Charge as involves a finding other than a finding of guilty of violation of Article of War 93.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which accused has been deprived by virtue of the findings so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 334917).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Record of trial
2. Draft of GCMO



DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D.C.

(369)

CSJAGH CM 334918

MAR 18 1949

UNITED STATES )

2D ARMORED DIVISION

v. )

Trial by G.C.M., convened at  
Camp Hood, Texas, 17 December  
1948 and 6 January 1949.

First Lieutenant WENDELL E.  
CURRY, 01032581, Cavalry, 4005th )  
Area Service Unit Station )  
Complement, Camp Hood, Texas. )

Dismissal and total forfeitures.

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HOLDING by the BOARD OF REVIEW  
BAUGHN, BERKOWITZ and LYNCH  
Officers of The Judge Advocate General's Corps

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

2. The accused was tried upon the following Charges and Specifica-  
tions:

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

Specification: In that First Lieutenant Wendell E. Curry,  
Cavalry Reserve, for the purpose of obtaining approval,  
allowance and payment of a claim against the United States  
by preparing and presenting to B. F. Hillman, Lieutenant  
Colonel, Finance Department, Finance Officer at Camp Hood,  
Texas, an officer of the United States duly authorized to  
approve, pay and allow such claims, did, at Camp Hood,  
Texas, on or about 23 November 1948 make and use a certain  
writing, to-wit: a basic information certificate for reimburse-  
ment for travel of dependents on supporting certificate to  
Standard Form 1012, Voucher for Per Diem and/or Reimburse-  
ment of Expenses Incident to Official Travel, which said  
basic information certificate, as he, the said First  
Lieutenant Wendell E. Curry, then knew, contained a state-  
ment that his dependent wife, Dorothy D. Curry, actually  
performed travel from Oak Harbor, Washington, to Camp Hood,  
Texas, and that such travel was actually performed between  
16 November 1948 and 21 November 1948, which statement was  
false and fraudulent, in that said dependent did not perform

such travel as alleged, and which statement was then known by the said First Lieutenant Wendell E. Curry to be false and fraudulent, and that by making and using such basic information certificate, he, the said First Lieutenant Wendell E. Curry, did, then obtain approval and receive payment of the said voucher, Standard Form 1012 in the sum of One Hundred and One Dollars and forty-eight cents (\$101.48) on November Accounts of said B. F. Hillman, Lieutenant Colonel, Finance Department, Finance Officer at Camp Hood, Texas.

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

**Specification:** In that First Lieutenant Wendell E. Curry, Cavalry Reserve, for the purpose of obtaining approval, allowance and payment of a claim against the United States, by preparing and presenting to B. F. Hillman, Lieutenant Colonel, Finance Department, Finance Officer at Camp Hood, Texas, an officer of the United States duly authorized to approve, pay and allow such claims, did, at Camp Hood, Texas, on or about 23 November 1948, make and use a certain writing, to-wit: Standard Form 1012, Voucher for Per Diem and/or Reimbursement of Expenses Incident to Official Travel, with supporting certificate thereto required by Finance Officer, which said voucher and supporting certificate thereto, as he, the said First Lieutenant Wendell E. Curry then knew contained a statement that he was due reimbursement for travel of his dependent wife, Dorothy D. Curry, from Oak Harbor, Washington, to Camp Hood, Texas, and that such travel of his dependent was actually performed from Oak Harbor, Washington, to Camp Hood, Texas, between the dates of 16 November 1948 to 21 November 1948; and that such statements made in said certificate were true and correct, which statement was false and fraudulent, in that such travel was not performed by dependent of the said First Lieutenant Wendell E. Curry, and which statements were then known by the said First Lieutenant Wendell E. Curry to be false and fraudulent; and that by making and using said voucher and supporting certificate he, the said First Lieutenant Wendell E. Curry, did, then obtain approval and payment of the said voucher in the sum of One Hundred and One Dollars and Forty-Eight cents (\$101.48) in cash on November Accounts of the said B. F. Hillman, Lieutenant Colonel, Finance Department, Finance Officer at Camp Hood, Texas, such conduct being of a nature as to bring discredit upon the military service.

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

**Specification:** (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and the specifications thereunder, and not guilty of Charge III and its specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution. The evidence pertinent to the findings of guilty is summarized as follows:

The accused is a member of the military service, having been ordered to extended active duty on 15 September 1948, by paragraph 11, Special Orders Number 175, Headquarters Sixth Army, Presidio of San Francisco, California, dated 27 August 1948 (R 6,15; Pros Exs 1,5).

A signature identification card (War Department Form No. 35) executed on 27 September 1948 by the accused in the presence of Captain William F. Fischer, AGD, Assistant Adjutant General, Camp Hood, Texas, was received in evidence without objection (R 6,7; Pros Ex 2). By making a comparison with this document, Lieutenant Colonel Burleigh F. Hillman, F.D., the Finance Officer at Camp Hood, concluded that the accused had signed disbursement officer's voucher number 10682 in his November accounts, executed on Standard Form 1012 (Revised). A copy of voucher number 10682 in photostat, certified as a true photostatic copy of the original by its custodian, Colonel R. Silverman, F.D., was received in evidence without objection (R 8,9; Pros Ex 3).

