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UNITED STATES	)	GULF COAST ARMY AIR FORCES TRAINING CENTER
v.	)	Trial by G.C.M., convened at Randolph Field, Texas. September 4, 1942. Dismissal.
Captain AUSTIN P. YOUNG (0-249552), Air Corps.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification 1: In that Captain Austin P. Young, Air-Res., Ellington Field, Texas, then and now on active duty as an officer of the Army of the United States, did, at San Antonio, Texas, on or about 8:00 o'clock A.M. December 7, 1941, wrongfully solicit from N.P. Craig, then a civilian, One Hundred ($100.00) Dollars lawful money of the United States of America, or other thing of value, not lawfully due the said Captain Young, in return for assistance to be given by the said Captain Young in obtaining for the said Craig a position as a civilian employee at Ellington Field, Texas.

Specification 2: In that Captain Austin P. Young, Air-Res., Ellington Field, Texas, then and now on active duty as an Officer of the Army of the United States, did, at Houston, Texas, on or about 8:00 o'clock P.M. December 7, 1941, wrongfully solicit from Carl A. Fuess, Jr., then a civilian, One Hundred ($100.00) Dollars, or other thing of value not lawfully due the said Captain Young, in return for assistance to be

given by the said Captain Young in obtaining for the said Fuess a position as a civilian employee at Ellington Field, Texas.

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

Specification 1: In that Captain Austin P. Young, Air-Res., Ellington Field, Texas, then and now on active duty as an Officer of the Army of the United States, did, at San Antonio, Texas, on or about 8:00 o'clock A.M. December 7, 1941, under color of his office, wrongfully and unlawfully attempt to obtain from N.P. Craig, then a civilian, One Hundred ($100.00) Dollars lawful money of the United States, or other thing of value, not lawfully due the said Captain Young, in return for assistance to be given by the said Captain Young in obtaining for the said Craig a position as a civilian employee at Ellington Field, Texas.

Specification 2: In that Captain Austin P. Young, Air-Res., Ellington Field, Texas, then and now on active duty as an Officer of the Army of the United States, did, at Houston, Texas, on or about 8:00 o'clock P.M. December 7, 1941, under color of his office, wrongfully and unlawfully attempt to obtain from Carl A. Fuess, Jr., then a civilian, One Hundred ($100.00) Dollars, lawful money of the United States, or other thing of value not lawfully due the said Captain Young, in return for assistance to be given by the said Captain Young in obtaining for the said Fuess a position as a civilian employee at Ellington Field, Texas.

ADDITIONAL CHARGE I: Violation of the 95th Article of War.

Specification: In that Captain Austin P. Young, Air-Res., Ellington Field, Texas, then and now on active duty as an Officer of the Army of the United States, did, at or near Ellington Field, Texas, on or about February 13, 1942, wrongfully solicit from Henry A. Jahnke, then a civilian, a United States Government Bond of the maturity value on One Hundred ($100.00) Dollars, or other thing of value, not lawfully due the said Captain Austin P. Young, in return for assistance to be given by the said Captain Young in obtaining for the said Jahnke a position as a civilian employee at Ellington Field, Texas.

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

Specification: In that Captain Austin P. Young, Air-Res., Ellington Field, Texas, then and now on active duty as an Officer of the Army of the United States, did, at or near Ellington Field, Texas, on or about February 13, 1942, under color of his office, wrongfully and unlawfully attempt to obtain from Henry A. Jahnke, then a civilian, a United States Government Bond of the Maturity value of One Hundred ($100.00) Dollars, or other thing of value, not lawfully due him, the said Captain Young, in return for assistance to be given by the said Captain Young in obtaining for the said Jahnke a position as a civilian employee at Ellington Field, Texas.

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. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The undisputed evidence shows that beginning about November 1, 1941, and continuing through February, 1942 (R. 64; Pros. Ex. 3), accused was on duty as director of the Ground School of the Air Corps Replacement Training Center at Ellington Field, near Houston, Texas. As such director it was his duty, among other things, to make investigations, by interviews or otherwise, as to the qualifications of applicants for positions as civilian instructors in the Ground School and to recommend qualified applicants for employment. Accused had as an assistant director First Lieutenant R. E. Smith, Air Corps. Lieutenant Smith concurred in all recommendations for employment made by accused. Accused made his recommendations to his immediate superior, Colonel A. W. Snyder, Air Corps. No civilian was employed as an instructor during the period covered by the charges except when recommended by accused (Pros. Ex. 3) About November 15, 1941, authorization was received for employment of two civilian instructors in mathematics. Thereafter eleven instructors in all were employed on the recommendations of accused (R. 66). Accused was 36 years of age at the time of the trial (R. 104). Prior to coming on extended active duty he had been a teacher in the public school system of Houston, Texas, for about thirteen years (R. 65).

The evidence for the prosecution directly relating to Specification 1, Charge I, and Specification 1, Charge II, shows that at about 8 a.m., Sunday, December 7, 1941, accused and Lieutenant Smith

met Mr. Nichol Palmer Craig, by appointment, at the Evergreen Drug Store in San Antonio, Texas, for the purpose of discussing the possible appointment of Craig as an instructor in mathematics (R. 9, 66, 68) at a salary of $2600 per annum (R. 13). Craig, 40 years of age, was principal of a high school in Stockdale, Texas, with a salary, including allowances for driving the school bus, of $1380 per year. His brother had been employed at Ellington Field and it was through his brother that the meeting of Craig and accused was originally arranged (R. 9). Stockdale is about 40 miles from San Antonio, Texas, and about 140 miles from Houston, Texas. San Antonio is about 180 miles from Houston (Rand-McNally Atlas). On December 6 Craig started for Ellington Field for the conference but en route received a telegram instructing him to go to San Antonio (R. 9).

Craig testified that after some general conversation and after Lieutenant Smith and he had discussed witness' qualifications, accused and Craig were left alone in the rear part of the drug store. While they were thus isolated accused said, "'Now, there's one other little thing, Mr. Craig ...' *** 'You realize that I have sole authority to hire?'". Witness replied that he understood accused had this authority, whereupon accused said, "'It would be quite a Christmas present if you'd get this job, wouldn't it'". Witness replied that, "'you might consider it that way'" and added that he would "'certainly appreciate'" the position. Accused continued,

> "'Well, there is lots of expenses involved in this Army life' ***. 'My expenses down here and officers' dues' ***. 'Those come up every month; I don't know where it goes' ***. 'That costs lots of money for incidentals like that' ***. 'I could use a Christmas present'". (R. 11)

Witness then asked accused what he would "consider an adequate Christmas present" and accused responded, "'Oh' *** 'one hundred dollars this Christmas and every Christmas; you don't know, this may last ten years'". Witness stated to accused that he did not have

> "a hundred dollars but that I felt that it would be worth one hundred dollars if I could get it and that it certainly would still be a big improvement over what I had " (R. 12).

Witness further testified that in the course of the conversation accused said to him,

> "' Now, there's no use your saying anything about this, Mr. Craig; it would only get us both in

> trouble and it would just be your word against mine and so I would advise you not to say anything at all about it'".

Witness was not certain as to when this latter statement was made but believed it was made prior to the remark concerning the $100 Christmas present. After the two had rejoined Lieutenant Smith, just before leaving the drug store, accused asked Lieutenant Smith, in witness' presence, how long he thought it would be before witness could "start work", and Lieutenant Smith suggested that it would be necessary for witness to acquaint himself with the work. Accused remarked, "'Well, I just don't know, or wonder if he could go to work right off'". Lieutenant Smith said that he could not say when witness could commence work - that he had two other men to interview about the position (R. 12, 13). Accused thereupon advised witness that he would telegraph from Houston if he wished to employ witness and would write if his decision was adverse (R. 13). Accused did not communicate with witness and on December 12 witness wrote a letter to his brother (R. 7, 8) relating accused's proposition (Pros. Ex. 4). On February 13, 1942, witness was employed as an instructor at Ellington Field, but in another position carrying a salary of $2000 per annum (R. 13).

Craig further testified that he did not recall hearing the proprietor of the drug store, Mr. R. Tulliver Jones, remark that he ought to charge rent for the use of his store as a conference room (as later testified to by a defense witness) and did not recall any jocular remarks by others present relating to Christmas presents (R. 14). Witness believed that his conversation with accused was wholly serious (R. 16, 17). Accused did not ask witness to pay him money for securing the $2000 position and witness did not pay him money at any time (R. 15). When the proposition of December 7 was made witness was willing to pay the $100 requested provided he could secure it (R. 18). He had paid for positions before. He testified,

> "In the school teaching business there is a so-called teacher's 'agency' and when I was young, when I first started to teach school, instead of going out looking for a job, I had them .. I'd let the other fellow find it for me and I'd pay him for it. I knew at the time that, of course, he was dividing his fee with the superintendent of the school which was all right with me. I knew he was doing that" (R. 17).

The evidence for the prosecution directly relating to Specification 2, Charge I, and Specification 2, Charge II, shows that about December 5, 1941, Mr. Carl A. Fuess, Jr., had a conversation with accused, in the latter's office at Ellington Field, concerning the possible

employment of Fuess as a mathematics instructor (a position similar to that later discussed with Craig on December 7) (R. 20, 21). Accused stated he was going to San Antonio to interview two other men concerning the position, and would communicate with Fuess later (R. 21). Fuess was 24 years of age, had recently married and had recently been employed by the National Youth Administration. He had never been a school teacher but had had experience in teaching mathematics through coaching other students at college (R. 20).

Fuess testified that in the interview of December 5 accused gave him "great hope" that he would get the position. About 8:30 p.m., December 7, witness found in his house in Houston a note from accused asking witness to call him (R. 21). Witness telephoned and accused asked him to come to accused's home. Witness, accompanied by his wife, went to the home of accused at about 9 p.m. After introductions and a "few minutes in idle conversation" accused asked witness to go with him to a bedroom. In the bedroom accused immediately told witness that he was going to give him the position on the basis of his superior qualifications. Accused then told witness,

> "in view of the fact that I was bettering myself so appreciably that I should be very grateful for this new position that he was responsible for my obtaining and he said that, on the face of things, that what he may say may seem dishonest but in view of the fact of my youth, that I was, maybe, too naive to understand why he did what he was going to do. Now, he said, in view of the fact that I should be so appreciative, I should show that appreciation, express it in a material way. He brought out the point that he was not having too easy a time meeting various expenses, Christmas was near and he was planning on buying his wife silver for Christmas and that he could use help in this matter" (R. 22).

Witness asked accused if he was trying to "bribe" him and accused replied, "Absolutely not" inasmuch as witness had already been given the job, but that accused merely expected witness' "appreciation" to be shown in a material way. Witness testified that accused,

> "made a point of this, that my idea of appreciation may not be the same as his and that if I were appreciative enough, a nice gift, such as golf clubs or watch wouldn't be out of the ordinary but, at the same time, as I didn't know what he needed, he felt that a monetary sub-

> stitution would be more to his liking as he could spend it as he saw fit ***. He mentioned no amount to me specifically that he would expect from me. He did say on his trip to San Antonio, that there was a man who was willing to pay him $100.00 for this position" (R. 23).

Witness remonstrated at the suggestion made to him and accused remarked that witness was "naive and young", that he had much to learn and that witness should not become "overwrought" at his request. Witness did not consider the conversation "joking or frivolous" in any way (R. 24), and believed accused was "in earnest" (R. 25). Witness was employed in the position but accused did not renew his proposal. Witness did not pay accused any money (R. 25). At the time of the conversation described witness was familiar with the civil service act and regulations and knew that he did not have to pay anything to get the position. He believed the position was his when accused told him it was. He never intended to pay accused. After his employment commenced witness went to Dallas on two occasions, making it necessary to secure a substitute instructor during his absence (R. 27). Accused remonstrated with witness when the second trip was made (R. 29). Witness had opposed a policy of accused involving the giving of reexaminations in the Ground School, and had heard that accused did not think well of him (R. 28). Witness bore no ill feeling toward accused (R. 25). He denied that on September 4, 1942, he made a statement to a "Mr. Kennedy" that he was "going to see Captain Young was sent to the penitentiary" (R. 26).

The evidence for the prosecution directly relating to Additional Charges I and II and their Specifications shows that about February 13, 1942, Aviation Cadet Henry A. Jahnke, then a civilian employed as a teacher in a junior high school of Houston, Texas, visited accused at Ellington Field, at accused's request. Jahnke had recently married. He had known accused as a teacher in the Houston schools. In the course of a conversation at accused's desk accused unconditionally offered Jahnke a position as a mathematics instructor at a salary of $2000 per annum. The offer was accepted at the time. Jahnke testified that thereupon,

> "We went to the Personnel Headquarters and on the way there Captain Young asked me if I realized how lucky I was to become a teacher there, since I would be able to stay near home. I told him that I did so realize, and I appreciated his assistance. He talked in rather hedging terms, finally saying to me, 'You look like a right guy, who would appreciate what his friends do for him, who would like to show his appreciation'. Also he said 'If I were to ask you for $100 bond you could have me

> sent to Leavenworth immediately, but I'm not going to do that. I will tell you that I am hoping to build up a fund of $1000, for my son's education, when he grows up. At the proper time I will let you know, and I am sure you can help me out in building up this fund'" (Pros. Ex. 5).

Jahnke testified that he was "dumbfounded" at the proposition. On the following day he told an employee of the "Civilian Employment Office" that he did not intend to accept the position because acceptance would involve loss of his teaching contract with the Houston schools. On the same day he told the assistant principal of a Houston school that he was not taking the position because he did "not like the conditions under which he would have to accept". In this conversation witness made a remark about the sale of positions and was advised to have nothing to do with the matter. On February 14, after these conversations, Jahnke advised accused, in effect, that he did not want the position for the reason that he did not wish to lose his school contract and did not want a position obtained through friendship. Accused said "that's what friends were for", and asked witness not to "hesitate because of anything said yesterday, that every one had to look out for himself". About February 25 accused telephoned witness, said that there had been some criticism of his employment of teachers and asked, in substance whether he had said anything that was wrong or that left an impression of wrongdoing. Later, while witness was stationed at Morris Sheppard Field, Wichita Falls, Texas, he received a letter from accused (Pros. Ex. 5), dated April 15, 1942, stating that criticism of accused had arisen and containing the following:

> "As I recall it, you hesitated about taking the job with me for two reasons, (1) the ruling of the School Board relative to leaves of absence for a better job, and (2) the dislike of the idea that you might be securing a job only because of our acquaintance or friendship. You will probably remember parts of our conversations in which I tried to let you know that I <u>wanted</u> you as a teacher not because of our acquaintance or friendship but because we needed teachers and I knew your reputation as a good one. Will you then, go before a Notary, or a Summary Court Officer, and make some statement more-or-less to the effect that though I gave you to understand that I wanted you, I also made it perfectly clear that if you took the job you'd be under absolutely no obligation to me personally .... that all I wanted from you was efficient teaching and the sort of cooperation any principal or director wants from teachers working with him. ***.

"Naturally I hope you will not discuss this matter with anyone; that you will send me the statement right away; and that after that is done you will not retain this letter or let it get into the hands of anyone else" (Pros. Ex. 6).

Witness did not give the statement requested but delivered accused's letter to the military authorities (Pros. Ex. 5).

Accused testified that in filling the first two positions of mathematics instructor he interviewed Craig, Fuess and a man named Lewis (R. 66). Employment of the instructors was urgent (R. 68). Colonel Snyder had told accused to select efficient persons but to "Get people that will be interesting to work with" (R. 65). Accused had not had previous experience in selecting persons for employment (R. 95). Lewis, who was in San Antonio, sent a message to accused asking him to come to San Antonio for an interview and offering to pay the "car expenses" for the trip. Accused's mother was in San Antonio at the time, staying at the home of a relative, the proprietor of the Evergreen Drug Store. Under the circumstances, accused decided to go to San Antonio and, while there, to interview the applicant Craig. Lewis paid accused $7 to cover the expenses of the trip (R. 94, 96). Accused arranged to meet Lewis and Craig at the drug store. When the group met at the store the proprietor, Mr. Jones, and others talked in a jocular manner, and the proprietor jokingly remarked that "he could use an extra $25.00 as a fee for using his store as a conference room". This and other remarks in a "light vein" prompted accused to suggest to Craig that if he got the $2000 position it would be better than the position he then held and would be "quite a nice Christmas present for him". Craig agreed. Accused testified:

"This was the first man I interviewed and the idea struck me that talking along that line would be a way of checking up on this man's character and his mental alertness to see whether or not he was the kind of a man that I thought Colonel Snyder had in mind when he said 'Let's get people that would be pleasant to work with'.

"So, with that in mind, I talked to him. I don't recall the entire conversation, it's impossible for me to, it's been too long ago, but I know that he evidently took it pretty seriously because, as I recall, when he was about ready to leave the store and had his coat on his arm or was putting his coat on, he said to me: 'What would you consider a good Christmas present?'

> "And, without giving it any deep thought or hardly any thought, I answered, offhandedly: 'Oh! I guess about one hundred dollars.'
>
> "And I thought that Mr. Craig, I thought teasingly or rather jokingly, said: 'Well, I haven't got one hundred dollars with me.'
>
> "And, as far as I remember, that was the end of the conversation" (R. 69).

Accused did not recall saying anything about his heavy expenses or about Christmas presents he had to buy. He did not suggest yearly Christmas gifts of $100 for ten years, and such a period was not mentioned (R. 70). Accused did not intend to have Craig pay him $100 (R. 71). When he said to Craig that $100 would be a good Christmas present he answered "quickly without much thought" (R. 85, 102) and could not say that "there was any purpose in it" (R. 84). Because of conversations with members of Colonel Snyder's staff accused believed that in interviewing the applicants he "was supposed to do 'S-2' work to some extent (R. 95). Accused thought that Craig had taken his jocular conversation too seriously (R. 70, 71), but did nothing to correct his impression (R. 95, 96). Neither accused nor Lieutenant Smith was favorably impressed with Craig's personality and ability. Both thought that Lewis and Fuess were better qualified for the positions (R. 70). Lewis accepted one of the positions and accused thereupon, about December 17, advised Craig that he would not be employed but would be kept in mind for the next opening (R. 75). Early in February, 1942, an urgent need for a teacher arose (R. 75) and Craig was employed (R. 76) although accused's estimate of him had not changed (R. 85). Accused did not believe there was any "animus" between Craig and himself, but he had heard that Craig had been "going around talking, trying to brag" about getting accused's "job" (R. 97).

Accused further testified that when Fuess came to his home in Houston on December 7 accused took him into his bedroom because his desk was there and "it must have seemed to me a good idea to get him away from the ladies while we were talking" (R. 99). After accused had told Fuess that he was to be employed (R. 71) accused remarked, in the course of the conversation, that Fuess "was getting a good break because of his youth and lack of much teaching experience" (R. 99). Accused did not ask Fuess to give him anything of monetary value (R. 73) but recalled,

> "telling him that I didn't..that I did, that is that I did want his cooperation and appreciation but I wanted him to appreciate the size, the magnitude of the job, the importance of the work, but I don't play golf..and I don't recall having told him to give me a set of golf clubs or anything of that sort" (R. 73).

Accused may have told Fuess that he contemplated buying some silverware (R. 85, 86). He did pay $157.11 for silverware about December 16 (R. 86, 91). Accused testified:

> "we started talking and discussing philosophy or ideas about education and many things and some where along the line I felt that Mr. Fuess was becoming a bit angry or was trying to lecture me about what I should or telling me what I should or should not do. First it amused me and then it provoked me because he was a good deal younger than I, because he had not had the experience as a teacher that I.. in fact, not much of any kind of experience because he was so young and so then when he told me something or other about 'I shouldn't talk the way I was', or something like that, I think I sort of lost my head a bit, possibly, and told him that there was a man in San Antonio who definitely was willing to pay a hundred dollars for the, to get that job ***. He asked me something or other about 'Was I trying to bribe him' or something like that and seemed very angry. I was pleased that he would resent the idea of a bribe as I wanted men of good character in the school ***. I was trying in all three interviews that day to feel out the men to find out about them, to see how they thought, to see how they reacted to ideas, how quick they were mentally and what type of character personality they had" (R. 71, 72).

Accused told Fuess he was not trying to "bribe" him (R. 104). In response to a question as to whether accused had in his interviews sought to test Craig and Fuess to determine whether they were of such character that they would be willing to pay for their positions, accused answered, "Very little of that came in with Mr. Fuess". Asked why he did not explain to Craig and Fuess his attempts to determine their character, he answered,

> "Because, if I had, if I cleared myself then, I would not have gained what I was after. At least, that is the way I thought of it, at the time, and I still believe that. I had no idea that these men were taking it quite so seriously what I was attempting to do" (R. 102).

Accused remonstrated with Fuess when the latter three times asked to leave the post under circumstances that required another instructor to

take over his work. Accused also impressed upon Fuess the necessity of permitting the cadets to take reexaminations. On both occasions Fuess showed some resentment (R. 74), but accused did not believe there was any "animus" between them (R. 97).

As to the Jahnke transaction accused testified that no position was available at the time Jahnke first applied. Later, when a position was open, accused several times attempted to reach Jahnke but did not succeed. Subsequently he saw Jahnke in a Mrs. Townsend's office. She told accused that Jahnke had decided not to take the position. Jahnke then explained that if he took the position he could not get leave of absence from the Houston schools and would lose his contract and seniority with the schools. He also said he "didn't want to come in 'riding on anybody's shirt tail, coat tail'". Accused said, "'I don't know what you mean'", to which Jahnke replied, "'I wouldn't come in on friendship only'" (R. 78). Accused did not recall discussing "bonds" with Jahnke. On February 25, having learned that his work was being criticised, accused called Jahnke on the telephone. Jahnke stated that accused had not said anything to him that would cause him to believe he was trying to do anything underhanded or wrong or that he had tried to get money from him (R. 79, 80). At the time of writing the letter of April 15, 1942, accused did not know that Jahnke was involved in an investigation then going on (R. 81). He wrote to him,

> "Because he was the only man to whom a job was offered, that turned it down and I was a little surprised or suspicious about him turning it down" (R. 88).

He asked that the letter be kept confidential because he was "ashamed of the whole thing" and desired to keep the matter quiet (R. 89).

Mr. Jones, proprietor of the Evergreen Drug Store in San Antonio, Texas, testified for the defense that accused had frequently used the drug store for meeting friends (R. 38). During the meeting of December 7 many jocular remarks were made, including remarks about Christmas presents (R. 33). Witness jokingly remarked that he would have to make a charge for use of the store as a conference room. He vaguely recalled that accused remarked to Craig that the prospective teaching position would be a "nice Christmas present for him", that Craig asked accused what he would consider a good Christmas present and that accused said, "'Oh, about a hundred dollars — something like that'" (R. 34, 36). Witness heard only part of the conversation (R. 33, 36). He did not hear a ten-year period discussed (R. 36). Lieutenant Smith testified for the defense that at the drug store "a lot of joking and joshing" occurred (R. 40) and that there was "some vague conversation about Christmas gifts" (R. 39), but that he did

not recall specifically what was said (R. 40). In witness' opinion Lewis and Fuess were better qualified for the instructor positions than Craig, and witness expressed this view to accused. Accused then told witness, or witness got the impression, that accused had decided not to employ Craig (R. 47, 52). Craig was later employed when the need for instructors became great, it appearing that he was the best applicant available at the time (R. 50). Oscar E. Kennedy, an instructor in mathematics at Ellington Field (R. 54), testified that Craig came to witness and asked how much money witness had to pay accused to get his position. Craig addressed the same question to another instructor. He told witness and others that he had written to his brother reporting his dealings with accused for the reason that he was "mad" because accused had not given him the position he wanted (R. 56).

Lieutenant Smith testified, for the defense, that he had observed that,

> "Fuess did not like the ruling that Captain Young made at one time on the matter of taking care of the cadets who had flunked exams. Captain Young and Mr. Fuess differed on that and I know Mr. Fuess was very, as I said, dogmatic in his attitude; although he carried out Captain Young's wishes he obviously didn't like it" (R. 43).

Kennedy testified that on the day prior to the trial Fuess remarked to him, in reference to accused, that Fuess was "going to send the son of a bitch to the penitentiary" (R. 58). Previously Fuess had said "It was a pity that a man up in life like that would do a thing like that" (R. 60).

It was stipulated that prior to the events involved in the charges accused had been a person of "spotless reputation and of the highest possible character and integrity" and that nothing was known to have occurred prior to such events that would "even remotely cast a derogatory reflection upon either his character, his reputation or his good name" (R. 6; Pros. Ex. 3).

5. The evidence thus shows that at the place and time alleged in Specification 1, Charge I, and Specification 1, Charge II, accused made remarks to Mr. N. P. Craig, a civilian then applying to accused for civil employment at Ellington Field, to the effect that accused wished Craig to pay him $100 or more as a "Christmas present" in appreciation of the employment. The remarks amounted to a solicitation, as charged. Accused was acting under color of his office. There is no material conflict in the evidence as to what was said in the course of the proposal. Accused contended that his remarks were made in levity and for the purpose of testing Craig's character and fitness for the position.

This contention was self-serving and, as appears from the findings, the court, after hearing and observing the witnesses, rejected it. The conclusion of the court in this particular must receive great weight for the court was the best judge of the credibility of the witnesses before it. The circumstances, moreover, fully support the conclusion of the court. Accused was a mature man of sufficient intelligence and experience in human relations to understand the natural implications of his words and acts and to be cognizant of the dignity expected of an officer of the Army charged with the responsibilities involved. The solicitation was made with sufficient adroitness to secure Craig's tentative acquiescence. It was made in relative secrecy. There was no attempt by accused to correct Craig's expressed impression of accused's corrupt intent. Not only did accused fail to renounce his abnormal behavior, but later, in the Fuess and Jahnke cases, pursued a similar course. Upon all the evidence the Board of Review is convinced that accused, using his official position to attain his ends, made the solicitation in a serious and deliberate attempt to obtain money in return for his assistance in securing employment for Craig. The attempt to secure money failed, but official corruption nevertheless characterized accused's conduct. Violation of Article of War 95, as well as violation of Article of War 96, was established.

The evidence shows that at the place and time alleged in Specification 2, Charge I, and Specification 2, Charge II, accused likewise solicited the sum of $100 from Carl A. Fuess, Jr., in return for the assistance rendered or to be rendered by accused in securing employment of Fuess by the United States. There is little material conflict in the evidence as to what was said. The approach to this applicant was somewhat different from the approach to Craig, but the implications of accused's words and acts were the same. Fuess rejected the proposal and expressed his indignation at it, but, as with Craig, accused did not attempt to renounce what he had said and done. Although accused contended that his proposal to Fuess was motivated by his desire to test the applicant's character, he conceded that his actions in this case were influenced but slightly by such a motive. In view of the fact that prior to making his proposal for the payment of money he had announced to Fuess that he had selected him for appointment, he could not at the trial effectively contend that in asking for money he was testing the applicant's fitness for the appointment. Again, there can be no reasonable doubt that the solicitation was made by accused in a serious and deliberate attempt to obtain the payment of money in return for his assistance in securing employment for the applicant. Violations of Articles of War 95 and 96 are proved.

With respect to the Additional Charge and Specification accused denied that he made to Henry A. Jahnke any proposal for the payment of money or its equivalent. Jahnke's testimony in this

connection is, however, positive and circumstantial. It shows a solicitation by accused in substantially the pattern of the Craig and Fuess cases. Jahnke had a subsequent conversation with accused in which Jahnke stated that he had declined the position because of his contract with the Houston schools and because he did not want to secure a position through friendship, but, according to Jahnke, accused asked him, in the same conversation, to disregard the previous proposal. There was nothing in Jahnke's remarks or in his failure at this time specifically to raise an issue as to the request for the $100 bond to justify a conclusion that his testimony concerning the original proposal was unworthy of belief. Accused's subsequent request for a statement by Jahnke to the effect that the latter was to be under no personal obligation to accused if he accepted the position, was strongly indicative of accused's knowledge of the proposal for delivery of the bond. On all the evidence the court was fully justified in finding that at the place and time alleged accused solicited and under color of his office attempted to obtain a bond of the value of $100 in return for assistance given or to be given in obtaining employment for the applicant, as charged. Violations of Articles of War 95 and 96 are established.

6. War Department records show that accused is 36 years of age. He attended John Tarleton Agricultural College for two years and Texas Agricultural and Mechanical College for two years. He was appointed a second lieutenant, Infantry Reserve, on May 26, 1928, was promoted to first lieutenant on May 18, 1933, and on June 4, 1937, was promoted to the grade of captain. He entered upon active military duty April 17, 1941.

7. Recommendations that the sentence to dismissal be suspended, signed by the defense counsel, the trial judge advocate and one member of the court, are attached to the record of trial.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 3 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Austin P. Young (0-249552), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. While charged as an officer of the Army with the duty of selecting and recommending civilians for employment by the United States, accused, on three occasions, solicited and attempted to obtain under color of his office sums of money or the equivalent in return for his assistance in obtaining such employment. There are no extenuating or mitigating circumstances. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the attached letter from Mrs. Gracemary Young, wife of accused, to the Commanding General, Gulf Coast Army Air Forces Training Center, Randolph Field, Texas, dated October 2, 1942, requesting clemency. Consideration has also been given to the attached letters to the Secretary of War from Honorable Sam Russell and Honorable Joseph J. Mansfield, House of Representatives, both dated December 3, 1942, in which the writers request clemency.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 21, 6 Mar 1943)

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

SPJGH
CM 226218

DEC 4 1942

UNITED STATES v. Second Lieutenant IVY A. CROMER (0-1041323), Battery C, 354th Coast Artillery, Searchlight Battalion (AA).	SOUTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Pasadena, California, September 19, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA), was, at Manhattan Beach, California on or about August 29, 1942 found drunk while on duty as Battery Communications Officer.

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

Specification 1: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA), was, at Manhattan Beach, California on or about August 29, 1942 drunk in uniform in the presence of his military inferiors.

Specification 2: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA), did at Manhattan Beach, California on or about August 29, 1942 drink intoxicating liquor with an enlisted man, one Private Fred C. Bahr.

Specification 3: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA), did at Manhattan Beach, California on or about August 29, 1942 drink intoxicating liquor with an enlisted man, one T-4 Leroy F. Wittleder.

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

Specification: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA) did at Manhattan Beach, California on or about August 29, 1942 knowingly and willfully apply to his own use and benefit a quarter ton Command Reconnaissance Car, W-2033111 of a value of about $752.50, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA), having been restricted to quarters did at 20:00 o'clock on or about August 29, 1942 break said restriction by entering Collette's Bonded Liquor's at 1014 Manhattan Avenue, Manhattan Beach, Calif.

Specification 2: In that 2nd Lieutenant Ivy A. Cromer, 354th Coast Artillery Searchlight Battalion (AA) did at Manhattan Beach, California on or about August 29, 1942 drive a government vehicle on the public highways while drunk.

ADDITIONAL CHARGE I: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Ivy Albert Cromer, O-1041323, 354th Coast Artillery Searchlight Battalion, having been restricted to the limits of Headquarters Battery area, 354th Coast Artillery Searchlight Battalion, Pacific Military Academy,

Culver City, California, did at Culver City, California, on or about September 5, 1942, break said restriction by going to Culver City, California.

Specification 2: In that Second Lieutenant Ivy Albert Cromer, O-1041323, 354th Coast Artillery Searchlight Battalion, was, at Headquarters Battery area, Pacific Military Academy, Culver City, California, on or about September 12, 1942, drunk and disorderly in uniform, in compromise of his position as an officer and to the prejudice of good order and discipline.

Specification 3: In that Second Lieutenant Ivy Albert Cromer, O-1041323, 354th Coast Artillery Searchlight Battalion, having been restricted to the limits of Headquarters Battery area, 354th Coast Artillery Searchlight Battalion, Pacific Military Academy, Culver City, California, did at Culver City, California, on or about September 13, 1942, break said restriction by going to Culver City and Los Angeles, California.

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

Specification 1: In that Second Lieutenant Ivy Albert Cromer, O-1041323, did, without proper leave, absent himself from Headquarters Battery area, 354th Coast Artillery Searchlight Battalion, Pacific Military Academy, Culver City, California, in which place he was in restriction, from about 0030, September 13, 1942, to about 0630, September 14, 1942.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Specifications, substituting in Specification 1, Charge IV, the figure "1101" for the figure "1014", and excepting in Specification 2, Additional Charge I, the words "and disorderly", and in Specification 3, Additional Charge I, the words, "by going to Culver City and Los Angeles, California"; guilty of Charges I, III, IV, and Additional Charge II; not guilty of Charge II and of Additional Charge I in violation of the 95th Article of War, but guilty of each in violation of the 96th Article of War.

3. The evidence for the prosecution presents a series of closely related events. The accused had been tried on August 22, 1942, by general court-martial and sentenced to be restricted to his "* * * quarters or quarters area" for the period of thirty days. This sentence was approved on August 31, 1942 (Ex. A). Following the trial which resulted in the imposition of the above restriction, the accused returned on August 25, to duty with Battery C, 354th Coast Artillery Searchlight Battalion, and was assigned the duties of battery communications officer with responsibility for the proper upkeep of the battery communication system, including telephones and radios. On that day the accused was informed by his battery commander as follows: "* * * As you know, you are under restriction. When not on duty, you are expected to be in the barracks". The battery commander then outlined the limits of the battery area as follows: The ocean on the west, Loyola University on the north, Western Boulevard on the east, and the extension of 1st Street, Manhattan Beach, on the south (R. 44). Thereafter at about 8:30 p.m. on August 29, 1942, the accused, accompanied by an enlisted man as his driver, drove to a barber shop in Manhattan Beach. The barber shop was closed and the accused started to return to his battalion area. As he passed a liquor store at 1101 Manhattan Avenue the accused stopped the car, entered the store, and purchased a bottle of whiskey. The liquor store was described by the battery commander as a place where the accused was not required to go in the proper performance of his duties, but as a place "* * * inside the limits of his restriction" (R. 8, 9, 42-46).

During the evening of August 29, 1942, the accused approached Technician Leroy F. Wittleder, invited him to have a Coca-Cola with him, and then invited this soldier to his room, where the accused and Wittleder drank whiskey together from a bottle of whiskey supplied by the accused. Lieutenant Wade C. Willey on this occasion was called by the accused and invited to drink with him, but Lieutenant Willey declined. Shortly thereafter Lieutenant Willey entered the room occupied by the accused for the purpose of securing a blanket, and was again invited by the accused to have a drink (R. 10-19, 24-27).

About two hours later Lieutenant Willey observed the accused at Post "1J4" where Sergeant Citek was in charge. The accused was conducting himself in such a drunken manner that Lieutenant Willey, after a conference with Sergeant Bonagura and Technician Wittleder, requested the accused to leave the area and return to his quarters. The accused complied with the request (R. 24-27).

On the same night of August 29-30, 1942, the accused entered the command post of Battery C and there drank part of a bottle of whiskey

with Private Fred C. Bahr who was on duty there at that time (R. 22-23). While he was drinking with Private Bahr, the accused spilled Coca-Cola on the table but made no attempt to wipe it up. At this time the accused gave the definite impression of being drunk (R. 22-27).

During the same evening the accused drove to the searchlight installation where Corporal Charles W. Frederickson and Sergeant Irving Mescon were on duty. The accused was in uniform and remained at the installation for about twenty minutes and was observed by both the soldiers on duty there. From the manner in which he inspected this installation, from the fact that he was not recognized as a searchlight officer, and from the fact that he staggered when he walked, both soldiers concluded that the accused was drunk (R. 28, 29, 36-37). Later, between the hours of 1 and 2 a.m. on August 30th, the accused drove to one of the barracks occupied by the enlisted men of his battalion. The accused entered the building and instructed a soldier to inform anyone who inquired concerning him that the accused was making a communications check and that there were "* * * no liquor and no women". The accused then left the building, got into a Government car, and drove away beyond the limits of the military reservation and up Vista Del Mar highway. There were four or five women in the car with the accused, and his conduct showed that he was under the influence of intoxicating liquor. The car was a Willys $\frac{1}{4}$-ton reconnaissance car of the value of $752.50, and the property of the United States Government. The accused had authority to use the car for official business only (R. 30-35, 43, 44, 61).

Later, at about 4 a.m. on August 30, 1942, the accused entered the command post at Manhattan Beach. The accused was observed to mumble as he attempted to talk, his face was flushed, his breath smelled of liquor, and he gave the impression of being drunk (R. 38-41).

On September 5, 1942, during the period of time in which the accused was restricted to the limits of his battery area, he absented himself from that area by going to Frank's Cafe in Culver City, a distance of about a mile and a quarter beyond the area to which he was restricted (R. 47-49).

During the evening of September 12, 1942, the enlisted men of the organization to which the accused was assigned were having a dance in their recreation room. In addition to the enlisted men, there were a number of women visitors present. The accused entered the hall, walked over to a group of men and women who were standing around a piano, and put his arm around a soldier and the woman standing by him. The soldier observed that the accused was intoxicated, called him aside,

and requested him to leave the building. The accused, however, walked over to a couch where a man and a woman were sitting and attempted to seat himself on the arm of the couch, lost his balance, and fell back and landed on the laps of a soldier and a civilian. When the dance was over the accused attempted to ride in the truck which was assigned to take the ladies to their homes, but was restrained by the enlisted men present. At this time the accused was dressed in uniform and was described as being drunk (R. 51-56).

Thereafter, on the night of September 12-13, 1942, the accused, while under the restriction previously described, attempted to leave the military area to which he was restricted. The accused was, however, prevented from leaving by a guard. This attempt to leave the area was reported and a thorough search made for the accused, but he could not be found. The morning report of Headquarters Battery, 354th Coast Artillery, shows that the accused was absent from 12:30 a.m. of September 13, 1942, to 6:30 a.m. of September 14, 1942 (R. 52-62; Ex. B).

4. No evidence was presented by the defense. The accused elected to remain silent.

5. The Specification, Charge I, alleges that the accused was, at Manhattan Beach, California, on August 29, 1942, "* * * drunk while on duty as Battery Communications Officer". The evidence shows that the accused was drunk on the night of August 29th while making various inspections within the areas assigned to the 354th Coast Artillery Searchlight Battalion. According to his own statement, the accused was on duty that night "making a communication check". The evidence is, therefore, legally sufficient to sustain the findings of guilty under this Specification, in violation of Article of War 85.

6. Specification 1, Charge II, alleges that the accused, was "* * * drunk in uniform in the presence of his military inferiors". The evidence clearly shows that the accused was drunk in uniform in the presence of various enlisted men on the night of August 29-30, 1942. The evidence, therefore, establishes the offense charged.

Specifications 2 and 3, Charge II, allege, respectively, that the accused on August 29, 1942, drank intoxicating liquor with Private Fred C. Bahr and Technician Leroy F. Wittleder. These two Specifications are clearly supported by the evidence showing that the accused drank with the two enlisted men as alleged.

The evidence clearly shows that each of the offenses alleged

under Charge II is a violation of the 96th Article of War.

7. The Specification, Charge III, alleges that the accused did, on August 29, 1942, willfully apply to his own use and benefit a ¼-ton reconnaissance car of the value of $752.50, property of the United States. The evidence shows that the accused had authority to use the reconnaissance car in the performance of his official duties only. On the date alleged, the accused accompanied by four or five women drove the car away from the military post at Manhattan Beach, California, upon the public highway of that state. This wrongful use of a Government automobile constituted a knowing and willful application of the car to his own use, in violation of the 94th Article of War (M.C.M., 1928, par. 150 i).

8. Specification 1, Charge IV, alleges that the accused, on August 29, 1942, broke a restriction imposed upon him by entering Collette's Bonded Liquor's at 1101 Manhattan Beach, California. The evidence shows that the accused entered the store in question, but also shows that the store was within the general area to which the accused was restricted. Because of this latter fact the evidence is legally insufficient to sustain the findings of guilty of this Specification.

Specification 2, Charge IV, alleges that the accused did, on August 29, 1942, drive a Government vehicle on the public highway while drunk. The evidence showing that the accused, while in a drunken condition, drove a Government car along the Vista Del Mar highway near Manhattan Beach, California, clearly sustains this Specification. This offense clearly violated the 96th Article of War.

9. Specification 1, Additional Charge I, alleges that the accused, having been restricted to the limits of Headquarters Battery Area of the 354th Coast Artillery Searchlight Battalion, did, at Culver City, California, on or about September 5, 1942, break this restriction by going to Culver City. This offense is established by proof that the accused on the date alleged entered a cafe in Culver City, a place outside the area to which he was restricted.

Specification 2, Additional Charge I, alleges that the accused, on September 12, 1942, was drunk and disorderly in uniform. The accused was found not guilty of being disorderly, but guilty of being drunk in uniform. The Specification is sustained by the evidence showing that the accused, while in uniform and in a drunken condition, entered the

recreation room where the enlisted men of his organization were conducting a dance at which women and civilians were present.

Specification 3, Additional Charge I, alleges that the accused did, at Culver City, California, on or about September 13, 1942, break a restriction imposed upon him by going into Culver City and Los Angeles, California. The accused was found guilty of the Specification, excepting the words "by going to Culver City and Los Angeles, California". The finding of the court is supported by evidence showing that the accused absented himself without leave from the area of his restriction on September 13, 1942.

The evidence clearly shows that each of the offenses alleged under Additional Charge I violated the 96th Article of War.

10. The Specification, Additional Charge II, alleges that the accused did, without proper leave, absent himself from his battery area from September 13, 1942, to September 14, 1942, in violation of the 61st Article of War. The evidence shows that the accused absented himself without leave from his organization at 12:30 a.m., September 13, 1942, and that he remained absent until 6:30 a.m. on September 14, 1942, in violation of Article of War 61.

11. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service from August 12, 1941; appointed second lieutenant, Army of the United States (from Officer Candidate Division, Antiaircraft Artillery School, Fort Davis, North Carolina), July 10, 1942.

He was convicted by general court-martial of being drunk in a public place and sentenced to be restricted to his quarters or quarters area for 30 days and to be fined $100. This sentence was adjudged on August 22, 1942, and approved August 31, 1942.

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge IV; legally sufficient to support the findings of guilty of all Charges and of all Specifications thereunder other than Specification 1, Charge IV; and legally sufficient to support the sentence,

and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 61st, 94th, or 96th Article of War.

[illegible], Judge Advocate.

Silas B. Isaacson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 226218 1st Ind.

War Department, J.A.G.O., DEC 10 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Ivy A. Cromer (O-1041323), Battery C, 354th Coast Artillery, Searchlight Battalion (AA).

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge IV; legally sufficient to support the findings of guilty of all other Specifications, and of all Charges; and legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the finding of guilty of Specification 1, Charge IV, be disapproved.

3. The findings of guilty of which approval is recommended, show that the accused was absent without leave for approximately one day, in violation of the 61st Article of War; was found drunk while on duty as battery communications officer, in violation of the 85th Article of War; willfully applied to his own use a reconnaissance car, property of the United States, in violation of the 94th Article of War; was drunk in uniform in the presence of military inferiors, drank with enlisted men (two Specifications), drove a Government car on a public highway while drunk, breached a restriction (two Specifications), and was drunk in uniform, all in violation of the 96th Article of War.

The total effect of the above offenses shows a serious breach of military duty and discipline. In view of this fact and of the previous conviction of accused by general court-martial of being drunk in uniform in a public place, I recommend that the sentence of dismissal be confirmed and ordered executed.

4. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action disapproving the finding of guilty of Specification 1, Charge IV, confirming the sentence and directing that the sentence be carried into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Finding of guilty of Specification I, Charge IV, disapproved. Sentence confirmed. G.C.M.O. 7, 18 Feb 1943)

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

SPJGK
CM 226219

NOV 6 1942

UNITED STATES v. Second Lieutenant WILLIAM H. RICKARDS (0-441960), Infantry, Company A, 5th Replacement Battalion.	FIRST SERVICE COMMAND SERVICES OF SUPPLY Trial by G. C. M., convened at Camp Edwards, Massachusetts, September 9 and 23, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification: (Finding of not guilty).