This voucher is made out in favor of the accused and contains the following:

"For travel of dependent Reimbursement of travel and other expenses paid by me in the discharge of official duty from 16 Nov 1948, to 21 Nov 1948, as per itemized statement within, under authority No. P 11 SO 175 Hq 6th Army dated 27 Aug, 1948, copy of which is attached \* \*."

The amount claimed, the amount listed under the section provided for the accounting classification, and the amount shown in the payment column are all the same viz; one hundred and one dollars and forty-eight cents (\$101.48). In the payment column, there are stamped the words and figures "November 29, 1948" and "Paid by F. M. Moore, Cashier," indicating payment in cash by Miss F. M. Moore, a bonded cashier in Colonel Hillman's office (R 9; Pros Ex 3). On the reverse side of voucher number 10682 under the section "Character of Expenditure," there appear the words and figures, "2537 OMT miles @ 4¢ per mile \$101.48."

A photostatic copy of a certificate also bearing a signature identified as that of the accused was introduced similarly without defense's objection. This certificate, which according to Colonel Hillman, was required by regulations, provides in pertinent part as follows:

"INSTRUCTIONS: In addition to executing the face of Standard Form 1012 and 1012a, the following BASIC INFORMATION WITH PROPER CERTIFICATES will be furnished with ALL claims for reimbursement for travel of dependents. Use typewriter, ink or indelible pencil in preparing all forms.

- |  |   |   |
|--|---|---|
| *  | *   | *   |
| 2. Old Permanent Station<br><u>Oak Harbor, Wash.</u>   |   | 3. New Permanent Station<br><u>Camp Hood, Texas</u> |
| 4. Location of dependents on date of receipt by me of change of station orders<br><u>Oak Harbor, Wash.</u> | 5. Travel actually performed by my dependents:<br>FROM: <u>Oak Harbor, Wash.</u><br>TO: <u>Camp Hood, Texas</u> |   |

6. Travel of my dependents was actually performed between the dates of:

From: Nov. 16 - Nov. 21, 1948  
To:

7. Mode of travel utilized by my dependents. Auto
8. Transportation in kind (namely, transportation furnished by the Government by transportation requests, Government transport, military aircraft, or Government owned automobile), including parlor-car or sleeping-car accommodations, has not been and will not be requested for my dependents except as follows:  
No Exceptions

- |  |   |   |
|--|---|---|
| *  | *   | * |
| 9. My dependents for whom claim is made are as follows:<br>DEPENDENTS (State given name)<br><u>Dorothy D. Curry</u> <u>Lawful Wife</u> | 10. CERTIFICATE<br><br>I certify that the child-children as listed is-are my legitimate, step or adopted child-children.<br>(Strike out the words not applicable)<br>(See paragraph 4.)<br>I further certify that the statements herein are true and correct. |   |

11. Signature of Claimant  
Wendell E. Curry 1st Lt

12. Grade of Claimant  
2nd Div -
13. Organization  
Dated 23 Nov. 48." (Pros Ex 4)

(Handwritten portions of the above voucher are indicated by underscoring).

A copy of the special orders providing for the officer's travel and a copy of the above certificate are required to support a voucher for dependent(s) travel executed on Standard Form 1012 (R 14-16; Pros Exs 3,4,5).

A certified true copy of a petition for divorce, filed by the accused in the District Court of Bell County, Texas, on a date not shown, was received in evidence. In this petition, which appears to have been initiated by "Evetts & Wagner, Attorneys for Plaintiff," in behalf of accused, was a prayer for a divorce of accused from Dorothy D. Curry, on the grounds of her abandonment of him in June of 1943 (R 18; Pros Ex 6). An affidavit, dated 6 October 1948, in support of citation by publication in the same proceedings, was received without objection as Prosecution Exhibit 7. This affidavit, which appears to have been signed and sworn to by one Henry Wagner, and filed at 2 p.m. on October 6, 1948, contains these recitations:

"Henry Wagner, one of the attorneys for the plaintiff in the above-entitled cause, being duly sworn says that the residence of the defendant, Dorothy D. Curry is unknown to him, and that the residence of the defendant is unknown to the plaintiff, or this affiant, and that after using due diligence plaintiff has been unable to locate the whereabouts of the defendant.

"WHEREFORE he prays that citation be issued for service by publication." (R 18; Pros Ex 7)

At the trial of the proceedings E. Wendell Curry v. Dorothy D. Curry on 22 November 1948 in Bell County, Texas, the accused, as plaintiff, is agreed to have testified as follows:

"E. WENDELL CURRY, the Plaintiff, on direct examination testified as follows:

"My name is E. Wendell Curry. I reside in Bell County, Texas. I have been for more than twelve months immediately prior to the filing of my petition for divorce on September 29th, 1948, an actual bona fide inhabitant of the State of Texas, and that I have resided in Bell County, Texas, where this suit is filed, for more than six months next preceding the filing of my petition.

"The address and residence of the defendant is unknown to me; that I have diligently endeavored to ascertain her address, as shown by telegram from her parents, but without success.

"That plaintiff and defendant were duly and legally married at Fort Lewis, Washington, on January 2nd, 1941, and continued to live together as husband and wife until on or about June 1943. That at all times, while married to the defendant, he conducted himself with propriety, and treated defendant with kindness and forbearance, and was guilty of no act of omission or commission toward defendant; that on or about the \_\_\_ day of June, 1943, the defendant, without provocation or cause whatever, voluntarily left and abandoned the bed and board of plaintiff, with the intention of finally separating and living apart from him and has continued to do so up to the filing of his petition; that defendant stated at the time she voluntarily left and abandoned the plaintiff, that she did not love him, was in love with another man, and would never live with him again as his wife.