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

Specification 1: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at Camp Edwards, Mass., on or about June 3, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Cash, a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA June 3, 1942 NO. 64-47
THE FIRST NATIONAL BANK & TRUST COMPANY
IN MACON
PAY TO THE
ORDER OF Cash $25 xx/100
Twenty-five & no/100-------Dollars
/s/ William H. Rickards
2nd Lt., Inf. A.U.S."

and by means thereof, did fraudulently obtain from V. H. Wing, twenty-five ($25.00) dollars, he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

Specification 2: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at Camp Edwards, Mass., on or about June 6, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Camp Edwards Exchange, a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA June 6, 1942 NO._____
THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON
PAY TO THE
ORDER OF Camp Edwards Exchange $30.50/100
Thirty & 50/100----------Dollars
/s/ William H. Rickards,
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Camp Edwards Exchange, thirty dollars and fifty cents ($30.50), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

Specification 3: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at Camp Edwards, Mass., on or about June 16, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Camp Edwards Exchange, a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA June 16, 1942 NO._____
THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON
PAY TO THE
ORDER OF Camp Edwards Exchange $25 xx/100
Twenty-five & no/100----------Dollars
/s/ William H. Rickards
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Camp Edwards Exchange, twenty-five dollars ($25.00), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

Specification 4: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at Camp Edwards, Mass., on or about June 19, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Camp Edwards Exchange, a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA June 19, 1942 NO._____
THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON
PAY TO THE
ORDER OF Camp Edwards Exchange $40 xx/100
Forty & no/100----------Dollars
/s/ William H. Rickards
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Camp Edwards Exchange, forty dollars ($40.00), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

Specification 5: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at Camp Edwards, Mass., on or about June 22, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Cash, a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA June 22, 1942 NO._____
THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON
PAY TO THE
ORDER OF Cash $30 xx/
Thirty & no/100----------Dollars
/s/ William H. Rickards
2nd Lt. Inf. A.U.S."

in payment of taxicab fare to Alton P. Hamblin, in the amount of thirty dollars ($30.00), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

Specification 6: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at Camp Edwards, Mass., on or about June 23, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Camp Edwards Exchange, a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA June 23, 1942 NO._____
THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON
PAY TO THE
ORDER OF Camp Edwards Exchange $10 xx/100
Ten & no/100----------Dollars
/s/ William H. Rickards
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Camp Edwards Exchange, ten dollars ($10.00), he,

the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

Specification 7: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at New Bedford, Mass., on or about July 7, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Cash a certain check, in words and figures as follows, to wit:

"July 7, 1942
The First National Bank & Trust Co.
Macon, Ga.

Pay to the
order of Cash $50 xx/100
Fifty & no/100----------Dollars
/s/ William H. Rickards,
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Cherry & Company, fifty dollars ($50.00), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company, of Macon, Georgia, for the payment of said check.

Specification 8: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at New Bedford, Mass., on or about July 9, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Cash, a certain check, in words and figures as follows, to wit:

"The ~~Merchants~~ First National Bank 53-68
Macon, Georgia July 9, 1942 NUMBER
~~New Bedford, Mass.~~

PAY TO THE
ORDER OF Cash $75 xx/100
Seventy-five & no/100---Dollars
/s/William H. Rickards
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Cherry & Company, seventy-five dollars ($75.00), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, of Macon, Georgia, for the payment of said check.

Specification 9: In that 2d Lieutenant William H. Rickards, Infantry, Company A, 5th Replacement Battalion, did, at New Bedford, Mass., on or about July 20, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Olympia Jewelry Co. a certain check, in words and figures as follows, to wit:

"MACON, GEORGIA July 20, 1942 NO._____
THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON

PAY TO THE
ORDER OF Olympia Jewler's $15 xx/100
Fifteen & no/100----------Dollars
/s/ William H. Rickards
2nd Lt. Inf. A.U.S."

and by means thereof, did fraudulently obtain from Olympia Jewelry Company, fifteen dollars ($15.00), he, the said 2d Lieutenant William H. Rickards, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank & Trust Company in Macon, of Macon, Georgia, for the payment of said check.

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

3. Following the arraignment the defense counsel stated that he had observed mental peculiarities in accused, requested that the court initiate a recommendation for an inquiry into accused's mental condition, and requested an adjournment pending the inquiry. The court thereupon adjourned on September 9, 1942 (R. 13). The court reconvened on September 23, 1942, whereupon the pleas to the general issue were entered. No special plea was made. During the course of the trial evidence concerning the mental condition of accused was introduced, as appears below.

4. It was stipulated in court that the nine checks set forth in the Specification, Charge II, were signed by accused, that accused received value in cash for each of the checks in the amount thereof except for the check described in Specification 5 for which accused received value in taxicab hire, and that each check was returned from the bank on which drawn because of "No Funds" (R. 27, 28). The evidence shows that eight of the checks were drawn on The First National Bank & Trust Company in Macon, Georgia, and the other (Specification 8) was drawn on the "First National Bank, Macon, Georgia". The checks were received in evidence (R. 28). The dates, amounts, payees and purported first indorsers were as follows:

Date	Amount	Payee	Purported first indorser	Spec.
1942				
June 3	$25.00	Cash	Veott H. Wing	1
June 6	30.50	Camp Edwards Exchange	Camp Edwards Exchange	2
June 16	25.00	Camp Edwards Exchange	Camp Edwards Exchange	3
June 19	40.00	Camp Edwards Exchange	Camp Edwards Exchange	4
June 22	30.00	Cash	Alton P. Hamblin	5
June 23	10.00	Camp Edwards Exchange	Camp Edwards Exchange	6
July 7	50.00	Cash	Cherry & Co., Inc.	7
July 9	75.00	Cash	Cherry & Co., Inc.	8
July 20	15.00	Olympia Jewler	Olympia Jewelry Co. (Ex. B-J).	9

Up to May 19, 1942, accused had had a checking account with The First National Bank & Trust Company in Macon, Georgia, but on that date he had "personally closed" the account by withdrawing all funds on deposit therein. No deposit was thereafter made to his credit in that bank. The cashier testified that the records of the bank did not show the receipt of any inquiry by accused relative to any deposit which he "may have mailed" to the bank after May 19. (Ex. K)

About July 9, 1942 (R. 31), after Article of War 24 had been called to his attention and after he had been warned that he was not required to say anything but that whatever he said might be used against him, accused made a written statement to the effect, among other things, that on about June 2, 1942, he paid about $275.21 to a man in Georgia following a complaint that accused had recently unlawfully driven a rented automobile from Georgia to Camp Edwards, Massachusetts, and that of this amount accused had borrowed $95 from other officers. Accused stated that when he left Georgia he believed that he had about $66 on deposit with The First National Bank & Trust Company in Macon, and that thereafter he "sent the bank a deposit of $100.00 cash to be applied to my account, which I understand they never received". Believing he had sufficient funds on deposit to pay them he drew a number of checks on this bank. Some of the checks he cashed at the Camp Edwards Exchange. About June 22, following a complaint by the exchange officer that the checks had been dishonored, accused drew a partial payment of $180.80 and paid the "checks outstanding". Thereafter he gave a check for $30 to a taxicab driver to cover the cost of a trip from Camp Edwards to New Bedford, Massachusetts. Accused did not recall whether, at this time, he knew his balance was insufficient to cover the check. He wrote three additional checks knowing that he had no funds in bank to pay them, but "expected to make a deposit in time to meet the payments". After arrival at Camp Edwards he purchased a used automobile. Accused also stated that he was married and had one child, that a divorce suit was pending, and that he intended to marry a certain woman named after he had obtained his divorce. (Ex. L)

About July 10, 1942, after having been warned that he need not say anything and that what he said might be used against him, accused made a second written statement (R. 46) to the effect that when he left Camp Wheeler, Georgia, on May 20, 1942, en route to Camp Edwards, he had approximately $68. He sent the $100 deposit to the bank on May 30 by special delivery letter. He wrote five checks "for the Camp Edwards, Mass Exchange", three for $30, one for $25 and one for $40, without

knowledge that he did not have sufficient funds in bank to pay them. He wrote three or more additional checks knowing he did not have funds in bank to pay them. One of these checks was for $15, payable to the Olympia Jewelry Company of New Bedford, Massachusetts. Two checks for $17.25 and $25, respectively, were presented to "Charlie Wing", a service station "man just outside of Camp Edwards". Other checks were made for $5 and $15. He paid current bills incurred after arrival at Camp Edwards, including bills incident to purchase of the car, aggregating about $283.17. He repeated his statement concerning his marriage, stated that he had two children (rather than one) and said that he had intended to remarry. (Ex. M)

Accused made an unsworn statement, as will hereinafter appear, but it contained nothing bearing upon the making or uttering of the checks described above. No evidence relating to the making or negotiation of the checks was introduced by the defense.

5. The uncontradicted evidence, including the statements made by accused prior to the trial, thus shows that at or near the places alleged and at about the times alleged in Specifications 1 to 7, inclusive, and in Specification 9, Charge II, accused made and uttered the checks described in these Specifications and thereby obtained the amounts of the checks in cash or in services. Accused did not have an account with the drawee bank at the time he made and cashed the checks. He stated, in substance, that he believed he had funds on deposit sufficient to meet certain of the checks and intended to make deposits to cover the others, but the court was fully justified in rejecting this statement as untrue. Accused had closed his account on the day before he departed from Georgia. It is not apparent how it would have been possible for him to make deposits, for his admitted expenditures during the period were in excess of his known resources. The bank did not receive any communication from accused concerning his asserted deposit by mail. Upon all the evidence the Board of Review has no doubt that accused made the checks described in Specifications 1 to 7, inclusive, and in Specification 9, with full knowledge that they were worthless and without any intention to have sufficient funds in bank to pay them, and that he intended to defraud in each case. His fraudulent acts were violative of Article of War 95.

As to Specifications 2, 3, 4 and 6, Charge II, the statements by accused sufficiently show that the checks described therein were uttered

to the Camp Edwards exchange and that the exchange was defrauded thereby, as charged. Specification 1, Charge II, alleges a fraud upon "V. H. Wing" and the check described in that Specification bears the purported indorsement of "Veott H. Wing". Accused stated that he had given checks to "Charlie Wing". It does not appear that V. H. Wing was the identical person referred to as Charlie Wing. The evidence does not in any way establish the identity of the persons to whom the checks described in Specifications 5, 7 and 9, Charge II, were uttered or the identity of the persons from whom the proceeds of the checks were fraudulently obtained. The genuineness of the indorsements on the various checks was not proved. Inasmuch as the gravamen of the offenses in question lay in the making, uttering and cashing of the particular checks with fraudulent intent, all of which is proved, the variance with respect to Specification 1, and the failure with respect to Specifications 5, 7 and 9, to establish the identity of the persons defrauded, is not fatal to the conviction in any case. There can be no question as to the identity of the offenses and the proof is such that the record of trial would support pleas of former jeopardy should accused be again charged with offenses involved in the making and uttering of the checks.

As to Specification 8, Charge II, the evidence sufficiently shows the making and cashing of the check described, drawn on the "First National Bank, Macon, Georgia". This check was returned unpaid, but there is no proof as to the nonexistence or condition of any account with that bank in the name of accused. The mere dishonor of a check is not sufficient to prove dishonorable or discreditable conduct by the maker (sec. 454 (66), Dig. Op. J.A.G., 1912-1940). The evidence is legally insufficient to support the finding of guilty of this Specification.

6. There was received in evidence a copy of a report of a board of three medical officers convened at Lovell General Hospital, Fort Devens, Massachusetts, for examination of accused. The report of the board, dated July 25, 1942, states that accused was admitted to the hospital on July 14, 1942. It recites a history and analysis of accused's mental status as follows:

> "He always had a sense of inferiority, and always attempted to bolster his inadequacies by telling lies and spending more money than he had. He was

> constantly overdrawing his checking account, and according to a Red Cross investigation he signed his father's name to many checks. However, a charge of forgery was never made because his father always honored the checks. His inability to adjust was such a problem to the family that he was taken to a psychiatrist. However, psychotherapy could effect no change in his personality. He never attempted to obtain a job. He was content to be supported by his father and worked as a clerk in his office for $20 per week. He married after five months of courtship, and at present has a child.
>
> * * * * *
>
> "The patient has been quiet and co-operative ever since admission to the ward. There never was any evidence of bizarre behavior and he did not appear to be activated by hallucinations. He spoke relevantly, coherently, and to the point. He was always completely at ease, even when confronted by definite proof that he had lied. His mood has been slightly euphoric. He never gave any evidence of being depressed by the situation. He denied delusions and hallucinations. He accounted for his behavior by stating that he had always felt inadequate and his lying and excessive expenditure of money made him feel superior. He showed little concern in the situation in which he found himself".

The board returned a diagnosis of "Constitutional Psychopathic State, inadequate personality and pathological lying". It also found that accused was sane and legally responsible for his acts. (Ex. N)

At the trial accused made an unsworn statement, through defense counsel, to the effect that he is 27 years of age and that he is married and has a child one year and three months old. He was surprised when his wife applied for a divorce. He suffered protracted illnesses when about 1½ and when about 3 years of age and on two occasions, between the ages of 7 and 9 years, he received accidental head injuries. At the age of about 13 years he received other severe blows on his head. He has suffered from headaches since childhood and in 1935 had his tonsils removed on account of the headaches and other pains and physical difficulties (R. 49, 50).

The trial judge advocate testified as a witness for the defense that on one occasion he entered the quarters of accused at Camp Edwards and found the room in "complete disorder", with articles of clothing, towels and other effects scattered about the floor. Witness had not observed any other unusual behavior by accused (R. 52, 53). There was received in evidence, in behalf of accused, a telegram from the father of accused, stating that accused had suffered a protracted illness when 3 years of age and had been hospitalized, following accidents, at the ages of 9 and 12 years (Ex. O).

It was stipulated (R. 51) that if Dr. Abraham Myerson, Clinical Professor of Psychiatry of the Harvard Medical School, Director of Research of the Boston, Massachusetts State Hospital and an official of various psychiatric research associations, were present he would testify in accordance with a letter signed by him and received in evidence in behalf of accused. By the letter Dr. Myerson stated that he had made an examination of accused on September 11, 1942, and had formed the opinion that accused "has a Constitutional Psychopathic Inferiority", not "classed with the formal insanities, although it is classed with the mental diseases and disorders". He expressed the view that accused's misconduct was "due to this mental disorder" (Ex. P).

7. There is nothing in the report of the board of medical officers or in the statement by Dr. Myerson to indicate that accused was insane at the time of the commission of his acts or at the time of trial or that he was not legally responsible for his acts. The board and Dr. Myerson agreed that accused is a constitutional psychopath.

8. Six of the seven members of the court and the personnel for the prosecution and the defense joined in a "Petition for Clemency", suggesting the elimination of accused from the service "without disgrace of dismissal". The suggestion was based upon the relatively short time accused had been on active duty and upon his "mental condition and habits of irresponsibility" existent upon his entrance on active duty.

9. War Department records show that accused is 25 years of age. He graduated from high school and from the Tennessee Military Institute. He was commissioned a second lieutenant in the Army of the United States about March 16, 1942, and was ordered to active duty on April 14, 1942.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the

trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge II and Specifications 1 to 7, inclusive, and Specification 9 thereunder, legally insufficient to support the finding of guilty of Specification 8, Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 28 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William H. Rickards (0-441960), Infantry, Company A, 5th Replacement Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 to 7, inclusive, and Specification 9, Charge II, legally insufficient to support the finding of guilty of Specification 8, Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. Accused made and negotiated a series of worthless checks, fraudulently obtaining the proceeds thereof. The record of trial indicates that he is a constitutional psychopath with "inadequate personality and pathological lying". He is, however, sane and legally responsible for his acts. Six of the seven members of the court recommended elimination from the service otherwise than by dismissal. In view of the serious nature of the offenses I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to an attached communication from the Office of the Secretary of State, dated October 23, 1942, addressed to The Adjutant General, together with a letter from accused, dated October 21, 1942, addressed to the Secretary of State, and to the attached letter from Honorable Claude Pepper, United States Senate, to the Special Assistant to the Under Secretary of War, Mr. Howard C. Petersen, dated November 24, 1942, inclosing a communication from accused, dated November 16, 1942.

4. Consideration has also been given to a letter to the Board of Review, dated November 7, 1942, attached hereto, in which accused requested permission to appear in person before the Board of Review in connection with the case. As appears from the accompanying indorsements accused was advised on November 16, 1942, that upon receipt of a statement by him as to the matter he wished to present orally, further consideration would be given to his request. No additional communication from accused has been received.

5. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to disapprove the finding of guilty of Specification 8, Charge II, to confirm the sentence and to carry it into execution, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

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

SPJGH
CM 226240

NOV 24 1942

N.D

UNITED STATES v. Second Lieutenant IRVING T. SPARLING (0-311086), Quartermaster Corps.	THIRD SERVICE COMMAND Trial by G.C.M., convened at Fort George G. Meade, Maryland, September 3, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE I: Violation of the 84th Article of War. (Finding of guilty disapproved by the reviewing authority).

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

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

Specification 1: In that Second Lieutenant Irving T. Sparling, Q.M.C., Quartermaster Section, 1322nd Service Unit, was, at Laurel, Maryland, on or about June 6, 1942, in a public place, to wit, a public street, drunk and disorderly in uniform.

Specification 2: (Not guilty).

Specification 3: In that Second Lieutenant Irving T.

Sparling, Q.M.C., Quartermaster Section, 1322nd Service Unit, was, at Laurel Road, Maryland, about 4 miles southeast of Laurel, Maryland, on or about July 25, 1942, in a public place, to wit, a public road, drunk and disorderly.

Specification 4: In that Second Lieutenant Irving T. Sparling, Q.M.C., Quartermaster Section, 1322nd Service Unit, did, at Laurel Road, Maryland, on or about July 25, 1942, without authority, appear in civilian clothing.

The accused pleaded not guilty to all Specifications and all Charges. He was found guilty of the Specification, Charge I; not guilty of Charge I, in violation of the 84th Article of War, but guilty in violation of the 83rd Article of War; not guilty of Specification 2, Charge II; and guilty of Specifications 1, 3, and 4, Charge II, and of Charge II. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of the Specification, Charge I, and of Charge I, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution upon the Specifications of which the findings of guilty were approved is substantially as follows:

a. Specification 1, Charge II: At about one o'clock the morning of June 6, 1942, Corporal Edwin D. Pauls, Military Police Detachment, 1322nd Service Unit, on patrol duty in Laurel, Maryland, saw an officer in uniform, whom he later identified as accused, staggering down the street, supported by one of two soldiers who were with him. The accused broke away from the soldier, touched the back of Staff Sergeant Walter P. Evans, Military Police Section, 1322nd Service Unit, commander of a patrol, and asked him to take care of a "small staff sergeant just in the rear". The accused had a strong odor of liquor about him and his speech was incoherent. The accused crossed the main street toward the hotel, then went to the liquor store but found the store closed, then went to Fox's Tavern, and back to the liquor store. When a soldier refused his invitation to go with him for a drink, the accused said "To Hell with you; I will go for one myself". When accused started to cross the street into the path of a rapidly moving truck a soldier jumped out and pulled him back to the curb. Accused then crossed the street and entered Fox's Tavern. When he was unable to buy a drink, accused pushed a bill in front of a soldier and asked the soldier to buy

a drink for him. The soldier moved away and the accused walked wobbly and still staggering up the street (R. 49-59, 67-75).

Carl Weaver, a Laurel policeman, saw the accused sometime between midnight and 2 a.m. at the taxi stand on the main street in Laurel. Accused was weaving and staggering as he was walking. He observed accused for about ten minutes. Accused was talking rather loud. Weaver told accused that he would have to quiet down as the people who lived over the drug store wanted to sleep. Although accused quieted down slightly, Weaver spoke to him again and accused then said that he was going to take a cab and leave (R. 59-64).

In his statement to the investigating officer, the accused stated that he recalled no drunkenness or disorderly conduct in Laurel on June 6, 1942 (R. 104, Ex. G).

b. Specifications 3 and 4, Charge II: On the night of July 25, 1942, William E. Shipley was driving a bus from Laurel to Fort Meade. After he had passed Long Hill he stopped the bus when a man in the road held up his hand. There was a Chevrolet coupe, Maryland license number 199-481, and Fort Meade number 1391, facing toward Laurel on the left side of the road with its left wheels in the ditch. Shipley and several soldiers got out of the bus. A man and a woman were in the car. The woman was sitting in behind the driver's wheel, crying, and holding her torn dress up to her face. Her pink slip was partly exposed. The man, who was later identified as the accused, was not in a military uniform but was dressed in a dark brown suit and a flannel shirt. His face was "scratched up" and bleeding, his hair was "all messed", and he was sweating. The accused told Shipley to "get the Hell away from here" and said he would have Shipley arrested. When Shipley asked the woman what was wrong, she said nothing and acted "like she was scared to death" (R. 76-82, 86).

One of the soldiers who got out of the bus was Private John G. Strigler of the military police. When he asked the woman if she wanted to come along in the bus, it seemed "as though she was" until the accused told her she had better stay there or she would get into trouble. The accused gave her the keys to the car, told her she could drive, that he would behave, and that they would go back. The accused told Strigler that he was an officer, showed Strigler an officer's cap, and told Strigler to get away or he would turn them in (R. 84-86, 97).

Shipley testified that accused had his hands on the fender and radiator when he walked around the car, that "he looked like he had something to drink, but he was not drunk, wasn't all the way drunk,

about half drunk" and that his breath smelled of whiskey. Private Strigler did not smell the breath of the accused. No other witness offered any testimony bearing upon the question whether accused was drunk or disorderly. When the woman said "I think he will behave", the driver and the soldier returned to the bus and the bus continued toward Fort Meade. Upon redirect examination, Strigler testified that as the bus was approaching the car, the man was putting the woman in the car on the left hand side (R. 78-79, 86, 99-100).

The prosecution introduced in evidence a copy of Circular 28, War Department, January 30, 1942, requiring that officers wear their uniforms at all times when out of the house except when engaged in exercise (R. 75; Ex. F).

With respect to Specification 4, Charge II, the accused in his statement to the investigating officer, stated that he put on civilian clothes before leaving his quarters at Fort Meade for his home in Laurel because as a result of an altercation with his wife he felt that further trouble was almost certain and did not want to be in uniform if any disturbance arose while en route in his car to his home in Laurel (R. 106; Ex. G).

With respect to Specification 3, Charge II, the accused made a long statement to the investigating officer. After the club dance on July 25th, accused invited another officer to come to his quarters and have a drink with accused and his wife. After changing his clothes in the bathroom, he found this officer just ready to kiss his wife. Accused then lay down on his bed and pretended to be drunker than he was, and his wife and the officer left. Accused later saw his wife and the officer coming from the building in which the officer was quartered. A fight resulted, in which accused was knocked down. After starting for Laurel with his wife, she abused him and hit him on the face. The accused stopped the car, his wife pretended that she was going to faint, and he grabbed her by the front of the dress and tore it. He told his wife they had gone far enough and he was going to put a bullet in his head. He left the car, went back some distance, and fired a shot into the ground. When they entered the car, which was parked on the wrong side of the road, his wife was about to drive. A bus came along. Some people got out of the bus and one broke a window in the car in attempting to strike accused. After his wife got them to leave him alone, saying that he was only a little drunk and had quieted down, accused and his wife proceeded to their home (R. 106; Ex. G).

4. Motion of defense to dismiss Charge I and Specifications 1 and 2, Charge II, was properly denied (R. 110).

5. The testimony of defense witnesses is substantially as follows:

Colonel Ralph Hutckins, Quartermaster Corps, 1343rd Service Unit, had known accused for about eighteen months, and accused had worked under him. The accused accomplished all the work desired of him courteously, directly, and without regard to office hours (R.111-112).

Charles W. Haas, manager of the telephone equipment, Fort Meade, left Fort Meade on July 25th at about 10:45 p.m. for Laurel. After seeing a taxi stop, he stopped and saw a car facing Laurel on the left side of the road with the left front wheel in a small ditch. The taxi driver stopped a bus coming from Laurel. Haas walked to the left side of the car, a coupe, and found a lady in the driver's seat, and a gentleman in civilian clothes. The lady looked a bit disheveled, as though her hair had been blown by the wind. He saw nothing wrong with her dress. He asked the woman if he could take her into Laurel, but she replied, "No, I will be all right if he will behave himself". The man in the car stated to a soldier from the bus that he was an officer and asked the soldier's name. He could not say whether the man and woman were drunk or sober. They both acted in a very normal manner, although the man had very little to say (R. 113-120).

Major George Robertie, Quartermaster Corps, 1322nd Service Unit, testified that he had known accused about six months, that accused handled his job to the satisfaction of everyone concerned without regard to hours (R. 120-124).

Captain Cloye E. Boner, Quartermaster Corps, 1322nd Service Unit, testified that accused had worked directly under him for six months, that he was efficient, energetic, and attentive to his duties. Accused came to work once an hour late with a "hangover" (R. 124-128).

6. The accused was warned of his rights as a witness, but the record contains no response from accused (R. 110-111). The accused neither testified, made an unsworn statement, nor stated that he elected to remain silent.

7. Specification 1, Charge II, alleges that accused was drunk and disorderly in uniform on a public street in Laurel, Maryland, on June 6, 1942.

The evidence shows that accused, in uniform, staggered down a street in Laurel supported by a soldier. He had a strong odor of liquor around him and his speech was incoherent. He crossed the street

to the hotel, went to the liquor store and to a tavern, invited a soldier to go for a drink with him, but was unable to buy one. He staggered into the street into the path of a truck, but was pulled out of danger by a soldier. A Laurel policeman observed accused for about ten minutes, weaving and staggering. Accused was talking rather loud and the policeman told him he would have to quiet down so that people could sleep. Although accused quieted down slightly, the policeman spoke to accused a second time, after which accused stated he would take a cab and leave. The accused was clearly drunk and was slightly disorderly. The record sustains the finding of guilty of Specification 1, Charge II.

8. Specification 3, Charge II, alleges that accused was drunk and disorderly on a public road near Laurel on July 25, 1942, and Specification 4, that he appeared there without authority in civilian clothes.

The accused and a woman were sitting in a coupe, halted on the left side of the road with the left wheels in a ditch. When a taxi, a public bus, and a private car stopped there, the woman was sitting behind the wheel crying and holding her torn dress up to her face. The man, who was later identified as the accused, was dressed in a dark brown suit and a flannel shirt. His face was scratched and bleeding and his hair was "messed up". The accused told the bus driver to "get the Hell away from here" or accused would have him arrested. The woman at first acted scared, but later declined an invitation to ride in the bus and said that she thought the accused would behave.

The bus driver, the only witness who testified as to the sobriety of accused, stated that the accused had his hands on the fender and radiator when he was walking around the car, and that "he looked like he had something to drink, but he was not drunk, wasn't all the way drunk, about half drunk".

In his statement to the investigating officer the accused admitted with respect to Specification 4, that he was dressed in civilian clothes because, as the result of an altercation with his wife, he had changed into civilian clothes in order that he might not be in uniform if any disturbance arose while en route in his car to their home in Laurel. With respect to Specification 3, the accused therein stated that his wife appeared to be having an affair with another officer that evening, out of which a fight ensued at the post, in which that officer knocked the accused down. On the way to Laurel

his wife abused accused and hit him in the face. He stopped the car, his wife pretended to faint, and he grabbed her by the front of her dress and tore it. Accused stated that he was going to put a bullet in his head, left the car, went back some distance, and fired a shot into the ground. He returned to the car, some people from a bus which came along and stopped, broke the window in attempting to strike him. After his wife got them to leave him alone, accused and his wife proceeded home.

For the defense, three witnesses testified to the efficiency and zeal of accused in the performance of his duties. One witness stated that he saw nothing wrong with the dress of the woman with accused; that the woman told him that she would be all right if accused would behave himself, and needed no assistance; that he could not say whether the accused and the woman were drunk or sober; and that both acted in a very normal manner, although the man had very little to say.

In the opinion of the Board of Review the evidence does not establish that the accused was drunk, but does upon his own admission as to firing a revolver while on the public road, and upon his statement that he grabbed the front of and tore the dress of his wife, and the proof as to the condition of the dress, establish that the accused was disorderly. The evidence also establishes that the accused, without authority, appeared in civilian clothes in a public place.

9. The Board of Review has given careful consideration to a letter in behalf of accused from Senator Alexander Wiley, and to a letter of Senator C. Wayland Brooks, addressed to The Judge Advocate General.

10. The accused is 43 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service from April 17, 1917 to May 23, 1919; appointed second lieutenant, Quartermaster Corps-Reserve, July 21, 1933; active duty C.C.C., June 15, 1935 to January 15, 1936; reappointed July 21, 1938; extended active duty, February 23, 1942.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 3, Charge II, as involves a finding that accused was

guilty of being disorderly at the time, place, and under the circumstances alleged; legally sufficient to support the findings of guilty of Specifications 1 and 4, Charge II, and of Charge II; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 226240 1st Ind.

War Department, J.A.G.O., NOV 28 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Irving T. Sparling (0-311086), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record is legally sufficient to support only so much of the finding of guilty of Specification 3, Charge II, as involves a finding that the accused was guilty of being disorderly at the time, place, and under the circumstances alleged; legally sufficient to support the findings of guilty of Specifications 1 and 4, Charge II, and of Charge II; legally sufficient to support the sentence and to warrant confirmation of the sentence.

The accused was drunk and slightly disorderly in uniform on a public street in Laurel, Maryland, and was moderately disorderly while in civilian clothes upon a public road near Laurel. I recommend that only so much of the finding of guilty of Specification 3, Charge II, be approved as involves a finding that accused was guilty of being disorderly at the time, place, and under the circumstances alleged, and that the sentence be confirmed, but in view of all the circumstances and of his apparent efficiency and zeal in the performance of his duties, that the execution of the sentence to dismissal be suspended during the pleasure of the President.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Only so much of finding of guilty of Specification 3, Charge II, approved as involves finding that accused was guilty of being disorderly at time, place, and under circumstances alleged. Sentence confirmed but execution suspended. G.C.M.O. 27, 8 Mar 1943)

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

(51)

SPJGK
CM 226247

OCT 16 1942

UNITED STATES	3RD AIR FORCE
v.	Trial by G. C. M., convened at MacDill Field, Florida, September 30, 1942. Dismissal.
Second Lieutenant CHARLES R. LEAVITT (0-1101545), 838th Engineer Battalion (Aviation).	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Charles R. Leavitt, Second Lieutenant, 838th Engineer Battalion, did, at Tampa, Florida, on or about September 8, 1942, engage in lewd and lascivious behavior with another male person, to-wit, a sailor, Charles A. Morris, Jr., U. S. Maritime Service, in a room in the Hillsborough Hotel.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The meaning of the pleas of guilty was explained to accused and he reaffirmed his pleas. No evidence was introduced. Accused remained silent. The Specification alleges acts violative of Article of War 95.

4. War Department records show that accused is 28 years of age. He graduated from the University of Maine in 1939 with the degree of Bachelor of Science. He served as an enlisted man from March 14, 1941, to July 8, 1942, on which latter date, upon completion of a course of instruction at an officers' candidate school, he was commissioned a second lieutenant, Army of the United States.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 22 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles R. Leavitt (O-1101545), 838th Engineer Battalion (Aviation).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Accused pleaded guilty to and was found guilty of engaging in lewd and lascivious conduct with a male person named. No evidence was introduced at the trial, but the report of investigation accompanying the charges shows that accused entered a hotel room with a man with whom he had been drinking and there embraced and kissed the man and fondled his penis. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 111, 26 Nov 1942)

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

SPJGK
CM 226261

NOV 3 1942

SEVENTH SERVICE COMMAND
SERVICES OF SUPPLY.

UNITED STATES v. Private HERBERT C. WILCOX (36041068), Ordnance Motor Transportation School Detachment (W), Fort Crook, Nebraska.	Trial by G. C. M., convened at Fort Crook, Nebraska, September 18, 1942. Dishonorable discharge (suspended) and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Herbert C. Wilcox, Ordnance Motor Transportation School Detachment (W), Fort Crook, Nebraska, did, at Fort Crook, Nebraska, on or about August 21, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Omaha, Nebraska, on or about September 3, 1942.

He pleaded guilty to the Specification, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty, and not guilty to the Charge but guilty of violation of Article of War 61. He was found guilty of the Charge and Specification. Evidence of four previous convictions

for absences without leave, one by general court-martial, one by special court-martial and two by summary courts-martial, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, remitted three and one-half years of the confinement imposed, directed execution of the sentence as thus modified but suspended execution of the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 486, Headquarters Seventh Service Command, September 29, 1942.

3. The evidence shows that accused absented himself without leave from his organization at Fort Crook, Nebraska, about August 21, 1942 (Ex. I), and remained absent until apprehended by military police in Omaha, Nebraska, about September 3, 1942. When apprehended he was wearing a complete khaki uniform and had in his possession a "billfold, fingernail file, dog tags, and an Omaha street car token" (R. 5). Accused did not testify or make an unsworn statement.

4. The proof thus establishes absence without leave by accused for thirteen days, terminated by apprehension in the immediate vicinity of his post. No circumstances indicative of an intention to desert, such as dissatisfaction by the soldier with his station or with the service, are shown. Accused was in full uniform, with his identification tags in his possession, when taken into custody. The Board of Review finds nothing in the absence of thirteen days to justify a reasonable inference of an intention by accused not to return to the service.

The following remarks by the Board of Review in the Fairchild case (CM 213817) may be repeated as applicable to the probative effect of the relatively short absence by accused in the present case:

> "The Manual for Courts-Martial states that -
>
> > 'If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent. * * *.' (Par 130a, M.C.M.)

> Determination of the question as to whether an absence is 'much prolonged' or satisfactorily explained, within the meaning of the quoted clause, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied. The absence must be so prolonged that, considered in the light of proved causes and motives or in the light of a lack of rational explanation, it leads in sound reason to a conclusion that the soldier did not intend to return. The absence in the instant case, so considered, is not of such duration as to justify an inference of intent not to return."

See also cases cited in the opinion in the Fairchild case (CM 213817), in which it has been held that absences for short periods do not alone establish desertion. In time of war, dependent on the circumstances immediately connected with the absence, absence without leave for a relatively short period may have strong probative force in proof of an intention to desert. Mere absence in time of war, unattended by other incriminating circumstances, cannot in reason be given greater probative force than is given to such absence in time of peace.

The failure of a soldier who is absent without leave to surrender while near a military post may, under some circumstances, indicate an intention not to return (par. 130a, M.C.M.), but mere failure to surrender during the course of a short period of absence, standing alone, is only an element of the continuing absence and furnishes no substantial basis for an inference of intention to desert (CM 213817, Fairchild).

The record of trial is legally sufficient to support only so much of the findings of guilty as involves absence without leave between the dates alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves the punishment authorized by paragraph 104c of the Manual for Courts-Martial for that offense.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of absence without leave from August 21, 1942, to

September 3, 1942, in violation of Article of War 61; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for 39 days and forfeiture of two-thirds pay ($33.33) per month for a like period.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV - 9 1942 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Herbert C. Wilcox (36041068), Ordnance Motor Transportation School Detachment (W), Fort Crook, Nebraska.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of the Charge and Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave, at the place and time alleged, terminated by apprehension, at the place and time alleged, in violation of Article of War 61, that so much of the sentence be vacated as is in excess of confinement at hard labor for 39 days and forfeiture of two-thirds pay ($33.33) per month for a like period, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(So much of the findings of guilty of the Charge and Specification vacated as involves findings of guilty of an offense by accused other than absence without leave, at the place and time alleged, in violation of Article of War 61, and so much of the sentence vacated as is in excess of confinement at hard labor for 39 days and forfeiture of $33.33 per month for a like period, by order of the Secretary of War. G.C.M.O. 103, 25 Nov 1942)

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

SPJGH
CM 226282

NOV 6 1942

N.R.

UNITED STATES	)	8th MOTORIZED DIVISION
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, August 28, 1942. Dismissal.
Second Lieutenant ROBERT G. LORING (0-24087), 13th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

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

Specification 1: In that Robert G. Loring, Second Lieutenant, 13th Infantry, did, without proper leave, absent himself from his station at Fort Jackson, South Carolina, from about 8:00 a.m., June 29, 1942, until about 12:00 noon June 30, 1942.

Specification 2: In that Robert G. Loring, Second Lieutenant, 13th Infantry, did, without proper leave, absent himself from his station at Fort Jackson, South Carolina, from about 8:00 a.m., July 16, 1942, until about 3:30 p.m., July 16, 1942.

Specification 3: In that Robert G. Loring, Second Lieutenant, 13th Infantry, did, without proper leave, absent himself from his station at Fort Jackson, South Carolina, from about 6:00 a.m., August 17, 1942, until about 7:45 a.m., August 18, 1942.

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

Specification: In that Robert G. Loring, Second Lieutenant, 13th Infantry, having been duly placed in arrest at Fort Jackson, South Carolina, on or about 7:00 a.m., July 16, 1942, did, at Fort Jackson, South Carolina, on or about 7:30 a.m., July 16, 1942, break said arrest before he was set at liberty by proper authority.

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

Specification 1: (Nolle prosequi).

Specification 2: (Finding of not guilty).

CHARGE IV: Violation of the 96th Article of War. (Not guilty).

Specification: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications except Specification 1, Charge III, to which the prosecution entered a nolle prosequi. He was found guilty of Charge I and the three Specifications thereunder, and Charge II and the Specification thereunder. He was found not guilty of Specification 2, Charge III, and of Charge IV and the Specification thereunder. No finding was made with respect to Charge III. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Specification 1, Charge I:

a. The evidence for the prosecution shows that the accused on the morning of June 29, 1942, requested permission of his company commander, First Lieutenant Louis S. Sohn, Jr., to go to the town of Spartanburg. Lieutenant Sohn replied, "it is perfectly all right with me for you to go, however it will be necessary for you to get the proper permission from the proper authority before you can go". Since Lieutenant Sohn received no notification by noon of that day concerning the granting of a leave to the accused, he searched the entire regimental area for the accused, but did not find him. On the following morning, June 30, he repeated his efforts but still did not find the accused. At noon, however, of June 30, the accused returned to his company area and Lieutenant Sohn reported his return to his commanding officer. Lieutenant Sohn thereafter accompanied the accused to regimental headquarters. The executive officer talked to the accused and told him

that the report of his having been absent without leave would be entered in his 201 file (R. 14-15, 19-21).

b. The accused testified that on June 29, 1942, when he asked Lieutenant Sohn for permission to be absent, Lieutenant Sohn told him that it would be perfectly all right with him for the accused to be absent. The accused testified further that he could recall no mention having been made by Lieutenant Sohn concerning the necessity of the accused securing permission from higher authority. When the accused returned to his company on June 30, he reported to Lieutenant Colonel Holland, who asked him if he did not realize that he (the accused) had been absent without leave. Colonel Holland talked to the accused in the presence of Lieutenant Sohn, his battalion commander, and his regimental adjutant, and told the accused that a report of the accused having been absent without leave would be entered in his 201 file. The accused testified that he considered that Colonel Holland had punished him by a verbal reprimand (R. 45-47).

4. Specification 2, Charge I:

a. The evidence for the prosecution shows that the accused after being placed in arrest by Lieutenant Sohn on July 16, 1942, secured a quarter-ton automobile and at about 7:30 a.m. went into the city. Private Collins drove the car for the accused. At about 3 o'clock in the afternoon the accused returned to the company area and was seen by Lieutenant Sohn at about 7 o'clock in the evening (R. 13, 32-38, 39-40).

b. The accused testified briefly that he did not sign out in the book provided for that purpose at regimental headquarters, but that so far as he knew his company commander had authority to excuse him from drill (R. 50-51).

5. Specification 3, Charge I:

a. The evidence for the prosecution shows that the accused had permission to be absent from his organization on Sunday, August 16, 1942. Accused did not, however, have permission to be absent on August 17. On the morning of August 17 the accused was not present with his company and at that time Lieutenant Sohn searched the organization area for the accused but could not find him. On the following

morning at about 8:30 the accused returned to the company area (R. 15-16, 35-36; Exs. 2 and 3).

b. The accused gave no direct testimony relating to the Specification.

6. Specifications 1, 2, and 3, Charge I, allege that the accused "did, without proper leave, absent himself from his station at Fort Jackson, South Carolina" on the dates named in the respective Specifications.

The evidence as to Specification 1 shows that during the morning of June 29, 1942, the accused absented himself from his company area and remained absent therefrom until noon of the following day. The contention of the accused that he thought his company commander could grant him leave for such a time is contradicted by the testimony of Lieutenant Sohn to the effect that he told the accused that the accused would have to procure permission from higher authority. Such permission was not procured by the accused and his act in leaving his duty was an unauthorized absence without leave.

The evidence as to Specification 2 shows clearly that the accused absented himself without leave from his company area and from his duties from about 7:30 a.m. to about 3 p.m. on July 16, 1942.

Furthermore, the evidence as to Specification 3 shows that the accused was absent without leave from his station at Fort Jackson for the entire day of August 17, 1942, and that he remained absent until he returned to his station at about 7:15 a.m. on August 18, 1942.

Each of the three acts of absence without leave are clearly violative of the 61st Article of War.

7. Specification, Charge II:

a. The evidence for the prosecution shows that at about 7 a.m. on the morning of July 16, 1942, the accused entered the orderly room of Company D, 37th Infantry, in a "wobbly condition". He was dressed in an oversized uniform which appeared not to be his own, and was wearing only one Lieutenant's bar. The accused looked at Lieutenant Sohn and said "well", and when Lieutenant Sohn made no reply the accused said, "sure I'm drunk". Lieutenant Sohn told the accused that he was not in a condition to do duty and that he would have to go to his quarters. Lieutenant Sohn then told the accused to go to his quarters and stated, "I

am going to place you under arrest of quarters until I can have it confirmed". The accused then left the orderly room. About ten minutes later Lieutenant Sohn found the accused sitting in the mess hall "apparently asleep". He awakened the accused and led him to his tent. A few minutes later the accused returned to the head of the company street and there met Lieutenant Sohn. The accused started to say something to Lieutenant Sohn and Lieutenant Sohn interrupted and told him not to be a "damn fool", and to go to his tent. The accused then waved his hand and said "good bye". Lieutenant Sohn promptly reported the conduct of the accused to his battalion commander and then searched the area for the accused. He did not, however, find the accused in his quarters or in the regimental area and did not see him again until about 7 o'clock in the evening (R. 11-13, 18-19).

b. The accused testified that on the morning of July 16, 1942, when he came into the company area, Lieutenant Sohn asked him if he were ready for duty and that he replied that he was. Lieutenant Sohn then told the accused that he thought the accused had better go to his tent and get some sleep. The accused replied that he did not want to return to his tent. Lieutenant Sohn then said, "if you don't go I will put you in arrest" and the accused said "all right", threw up his hands, and left. The accused testified that on several occasions in the past Lieutenant Sohn had told him in a joking manner that some minor infractions of the rules would cost him "a couple more weeks". The accused explained, however, that Lieutenant Sohn had never placed restrictions upon him (R. 47-51).

8. The Specification, Charge II, alleges that the accused on July 16, 1942, having been duly placed in arrest at Fort Jackson, did break said arrest before he was set at liberty by proper authority.

The evidence under this Specification shows that on the morning of July 16, 1942, the accused appeared in the orderly room of his company in an apparent drunken condition. It appears, however, that there is nothing in the nature of a quarrel, affray, or disorder in this situation to bring this case within the purview of the 68th Article of War, so as to authorize Lieutenant Sohn to place accused in arrest. The company commander informed the accused that he was placing him in arrest until he could have the arrest confirmed. Shortly thereafter the accused absented himself from his company area. There is no evidence showing that the arrest was confirmed.