"That no children were born of this union, and no community property has been acquired by plaintiff and defendant." (Pros Ex 8)

As a result of the afore-mentioned proceedings, a final decree of divorce was granted the accused from Dorothy D. Curry on 22 November 1948 (R 21; Pros Ex 9).

The affidavit of the accused, sworn and subscribed to on 4 December 1948 before Captain Alex Hacker, CE, the investigating officer, contains the following:

"On 24 November 1948, I did claim and collect travel pay for Dorthy D. Curry, once my lawful wife. On 22 November, 1948 I was divorced from Dorthy D. Curry by final decree. On 23 November 1948, I was married to Florence E. Gallic. Florence E. Gallic to whom I was married on 23 November 1948, actual<sup>l</sup> did perform the travel claimed and during the period claimed.

"On Dec 2, 1948 I paid to B. F. Hillman, Lt Col., F.D. the sum of \$189.16 which included payment for travel by dependent, over payment for travel by myself and repayment for pay and allowances which the Finance Officer said I was not due but had collected.

"At the time I received orders about active duty, I was in Pasadena, California. As directed by orders, I reported to Fort Worden, Washington for physical examination. After completing the physical I returned to San Francisco to Sixth Army Headquarters, where I picked up orders ordering me to active duty at Camp Hood, Texas." (Pros Ex 10)

The above statement was received in evidence over defense's objection (R 22,23; Pros Ex 10).

4. Following the court's denial of its motions for findings of not guilty of all Charges and specifications (R 23-27,28,31), the defense offered no evidence (R 31).

After being advised of his rights as a witness, the accused elected to remain silent.

5. The accused has been found guilty of two specifications which allege in substantially the same language, the making and use of interrelated false writings to obtain approval and payment of a claim against the United States in the amount of one hundred one dollars and forty-eight cents (\$101.48), in violation of Articles of War 94 and 95. With reference to this seeming duplicity, it is well settled that there is no objection, legal or otherwise, to charging the same offenses under two Articles of War and that such does not constitute an improper duplication of charges (CM 248494, Kwarchak, 31 BR 297,300; CM 275518, Linville, 48 BR 55,61; CM 325484, Dallman, 74 BR 253,259).

The proof required to sustain the above offenses, which may be singularly considered since the writings involved derive mutual support from each other, is set forth in paragraph 150d, Manual for Courts-Martial 1928, on pages 182 and 183 as follows:

"Proof.--(a) That the accused made or used or procured or advised the making or use of a certain writing or other paper, as alleged; (b) that certain statements in such writing or other papers were false or fraudulent, as alleged; (c) that the accused knew this; (d) the facts and circumstances indicating that the act of the accused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified, and (e) the amount involved, as alleged."

The only modification made in the above requirement by the Manual for Courts-Martial, 1949, which became effective on 1 February 1949, concerns sub-sections (b) and (c) above. With reference to the first mentioned, it is now essential to prove that the statements in the writing were material. The second change appears to be for clarification purposes only and entails the substitution of the phrase "\* \* the statements were false or fraudulent \* \*" in lieu of the word "this" used in sub-paragraph "c" of the 1928 Manual for Courts-Martial (Par 181c, MCM 1949, p.250).

In first considering the elements of proof enunciated in sub-sections (a), (d) and (e) above, it is clear that the prosecution has established by competent evidence that the accused is chargeable with having made the writings alleged, that he did this for the purpose of obtaining approval and payment of a claim against the United States, and that the claim was in the amount of one hundred one dollars and forty-eight cents (\$101.48), as alleged.

The voucher and the supporting certificate, each bearing a signature clearly established as that of the accused, is sufficient proof that the accused made and used such instruments for the purpose of obtaining approval and payment of the claim in the amount recited thereon, within the requirements of (a), (d), and (e) respectively. In view of the substantial and undisputed character of this documentary evidence, even independent of accused's extrajudicial statement, there is no necessity for a further recomputation of the proof adduced in support thereof. Before proceeding to other phases of the case, it is to be noted that the requirements of proof listed under these sub-sections ((a), (d), and (e)) are identical in both the 1928 and the 1949 Manuals for Courts-Martial.

In passing from the above phases of the case, after having determined that the record of trial presents no real problem with respect thereto, the Board is confronted with the issues in the case upon which the legal sufficiency of the record must ultimately rest. These may be briefly stated to be whether there is contained in the record of trial the proof required to establish that the statements in the voucher and in the supporting certificate were in fact false and that the accused was chargeable legally with knowledge of their false or fraudulent character (sub-paragraphs (b) and (c), paragraph 150d, Manual for Courts-Martial, 1928, p.182; and sub-paragraphs (b) and (c), paragraph 181c, Manual for Courts-Martial 1949, p.250). Since the proof of knowledge of falsity is necessarily dependent upon the establishment of the actual fact of falsity, the Board of Review is required to consider only the actual proof of falsity for reasons which are patent and which are hereinafter submitted.