The Manual for Courts-Martial states that an officer may be placed in arrest -

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

In view of the above limitations upon Lieutenant Sohn's authority to place the accused in arrest, it is apparent that the accused was not legally in arrest on July 16, 1942, and that, therefore, he could not be guilty of breaking arrest on that date. It necessarily follows that the evidence is insufficient to support the allegations of the Specification, Charge II.

9. Although the court failed to make a finding as to Charge III, the finding of not guilty of the remaining Specification under that Charge made that failure an immaterial error.

10. The accused is 27 years of age. The Army Register shows his service as follows:

"Pvt. and pvt. 1 cl. Cos. B and H, 5 Inf. 18 June 35 to 25 June 37; cadet M.A. 1 July 37; 2nd Lt. of Inf. 11 June 41."

11. The court was legally constituted. 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 Specification; legally sufficient to support the findings of guilty of Specifications 1, 2, and 3, Charge I, and of Charge I, and legally sufficient to support the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Lester S. Hecht Jr., Judge Advocate.

Chas. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 226282 1st Ind.

War Department, J.A.G.O., NOV 14 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert G. Loring (0-24087), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and the Specification thereunder, legally sufficient to support the findings of guilty of Charge I and the three Specifications thereunder, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Each offense of which approval of the finding of guilty is recommended is, however, of a minor nature. The first and third offenses each involve an absence without leave for approximately a day, and the second offense involves a similar absence for less than a day. The dismissal of an officer is a serious punishment and not an appropriate punishment for those minor offenses. I recommend, therefore, that the sentence of dismissal be confirmed but commuted to a reprimand and the forfeiture of $25 per month for six months.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence but commuting the sentence to a reprimand and the forefeiture of $25 per month for six months, and directing that the sentence as modified be carried into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Findings of guilty of Charge II and Specification thereunder disapproved. Sentence confirmed but commuted to a reprimand, and forfeiture of $25 per month for six months. G.C.M.O. 2, 7 Jan 1943)

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

SPJGK
CM 226304

NOV 1 1 1942

UNITED STATES	)	PUERTO RICAN DEPARTMENT
v.	)	Trial by G. C. M., convened at Borinquen Field, Puerto Rico, August 28, 1942. Confinement for six (6) months and forfeiture of thirty-five dollars ($35) pay per month for like period. Borinquen Field, Puerto Rico.
Corporal Technician 5th Grade ELMER WEST, JR. (18038043), 746th Ordnance Company, Aviation (AB).	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Corporal Technician 5th Grade Elmer West, Jr., 746th Ordnance Co Avn (AB), did, at Borinquen Field, P.R., on or about August 2, 1942, with intent to do him bodily harm, commit an assault upon Private George F. Weiser, 746th Ordnance Company Avn (AB), by cutting him on the hand with a dangerous instrument to wit, a butcher knife.

He pleaded not guilty to the Charge and Specification. He was found

"Not guilty of the Charge and Specification, but Guilty of:

Charge: Violation of the 96th Article of War.

Specification: In that Technician 5th Grade Elmer West, Jr., 746th Ordnance Company

> Avn (AB) did, at Borinquen Field, P. R., on or about August 2, 1942, wrongfully cut Private George F. Weiser on the hand with a butcher knife".

Evidence of one previous conviction by summary court-martial for absence without leave was introduced. He was sentenced to reduction to the grade of private, confinement at hard labor for six months and forfeiture of $35 of his pay per month for a like period. The reviewing authority approved the sentence, directed its execution and designated the guardhouse at Borinquen Field, Puerto Rico, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 185, Headquarters Puerto Rican Department, September 30, 1942.

3. The evidence shows that in the course of a physical encounter between accused and Private George F. Weiser, 746th Ordnance Company, Aviation (AB), while accused was in the cooks' quarters of the company mess hall at Borinquen Field, Puerto Rico, on the night of August 2, 1942, Weiser was cut on the hand with a butcher knife. Weiser testified that he had had a bottle of beer that evening (R. 10) and that there was a case of bottled beer in the cooks' quarters (R. 23). Accused testified that he had the butcher knife in his hand for the purpose of preparing a sandwich and that Weiser "threw his hands up and hit this knife" (R. 19). He also testified that he had been drinking, that he had had three cans of beer (R. 20), and that there was a case of twenty-four cans of Trommers beer in the quarters but that there was no bottled beer there (R. 21, 27).

After accused had testified the court called one of its members, Major Richard L. Dilworth, Army Air Forces, as a witness. He testified that he was the "Post Exchange Officer", that the exchange had sold bottled beer to the noncommissioned officers' club but that it had not sold any "Trommers" beer in cans for approximately two months (R. 28, 29). Witness did not know of any canned beer in the local market (R. 29).

4. Upon completion of his testimony Major Dilworth was asked by the president of the court whether, "as a result of being a witness", he had formed "any opinion" in the case and whether he believed, as a

result of his "knowledge as Post Exchange Officer or for any other reason", that he should not continue as a member of the court. Major Dilworth answered both inquiries in the negative. The defense was then afforded an opportunity to challenge Major Dilworth but it declined to do so (R. 29). In so far as the record of trial shows the officer was not excused but continued as a member of the court and participated in the findings and sentence.

5. The only question requiring consideration here is whether the proceedings were rendered null and void by reason of the fact that a member of the court was called as a witness, gave testimony and was not thereafter excused, but was permitted to participate in the findings and sentence of the court.

6. Article of War 8, authorizing the appointment of general courts-martial, provides, inter alia, that:

> "no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution" (underscoring supplied).

Paragraph 59 of the Manual for Courts-Martial, provides:

> "If at any stage of the proceedings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member in the case. Whether a member called as a witness for the court is to be considered as a witness for the prosecution depends on the character of his testimony. In case of doubt he should be excused as a member".

Major Dilworth, a member of the court, testified in impeachment of accused. The issue as to whether the beer in the cooks' quarters was "Trommers" beer in cans or bottled beer was, of course, wholly collateral to the issue of guilt but the court deemed the matter to be of sufficient importance to warrant the taking of the testimony. The only effect this testimony could have had was to diminish the credibility of accused, to the advantage of the prosecution. From the character of the testimony it must be concluded that Major Dilworth was, in legal effect, a witness for the prosecution. This being the case he was statutorily ineligible to sit as a member of the court. His ineligibility could not

be waived, and his participation in the proceedings rendered the findings and sentence null and void (sec. 365 (8), Dig. Op. J.A.G. 1912-1940).

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 13 1942 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Corporal Technician 5th Grade Elmer West, Jr. (18038043), 746th Ordnance Company, Aviation (AB).

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

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Findings and sentence vacated. G.C.M.O. 107, 26 Nov 1942)

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

SPJGH
CM 226307

DEC 18 1942

UNITED STATES v. Privates LEROY DOHRMAN (16011099), Headquarters 3rd Battalion, 15th Infantry, RUBEN C. WALBERG (37027281) and VIRGIL M. KAUFMAN (16005220), both Company M, 15th Infantry.	3RD INFANTRY DIVISION Trial by G.C.M., convened at Fort Ord, California, July 6, 1942. As to Dohrman and Walberg: Dishonorable discharge and confinement for five (5) years and nine (9) days. As to Kaufman: Dishonorable discharge (suspended) and confinement for six (6) months and nine (9) days, Published Order case.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. Privates Dohrman and Walberg were in a common trial found guilty of sodomy, in violation of the 93rd Article of War and of absence without leave from June 4 to June 6, 1942, in violation of the 61st Article of War. Each was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years and nine days.

Private Kaufman was found guilty of being drunk and disorderly under such circumstances as to bring discredit upon the military service, in violation of the 96th Article of War, and of absence without leave from June 4 to June 6, 1942, in violation of the 61st Article of War. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months and nine days.

In the case of Private Dohrman and in the case of Private Walberg the reviewing authority approved the sentence and forwarded the common record of trial for action under Article of War 50½. In the case of Private Kaufman the reviewing authority approved the sentence and

ordered it executed, but suspended the dishonorable discharge, and published the proceedings in General Court-Martial Order No. 144, Headquarters Third Infantry Division, October 7, 1942.

3. Where absence without leave is longer than one day, effect is to be given to the general rule of law that parts of a day are not to be considered in computing the length of absence (Dig. Ops. JAG, 1912-40, sec. 419 (4)). Each accused was, therefore, absent without leave for two days.

4. The maximum authorized confinement (par. 104 c, M.C.M., 1928), for sodomy is five years, for being drunk and disorderly under such circumstances as to bring discredit upon the military service is six months, and for absence without leave for two days is six days.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence in the case of Private LeRoy Dohrman and in the case of Private Ruben C. Walberg as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years and six days, and legally sufficient to support only so much of the sentence in the case of Private Virgil M. Kaufman as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months and six days.

_____, Judge Advocate.

_____ Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., [illegible] 21 1942 - To the Commanding General, Third Infantry Division, APO #3, Camp Pickett, Virginia.

1. In the case of Privates LeRoy Dohrman (16011099), Headquarters 3rd Battalion, 15th Infantry, Ruben C. Walberg (37027281), and Virgil M. Kaufman (16005220), both Company M, 15th Infantry, I concur in the holding by the Board of Review.

2. In the case of Private Dohrman and Private Walberg, I recomment that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years and six days.

3. Your action failed to designate a place of confinement of Private Dohrman or Private Walberg. Confinement in a penitentiary is authorized by law in each case. In view, however, of the instructions contained in the letter dated February 26, 1941 (AG 253, 2-5-41(E)), from The Adjutant General to all commanding generals, "Subject: Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", a penitentiary should be designated as the place of confinement of Private Dohrman, as he is over 31 years of age, and a Federal correctional institution or reformatory should be designated as the place of confinement of Private Walberg, as he is under 31 years of age and with a sentence of less than ten years. Thereupon you will have authority to order the execution of the sentence of Private Dohrman and the sentence of Private Walberg.

4. In the case of Private Kaufman, in which you have directed the execution of the sentence but suspended the dishonorable discharge, I recommend that you remit the three days' excess confinement.

5. 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 226307).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

DEC 22 42 PM

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

SPJGK
CM 226310

OCT 24 1942

UNITED STATES	)	7TH ARMORED DIVISION
	)	
v.	)	Trial by G. C. M., convened at Camp Polk, Louisiana, September 13, 1942. Dismissal.
	)	
Captain GERALD G. DAUBEK (0-284443), 48th Armored Infantry Regiment.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Gerald G. Daubek, 48th Armored Infantry Regiment, did, at Camp Polk, Louisiana, on or about August 6, 1942, with intent to deceive Colonel Virgil Bell, the Commanding Officer, 48th Armored Infantry Regiment, officially report to the said Colonel Virgil Bell, Commanding Officer, 48th Armored Infantry Regiment, as follows:

THIRD BATTALION HEADQUARTERS
FORTY EIGHTH ARMORED INFANTRY REGIMENT
Camp Polk, Louisiana.

August 7, 1942.

SUBJECT: Rifle Markmanship.
TO: Commanding Officer, 48th Armd Inf Regt, Camp Polk, La.

1. Summary report of the record firing of the M1 rifle by the riflemen of this battalion on August 6, 1942, is as follows:

Number of Men Fired.....176
Number of Men Qualified.....166
Percentage Qualified..... 94.4%

Number of Sharpshooters..... 42
Number of Experts..... 28

Total Battalion Score..... 41,941
Total Battalion Possible..... 54,180
Average Battalion Score..... 238.3

2. Breakdown by companies is attached.
3. Individual scores by standing in markmanship are attached.

/s/ GERALD G. DAUBEK
Capt., 48th Armd Inf Regt.,
Commanding

which report was made by the said Captain Gerald G. Daubek with a disregard of a knowledge of the facts in that the said Captain Gerald G. Daubek knew that scores were incorrect by reason of the fact that other men had fired on the same targets at the same time on the orders of said Captain Gerald G. Daubek.

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 under Article of War 48.

3. The evidence shows that on August 7, 1942, at Camp Polk, Louisiana, accused, who was then in command of the 3rd Battalion, 48th Armored Infantry Regiment, submitted the official report set out verbatim in the Specification, addressed to the Commanding Officer, 48th Armored Infantry Regiment, and summarizing the results of record firing on the target range by the riflemen of the battalion on August 6, 1942 (R. 29, 33; Pros. Ex. A). In computation of the numbers and percentage of men qualifying and of the total and average scores credit had been given on targets used in rapid fire which showed greater numbers of hits than the number of shots per target authorized. On targets showing more than the authorized number of shots,

the highest scoring hits only were scored. Accused had given specific instructions to four noncommissioned officers, including two expert riflemen, not having targets assigned to them, to fire on targets of other men in each firing order (R. 10, 16-23, 36), this in order to "help the score" (R. 21). The instructions were carried out by at least one of the expert riflemen who fired sixteen extra shots on fourteen targets of one firing order (R. 17).

About August 1, 1942, the executive officer of the regiment, Lieutenant Colonel Alan G. Fadness, 48th Armored Infantry Regiment, had called accused to his office, advised him that the regimental commander was not satisfied with previous firing by another battalion (R. 40, 41) and showed him a note by the regimental commander on a report of the results of record firing by the 1st Battalion of the regiment, which note read: "This is a rotten record and shows the need of much more training in shooting" (R. 41; Pros. Ex. B). Lieutenant Colonel Fadness told accused that his company officers and noncommissioned officers could by diligent and better instruction, devotion of more time to practice and a requirement of adequate "preliminary dry work", so improve marksmanship by the men that the average score of accused's battalion could be raised to a point "considerably better than the other battalion" (R. 41, 42). Emphasis was laid on the necessity of complete training rather than on scores (R. 42, 44). In response to a question as to whether witness' manner in addressing accused had been stern, Lieutenant Colonel Fadness testified, "I just told him what I wanted and that was that" (R. 42). He also testified that he did not say anything to accused suggesting that witness desired underhanded methods (R. 43), but that "there is a possibility" that accused "could infer" (R. 44) that it was incumbent upon him to produce better scores (R. 43, 44). Witness did not believe that he said anything to the effect that the score of the 3rd Battalion would "raise the average of the regiment" (R. 41).

Accused testified that he gave his instructions for the additional firing in such a way as to amount to orders. He took the action because he believed it was desired by his regimental commander (R. 30). As to Lieutenant Colonel Fadness' remarks accused testified that after that officer had given him the instructions as to means of improved and more efficient training and had showed accused the critical notation on the report of firing by the 1st Battalion,

> "I was told that that must not happen in the third battalion and though the exact wording isn't remembered, I was told that the third battalion was expected to average out the scores of the first battalion. I again repeat that I didn't know Colonel Fadness very well while this conversation was going on. Since I have gotten to know him I realize absolutely that I misconstrued, misunderstood, misinterpreted, missed everything in that conversation but I believe that any civilian officer could have made the same mistake that I made that day who had listened to the same conversation" (R. 31-32).

As to the report of the firing submitted by him accused testified that he "knew it was incorrect" (R. 35) and misleading (R. 36) but that he had no intention to deceive through its submission "because I understood that my superior desired such a report" (R. 30) and had knowledge of its incorrectness (R. 34). He also testified:

> "I didn't like the report in the first place. I didn't certify to it and my original sentence in that report was that it was a summary of other scores that had been given to me. I knew that report could be incorrect. I didn't think it was deceiving anybody because I had this mistaken impression that it was the type of report that was called for.
> * * * * * * *
> "I would never in my life certify to that report, never" (R. 32).

When accused observed on the range that the scores had been raised sufficiently he stopped further firing by the extra men (R. 33, 35, 36). One of the companies of the battalion did not fire any additional rounds (R. 33). He knew that this extra firing was wrong (R. 35). He had been employed as a salesman by Swift and Company, packers, prior to entering the Army on extended active duty. In the course of this employment he conducted himself honorably (R. 39).

Colonel Virgil Bell, 55th Armored Infantry Regiment, testified for the defense that he had been in command of the 48th Armored Infantry Regiment during January and February, 1942, and for about two weeks early

in July, 1942, and had observed accused as a battalion commander. He would rate accused's "character as a soldier" as very satisfactory (R. 49) and would be willing to have accused in his command (R. 50). Witness had found accused to be zealous in his work and a hard worker and had had no reason to doubt his honesty or integrity (R. 59). Witness believed that accused's retention in the service would be of benefit to the Government (R. 50). First Lieutenant Sidney F. Frazier, 48th Armored Infantry Regiment, testified that he had served in accused's battalion for about three months and had observed that in his audits of accounts accused had been meticulously careful. Witness believed that accused was an officer of above average character and of distinct value to the service (R. 47, 48). Second Lieutenant Gregory F. Wellnitz, 31st Armored Infantry Regiment, testified that he had served under accused for about two and a half months as a sergeant and acting first sergeant while accused was a company commander. He had not observed any dishonesty in accused. Witness had high regard for accused "as a soldier", considering him zealous, hardworking, a strict disciplinarian and painstakingly accurate (R. 45, 46).

4. It is undisputed that at the place and time alleged accused made the official report set forth in the Specification. It is also undisputed that the scores summarized on the report were not in all cases legitimate scores of the men who had fired, this for the reason that in some cases other men had purposely fired upon their targets. It was not proved that the scores were incorrect in the sense that the hits upon the targets were not accurately computed. The scores reported were, however, manifestly incorrect in that they were not, in some cases, legitimate scores. Accused knew that the scores were incorrect in this sense and that the report presented a false and misleading record indicative of the state of efficiency and training of his battalion. He made the report with admitted disregard of his knowledge of its false character.

Accused testified that he had received official instructions which he believed justified his course of conduct, and that he had not intended to deceive. The instructions received by accused were proper in all respects and any inference by accused that the regimental commander intended to suggest dishonest methods was wholly unwarranted. The only conclusion reasonably justified upon examination of all the evidence is that accused, fearing criticism or more drastic official action derogatory to him on account of his failure or inability to bring his battalion to the expected level of efficiency, conceived and executed the scheme of firing by extra men and made the report with the purpose of

misleading his regimental commander and avoiding the consequences of a possible poor battalion record. The essential elements of the offense alleged are established beyond reasonable doubt. Accused's acts, having been characterized by dishonesty and deceit, amounted to conduct unbecoming an officer and gentleman in violation of Article of War 95.

5. The Specification alleges that "with intent to deceive Colonel Virgil Bell, the Commanding Officer, 48th Armored Infantry Regiment" accused made the official report "to the said Colonel Virgil Bell, Commanding Officer, 48th Armored Infantry Regiment". The evidence does not show that Colonel Bell was the commanding officer of the regiment at the time the report was made, and it may be implied from that officer's testimony that he was not in fact the commanding officer at that time (R. 48, 49). The gravamen of the charge was the making of the report to the commanding officer of the regiment and the identity of that officer was of no special significance. The offense involved would have been adequately charged had the name been omitted from the specification. The letter constituting the report, as alleged and set forth in the Specification, was addressed only to the Commanding Officer, 48th Armored Infantry. It is clear from the record that accused could not have been misled or injured by any failure of proof or variance in the premises.

6. All of the members of the court joined in a letter to the reviewing authority recommending that clemency be extended. The letter, which is attached to the record of trial, contains the following:

> "2. *** The Court believes that sworn testimony of several witnesses has definitely established this officer's value to the Service. Colonel Virgil E. Bell, Regimental Commander, 55th Armored Infantry, formerly Regimental Commander of the accused, testified that he would be willing to have the accused as a member of his command in the same capacity that he now holds, to wit: Battalion Commander.
>
> "3. Sworn testimony has produced evidence of the fact that the quality of the work of this officer in the past has been above the average of the quality of officers in the present emergency. No evidence has been found by the Court of any previous misdemeanor or misconduct.
>
> "4. In view of the acute shortage of trained officers in the present national emergency, it is urgently recommended that clemency be granted in this case".

There is attached to the record of trial a letter by accused to the reviewing authority, dated September 19, 1942, requesting clemency upon the ground that it is justified by accused's past military efficiency, zeal and capacity for future valuable service.

7. War Department records show that accused is 33 years of age. He is a graduate of the University of Illinois. He was commissioned a second lieutenant, Cavalry Reserve, on March 28, 1931. He was promoted to first lieutenant on July 23, 1935, and was reappointed in the same grade on May 27, 1940. He was promoted to captain on January 15, 1941, and was ordered to extended active duty on March 28, 1941.

On November 12, 1941, his reclassification was requested, his regimental commander stating:

> "Captain Daubek is not qualified to command a company. He does not appear to understand regulations concerning Company Administration and does not refer to them when in doubt. He does not take the trouble to verify the contents of papers which he signs, particularly in accounting for his personnel or his funds, or he is incapable of doing so. He fails frequently to carry out instructions, both written and oral".

A reclassification board convened in response to this request recommended the officer's retention and reassignment,

> "in view of the superior force, excellent initiative, and very satisfactory cooperation displayed by this officer during the period under consideration, and the unsatisfactory situation surrounding his association with fellow officers of his regiment brought about by an unfortunate occurrance with an officer who has since been dismissed from the service, and by the necessity of testifying before a General Court Martial against another officer of his regiment".

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is

legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 29 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Gerald G. Daubek (0-284443), 48th Armored Infantry Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. With intent to deceive his commanding officer and with disregard of knowledge of the facts accused made an official report of scores attained by members of his battalion in record firing on the rifle range, knowing that the scores were incorrect in that they had been recorded from targets of certain men upon which targets accused had wrongfully directed other men to fire extra shots. All members of the court recommended clemency stating that they believed accused capable of future valuable service. Accused's previous record is satisfactory. In view of the circumstances of the case and the recommendation for clemency I recommend that the sentence be confirmed but commuted to a reprimand to be administered by the reviewing authority and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 116, 1 Dec 1942)

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

SPJGH
CM 226357

NOV 3 1942

UNITED STATES v. Major PHILIP F. BETETTE (0-290934), Headquarters Second Armored Division.	SECOND ARMORED DIVISION Trial by G.C.M., convened at Fort Bragg, North Carolina, October 5, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Major Philip F. Betette, Cavalry-Reserve, being then on active duty in the Army of the United States and assigned to Headquarters Second Armored Division, was, at Pinehurst, North Carolina, on or about September 26, 1942, drunk and disorderly while in uniform in a public place, to wit, the Berkshire Hotel.

He pleaded not guilty to the Specification and the Charge, and was found guilty of the Charge and its Specification, excepting the words "in uniform". The reviewing authority approved the sentence, recommended that the execution of the sentence be suspended during the pleasure of the President, and forwarded the record of trial for action under the 48th Article of War. He also recommended that consideration be given to the reduction of accused to his permanent grade of captain and his transfer to another command.

3. The evidence for the prosecution may be briefly summarized as follows:

On the evening of September 26, 1942, accused gave a party at the Berkshire Hotel, Pinehurst, North Carolina, where he served Martini and bourbon cocktails. The guests were an officer and the wives of officers of the Second Armored Division. At about 10:45 p.m. the accused became involved in an argument with all of the ladies. The accused talked to Mrs. Oscar W. Koch in a tone of voice unbecoming an officer. Mrs. Koch objected to the manner in which accused was talking to her and "God damning" her. Mrs. Koch told him to "shut up" or she would call "Oscar Koch" on the telephone and tell him to come and order accused back to duty. He replied if there was "that much God damn politics in the army" he did not want any part of it. Major E. W. Howell told the accused to be quiet or he would stop accused. The accused gave a curt answer and again "directed his unmanly conduct at Mrs. Koch". Major Howell stood up, walked around the table, told accused he would prefer charges against him, and then left with Mrs. Howell and went to their own room (R. 8-10).

In about 20 minutes Mrs. Betette knocked on the door of Major Howell's room, came in, and sat on the bed with Mrs. Howell. Mrs. Betette was almost hysterical. The accused soon entered, dressed in his pajamas, talked in a loud obnoxious voice, and would not be quiet. Accused told his wife to get packed and go to New York, that he did not want her down there and did not want to see any of them. In response to Major Howell's request, accused left the room. Five minutes later the accused again entered the room, walked across to where his wife was sitting on the bed, cursed her, jerked her to her feet, and knocked her down across the bed. Major Howell separated them, pushed accused back against the wall and held him there until the ladies could get Mrs. Betette out of the room. At about midnight the manager of the hotel, Mr. W. R. Findley, and Major Howell escorted accused to his own room on the second floor (R. 10-13, 22-23).

About half an hour after midnight Mr. Findley heard a disturbance in the room of the accused, heard loud talking, and recognized the voices of accused and his wife. There were slapping noises, and a noise as though a body struck the floor. Mr. Findley then called a deputy sheriff, Mr. A. G. Jones, who brought a civilian, Mr. E. C. Maness, Jr., with him. Mr. Findley then went with the two men to the door of the room of accused and demanded that the noise cease or that the room be given up. The accused then referred to Mr. Findley by a vile name, and made a vulgar remark as to what Mr. Findley could do with his hotel and the hotel room. Mr. Jones then called the military police. Soon thereafter an employee of the hotel who lived on the third floor came down and stated that something distressing was occurring in the room of accused. As Mr. Findley with his night man and Mr. Maness approached the room they heard

the screams of a woman and Mr. Findley recognized the voice as that of Mrs. Betette. Someone opened the door. There was a struggle in which the accused was in a clinch with his wife and had her down between his knees. Mr. Findley struck accused with "a little bludgeon" he had with him and felled accused to the floor. Mr. Findley struck accused without attempting to pacify him, because he figured accused was beyond that stage, and in order to protect Mrs. Betette. Mr. Maness and a Mr. Shaw pulled accused out into the hall and Sheriff Jones and Mr. Shaw then took accused, each by an arm, downstairs to the lobby and sat him down in a chair (R. 14, 22-27, 27-29, 30-32).

Major Howell, in response to a call from accused to "save him", went down into the lobby and interceded for accused with the manager, the sheriff, and the military police, requesting them not to take accused to jail. Upon Major Howell's agreement to be responsible for accused if accused were put in a separate room and the room locked for the night, Major Howell and the manager escorted the accused to a room on the second floor and placed accused in bed. The accused then started crying and was deeply distressed. Major Howell dashed a pitcher of water on accused, turned out the light, and locked the door. Nothing further was heard from the accused that night (R. 13, 25, 29-30).

The accused was in uniform while at the party in the Red Room, but was dressed in his pajamas when he entered the room of Major Howell and thereafter when he was in the lobby with the manager of the hotel and the sheriff (R. 11, 17, 26).

Major Howell saw accused drink six or seven Martinis in the Red Room, was of the opinion that accused was definitely under the influence of intoxicating liquor, and was drunk to a certain degree although he could still talk clearly and distinctly. He was disorderly in the Red Room only with respect to his tone of voice, and the manner in which he talked to Mrs. Koch (R. 18-20).

Mr. Findley stated that accused was a definitely drunken man while in the room of Major Howell, and continued in an intoxicated state when in his own room (R. 25). Sheriff Jones stated that the accused in his room was so drunk that he could not get up and could not walk (R. 29). Mr. Maness would not say that accused was sober, would not say that he was drunk, but that he was under the influence of liquor (R. 33).

4. The accused elected to remain silent (R. 42).

Brigadier General Hugh J. Gaffey, Lieutenant Colonel Robert H.

Shell, and Major Horace A. Franklin, testified for the defense in substance that accused was an officer of high character and that they had never seen him drunk. Colonel Shell identified the 201 file of accused and testified that the only breach of discipline there disclosed was the violation of speeding regulations (R. 33-35, 37-38, 38-40).

5. The evidence shows without contradiction that the accused was both drunk and disorderly in the Berkshire Hotel, Pinehurst, North Carolina, on the night of September 26-27, 1942, in the presence of one Army officer, of the wives of two officers, and of at least five civilians. While it may be said that he was not grossly drunk, his entire conduct was a disgraceful exhibition of himself. His insulting language to Mrs. Koch, his abuses of his wife, both in his own room and in that of Major Howell, and his reviling of the manager of the hotel in vulgar language, constituted in the aggregate very disorderly conduct. His conduct in the hotel within the sight and hearing of both military personnel and civilians was clearly conduct unbecoming an officer and a gentleman, and cognizable under the 95th Article of War.

6. Four of the five members of the court recommended in view of his previous excellent character and recent promotion to field grade the extension of clemency to accused by the suspension of his sentence of dismissal or commutation of the dismissal to other punishment.

The reviewing authority recommended the suspension of the execution of the dismissal, that consideration be given to the reduction of accused to his permanent rank of captain and to his transfer to another command.

7. The accused is 32 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Cavalry-Reserve, Army of the United States from Enlisted Reserve, December 8, 1931; active duty for six months, C.C.C., May 13, 1935; extended six months, November 12, 1935; appointed first lieutenant, Cavalry-Reserve, December 19, 1935; relieved from active duty upon own request January 7, 1936; reappointed first lieutenant, Cavalry-Reserve, Army of the United States, December 18, 1940; extended active duty, February 13, 1941; appointed captain, Cavalry-Reserve, Army of the United States, August 22, 1941; placed before a Reclassification Board, found not subject to reclassification and recommended for reassignment within his division, December 22, 1941; appointed temporary major, Army of the United States, September 21, 1942.

8. The court was legally constituted. 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 mandatory upon conviction of a violation of the 95th Article of War.

Lester S. Hill Jr., Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 226357 1st Ind.

War Department, J.A.G.O., NOV 4 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Philip F. Betette (0-290934), Headquarters Second Armored Division.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation of the sentence. The accused was drunk and very disorderly in a hotel in the presence of military personnel and civilians. Four of the five members of the court recommended, in view of the previous excellent character of accused and because of his recent promotion to field grade, that clemency be extended by the suspension of the dismissal. The reviewing authority concurred in that recommendation. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

I intend to recommend, if that action is taken, the carrying out administratively of the further recommendation of the reviewing authority that the temporary promotion of accused to the grade of major in the Army of the United States be terminated (which would reduce him to his former grade of captain), and that he be transferred to another command.

3. Inclosed herewith are the draft of letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence but suspending the execution thereof during the pleasure of the President.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but execution suspended. G.C.M.O. 3, 2 Feb 1943)

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

SPJGH
CM 226362

DEC 10 1942

UNITED STATES v. ISABELINO ALAMO, Civilian employee, War Department, serving as crewman on United States Army Transport "EDMUND B. ALEXANDER".	THIRD SERVICE COMMAND Trial by G.C.M., convened at Fort George G. Meade, Maryland, August 31, and September 1 and 12, 1942. Confinement for two (2) years and six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Isabelino Alamo, Civilian employee, War Department, serving with the armies of the United States in the field, as crewman on the United States Army Transport "EDMUND B. ALEXANDER", did in the harbor of Havana, Cuba, on or about the 4th day of May, 1942, knowingly and wilfully abet Ignacio Rodriguez, alias "Bruno", and Rafael Alfonso y Espin, aliens, in their attempt to violate Section 469, Title 18, United States Code by stowing away on board United States Army Transport "EDMUND B. ALEXANDER", to the prejudice of good order and military discipline.

The accused challenged the jurisdiction of the court on the grounds that the accused was not an enlisted man, nor an officer of the United States Army, that the scene of the alleged offense was Havana, Cuba, and that there is no evidence submitted to show that the alleged stowaways named in the Specification were in fact stowaways. This plea to the jurisdiction was overruled. The accused pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. He was sentenced to be confined at hard labor for a period of two years and six months. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Isabelino Alamo, hereinafter referred to as the accused, was tried jointly with Juan J. Correa and Joseph H. Branch under Specifications similar to the one under present consideration. The evidence against the latter two civilians forms no part of the case against the accused and is, therefore, not considered here. The evidence shows that on May 4, 1942, the United States Army Transport "Edmund B. Alexander" was lying at anchor in the harbor of Havana, Cuba, and that the ship was being operated by a crew of civilian employees, including the accused, all of whom were employed by the War Department.

On that day an unauthorized person was reported by one of the seamen as having been on the ship. Later this person, identified as Ignacio Rodriguez, alias "Bruno", was arrested on shore and returned to the transport. He at first identified a seaman by the name of Sandy Thompson as the seaman who had given him food while he was on ship. After several hours of questioning, however, he repudiated his first identification and identified the accused as the seaman who had brought him food (R. 3, 47, 88-89).

Major Franklin Stekert, the commanding officer of the troops aboard the transport, testified that following the discovery of the man "Bruno" aboard the ship, the accused went ashore without permission and was thereafter arrested by the Cuban police and placed in jail. Major Stekert further testified that he, and Mr. Arthur Jukes, American Vice-Consul, took the accused from the Cuban jail to the American Consulate, and there questioned him. As a result of questioning of the accused, the accused made a statement. The statement, which was retained in the Consulate, was first made in Spanish and translated by Mr. Jukes into English. The English translation was read to the accused. The accused understood it and stated that it was correct. The substance of this statement, as repeated by Major Stekert, is as follows:

"He stated -- he denied being a relative of Bruno's, said that he had known him, had met him ashore, and that he had seen him on board ship. Bruno told him he was hungry, asked him for something to eat, that he felt sorry for him, even though he wasn't a crew member and he went down to his own locker to -- Alamo's own locker -- brought up some food and took it to Bruno's hiding place, and he also stated that if Bruno said anything else, when his time was up he would kill him. That is in the official statement in the United States Consul's office. He made a threat to kill Bruno in his statement" (R. 91).

In addition to the above statement, a written statement which the accused made after his return to the United States was introduced in evidence. This second statement varied from the first statement in that the second statement did not show that the accused took the food which he gave to Bruno to a hiding place on the ship but, on the contrary, shows that the accused did not know that Bruno was in hiding on the ship (R. 64-69; Ex. I).

4. The accused testified that he was a Puerto Rican and employed by the War Department of the United States as a member of the crew of the United States Army Transport "Edmund B. Alexander"; that he knew "Bruno"; that he had seen "Bruno" both in New York and in Cuba; that he saw "Bruno" on the United States Army Transport "Edmund B. Alexander"; that he gave him a piece of salami and grapefruit; that at the time he gave him the food he did not know that he was a stowaway, and that he did not report "Bruno's" presence on the ship because he did not know he was not working on the ship. The accused testified further that in 1941 he had been drafted into the United States Army but after eight months of service he had been released because he was over 28 years of age. The accused denied that he had made a statement while in Havana, Cuba. The accused further testified that he saw "Bruno" in the office on board the transport about 7 days after he had given him food, and that Bruno was at that time tied to a chair and blood was running out of his mouth. The accused denied that he knew Bruno was attempting to become a stowaway on the ship (R. 141-147).

5. Before considering the merits of this case, it is necessary to consider the plea to the jurisdiction of the court-martial and to determine that the court had authority to try the accused for the offense alleged. The fact is admitted that the accused was a civilian employee of the War Department, serving as a member of the crew of the United States Transport "Edmund B. Alexander". The evidence shows further that the ship was in foreign waters and that United States

troops were aboard. Article of War 2 designates the various classes of persons who are subject to the provisions of the Articles of War. Among these various classes are the following:

> "All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;"

Furthermore, the authoritative statement has been made that -

> "* * * The following categories of persons, while on board American vessels, are subject to the military jurisdiction of the United States: (1) All persons on board United States Army transports or Army cargo transports or other vessels operating under the jurisdiction and command of the United States War Department, for purposes connected with the operation of the Army. (See Ex parte Gerlach, 247 Fed. 616, and Ex parte Falls, 251 Fed. 415); * * *". (Sec. 369 (6), Dig. Op. J.A.G., 1912-40).

In view of the above authorities, the conclusion necessarily follows that the accused was, at the time of the alleged offense, subject to the Articles of War, and that the court-martial had jurisdiction over both the person of the accused and the offense alleged.

6. The Specification under which the accused was tried alleges that the accused did -

> "* * * on or about the 4th day of May, 1942, knowingly and wilfully abet Ignacio Rodriguez, alias 'Bruno', and Rafael Alfonso y Espin, aliens, in their attempt to violate Section 469, Title 18, United States Code by stowing away on board the United States Army Transport 'EDMUND B. ALEXANDER', to the prejudice of good order and military discipline".

The statute mentioned in the above specification provides as follows:

> "Stowing away on vessels; penalty.
> "Any person, without the consent of the owner, charterer, or master of any vessel and with intent to obtain, without paying therefor, transportation on such vessel to any place, within or without the United States, who shall board, enter, or secrete himself aboard such vessel, and shall be thereon at the time of departure of said vessel from a port, harbor, wharf, or other place within the jurisdiction of the United States, including the Canal Zone, or who, having boarded, entered, or secreted himself

aboard such vessel in any place within or without the jurisdiction of the United States, shall remain aboard any such vessel after such vessel has left such place and who shall be found thereon at or before the time of arrival of such vessel at any place within the jurisdiction of the United States, including the Canal Zone, shall be guilty of a misdemeanor and shall be liable to a fine not exceeding $500 or imprisonment for a period not exceeding one year, or both, in the discretion of the court. (June 11, 1940, ch. 326, par. 1, 54 Stat. 306.)"

The accused was found guilty under this Specification, excepting from its finding any connection between the accused and Rafael Alfonso y Espin.

In order to sustain the findings of guilty under this Specification the evidence must show that the man "Bruno" attempted to secrete himself or to remain secreted aboard the "Edmund B. Alexander" while awaiting its departure and that the accused knowing the purpose of the man "Bruno" did some act which abetted or encouraged, or which in reason should have abetted or encouraged him in his (Bruno's) attempt to remain on the ship until after its departure from Havana, Cuba. The fact that an attempt to become a stowaway and an act abetting or encouraging such an attempt are not designated as offenses in the Federal Penal Code, is immaterial to the present issue. The gravamen of the present offense is not the mere aiding of one to secure transportation without payment but the act of a person subject to military law, in abetting or encouraging an unauthorized person to remain or to attempt to remain secreted on board a United States transport. The criminal responsibility of the accused is based solely upon military law and upon the fact that he did an act which in common knowledge was prejudicial to the welfare of the ship and all on board. Furthermore, such an act was necessarily prejudicial to good order and military discipline, and constituted a violation of the 96th Article of War as charged.

The proof clearly sustains the allegations. The evidence shows that the accused carried food to the man "Bruno" while "Bruno" was in hiding on the Transport "Edmund B. Alexander". Obviously, the giving of food to a man in hiding would necessarily encourage him in his attempt to remain in hiding. The court was justified in concluding from these facts that "Bruno" attempted to remain aboard the "Edmund B. Alexander", and that the accused knew of this fact when he brought him food.

7. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

Approved.

WAR DEPARTMENT
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Washington, D. C.

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NAVY DEPARTMENT
NOV 28 1942

UNITED STATES	FIRST SERVICE COMMAND
v.	Trial by G.C.M., convened at Camp Edwards, Massachusetts, September 9, 1942. Dishonorable discharge (suspended) and confinement for one (1) year. Camp Edwards, Massachusetts.
Private EMILE J. BEAUCAGE, Jr. (11016686), Military Police Company, 1114th Service Command Unit, Camp Edwards, Massachusetts.	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Pvt Emile J. Beaucage, Jr., Military Police Co., 1114th SCU, being on guard and posted as a sentinel, at the Warehouse area, Camp Edwards, Mass., on or about August 13, 1942, was found sleeping upon his post.

The accused pleaded not guilty to, and was found guilty of the Charge and the Specification thereunder. Evidence of one previous conviction for absence without leave for six days was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two

years. The reviewing authority approved the sentence, reduced the term of confinement to one year, suspended the dishonorable discharge, and designated Camp Edwards, Massachusetts, as the place of confinement. The proceedings were published in General Court-Martial Order No. 180, Headquarters First Service Command, Boston, Massachusetts, October 7, 1942.

3. The evidence for the prosecution shows that on August 13, 1942, the accused was posted as a sentinel on Post No. 7 at Camp Edwards, Massachusetts. Post No. 7 included an area of approximately five acres upon which were located twelve warehouses and a refrigeration plant. This area was separated from Post No. 8 by a roadway. The area of Post No. 8 also included a number of buildings, one of which was a bakery. The evidence shows that often the sentinels on Post No. 7 and Post No. 8 walked together along the road separating the two general areas. Although each sentinel usually stayed on his own side of that roadway, the evidence shows that it was the duty of both sentinels to enter the area of the adjoining post when necessary to inspect any conditions which might require an investigation. There was also testimony that each sentinel was under the duty to "cover each other's posts". The accused was posted as a sentinel at 12 midnight. At about 2:15 a.m. or 2:30 a.m., the accused was found in a truck which was parked behind the bakery and within the perimeter of Post No. 8. The corporal of the guard upon finding the accused, flashed a light in his eyes, and observed that he was asleep. The accused was at once aroused by the corporal and relieved of his duties as a sentinel (R. 6-21, 21-28).

4. The accused made an unsworn statement in which he explained that he was posted on Post No. 7 at 12 midnight and that about two hours later he thought he heard a noise near the bakery on Post No. 8. In order to investigate this noise he went behind the bakery but found nothing unusual. He then jumped into the back of a truck which was parked near the bakery and sat down on a cushion which was in the truck and leaned against other cushions there. He was in this position when Corporal Varga flashed a light in his face, and he jumped up. Corporal Varga then took him into the bakery shop and relieved him of his sidearms (R. 32).

5. The Specification alleges that the accused "* * * being on guard and posted as a sentinel, at the Warehouse area, Camp Edwards, Mass., on or about August 13, 1942, was found sleeping upon his post". In view of the corroborated testimony that the accused was found asleep

in an area beyond the normal limits of his post, but within an area contiguous thereto, the important question to be determined is whether the accused was found asleep "upon his post" within the purview of the 86th Article of War.

The Manual for Courts-Martial states that -

> "A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article" (M.C.M., 1928, par. 146 a).

One test, therefore, to be applied in determining whether a sentinel, who has been found asleep beyond the normal limits of his post but within an area contiguous thereto, was asleep "upon his post" within the purview of the 86th Article of War, is to determine whether such sentinel was within this contiguous area for the purpose of protecting property committed to his charge or for the purpose of discharging such other duties as may have been imposed by his general or special orders.

In the present case, the duties of the accused required him to guard the general area within the perimeter of Post No. 7. He was also under the additional duty of observing the area contiguous thereto and of entering such area if necessary in order to protect Government property or to investigate any conditions there which might require his inspection. According to his own statement, the accused left the normal area of Post No. 7 and entered the contiguous area in order to investigate a noise which he thought he had heard. The court had a legal right to accept such explanation as true and to conclude, therefore, that the accused, at the time he went to sleep, was on his post as such post was extended by the lawful exercise of his general or special orders.

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

Lester S. Hill Jr., Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGH
CM 226512

JAN 9 1943

UNITED STATES	4th MOTORIZED DIVISION
v.	Trial by G.C.M., convened at Camp Gordon, Georgia, September 18, 1942. Dishonorable discharge and confinement for thirty-five (35) years. Penitentiary.
Private WALTER M. LUBOW (32007812), Service Company, 22nd Infantry.	

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification: In that Private Walter M. Lubow, Service Company, 22d Infantry, having been duly placed in arrest at Camp Gordon, Georgia, on or about April 20, 1942, did, at Camp Gordon, Georgia, on or about April 30, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Private Walter M. Lubow, Service Company, 22d Infantry, did, at Camp Gordon, Georgia, on or about April 30, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Graniteville, South Carolina, on or about May 2, 1942.

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

Specification 1: (Nolle prosequi entered).

Specification 2: In that Private Walter M. Lubow, Service Company, 22d Infantry, did, at Graniteville, South Carolina, on or about May 2, 1942, feloniously take, steal, and drive away one (1) 1935 Ford sedan automobile, the property of Leonard Clark, Warrenville, South Carolina, value of about $350.00.