Proof introduced to establish that Dorothy D. Curry did not in fact perform travel from Oak Harbor, Washington, to Camp Hood, Texas, a distance of some 2537 miles, between the dates of 16 November 1948 and 21 November 1948 as recited upon accused's voucher and supporting certificate, appears of doubtful character from the outset. Conceding to the prosecution for purposes herein, the most liberal of rules concerning the admissibility and competency of the evidence, the proof that the travel was not performed appears to be limited to (1) accused's orders to extended active duty and for travel, effective 15

September 1948, (2) a divorce petition of accused against Dorothy D. Curry filed in Bell County, Texas, by accused's attorneys on a date not shown, (3) a certificate executed by one of accused's attorneys in support of service by publication, (4) the "Statement of Facts" in the proceedings including accused's testimony, (5) the decree of divorce taken by default, on 22 November 1948, (6) and the pretrial statement of the accused taken by the investigating officer. Careful consideration of this evidence in the light of the question presented shows clearly that there is a serious question presented as to whether the corpus delicti has been established within the prescribed limitations. Although there is no requirement that the evidence of corpus delicti, independent of an accused's admissions or confession, need cover every element of an offense (par 114a, MCM 1928, p.115; par 127b, MCM 1949, p.159), the factor of whether or not the travel was actually performed is so vital to the present case as to constitute, in substantial measure, the corpus delicti for the two offenses alleged in violation of Articles of War 94 and 95. With this premise before it, the Board must determine whether there is in the competent proof adduced, evidence to show the probability that Dorothy D. Curry did not perform the travel alleged between the dates indicated (par 114a, MCM 1928). Or to take a view more favorable to the prosecution's case, for purposes of emphasis, but one clearly not permitted by precedent since the rule followed in such cases as CM 202213, Mallon, 6 BR 1 and CM 210693, Alexander, 9 BR 331, has been expressly overruled (CM 317673, Wing, 67 BR 19; CM 325056, Balucanag, 74 BR 67; CM 325377, Sipalay, 74 BR 169), whether the record contains some evidence corroborative of the admissions and confessions of the accused relative to the performance of the disputed travel by Dorothy D. Curry.

Mindful of the fact that circumstantial evidence is equally competent to establish the corpus delicti as well as other requisites in the field of legal proof, we are at first impressed with the possible contention that the decree of divorce of accused from Dorothy D. Curry on 22 November 1948 would, without more, be sufficient to establish the probability that she did not travel to Texas, or at least to corroborate accused's admissions that she did not. A more careful analysis of the legal feasibility of such a conclusion shows, however, that the divorce and the divorce proceedings in all aspects stem from the accused. From the first filing of the petition to the final decree, the matter was wholly ex parte. The Board of Review, as well as the trial court and the reviewing authority are chargeable with knowledge that there was nothing in the entire proceedings which do not emanate from the accused. It is for this reason, and for the reasons manifest from the ultimate holding of legal insufficiency, that the Board of Review is not herein concerned with the action of the court in accepting in evidence some of the documents relating to divorce. Under the circumstances shown and for the purposes of this case the bulk of these documents derive both their value and their conceivable admissibility by virtue of being admissions chargeable to the accused. In this regard, for reasons

previously set forth, it will be unnecessary to consider the question of whether the accused has a responsibility from an evidentiary standpoint for admissions made by his counsel during the course of the divorce action (Pros Exs 6,7). This being the case, we are not prepared to hold that such ex parte proceedings, resulting in a decree of divorce entered by default, has any more effect in establishing that Dorothy D. Curry did not travel from Oak Harbor, Washington, to Camp Hood, Texas, between 16 November 1948 to 21 November 1948, than would accused's statement to that effect. In reality, and in final analysis, the greatest evidential value that can be assigned to the court proceedings is that they are no more than admissions of the accused insofar as establishing the fact that the travel was not performed is concerned. This realization impells the conclusion that the record of trial is void of any corroborative evidence of accused's admissions and confession to show that Dorothy D. Curry did not perform the travel, as alleged, or that the statements made by the accused on the Standard Form 1012 (Revised) or the supporting certificate thereto were false.

Some doubt has been expressed as to the necessity for the rule requiring proof of the corpus delicti aliunde the accused's admissions or confession (Wigmore on Evidence, Third Ed, Vol III, Sec 2070, p.395; Daeche v. United States, 250 Fed 566,571) and this appears to have been instrumental in causing a relaxation of the requirement in several instances as hereinbefore mentioned (CM 202213, Mallon, and CM 210693, Alexander, supra). Notwithstanding the Mallon and Alexander decisions which clearly should not be followed, it remains a requirement in military jurisprudence that there be in the record of trial direct or circumstantial evidence, other than that flowing from an accused's admissions or confessions, to show that the offense or offenses have probably been committed (pars 114a and 127a, MCM 1928 and 1949, respectively).

Accepting either the accused's testimony before the divorce tribunal on 22 November 1948 or his pretrial statement to the investigating officer on 4 December 1948 as a confession, or that both considered together were of confessional character, there is still nothing in the record independently to provide the necessary corpus delicti therefor within the requirements of the preceding paragraph. Nor can one admission or confession of an accused be used as corpus delicti for a subsequent confession. With respect to this proposition the Board of Review in CM 302838, Zaleski, 59 BR 45, has stated on pages 50,51 and 52:

"\* \* \* The remaining element of the offense alleged in the specification of Charge I which the prosecution was bound to establish was that accused fraudulently converted these funds to his own use (MCM 1928, par. 149h).

"A careful examination of the record reveals, however, that proof of this element comes solely from admissions made by accused. \* \* \*

\* \* \*  
"The proof thus far adduced fails to show that accused embezzled the money as alleged and to establish this element

of the case we must, perforce, rely on accused's extra-judicial admissions. These have been detailed above and no useful purpose will be served by going into them again. It is elementary that a conviction cannot be supported unless there is evidence of the corpus delicti apart from accused's admissions. 2 Wharton's Criminal Law (12th Ed.) sec. 1279, pa. 1595; MCM, 1928, par. 114a. (Underscoring supplied)

"\* \* We conclude, then, that there is no evidence, apart from accused's admissions, that would justify a finding that he embezzled the money, as alleged, and, accordingly, the conviction on that Specification must be disapproved.

"\* \* This Specification [Specification of Charge II] charges accused with wrongfully removing the fund from the station to which it pertained (AR 210-50, par. 15a(2)). The only evidence of this charge was contained by implication in the accused's alleged confession made to the investigating officer on 16 October 1945. There is similarly as to this Specification no proof of the corpus delicti apart from the confession and therefore the record is not legally sufficient to support a finding of guilty." (Underscoring supplied)

The same provision has been incorporated in the Manual for Courts-Martial 1949, as follows:

"An accused cannot be legally convicted upon his uncorroborated confession. A court may not consider the confession of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be substantial evidence of the corpus delicti other than the confession. Other confessions or admissions of the accused are not such corroborative evidence." (MCM 1949, par 127a, p.159)

In view of the most applicable limitations recited in the above precedents, there is clearly a failure of proof in the instant case. Independent of the divorce proceedings stemming from the accused in all aspects, and tantamount, at best, to admissions by him, as hereinbefore stated, and the accused's pretrial statement to the investigating officer, there is no evidence, either direct or circumstantial, to show that Dorothy D. Curry did not in fact travel from Oak Harbor, Washington, to Camp Hood, Texas, between the dates 16 and 21 November 1948. This is clearly a requirement in support of each of the specifications since neither the voucher nor the supporting certificate indicate or even suggest the possibility of irregularity or wrongdoing much less the probability thereof, and the necessary corpus delicti is not otherwise provided by the proof.

6. Department of the Army records show that the accused is 30 years of age, married, and has one child. He attended college for two years

and was employed as a timekeeper and foreman in the meat packing industry. He enlisted in the service on 9 August 1940 and was honorably discharged to accept appointment as a second lieutenant on 14 July 1943 after attending Officers' Candidate School. He is authorized the Combat Infantry Badge (and as a result of such award, pursuant to General Order 16, 12th Cavalry Division and AR 600-45, C14, par 15.1e, he is further authorized the Bronze Star Medal), the Purple Heart, Asiatic-Pacific Service Medal with three bronze service stars and one arrowhead, the American Theater Service Medal, Philippine Liberation Medal, and World War II Victory Medal. His efficiency index includes three (3) ratings of superior, one (1) rating of excellent, and two (2) ratings of very satisfactory.

7. The court was legally constituted and had jurisdiction of the person and the offenses. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Wilmut T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

J. W. Lynch, J.A.G.C.

CSJAGH CM 334918

1st Ind

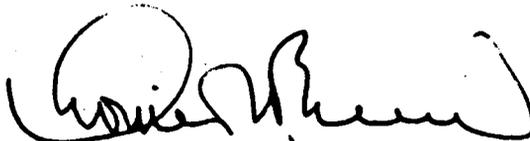
JAGO, Department of the Army, Washington 25, D.C.

TO: Commanding General, 2d Armored Division, Camp Hood, Texas.

1. In the case of First Lieutenant Wendell E. Curry, 01032581, Cavalry, 4005th Area Service Unit Station Complement, Camp Hood, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence. You have authority to direct a rehearing.

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

(CM 334918).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl

Record of trial



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D. C.

(383)

MAR 3 0 1949

CSJAGQ - CM 334926

UNITED STATES )

RYUKYU IS COMMAND

v. )

Recruits ELINO EVANGELISTA  
(PS 10314658), Battery A  
and RAMON PACHECO (PS  
10317284), Battery C, both  
of 511th Antiaircraft Ar-  
tillery Automatic Weapons  
Battalion (PS), APO 331. )

Trial by G.C.M., convened at  
APO 331, 2 November 1948.  
Pacheco (Acquitted).  
Evangelista: Dishonorable dis-  
charge and confinement for four  
(4) months. O'Donnell Division,  
PHILCOM Stockade, General  
Prisoner Branch, APO 613.

HOLDING by the BOARD OF REVIEW  
GOFF, BOROM and SKINNER

Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldiers named above, and submits this, its holding to The Judge Advocate General, under the provisions of Article of War 50e.
2. Accused were tried upon the following Charge and Specification.

CHARGE: Violation of the 94th Article of War.

Specification: In that Recruit Elino Evangelista, Battery "A", 511th Antiaircraft Artillery Automatic Weapons Battalion (Philippine Scouts) and Recruit Ramon Pacheco, Battery "C", 511th Antiaircraft Artillery Automatic Weapons Battalion (Philippine Scouts) did, at Kuba Saki, Okinawa, on or about 2000 hours, 19 September 1948, in pursuance of a common intent, feloniously take, steal, and carry away five (5) sacks of rice, value \$37.50, one (1) sack of sugar, value \$8.00, and two (2) sacks of salt, value \$0.40, of a total value of \$45.90, property of the United States furnished and intended for the Military service thereof.