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

Specification 1: In that Private Walter M. Lubow, Service Company, 22nd Infantry, with intent to defraud Corporal James H. Kennedy, 14th Transport Squadron, Daniel Field, Augusta, Georgia, Martin J. Kennedy, 134 High Street, Mauch Chunk, Pennsylvania, and Western Union Telegraph Company, Graniteville, South Carolina, did, at Graniteville, South Carolina, on or about May 2, 1942, wrongfully and unlawfully pretend to Oscar Randall, Graniteville, South Carolina, that he, Walter M. Lubow, Service Company, 22nd Infantry, was Corporal James H. Kennedy, 14th Transport Squadron, Daniel Field, well knowing that said pretenses were false and by means thereof did wrongfully and fraudently [sic] attempt to obtain from the said Oscar Randell, Graniteville, South Carolina, a sum of $25.00.

Specification 2: In that Private Walter M. Lubow, Service Company, 22d Infantry, did, at Graniteville, South Carolina, on or about May 2, 1942, drive a motor vehicle while drunk.

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

Specification: In that Private Walter M. Lubow, Service Company, 22nd Infantry, did, at Camp Gordon, Georgia, on or about May 11, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at or about New York, New York, on or about June 20, 1942.

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

Specification 1: In that Private Walter M. Lubow, Service Company, 22nd Infantry, having been duly placed in

confinement at the Post Stockade, Camp Gordon, Georgia, on or about May 4, 1942, and having been thereafter placed in confinement in the Prison Ward, Station Hospital, Camp Gordon, Georgia, did, at Camp Gordon, Georgia, on or about May 11, 1942, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Walter M. Lubow, Service Company, 22nd Infantry, having been duly placed in confinement in Post Stockade, Camp Gordon, Georgia, on or about July 17, 1942, did, at Camp Gordon, Georgia, on or about July 23, 1942, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all Specifications and Charges. He was found guilty of all Specifications and Charges, substituting the date "May 24, 1942" for the date "June 20, 1942" in the Specification, Additional Charge I. Evidence of two previous convictions was introduced in evidence: (a) desertion, July 21, 1941, terminated by surrender January 31, 1942; (b) failure to obey a lawful order, drunk in uniform in a public place, and entering a restricted area. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for 35 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

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

a. Specification, Charge I, Specification, Charge II, Specification 2, Charge III, and Specifications 1 and 2, Charge IV.

On April 20, 1942, First Lieutenant George W. Hassell, in command of the Service Company, 22nd Infantry, at Camp Gordon, Georgia, placed accused in arrest and informed him that charges were being preferred against him. Accused stated that he understood the meaning of arrest. The accused was not released from arrest at any time to include April 30, 1942. On April 30, 1942, following his trial in which he was sentenced to confinement at hard labor for six months and to certain forfeitures, the accused absented himself without leave at 10 p.m. In checking his equipment a tablet was found in his locker with an obscene remark written in pencil (R. 8-11; Ex. A, Exhibit unnumbered).

At about 1:15 p.m., May 2, 1942, accused came into the Southern Railway station, Graniteville, South Carolina, and handed a clerk, Mr. Dawson, a telegram to Martin Kennedy, Mauch Chunk, Pennsylvania, signed James H. Kennedy, stating, "Please wire $25.00 have furlough. Am waiting". Oscar H. Randall, a clerk at the station, stated that accused wrote the message, but did not state that he saw him write it. Accused returned about 3 p.m., stated to Mr. Randall that his name was Kennedy, and asked if a reply had been received. He was told that nothing had been received. About 5 minutes later Mr. Randall heard a car start and saw accused drive rapidly round the corner in an automobile belonging to Mr. Leonard Clark, who had parked his 1935 Ford coach in front of the depot with the key in the lock (R. 14-20; Ex. B).

During that afternoon Deputy Sheriff W. E. Herrington saw a car whizz by on the road about a mile from Graniteville. He then heard a crash and immediately drove to the scene of the accident. Accused was in the car, which was "hung * * * onto a post". The sheriff turned accused over to state highway patrolman A. C. Wright, checked the license number of the car, and discovered that it belonged to Mr. Clark. In the opinion of the sheriff, accused was under the influence of intoxicants, "had too much to drive a car", but was not drunk (R. 21-23).

b. Specification, Additional Charge I, and Specification 1, Additional Charge II:

The accused was confined in the post stockade, Camp Gordon, on May 4, 1942. He was thereafter admitted to the station hospital as an automobile accident case, and had sustained an injury to his right hip, and complained of an injury to his head. He was placed in Ward 28, a prison ward for surgical cases. The only diagnosis made of accused was contusion of the right hip. Accused was last seen there by a guard at about 6 a.m., May 11, 1942 (R. 23-28; Ex. unnumbered).

The accused, in civilian clothes, was arrested by Sergeant Miller, C.A.S.U. 1240, New York City, in Part 8, General Sessions Court, 100 Center Street, New York City, at 10:30 a.m., June 26, 1942. It was stipulated that he had been apprehended by the civil authorities at New York City on May 24, 1942 (R. 28, 34).

c. Specification 2, Additional Charge II.

The accused was confined in the post stockade, Camp Gordon,

Georgia, at 4:50 p.m., July 17, 1942, and escaped therefrom at 9 a.m., July 23, 1942. At about 10:45 a.m., July 23, 1942, the accused was apprehended by two members of the military police in the woods about 3 miles down Highway No. 1, toward Augusta (R. 23, 28-30).

4. For the defense the accused testified that on April 30, 1942, he went to the place of trial by special court without restraint. He was told that he had received a 6 months' sentence, and returned to his company without any guard. He won some money in a gambling game, signed out, and went to town where he had a few drinks. He remembered little of what happened after that, and disclaimed any knowledge of the writing on the tablet. He did return to camp, left again, and remembered nothing more until he reached New York. He believed his condition was due to "partly intoxication and partly dope". At the age of 8 years the accused sustained a head injury, was treated 2 years by a psychiatrist, and still suffered from pains in his head. He had hurt his head in an automobile accident (in Graniteville, South Carolina), in which his hip was injured. He admitted leaving the hospital on May 11th and went to New York because he had a letter that his mother was sick. He intended to stay a few days and return. He was picked up by the civil authorities on May 21, 1942, and told them he was a soldier. (It was stipulated that the date of his apprehension was May 24,1942). Over a month later he was taken to Fort Jay by the military police.

En route he had stopped in Baltimore to see a sister, and was advised by her and a priest to turn in as soon as possible. He was apprehended in civilian clothes because he could not obtain a uniform when he left the hospital. When arrested in New York he was riding with a girl with whom he had been drinking at a bar, in a car which the girl said belonged to a friend of hers. He denied knowledge of any happenings in Graniteville on May 2, 1942, he had never seen any of the witnesses who testified as to events there, and had never heard of Mauch Chunk, Pennsylvania. He did not know James H. Kennedy.

Accused did not recall breaking away from the military police (escape from confinement) on July 23, 1942. "I had been working one morning and got dizzy in the head. I get that way often. On the spur of the moment I didn't realize what I was doing" (R. 31-39).

5. The evidence shows, with respect to the Specification, Charge I, that accused was placed in arrest in quarters on April 20, 1942, and stated that he understood what arrest meant. He was not released from arrest prior to the time he absented himself without leave on April 30, 1942, following his trial at which he received a sentence

including confinement at hard labor for 6 months. The evidence supports the finding of guilty of the Specification, Charge I.

The Specification, Charge II, alleges desertion at Camp Gordon, Georgia, April 30, 1942, terminated by apprehension at Graniteville, South Carolina, on May 2, 1942. The fact that accused was in arrest, had just been sentenced to 6 months' confinement, and was apprehended after he had apparently telegraphed for funds and had stolen a car, are facts from which the court was warranted in inferring the intent to desert.

Specification 2, Charge III, alleges the larceny of a 1935 Ford automobile, value about $350, property of Mr. Leonard Clark. The proof shows that the accused drove Mr. Clark's car round a corner of the station where it had been parked with the key in the lock, and, after failing to take a sharp curve in the road about a mile from the station, crashed into a post and wrecked the car. The record contains no proof of the value of the car. The evidence is legally sufficient to support only so much of the finding as to value under Specification 2, Charge III, as involves a finding of some substantial value not in excess of $20.

Specification 1, Charge IV, alleges that accused, with intent to defraud Corporal J. H. Kennedy, Mr. M. J. Kennedy, and Western Union Telegraph Company, did wrongfully and unlawfully pretend to Oscar Randall that he was Corporal Kennedy, and did wrongfully and fraudulently attempt to obtain from Randall the sum of $25. The evidence shows that accused came into the depot at Graniteville, and handed to a clerk, Mr. Dawson, a message to be sent by Western Union to Mr. Martin Kennedy, Mauch Chunk, Pennsylvania, "Please wire $25.00 have furlough. Am waiting", signed James H. Kennedy. About 2 hours later accused returned, stated to the clerk, Oscar Randall, that his name was Kennedy, and inquired whether a reply had been received, and was informed that it had not been received.

The only reference in the record to Corporal James H. Kennedy or to Mr. Martin J. Kennedy, is the appearance of their names as the sender and the addressee, respectively, of the telegram. The mere fact that the accused handed in the telegram for dispatch and later appeared at the station stating that his name was Kennedy, and inquiring of Oscar H. Randall, whether a reply had been received, do not establish the allegations contained in the Specification. The Board of Review is accordingly of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge IV.

Specification 2, Charge IV, alleges that accused did, on May 2, 1942, at Graniteville, South Carolina, "drive a motor vehicle while drunk". The Specification fails to allege that the driving was wrongful or unlawful. It also fails to allege that he drove the vehicle on a public road or highway. From all that was alleged, the vehicle may have been driven on private property. In the opinion of the Board of Review the Specification fails to allege an offense.

The Specification, Additional Charge I, and Specification 1, Additional Charge II, allege that accused escaped from confinement and deserted at Camp Gordon, Georgia, May 11, 1942, and was apprehended in New York City, on June 20, 1942 (found as May 24, 1942). The evidence shows that accused was confined in the post stockade, Camp Gordon, May 4, 1942, and admitted to the prison ward of the station hospital, and was last seen in the prison ward by a guard at about 6 a.m., May 11, 1942. The accused, in civilian clothes, was arrested by the military police in the General Sessions Court, New York City, on June 26, 1942. It was stipulated that he had been arrested by the civil authorities on May 24, 1942. The proof of escape from confinement, Specification 1, Additional Charge II, is clear. The court was warranted in inferring the intent to desert from his escape from confinement, and from his apprehension by the civil authorities, 13 days later, in civilian clothes, in New York City, 800 miles from his post.

Specification 2, Additional Charge II, alleges that accused escaped from confinement, post stockade, Camp Gordon, on July 23, 1942. The proof shows that he was confined in the post stockade, Camp Gordon, on July 17, 1942. At about 9 a.m., July 23, 1942, the accused escaped from confinement and was apprehended at about 10:45 a.m. by two members of the military police, in the woods about 3 miles down Highway No. 1, toward Augusta. The evidence supports the finding of guilty of Specification 2, Additional Charge II.

6. The accused is 23 years of age. He was inducted at New York City, February 19, 1941.

7. There is no maximum limit of punishment for the offense of wartime desertion (Spec., Chg. II, and Spec., Add.Chg.I). The maximum confinement authorized under the Specification, Charge I (breach of arrest), is 3 months; under the Specification, Charge III (larceny, value under $20), 6 months; and under Specifications 1 and 2, Additional Charge II (escape from confinement), 2 years; a total confinement under Specifications other than of desertion, of 2 years and 9 months.

The confinement adjudged of 35 years, though legal, is considered grossly excessive.

Confinement in a penitentiary is authorized by law for wartime desertion. Under the provisions, however, of paragraph VII, Circular 368, War Department, November 9, 1942, accused should be confined in the United States Disciplinary Barracks if his dishonorable discharge is not suspended, or in a detention and rehabilitation center if his dishonorable discharge is suspended.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board holds the record of trial legally insufficient to support the findings of guilty of Specifications 1 and 2, Charge IV, and of Charge IV; legally sufficient to support only so much of the finding of guilty of Specification 2, Charge III, as involves a finding of guilty of larceny by accused, at the time and place alleged, and of the property described, of some value not in excess of $20, and of the ownership alleged; and legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, Charge II and the Specification, thereunder, of Charge III, of Additional Charge I and the Specification thereunder, and of Specifications 1 and 2, Additional Charge II, and of Additional Charge II; and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 226612

1st Ind.

War Department, J.A.G.O., JAN 14 1943 - To the Commanding General, Headquarters 4th Motorized Division, Camp Gordon, Georgia.

1. In the case of Private Walter M. Lubow (32007812), Service Company, 22nd Infantry, I concur in the foregoing holding of the Board of Review and, for the reasons therein stated, recommend that the findings of guilty of Specifications 1 and 2, Charge IV, and of Charge IV, be disapproved, and that only so much of the finding of guilty of Specification 2, Charge III, be approved as involves a finding of guilty of larceny by accused, at the time and place alleged, and of the property described, of some value not in excess of $20, and of the ownership alleged. Thereupon you will have authority under the provisions of Article of War 50½ to order the execution of the sentence.

2. Confinement in a penitentiary is authorized for desertion in time of war (AW 42). In view, however, of the provisions of War Department Circular No. 368, November 9, 1942, the accused should be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

In my opinion the sentence to confinement adjudged and approved is excessive. The accused now stands convicted of two desertions, of two escapes from confinement, of larceny of property of a value not in excess of $20, and of breach of confinement. The maximum confinement authorized for the offenses other than desertion is two years and nine months.

I recommend that a substantial portion of the sentence be remitted and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement in lieu of the United States Penitentiary, Atlanta, Georgia.

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:

JAN 16 (CM 226612).

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

SPJGK
CM 226554

NOV 13 1942

THIRD DISTRICT
ARMY AIR FORCES TECHNICAL
TRAINING COMMAND

UNITED STATES)
)
v.)
)
First Lieutenant CHARLES)
E. CROZIER (0-904781),)
303rd Technical School)
Squadron (Special), Air)
Corps.)

Trial by G. C. M., convened at Keesler Field, Mississippi, September 28 and 29, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

CHARGE I: Violation of the 95th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Charles E. Crozier, 303rd Technical School Squadron (Sp), Army Air Forces, having received a lawful command from Major General W. R. Weaver, U.S.A., on or about May 12, 1942, to proceed without delay to Keesler Field, Mississippi, and to report to the Commanding Officer thereof for duty, the said Major General Weaver being in the execution of his office, did, at Atlanta, Georgia, on or about May 14, 1942, fail to obey the same.

Specification 2: In that First Lieutenant Charles E. Crozier, 303rd Technical School Squadron (Sp), Army Air Forces, did, at Keesler Field, Mississippi, on or about June 11, 1942, with intent to deceive the Commanding General, Army Air Forces Technical Training Command, Knollwood Field, North Carolina, officially state in writing to the said Commanding General, that he departed Southern Pines on May 13, 1942, and when he reached Atlanta, Georgia, he was so utterly sick and miserable that he went to a hotel where he stayed for over a week with no one but a bell boy to wait on him, or words to that effect, which statement was known by said First Lieutenant Charles E. Crozier to be untrue, in that he did not stay at any one hotel from May 14, 1942, to May 23, 1942, but, in fact, registered and stayed at divers hotels and appeared at various public places from May 14, 1942, to May 23, 1942, in Atlanta, Georgia.

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

Specification: In that First Lieutenant Charles E. Crozier, 303rd Technical School Squadron (Sp), Army Air Forces, did, without proper leave, absent himself from his station at Keesler Field, Mississippi, from about June 15, 1942, to about June 23, 1942.

He pleaded not guilty to Charge I and its Specifications, guilty to Charge II and Specification 1 thereunder, not guilty to Specification 2, Charge II, guilty to Charge III, and guilty to the Specification, Charge III, except the "words, 'June 23, 1942'", substituting therefor the "words, 'June 21, 1942'", of the excepted words, not guilty, of the substituted words, guilty. He was found not guilty of Charge I and its Specifications, guilty of Charge II and its Specifications, guilty of Charge III and guilty of the Specification, Charge III, except the "words June 23, 1942", substituting therefor the "words June 22, 1942", of the excepted words, not guilty, of the substituted words, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the findings of guilty "upon Charge II and Charge III" and the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused was commissioned on May 8, 1942, and that he reported for active duty at Headquarters Technical Training Command, Army Air Forces, at Knollwood Field, Southern Pines, North Carolina, on May 12, 1942 (R. 76; Pros. Exs. 1, 3). On May 12 he received (Pros. Ex. 1) assignment and travel orders issued by that headquarters, Major General W. R. Weaver, United States Army, commanding (par. 6, S.O. No. 110, May 12, 1942), reading, in material part, as follows:

> "*** First Lieutenant CHARLES EDWARD CROZIER (0-904781), Air Corps, having reported for duty at these headquarters on May 12, 1942, in compliance with instructions contained in paragraph 20, Special Orders No. 120, War Dept., 8 May 1942, is assigned to Keesler Field, Mississippi, will proceed thereto without delay and will report to the Commanding Officer thereof for duty" (Pros. Ex. 2).

He did not report at Keesler Field until May 26, 1942 (R. 17; Pros. Ex. 3). The shortest and most direct and serviceable rail route between Southern Pines, North Carolina, and Keesler Field, Mississippi, passed through Atlanta, Georgia, Birmingham, Alabama, and Biloxi, Mississippi, and the travel time normally required was about 22 or 23 hours (R. 14, 15). A change of trains at Atlanta was necessary (R. 14).

Accused registered at the Henry Grady Hotel in Atlanta, Georgia, on May 14 (Pros. Exs. 1, 5). At about this time he requested a clerk at the Robert Fulton hotel in Atlanta to cash a check for him, but the request was denied because accused was not registered at that hotel and because he was under the influence of liquor and his appearance was unmilitary (R. 18, 21). He registered, alone, at the Robert Fulton hotel on May 15, and paid room rent in advance for one day (R. 28; Pros. Exs. 7, 9). He was seen "in and out" of this hotel three or four times after his first appearance there (R. 21, 22) and on May 19, 1942, he cashed a check for $10 at the hotel. He again registered, for himself "and wife", at the Robert Fulton hotel on May 21, and paid room rent for one day (R. 28; Pros. Exs. 8, 10). A clerk of the hotel testified that "it is possible" that accused registered at the hotel on other occasions between the dates mentioned, but that witness had searched the hotel files and had been unable to find any record of his having so registered (R. 29). While registered at this hotel accused did not report himself ill (R. 29, 31, 37). About May 18 accused cashed a check at the Piedmont

hotel in Atlanta (R. 57). About May 19 he cashed checks at the Winecoff (R. 49) and Ainsley hotels in Atlanta (R. 55, 56). The Piedmont, Ainsley, Robert Fulton and Henry Grady hotels are located in the "downtown section" of Atlanta (R. 57).

Miss Edna Roper, a registered nurse employed at the time as cashier (R. 61) of a restaurant (R. 40), testified that she saw accused in a "small cafe on Carnegie Way" in Atlanta about May 21, 1942. There were enlisted men in the cafe. Accused was drinking beer. Witness had known accused previously "by reputation". She asked him to go to a hotel and "straighten himself out", and thereupon "had him registered" at a hotel, apparently the Robert Fulton, where he remained until May 25. Accused had a slight cold but was in "no condition to travel" due to drinking (R. 59). Witness saw accused "every spare moment" between May 21 and 25 in which she was not on duty at the restaurant or as a nurse. She paid the hotel bills. She gave accused about a case of beer which he drank (R. 60, 62). She redeemed two checks made by accused which had been returned by the drawee bank unpaid (R. 63).

A medical officer testified that he saw accused in the station hospital, Keesler Field, on May 26, 1942. Accused's temperature was slightly above normal and "he appeared ill, not acutely ill, not seriously ill, but he appeared worn out, bedraggled, so to speak". He was suffering from "a bronchitis which was serious enough to confine him to bed" (R. 84). The final diagnosis was:

> "1.) Bronchitis, acute, catarrhal, sever_,
> "2.) Conjunctivitis, catarrhol, bilateral, accute, cause undetermined, moderately severe.
> "3.) Tonsellitis, hypertrophic, chronic, bilateral
>
> E P T E".
>
> (Court Ex. X).

On a subsequent hospitalization at the station hospital from June 22 to June 27, the diagnosis reached included a finding of "Constitutional psychopathic, inadequate personality" (Court Ex. Y).

By 4th Indorsement to the Commanding General, Air Force Technical Training Command, Knollwood Field, North Carolina, dated June 11, 1942,

upon correspondence relating to a check cashed by accused at the Ainsley hotel and requesting an explanation as to his delay in reporting to Keesler Field, accused stated, among other things:

> "2. For the clearest understanding of the undersigned's delay in reaching Keesler Field from Southern Pines, it would be best to start at the beginning, when he left home in Florida. At that time he had a severe head cold which steadily grew worse, and complications developed. By the time he reached Southern Pines, he had a splitting headache, sore throat and cold had moved into his chest. En route to Southern Pines he ate nothing that stayed on his stomach, nor could he sleep because of severe coughing and choking up. While in Southern Pines, the undersigned unfortunately gained the impression that there was no particular hurry about his getting to Biloxi. He realizes now that was an erroneous conclusion. He left Southern Pines on the 13th of May and by the time he reached Atlanta he was so utterly sick and miserable he went to a hotel and to bed. He had considerable fever, difficulty in breathing, a raging headache and sore throat. He was unable to eat or to sleep to any extent. His throat was swollen and he coughed constantly. He thought every day he would surely feel better the next, but he just became weaker and sicker. The doctor at the hospital here has since told the undersigned that he should have called Fort McPherson. This did not occur to me. He stayed at the hotel over a week with no one but a bell boy to wait on him. He knew he had to go on to Biloxi somehow. He managed finally to leave and got to Birmingham ***. He arrived in Biloxi on the morning of May 25, twelve days after leaving Southern Pines. He could barely walk and could scarcely see ***" (Pros. Ex. 4).

Accused absented himself without leave from the 303rd Technical School Squadron at Keesler Field on June 15, 1942, and remained absent until June 22, 1942 (R. 68; Pros. Ex. 15).

A witness for the defense testified that during the night of May 25-26, 1942, accused was removed from a hotel in Biloxi, Mississippi, on a stretcher and was taken away in an ambulance (R. 70). An officer testified for the defense that he saw accused in his room in bachelor officers' quarters at Keesler Field on the night of June 21, 1942 (R. 72, 73).

Accused made an unsworn statement to the effect that he had had but little military training before being commissioned, the training being that received in the Reserve Officers' Training Corps and, for short periods, in the Florida Home Guard and the Florida Defense Force. At college his extracurricular activities included football, editorial work, debating and political organization. For six years he engaged in the advertising business in Florida. In addition he had been active with Chambers of Commerce and had been chairman of the "County Democratic Fund Committee of Lake County, Florida". While in arrest in quarters he studied many military text books and manuals and took part in a physical training program. He realized that "some of the things I have done since coming on to active service are not a credit to my uniform or to the military service; and are not the marks of an efficient officer". He expected to avoid such action in the future. He stated that his mental and physical condition was good and that he hoped to return to duty (R. 76-78).

Attached to the record of trial are eight letters attesting to the good reputation of accused in civil life (Def. Exs. C-J).

4. The evidence, together with the pleas of guilty, shows that on May 12, 1942, as alleged in Specification 1, Charge II, accused received a lawful command from Major General W. R. Weaver, to proceed without delay to Keesler Field, Mississippi. He did not reach that destination until about May 26. The delay was unreasonable and inexcusable. Accused did not at the trial attempt to explain the delay, but prior to the trial stated that it was caused by his illness. The evidence does not substantiate this assertion. Culpable failure to obey the command is established.

The evidence further shows that having been asked to explain his delay in reporting to Keesler Field, accused, at the place and time alleged in Specification 2, Charge II, forwarded an official indorsement to the commanding general of the Army Air Force Technical Training Command which contained in substance the statement alleged in this Specification. The gist of the statement made by accused was that he had

been unable to travel because illness had confined him to a hotel in Atlanta for more than a week. It is alleged that the statement was known by accused to be untrue in that he had not remained in any one hotel during the period in question. It is proved that during this period accused registered in at least two different hotels and that he registered in one, the Robert Fulton, on May 15 for one day and again registered in the same hotel on May 21. His woman companion testified that he remained in the Robert Fulton hotel from May 21 to May 25, but the hotel records do not show that he remained in this hotel between May 16 and May 21. He appeared in the Robert Fulton hotel while he was not registered there. On May 18 he appeared at the Piedmont Hotel and on May 19 he appeared at the Winecoff and Ainsley hotels, in Atlanta. On May 21 he appeared in a cafe on "Carnegie Way" in the city. It is thus proved without contradiction that accused did not, in fact, remain in any one hotel but lived at various hotels or elsewhere and went about the city during the period in question. His statement was false as to his whereabouts and actions and was therefore misleading as to his physical condition and fitness to travel during the period of delay. The statement was no doubt made by accused with knowledge of its falsity and with intent to deceive, as alleged. Its official submission was prejudicial to good order and military discipline and violative of Article of War 96.

The evidence establishes absence without leave by accused from June 15, 1942, to June 22, 1942, as found under Charge III and its Specification.

5. War Department records show that accused is 36 years of age. He graduated from Porter Military Academy in 1924 and attended the University of Florida for two years. He completed the senior division, R.O.T.C., in 1926 but was not tendered a commission because of a hernia. He served in the Florida Home Guard and in the Florida Defense Force for about one year. He was commissioned a first lieutenant, Army of the United States, on May 8, 1942, and entered on active duty May 12, 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence

and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Charles E. Crozier (0-904781), 303rd Technical School Squadron (Special), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Upon reporting for duty as an officer following his appointment from civil life accused was assigned to a station and given orders to proceed at once to that station, about 24 hours distant. He delayed en route for almost two weeks, thus failing to obey the order. Upon being required to explain his delay he made a false and misleading statement to his commanding general as to the reasons for the delay. Later he again absented himself without leave for a period of seven days. A clinical report attached to the record of trial contains a finding to the effect that accused is a constitutional psychopath with inadequate personality. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 123, 18 Dec 1942)

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

SPJGK
CM 226579

OCT 30 1942

UNITED STATES v. Private JAMES A. EVANS (34096867), Service Company, 2nd Student Training Regiment, Infantry School Service Command.	FORT BENNING, GEORGIA. Trial by G. C. M., convened at Fort Benning, Georgia, August 13, 1942. Dishonorable discharge and confinement for three and one-half (3½) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

2. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated".

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

3. The only offense of which accused was found guilty which is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by a statute of the United States of general application within the continental United States or

by the law of the District of Columbia, is the offense of larceny of a wrist watch, as alleged in Specification 4 of the Charge, the value of this watch, under the approved findings, being fixed at $50. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for this offense is confinement at hard labor for one year. This offense is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by the law of the District of Columbia (22 D.C.Code 2201). Although an offense of which an accused has been convicted be so recognized a penitentiary may not be designated as the place of confinement under a sentence adjudged by a court-martial,

> "unless, also the period of confinement authorized and adjudged by such court-martial is more than one year" (A.W. 42).

Inasmuch as the authority for penitentiary confinement is basically conditioned by Article of War 42 upon conviction of some particular offense recognized by Federal civil statute, it is clear that the further condition pertaining to the period of confinement authorized and adjudged by court-martial likewise relates to the confinement authorized and adjudged for that particular offense. The entire context of the article supports this view. Confinement in excess of one year not being authorized by the Manual for Courts-Martial for the offense of larceny here in question, it follows that penitentiary confinement in the case is not authorized.

The values of the various articles larceny of which was found under the several specifications may not be aggregated for the purpose of authorizing penitentiary confinement (sec. 399 (2), Dig. Op. J.A.G., 1912-1940).

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

3 42 PM

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 31 1942 - To the Commanding General, Fort Benning, Georgia.

1. In the case of Private James A. Evans (34096867), Service Company, 2d Student Training Regiment, Infantry School Service Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three and one-half years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, 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 226579).

Myron C. Cramer NOV 3 '42 PM

Myron C. Cramer,
Major General,
The Judge Advocate General.

HEADQUARTERS, FORT BENNING, GA.
RECEIVED

1 Incl.
Record of trial.

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

SPJGH
CM 226655

NOV 25 1942

N.D

UNITED STATES	)	77th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, October 9, 1942. Dismissal.
First Lieutenant BERNARD J. CURRAN (O-453481), 77th Signal Company.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that 1st Lieutenant, Bernard J. Curran, 77th Signal Company, Fort Jackson, South Carolina, did at Fort Jackson, South Carolina on or about August 7, 1942, feloniously take, steal, and carry away about fifty (50) gallons of gasoline of the value of about Four Dollars and Seventy-Five cents, ($4.75), property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that First Lieutenant Bernard J. Curran, 77th Signal Company did at Fort Jackson,

South Caroline, on or about June 1, 1942, borrow from Technical Sergeant Harold R. Fisher, 77th Signal Company the amount of Sixty Dollars ($60.00), to the prejudice of good order and military discipline.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Charge and the Specification thereunder and of Specification 1, Additional Charge, and of the Additional Charge, but not guilty of Specification 2, Additional Charge. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution may be summarized briefly as follows:

a. Specification of the Charge:

About August 5, 1942, Second Lieutenant Charles S. Scovil, motor officer, 77th Signal Company denied the request of accused, the supply officer of that company, for the loan of some gasoline, but did lend him some cans. At some time about the first week in August 1942, Corporal Edward F. Dombroski, 77th Signal Company, drove a 1½ or ½-ton truck up to the gas station, and under instructions from Sergeant Chester Thomas, filled some cans with gasoline and parked the truck in the motor park (R. 21, 27-30).

On August 7, at about 6:30 p.m., the accused brought his blue convertible roadster to the garage and asked the dispatcher about some cans. The accused and the dispatcher walked out in the motor pool to a 1½-ton truck, in which there were ten painted 5-gallon cans of the kind usually taken out into the field. At the direction of the accused, the dispatcher drove the truck into the garage where the cans, which were full, were taken out of the truck and placed in the rear compartment of the car of accused (R. 8-15).

Second Lieutenant Edward J. Brackey came into the motor pool and saw the coupe of accused parked in the shop with Government issue 5-gallon gasoline cans in the open rear compartment and in the rear seat. Accused there stated to Lieutenant Scovil that "he had gotten it". When Lieutenant Brackey asked accused how he rated it, the accused stated that he knew someone, a civilian, from whom he got gasoline. About an hour and a half later, the accused picked up Lieutenant

Brackey in the car and drove to Brackey's quarters off the post, where Brackey returned to accused a borrowed tire. The accused, in the presence of Lieutenant Brackey, opened the compartment, removed one of the cans to make room for the tire, opened the can, put a nozzle on it, and poured the contents of the can into the gas tank of his car. Lieutenant Brackey definitely smelled the odor of gasoline when the accused poured the contents of the can into the tank (R. 15-20, 22).

On September 21, 1942, the accused, through another officer, made an appointment with, and came to the Station Hospital to see Major Kenneth F.Zitzman, signal officer, and in command of the 77th Signal Company for training and operations. The accused made a voluntary statement to Major Zitzman that he took the gasoline and used it for his personal use; that he took enough to get home on leave because he was unable to buy it and his requests for Government gasoline were denied; that he was willing to take the consequences; and that he made the statement in an effort to clear the record of Lieutenant Scovil, the company motor officer (R. 32-36).

On September 22, 1942, the accused made an appointment with, and saw Colonel Hugh Cort, Chief of Staff, 77th Infantry Division, in his office. The accused volunteered the statement to Colonel Cort that he was in trouble again and had taken fifty gallons of Government gasoline (R. 36-38).

The contract price of gasoline delivered at Fort Jackson at about August 7, 1942, was $.08507 per gallon. The value of fifty gallons was $4.25 (R. 38-39).

b. Specification 1, Additional Charge:

On June 1, 1942, Technical Sergeant Harold R. Fisher, 77th Signal Company, upon the request of accused, loaned accused $60 for one day. When, on June 2, 1942, the accused gave Sergeant Fisher a check for $10 and asked if he could use the balance until the first of the next month, Sergeant Fisher agreed, and did receive the balance on July 1, 1942. No benefit or favor was derived by Fisher from loaning this money. Sergeant Fisher denied that accused asked him to cash a check or offered a check for him to hold (R. 39-42).

4. The testimony for the defense was with respect to Specification 1, Additional Charge, only.

First Lieutenant Robert J. McKithan, 77th Signal Company, testified that in the course of his investigation of the gasoline charge, he

learned that accused borrowed money from Sergeant Fisher (R. 46-48).

The accused elected to testify with respect to Specification 1, Additional Charge, only. He stated that he offered Sergeant Fisher a check in connection with the $60 transaction but that Fisher refused the check and stated that he did not need it. He asked Fisher if he would hold the check for a day or so. Upon the following day he gave Fisher $10 and a check for $50. There were not enough funds in the bank in Rahway, New Jersey, upon which he drew the check, but it was the family bank and "it is always covered". It was not longer than a week before he had repaid the $60. He had needed the money because he had fallen asleep and smashed his car (R. 49-51).

5. The evidence shows the larceny of, and the accused admitted in his two confessions, the taking of 50 gallons of Government gasoline for his personal use in driving home on leave.

The evidence also shows that the accused borrowed $60 on June 1, 1942, from Staff Sergeant Fisher of his company, repaying $10 the next day, and the balance at the end of the month. Sergeant Fisher denied the statement of accused that accused offered him a check to hold for the $60.

The record supports the findings of guilty of the Charge and its Specification, and of Specification 1, Additional Charge.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service from March 3, 1941; appointed second lieutenant, Army of the United States, and extended active duty, January 9, 1942; appointed first lieutenant, Army of the United States, July 7, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 94th or the 96th Article of War.

Preston S. Hill Jr., Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 226655 1st Ind.

War Department, J.A.G.O., JAN 20 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Bernard J. Curran (O-453481), 77th Signal Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation of the sentence.

Since taking his action in this case, the reviewing authority, Commanding General, 77th Infantry Division, has by letter to the President stated that the accused was assigned to a section of his headquarters for three months while awaiting result of trial, and has zealously and faithfully performed all assignments so satisfactorily that the reviewing authority now recommends the suspension of the execution of the dismissal adjudged. I recommend that the sentence be confirmed, but in view of this expressed opinion of the reviewing authority that the accused has considerable salvage value to the service, recommend that the execution of the sentence to dismissal be suspended during the pleasure of the President.

3. Inclosed herewith are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action carrying into effect that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but execution suspended. G.C.M.O. 50, 22 Mar 1943)

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

SPJGK
CM 226656

OCT 29 1942

UNITED STATES	36TH INFANTRY DIVISION
v.	Trial by G. C. M., convened at Camp Edwards, Massachusetts, October 14, 1942. Dismissal and confinement for six (6) months. Disciplinary Barracks.
Second Lieutenant JAMES S. HOLMES (0-1288054), 143rd Infantry.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification: In that 2nd Lt. James S. Holmes, 143rd Infantry, did, without proper leave, absent himself from his organization at Camp Edwards, Massachusetts, from about September 7, 1942 to about September 20, 1942.

CHARGE II: Violation of the 64th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

He pleaded guilty to Charge I and its Specification and not guilty to Charges II and III and their Specifications. He was found guilty of Charge I and its Specification and not guilty of Charges II and III and their 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 six months. The reviewing authority approved the sentence, designated

the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record for action under Article of War 48.

3. The evidence shows that accused absented himself without leave from his organization, Company B, 143rd Infantry, at Camp Edwards, Massachusetts, on September 7, 1942 (R. 12; Ex. A), and remained absent until he surrendered to military authorities at Chicago, Illinois, on September 20. He returned to Camp Edwards on September 22, 1942. (R. 19; Ex. A)

The Commanding Officer, 143rd Infantry, testified that on the afternoon of September 8, 1942, he received a telegram from accused, sent from Boston, Massachusetts, stating that accused's mother was ill and that he was going to St. Louis, Missouri. He asked for a leave of absence for ten days and requested that an answer be sent to him at a St. Louis address which he furnished. The commanding officer dispatched a telegram to the address indicated directing accused to return to Camp Edwards, Massachusetts, immediately. No reply from accused was received. (R. 16) Upon his return accused told the commanding officer that he did not have any reason for absenting himself except that he had been somewhat discouraged because he had not been given adequate responsibilities with his platoon and felt that he "would make a better non-commissioned officer than an officer" (R. 17).

Accused enlisted June 9, 1941, and served with Company B, 1st Infantry, as private, corporal and sergeant. He graduated from officers' candidate school and was commissioned a second lieutenant on July 17, 1942 (R. 20, 21). He reported for duty with the 143rd Infantry on August 9 and was assigned to Company B of that regiment on August 26 (R. 13, 22). His company commander testified, on cross-examination, that, except for failure to report for one very early formation, accused had performed his duties with the company, as platoon leader and mess officer, in an excellent manner (R. 7, 8, 18). His company commander and his battalion and regimental commanders testified, on cross-examination, that they believed accused capable of further useful service as an officer (R. 8, 14, 20).

Accused testified that he hoped to remain in the military service "until the war is over" (R. 21).

4. The evidence, together with the pleas of guilty, establishes absence without leave as found by the court under Charge I and its Specification.

5. War Department records show that accused is 25 years of age. It does not appear that he is a high school or college graduate. Upon his application for appointment as an officer he stated that he had had experience for three years as a salesman and for one year as a bartender.

6. In an application for clemency signed by accused and his defense counsel, attached to the record of trial, request is made that the sentence be disapproved in whole or in part or suspended.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James S. Holmes (0-1288054), 143rd Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused absented himself without leave for a period of thirteen days, this less than two months after he was commissioned from the ranks and less than two weeks after he was first assigned to a company as an officer. His educational and civil life backgrounds are not impressive. It does not appear that accused is qualified to remain an officer. I believe the sentence to dismissal is appropriate but that the confinement and forfeitures adjudged are unnecessary. Accordingly, I recommend that only so much of the sentence as involves dismissal be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm only so much of the sentence as involves dismissal and to carry the sentence to dismissal into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Only so much of sentence confirmed as involves dismissal. Sentence as thus modified suspended. G.C.M.O. 26, 8 Mar 1943)

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

SPJGK
CM 226734

NOV 20 1942

UNITED STATES	)	4TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Pine Camp, New York, August 28, 1942. Dishonorable discharge and confinement for two (2) years. Federal Reformatory, Chillicothe, Ohio.
Private GROVER L. BROWN (15044610), Company A, 84th Armored Reconnaissance Battalion.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Nolle Prosequi.)

Specification 4: In that Private Grover L. Brown, Company A, 84th Armored Reconnaissance Battalion, did, at Pine Camp, New York, on or about June 6, 1942, feloniously take, steal and carry away a letter, value under twenty ($20.00) dollars the property of Private Nicklas C. Kallas, Company A, 84th Armored Reconnaissance Battalion, Pine Camp, New York.

Specification 5: In that Private Grover L. Brown, Company A, 84th Armored Reconnaissance Battalion, did, at Pine Camp, New York, on or about June 14, 1942, feloniously take, steal and carry away a letter, value under twenty ($20.00) dollars, containing two ($2.00) dollars, U. S. currency the property of Technician Fifth Grade Donald P. Wolfe, Company A, 84th Armored Reconnaissance Battalion, Pine Camp, New York.

Specification 6: In that Private Grover L. Brown, Company A, 84th Armored Reconnaissance Battalion, did, at Pine Camp, New York, on or about October 11, 1941, feloniously take, steal and carry away a letter, value under ($20.00) dollars, the property of Corporal Bernard Herskovitz, Company A, 84th Armored Reconnaissance Battalion, Pine Camp, New York.

Specification 7: In that Private Grover L. Brown, Company A, 84th Armored Reconnaissance Battalion, did, at Pine Camp, New York, on or about April 24, 1942, feloniously embezzle by fraudulently converting to his own use the following personal property:

First: Letter under the value of twenty ($20.00) dollars;

Second: Letter under the value of twenty ($20.00) dollars;

Third: Letter under the value of twenty ($20.00) dollars

and containing ten ($10.00) dollars, U.S. currency; the above items all being the property of Sergeant Bernard Herskovitz, Company A, 84th Armored Reconnaissance Battalion, Pine Camp, New York, and having been entrusted to the said Private Grover L. Brown for deposit in the United States mail.

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

Specification 1: In that Private Grover L. Brown, Company A, 84th Armored Reconnaissance Battalion, did, at Pine Camp, New York, on or about June 13, 1942, enter into and trespass upon a certain foot locker, the property of G. Alvin Gross, without the permission of the owner, such act being to the prejudice of good order and military discipline.

Specification 2: In that Private Grover L. Brown, Company A, 84th Armored Reconnaissance Battalion, did, at Pine Camp, New York, on or about June 26, 1942, enter into and trespass upon a certain foot locker the property of Arthur W. Morgan, without the permission of the owner, such act being to the prejudice of good order and military discipline.

He pleaded not guilty to Charge I and its Specifications and to Charge II and its Specifications. In the course of the trial a nolle prosequi was entered with respect to Specification 3, Charge I. He was found not guilty of Specifications 1 and 2, Charge I, and guilty of Charge I and Specifications 4, 5, 6 and 7 thereunder and of Charge II and its 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 two years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record for action under Article of War 50½.

3. Specifications 4, 5 and 6, Charge I, relate to the alleged larceny of three letters, the property of Private Nicklas C. Kallas, Technician Fifth Grade Donald P. Wolfe and Corporal Bernard Herskovitz, respectively. Specification 7, Charge I, relates to the alleged embezzlement of three letters and $10 United States money, the property of Herskovitz. Specifications 1 and 2, Charge II, relate to alleged trespasses by entering two foot lockers belonging to Privates G. Alvin Gross and Arthur W. Morgan. The alleged owners of the several letters, the money and the footlockers, as well as Privates Gross and Morgan, were members of Company A, 84th Armored Reconnaissance Battalion, of which company accused was a sergeant. The company was stationed at Pine Camp, New York, during the period covered by the charges (R. 18, 23, 26, 27, 32, 34). Mail for members of the company was habitually delivered to the charge of quarters for distribution and undelivered mail was usually left in the day room, tied in a bundle, on or near a desk assigned to the charge of quarters (R. 13, 14, 21). Accused served from time to time as charge of quarters (R. 41). Accused and another noncommissioned officer together occupied a "small Sergeant's room" in barracks (R. 9, 43). About June 27, 1942 (R. 8, 27), at a time at which accused was preparing to "leave for Fort Knox", accused's room was searched and some letters were found under a piece of linoleum beneath his footlocker (R. 6, 29) and others were found in his barracks bag (R. 20) among a "huge bunch of letters". Some soiled clothing and a pair of boots were also found in the barracks bag(R. 21, 22).

Among the letters found under the linoleum was that described in Specification 4, Charge I, addressed to Private Nicklas C. Kallas

(R. 29) and postmarked at Lorain, Ohio, June 6, 1942. The letter, written by Kallas' 11-year-old brother and containing a message of personal interest to Kallas, contained nothing of intrinsic value (Ex. C). Kallas testified that the only time he had seen the letter was when his company commander had shown it to him and that he had not given accused permission to have the letter in his possession (R. 17).

Among the letters found in the barracks bag was that referred to in Specification 5, Charge I (R. 20, 28), signed by three persons and addressed to Technician Fifth Grade Donald P. Wolfe (Ex. E). The letter had been mailed May 25, 1942, at Canton, Ohio. It had contained "news from home" and $2 in bills (Ex. J). Wolfe testified that he had seen the letter on June 27, 1942, and that he had not given accused permission to have it (R. 28).

The letter referred to in Specification 6, Charge I, was found in the barracks bag (R. 20). It was dated October 11, 1941, signed by Corporal Bernard Herskovitz (R. 23), and addressed to Miss Syd Freedman, New York City (Ex. D). Herskovitz testified that he delivered the letter, sealed, to accused for mailing (R. 25, 26). When found the letter was still sealed (R. 23, 26). It had not been mailed (R. 23; Ex. D). Herskovitz testified that he had never given accused permission to keep the letter (R. 23).