Both accused pleaded not guilty. Pacheco was acquitted. Accused Evangelista was found guilty of the specification except the words, "Recruit Ramon Pacheco, Battery 'C', 511th Antiaircraft Artillery Automatic Weapons Battalion (Philippine Scouts) in pursuance of a common intent, feloniously take, steal, and carry away", substituting therefor, "knowingly and willfully misappropriate" - of the excepted words "Not Guilty" of the substituted

words, "Guilty", and guilty of the Charge. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, reduced the period of confinement to four months, designated the O'Donnell Division, PHILCOM Stockade, General Prisoner Branch, APO 613, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question involved in this case is the legal effect of the findings of the court. Under the holdings of the Board of Review, hereinafter mentioned, it is not necessary to summarize the evidence.

4. The court attempted to find accused Evangelista not guilty of larceny but guilty of misappropriation, by exceptions and substitutions, as a lesser offense necessarily included in the larceny charged.

In the case of CM 318499, White, et al., 67 BR 338, respecting similar circumstances the Board of Review stated:

"\* \* \* we are of the opinion that misappropriation of military property is incidental to larceny, embezzlement, misapplication, wrongful selling and wrongful disposition of military property. It does not follow, however, that it is an offense necessarily included in the other offenses denounced by the 9th subparagraph of Article of War 94. The indivisible and unexpungeable elements of larceny are a taking and carrying away by trespass. In misappropriation, the devotion to an unauthorized purpose, it is immaterial whether the initial taking is by trespass or not, or that there be any taking at all. Thus all types of misappropriation can not be included in larceny, since misappropriation may involve wrongful dealings with property which are in no way connected with larceny."

\* \* \* \* \*

"\* \* \* it is clear that the finding of guilty of misappropriation as approved by the reviewing authority does not indicate how the accused misappropriated the property described in the specification. Obviously the reviewing authority attempted to exclude a taking by trespass. Trespass being eliminated and the kind of misappropriation not being specified, it cannot be said that the offense as approved was necessarily included in that charged."

This language was quoted with approval by the Board of Review in the cases of CM 319857, Dingley, 69 BR 166, and CM 329093, Edwards, 77 BR 357. As this reasoning is thus the settled rule we are constrained to hold that the conviction cannot be sustained.

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

Abe M. S. Goff, JAGC

J. K. Brown, JAGC

F. C. Kanner, JAGC

(386)

APR 13 1949

CSJACQ - CM 334926

1st Ind

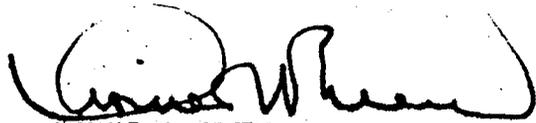
J.A.G.O., Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Ryukyus Command, APO 331, c/o Postmaster,  
San Francisco, California.

1. In the case of Recruits Eline Evangelista (PS 10314658), Battery A and Ramon Pacheco (PS 10317284), Battery C, both of 511th Antiaircraft Artillery Automatic Weapons Battalion (PS), APO 331, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to Evangelista. Under the provisions of Article of War 50a(3), this holding and my concurrence therein vacate the findings of guilty and the sentence as to Evangelista.

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

(CM 334926).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
R/T

Ryukyus Command.



DEPARTMENT OF THE ARMY  
Office of The Judge Advocate General  
Washington 25, D.C.

MAR 9 1949

CSJAGV CM334978

U N I T E D S T A T E S	)	HEADQUARTERS PHILIPPINE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
Sergeant PRIMITIVO B.	)	Headquarters, PHILCOM, APO 707,
CANTA (10308522),	)	4 January 1949. Dishonorable
Private DELFIN CORPUZ	)	discharge (suspended) and
(10308346), both of	)	confinement for CANTA - four
Company A and Private	)	(4) years, CORPUZ - three (3)
SANTOS GUALVEZ (10313676),	)	years, GUALVEZ - four (4) years.
Headquarters and Head-	)	General Prisoner Stockade.
quarters Company, all of	)	
1st Battalion, 45th In-	)	
fantry (Philippine Scouts).	)	

---

HOLDING by the BOARD OF REVIEW  
MCAFEE, CHAMBERS and SPRINGSTON  
Officers of the Judge Advocate General's Corps

---

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Sergeant Primitivo B. Canta and Private Delfin Corpuz, both of Company A, and Private Santos Gualvez, Headquarters and Headquarters Company, all of 1st Battalion, 45th Infantry (Philippine Scouts), acting jointly and in pursuance of a common intent, did, at Nichols Field, Philippines, on or about 6 December 1948, feloniously take, steal and carry away one three-quarter ton truck (weapons carrier), of the value of about \$1,890.00, property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to the charge and its specification. They were found guilty and sentenced to dishonorable discharge the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five years. There was no evidence of previous convictions.

The reviewing authority approved the sentence as to each accused, reduced the periods of confinement as to Canta and Gualvez to four years and as to Corpuz to three years, ordered the sentence as modified executed as to each accused, suspended the execution of the dishonorable discharge as to each accused until his release from confinement and designated O'Donnell Division, PHILCOM General Prisoner Stockade, APO 613, or elsewhere as the Secretary of the Army may direct, as the place of confinement as to each accused. The results of trial were promulgated in General Court Martial Orders No. 18, Headquarters Philippine Command, APO 707, dated 31 January 1949.

3. The findings and sentence of the court as to the accused Canta and Gualvez are supported by competent evidence of record. The only question presented is the legal sufficiency of the evidence adduced to support the findings and sentence as to the accused Corpuz.

4. a. Evidence for the prosecution.

On 6 December 1948 the accused Gualvez without authority drove a U.S. Army weapons carrier from Nichols Field to Cavite where it apparently became stuck in the mud and was abandoned. This weapons carrier had been dispatched to Private Marinay. The accused Canta and Corpuz were in the weapons carrier when it was driven from Nichols Field to Cavite (R 11, 16-18). On the morning of 7 December 1948 a Cavite patrolman, Antonio Bagalawis, who had talked to Canta near the scene of the vehicle's abandonment the preceding day concerning aid in removing the vehicle, repossessed the car and brought it to the municipal building (R 20). Statements taken subsequently from Gualvez and Canta implicated Corpuz in the theft of the truck (Pros. Exhibits 3 and 4) and at the trial Gualvez, in an unsworn exculpatory statement in which Gualvez attempted to place the responsibility on Sergeant Canta, again implicated Corpuz to the extent of an alleged conversation held between Canta and Corpuz after leaving Nichols Field indicating that the latter two proposed to sell the truck (R 43).

b. Evidence for the defense.

Corpuz, both in his pre-trial statement (Pros. Ex. 2) and his sworn testimony (R 29) consistently maintained he had "hitch hiked" a ride in the weapons carrier.

5. The sole admissible evidence against the accused Corpuz which in any manner connected him with the larceny of the weapons carrier, as alleged, consisted of his presence with the other accused in the truck when it left Nichols Field and proceeded to Cavite. While this fact tended to indicate accused Corpuz might have been involved in the larceny, standing alone it affords only a basis for pure conjecture or a mere possibility that he was guilty of the offense charged. In similar situations, CM 312356, Preater, et al, 62 B.R. 135, 141 and CM 312079, Smith, 61 B.R. 339, 341, mere proof of accused's presence in the vehicle in question at the time was held insufficient to sustain a finding of guilty.

The written statements of Gualvez and Canta which tended to implicate Corpuz were taken subsequent to the commission of the offenses, consequently they were inadmissible as against Corpuz (CM 325056, Balucanag, 74 B.R. 67, 70, 7 Bull. JAG 14). The remaining evidence in the form of Gualvez's exculpatory unsworn statement at the trial was not only vague and indefinite but also, as it related to accused Corpuz, pertained to the offense of selling, not stealing the vehicle, at a time subsequent to the theft and after the departure of the three accused from Nichols Field, where the theft occurred. Furthermore, this unsworn statement of Gualvez is not evidence against the other accused (Paragraphs 76 and 114 c Manual for Courts Martial 1928). The record is barren of any competent evidence disclosing that the accused Corpuz was engaged in a common enterprise with the other two accused with respect to the possession of the weapons carrier (See CM 234964, Furtado, 21 B.R. 217). The competent evidence at most shows mere presence of the accused Corpuz in the vehicle which is insufficient to establish Corpuz' participation in the larceny (CM 312657, Reck and Montgomery, 62 B.R. 247, 255 and authorities there cited).

6. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as to the accused Gualvez and the accused Canta, and legally insufficient to support the findings and sentence as to the accused Corpuz.

Carlos E. McAfee, A.G.C.

(Sick in hospital), J.A.G.C.

George B. Huntington, J.A.G.C.

(390)

CSJAGV CM 334978

1st Ind.

JAGO, Department of the Army, Washington 25, D. C.

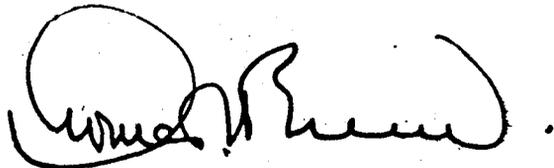
To: Commanding General, Philippines Command, APO 707, c/o Postmaster,  
San Francisco, California.

1. In the case of Sergeant Primitivo B. Canta (10308522), Private Delfin Corpuz (10308346), both of Company A and Private Santos Gualvez (10313676), Headquarters and Headquarters Company, all of 1st Battalion, 45th Infantry (Philippine Scouts), I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Gualvez and Canta, and legally insufficient to support the findings of guilty and the sentence as to accused Corpuz. Under Article of War 50e (3) this holding, together with my concurrence, vacates the findings of guilty and the sentence as to the accused Corpuz.

2. Since the record of trial has been held legally sufficient as to the accused Canta and Gualvez, no further action in respect to said accused is required. With respect to accused Corpuz, it is requested that you publish a general court-martial order in accordance with the said holding and this indorsement restoring all rights, privileges and property of which the accused Corpuz has been deprived by virtue of the findings and sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(CM 334978).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

- 1 Record of trial
- 2 Draft of GCMO

DEPARTMENT OF THE ARMY  
In the Office of The Judge Advocate General  
Washington 25, D. C.