Neither of the letters referred to in Specification 7, Charge I, was produced at the trial. Herskovitz testified that the three letters were written, sealed and stamped by him about April 24 or 25, 1942, that they were delivered to accused with the request that he mail them "in town", that they were addressed to Julius Herskovitz, Miss Syd Freedman and Miss Rochelle Kline, respectively, and that the letter to Miss Kline contained a wedding gift of $10 in money (R. 23, 24). Witness further testified that within about two hours after receiving the letters accused reported to witness that he had mailed them (R. 25). These letters were not received by the persons to whom they were addressed (Exs. G, H, I).

As to Specification 1, Charge II, Sergeant George W. Grant, Company A, 84th Armored Reconnaissance Battalion, testified that on Saturday afternoon, June 13, 1942, while the company was "having athletics", he entered the company barracks and by means of a mirror saw that accused "had a footlocker open". The footlocker belonged to Private G. Alvin Gross of the company. Accused "slammed" the top shut, apparently when he heard witness enter (R. 34). Accused turned around and said that he had pinched himself (R. 35). Gross testified that he had not given accused permission at any time to enter his footlocker (R. 36).

In respect to Specification 2, Charge II, Technician Fifth Grade Nick Chychula, Company A, 84th Armored Reconnaissance Battalion, testified:

"It was on Friday, June 26th, when I went to call the table waiters. I opened the door of the barracks and I saw Grover Brown on the footlocker in the middle of the aisle. The footlocker belonged to Private First Class Morgan. While I closed the door, he closed the footlocker and his face turned red. He told me that he was looking for matches. I offered him mine and he took the light and he went upstairs" (R. 30).

Witness saw accused's hands "in the footlocker" but did not see him remove anything (R. 31). Morgan testified that he left his locker closed but unlocked (R. 33) and that he did not give accused permission to enter it (R. 32).

Accused testified that he never saw the Kallas and Wolfe letters (Exs. C, E) (Specs. 4, 5, Chg. I) before they were shown to him by his company commander after they were found in his room, and he did not know they were in his room (R. 40, 41, 43). The letter to Miss Freedman, dated October 11, 1941 (Ex. D)(Spec. 6, Chg. I) and another letter were given to accused by Herskovitz with a request that accused mail them. Accused put them in a pocket of his shirt and forgot to mail them. He testified that Herskovitz,

"never brought up the subject when I came back and I forgot about them. I sent that shirt to the cleaner and when it came back the two letters were pinned on the pocket. At that time men over 28 were discharged drom the Army and Sergeant Herskovitz was discharged and I did not know where to mail them since he was already gone. I put them in some of my possessions. He came back and I thought about giving him the letters, but it must have slipped my mind. At the time I thought of them, he was not around" (R. 40, 41).

Asked concerning pin marks on the letter accused testified that the letter was "sort of clamped on the shirt" (R. 44). With respect to Specification 1, Charge II, alleging trespass upon Private Gross' footlocker, accused testified that he entered the barracks and, not feeling well, sat down on a locker. The lid was partly open and "I caught the back of my pants between the lid and the bottom of the footlocker". He raised the lid to release his clothing. As to the other footlocker involved in Specification 2, Charge II, accused testified that while preparing to leave the company he saw a book of matches in an open locker and picked it up but that there were no matches in it so he asked Chychula for a light for his cigarette (R. 42).

Captain Leslie R. Wilcox, Company A, 84th Armored Reconnaissance Battalion, company commander of Company A, testifying in response to questions by the defense in regard to the circumstances under which accused had been administratively reduced to the grade of private, was

allowed to testify, that money and other things had been missed by men of the company and that "things pointed to Brown" (R. 37). Witness also testified, in response to questions by the court, that he reduced accused because,

> "I knew he was guilty ***. As for the offense as alleged in this case, I cannot actually say that Brown was guilty, but the men of the company did not trust him. They thought he was guilty of stealing money and it is not a good idea to have a non-com in charge of men that cannot be trusted. He was not reduced for this alleged offense" (R. 38).

4. The evidence with respect to Specifications 4 and 5, Charge I, shows that letters addressed to Kallas and Wolfe were found in a room occupied by accused jointly with another soldier. The Kallas letter was found under a piece of linoleum on which accused's footlocker was resting and the Wolfe letter was found in accused's barracks bag. The letters had been in the mails but had not been received by the addressees. The manner in which the letters were diverted from the addressees does not appear except that it was shown that the company mail was normally distributed by the charge of quarters or, if undistributed, was left openly in the company day room to which all members of the company had access. There is no proof of trespass by anyone in either case.

Such possession by accused as was proved was not, of itself, sufficient to raise a presumption that the letters had in fact been stolen (Rosenberg v. State, 134, N.E. (Md.) 856; State v. Lee, 182 S.W. (Mo.) 972). The letters could have reached accused's room by means other than through theft. It is only proved that they reached this room and did not reach the addressees. The following from an opinion of the Court of Appeals of Alabama expresses the applicable rule of law:

> "The only support for the charge of larceny made against the defendant was evidence tending to prove his possession and sale of a cow which had disappeared from a pasture from which cattle sometimes escaped through broken places in the fence which inclosed it or at a point where a branch ran under the fence. There was an entire absence of evidence having any tendency to prove how the cow got out of the possession of its owner or came into the possession of the defendant. It would be pure surmise to say that he feloniously took and carried it away, rather than that he innocently took charge of it when it strayed on premises of which he had possession or control. To say the defendant's acquisition of possession amounted to a trespass or was accompanied by a felonious intent would be a guess, not a finding on evidence capable of shedding any light on the inquiry" (62 Southern (Ala.) 270).

Paragraph 112 a of the Manual for Courts-Martial states:

> "Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it."

It is clear from the language thus used that the presumption of guilt is not raised until it first be proved that the property was stolen by someone. The corpus delicti of larceny may be established by circumstantial evidence, but the circumstances proved in this case, including the location of the letters when found, did not suffice for that purpose.

Although possession by accused of the Wolfe letter was sufficiently established by the proof that it was found in his barracks bag to which, in so far as appears, no one else had access, it is to be noted that the Kallas letter was not shown to have been in the personal, conscious and exclusive possession of accused. To be true, the letter was found under accused's footlocker but the circumstances indicate that it could readily have been placed there by some person other than accused (see CM 202720, Clem, and cases cited therein). The controlling rule in this connection is stated in Ruling Case Law as follows:

> "The general rule that the possession of stolen property is evidence of guilt is limited by the rule that to warrant an inference of guilt it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by the accused. It would be pushing the rule too far to require of one accused of a crime an explanation of his possession of the stolen property, when such possession could also, with equal right, be attributed to another. Hence the mere fact of finding stolen articles on the premises of a man of a family or in a place in which many others have free access without showing his actual conscious possession thereof discloses only a prima facie constructive possession and is not such a possession as will justify an inference of guilt by reason thereof" (17 R.C.L. 73).

There being no adequate proof of the corpus delicti of the larcenies charged in Specifications 4 and 5, Charge I, the findings of guilty of those Specifications must fall.

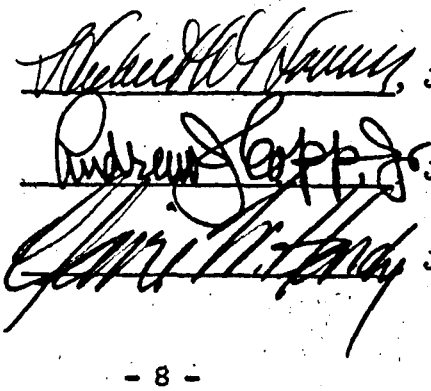
As to Specification 6, Charge I, the evidence shows that Corporal Herskovitz handed the letter involved to accused for mailing, that accused failed to mail it and that it was recovered, unopened, from the barracks bag belonging to accused. Larceny is charged but

there is no proof whatever that the letter was taken by trespass. It was, in fact, intrusted to accused, and there is nothing in the circumstances to suggest that when he received it he had the intent to convert it to his own use. Trespass, an essential element of larceny (par. 149 g, M.C.M.), not having been established the evidence is legally insufficient to support the finding of guilty of this Specification.

The evidence shows, with respect to Specification 7, Charge I, only that the three letters referred to in the Specification were turned over to accused for mailing, that he reported that he mailed them, and that they were not received by the addressees. There is no proof of any act of appropriation of the three letters by accused, and embezzlement, as charged, is not therefore proved. The finding of guilty of this Specification has no substantial support in the evidence.

In respect to Specifications 1 and 2, Charge II, the evidence shows that accused, without the permission of the owners, touched or placed his hands within footlockers belonging to the two soldiers named in the Specifications. There is no proof that accused violated any substantial property right in either case, or that he intended to do so. There is no evidence that any military regulation or order was violated. The trespasses were purely technical. In the absence of proof of an intent to steal or otherwise to interfere with the owner's rights of property or of an intent to commit a depredation, the acts of accused were not prejudicial to good order or military discipline and did not amount to offenses in violation of Article of War 96. The company commander testified that accused was suspected of being a thief and that he believed accused guilty of the larcenies herein charged, but this testimony, if competent for any purpose, was certainly not competent, either as evidence of bad character or as an opinion as to guilt, to prove that accused entertained criminal designs with regard to the lockers or their contents (par. 112 b, M.C.M.; sec. 945, Wharton's Criminal Evidence, (11th Ed.); People v. Creegan, 53 Pac. (Calif.) 1082).

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.



Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 1 1942 - To the Commanding General, 4th Armored Division, Camp Young, California.

1. In the case of Private Grover L. Brown (15044610), Company A, 84th Armored Reconnaissance Battalion, I concur in the holding of the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be 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 226734).

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

DEC 1 '42 PM

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY
J. A. G. O.

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

NOV 12 1942

SPJGH
CM 226833

N.D

UNITED STATES	)	WEST COAST ARMY AIR FORCES TRAINING CENTER
v.	)	
Private RAY T. JOSEPH (16028078), 302nd Service Squadron, Lemoore Army Flying School, Lemoore, California.	)	Trial by G.C.M., convened at Lemoore Army Flying School, Lemoore, California, September 16, 1942. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ray T. Joseph, 302nd Service Squadron, did, at Lemoore Army Flying School, Lemore, California, on or about July 15, 1942, at about 2 P.M., desert the service of the United States and did remain absent in desertion until he was apprehended at Auburn, California on or about July 16, 1942.

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

Specification: In that Private Ray T. Joseph, 302nd Service Squadron, Lemoore Army Flying School, Lemoore, California, did, at Inglewood, California on or about June 3, 1942 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of George Weber, a civilian, cash and indorsed bank

checks, the property of the said George Weber, value of about $150.00.

He pleaded not guilty to Charge I and the Specification thereunder and guilty to the Additional Charge and the Specification thereunder. He was found guilty of all Specifications and Charges and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 20 years. The reviewing authority approved the sentence, reduced the period of confinement to 15 years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

At about 8:45 p.m., June 3, 1942, Georga A. Weber, a service station operator in Inglewood, a suburb of Los Angeles, California, placed four gallons of gasoline in a car occupied by three "boys". Before payment was made, one of the three put a gun in the back of Mr. Weber, took him to his storeroom where another emptied his till, asked him for his purse and took the money out of it. They secured in all about $108 in cash and three checks; one for $18.75, one for about $7 and a third for about $2 -- totalling about $135. Mr. Weber identified one check taken from him (Ex. B), a check for $18.75 dated May 28, 1942, drawn by the Sam Hill Realty Company to the order of Taylor C. Felt, and indorsed by Mr. Felt, which Weber had cashed for Felt. This check bore the further indorsement "Edsel Layne", two cancelled bank stamps, an illegible one dated June 11, 1942, and one of Bank of America, N.T. and S.A., Los Angeles, California, dated June 12, 1942. The words "Payment Stopped" were stamped across the face of the check (R. 20, 21, Ex. B).

Private Joseph A. Bates testified that he accompanied the accused on the night of June 3, 1942, on a robbery of a filling station between Inglewood and Los Angeles. The accused was then armed with a .22 caliber revolver (Ex. C). Bates, Edsel Layne and accused were in a line-up with their guards at a later date when the filling station attendant tried to identify them (R. 25, 28).

Mr. A. J. Norwood, teller, Visalia Bank of America, identified accused as a man whom he had twice seen in the bank. The first time was in the first part of June when he cashed a check for accused. That check was never returned to the bank. At the same time he cashed a bad check (Ex. B) for Mr. Layne upon proper identifiecation. He saw accused a second time when accused and Layne were brought to the bank under guard for identification early in July (R. 16-19).

In the latter part of June or early part of July, 1942, Captain Arthur Wright, Air Corps, Assistant Provost Marshal, Lemoore Army Flying School, advised the accused and Layne that they were

under investigation for certain holdups and robberies committed in Los Angeles during the period the two men were in Los Angeles, and in view of the gravity of the situation the men should be rather careful. Some time after that conversation the two men were released from confinement around July 15 or 20 (R. 12-15).

The accused absented himself without leave from his organization at Lemoore Army Flying School, Lemoore, California, at 2 p.m., July 15, 1942. The accused and Layne were apprehended in civilian clothes by L. W. Lardner, California State Highway Patrolman, on Highway 40, between Auburn and Colfax in Placer County at about 10 p.m. on July 16, 1942. "They" stated that they were from Los Angeles and were going to Reno to seek employment and had given their draft registration cards to their little sister to play with. He took them in the back seat of his car to Placer County Jail. He also placed their small bag in the car. About six weeks later, Lardner saw his captain remove a loaded gun (Ex. C) from under the back seat of that car. Lemoore is approximately 280 miles distant from Auburn and 298 miles from Colfax (R. 10, 11, 28-32; Ex. A).

The accused was received at McClellan Field, Auburn, from the civil authorities, confined there, and about July 23 was brought with Layne to Lemoore Army Flying School by Sergeant O. F. Brandon. Accused and Layne both asked Brandon to stop in Sacramento to pick up the military clothing which they had thrown away at an Associated Service Station. At the Military Police Station, Sacramento, they identified clothing as their military clothing and asked if they could remove their civilian clothes and put on the military clothing before reaching Lemoore (R. 41, 43).

The accused stated, about July 25, to Private Bert A. McIntyre, a prisoner confined in the next cell at the post guardhouse, Lemoore Army Flying School, that he had intended to go to Illinois and leave the service when he left and was picked up, that he intended to become a second "John Dillinger", and that when he was picked up he placed the pistol under the back seat of the car of the officer who picked them up (R. 32-41).

At some date in July, Mr. Weber came to the guardhouse and inspected a line-up of about 15 boys. He stated to Major Spiegel that he could not identify any of the men in the line-up as the men who held him up (R. 22-24).

4. Defense:

Private Edsel P. Layne testified that while confined in the guardhouse, from July 23 to August 19, 1942, in the same cell as accused and next to the cell of Private McIntyre, he did not remember that accused ever said that he intended to leave and never come back. He remembered that accused let him read a letter from the family of accused in which it was stated that the wife of accused had been stepping out and not taking adequate care of the child of accused. He was in a line-up between June 2 and July 14, when a man who attempted to identify some of them stated to Major Spiegel that he could not identify any of the men who held him up. He heard accused say that accused intended to return home to straighten out family matters, but did not remember anything about imitating Dillinger. Both he and accused knew that they were under investigation but did not know the subject matter of the investigation (R. 44-52).

The accused stated that he enlisted two years ago at the age of 17. He had had no trouble in civil life. He denied making statements to McIntyre as to what he intended to do. He overheard conversation between Mr. Weber and Major Spiegel at the line-up to the effect that Weber did not recognize any of the men. He had permitted Layne to read letters from his family which contained adverse criticism of his wife, but those letters had been destroyed. The accused left shortly after his release from confinement on July 15, to go home, straighten out his wife and get custody of his child. He changed from uniform to civilian clothing in Sacramento because he figured he could get by the military police in civilian clothes and because he had once been caught by them at Needles, California. He had never seen Exhibit C before but did have a .22 automatic. He denied the truth of the testimony of Bates and the officer as to the gun. He knew that he was under investigation and that the investigation was not over when he was released from confinement. One reason for leaving was that he knew "this" was coming up, that he would get ten years for it and he wanted to see his baby before it did (R. 53-57).

5. The accused pleaded guilty to the Additional Charge and its Specification alleging robbery by stealing by force and violence cash and bank checks of a value of about $150 from the person and presence of George Weber at Inglewood -- a suburb of Los Angeles, California -- on June 3, 1942. Although Mr. Weber did not identify the accused, the evidence shows that accused, armed with a revolver, did participate in that robbery.

6. With respect to the original Charge and its Specification, the evidence shows that the accused absented himself without leave from his organization at Lemoore Army Flying School, Lemoore, California, at 2 p.m., July 15, 1942, and was apprehended in civilian clothes on U. S. 40 between Auburn and Colfax in Placer County, California, about 290 miles

from Lemoore.

He had been previously confined because of a suspected connection with robberies in Los Angeles, but was released with knowledge on his part that the investigation was not completed. While confined in the guardhouse after his apprehension, accused stated to a fellow prisoner that when he left and was picked up, he intended to go to Illinois, to leave the service and become a second "John Dillinger", and that he secreted a pistol under the back seat of the car of the patrolman who apprehended him. The accused testified that he left after his release from confinement on July 15, to go home, straighten out his wife and get custody of his child; that he knew when released he was still under investigation; that one reason for his leaving was that he knew "this" was coming up, that he would get ten years for it and he wanted to see his baby before it did; and that he changed from uniform to civilian clothes in Secramento with the purpose of evading military police en route.

The court was authorized to infer, as it did, from the above circumstances, the intent of accused to remain permanently absent.

7. Accused enlisted September 17, 1940, stating his age as 18 years. He now states that his correct age at that time was 17 years.

There is no limit of punishment for desertion committed in time of war. Dishonorable discharge, total forfeitures and confinement for ten years is authorized upon conviction of robbery in violation of Article of War 93.

Evidence of five previous convictions for absence without leave for periods from three days to two and one-half months were introduced in evidence.

8. The court was legally constituted. 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 is legally sufficient to support the findings of guilty and the sentence.

Curtis S. Hill Jr., Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGH
CM 226842

JAN 13 1943

UNITED STATES N.D.	7th MOTORIZED DIVISION
v.	Trial by G.C.M., convened at Needles, California, September 15 and December 5, 1942. Dismissal, total forfeitures, and confinement for one (1) year.
Second Lieutenant JOSIAH P. GAYLE, Jr. (0-352478), 7th Reconnaissance Squadron.	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification 1: In that 2nd Lt. JOSIAH P. GAYLE, JR. did, at Needles, California, on or about September 8, 1942, offer violence against Captain ASHLEY A. BLINN, 1st Lt. LOWELL M. GRAVES, and 1st Lt. GEORGE W. JONES, his superior officers, who were then in the execution of their office, in that he, the said 2nd Lt. JOSIAH P. GAYLE, JR., did violently resist their attempts to quell a disorder in which he was engaged.

Specification 2: In that 2nd Lt. JOSIAH P. GAYLE, JR., having received a lawful command from Major JAMES E. PEMBERTON, his superior officer, to "state his rank, name, and organization" or words to that effect, did, at Needles, California, on or about September 8, 1942, willfully disobey the same.

CHARGE II: Violation of the 68th Article of War.

Specification 1: In that 2nd Lt. JOSIAH P. GAYLE, JR. being engaged in a fray among persons subject to military law, and having been ordered into arrest by Pfc. JAMES E. CLINE, did at Needles, California on or about September 8, 1942 do violence to the said Pfc. JAMES E. CLINE by striking him with his fist, Pfc. JAMES E. CLINE being then in the execution of his duty as a military policeman.

CHARGE III: Violation of the 85th Article of War (Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

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

Specification 1: In that 2nd Lt. JOSIAH P. GAYLE, JR. was, at Needles, California, on or about September 8, 1942 in a public place, to wit, Highway 66 at edge of Needles, California, drunk and disorderly while in uniform.

CHARGE V: Violation of the 96th Article of War. (Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

Specifications 1 and 2, Charge I, Specification 1, Charge II, Specification 1, Charge IV, and Specification 2, Charge V, were amended by changing the date from September 8, 1942, to September 7, 1942 (R. 6). He pleaded guilty to the Specification, Charge IV, and to Charge IV; and not guilty to all other Specifications and Charges. He was found not guilty of the Specification, Charge III, and of Charge III, and of Specifications 1 and 2, Charge V, and of Charge V. He was found guilty of Specifications 1 and 2, Charge I, and of Charge I; of the Specification, Charge II, and of Charge II; and of the Specification, Charge IV, and of Charge IV. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution, upon the Specifications of which the findings of guilty were approved, is substantially as follows:

The accused, a platoon leader of Troop "B", 7th Reconnaissance Squadron, was given the duty, on September 7, 1942, of conducting his platoon to Needles, California, and returning it at 10:30 p.m. to camp in the bivouac area occupied during maneuvers. The party left camp about 6 o'clock and returned at about 11 o'clock in the evening (R. 16). While in the town of Needles the accused became drunk. A number of the men had been drinking, and there was considerable confusion. After the truck had proceeded a short distance towards camp, the truck was stopped and the accused got into the body of the truck with the men. There was scuffling, and some blows were struck. The truck continued for a short distance, and again stopped. The accused and two of his men engaged in argument, left the truck, and began fighting on the ground at the side of the road (R. 16-19, 23-24, 28-29, 34a-35).

Captain Ashley A. Blinn, First Lieutenant Lowell M. Graves, First Lieutenant George W. Jones, and a Mr. Woods, who were proceeding by car from Needles to camp over the same route, observed the fight, and succeeded in stopping it. Captain Blinn was attempting to reorganize the men and start them on their way to the camp when the accused became belligerent. The accused protested and refused to accompany Captain Blinn and Lieutenants Graves and Jones, called upon his men to help him physically oppose the officers, repeatedly struck at them with his fists, and swore at them, and, with the assistance of one of the members of his platoon, forced Captain Blinn, and Lieutenants Graves and Jones to withdraw until military police arrived at the scene to aid in the quelling of the disorder in which the accused was engaged. The accused stated to Captain Blinn that at first he thought they were his friends, but they were really his enemies. In the opinion of Captain Blinn, accused was very drunk, but knew and understood what they wanted, and objected to what they wanted to do. The accused resisted the members of the military police, and ordered them away. Captain Blinn directed the military police to go ahead and handle the situation (R. 21-25, 25-29, 29-31, 38-41).

Private First Class James E. Cline, Military Police, told accused that he was a military policeman and had an order to take accused to the hospital. Accused told Cline that he did not want Cline or anyone else bothering him. When Captain Blinn ordered accused taken to the hospital, the accused hit Cline with his fist, and knocked Cline down. Cline then got up, held accused so that accused could not hit him, and forced accused into the jeep. At the hospital, the accused

refused to let the doctor look at his head. The doctor said that accused was not badly hurt, but had lacerations about the mouth and face. When Cline grabbed accused by the arm, accused swung at and kicked Cline while he was forcing accused into the jeep to take accused to the police station in Needles. Cline had on his military police brassard, told accused that he was a military policeman, but did not tell accused that he was under arrest (R. 29-31, 41).

At the police station Major James E. Pemberton, Provost Marshal, asked accused for his name, serial number, and organization. The accused refused to answer. When asked if he knew that he was receiving orders from a senior officer, accused replied that he did. Major Pemberton then stated that he was giving accused a direct order to give his name, rank, serial number, and organization. The accused replied, "I do not have to". Accused made no reply to Major Pemberton's request to see his "dog tags". When Major Pemberton reached out for them, the accused struck his hand away. Major Pemberton called in Major Edwards and Captain Blinn and repeated his order to accused with no result. Major Pemberton then learned the identity of accused from the passes of some men in the organization of accused. When the accused was told that he was Lieutenant Gayle, he admitted his identity (R. 22-23, 31-32, 32-34).

Captain Blinn expressed the opinion that accused was very drunk; Major Edwards, Captain Rucks, Medical Corps, and First Lieutenant Graves, that he was drunk; and First Lieutenant Jones, that he was under the influence of liquor (R. 22, 27, 33, 41).

4. The accused testified that he was directed to take his platoon into Needles on the night of September 7-8, 1942. After arrival at Needles, he went to the Elks Club, had a couple of drinks, went to a drug store, bought "a pint", and drank about half of it, and did not know what happened after that. When all of the men returned to the truck, he first sat on the front seat, and then jumped in back. The boys were arguing there and one of them grabbed him. He stopped the car, straightened them out, and he was hit on the head with something. He did not remember walking away from the vehicle, did not recall seeing Captain Blinn or the presence of any officer, had no recollection of being at the hospital, or at the police station in Needles, but did have a vague idea of coming back to camp in a jeep the next morning (R. 42-46).

5. With respect to Specification 1, Charge I, offering violence to his superior officer, and Specification 2, Charge I, willful disobedience of his superior officer, the evidence is clear that the accused offered violence to Captain Blinn, and First Lieutenants Graves

and Jones, and that he willfully disobeyed the order of Major Pemberton to state his name, rank, and organization. The accused seeks to avoid responsibility for his acts by stating that he became drunk and did not know what happened.

Five officers expressed varying opinions as to his sobriety - one that he was very drunk; three, including a medical officer, that he was drunk; and one that he was apparently under the influence of liquor. It appears clear, however, from his conversation with Captain Blinn, his remarks to the military police, and his statement that he understood that he was receiving orders from a senior officer, that he had sufficient mental capacity to understand that in the first case he was offering violence, and in the second, willfully disobeying the lawful command of his superior officer. From those facts the inference may be properly drawn that accused, at the time, had sufficient mental capacity within the purview of paragraph 126a, Manual for Courts-Martial, to understand that the officers were his superior officers, and to entertain the necessary element of specific intent to offer violence to them, and willfully and intentionally to disobey the order of one of them. In the opinion of the Board of Review the accused was not so drunk but that he recognized that the persons against whom he offered violence were his superior officers, and knew that the order was from a superior officer, and that he willfully disobeyed it (M.C.M., 1928, par. 34).

6. Specification 1, Charge II, alleges that accused did violence to Private First Class James E. Cline, a military policeman in the execution of his duty, by striking Cline with his fist after he had been ordered into arrest by Cline, in violation of the 68th Article of War.

Article of War 68 grants power to "All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers" to order into arrest in certain circumstances, and provides that whosoever, being so ordered, refuses to obey the order of such person, or does violence to him, shall be punished as a court-martial may direct. This Article of War does not grant such power either to a private first class, or to a military policeman as such. Private Cline expressly denied that he informed the accused that he was under orders to place accused in arrest, or that he told accused that accused was under arrest.

The evidence fails to support the allegation of a violation of the 68th Article of War. It does, however, show that the accused

struck with his fist and knocked down a military policeman in the execution of his duty. That offense is one lesser than, and included within, the Specification alleged, and constitutes a violation of the 96th Article of War.

In the opinion of the Board of Review, the record of trial is legally insufficient to support the finding of guilty of a violation of the 68th Article of War, but legally sufficient to support a finding of guilty of striking with his fist, at the time and place alleged, a military policeman in the execution of his duty, in violation of the 96th Article of War.

7. The accused pleaded guilty to being drunk and disorderly while in uniform in a public place, as alleged in Specification 1, Charge IV, in violation of the 95th Article of War.

The evidence shows that his intoxication was sufficient sensibly to impair the rational and full exercise of his mental and physical faculties, within the definition of drunkenness under the 85th Article of War, and that he was disorderly. Not only did he make a disgraceful exhibition of himself in the presence of enlisted men, but he did so among the men of his own organization who were under his charge for the recreational trip to Needles. The accused and two of his men engaged in an argument in the truck and began fighting on the ground at the side of the road. Winthrop cites "Engaging in unseemly altercations or broils with military persons * * * or other disorderly or violent conduct of a disrespectful character in public" as an instance of conduct unbecoming an officer and a gentleman, in violation of the 61st (95th) Article of War (Winthrop, Military Law and Precedents, Reprint, p. 718). In the opinion of the Board of Review, the record establishes a violation of the 95th Article of War.

8. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Cavalry-Reserve, from the Reserve Officers Training Corps, Virginia Military Institute, May 31, 1937; transferred to Field Artillery-Reserve, July 2, 1937; transferred to Cavalry-Reserve, November 15, 1937; extended active duty, March 1, 1942.

9. The accused was found guilty by a general court-martial on July 30, 1942, of being drunk in uniform in Camp San Luis Obispo, California, July 16, 1942, and sentenced to forfeit $50 per month for 3 months, to be restricted to the limits of the post for 3 months, and to be reprimanded.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and of Charge I; legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, and of Charge II, as involve findings of guilty of assault and battery, at the time, place, and upon a military policeman in the execution of his duty, as alleged, in violation of the 96th Article of War; legally sufficient to support the findings of guilty of Specification 1, Charge IV, and of Charge IV; and legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and is authorized upon conviction of a violation of the 64th or the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 226842 1st Ind.

War Department, J.A.G.O., JAN 18 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Josiah P. Gayle, Jr. (0-352478), 7th Reconnaissance Squadron.

2. I concur in the opinion of the Board of Review that the record is legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and of Charge I; legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, and of Charge II, as involve findings of guilty of assault and battery at the time, place, and upon a military policeman in the execution of his duty, as alleged, in violation of the 96th Article of War; legally sufficient to support the findings of guilty of Specification 1, Charge IV, and of Charge IV; and legally sufficient to support the sentence, and to warrant confirmation of the sentence.

I recommend that only so much of the findings of guilty of Specification 1, Charge II, and of Charge II, be approved as involve findings of guilty of assault and battery by accused at the time, place, and upon a military policeman in the execution of his duty, as alleged, in violation of the 96th Article of War, and that the sentence be confirmed and ordered executed.

3. This officer was heretofore found guilty by general court-martial of being drunk in camp on July 16, 1942, and sentenced to forfeit $50 per month for 3 months, to be restricted to his post for 3 months, and to be reprimanded.

4. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action to carry into effect that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Only so much of the findings of guilty of Specification 1, Charge II, and of Charge II, are approved as involves findings of guilty of assault and battery by accused at the time, place, and upon a military policeman in execution of his duty, as alleged, in violation of the 96th Article of War. Sentence confirmed. G.C.M.O. 62, 27 Mar 1943)

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

SPJGK
CM 226870

NOV 25 1942

UNITED STATES	)	2ND ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, October 17, 1942. Dishonorable discharge and confinement for eleven (11) years. Federal Reformatory, Chillicothe, Ohio.
Private EDDIE I. WOODS (14012035), Company C, Maintenance Battalion, 2nd Armored Division.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification: In that Private Eddie I. Woods, Co. C, Maintenance Bn., 2d Armored Division, having received a lawful command from Capt. Allen E. Stalvey, his superior officer, to "double time down to the kitchen and then back here", did, at Fort Bragg, North Carolina, on September 6, 1942, willfully disobey the same.

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

Specification: In that Private Eddie I. Woods, Co. C, Maintenance Bn., 2d Armored Division, did, at Fort Bragg, North Carolina, on September 6, 1942, behave himself with disrespect toward Captain Allen E. Stalvey, his superior officer, by saying to him "No, by God I won't do it", or words to that effect.

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

Specification: In that Private Eddie I. Woods, Company "C", Maintenance Battalion, Second Armored Division, did, at Charlotte, North Carolina, on or about August 10, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

(face)

No_____ Loretta, Tennessee, Aug.10-1942
COMMERCIAL NATIONAL BANK 66-17
Loretta Tenn
Pay to the order of Eddie I. Woods $10.00
Ten Dollars and 00/ Dollars
Nigel C. Gambrell

(Reverse)

Eddie I. Woods
Allen L. Stalvey
1st Lt. Maint.Bn.
2nd Armored Div

which said check was a writing of a private nature which might operate to the prejudice of another.

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

Specification: In that Private Eddie I. Woods, Co. C, Maintenance Bn., 2d Armored Division, did, at Charlotte, North Carolina, on or about August 10, 1942 with intent to defraud, falsely represent to Roy C. King of Charlotte, N.C. that a certain check in words and figures as follows, to wit:

(Face)

No___ Loretta, Tennessee, Aug 10-1942
COMMERCIAL NATIONAL BANK 66-17
Loretta Tenn
Pay to the order of Eddie I. Woods $10.00
Ten Dollars and 00/ Dollars
Nigel C. Gambrell

(Reverse)

Eddie I. Woods
Allen L. Stalvey
1st Lt. Maint. Bn.
2nd Armored Div

was a good and valid check and that it would be honored and paid by the Commercial National Bank of Loretta, Tennessee on demand, which means whereof the said Eddie I. Woods did obtain from Roy C. King, the sum of ten dollars, lawful money of the United States.

ADDITIONAL CHARGE III: Violation of the 61st Article of War.

Specification: In that Private Eddie I. Woods, Company "C", Maintenance Battalion, Second Armored Division, did, without proper leave, absent himself from his Company at Peachland, North Carolina, from about August 2, 1942, to about August 28, 1942.

He pleaded not guilty to Charges I and II and their Specifications and guilty to Additional Charges I, II and III and their Specifications. He was found guilty of the Charges and Specifications. Evidence of one previous conviction by special court-martial for absence without leave and breach of arrest, was introduced (Ex. C). He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eleven years. Three-fourths of the members of the court present concurred in the sentence. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence relating to Charges I and II and their Specifications shows that about September 6, 1942, the cook in charge of the company kitchen of Company C, Maintenance Battalion, 2nd Armored Division, at Fort Bragg, North Carolina, reported to the company commander, Captain Allen E. Stalvey, Ordnance Department, that accused was in the kitchen creating a disturbance, demanding immediate service of food and hindering the cooks in their duties. Captain Stalvey ordered the cook to direct accused to report to him at the supply room "on the double". Captain Stalvey waited in the supply room a few minutes and then went to the orderly room. He left word with men in the supply room to send accused to the orderly room. More than sufficient time had then elapsed to permit the arrival of accused. Accused did not appear at the orderly room. Captain Stalvey then went outside and "saw Private Woods strolling up" towards him "at a shambling or loitering gait". (R. 10) Upon being questioned accused stated to Captain Stalvey that he had been told by the sergeant to come at double time and that he had not done so because "he hadn't done anything to have to double-time for" (R. 11). Captain Stalvey testified that he then ordered accused to "double-time back down there to the kitchen and then double-time back to where I was, as ordered". Accused made no

movement to comply with the order and Captain Stalvey repeated it to him. He still made no movement toward compliance. Captain Stalvey asked him if he was going to comply with the order, whereupon accused stated that "he would double-time down to the kitchen if Private, T-4 Brownlee, who was standing nearby, would go down there with him". Captain Stalvey admonished accused to obey the command whether or not Brownlee went with him and again asked if the accused was going to comply. Accused "hesitated a few minutes" and then stated, "No, by God, I am not" (R.11).

In support of Additional Charges I and II and their Specifications there was introduced in evidence a check which conformed to the description set forth in the Specifications of Additional Charges I and II (R. 9; Ex. A). Attached thereto is a memorandum of the Commercial National Bank of Charlotte, North Carolina, noting that same had been dishonored (Ex. A). Accused presented the check to King's Soda Grill in Charlotte, North Carolina, and obtained $10 thereon (R. 13). Captain Stalvey testified that he never saw the check until it was returned to him by mail, and that he did not sign or authorize anyone to sign the name "Allen L. Stalvey" thereon as an indorser. This witness also testified that when the check was shown to accused the latter stated that he had "written everything on the check and had cashed it" (R. 11).

As to Additional Charge III and its Specification, Captain Stalvey testified that accused was absent without leave from his organization from August 2 to August 28, 1942, at which time he returned to the company of his own volition (R. 10).

Accused did not testify or make an unsworn statement.

4. The evidence shows that at the place and time alleged in the Specification, Charge I, accused received the command by Captain Stalvey to double time to the kitchen and back and that accused refused to obey it. Was this command a lawful one? There is nothing in the evidence to indicate that it had any relation to the performance of a military mission or was designed for or adapted to training purposes. On the other hand, the testimony of Captain Stalvey plainly shows that the command was given only because accused had failed to obey the previous order with alacrity. The results to be accomplished as well as the physical acts required were wholly punitive in purpose and effect. This being so, the command was unauthorized for it was not of a type specifically included among the disciplinary punishments sanctioned by Article of War 104 and was not similar to any of the punishments specifically so sanctioned. It has been expressly held that double timing is not authorized as punishment under Article of War 104. In CM 173875, Pichla, the Board of Review said:

> "The imposition of 'double-timing' as such is not one of the punishments authorized by the 104th Article of War. However, extra fatigue is one of the punishments authorized by that Article, but fatigue or fatigue work means work in connection with the handling or care of property, or necessary police or sanitary measures on posts and reservations and cannot be stretched in meaning to include simple 'double-timing' unconnected with some such work as just mentioned".

Although a soldier be insubordinate in the most reprehensible degree tyrannical or capricious disciplinary measures are not to be countenanced. The traditional rule in this regard is stated in Army Regulations as follows:

> "Superiors are forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language. While maintaining discipline and the thorough and prompt performance of military duty, all officers, in dealing with enlisted men, will bear in mind the absolute necessity of so treating them as to preserve their self-respect" (par. 3, A.R. 600-10, June 2, 1942).

The command was unlawful and the refusal by accused to obey it was not a violation of the Articles of War. The record is legally insufficient to support the findings of guilty of Charge I and its Specification.

The evidence shows that after the command discussed above had been repeated accused was asked by Captain Stalvey if he intended to obey it. Accused answered, "No, by God, I am not". The words used did not differ in effect from those set forth in the Specification, Charge II. The circumstance that the command was not one which the officer had authority to give did not justify the use by accused of impertinent and blasphemous language. The use of the language certainly detracted from the respect due to the authority and person of the officer concerned and amounted to disrespectful behavior within the purview of Article of War 63. The evidence supports the findings of guilty of Charge II and its Specification.

The evidence, together with the pleas of guilty, supports the findings of guilty of Additional Charges I, II and III and their Specifications.

5. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for the offenses of disrespect to a superior officer, forgery, obtaining money by false pretenses and absence without leave, as found under Charge II and Additional Charges I, II and III and their Specifications, respectively, is confinement at hard labor for six years and 78 days. Confinement in a penitentiary is authorized by Article of War 42 for the offense of forgery (Additional Charge I and its Specification), recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 1401, Title 22, Code of the District of Columbia.

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification and 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 years and 78 days in a penitentiary, Federal reformatory or correctional institution.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 1 1942 - To the Commanding General, 2nd Armored Division, APO 252, Fort Bragg, North Carolina.

1. In the case of Private Eddie I. Woods (14012035), Company C, Maintenance Battalion, 2nd Armored Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, 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 six years and 78 days in a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon vacation of the findings of guilty of Charge I and its Specification and vacation of 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 years and 78 days in the place of confinement heretofore designated, 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 226870).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

DEC 2 '42 AM

1 Incl.
Record of trial.

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

SPJGH
CM 226871

NOV 4 1942

N.D

UNITED STATES	)	SECOND ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, October 18, 1942. Dishonorable discharge and confinement for twenty-five (25) years. Disciplinary Barracks.
	)	
Private J. C. GREEN (14029506), Company H, 41st Armored Infantry Regiment.	)	

REVIEW by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: In that Private J. C. Green, Company "H", 41st Armored Infantry Reg't., did at Fort Benning, Georgia on or about June 5, 1942, desert the Service of the United States and did remain absent in desertion until he was apprehended at Dalton, Georgia, on or about June 17, 1942.

Specification 2: In that Private J. C. Green, Company "H", 41st Armored Infantry Regiment, did at Ft. Oglethorpe, Georgia, on or about June 23, 1942, desert the Service of the United States and did remain absent in desertion until he was apprehended at Dalton, Georgia on or about July 8, 1942.

Specification 3: In that Private J. C. Green, Company "H", 41st Armored Infantry Regiment, did at Ft. Oglethorpe, Georgia, on or about July 14, 1942, desert the Service of the United States and did remain absent in desertion until he was apprehended at Dalton, Georgia on or about August 9, 1942.

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

Specification 1: In that Private J. C. Creen, Company "H", 41st Armored Infantry Regiment, having received a lawful order from his superior officer to proceed to his proper station at Fort Benning, Georgia, reporting on his arrival to his Commanding Officer, did, at Ft. Oglethorpe, Georgia on or about June 23, 1942, fail to obey the same.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to all Specifications and Charges and was found guilty of all Specifications and Charges except Specification 2, Charge II. Evidence of three previous convictions was introduced. The accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty-five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. a. Specification 1, Charge I:

The accused, a member of Company H, 41st Armored Infantry, absented himself without leave on June 5, 1942, at Fort Benning, Georgia, and next returned to his organization on September 2, 1942 (R. 7-8, Ex. A). He was apprehended at his home in Dalton, Georgia, by Deputy Sheriff W. T. Crow on June 17, 1942, who found accused sitting on the front porch dressed in yellow khaki clothes. Sheriff Crow placed accused in jail and later delivered him at Fort Oglethorpe, Georgia (R. 9-10).

The accused in his unsworn statement said that he went home because he received a letter that his mother was "serious, bad off sick". After he had been absent without leave a few days Sheriff Crow came for him and he asked Crow to let him go back to turn in (R. 24).

b. Specification 2, Charge I and Specification 1, Charge II:

On June 23, 1942, the accused was given a written order by the Commanding Officer, Fort Oglethorpe, Georgia, to report to the Commanding Officer, Fort Benning, Georgia, was furnished transportation and placed on a train for Fort Benning. When the train stopped at Dalton, he left the train and went home because he was worried about his mother and had not been able to get anyone to stay with her (R. 23; Ex. B).

On July 8, 1942, John T. Burch of the Dalton Police Department went to the home of accused and pulled him out from under a bed where accused, dressed in civilian clothes, was huddled up against the wall. Accused said that if he could get somewhere else than where he was, he believed he could stay and make a soldier of himself. The accused explained in his unsworn statement that he saw the police coming, did not wish to be found undressed, and as his mother was washing his shirt, he was looking under his bed for his slippers when Mr. Burch found him dressed in uniform pants and a sweat shirt. Accused was placed in jail and two days later was taken to Fort Oglethorpe and confined (R. 12-14, 24-25).

c. Specification 3, Charge I:

In his unsworn statement the accused stated that about July 14, 1942, at Fort Oglethorpe, he was given orders and transportation to report to his organization at Camp Sutton, North Carolina, and put on a train. He did not go back to his outfit but went home because he was still worried about his mother. On reaching Dalton, he found his mother no better and went down to his aunt's to get her to come and stay with his mother. While there, on August 8, 1942, he saw the sheriff in his car, started walking to the car and got into the car. Sheriff Crow testified that while looking for accused, he found him near the lake at Dalton on August 8, 1942, took him in the car and placed him in jail. The accused was then dressed in a light shirt and dark civilian trousers. The accused stated further that after keeping him in jail for two weeks, the sheriff took him to Fort Oglethorpe, where he was confined on August 20, 1942, and remained until he was brought to Fort Bragg under guard on September 2, 1942 (R. 15-20, 25-26; Ex. C).

d. In rebuttal Policeman Burch testified in substance that he had seen the mother of accused frequently walking about during June and July 1942, that while she was not a strong woman, he observed nothing unusual about her physical condition and she appeared to get around all right (R. 27-30).

Sheriff Crow stated that the mother of accused visited accused every day or two while accused was in jail in August. Although she was a small woman, she was pert and did not appear to be sick (R. 31).

Captain Greer testified that accused had not, to his knowledge, applied for a pass or a furlough while in the organization.

4. The evidence shows that accused absented himself without leave at Fort Benning on June 5, 1942, and was apprehended at his home in Dalton, Georgia, on July 17, 1942; absented himself without leave on June 23, 1942, while en route from Fort Oglethorpe, Georgia, under orders to return to Fort Benning, and was apprehended on July 8 at his home in Dalton; and absented himself without leave a third time on July 14, 1942, while en route from Fort Oglethorpe under orders to join his organization at Camp Sutton, North Carolina, and was again apprehended at his home in Dalton on August 8, 1942. He was absent for 12, 15, and 26 days, respectively, terminated in each case by apprehension. On each of the last two apprehensions he was dressed in civilian clothes.

The accused in his unsworn statement claimed that he absented himself each time because he was worried because his mother was sick. The testimony of Sheriff Crow and Policeman Burch is to the effect that she did not appear to be ill and that she was able to get around in a normal manner.

His repeated absences terminated in each case by apprehension and his failure twice to comply with his orders to return to his organization for which he was furnished transportation, his statement of dissatisfaction with the station at which he was serving, the circumstances of each apprehension, and the increasing length of his absences, are circumstances from which the court could legally draw, as it did, the inference of intent to desert.

His failure to obey the order to return to Fort Benning is clearly shown and was in fact admitted by accused in his unsworn statement.

5. The accused is 20 years old. He enlisted for three years on October 14, 1940.

Evidence of three previous convictions was introduced. The first, for absence without leave for 67 days; the second, for desertion for 3 months and 10 days, terminated by surrender at Dalton; and the third, for desertion for 22 days, terminated by apprehension at Dalton.

There is no limit of punishment for desertion in time of war.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during

the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence.

_____ Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

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

SPJGK
CM 226966

UNITED STATES v. Private JOSEF SCHMIDT (32246877), Company C, 12th Training Battalion, 4th Regiment, Branch Immaterial Replacement Training Center.	FOURTH SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Fort McClellan, Alabama, July 20, 1942. Dishonorable discharge and confinement for six (6) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Josef (NMI) Schmidt, Company "C", Twelfth Training Battalion, Fourth Regiment, Branch Immaterial Replacement Training Center, Fort McClellan, Alabama, did, at Fort McClellan, Alabama on or about May 15, 1942, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit, "I will never fight against Germany. The German people are superior to the American people. This is a poor army and the German army is superior.", or words to that effect.

Specification 2: In that Private Josef (NMI) Schmidt, Company "C", Twelfth Training Battalion, Fourth Regiment, Branch Immaterial Replacement Training Center, Fort McClellan, Alabama, did, at Fort McClellan, Alabama, on or about May 16, 1942, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit, "I will not fight

against Germany. If I was told to fire on the Germans I would get some of our men first.", or words to that effect.

Specification 3: In that Private Josef (NMI) Schmidt, Company "C", Twelfth Training Battalion, Branch Immaterial Replacement Training Center, Fort McClellan, Alabama, did, at the Morrisville Maneuver Area, Fort McClellan, Alabama, on or about June 2, 1942, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit, "I did not ask for this Goddamn uniform. I will not fire against anyone we are fighting, I will not fight against Germany. If we ever go to Germany to fight I would fight for Germany instead of the United States. I will try to shoot as many men in the back as possible before they get me. This country had no business to sell supplies to England or Russia.", or words to that effect.

He pleaded not guilty to and was found guilty of the Charge 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to six years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings and legally sufficient to support the sentence subject to the qualifications as hereinafter stated. The sole question to be determined is whether the designation of a Federal Reformatory as the place of confinement is authorized.

4. The Specifications of which accused was found guilty allege wrongful and unlawful utterances by accused of disloyal statements against the United States. No specific intent or purpose in making the utterances is alleged or found. It is not expressly or impliedly alleged or found that the utterances were made with intent to arouse disloyalty, mutiny or disobedience of orders by others, to aid the enemies of the United States, or to interfere with or impair theloyalty, morale or discipline of the armed forces.

5. A Federal penitentiary, reformatory or correctional institution may lawfully be designated as a place of confinement only as punishment for desertion in time of war, repeated desertion in time of peace, and

mutiny, unless the act or omission of which the accused is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of United States, 1910 or by the law of the District of Columbia or by way of commutation of a death sentence and unless also the period of confinement authorized and adjudged by such court-martial is more than one year (A.W. 42). To justify penitentiary confinement in this case, the acts or omissions of which accused was convicted must come within the provisions of Article of War 42. The offenses of which accused was convicted do not constitute mutiny. They are military offenses solely, not denounced by the law of the District of Columbia or by other Federal statute. The only statutes of the United States which denouce disloyal utterances are the section of the Espionage Act of June 15, 1917, as amended, reading as follows:

> "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both" (50 U.S.C. 33),

and the section of the act of June 28, 1940, reading:

> "(a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States—
>
> "(1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States;" (18 U.S.C. 9).

By the terms of these statutes disloyal words are punishable only if uttered with the specific intent or purpose set forth therein. Such

intent or purpose not being here charged or found, the offenses involved are not the equivalent of those denounced by the statutes (sec. 451 (44) Dig. Ops. JAG, 1912-40).

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 involves dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for six years in a place other than a penitentiary, Federal reformatory or correctional institution.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 26 1942 - To the Commanding General, Fourth Service Command, Services of Supply, Atlanta, Georgia.

1. In the case of Private Joseph Schmidt (32246877), Company C, 12th Training Battalion, 4th Regiment, Branch Immaterial Replacement Training Center, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six years in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution 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 226966).

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

RECEIVED
NOV 28 1942
STAFF
JUDGE
ADVOCATE

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

SPJGK
CM 227025

NOV 24 1942

UNITED STATES v. Private WILLIAM R. MAPP (32181131), 830th Quartermaster Company, Truck (Aviation).	SOUTHEAST ARMY AIR FORCES TRAINING CENTER Trial by G. C. M., convened at Moody Field, Georgia, September 3, 1942. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification 1: In that Private William R. Mapp, 830th Quartermaster Company Truck, Aviation, did, at Moody Field, Georgia, on or about August 18, 1942, strike Major Earl L. Mullineaux, his superior officer, who was then in the execution of his office, on the face with his fist.

Specification 2: In that Private William R. Mapp, 830th Quartermaster Company Truck, Aviation, having received a lawful command from Major Earl L. Mullineaux, his superior officer, to go to his quarters, did, at Moody Field, Georgia, on or about August 18, 1942, willfully disobey the same.

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

Specification: In that Private William R. Mapp, 830th Quartermaster Company Truck, Aviation, having been duly placed in arrest in his quarters

on or about August 18, 1942, did, at Moody Field, Georgia, on or about August 18, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Private William R. Mapp, 830th Quartermaster Company Truck, Aviation, did, at Moody Field, Georgia, on or about August 18, 1942, desert the service of the United States and did remain absent in desertion until he surrendered himself at Moody Field, Georgia, on or about August 29, 1942.

He pleaded not guilty to Charge I and its Specifications, guilty to Charge II and its Specification, guilty to the Specification, Charge III, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty and not guilty to Charge III but guilty of violation of Article of War 61. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved only so much of the findings of guilty of Charge III and its Specification as involves findings of guilty of absence without leave from August 18, 1942, to August 29, 1942, in violation of Article of War 61, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on the morning of August 18, 1942, at Moody Field, Georgia, accused returned from hospital to his company, 830th Quartermaster Company, Truck, Aviation, for duty. He was assigned to duty at a motor pool. (R. 13) During the morning of that day he asked his acting first sergeant for a "pass to go to town" but the pass was refused because accused had been previously restricted to camp. At about 8 p.m. accused again asked the acting first sergeant for a pass. The pass was again refused whereupon accused requested permission to speak to the company commander, Major Earl L. Mullineaux, Air Corps (R. 5, 6, 12). The request was transmitted to Major Mullineaux (R. 6, 12). While accused was in the orderly room (R. 22) or supply room (R. 19), Major Mullineaux walked up to him and told him he would not be given a pass.

Accused "exclaimed that he thought he should have a pass" (R. 6) and that having been in hospital for a week his previous restriction should not be effective (R. 6, 12). The acting first sergeant, who was present, testified that the officer

> "told him that his restriction wasn't over and after he finished his restriction he could have a pass. Mapp didn't seem to like that and then he asked why. And one word led to another word and the Major finally ordered him to go to his quarters. Mapp didn't go to his quarters and continued to argue" (R. 12).

Major Mullineaux testified that on account of accused's disobedience of the order to go to his quarters he told accused he was in arrest, went to the entrance of the room, pushed open a screen door and told accused to go to his "quarters in arrest" (R. 7). Eyewitnesses testified that accused started to leave but as the officer turned away (R. 7, 24, 25) accused said, in substance, "I will give you something to arrest me for" (R. 23, 26), and struck the officer on the chin (R. 17) or on the side of his face (R. 23, 25) with his fist (R. 16) and put his arm around the officer's neck and placed his "hands on his chin" (R. 12, 25). Others present seized accused and pulled him away (R. 13, 19, 25, 26). Major Mullineaux was rendered temporarily unconscious by the blow (R. 7). During the exchange of words both accused and the officer appeared to be angry and each raised his voice (R. 21).

About 9 p.m., the acting first sergeant went to the quarters of accused but did not find him there. A search for him was made without success (R. 13). He had absented himself without leave (R. 6; Ex. 2). He surrendered at the Valdosta, Georgia, police station about August 30, 1942 (R. 28; Ex. 6).

A medical officer testified for the defense that on July 24, 1942, accused was admitted to the Moody Field station hospital with a chest cold. He ran a slight fever, but was discharged with normal temperature on August 5, 1942. He was readmitted on August 8, 1942, with a complaint of dizziness and "feeling hot", and was discharged on the morning of August 18, 1942 (R. 31). In the opinion of the medical officer he was not feigning illness during the period he was in the hospital but was unquestionably ill and suffering from an organic illness of

some kind (R. 32). In witness' opinion it was possible that accused's physical condition on August 18 resulted in a "mental disturbance" (R. 31) which may have affected his capacity to distinguish between right and wrong (R. 33). Witness doubted, however, that the illness did, in fact, affect accused's ability to distinguish between right and wrong (R. 32). Witness did not discover any symptoms of psychosis or insanity (R. 35).

An enlisted man testified for the defense that he saw accused come into his barracks about 8 p.m., August 18, and remain there for thirty or forty minutes, sitting on his locker, "as usual sitting there writing" (R. 36). Another soldier testified that accused borrowed a dollar from him at about 7:15 p.m., August 18, and that later, subsequent to the assault, accused came to him and returned the dollary (R. 37), saying, "I don't need it" (R. 38).

Accused made an unsworn statement through his counsel. He stated that he was 28 years of age and was born in Alabama. He had attended public school for seven years and in April, 1942, had married a Valdosta, Georgia, girl who still lived in that village. On the morning of August 18, 1942, he had been discharged from the hospital and was sent to the motor pool for duty. There he was given some work to do and got his feet wet. After doing this work he took a truck and engaged in hauling logs (R. 38). After finishing the day's work and after attending a meeting of the truck squadron, which lasted from 6 p.m., until 7:30 p.m., he requested a pass to leave the post and visit his wife whom he had not seen for some time. He was hot, dizzy, fatigued, ill and feverish (R. 39, 40). When Major Mullineaux refused the pass accused became very angry and, not knowing "what he was doing, he struck the major". He then went to quarters and stayed there thirty or forty minutes. No one came to place him in confinement. He knew he was in arrest in quarters but left the post and went to his wife's house and stayed there that night. In the morning he heard that the military police were looking for him and that if they caught him they would shoot him. He was frightened and decided to go to Fort Benning and surrender (R. 39), but finally returned to Valdosta and surrendered (R. 40).

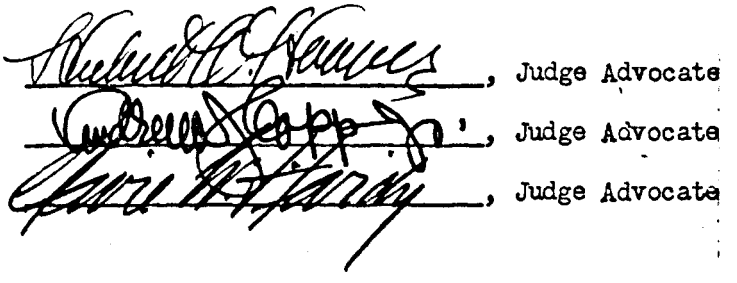
4. The evidence clearly shows that at the place and time alleged accused struck Major Earl L. Mullineaux, his superior officer, in the face with his fist while the officer was in the execution of his office. Accused acted without excuse or justification. The evidence is likewise clear that just prior to the assault he willfully disobeyed the command

of his superior officer to go to his quarters. Accused finally did go to his quarters but did not go when ordered to do so. Violations of Article of War 64, as charged, are established. Having been placed in arrest accused breached the arrest and absented himself without leave. His absence without leave continued from August 18 to August 30, 1942. The findings of guilty, as approved by the reviewing authority, are fully supported by the evidence.

5. On October 12, 1942, following the trial, a board of medical officers was convened for the purpose of determining the sanity of accused. The report, which accompanies the record of trial, shows that the board found accused to be sane and responsible for his acts at the time of his offenses and at the time of the examination.

6. Attached to the record of trial is a letter addressed by the reviewing authority to the President, dated October 29, 1942, recommending, in the "light of all the circumstances", that the sentence be commuted to confinement for twenty years.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Punishment of death is authorized upon conviction of violation of Article of War 64 in time of war.



_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., NOV 28 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private William R. Mapp (32181131), 830th Quartermaster Company, Truck (Aviation).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Accused willfully disobeyed a command by his company commander to go to his barracks and, when the command was repeated, struck the officer in the face with his fist rendering him temporarily unconscious. Other enlisted men were present. The reviewing authority recommends that the sentence to death be commuted to confinement for twenty years. Papers accompanying the record of trial indicate that accused is a negro, 28 years of age, and that he enlisted September 8, 1941. He was confined in a state prison from about June 30, 1933, to about June 22, 1941, following conviction of robbery and assault. In view of the recommendation for clemency and all the circumstances in the case, 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 twenty years, and that the sentence as thus commuted be carried into execution. If the sentence is so commuted it is recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but commute it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years, and to direct the execution of the sentence as thus commuted, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years. G.C.M.O. 9, 24 Feb 1943)

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

SPJGK
CM 227041

NOV 25 1942

UNITED STATES	)	GULF COAST ARMY AIR FORCES TRAINING CENTER
v.	)	
Second Lieutenant JAMES W. BRYAN (0-450209), Cavalry.	)	Trial by G.C.M., convened at San Antonio, Texas, October 9, 1942. Dismissal and confinement for three (3) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

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

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

Specification: In that 2nd Lieutenant James W. Bryan, Cavalry, did at the San Antonio Aviation Cadet Center on or about June 10, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Portland Oregon, on or about August 24, 1942.

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

Specification: In that 2nd Lieutenant James W. Bryan, Cavalry, did at San Antonio, Texas, on or about June 5, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

Junction City Kans. June 5 1942 No. 10
CENTRAL NATIONAL BANK 83-129
United States Depository
PAY TO THE ORDER OF James W. Bryan $25.00
THE SUM OF * * * * 25 DOL'S 00 CTS DOLLARS
FOR _____
K. L. Smith Jr.

Which said check was a writing of a private nature which might operate to the prejudice of another.

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

Specification: In that 2nd Lieutenant James W. Bryan, Cavalry, did at San Antonio, Texas, on or about June 9, 1942, with intent to defraud willfully, unlawfully, and feloniously utter as true and genuine a certain check in words and figures as follows:

Junction City, Kans. June 5 1942 No. 10
CENTRAL NATIONAL BANK 83-129
United States Depository
PAY TO THE ORDER OF _____ $25.00
THE SUM OF * * * * 25 DOL'S 00 CTS DOLLARS
FOR _____
K. L. Smith Jr.

(Endorsement: James W. Bryan)
A.A.F.P.S.(Pilot))
Kelly Field, Texas)

A writing of a private nature which might operate to the prejudice of another which said check was as he, the said 2nd Lieutenant James W. Bryan well knew, falsely made and forged.

CHARGE IV: Violation of the 95th Article of War.
(Finding of Not Guilty.)

Specification 1: (Finding of Not Guilty.)

Specification 2: (Nolle Prosequi)

Specification 3: (Nolle Prosequi)

Specification 4: (Nolle Prosequi)

Specification 5: (Nolle Prosequi)

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

Specification 1: In that 2nd Lieutenant James W. Bryan, Cavalry, did at San Antonio Texas, on or about June 4, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

June 1, 1942 No. 42
THE FIRST NATIONAL BANK
Lawrenceville, Georgia
PAY TO THE ORDER OF James W. Bryan $75.00
THE SUM OF * * * * 75 DOL'S 00 CTS DOLLARS
88-0303
James S. Bryan

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that 2nd Lieutenant James W. Bryan, Cavalry, did at San Antonio, Texas, on or about June 6, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

June 6, 1942
The First National Bank, Lawrenceville, Ga.
(Write Name of Your Bank on Above Line) (Town here)
PAY TO Lt. James W. Bryan OR ORDER $50.00
THE SUM OF * * * * 50 DOL'S 00 CTS DOLLARS
For value received, I Represent The Above Amount is on Deposit in Said Bank in My Name, is Free From Claims and is Subject To This Check.
Mrs. Ruth Bryan

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that 2nd Lieutenant James W. Bryan, Cavalry, did at San Antonio, Texas, on or about June 6, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

June 1, 1942
The First National Bank of Lawrenceville, Ga.
(Write Name of Your Bank on Above Line) (Town Here)
PAY TO Lt. James W. Bryan OR ORDER $50.00
THE SUM OF * * * * 50 DOLS 00 CTS DOLLARS
For value Received, I represent the above Amount is on Deposit in said Bank in My Name, is Free from Claims and is Subject To This Check.
James S. Bryan

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 4: In that 2nd Lieutenant James W. Bryan, Cavalry, did at San Antonio, Texas, on or about June 6, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

June 1, 1942
The First National Bank of Lawrenceville, Ga.
(Write Name of Your Bank on Above Line) (Town here)
PAY TO Lt. James W. Bryan OR ORDER $74.69
THE SUM OF * * * * 74 DOL'S 69 CTS DOLLARS
For value received I Represent the above maount is on deposit in said Bank in My Name, is free from claims and is subject to this Check.
Mrs. Ruth Bryan

which said check was a writing of a private nature which might operate to the prejudice of another.

A nolle prosequi was entered with respect to Specifications 2, 3, 4 and 5, Charge IV. Accused pleaded guilty to the Specification, Charge I, 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 to Charge I but guilty of violation of the 61st Article of War, guilty to Charges II and III and their Specifications, guilty to Charge IV and Specification 1 thereunder, and guilty to the Additional Charge and its Specifications. He was found guilty of the Specification, Charge I, 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 Charge I but guilty of violation of the 61st Article of War, guilty of Charges II and III and their Specifications, not guilty of Charge IV and Specification 1 thereunder, and guilty of

the Additional Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for six years. The reviewing authority approved the sentence, reduced the period of confinement to three years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that between about June 4, 1942, and June 9, 1942, accused presented for payment to various merchants in San Antonio, Texas, a series of five worthless checks (R. 23, 26, 27, 30, 31, 33, 34, 37). One, drawn on the Central National Bank of Junction City, Kansas, for $25, had been forged by accused through signing a fictitious name of K. L. Smith, Jr., thereon as maker (Exs. A, H). Two drawn on the First National Bank of Lawrenceville, Georgia, for $50 and $74.69, respectively, had been forged by accused through signing the name of his mother, Mrs. Ruth Bryan, thereon as maker (Exs. B, D. H). Two, drawn on the First National Bank of Lawrenceville, Georgia, for $50 and $75, respectively, had been forged by accused by signing the name of his father, James S. Bryan, thereon as maker (Exs. C, E, H). Accused obtained the proceeds of the checks in cash or cash and merchandise (R. 23, 26, 30, 31, 33, 37). (Charges II, III and Additional Charge and Specifications).

Accused absented himself without leave from his station at San Antonio, Texas, on June 10, 1942, and remained absent until apprehended at Portland, Oregon, on August 24, 1942 (Ex. H). (Charge I and Specification).

4. There was received in evidence a report of a board of medical officers which examined accused on October 5, 1942, following his hospitalization in the station hospital, San Antonio Aviation Cadet Center, for one month. The board found him sane and capable of distinguishing right from wrong. It made a diagnosis of "Constitutional Psychopathic State: Inadequate Personality and Pathological Liar". A member of the board on duty with the neuropsychiatric section of the station hospital (Ex. J), testified concerning the diagnosis of constitutional psychopathic state,

> "These people are intellectually perfectly normal, physically perfectly normal, but they simply never grow up emotionally. They never come to appreciate the social requirements of our civilization" (R. 31).

Accused made an unsworn statement to the effect that he was raised on a farm where he was required as a child to do the work of a man, and that his father was very harsh in his treatment of accused.

He finished high school and worked his way through two years of college. He enlisted in the hope of securing an appointment to the United States Military Academy. He entered an officers' candidate school about June 1, 1941. He absented himself without leave while drunk. While absent he went to Kansas City, Missouri, Atlanta, Georgia, Oklahoma City, Oklahoma, Omaha, Nebraska, Denver, Colorado, and Portland, Oregon (R. 46-50).

5. The evidence, together with the pleas of guilty, fully supports the findings of guilty.

6. War Department records show that accused is 23 years of age. He attended Abraham Baldwin College for two years. He enlisted January 10, 1941. Having completed an officers' candidate school he was appointed a 2nd Lieutenant, Army of the United States, on September 27, 1941, and entered upon active duty the same day. Upon an efficiency report covering the period from October 13, 1941, to November 27, 1941, he received general ratings of excellent. His 201 file contains correspondence relating to numerous worthless checks other than the checks involved in the Charges, negotiated by accused.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violations of Articles of War 61, 93 and 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 3 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James W. Bryan (0-450209), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Accused forged a series of five checks and negotiated them, obtaining cash or cash and merchandise thereon, and was absent without leave for 44 days. There are no extenuating circumstances. The term of confinement at approved by the reviewing authority is not excessive. I recommend that the sentence be confirmed and carried into execution.

3. The reviewing authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement.

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 confirm the sentence as modified by the reviewing authority and to carry it into execution, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence as modified by reviewing authority confirmed. G.C.M.O. 16, 3 Mar 1943)

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

SPJGH
CM 227191

DEC 9 1942

UNITED STATES	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Schofield Barracks, Territory of Hawaii, August 21, 1942. Dismissal.
First Lieutenant MAURICE B. SAUL (O-264227), 27th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: In that 1st Lieut. Maurice B. Saul, 27th Infantry, did, without proper leave, absent himself from Company K, 27th Infantry, his properly appointed place of duty, at Honolulu, T. H., from June 4, 1942, to June 11, 1942.

Specification 2: In that 1st Lieut. Maurice B. Saul, 27th Infantry, did, without proper leave, absent himself from the Officers' Ward, 147th General Hospital, St. Louis College, Honolulu, T. H., where he was a patient, from July 6, 1942, to July 7, 1942.

Specification 3: In that 1st Lieut. Maurice B. Saul, 27th Infantry, did, without proper leave, absent himself from Company D, 27th Infantry, his properly appointed place of duty, at Honolulu, T. H., from July 16, 1942, to July 17, 1942.

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

Specification 1: In that 1st Lieut. Maurice B. Saul, 27th Infantry, was, at Honolulu, T. H., on or about July 17, 1942, at a public place, to wit, the corner of Pauahi Street and Nuuanu Avenue, Honolulu, T. H., grossly drunk while in uniform.

Specification 2: In that 1st Lieut. Maurice B. Saul, 27th Infantry, did, at Honolulu, T. H., on or about July 16, 1942, wrongfully enter a public house of prostitution, while in uniform and not on official business, to wit: Palace Hotel, 1252 Nuuanu Avenue, Honolulu, T. H.

The motion of the defense to dismiss Specification 1, Charge II because it did not allege an offense under the 95th Article of War, was properly denied (R. 6). The accused pleaded guilty to Specification 1, Charge I, and not guilty to all other Specifications and to all Charges. He was found guilty of all Specifications and of all Charges. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution shows that on the afternoon of June 4, 1942, the accused failed to be present at a scheduled lecture which he had been ordered to attend at the 3rd Battalion Post of the 27th Infantry. The accused was absent without leave from his organization from that time until the evening of June 11, 1942. On this latter date the accused was apprehended by Sergeant Confer of the military police at the Alexander Young Hotel in Honolulu, delivered to the officer of the day at the Military Police Station, and thereafter returned to his organization (R. 8-10, 28-29, Ex. B).

On June 20, 1942, the accused became a patient in the 147th General Hospital in Honolulu. On the morning of July 6, 1942, the accused obtained permission from Captain William A. Castles, who was in charge of the officers' ward, to accompany a warrant officer to Schofield Barracks for the purpose of attending to some personal business. The permission thus given did not stipulate when the accused was to return, but the accused was requested to complete his business and return to the hospital with the warrant officer. Upon their return from Schofield Barracks to Honolulu the accused left the car and the warrant officer at about 11:30 a.m. The accused stated to Chaplain G. A. Bousman in whose car he had made the trip, that he was on pass and would remain in town for a few hours. About 9 o'clock that evening, the accused telephoned to the officers' ward of the hospital and stated to Second Lieutenant

Madeline Modry, the nurse in charge, that he would be unable to return that night because of blackout restrictions. On the following day, July 7, the accused was apprehended at the Moana Hotel after 4 p.m. and returned to the hospital between the hours of 4:30 p.m. and 7 p.m. (R. 12, 13, 14, 16, 29, 37; Ex. C).

The entry in the morning report of Company D, 27th Infantry, showing accused from sick in hospital to duty, July 16, 1942 (Ex. D), was incompetent because Captain F. L. Walker, Jr., who authenticated that entry testified that it was based upon information he received from the Regimental Adjutant (R. 18). Proof that he was released from the hospital and directed to return to his organization on that date, was furnished by the accused in his unsworn statement (R. 44).

While in the hospital the accused had been transferred from Company K to Company D of the 27th Infantry. The order directing this transfer was not delivered to the accused. After leaving the hospital on July 16, he failed to report promptly to either Company K or Company D but on July 18, 1942, reported to Company D (R. 8, 9, 17, 18; Exs. A and C).

On July 16, 1942, the accused entered the Palace Hotel, which was, and was generally known as a house of prostitution. At that time he was dressed in uniform and wore the insignia of his rank. When questioned by the military police as he entered, accused stated that he was not absent without leave and that he was going to see a girl named "Dixie". The accused and his counsel stipulated that if the accused were in the Palace Hotel at the time and on the date alleged, he was not there on official business (R. 30-32, 37-43).

About noon on the following day, July 17, 1942, the accused staggered to the entrance of the bar at 1129 Nuuanu Avenue in Honolulu and requested admission. The doorman refused to admit the accused because in his opinion the accused was drunk. The accused turned from the bar entrance and staggered across the street. After accused almost fell in the middle of the street he collapsed and fell on the sidewalk. He was dressed in his uniform and was observed by both civilians and soldiers as he lay on the sidewalk for five minutes in an unconscious condition. The accused was then placed in a police car and carried to the Honolulu Police Station, and to the Command Post, 27th Infantry, in an ambulance. There was a strong smell of liquor on his breath, his clothes were disorderly, he mumbled incoherently, he was unable to walk, and in the opinion of First Lieutenant P. H. Johnston, Jr., 810th Military Police Company and of Lieutenant Colonel Douglas Sugg and Captain C. J. Christianson, 27th Infantry, was drunk (R. 11, 26-28, 33-34).

4. The accused elected to make an unsworn statement in substance as follows:

As to Specification 1, Charge I, the accused returned to Company K, 27th Infantry, on the evening of June 11 and was examined on that date by the battalion medical officer who pronounced him to be sober. He was taken to the St. Louis Hospital for a blood test which showed 0.5 milligrams of alcohol per cubic centimeter of blood. He remained at the hospital until July 16, 1942 (R. 43, 44).

As to Specification 2, Charge I, the accused procured permission on July 6, from Captain Castles of the St. Louis Hospital to accompany Warrant Officer Hedrick to Schofield Barracks in order to attend to some business matters. He was delayed by his business at his bank in Honolulu, then went to Waikiki, where he had dinner and then went to the Moana Hotel. He realized that it was late when the blackout shutters were placed and telephoned the hospital. He talked with Lieutenant Madeline Modry, informed her that he was unable to return to the hospital and that he would come back on the following day. He quoted the answer of Leiutenant Modry as "All right" (R. 44).

As to Specification 3, Charge I, the accused had never been notified by any official notice during his stay at the St. Louis Hospital that he had been transferred from Company K to Company D, but had been informed by visitors of his transfer. He stated to Captain Castles, the Ward Officer, when he was released on July 16 that since he had been in the hospital for 35 days it was necessary for him to stop in Honolulu and buy at least two uniforms before reporting to his organization for duty. No particular time had been set for his arrival at Fort Kamehameha and he understood that his company was engaged in a large-scale maneuver with the rest of the regiment at that time (R. 44).

As to Specification 1, Charge II, the accused had been treated for chronic alcoholism prior to entering upon active duty with the Army. As a result of this treatment, his consumption of alcohol had been considerably reduced. His doctors had warned him, however, that after a period of cessation of drinking, he would most probably become violently ill and might even suffer a total collapse. Following his discharge from the hospital on July 16, he was extremely nervous, and on July 17 he took three drinks in an effort to prevent a physical collapse. After taking the three drinks, he stopped at a bar and requested the doorman to get him something to "straighten him out". The doorman, however, replied that "he thought that I had had enough from my appearance". While he was going to a parking lot to get a taxicab, he collapsed and fell upon the pavement. He did not recall any further events until late that night when he found himself in the civil department of the Honolulu Police Station (R. 44).

5. Specifications 1, 2 and 3, Charge I, present three separate charges of absence without leave.

Specification 1 alleges that the accused absented himself without leave from Company K, 27th Infantry, from June 4, 1942, to June 11, 1942. The accused pleaded guilty to this Specification. The prosecution presented evidence to show that the accused failed to be present at the scheduled lecture on June 4, 1942, and that he remained absent from his organization from that time until the evening of June 11, 1942.

Specification 2 alleges that the accused absented himself without leave from the officers' ward, 147th General Hospital from July 6, 1942, to July 7, 1942. The evidence shows that the accused, while a patient of the 147th General Hospital, obtained permission on July 6, to go to Schofield Barracks with a certain warrant officer and directed to return with the warrant officer to the hospital. The evidence shows further that the accused failed to return to the hospital with the warrant officer, absented himself without leave and did not return to the hospital until he was apprehended after 4 p.m. of the following day, July 7, 1942.

Specification 3 alleges that the accused absented himself without leave from Company D, 27th Infantry, from July 16, 1942, to July 17, 1942. This allegation is clearly established by the admission of accused that he was discharged on July 16, from the 147th General Hospital, and that he had been informed of his transfer from Company K to Company D, 27th Infantry. Instead of reporting to his organization, the accused remained in Honolulu. When apprehended on July 17, he was so drunk that he was unable to walk.

6. Specification 1, Charge II, alleges that the accused was on July 17, 1942, on a public street in Honolulu grossly drunk while in uniform. The evidence shows that the accused on the date alleged was grossly drunk in uniform and that he lay in a drunken condition upon a sidewalk in Honolulu. The evidence shows further that he was observed in such condition by both civilians and soldiers and that he was apprehended and carried in arrest to the military police station. An officer of the military police and two officers of his regiment were of the opinion that accused was drunk. Lieutenant Colonel Sugg testified that accused was "dead drunk". These facts, showing gross and conspicuous drunkenness in a public place, constitute conduct unbecoming an officer and a gentleman in violation of the 95th Article of War (M.C.M., 1928, par. 151; Winthrop's Military Law and Precedents (2nd Ed.), p. 717).

Specification 2, Charge II, alleges that the accused on July 16, 1942, at Honolulu wrongfully entered a public house of prostitution while in uniform and not on official business. The proof shows that the accused on July 16, 1942, while dressed in uniform, and not in the performance of a duty, openly and intentionally entered the Palace Hotel which was, and was generally known as a house of prostitution. Upon entering the house, the accused stated to a military policeman that he was going to see a girl named Dixie. The conduct of accused in entering

the house under the circumstances shown in this case was conduct unbecoming to an officer and a gentleman and constituted an offense in violation of the 95th Article of War.

7. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Infantry-Reserve, from R.O.T.C., June 10, 1929; appointed first lieutenant, June 22, 1932; reappointed June 22, 1937; extended active duty, March 6, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and of Charge II and the Specifications thereunder, legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and is authorized upon conviction of a violation of the 61st Article of War.

_____, Judge Advocate.

Chas. I. Dessoy Judge Advocate.

Abner E. Lipscomb Judge Advocate.

SPJGH
CM 227191 1st Ind.

War Department, J.A.G.O., DEC 15 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Maurice B. Saul (0-264227), 27th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, and legally sufficient to support the sentence, and to warrant confirmation of the sentence.

The three Specifications under Charge I involve three offenses of absence without leave, one for seven days, in violation of the 61st Article of War. The two Specifications under Charge II involve, respectively, gross drunkenness in a public place while in uniform, and a wrongful entry, while in uniform, into a public house of prostitution, in violation of the 95th Article of War. Since such conduct of which accused was found guilty under Charge II is clearly conduct unbecoming an officer and gentleman in contemplation of the 95th Article of War, I recommend that the sentence of dismissal be confirmed and ordered executed.

In this connection I invite attention to the statement of accused in his request for clemency, dated August 23, 1942, to the Commanding Officer, 25th Division, in which he stated that he was confined in the Dufus Hospital for Nervous and Mental Diseases at Ambler, Pennsylvania, for acute and chronic alcoholism almost continuously from October 1941 to March 5, 1942.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 24, 6 Mar 1943)

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

(205)

SPJGK
CM 227195

DEC 3 1942

UNITED STATES	FIRST CAVALRY DIVISION
v.	Trial by G. C. M., convened at Fort Bliss, Texas, October 20, 1942. Dismissal and confinement for two (2) years.
Second Lieutenant PHILIP FRANKLIN (0-1574045), Company D, 302nd Quartermaster Battalion.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Philip Franklin, Company "D", 302nd Quartermaster Battalion, did, at the Gateway Hotel in El Paso, Texas, on or about September 11, 1942, with felonious intent and against the order of nature attempt to commit the crime of sodomy by fondling and kissing the body and penis of Staff Sergeant Leslie C. Major, 457th Bombardment Squadron, with his hands and mouth.

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 be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Technical Sergeant Leslie C. Major, 457th Bombardment Squadron, 330th Bombardment Group, testified that on the evening of September 11, 1942, he met accused for the first time at the bar of the Continental

Hotel, El Paso, Texas. Accused engaged the witness in conversation, during the course of which accused remarked that he had no whiskey. Thereupon the witness invited accused to his room in the Gateway Hotel in El Paso (R. 7) where each had two drinks of whiskey. While the two were sitting on a bed accused remarked that they had not introduced themselves and asked witness to "just call me 'Phil'" (R. 7, 8). Witness proposed that they attempt to take home some girls of his acquaintance who worked in a nearby drug store. Accused suggested that they first finish their drinks. After an interval witness suggested that they leave, whereupon accused moved nearer witness and put his right hand on witness' leg and asked, "Wouldn't you like it as well the other way?". Witness testified that he was "dumfounded" and replied, "Well, *** I had rather have a woman first". He seized accused's hand which was being moved along witness' leg toward his penis and told him to "take it off me and let's go and go get these women". As they were leaving the room accused stopped and said, "It will take just a minute or two and we're not in that big of a hurry, are we?". Witness replied, "Let's go, come on, let's go down". (R. 8) On passing through the hotel lobby witness requested the telephone operator to ask the military police to come to his room (R. 9).

Major testified further that the two walked "down the street" and met two girls one of whom witness knew. They walked home with these girls. After leaving them accused was accosted by some other women, but following some conversation the two men returned alone to witness' hotel. (R. 9, 10) Accused suggested that they get the key and return to the room. They did so, accompanied by a female hotel employee whom witness had invited in for a drink. While drinking, witness asked accused if he did not wish to get another room and stated that if necessary he would lend him money for this purpose. Accused replied in the negative and stated that he would sleep on the floor (R. 11, 22). Accused went into the bathroom, called witness and asked him what he was going to do. Witness replied, "you just stay in here and I will take this girl here in the bed and then you can" (R. 11). The woman promptly left the room. Witness told accused to remain in the bathroom "until I get through" and walked out of the room to the hallway where he met a Lieutenant Kilcrease and two soldiers of the military police, together with two civil police officers. Upon being advised of the situation by witness, Lieutenant Kilcrease told accused that in order to prove anything it would be necessary to catch accused "in the act" and that both men should be undressed. It was arranged that the military and civil police would enter the witness' room in ten minutes. Witness then returned to the room where he

remarked that the woman had become angry and had gone. (R. 12) Accused proposed that they "might as well go to bed". They prepared for bed, witness removing his trousers and drawers. As accused had removed all his clothes except his shorts, witness asked him if he slept with his shorts on. Upon accused asking, "Do you?", witness replied, "I never do". Accused then removed his shorts. Witness asked this question "because the Provost Marshal told me also that he had to catch him in the act and we would have to be naked". After accused had "checked the front door" and had gotten into bed, witness, on a pretext, opened the door about four inches, noting the time as "I knew they were coming in at five minutes till twelve into my room and I had to have the Lieutenant the way the Provost Marshal asked me to have him, in the act". Upon getting into bed the witness had on only his "Tee-shirt". He removed it upon accused asking him if he had to sleep with it on. (R. 13)

Major testified that accused was on the side of the bed nearest the entrance to the room with his back thereto, witness being on the farther side facing the door. Accused put his arm over witness and "kind of got around on top of me". He twice attempted to kiss witness on the mouth, -

> "he was feeling me over and started playing with my penis *** and when he saw he couldn't kiss me in the mouth he started kissing my body up around my breast *** and started kissing me down around my body".

Witness then told accused he was "not very emotional tonight". Accused

> "played with me and he went on kissing my body until he got down to my penis and then he kissed the side of my penis a couple of times". (R. 14)

At this point the military police entered the room, ordered both men to dress and took them to the police station (R. 14, 15).

First Lieutenant Dallas F. Kilcrease, Cavalry, Corps of Military Police, Eighth Service Command, testified that on the evening in question he went to the Gateway Hotel in response to a telephone call. After making the arrangements with Major he entered the room in question and found Major lying on the bed facing the door leading into the room and

accused on the bed with his back to the door. Both men had on only their undershirts. Accused's head was on the lower part of Major's abdomen. Witness heard "a sort of hissing sound, a kissing sound". The witness then arrested the accused who

> "denied there having been any penetration, but he did admit that he had been kissing Sergeant Major and in his own words he admitted that he had had his hands on Sergeant Major's tool" (R. 33).

Witness denied having told Major prior to entering the room that he was to have accused in bed with his clothes off, or that they "must catch him", but testified that he did state that they should set a time when "he would be in the act" (R. 35). Sergeant Lorraine H. Hill, Detachment Corps of Military Police, Eighth Service Command, testified that he entered the room with Lieutenant Kilcrease and saw accused lying with his back to the room entrance and his face "was down close to Sergeant Major's stomach as far as I could tell". Witness heard a "sucking sound that was very loud" (R. 37).

Mr. Ramon Duron, city patrolman, El Paso Police Department, testified for the defense that when he entered Major's room both men were naked and accused was kissing Major on the face (R. 40-42).

Accused's company commander, 2nd Lieutenant Sol Porte, 302nd Quartermaster Battalion, testified for the defense that he had known accused from six to eight weeks and had found him a very capable officer, intelligent and of excellent character. (R. 43-45) Second Lieutenant Eric D. Berquist, 7th Cavalry, a defense witness, testified that he had known accused for about two weeks and had spent practically all off duty hours with him. He considered accused intelligent and had noticed no evidence of sexual abnormality. (R. 45-48)

Accused did not testify or make an unsworn statement.

4. The evidence shows without contradiction that at the place and time stated in the Specification accused fondled and kissed the body and penis of Staff Sergeant Major as alleged. Major's testimony clearly establishes this fact. Other witnesses testified that when they entered the room accused's head was in the vicinity of Major's abdomen and that they heard a "kissing" or "sucking" sound.

An attempt is defined by the Manual for Courts-Martial as follows:

> "An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission" (par. 152c, M.C.M.).

Accused had previously asked Major if he would not like it "the other way" and asserted that it would "take just a minute or two". Simultaneously he placed his hand on Major's leg and advanced it toward his penis. There can be no possible doubt as to accused's intentions at the time. Immediately upon their return to the room and getting into bed accused first attempted to kiss Major's lips. He then kissed and fondled his body and finally kissed and fondled his penis. This chain of circumstances leads inevitably to the conclusion that the intention of accused to commit sodomy continued and that had he not been interrupted by the entrance of witnesses he would have consummated the offense. On all the evidence the court was fully justified in concluding that accused in fact attempted to commit sodomy in the manner alleged.

Consideration has been given to the doctrine of entrapment in view of the plan made by Major and Lieutenant Kilcrease whereby, with the aid of Major, the military and civil police entered the room and apprehended accused who was then attempting to commit the crime alleged. It is to be noted that accused made the initial advance to Major by placing his hand on the witness' leg, advancing it toward his penis and asking the witness, "Wouldn't you like it the other way?". Later accused stated, "It will take just a minute or two and we're not in that big of a hurry, are we?". It is clear from the evidence that Major then offered no encouragement to accused and in fact attempted to get him out of the room as soon as possible. After their return and upon their getting in bed, accused immediately renewed his advances. Major told him that he (Major) was not "feeling very emotional" and again offered no response to the advances. He turned his head away when accused attempted to kiss him but accused persisted in his attentions. The situation was not one in which an innocent person was induced to commit a crime but was a case where plans were made to apprehend a person in the act of committing a crime of his own choosing.

"The fact that decoys were set, or a trap laid, by means of which a person was detected in the perpetration of a crime, cannot be set up as a defense to the prosecution therefor, where the crime was conceived by the accused, and not suggested by the prosecuting witness ***" (sec. 390, pp. 523, 524, Wharton's Criminal Law) (Underscoring supplied).

"Guilty intent to commit crime being formed, any person may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of detection and punishment" (Ibid, note 3, p. 523).

The doctrine of entrapment is not applicable in this instance.

5. War Department records show that accused is 32 years of age. He graduated from high school, attended Long Island University for three years and Columbia University for one year. He was inducted March 12, 1941, and transferred to the Enlisted Reserve Corps November 10, 1941, with character excellent. He was recalled to active duty January 30, 1942. Upon completion of a course at the Quartermaster Corps Officer Candidate School, Fort Francis E. Warren, Wyoming, he was appointed a temporary second lieutenant, Army of the United States, July 3, 1942.

6. Accompanying the record of trial are numerous letters and affidavits attesting to the good character of accused and requesting clemency. There also accompanies the record a letter to the reviewing authority from Colonel H. L. Conner, Medical Corps, commanding officer, Station Hospital, Fort Bliss, Texas, wherein Colonel Conner states that after reading the record of trial he considers the accused to be strongly bisexual. Colonel Conner expresses the opinion that accused has unstable personality and will probably require treatment in a psychopathic institution unless his tendencies are corrected in the near future. He recommends, in effect, that accused be eliminated from the service and that the sentence to confinement be remitted. Attached to the report of investigation of the charges is a statement of Captain Louis B. Shapiro, Medical Corps, neuropsychiatrist of the Station Hospital, Fort Bliss, Texas, in which he expresses the opinion, based upon an examination, that accused is not an habitual, overt homosexual psychopath.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 7 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Philip Franklin (0-1574045), Company D, 302nd Quartermaster Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused, after some drinking, proposed sodomy to an enlisted man in the latter's room in a hotel. Shortly thereafter the soldier left the room and privately informed the military police of his suspicions as to accused's intentions and arrangements were made for the apprehension of accused. About twenty minutes thereafter accused, while in bed with the enlisted man, placed his mouth upon the enlisted man's penis in an attempt to commit sodomy. It is believed that the punishment of dismissal and forfeitures will suffice. I recommend that the sentence be confirmed but that the confinement be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to letters and affidavits accompanying the record of trial from Mr. Henry L. Lambert, Mr. J. Kenneth Schachter, Mr. Mitchell Salem Fisher, Dr. Howard Gilman, Mr. Henry Franklin, Mr. Harry H. Frackman, Mr. Robert G. Skeller, all New York City, New York, Mr. Edmund J. Keating, Mr. Hugh S. O'Rourke, Mr. Mark Frackman, all Brooklyn, New York, Mr. Cebert H. Skidmore, Elmira, New York, Mr. Wendell A. Phillips, El Paso, Texas, Peggy Hull Deuell, Cornwall, New York, Captain Claud A. Martin, Medical Corps, 7th Cavalry, Captain W. C. Noon, Quartermaster Corps, and Private 1st Class Daniel J. Grossman, 719th Military Police Battalion.