CSJAGN-SpCM 110

27 MAY 1949

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

NEW YORK PORT OF EMBARKATION )

v. )

Trial by SpCM convened at Camp  
Kilmer, New Jersey, 18 March )

Private JOHN H. MOORE, JR. )  
(RA 32912978), 9213 Technical )  
Service Unit, Transportation )  
Corps, Replacement Center, De- )  
tachment 10, Camp Kilmer, New )  
Jersey. )

1949. Bad conduct discharge )  
(suspended), forfeiture of \$50 )  
per month for six (6) months )  
and confinement for six (6) )  
months. Post Stockade. )

-----  
HOLDING by the BOARD OF REVIEW  
YOUNG, FITZER and GUIMOND  
Officers of the Judge Advocate General's Corps  
-----

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification 1: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, did, without proper leave, absent himself from his organization at Camp Kilmer, New Jersey, from about 12 January 1949 to about 7 February 1949.

Specification 2: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, did, without proper leave absent himself from his organization at Camp Kilmer, New Jersey, from about 14 February 1949 to about 15 February 1949.

Specification 3: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, did, without proper leave absent himself from his organization at Camp Kilmer, New Jersey, from about 23 February 1949 to about 3 March 1949.

Specification 4: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, did, without proper leave, absent himself from his organization at Camp Kilmer, New Jersey from about 4 March 1949 to about 14 March 1949.

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

Specification 1: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, having been restricted to the limits of Area Six (6), Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 14 February 1949, break said restriction by going to places unknown.

Specification 2: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, having been restricted to the limits of Area Six (6), Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 23 February 1949, break said restriction by going to places unknown.

Specification 3: In that Private John H. Moore, Junior, 9213 Technical Service Unit-Transportation Corps, Replacement Center Detachment 10, Camp Kilmer, New Jersey, having been restricted to the limits of Area Six (6), Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 4 March 1949, break said restriction by going to places unknown.

The accused pleaded not guilty to Specification 2 of Charge I and Specification 1 of Charge II, and guilty to all other Specifications and Charges. He was found guilty of all Specifications and Charges and was sentenced to be discharged from the service with a bad conduct discharge, to be reduced to the seventh grade, to be confined at hard labor for six months and to forfeit \$50.00 per month for six months. The convening authority having approved the sentence,

the officer authorized to appoint a general court-martial for the station then approved the sentence and ordered it executed, but suspended execution of that portion thereof adjudging bad conduct discharge until the soldier's release from confinement, and designated the Post Stockade, Fort Jay, Governors Island, New York, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders No. 2, Headquarters New York Port of Embarkation, Brooklyn, New York, 14 May 1949.

3. Whether the sentence imposed is within the permissible maximum is the only question presented by the record. For the twenty-six day unauthorized absence alleged and proved under Specification 1 of Charge I, seventy-eight days, or two months and eighteen days, confinement at hard labor with corresponding partial forfeitures, and automatic reduction to the seventh grade is the maximum allowable punishment (par. 116d, p. 128; par. 117c, p. 134, MCM, 1949). The remaining three absences without leave, shown to have commenced on the dates alleged, respectively 14 February, 23 February and 4 March 1949, began with breaches of restriction, the same offenses asserted in Charge II. In each of these three instances, the unauthorized absence and breach of restriction are concurrent offenses, "different aspects of the same act or omission," which must be construed together and punished only in their most important aspect (CM 313544, Carson, 63 BR 137; CM 323305, Raabe, 72 BR 205; CM 336362, Hall (1949); par. 80a, p. 80, MCM, 1949). Since none of these three absences exceeded ten days, the maximum permissible confinement which may be sustained as punishment for any one of them can in no case exceed thirty days, or one month, which is also the limit prescribed for the offense of breach of restriction (par. 117c, pages 134 and 138, MCM, 1949). There being three breaches of restriction properly alleged and proved, concurrent with lesser offenses of short absence without leave, three months confinement at hard labor and partial forfeiture for three months may be added to the punishment described above as applicable to Specification 1 of Charge I, making the total maximum punishment authorized in the instant case, reduction to the seventh grade, confinement at hard labor and partial forfeiture for five months and eighteen days. The total authorized period of confinement being less than six months, a bad conduct discharge is not authorized (par. 117c, p. 143, MCM, 1949).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as involves confinement at hard labor for five months and eighteen

(394)

days, forfeiture of fifty (\$50.00) dollars of his pay per month for a like period, and reduction to the seventh grade.

*W. E. [unclear]*, J. A. G. C.

ON LEAVE, J. A. G. C.

*J. H. [unclear]*, J. A. G. C.

CSJAGN-SpCM 110

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, New York Port of Embarkation, Brooklyn,  
New York.

1. In the case of Private John H. Moore, Jr. (RA 32912973), 9213 Technical Service Unit, Transportation Corps, Replacement Center, Detachment 10, Camp Kilmer, New Jersey, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as provides for confinement at hard labor for five months and eighteen days, forfeiture of fifty (\$50.00) dollars pay per month for a like period, and reduction to the seventh grade. Under Article of War 50a(3) this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for five months and eighteen days, forfeiture of fifty (\$50.00) dollars pay per month for a like period, and reduction to the seventh grade.

2. It is requested that you publish a special court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the part of the sentence so vacated. A draft of a special court-martial order designed to carry into effect the foregoing recommendation is attached.

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

(SpCM 110).

2 Incls

1 - Record of trial

2 - Draft of SpCMO



HUBERT D. HOOVER

Major General, United States Army

Acting The Judge Advocate General



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