Consideration has also been given to a letter to the Secretary of War from Mr. Mitchell Salem Fisher, dated November 20, 1942, requesting remission of the confinement adjudged.

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

Myron C. Cramer

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

Myron C. Cramer,
Major General,
The Judge Advocate General.

(Sentence confirmed but confinement remitted. G.C.M.O. 42, 17 Mar 1943)

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

(213)

JGH
227204

DEC 30 1942

UNITED STATES	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND
v.	Trial by G.C.M., convened at Fort Lewis, Washington, September 11, 1942. Dishonorable discharge (suspended), and confinement for nine (9) months. Disciplinary Barracks.
Private ALBERT E. HUGHES (20438944), Company B, 750th Military Police Battalion.	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence as approved by the reviewing authority.

Lester S. Hill, Jr., Judge Advocate.

Solomon Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., Board of Review, December 30, 1942, To The Judge Advocate General.

For his information.

Lester S. Hill, Jr.,
Colonel, J.A.G.D.,
Chairman, Board of Review No. 1.

WAR DEPARTMENT
SERVICES OF SUPPLY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

(214)

SPJGH
CM 227204

December 30, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Trial by general court-martial of Private Albert E. Hughes (20438944), Company B, 750th Military Police Battalion.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Pvt. Albert E. Hughes, Co. "B", 750th MP Bn., W.C.C.A., No. Portland, Ore. did at said place, and on or about June 4th, desert the Service of the United States and did remain absent in desertion until he was apprehended at Concordia, Kansas on or about June 7th, 1942

The accused pleaded not guilty to, and was found guilty of the Charge and the Specification thereunder. 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, but reduced the period of confinement to nine months, suspended the dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of his trial was published in General Court-Martial Order No. 35, Headquarters Northwestern Sector, Western Defense Command, Fort Lewis, Washington, October 15, 1942.

3. The findings of guilty of desertion in this case are supported by the following facts:

FOR VICTORY BUY UNITED STATES WAR BONDS AND STAMPS

(1) The accused absented himself without leave from his organization at North Portland, Oregon, on June 4, 1942,

(2) the accused was apprehended by civilian authorities at Concordia, Kansas, on or about June 4, 1942, approximately 1,850 miles from Portland, and

(3) at the time of his apprehension the accused was wearing civilian clothes.

From the above evidence the court was warranted in drawing the inference of intent to desert (M.C.M., 1928, par. 130).

4. The error of receiving evidence containing hearsay statements in a letter and in a telegram was made harmless by the introduction of direct testimony establishing substantially the same facts.

5. It is noted in the companion case, C.M. 224855, Sutherland, a case in which Sutherland was tried for having deserted in company with the accused, that the record of trial was held legally sufficient in the Military Justice Division.

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

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

APR 3 1943

SPJGH
CM 227239

N.D

UNITED STATES	)	THIRD DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Keesler Field, Mississippi, August 24-29, inclusive, 1942. Dismissal.
Captain FRANK H. WYATT (0-181423), Corps of Engineers.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification: In that Captain Frank H. Wyatt did, at Keesler Field, Mississippi, on or about April 4, 1942, knowingly and wilfully apply to his own use and benefit 960 feet of 1" x 6" tongue and groove No. 2 pine lumber; 536 square feet of 2" x 6" No. 2 pine lumber; the lumber for one door frame, size 3' x 6'8"; the lumber for one door frame, size 2'8" x 6'8"; the lumber for five each, window and screen frames, size 2'7" x 4'6"; the lumber for one each, window and screen frames, size 4'0" x 3'10"; the lumber for one each, window and screen frames, size 3'8" x 4'6"; the lumber for one each, window and screen frames, size 2'4" x 3'2"; lumber for one each, window and screen frames, size 2'4" x 2'10"; 2 yards of gravel; 1 yard of sand, and

12 bags of cement of the value of one hundred dollars ($100.00), property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Captain Frank H. Wyatt did, at Keesler Field, Mississippi, on or about April 4, 1942, knowingly and wrongfully consent to the construction by John S. Ellis, in the Post Utilities Carpenter Shop, of one door frame, size 3' x 6'8"; one door frame, size 2'8" x 6'8"; five each, window and screen frames, size 2'7" x 4'6"; one each, window and screen frames, size 4'0" x 3'10"; one each, window and screen frames, size 3'8" x 4'6"; one each, window and screen frames, size 2'4" x 3'2"; one each, window and screen frames, size 2'4" x 2'10", for a two-story garage apartment on Belvedere Avenue, Biloxi, Mississippi, for the personal use and benefit of Captain Frank H. Wyatt, for which labor and time so expended the said John S. Ellis received pay from the United States, to the prejudice of good order and military discipline.

Specification 2: In that Captain Frank H. Wyatt did, at Biloxi, Mississippi, on or about April 1, 1942, knowingly and wrongfully consent to the employment of Earl M. Helm, John C. Applewhite, and Julian E. Phelps to perform work and labor for the personal use and benefit of said Captain Frank H. Wyatt, to-wit: In the construction of a private two-story garage apartment on Belvedere Avenue, Biloxi, Mississippi, for which labor and time so expended the said Earl M. Helm, John C. Applewhite, and Julian E. Phelps received pay from the United States, to the prejudice of good order and military discipline.

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

Specification 1: In that Captain Frank H. Wyatt, did at Keesler Field, Mississippi, on or about March 29, 1942, knowingly and wilfully consent to the employment of Vincent Groschner, Cleo Byrd, and Thomas H. Tabb, to perform work and labor for the personal use and benefit of the said Frank H. Wyatt, to-wit: In the construction of a private two-story

garage apartment on Belevedere Avenue, Biloxi, Mississippi, for which labor and time so expended the said Vincent Groschner, Cleo Byrd and Thomas H. Tabo received pay from the United States, to the prejudice of good order and military discipline.

Specification 2: (Disapproved by reviewing authority.)

Specification 3: (Finding of not guilty.)

Accused entered a special plea denying the jurisdiction of the court, and a plea in abatement. Accused also moved to strike Specifications 1 and 2 of Charge II, and Specifications 1, 2, and 3 of the Additional Charge. The court denied the special plea, the plea in abatement, and the motions to strike. Accused then pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and of the Specifications thereunder, guilty of Specifications 1 and 2, Additional Charge, not guilty of Specification 3, Additional Charge, and guilty of the Additional Charge. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 2, Additional Charge, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. It was stipulated that accused was Post Utilities Officer, Keesler Field, Mississippi from November 17, 1941, to May 31, 1942, and that accused and his wife were owners of a lot on which was erected a two story garage apartment in Biloxi, Mississippi. It was further stipulated that Exhibits 3 and 4 were photographs of the garage apartment erected on the lot owned by accused and his wife, that these photographs were taken on or about May 7, 1942, and that they represented the "then condition of the property". Exhibits 3 and 4 were received in evidence (R. 40-42, 455-456; Exs. 3, 4).

4. The evidence for the prosecution shows that accused, during the period he was post utilities officer at Keesler Field, Mississippi, was in charge of the operation, maintenance and repair of all buildings, utilities and facilities on the field. He was responsible for materials charged to his section. Mr. Joseph Gallotte was foreman of the carpenter shop, Mr. Fred Harris was the foreman in charge of "outside" carpenters, and Mr. Edward Braun was general carpenter foreman. Accused, as head of the post utilities section, had charge of 300 to 350 employees (R. 30, 32-34, 36).

5. With reference to Specification 1, Charge II, the evidence for the prosecution shows that Mr. John S. Ellis, a civilian employee in the carpenter shop at Keesler Field, was given a plan or drawing by Joseph Gallotte, foreman of the carpenter shop. The plan bore the name of accused. Gallotte told Ellis to make some door frames, and some window and screen frames, stating that accused had given him the plan and had ordered him to have the frames made. Ellis made nine window frames and two door frames. He also constructed two screen doors and ten window screens, as one of the window frames he had made, was of the casement type which required a double screen. (Specification 1, Charge II alleges two door frames, nine window frames and nine window screens.) The frames were made in the post utility carpenter shop, Keesler Field, and the material was obtained from the carpenter shop material shed. No "work order" was received by Ellis authenticating the making of the door frames, although it was a policy in the carpenter shop to issue a work order whenever any article was to be made. When making the frames, Ellis placed on them a mark which he customarily used when constructing new door frames and windows. During the week before Easter Sunday, one Vincent Groeschner, aided by Ellis, loaded some of the frames on a Government truck. Groeschner, in three trips, hauled them to the garage apartment of accused, acting under the orders of Gallotte, the carpenter shop foreman. When Groeschner unloaded the frames, two men, Julian E. Phelps and Cleo Byrd, were working at the location. Accused was not present when Gallotte told Groeschner to haul the frames, nor did accused ever give Groeschner any instructions with respect to hauling material off the field. During the month of May 1942, Ellis went to the garage apartment of accused and observed that the door and window frames which he had made, had been installed in the building. He identified the frames by the mark which he had placed on them. At the time of the trial, the screen doors and window screens were still at the post carpenter shop. At no time did accused give Ellis any instructions relative to the construction of the frames, nor did Ellis see accused in the carpenter shop when he was making them. Ellis was paid by the Government for the time and labor consumed while making the frames. He received his regular monthly Government check, and did not receive payment from any other source (R. 43-50, 58-59, 64-72, 134-136, 138).

6. With reference to Specification 1, Additional Charge, the evidence for the prosecution shows that Vincent Groeschner, a civilian laborer in the carpenter shop at Keesler Field, worked at the garage apartment of accused on a day sometime before Palm Sunday. On that day he dug the foundation for the building. On Palm Sunday (March 29), Groeschner worked at the house of accused about eight hours, helping to remove the wooden

forms from the foundations. The lumber was second hand. Thomas H. Tabb, Cleo Byrd and Joseph Gallotte worked there that day. On Palm Sunday, accused visited "the job" but Groeschner did not hear him say anything. Pursuant to instructions received from Gallotte, on Palm Sunday (March 29), Groeschner "signed in" on the Government payroll at Keesler Field and then departed to work at the home of accused. On the next day (Monday), he "signed out" from the field as of the previous day. Accused never instructed Groeschner to follow such a course of procedure. Groeschner was paid by the Government for the time he spent during the two days working at the house of accused. He was also paid by the Government for the time during which he hauled the frames to the house (see paragraph 5). (R. 133-134, 136-138; Ex. 14).

Thomas H. Tabb, a carpenter employed at Keesler Field, helped one Julian E. Phelps to make some concrete forms from new lumber at the carpenter shop at Keesler Field. The plans for the forms were given to Phelps by Gallotte and bore the legend "Garage Apartment for Captain F. H. Wyatt." On March 29, 1942 (Palm Sunday) Tabb removed these forms from the concrete "that had been poured out on Captain Wyatt's house". He also, on March 29th, helped to frame the building. On that day Cleo Byrd, John Applewhite, Vincent Groeschner and Earl Helm were also working on the house. They were supervised by Joseph Gallotte, the carpenter shop foreman. Accused was not present when the forms were made at the carpenter shop, nor did he ever give any instructions with reference to their construction. He was not at the house when the forms were removed from the concrete on March 29. Gallotte gave all instructions with reference to the work. Accused was at the house with Edward Braun on that day for about 30 minutes or one hour, and told the men how he wanted the floor joists cut to "frame in" the chimney. Tabb did not "keep track" of the hours he spent working on the forms at the carpenter shop. He worked eight hours at the house of accused on March 29. On Monday (March 30), Tabb signed the time sheet for March 29 as having worked at Keesler Field on that day. Joseph Gallotte instructed Tabb to sign in as having worked at Keesler Field on March 29. He was paid by the Government for the labor he performed both with respect to the forms, and while working at the garage apartment of accused. (R. 114-118, 121-122, 124-128; Ex. 14).

Cleo Byrd, an employee in the carpenter shop at Keesler Field, worked "four days or five" at the garage apartment of accused. One of the days was a Sunday. Byrd noticed that accused was there on that day with Edward Braun. Julian E. Phelps was working at the house at the same

time, and Thomas H. Tabb also worked there a day. The Government paid Byrd for this work because he "got my check like I always got it". He received his instructions with reference to the house of accused from Joseph Gallotte. Accused never talked with Byrd about building a house. The time sheets for the dates March 29 (Sunday), 30, 31, April 1 and 2, show that Byrd signed in and out at Keesler Field on those dates. Byrd admitted having previously stated to an officer investigating the charges before trial, that he worked four days on the house of accused, that he signed in and out at the post on those days and that he was paid by the Government for the days worked. A request by Byrd for a leave of absence for three days exclusive of Sundays and legal holidays was admitted in evidence. This request was signed by Byrd and was dated April 2, 1942. Accused, as post utilities officer, approved the leave of absence for the period "8:00 A.M. March 29, 1942 through 5:00 P.M. April 1, 1942". Byrd took the leave of absence, and could not explain how his name appeared on the daily time sheets (March 29-April 2). He admitted having previously stated to an officer reinvestigating the charges before trial, that he "could make no explanation as to why he checked in for work on the days that were covered by his leave," and that he stated to this officer that it appeared something was "crooked there". He also stated to this officer that he believed Gallotte had asked him to sign the leave slip after he had worked at the house of accused. Byrd testified that he did not ask for "those particular dates" for which he took the leave of absence. He signed the request for leave when it was brought to him in the carpenter shop by the timekeeper (R. 226-229, 230-231, 233-234, 236-237, 240; Exs. 14-18 incl.; Ex. 26).

7. With reference to Specification 2, Charge II, the evidence for the prosecution shows that John C. Applewhite, a civilian employee at the carpenter shop, Keesler Field, worked about six days at the garage apartment of accused. He worked at the house the Saturday and Sunday before Easter (March 28 and 29), and worked there about four days after Easter. Each day he worked at the house, he signed in and out at Keesler Field. Cleo Byrd was working there on the Saturday the forms were set (March 28). According to Applewhite's best recollection, Thomas H. Tabb and Earl Helm were working at the house on Sunday (March 29). Applewhite helped to set the forms for the concrete, and aided in framing the house and in putting up some of the storm sheathing. He also had assisted in the construction of the forms for the concrete in the carpenter shop at Keesler Field. Accused "came by" the house several times while Applewhite was working there. Applewhite did not recall whether accused was present when the forms were being "worked on", or when a Government truck was

at the house. Applewhite worked at the house pursuant to instructions received from Joseph Gallotte, the carpenter shop foreman. Accused never told him to work there. He received no payment for his work at the house other than his "check from the field" (R. 241-245; Ex. 13, 14).

Earl Helm, a carpenter's helper employed at Keesler Field, worked on Palm Sunday (March 29) on the house of accused. Thomas Tabb, John Applewhite, Cleo Byrd, Joseph Gallotte and Vincent Groeschner also worked there on that day. The men removed the forms from the foundation and "framed up" the building. Helm had previously assisted John S. Ellis in making ten window frames and ten window screens in the carpenter shop at Keesler Field. He later observed what "seemed to be" the same frames and screens at the garage apartment of accused. The material for the frames and screen came from the lumber pile at the carpenter shop, and belonged to the Government. On March 29, accused and Edward Braun came to the garage apartment and remained about 15 or 20 minutes "after dinner". Accused told the men where he wanted the chimney placed. Helm worked on the house of accused on "government time" that day. He received no pay for his work other than his regular Government check. Pursuant to instructions from Gallotte, Helm first "checked in" at Keesler Field on March 29th, and then went to the garage apartment of accused. Accused did not instruct him to do this. When the charges against accused were being investigated, accused sent for Helm. He asked Helm whether he had worked at the house and Helm replied in the affirmative. Accused then asked Helm whether he knew or thought that it was the house of accused where he worked on March 29. Accused then told Helm to tell Major Eley (who was investigating the case) that he, Helm, could not swear whether it was the house of accused. Accused then asked Gallotte, who was present, how Helm had been paid. Helm told accused he had been paid by his regular government check. Accused then informed Gallotte that "he (accused) was trying to prevent from paying on Government time." Helm then asked accused if there would be any trouble "checking in at the field." Accused "claimed he didn't know we checked in the field." Gallotte also said that he did not know the men had checked in on the field. Accused then told Helm that he (Helm) might get in trouble and he might not (R. 72-75, 77-80; Ex. 14).

Fred Lusk, a carpenter's helper at Keesler Field, heard accused ask Helm if he had ever worked on his house. Helm said that he did. Accused asked Helm how he knew it was his house. Helm answered that Gallotte told him that the house belonged to accused. Accused then denied that he

owned the house, and said, "If you go to the judge's, I want you to tell the truth and if they ask you who the house belonged to, tell them you don't know, which will be the truth." Gallotte was present during this conversation (R. 260, 262-266).

Julian E. Phelps was also employed in the carpenter shop at Keesler Field. On March 26, he built some concrete forms, using a plan of the house of accused given to him by Gallotte, the carpenter shop foreman. Phelps was told that part of the lumber to be used belonged to the P.W.A., and that "the other pile belonged to the shop." Phelps told Gallotte that it made no difference, that all of the lumber belonged to the Government. Accused was not present during this conversation. Phelps did not have a work order, authorizing the construction of the concrete forms. Gallotte said, "I'll take care of the work order, you do the work — I have got one in the office". Gallotte also told Phelps not to allow anyone to see the plans as "they may ask a whole lot of questions". In addition to making the concrete forms on March 26, Phelps worked on four different days at the garage apartment of accused. On March 28th he set the concrete forms, and on April 1st he reframed all the windows in the building. On April 2nd and 3rd he put on storm sheathing. On the morning of April 3rd he "got three boards on and was called back to the shop". Accused never gave Phelps any instructions about working at the house. Pursuant to instructions received from Gallotte, Phelps signed in and out on the time sheet at Keesler Field each day he worked at the garage apartment of accused. Phelps was paid by the Government for the time he worked at the home of accused. Phelps worked at the house of accused because he was ordered to do so by Gallotte, and it was a case of obeying orders or being sent home. (R. 141-144, 146, 156-158, 160, 162-163, 165, 168, 177; Exs. 7, 13, 17, 18, 19).

Gallotte gave to Frederick A. Stapledon a check in the sum of $30 dated April 4, 1942, purportedly signed by accused and payable to Phelps. On the check were the words "For services (Carpenter) on House in Biloxi." Gallotte told Stapledon to deliver the check to Phelps. Phelps, however, refused to accept the check and Stapledon returned it to Gallotte. Phelps then received the check through the mail. He again refused to accept the check for he believed that as he was paid for his time by the Government, the Government "could come back" at him by accepting checks "on the outside" (R. 153-154, 277-278; Ex. 8).

About April 10, 1942, accused called to his office Mrs. Francis W. Lewis whose duties concerned "payrolls and leaves" and James W. O'Briant,

clerk in the personnel section. Accused asked her if Julian Phelps had been shown as present on certain days. Mrs. Lewis examined the time sheet and discovered that Phelps had signed in and out. Accused told Mrs. Lewis that Phelps "can't be marked as present because he didn't work here on the field on those days and that he would have to be put on annual leave". Accused left the method of correction of the matter to Mrs. Lewis and O'Briant. It was the custom of accused to allow Mrs. Lewis to handle all requests for annual and sick leave (R. 182, 188-189, 191-192, 214, 247-249, 254-256).

Gallotte told Phelps that he would be forced to lay him off for four or five days on a sick leave, because "somebody talked". Phelps said that he was not sick, but that if he was ordered to go home he would obey. Gallotte ordered him to do so. O'Briant then took a request for sick leave to Phelps for his signature. Phelps refused to sign it, saying that he was not sick and would not sign a sick leave slip. Phelps noted in pencil on the slip the days that he was "absent on pay". O'Briant returned to his office and told Gallotte that Phelps had refused to sign the request for sick leave. Gallotte then requested a blank slip and departed. The sick leave slip was later returned by Gallotte with the purported signature of Phelps thereon. The period of sick leave was 8 a.m. April 4-5 p.m. April 8, 1942. The request was dated April 9, 1942. (R. 150-151, 184-185, 205; Ex. 10).

On the day following that on which Phelps refused to sign a request for sick leave, O'Briant brought to accused a blank request for annual leave. Phelps signed the slip. Phelps testified that he signed a blank request for annual leave (Ex. 11), but denied that he had requested sick leave and that he had signed the request for such leave (Ex. 10). He was, however, absent for the five day period covered by the request for sick leave pursuant to the orders of Gallotte. Accused never asked Phelps anything regarding the annual leave. O'Briant, who was familiar with Phelps' signature, was of the opinion that the request for sick leave (Ex. 10), did not bear the genuine signature of Phelps, but that the request for annual leave (Ex. 11), did have his genuine signature thereon. The period of annual leave approved by accused was 8 a.m. 3-28-42 through 5 p.m. 4-2-42. The request was dated April 3, 1942. (Sunday, March 29th, would not be charged against Phelps as a day of annual leave.) (R. 151-152, 163-165, 189, 197-198, 206; Exs. 10, 11).

Accused approved the annual leave slip. His purported initials,

indicating approval, are also on the sick leave slip. Phelps' individual time sheet was changed to show that he was absent on March 28, 30, 31, and April 1 and 2. O'Briant could not account for the fact that the name of Phelps still appeared, however, on the group time sheets during the period that he was supposedly on annual leave. In the opinion of O'Briant, the taking of the five day period of annual leave by Phelps authorized a deduction from his accrued annual leave which "eventually would be the same as deducting that amount from his salary" (R. 187, 190-191, 211; Ex. 10, 11, 13, 16, 17, 18, 19, E).

8. With reference to the Specification, Charge I, John S. Ellis made the door, window and screen frames alleged, under the circumstances set forth in paragraph 5 hereof. The value of the labor and material involved in making the frames was between $90 - $100 (R. 51, 58).

Harold C. Deemer, a mason employed at Keesler Field, mixed some concrete at the field for the house of accused. The material came from Government stock. The concrete was later hauled in a Government truck to the home of accused, where Deemer worked about five hours pouring the cement into forms for the foundations which were already constructed. Twelve bags of cement valued at 57½ cents a bag, one yard of sand and 2 yards of gravel valued at $1.60 a yard, represented the actual cost to the Government. The concrete was mixed and carried to the house of accused on the authorization of Edward Braun, general carpenter foreman. Accused was not present when the concrete was mixed, hauled, or poured into the forms, nor did accused give Deemer any orders with respect to the work. Braun told Deemer to keep an account of how much material he used, in order that it might be returned to the post. Deemer gave Braun a bill for his labor, "and the return of the material". The bill had not yet been paid. Deemer did not know that the material used had been returned to the post, although there was a possibility that it had, as he had not checked the records. During June 1942, and prior to the investigation of the charges by Major Eley, Deemer gave accused a second bill, as accused said he had lost the first bill. Accused told Deemer he would pay the account "as soon as matters were settled". Deemer was on a monthly salary and the Government, therefore, could not pay him for hours worked overtime. He was, however, allowed to take an hour's time off, for each hour he worked overtime. When he worked the five hours at the home of accused (2 p.m. to 7 p.m.), he had an adequate accumulation of overtime. Deemer signed in at Keesler Field that day at 8 a.m., and signed out at 5 p.m. He put down on his daily report "Three hours off

for overtime". (R. 94-97, 100-107).

John C. Applewhite observed that a Government truck delivered concrete to the garage apartment of accused while he was working there on March 28. Frank E. Andrews, senior paint foreman at Keesler Field, drove by the house one morning and saw cement being unloaded from an Army truck (R. 285-286).

When Phelps made the concrete forms at Keesler Field, he used 536 feet (lineal) of "two by sixes". He used 90 feet of "one by fours for batts to hold the two by sixes together", and 99 feet of one by fours for braces when he set the forms. The lumber used belonged to the Government. Phelps kept a memorandum with reference to the material used (R. 141-143).

Adam Arcenaux, a civilian truck driver employed at Keesler Field, drove a Government truck to the house of accused, containing 2 x 6 concrete forms, which were already constructed, and which he secured at the carpenter shop at Keesler Field. Arcenaux, on another day, obtained from the carpenter shop and hauled by Government truck to the house, 960 feet of pine 1 x 6 center match (tongue and groove sheathing). Upon examination by the court, Arcenaux testified that Gallotte ordered him to haul the lumber, saying that accused had instructed him (Gallotte) to this effect. Accused did not order Arcenaux to haul the material. Accused was not present when the lumber was taken from the carpenter shop, or when it was delivered to his house. No one was present at the house when the lumber was unloaded. Arcenaux made the two deliveries prior to Easter Sunday. The lumber was new. On Easter Sunday, Arcenaux delivered by Government truck to the house some second hand material which had been part of the construction of a razed plumbing shop on the field. The regular retail price of 960 feet of 1 x 6 number 2 pine lumber tongue and groove, in April, 1942, was $34 "a thousand". The fair cash market value of 536 square feet of 2 x 6 number 2 pine lumber was then about $36 "a thousand" (R. 52, 86-92).

Henry House, a labor foreman at Keesler Field obtained from the carpenter shop and hauled to the garage apartment of accused, thirty bundles of new 6 inch center match (tongue and groove lumber). The delivery, which occurred "near Easter", was made in a Government truck. Gallotte ordered House to haul the lumber. Accused was not present when the material was

taken from the carpenter shop or when it was unloaded at his home (R. 109-112).

On Good Friday (April 3), John Yallanrakis, a civilian employed at Keesler Field, hauled by Government truck, two loads of second hand lumber obtained from the Dupre plumbing shop at Keesler Field to the home of accused. Yallanrakis first testified that the material was comprised of "2 x 5 - 20 or 22 feet lumber, six pieces. Nine pieces 1 x 8; Ten to twelve from 10 to 14 feet lumber and about 34 or 26 2 x 4's". He later testified that he carried only "1 x 8, 1 x 10 and 1 x 12". Accused did not order Yallanrakis to haul the lumber nor was he present when it was delivered at the house. The material was delivered pursuant to an order received by Yallanrakis from Edward Braun, general carpenter foreman (R. 266, 271-273).

Earl Helm who worked at the house of accused on Palm Sunday, March 29 (paragraph 7 hereof), checked in at Keesler Field that morning on the orders of Gallotte and, with the aid of Gallotte loaded on a Government truck some lumber from a pile near the carpenter shop. He delivered it to the house of accused in two trips. The lumber was new, and was 1 x 6 in size. Later, during the day, an Army truck brought some new 2 x 10 lumber to the house. Accused was not present when Helm and Gallotte loaded the truck at Keesler Field with the 1 x 6 lumber, nor did he order Helm to load it. Accused arrived at the house with Braun "after dinner" when the Army truck loaded with the 2 x 10 lumber was parked on the lot. Accused told Gallotte "to get the truck off the grounds and that he didn't want it parked there - to let it come there and unload and go off right away". The truck was sent away. Accused remained at the house about 15-20 minutes and gave directions as to the placing of the chimney. As the 2 x 10's were "two feet too short", the men used the 2 x 10's for the chimney (R. 75-77, 80-83).

When Thomas H. Tabb was working at the home of accused on Sunday, March 29 (paragraph 6 hereof), the men needed some fourteen foot floor joists. Gallotte sent a Government truck for this material, but the truck returned with "twelves" (2 x 10) in new lumber. Although he was not certain of the fact, Tabb believed that accused was present when the truck was at his house. Vincent Groeschner, who assisted in removing the forms from the foundations on Sunday, March 29 (paragraph 6 hereof), testified that the 2 x 12 lumber with which the forms were built was second hand lumber. On Saturday, March 28, some lumber was

delivered at the garage apartment by a private lumber company (Walter H. Latimer). John C. Applewhite, who was then working at the house (paragraph 7 hereof), signed the delivery slip. Although the slip was dated March 30, Applewhite believed the lumber was actually delivered March 28 (R. 117-118, 134, 241, 245; Ex. H).

Julian E. Phelps, who worked for four days at the home of accused (paragraph 7 hereof), in addition to other work, "storm sheathed" and "framed the openings". The material came from the shop at Keesler Field. Thirty bundles of 1 x 6 came from the shop (960 feet, board measure), as well as the 1 x 4's and the forms for the foundations. Also, during the time that Phelps worked at the house, some "old stuff" which had been stored at Keesler Field was delivered to the premises. Some of the material was delivered by a civilian truck and part by a Government truck. While working at the house, Phelps signed two delivery slips for lumber delivered to the premises by a private lumber company (Walter H. Latimer). Although the delivery slips were dated March 27, Phelps believes the delivery occurred on Tuesday or Wednesday following March 27 (March 31, April 1) as he was not at the premises March 27 (R. 155, 215; Exs. F, G).

9. The evidence for the defense shows that Miss Betty Van Pelt, secretary of accused at Keesler Field, heard accused, on several occasions about the time the garage apartment was being built, tell Gallotte that no Government material or labor was to be used in the construction of the house. Gallotte and accused also discussed the fact that Gallotte would get his materials from the personal accounts of accused. Accused established private accounts for building materials. Miss Van Pelt typed a written agreement between Gallotte and accused with reference to the construction of the house. She copied the agreement from a handwritten slip. Gallotte and accused told her that a verbal agreement had already been made. Miss Van Pelt typed the agreement about the middle of April, but it was dated back "approximately a month" to the time she understood that the verbal agreement had been consumated. The agreement was dictated by accused. Miss Van Pelt read the agreement to Gallotte who signed it saying "I guess that is all right, Captain". The instructions given by accused to Gallotte with reference to the use of Government materials and labor, occurred prior to the writing of the contract. Accused had refused several requests for the use of Government labor and material off the field. After an investigation of the charges had begun, accused asked Gallotte where the sashes for the house of accused had been constructed.

Gallotte replied that they had been made in his (Gallotte's) home with the aid of his brother, and that they had not been made in the carpenter shop (R. 331-340, 342-347, 350).

When Gallotte was about to start construction of the house, Edward J. Blake, a clerk in the personnel section of the post utilities office, heard accused tell Gallotte that men who were Government employees were not to work on any other jobs. H. L. Schwan, President of the Mississippi Coast Supply Company was, on one occasion, riding with Edward Braun and accused near "Tent City" (on Keesler Field). An old house was being torn down. Braun told accused that "some of that stuff would look nice around his apartment". He was referring either to some shrubbery or to some concrete which was then being removed. Accused replied "Hell, no, you leave that damm stuff there" (R. 356, 369, 376, 378, 383).

Accused, on several occasions, ordered notices to be written by Henry P. Hughes, administrative assistant in the post utilities office. The notices which were posted and distributed to key personnel, warned foremen and employees that no work was to be performed without a work order first being secured. Accused also had several meetings of the foremen and other employees for the purpose of discussing the work order system. Accused personally reprimanded violators of the system. He reprimanded Braun and had cautioned Gallotte on several occasions (R. 395-399, 409-410, 412).

Accused arranged with the firm of Walter H. Latimer for credit for building materials to be used in the construction of his house. Accused authorized the firm to accept orders for material from Gallotte on his account. Admitted in evidence were delivery slips and invoices concerning lumber delivered by Latimer's trucks to the house of accused. Accused also arranged for credit with U.S. Joachim, of the Combel Hardware Company. Accused authorized the company to accept purchases by Gallotte on his account. Hardware and "other building materials" were purchased on the account of accused. Admitted in evidence were invoices for lumber sold to accused by the Latimer Lumber Company. (R. 361, 364-365, 385-386, 389, 416-418; Exs. F, G, H, J, K).

On one Sunday when Gallotte began construction of the garage apartment of accused, Edward Braun met accused at the site about 11:45 a.m. Accused was sitting in his car. Gallotte walked over to the car and told accused that he had three or four men working there and that he hoped to frame the house that day. 2 x 6's, 2 x 10's and 2 x 4's had been

ordered from the Latimer Lumber Company for framing. Some 1 x 6-8 lumber had also been ordered from that company for sub-flooring. The 1 x 6 material had not arrived. Gallotte asked accused if he could borrow some 1 x 6 lumber from Keesler Field for sub-flooring, stating that the material would be returned to the field when delivered by the Latimer Company. Accused told Gallotte that he did not want him to take one nail or one piece of lumber from the field, that he had orders to buy anything he needed from three or four firms. No Government truck was on the premises at the time of this conversation. On the same day, about 3 p.m., Braun again visited the house. Accused was there, giving instructions with respect to the location of his chimney. No Government truck was then on the premises. Braun believed that these events occurred on a Sunday about two weeks before Easter Sunday (March 22) (R. 421-422, 430, 432, 441-443, 449-450).

During the month of March, Braun bought for $60 a building owned by the Dupre Plumbing Company. Accused bought for $100 a building owned by the Brown Plumbing Company. Both buildings were situated on Keesler Field, and were demolished about the middle or latter part of March, and subsequent to the Sunday to which reference is made in the preceeding paragraph. Both buildings were demolished by private labor. Accused paid for the demolition of the Brown building, and paid $48 to get the Brown building lumber "in shape". In the opinion of Braun the Brown building contained 8,000 - 10,000 feet of lumber, 1 and 2 inch, with a two inch floor made of 2 x 6's. He thought that the Dupre building contained about 5,000- 6,000 feet of 1 and 2 inch lumber. Both buildings contained 1 x 6 center match tongue and groove lumber. They were sheathed with 1 x 6, 1 x 8, 1 x 10 and 2 x 4 lumber. The Brown building contained 1 x 6, 1 x 8, 2 x 4, 2 x 6 and 4 x 6 lumber. The construction of the Dupre building was similar to that of the Brown building. It contained 2 x 4 studding, 1 x 12 boards on the outside, and 2 x 6 rafters. The buildings were built with first class lumber about July or August (1941), and were six or eight months old when demolished. The Brown building floor was oil stained and marked, but the rafters,ceiling joists and plates were in good condition. The roofs of the buildings were covered with tar paper, the sheathing on the outside was "a little brown from the sun", but the nail holes in the wood were the only indication that the lumber was second hand. In the opinion of Braun, the loss of lumber involved in the demolition of a building sized 50 x 60 (Brown building) would be about 10-20%. The buildings were carefully demolished, and the nails were extracted before the lumber was removed. Braun believed that the garage

apartment of accused could have been constructed entirely from the lumber salvaged from the Brown building alone (R. 423-428, 436, 435, 439, 446, 450).

Braun sold to accused 3,000 feet of 1 x 10 and 1 x 12 sheathing from the Dupre building. The lumber from the Brown building was loaded and hauled from Keesler Field to the house of accused by private labor in a truck privately owned by the Biloxi Coal and Dray Company. Part of this lumber was delivered on Easter Sunday (April 5), according to Braun's recollection. Braun believed it was also on Easter Sunday that part of the Dupre building lumber was delivered to the garage apartment. Braun asked a foreman named Blackman if three or four loads of the Dupre lumber could be taken to the house of accused. The lumber was hauled in a Government truck and the Government paid for the labor involved. Accused was not present when the truck was loaded, nor, with reference to the building of the garage apartment, did he ever instruct Braun to use Government labor or to take material from Keesler Field (R. 422-423, 425-426, 433-434, 437, 441, 448, 455).

It was stipulated that Sergeant Robert H. Weiss would testify that at noon he drove accused to the location of the garage apartment, on the Sunday its construction began. Gallotte came to the car and told accused that the Latimer Lumber Company did not send the material which he needed that day. He requested permission to borrow the lumber from Keesler Field and to return it on Monday when the Latimer company made delivery. Accused replied "that he did not want any labor or materials taken from Keesler Field at any time to be used on the construction of his house, under any circumstances" (R. 455-456).

Richard A. Montgomery, superintendent of the Dupre Company, testified that the Dupre building was demolished during the first few days in April and before Easter Sunday (April 5). The Brown building was torn down about one week later. The Dupre building, which was sold to Braun for $60, contained about 4,000 - 5,000 feet of lumber. The sheathing was 3/4 by 6, and the roof, made of flat boards, was made of about the same size. The building contained 2 x 4 and 2 x 6 studding. About 70% of the building was ruined by oil or paint stains or damaged by grease. The outside portion was well seasoned and weatherbeaten. Some of the oil would necessarily seep through to the bottom of the floor boards. The roof, which was covered by tar paper, had leaked, thereby causing a thorough soaking of much of the interior. Tar stains are usually left when tar paper is removed from a building situated in a hot country.

Material in the roof of the Dupre building, and the upper part of the building "could be used for some siding or something like that". In the opinion of Montgomery, not over 30% of the Dupre building lumber could be used in the construction of a home. The Brown building was much larger than that owned by the Dupre Company (R. 496-505).

Mrs. Nellie Wyatt, wife of accused, had a half ownership in the lot on which the garage apartment was constructed. About November (1941), Gallotte suggested that he build the Wyatts a house. Several times thereafter, Gallotte repeated the suggestion. Before March 1, 1942, accused had a blueprint of a house, and asked Mrs. Wyatt how she liked the layout. Accused and Mrs. Wyatt owned three lots in Biloxi. Before March 1st, Gallotte offered to build a house for accused if accused would buy Gallotte a lot. Accused replied that he thought he would arrange to get a lot for Gallotte. Accused told Gallotte that he would open some accounts and that Gallotte could order the material he needed. Accused told Mrs. Wyatt that he planned to buy the Brown building. Mrs. Wyatt then left for Miami on March 1 and returned March 31. Construction on the house began during her absence. Upon her return the house had been framed. The lumber from the Brown building had been delivered, and some of the nails had been extracted. Accused hired a boy to finish the job. After her return, Mrs. Wyatt occasionally visited the house with accused. She wanted cream shingles on the side of the house and gray shingles on the roof. Accused told Mrs. Wyatt that she could not have that shade because "sure as living, somebody will think that we took them from Keesler Field". When visiting accused in his office, Mrs. Wyatt frequently heard him tell Gallotte that a work order was always necessary before anything was done. Several officers desired to have things made at Keesler Field and she often heard accused say that no labor or material was to be used "on anything off the reservation". One day prior to an investigation by Major Eley, accused said to Mrs. Wyatt that she could not imagine what Gallotte had done. " * * * just the very thing that I have tried to drive into his thick skull, he has gone and done." " * * * he has used a man that was employed here by the Government, to do some work on our house". Accused said that Gallotte "came in all excited one morning", and said that he had a man working on the house, and that the man wanted his money. Accused was "very much upset". He received money from Mrs. Wyatt to pay the man. "That was the first time we knew that there was anything irregular". "The contract was off", when accused discovered that Gallotte had used a Government employee to work at the house (R. 468-472, 474-481, 485, 488, 492-493).

10. Accused testified that he was 54 years of age. He was commissioned a first lieutenant in 1917, discharged in 1919, and became a reserve officer in 1923. About 1927 he was promoted to the rank of Captain. He was ordered to extended active duty in October, 1940. In addition to short tours of duty, he was on duty for one year in 1937 and 1938. Since October 1940 he had been constructing quartermaster at Camp Grant, Illinois, a $6,000,000 project, assistant constructing quartermaster at Pine Camp, New York and Camp Polk, Louisiana, and post utilities officer at Keesler Field, where he was in charge of about 400 employees. For two years he was a consulting construction engineer in Russia. Accused was superintendent of construction for the H. K. Ferguson Company, and the Rusk Engineering Company. He was the night supervising engineer for the Jones & Laughlin Steel Company on several occasions, and chief construction engineer for the United States Steel Corporation. (R. 506-507, 519, 566-567, 593).

During September or August 1941, accused and Gallotte first discussed the building of a home for the accused. Accused bought two lots from the city of Biloxi and a third from a real estate firm. About the middle of March he entered a "verbal pencil note agreement" with Gallotte for construction of the house. This agreement was subsequently typed verbatim by Miss Van Pelt about April 1, and was at that time signed by Gallotte after Miss Van Pelt had read it to him. Construction of the house had already started when the typewritten agreement was signed. The typewritten agreement was dated back to the time the pencil agreement was made. In consideration of being given a lot by accused, Gallotte was to furnish the labor for framing the house, and for the lining and interior. Accused was to provide the materials. The agreement was in the form of a letter addressed to accused, signed by Gallotte. It contained the following second paragraph:

> "It is further agreed by me that I will not employ or have anyone who has worked at Keesler Field except those that are not on the payroll at the time they may work for me on your house or anyone who may have time off and wants to work for me on his own time. If I personally do any work on your house, I agree to do it all at night or on my days off."

Accused had this clause inserted in the letter agreement for self protection, as he had "had trouble with preventing that thing before". Although the salary of Gallotte was about $2300, accused never gave a thought to the means whereby Gallotte would pay for the labor employed. In fact, it was

not intended that Gallotte would defray labor expenses because Gallotte and his brother were to build the house. Later, Gallotte told accused that several carpenters had promised to help him build the house. Gallotte "didn't say how he was going to pay or what he was going to do" (R. 508-512, 518, 543-544, 547-548, 568, 576-577; Ex. L).

Before construction began, accused arranged for credit with the Latimer Lumber Company, Combel Hardware Company, Back Bay Lumber Company and Fitzroy-Harris Lumber Company. He also arranged that Gallotte would have the privilege of purchasing on the account of accused from the Latimer Lumber Company and Combel Hardware Company. Accused did not know where the forms for the foundation had been made, nor did he know anything about the digging of the foundation. Gallotte had never admitted to accused that Government material was used when the foundation forms were constructed. He did not know that Ellis had made the door, window and screen frames in the post carpenter shop. One day he drove by the house and saw window and door frames "sticking out by the garage door". He asked Gallotte where he got the frames and Gallotte replied that he and his brother had made them at home. Accused never gave anyone orders to make anything for him in the carpenter shop at any time. He was later told by Major Eley, who was investigating the case, that the frames were made in the carpenter shop. This was the first time accused knew anything was wrong. Accused then, purposefully in the presence of a Miss McManus, again asked Gallotte where the frames had been constructed and Gallotte replied in his home. Gallotte gave accused two invoices from the Strangi Saw Mill and Lumber Yard, received by Thomas Gallotte and L. D. Gallotte respectively, and stated that they were invoices for lumber used in the construction of window and door frames. The defense offered the two invoices in evidence. The law member refused to admit the invoices in evidence but stated that they would be appended to the record. (R. 512, 514-515, 517-519, 532, 538, 545, 550; Exs. P, Q).

About March 29 (Palm Sunday) accused drove by the premises and saw that construction had started. Braun was present. Accused did not get out of the car. Gallotte came over, said that the Latimer Lumber Company had not delivered the 1 x 6 lumber for sheathing, and asked if he could borrow lumber from Keesler Field, and pay it back on Monday when delivery of the Latimer lumber was made. Accused replied: "Now, Joe, under no consideration, under any circumstances, shall you take one damn thing from Keesler Field and bring it over here". No Government truck was there at the time, nor was delivery then made of any lumber.

Accused never told Gallotte to get a truck off the premises as quickly as possible. Several men were working at the house, but accused did not recognize any of them. About April 4, 1942, Gallotte told accused that Phelps was "raising hell about his money", saying that Phelps had promised him to give a few days work on the house, but had "double-crossed" him, by "signing in" at Keesler Field. Accused said that Phelps could not be paid by the Government if he did not work at the field. Upon discovering that Phelps had "signed in" on the field for the days Gallotte said he had worked on the house, accused gave Gallotte a check for $30 for Phelps. Phelps refused the check, and accused then sent it to him by mail. Accused did not see the check again until "this case came up" and it was shown to him in the records. Accused then informed certain employees in the personnel and time keeping sections that Phelps could not be paid by the Government for time spent on work of a private nature. He said that Phelps either had to pay the money back, or that the matter had to be remedied in some manner. He left the details to them as he did not know the proper procedure. He approved the requests for leave of Phelps as a matter of routine, having confidence in his employees. He did not know that Phelps was not actually ill, nor could he identify the signature of Phelps on the slips. He had not known that Phelps worked on his house. Accused understood that when the annual leave taken by Phelps was charged against him, the Government had been reimbursed for Government pay received by Phelps for working on the garage apartment. (R. 513, 515, 519-520, 539-540, 546, 557-559, 575, 591).

Accused did not know Helm. When Helm was sent for by the officer who was investigating the case, accused first summoned him to his office. Accused denied telling Helm that it was not his house on which Helm had worked. He did tell Helm that whether the house belonged to accused was hearsay as far as Helm was concerned, but to tell the truth (R. 563-565).

Accused did not know of any 1 x 6 pine lumber, or of any material being delivered to his property from Keesler Field. He had drawn plans and specifications for, and had constructed "a few million dollars worth" of buildings. He had purchased enough new and second hand material "to carry the job as far as Joe Gallotte carried it" before accused discharged him. In March he bought the Brown building for about $110. He paid the Biloxi Coal and Dray Company $90 for demolishing the building and hauling it to his house. The lumber was used in the construction of the house. He also paid $16 a thousand for 3000 feet of second hand 1 x 8 and 1 x 12 sheathing from the Biloxi Coal and Dray Company (part of the Dupre building).

Introduced in evidence was a bill for lumber purchased from the Back Bay Lumber and Box Factory (R. 517, 523-525, 527-530, 534-535; Exs. M, N).

Accused inspected the Brown building before he purchased it. Some of the boards were not useable. He did not recall that there was any paint on the walls, and did not believe that the building leaked. The building was torn down after construction of his house had started, and was moved to the premises between April 1-15. Accused did not know when the 3000 feet of lumber from the Dupre building was hauled to his house. About April 13, accused stopped participation by Gallotte in the construction of the house. He did not discharge Gallotte or take any disciplinary action against him, because it would immediately have caused "remarks and suspicion". When Gallotte was removed, the house was partially sheathed, there being no sheathing on the roof. There was "a little bit" of flooring. The window frames "were on the job" but had not yet been installed. Accused did not remove the window and door frames from the property after Major Eley told him they were made in the carpenter shop because this was only "hearsay"; Gallotte had assured him that they were made in his (Gallotte's) home, and had given him the bill. Accused had refused to allow gray shingles to be used on his house because of the fact that he had purchased gray shingles for the Government, and people would say that he took them from Keesler Field. Accused had frequently instructed his personnel, by means of bulletins and meetings, not to perform work without work orders, and that "no materials or labor shall go off the field." Gallotte was "most always" at the meetings (R. 533, 537-538, 549, 552, 568, 570, 576, 579-580, 583, 589-592).

When accused discovered that Gallotte had used Government material contrary to his instructions, he decided to remove him from his position. He took no action, however, because "I couldn't make a move at that time because it would immediately cause remarks and suspicion, so I just let the matter take care of itself". After he discovered that Phelps had checked in and out at Keesler Field on the days he worked at the garage apartment, accused did not attempt to ascertain whether the other men had done the same thing, as he did not believe it necessary (R. 548-550, 553, 554, 557-558).

Several witnesses testified that the reputation of accused for honesty and veracity at Keesler Field and in Biloxi was good. An officer under whose direction accused had worked, believed him to be "a good officer; efficient, honest, and all" (R. 310-311, 318, 320, 325, 328, 330-331, 352-353, 355, 360, 369-370, 418, 467).

Miss Jessie McManus, an employee in the post utilities office, about June 1-6, 1942 heard accused ask Gallotte what he had done about the bill for the window and door frames Gallotte had made for him. Gallotte said that he believed his (Gallotte's) brother had paid the bill. Accused asked him to find out as he desired to pay either the brother or the company. Accused asked if anyone had seen Gallotte make the frames at the Gallotte home. Gallotte replied that he could not recall but that he was certain that the frames were made at his house (R. 642).

11. Joseph Gallotte, carpenter shop foreman, called as a witness by the court, agreed to build accused a house. Gallotte was to furnish the labor and accused the materials. In return, Gallotte was to receive a lot of land. A written agreement was made three or four months after Gallotte agreed to build the house, and after an investigation of the case had started. Gallotte did not recall any agreement written in pencil. He agreed to use men employed on Keesler Field on their spare time only. Gallotte was called to the office of accused, and signed the agreement after it was read to him by Miss Van Pelt. Gallotte could not read or write. He had a boy at Keesler Field who wrote for him and who told him what he was signing. He did, however, "know" his materials and lumber and could read figures. Accused told Gallotte that he or no one was to work on his house on Government time (R. 603-604, 612-613, 616-618, 622-623, 625-626, 633, 638-639).

The forms for the foundation of the house were made by Phelps in back of the carpenter shop at Keesler Field. Braun gave the plans to Gallotte and told him to have the forms made. Braun said that he "would replace the lumber". The lumber was unloaded from a truck, but Gallotte did not know to whom the lumber belonged. He believed it must have belonged to the Government because Braun had promised to replace it. The lumber was 2 x 6 in size and had nails in it. Gallotte did not tell accused that the forms were made at the carpenter shop. When he was given the plans and told by Braun to make the forms, he believed that accused was not present. He was, however, not certain of this fact. Accused did not tell Gallotte to make the forms. Gallotte was also ordered by Braun to make the door and window frames. Gallotte, in turn, told Ellis to make the frames. The frames were constructed in the carpenter shop. Gallotte denied having told accused that the frames were built in his (Gallotte's) house. He gave accused a bill for the lumber used for the frames because accused requested the bill (R. 605-607, 610, 618-619, 630-631, 638).

Before construction of the garage apartment began, Gallotte told certain civilian employees at Keesler Field that accused was going to build a house, and asked if they would "give him a day's work and help him out". All of them agreed to do so. Phelps, Byrd, Applewhite, Groeschner and Helm were some of the men who worked on the garage apartment. Gallotte testified that the men "double-crossed" him as he understood that they had signed time sheets, indicating that they had purportedly worked at Keesler Field on the days concerned. Gallotte did not know at the time that they had signed the time sheets nor did he tell them to do so. As he could not read or write, Gallotte did not know that he was certifying that the man had worked at Keesler Field when he signed the time sheets in his capacity as foreman (R. 608-609, 614, 625-626, 637-638)

Gallotte did not arrange to have the foundation made. Construction of the house began sometime prior to Easter Sunday. He arranged to meet the men at the premises. When Gallotte arrived on the day construction started, the men were already there, and the material had been delivered. He did not recall having been told that day on the premises by accused, that he was not to take any lumber or use any labor from Keesler Field. There was some conversation about the non-delivery of some lumber. Braun suggested getting some lumber from the field. Gallotte also made the same suggestion and said they could "pay it back, and there was one or two words brought on, and I walked around beside the house, and I don't remember if there was any lumber sent there or not". At the time of the conversation, a flat truck was there but Gallotte did not know if it belonged to the Government. He did not recall telling accused that he was running out of sheathing, and that he would like to send a truck to the field. "We never got up to the sheathing that day" (R. 604, 610-612, 616, 627-630).

Gallotte admitted that prior to the trial he stated to certain military personnel that on Palm Sunday, March 29, he needed some sub-flooring, and that Braun and accused were on the premises. Gallotte asked accused if he could send to Keesler Field for some lumber. Accused replied "There is the truck; go get it". Gallotte did not know if the truck belonged to the Government as the truck was not marked. He was then asked if on May 11, 1942, he had made a statement to an officer investigating the case, that accused told him to go ahead and use the labor, that "when a person talks you can usually read between the lines", that accused frequently went to the premises, gave the men directions, that he knew all the

carpenters, and that the men told him "when they have been out there". Gallotte denied having made the statement, saying that he could not read and that "they could read anything" to him. He admitted that the statement bore his signature. When asked if accused ever told him to use Government labor on the house during his work time, Gallotte testified that "he told me to use it after I was finished" (R. 615-616, 619-620, 623).

Phelps told Gallotte that he had not been paid for his labor. Accused then gave Gallotte a check for Phelps. Gallotte gave it to Mr. Stapledon who was to present it to Phelps. Stapledon returned the check, saying that Phelps refused to accept it. Gallotte had nothing to do with the sick leave slip of Phelps, and knew nothing about either of the leave slips. He believed that all the lumber for the garage apartment came from the firms of Latimer, Strangi, and the Back Bay Lumber Company. Some lumber was obtained after Easter (April 5), from a wrecked building on Keesler Field. Gallotte ordered "sheet rock", nails, and hardware only, from private companies, and did not personally place orders with them for lumber. He told accused what to order and supposed that accused then placed the orders. Accused had, however, told Gallotte that he could order anything required. About 1700 square feet of sheathing 1 x 6, was used in the entire building. This sheathing was made from used material. The width of the sheathing was 24 x 26, its height, 18 feet. Gallotte never received a lot from accused. Work on the house was stopped "because there was so much said about this and that and different things". When the witness ceased to work on the garage apartment, the house was framed, had storm sheathing, and sub-flooring. Gallotte had at various times, been reprimanded by accused for doing work without a work order (R. 609-610, 612, 620, 624, 632-635).

12. <u>With reference to Specification 1, Charge II</u>, the evidence shows that at the time alleged, John S. Ellis, a civilian employee, with the assistance of Earl Helm, made the frames described in the post utilities carpenter shop from Government material. Ellis made the frames pursuant to orders and according to a plan received by Ellis from Joseph Gallotte, carpenter shop foreman. Gallotte told Ellis that accused had given him the plan and ordered him to have the frames constructed. Contrary to instructions, no "work order" was received by Ellis authorizing the construction of the frames. The door and window frames were later hauled by Vincent Groeschner to the house of accused in a Government truck. Groeschner was ordered to deliver the frames to the house by Gallotte. At the time of the trial, the screen doors and window screens were still at the carpenter shop. When making the frames, Ellis placed on them a mark which he customarily used

when building new door frames and windows. During the month of May, 1942, Ellis went to the garage apartment of accused and observed that the door and window frames had been installed in the house. He identified the frames by the mark of identification. Accused did not instruct Ellis relative to the construction of the frames, nor was he present when they were made. He was not present when Gallotte told Groeschner to haul the frames, nor did he ever instruct Groeschner with respect to taking any material from the field. Ellis was paid by the Government, by his regular monthly check for the time and labor consumed in making the frames. He did not receive payment from any other source.

With reference to Specification 1, Charge I, the evidence shows that on some day prior to March 29, Groeschner dug the foundation for the garage apartment of accused. On March 29 he helped to remove the wooden forms from the foundations. Pursuant to instructions from Gallotte, on March 29 Groeschner "signed in" on a time sheet at Keesler Field prior to going to the house of accused. The following day (Monday), he "signed out" from the field as of March 29. Accused did not tell Groeschner to do this. Groeschner was paid by the Government for the time he spent both days working on the house, and also for the time during which he hauled the frames to the house from Keesler Field. Accused visited "the job" March 29.

Thomas H. Tabb assisted Julian E. Phelps to build some concrete forms at the carpenter shop, Keesler Field. On March 29, Tabb removed the forms from the foundation of the garage apartment, and assisted in the framing of the building under the direction of Gallotte. Accused was not present when the forms were made nor did he give any instructions with respect to their construction. He was not present when the forms were removed from the foundation. He was at the house on March 29 giving instructions as to the building of the chimney. Pursuant to instructions from Gallotte, Tabb signed the time sheet at Keesler Field, indicating that he had worked there March 29. He was paid by the Government for working on the forms at Keesler Field, and for his work at the house March 29.

Cleo Byrd worked at the garage apartment four or five days under the direction of Gallotte and signed the time sheets at Keesler Field for March 29, 30, 31, April 1 and 2. Byrd was paid for his work at the garage apartment by the Government. Byrd later took a leave of absence for the period March 29 - April 1 at the request of Gallotte.

Accused approved the request for leave of absence. Accused never talked with Byrd relative to the building of the house.

With reference to Specification 2, Charge II, John C. Applewhite worked about six days at the home of accused, under the direction of Gallotte. Each day he signed in and out on the time sheets at Keesler Field. He also assisted at Keesler Field in the construction of the concrete forms. Accused "came by" the house on several occasions, but had not directed Applewhite to work on his house. Applewhite was paid by the Government for the work involved.

Earl Helm assisted Ellis in making the window frames and screens at Keesler Field from Government material, and worked on the garage apartment on March 29. Following instructions from Gallotte he signed the time sheet at Keesler Field prior to going to the house. Accused did not tell him to follow this procedure. He was paid for his labor by the Government. When charges against accused were being investigated, accused told Helm to tell the investigating officer that he could not swear it was the house of accused on which Helm had worked, and that this would be the truth. When told by Gallotte, who was then present, that Helm had received Government pay for his work, accused said that he had been trying to prevent such a thing, and that he did not know the men had been checking in at Keesler Field for the days worked on his house. On March 29, accused was at the house and told the men where he wanted the chimney placed.

On March 26, Julian E. Phelps built the concrete forms at Keesler Field for the garage apartment, using a plan of the house given him by Gallotte. Gallotte told him to do the work, saying he would furnish Phelps with a work order, but he did not do so. He told Phelps not to let anyone see the plans as "they may ask a whole lot of questions". From what was said to him as to the ownership of the material used, Phelps concluded that it belonged to the Government. (Groeschner, who removed the forms from the foundation testified that the lumber was second hand, and Gallotte testified that the lumber with which the forms were made had nails in it. Thomas H. Tabb testified that the lumber was new). The forms were delivered in a Government truck to the house of accused by Adam Arcenaux. Gallotte and not accused ordered the forms to be so hauled,

telling Arcenaux that accused had instructed Gallotte to this effect. Accused was not present when the forms were taken from the field or unloaded at the house. Phelps also worked at the garage apartment March 28, April 1, 2 and 3. On orders from Gallotte, he signed the time sheets at Keesler Field for those days.

About April 10, 1942, accused asked Mrs. Lewis and James W. O'Briant if Phelps had been shown as working on Keesler Field on certain days. Upon being told that he had, accused said Phelps must be put on annual leave as he had not worked on the field those days. Accused left the method of correction to Mrs. Lewis, who handled all requests for annual and sick leave. Gallotte told Phelps "somebody talked" and that Phelps must take four or five days sick leave. Phelps replied he was not sick but would take sick leave if ordered to do so by Gallotte. Gallotte ordered him to do so. O'Briant took a request for sick leave to Phelps who refused to sign it. Phelps then signed a blank request for annual leave. Accused did not ask Phelps anything concerning this leave. He approved a request for annual leave dated April 3 for the period 8 a.m. March 28, 1942, through 5 p.m. April 2, 1942. Gallotte also asked O'Briant for a blank sick leave request. He later returned the request with the purported signature of Phelps thereon. The initials of accused appear on the slip with respect to approval of a request for sick leave for Phelps dated April 9, for the period 8 a.m. April 4 - 5 p.m. April 8, 1942. The evidence established the fact that the genuine signature of Phelps appeared on the annual leave slip but not on the request for sick leave. The individual time sheet of Phelps was changed to show his absence from work on March 28, 30, 31 and April 1 and 2, but the group time sheets were not altered.

With reference to the Specification of Charge I, the evidence shows that the value of the labor and material involved in the making of the door, window and screen frames by Ellis (paragraph 5 hereof) was $90 - $100.

The evidence further shows that Edward Braun, general carpenter foreman, ordered Harold C. Deemer to mix some concrete for the house of accused. Deemer did so, using Government material. Twelve bags of cement at 57½ cents a bag, one yard of sand and two yards of gravel at $1.60 a yard were used. Braun told Deemer to keep an account of the material used so that restitution could be made. Deemer then hauled the cement to the home of accused by the order of Braun. Deemer worked

five hours pouring the cement at the house, but he was not working on Government time. He gave Braun a bill for his labor "and the return of the material". He gave a second bill to accused at the latter's request. Accused said he would pay it "as soon as matters were settled". Deemer had no information to the effect that the material had been returned, although he had not checked the records. Accused was not present when the concrete was mixed, hauled or poured into the forms, nor did he ever give Deemer any orders with respect to the work.

Phelps used 536 feet of 2 x 6 Government lumber when we built the concrete forms at Keesler Field. Pursuant to Gallotte's orders, Adam Arcenaux delivered the forms to the house of accused in a Government truck. Also acting under the orders of Gallotte, Arcenaux obtained from the carpenter shop at Keesler Field and delivered by Government truck to the garage apartment, 960 feet of pine 1 x 6 tongue and groove lumber. Upon examination by the court, Arcenaux testified that Gallotte told him that accused had instructed him (Gallotte) to have the lumber delivered. Accused did not order Arcenaux to deliver the lumber, nor was he present when the lumber was unloaded. The lumber was new. The value of the 536 feet of lumber used by Phelps was $36 a thousand feet. The value of 960 feet of 1 x 6 tongue and groove lumber was $34 a thousand feet.

Henry House, labor foreman, obtained from the Keesler Field carpenter shop and delivered by Government truck to the home of accused thirty bundles of new 6 inch center match (tongue and groove lumber). Gallotte ordered House to haul this lumber. Accused was not present when the lumber was obtained and later unloaded.

On March 29, Earl Helm, pursuant to the orders and with the aid of Gallotte, obtained some new, 1 x 6 lumber from a pile near the carpenter shop. The lumber was delivered to the garage apartment in two trips. Accused was not present when the truck was loaded. During the day, some new 2 x 10 lumber ("twelve's") was delivered to the house in an Army truck. Accused was present and told Gallotte "to get the truck off the grounds and that he didn't want it there — to let it come there and unload and go off right away". The truck was sent away. Accused gave directions to the men as to the placing of the chimney. As the 2 x 10 lumber was too short for other purposes, this lumber was used in the erection of the chimney.

Julian E. Phelps assisted in storm sheathing the house of accused. The material came from the Keesler Field carpenter shop.

Thirty bundles of 1 x 6 came from the shop (960 feet board measure) and some 1 x 4's.

About March 28th, some lumber was delivered to the garage apartment by the Latimer Lumber Company. The Latimer company also delivered some lumber about March 31st or April 1st.

Accused, before construction of his garage apartment began, arranged for credit with four lumber firms. He authorized Gallotte to purchase lumber on his account from two of these firms. He also purchased from the Brown Plumbing Company a building on Keesler Field containing about 8,000 - 10,000 feet of lumber, which was demolished by private labor and hauled to the garage apartment by private labor in a privately owned truck. Accused also purchased 3,000 feet of sheathing which comprised part of a demolished building owned by the Dupre Plumbing Company, and had the nails extracted from this lumber. This lumber was hauled in a Government truck to the home of accused by a person employed by the Government, upon the request of Edward Braun, general carpenter foreman. Accused did not order Braun to have the lumber so delivered, and he was not present when the truck was loaded at Keesler Field. One witness believed that about 10 to 20 per cent only of the lumber would be lost through demolition of a building sized 50 x 60 (Brown building).

Accused had first entered an agreement with Gallotte, written in pencil, to the effect that Gallotte would furnish labor for the framing, lining and interior of the garage apartment. A typewritten letter addressed to accused, embodying the terms of the original agreement, was later signed by Gallotte after construction had started, and also after an investigation of the matter had begun. The letter was dated back to the time of the original agreement. Gallotte agreed to use men employed on Keesler Field on their spare time only. Accused told Gallotte that he or no one was to work on his house on Government time. Gallotte testified that he did not arrange for the digging of the foundation, and that on instructions from Braun, he ordered Phelps to make the concrete forms. Accused did not tell Gallotte to have the forms made. Gallotte testified that he ordered Ellis to make the frames pursuant to orders received from Braun. He denied having told accused that the frames were made in his (Gallotte's) house, but he gave accused a bill for the lumber involved because accused requested the bill.

Gallotte further testified that several men employed at Keesler Field promised him to give a day's work to help him out in the construction

of the house of accused. The men then "double-crossed" him by signing the time sheets, indicating that they had worked at Keesler Field on the days they actually were working on the house. Gallotte denied that he told them to do this, and did not know that they had followed this procedure. Gallotte could not read, and did not realize that he was in fact certifying that the men had worked at Keesler Field when he signed the time sheets as their foreman. Gallotte did not recall telling accused on March 29 that he was running out of sheathing, and that he would like to send a truck to the field. They "never got up to the sheathing that day". He did make the suggestion that they could borrow some lumber from the field to replace lumber which should have, at that time, been delivered by a private concern, saying they could "pay it back" later. He then walked around the house and did not remember if "any lumber was sent there or not". (Two witnesses for the defense testified that on March 29, Gallotte asked accused for permission temporarily to borrow lumber from the field and that accused replied that he was not to borrow anything from Keesler Field).

Gallotte admitted that prior to trial he told certain military personnel that he needed some sub-flooring, that he asked accused if he could send to the field for some lumber, and that accused replied "There is the truck; go get it". However, Gallotte did not know if the truck, which was then on the premises, belonged to the Government, as the truck was not marked. He denied making a statement to an officer investigating the case that accused told him to go ahead and use the labor, that "when a person talks you can usually read between the lines", that accused frequently went to the premises, gave the men directions, that he knew all the carpenters and that the men told accused "when they have been out there". Although he admitted that his signature was on such a statement, since he could not read, "they could read anything" to him. He further testified that accused told him he could use Government labor on the house after work hours.

Gallotte believed that all the lumber for the house came from three privately owned lumber companies. He testified that about 1700 square feet of 1 x 6 sheathing had been used in the entire building. This sheathing was made from used material. Although he had been authorized by accused to order lumber on his account from private firms, Gallotte had personally ordered "sheet rock", nails and hardware only. He told accused what he needed and supposed that accused had placed the orders. Gallotte had, at various times, been reprimanded by accused for

doing work without a work order. He denied having anything to do with the request for sick leave by Phelps.

Miss Van Pelt, the secretary of accused, during the time the garage apartment was being constructed, heard accused on several occasions tell Gallotte to get materials from the personal accounts of accused, and that Gallotte was to use no Government labor or material on the house. Edward Blake, a clerk in the personnel section of the post utilities office, heard accused tell Gallotte that men who were Government employees were not to work on any other jobs. At this time, Gallotte was about to build the house. Miss Jessie McManus, a civilian employee in the office, heard Gallotte tell accused that he believed his brother had paid the bill for the lumber used in the window screen and door frames, and that the frames were made at Gallotte's home.

13. With reference to Specification 1, Charge II, the evidence is legally insufficient to sustain the finding that accused knowingly and wrongfully consented to the construction by Ellis of the door, window and screen frames as alleged. It was established in evidence that Ellis made the frames in the carpenter shop from Government material pursuant to an order received from Gallotte, and that Ellis was paid by the Government for the labor involved. The frames were hauled by Groeschner in a Government truck to the house of accused. Accused did not tell Ellis to make the frames, was not present in the shop at any time during their construction, and did not tell Groeschner to deliver them to the garage apartment. There was no evidence that he knew the frames were made by Government labor and from Government material, or that he consented to such construction. Upon cross, redirect, and recross examination, Ellis testified that Gallotte told him that accused had given Gallotte the plans and had ordered Gallotte to have the frames made (R. 70-72). Such evidence, however, would not necessarily indicate that accused in fact ordered Gallotte to have the frames made in the carpenter shop by Government labor and from Government material. Even if such an inference could reasonably be drawn, this type of testimony, standing alone, would not be sufficient to establish beyond a reasonable doubt that accused knowingly and wrongfully consented to the construction of the frames as alleged. The evidence is legally insufficient to establish the findings of guilty of Specification 1, Charge II.

14. With reference to Specification 2, Charge II, and Specification 1 of the Additional Charge, it was established in evidence that Helm, Applewhite, Phelps, Groeschner, Byrd, and Tabb worked at the garage

apartment, and that they received pay from the United States for the labor and time so expended. There was no evidence that accused told the men to work on the premises on Government time, that he knew that they had, on various occasions, signed the time sheets, indicating that they had worked at Keesler Field on the days they had in fact worked on his garage apartment or that he in any way consented to their doing so. Further, there was no evidence that accused knew that Groeschner hauled the frames from Keesler Field to the garage apartment, that Phelps had built the concrete forms at the field with the aid of Tabb and Applewhite, or that Helm assisted Ellis in making the frames at the carpenter shop. The mere presence of accused on the premises would not indicate that he knew the men would be paid by the Government for work then being done for his benefit. Gallotte testified that the men volunteered to give their time, and that they "double-crossed" him by signing in at the field. The testimony of Gallotte was substantiated by that of accused. On the other hand, the men testified that Gallotte told them to sign in. In any event, there was no proof that accused knew of or consented to such a procedure. Upon discovering that Phelps had signed the time sheets, accused told Mrs. Lewis and O'Briant that Phelps could not be paid by the Government as he did not work at the field on the days in question. He said that Phelps must take annual leave and directed that steps be taken to rectify the situation. He twice attempted to pay Phelps for his labor by a personal check. There was no evidence that accused had any knowledge of the facts surrounding the request for sick leave of Phelps. Miss Van Pelt, the secretary of accused, heard accused caution Gallotte to use no Government labor on the house, and Edward Blake, a clerk in the office, heard him tell Gallotte that Government employees should not work "on any other jobs". Gallotte testified that accused told him to use Government labor at the house only after work hours.

Gallotte denied making a statement to an officer investigating the case that accused told him to go ahead and use the labor, that "when a person talks you can usually read between the lines", that accused frequently went to the premises, gave the mendirections, that he knew all the carpenters and the men told him "when they have been out there". He denied having made the statement, saying that he could not read and that "they could read anything" to him. He admitted that the statement bore his signature.

The facts that accused frequently visited the premises, directed the work, knew the carpenters, and that the men told him "when they have

been out there", do not warrant the conclusion that accused knew that the men were working on Government time and would accordingly be paid for such work by the Government. Neither would such facts signify that he impliedly consented in any way to the men working on Government time or to the payment by the Government for such labor.

As Helm was about to appear before an officer investigating the case, accused asked him whether he had worked on the house. Helm replied in the affirmative, that Gallotte told him the house belonged to accused. Accused, in substance, told him to say that he did not know whether the house in fact belonged to accused, that he wanted him to tell the truth, and that such a statement would be the truth. Accused apparently meant that Helm's knowledge as to ownership of the premises was based upon hearsay. This action by accused, although injudicious, does not justify the inference that he knowingly and wrongfully consented to the alleged employment of Helm.

The evidence is legally insufficient to sustain the findings of guilty of Specification 2, Charge II, and Specification 1 of the Additional Charge.

15. With reference to the Specification, Charge I, the evidence is legally insufficient to sustain the allegation that accused knowingly and willfully applied to his own use and benefit the lumber involved in the construction by Ellis of the door, window and screen frames (see paragraph 13 hereof).

The evidence is also legally insufficient to sustain the allegation that accused knowingly and willfully applied to his own use and benefit the cement, gravel, and sand described in the Specification. It was established in evidence that Harold C. Deemer, a mason employed at Keesler Field, mixed the concrete from the materials described from Government material of the value alleged. The cement was hauled to the premises owned by accused and there poured by Deemer on his own time. Braun ordered Deemer to keep an account of the material used in order that restitution thereof might be made, but it was not established in evidence that the material had in fact been returned. Accused was not

present when the concrete was mixed, hauled or poured, nor did he give Deemer any orders with respect to the work. No evidence was introduced which established that accused knew that this Government material was in fact used in the construction of the garage apartment, or that he consented to the use of the material.

Phelps testified that he used the 536 feet of 2 x 6 lumber owned by the Government when he built the concrete forms at Keesler Field. He built the forms pursuant to Gallotte's orders. In the opinion of one witness the lumber was new, another testified that it was second hand, and a third testified that it had nails in it. In any event, accused did not order Phelps to make the forms. Gallotte ordered Arcenaux, a truck driver, to deliver the forms to the house of accused in a Government truck. Accused did not order Arcenaux to haul the forms and was not present when the forms were loaded or unloaded. The forms were then used when the cement was poured for the foundation, and were later removed on March 29. There was no evidence which established that accused knew that Government material was used in the construction of these forms, that the forms were then delivered to the premises and later used when the cement was poured, or that he in any manner consented to such a use of Government material.

Arcenaux also obtained at the carpenter shop and delivered to the site of the garage apartment, 960 feet of pine 1 x 6 center match (tongue and groove sheathing). Upon examination by the court, Arcenaux testified that Gallotte ordered him to deliver this lumber, saying that accused had instructed him (Gallotte) to this effect. The evidence was hearsay in character, highly prejudicial to the substantial rights of accused, and should have been expressly excluded by the court, whose questioning elicited the testimony. This evidence, moreover, standing alone, would not in and of itself, be sufficient to establish the fact that accused knowingly and willfully applied to his own use and benefit the 960 feet of lumber described. Accused did not order Arcenaux to haul the lumber. He was not present when the lumber was taken from the shop or when it was unloaded at the premises. Furthermore, it was not established in evidence that accused knew of or consented to the lumber being taken from the carpenter shop and delivered to his garage apartment. The evidence is legally insufficient to sustain the finding that accused knowingly and willfully applied to his own use

and benefit the 536 feet and 960 feet of lumber alleged.

For the reasons stated the Board of Review is of the opinion that the evidence is legally insufficient to sustain the findings of guilty of Charge I and of the Specification thereunder.

16. Particular reference is made to certain testimony by Gallotte and Helm with reference to some 1 x 6 and 2 x 10 lumber. This lumber was not the subject of an allegation in any of the Specifications, and the evidence was introduced upon examination of the witnesses by the prosecution for the apparent purpose of establishing general guilty knowledge on the part of the accused.

Gallotte testified that he made a statement prior to trial to the effect that on March 29 (Sunday) he needed some sub-flooring and asked accused if he could send to Keesler Field for some lumber. Accused replied "There is the truck; go get it". Gallotte did not know whether the truck belonged to the Government because it was not marked. Braun, a witness for the defense testified, however, that when Gallotte asked if he could borrow some 1 x 6 lumber for sub-flooring from the field, accused replied that Gallotte was not to take one nail or piece of lumber from Keesler Field, and that he had orders to buy anything he needed from three or four firms. The testimony of Braun was corroborated by the fact that it was stipulated by the prosecution and defense that if present, Sergeant Robert H. Weiss, driver for accused, would testify for the defense that when Gallotte made the inquiry, accused replied "that he did not want any labor or materials taken from Keesler Field at any time to be used on the construction of his house, under any circumstances". There was no evidence that Gallotte in fact sent the truck to Keesler Field for the 1 x 6 lumber. Helm testified that on March 29, after checking in at Keesler Field, he and Gallotte had loaded a Government truck with new 1 x 6 lumber, and delivered it to the garage apartment in two trips. Accused was not then present, nor did he order Helm to load this material. In view of the conflicting evidence concerning the reply of accused to Gallotte's request, the fact that it was not shown that a truck was actually then sent to Keesler Field for the 1 x 6 lumber, or that accused knew of the prior delivery by Helm in a Government truck of the 1 x 6 lumber that morning, the testimony by Gallotte is not of substantial evidentiary value with reference to establishing the guilt of accused as to any of the Specifications.

Helm further testified that "after dinner" on March 29, an Army truck arrived at the premises with some 2 x 10 lumber. Accused told Gallotte "to get the truck off the grounds and that he didn't want it parked there — to let it come there and unload and go off right away". The source of this 2 x 10 lumber was not established in evidence. No proof was introduced to show that it belonged to the Government. The order of accused to Gallotte to effect immediate removal of the truck was entirely consistent with innocence. Although it would appear that the delivery of the lumber by means of a Government truck was wrongful, there was no evidence that accused either ordered the delivery, or knew that the truck was to have been used for such a purpose. The fact that he stated that the lumber could be unloaded, although indicative of indiscretion, does not warrant the conclusion that accused was guilty of the offenses alleged.

17. The record of trial contains some circumstantial evidence which might tend to arouse suspicion as to the guilt of accused. He testified that he and Gallotte had entered a "verbal pencil note agreement" about the middle of March. The contents of this agreement were not established in evidence. About the middle of April, Miss Van Pelt, secretary of accused, typed an agreement in the form of a letter which, according to Miss Van Pelt, was copied from a handwritten slip, and which, according to accused, was an exact copy of the earlier agreement. The typewritten agreement was dated back to March 16, the date of the prior agreement. Construction of the house and an investigation of the case had been started when the letter agreement was typed. The evidence did not disclose any apparent reason why accused should have deemed it advisable to have a duplicate agreement typed and signed by Gallotte at that particular time.

Gallotte testified that when he requested permission to send to Keesler Field for some lumber, accused replied "There is the truck; go get it".

Helm testified that an Army truck arrived at the garage apartment loaded with 2 x 10 lumber. Accused told Gallotte that he did not want it on the premises, that it should be unloaded and sent away immediately. He also told Helm to state at the investigation that he did not know that the house on which he had worked belonged to accused, that he wanted Helm to tell the truth and that such a statement would be the truth.

Accused admitted that after he discovered that Phelps had worked at the garage apartment on Government time, he did not check to see if the other men had done the same thing because he did not deem it necessary. Although he had decided to dismiss Gallotte after discovering that he had used Government material contrary to instructions, he did not do so because such an action would "cause remarks and suspicion, so I just let the matter take care of itself".

> "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt."
>
> "Where circumstances are relied on entirely to justify conviction, they must not only be consistent with guilt but inconsistent with innocence."
>
> "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 a 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 228831 - Wiggins, and cases cited therein.)

In the case under consideration, as the circumstantial evidence described, did not "exclude every reasonable hypothesis except that of accused's guilt", and was not "inconsistent with innocence", such evidence cannot be relied upon to justify the findings of guilty of the Charges and Specifications thereunder.

18. Accused entered a plea in abatement which was denied by the court. The plea, in substance, alleges that accused was not informed of the nature of the charges pending against him as required by paragraph 35, M.C.M., 1928,

that the witnesses were examined by the investigating officer not in the presence of accused, and that accused was not afforded the opportunity by the investigating officer to cross-examine witnesses after their statements had been reduced to writing and signed. The plea also alleges that the charges were not forwarded prior to trial through the commanding officer exercising immediate jurisdiction over accused under Article of War 104 as required by paragraph 30b, M.C.M., namely, the Division Engineer, South Atlantic Division Corps of Engineers, Atlanta, Georgia, and that this officer was not afforded the opportunity to act in accordance with paragraph 33, M.C.M. "which requires him to act under A.W. 104, to line out charges which can be disposed of thereunder" (R. 10-11, 24).

Accused also entered a plea denying the jurisdiction of the court, which plea was denied by the court. In substance, the plea alleged that accused was not under the authority of the Commanding General, Third District Army Air Forces Technical Training Command, but under the authority of the Division Engineer, South Atlantic Division, Corps of Engineers, Atlanta, Georgia, that the charges should have been forwarded through the latter officer who in fact exercised jurisdiction under Article of War 104 over accused, and that such officer had no opportunity to act under Article of War 104, namely, "to line out charges which can be disposed of thereunder". The plea denied the jurisdiction of the court over accused (R. 6-9).

Accused entered motions "to strike out" Specifications 1 and 2, Charge II (violation of Article of War 96), on the ground that the acts or omissions alleged were indirectly and remotely prejudicial only, that they were expressly made punishable by Article of War 94, and that under the 94th Article of War proof of intent was necessary, whereas no such proof is required under Article of War 96. Accused also moved to strike out Specifications 1, 2 and 3, of the Additional Charge for the same reasons, and also because only such acts or omissions are included under "DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE" which are not made punishable by any Articles of War preceding the 96th Article of War. The court denied the motions (R. 24, 25).

With reference to the subject matter contained in the plea in abatement, accused testified that a Captain Couch first investigated the charges. Accused was not called by Captain Couch for an investigation, nor was he present when the captain interviewed any witnesses. Upon the advice of a former defense counsel, Captain Conway, accused signed a stipulation "with the investigating officers that if the witnesses

whose sworn statements appear in the attached investigation were present they would testify substantially as is set out in the sworn statements as is appended to said investigation". Captain Boyd, trial judge advocate, was later appointed to investigate the charges. Captain Boyd summoned accused, showed him signed statements of various witnesses, and afforded him the right to have any of the witnesses called for interrogation. Accused had not been present when the witnesses had first been questioned (R. 12-24). All of the witnesses whose presence was then requested by accused, reappeared and were cross-examined by accused. "Accused is not entitled to be confronted by all witnesses who testify before an investigating officer, provided he is accorded the right to cross-examine such witnesses". (Dig. Ops. J.A.G., 1912-1930, section 1266, pp. 623, 624.) Accused admittedly was afforded the right to cross-examine all witnesses who had appeared before the investigating officer, and availed himself of this privilege. The witnesses whose presence was requested by accused, reappeared and were cross-examined.

The contention that the Division Engineer, South Atlantic Division, Corps of Engineers, exercised immediate jurisdiction over accused under Article of War 104, and that the charges should have been forwarded through that officer, is without merit. Pursuant to paragraph 30b, M.C.M., the charges were properly forwarded through the Commanding Officer, Keesler Field who was the immediate commanding officer of accused. This officer was empowered to take any appropriate action under the 104th Article of War, pursuant to the provisions of paragraph 33, M.C.M.

The contention by accused that the court had no jurisdiction in the premises was similarly without foundation. It is not necessary to pass on the question whether accused was in fact under the command of the officer who appointed the court. This officer was empowered to appoint a general court-martial. The jurisdiction, or power of a court-martial to try offenders, once it is convened, is not limited in the exercise to persons under the command of the convening power. On the contrary, it has no limitation except that the person to be tried shall be a person subject to military law (CM 200804 - Wineland et al.)

Accused asserted in his motions "to strike out", that the offense alleged in Specifications 1 and 2 of Charge II, and Specification 1 of the Additional Charge (of which offenses he was found guilty), should have been charged as violation of the 94th Article of War. The offenses described, if supported by the evidence, obviously would have been directly to the prejudice of good order and military discipline, and were properly

chargeable under Article of War 96. Further, such offenses are not expressly made punishable by the provisions of Article of War 94, as contended by accused.

Moreover, even if an offense is violative of a specific article, if it also constitutes conduct to the prejudice of good order and military discipline, it may be charged under both the specific article and the 96th Article of War, as the provisions of each article have been violated (Dudley's Military Law and the Procedure of Courts-Martial p. 412; Carter v. McClaughry, 183 U.S. 395, 396).

When the prosecution rested its case, the defense moved to strike from the record all of the testimony and evidence introduced by the Government, substantially on the ground that such evidence did not directly connect accused with the charges, and because all of the evidence was admitted "subject to connection, which connection has not been made". The defense also moved for findings of not guilty, substantially on the ground that the evidence was not legally sufficient to support findings of guilty of the offenses alleged (R. 296-301).

In view of the complex nature of the evidence, and of the then apparent intention of the court to call Gallotte as its witness (R. 305), the Board of Review is of the opinion that the denial of the motion for findings of not guilty was proper.

19. The court adjourned on August 28, 1942, to meet on August 29, 1942 (R. 640). An examination of the record discloses that the proceedings were completed, and the findings and sentence announced on August 29, 1942. The statement that the court finally adjourned on August 26, 1942, instead of August 29, 1942, is apparently an error on the part of the court reporter.

20. Consideration has been given to the following documents filed by the defense: Special plea as to the jurisdiction, petition for rehearing, brief of authorities and argument on petition for rehearing, and supplemental brief of authorities and argument on petition for rehearing. Civilian counsel for accused, Albert Sidney Johnston, Jr., Esq., made an oral argument before the Board of Review.

21. Accused testified that he was 54 years of age. The charge sheet shows his age to be 54 years. The records of the Office of The Adjutant General, however, show that accused was born September 22, 1885, and that he is, therefore, 57 years of age. The records of the Office of The

Adjutant General show his service as follows:

Appointed first lieutenant, Engineers Reserve Corps, September 29, 1917; extended active duty, December 28, 1917; honorably discharged January 28, 1919; appointed first lieutenant, Officers Reserve Corps, (Engineers), July 9, 1923; promoted to captain, February 25, 1925; reappointed captain, February 25, 1930, February 25, 1935, and March 22, 1940; active duty (CCC) January 12, 1938, to January 11, 1939; extended active duty October 21, 1940.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

(258)

SPJGH
CM 227239 1st Ind.

War Department, J.A.G.O., APR 22 1943 - To the Commanding General, Third District Army Air Forces, Technical Training Command, Tulsa, Oklahoma.

1. In the case of Captain Frank H. Wyatt (O-181423), Corps of Engineers, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence and, for the reasons stated therein, I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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 opinion 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 227239).

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY

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

SPJGH
CM 227335

DEC 16 1942

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Davis-Monthan Field, Tucson, Arizona, September 20 and October 11, 1942. To be hanged by the neck until dead.
Private First Class FRANCIS A. LINE (36172096), 376th Base Headquarters and Air Base Squadron.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private 1cl Francis A. Line, 376th Base Headquarters and Air Base Squadron, did, at Tucson, Arizona, on or about August 11, 1942, forcibly and feloniously, against her will, have carnal knowledge of Eunice Howard, residing at 1327 North Fourth Avenue, Tucson, Arizona.

3. The defense moved that an inquiry be made into the sanity of accused.

Captain Marvin C. Schlecte, Medical Corps, testified that he had, at the request of defense counsel, made a mental examination of the accused on two successive days, September 18 and 19, 1942. He diagnosed accused to be of a constitutional psychopathic state. When asked if he had doubt as to the sanity of accused, he stated that he had no doubt as to the sanity of accused but that it was difficult to

come to a conclusion upon a 2-day examination, and he felt that there should be further examination (R. 4-6).

Dr. A. O. Smiley, Professor of Abnormal Psychology, University of Arizona, testified that he had examined accused for 1½ hours, had some doubt regarding the mental condition of accused, and believed that accused should be further examined (R. 7).

The court granted the motion of defense for a recommendation to the appointing authority for the appointment of a board of medical officers to inquire into the mental condition of accused (R. 7).

4. At an adjourned session, the report of the Board of Medical Officers appointed under paragraphs 35c and 63, Manual for Courts-Martial, 1928, to examine the mental condition of accused was introduced in evidence (R. 15; Ex. 1). The board found:

> "1. That there is no evidence of insanity in Private Line, and he mentally is completely responsible for his actions and thoughts.
>
> "2. That the condition of constitutional psychopathic state, of the inadequate personality type, is existent in this individual",

and recommended that further investigation for sanity was not necessary.

5. Each of the three members of the board testified before the court.

Major Charles F. Sweigert, Medical Corps, testified that the report reflected his opinion of the sanity of accused at the time of examination, September 25 to October 1, 1942, and that the man's mental condition on August 11, 1942 (date offense was committed), and prior to that date was the same as when the board examined him. He stated that persons in a constitutional psychopathic state are considered legally responsible, are not acceptable to institutions for the insane, that a psychopath knows the difference between right and wrong and would be mentally capable of choosing the right, but he may at times choose to do the right, and at other times choose not to do the right (R. 8-12).

Captain Marvin C. Schlecte, Medical Corps, testified that he could find no evidence of insanity of accused and that the condition of accused on August 11, 1942, was the same as at the time of examination in September. He found no change in the mental condition between his examination of accused on September 18 and 19, 1942, and as a member of

the board on September 25 to October 1, 1942. In his opinion accused was sane on August 11, 1942. A constitutional psychopathic state is not considered a true mental condition. The constitutional psychopath can think "straight and clear", but at times does not choose between right and wrong because he does not want to (R. 12-14).

Captain Eric G. DeFlon, Medical Corps, testified that he detected nothing in his examination to indicate that the accused was in any different mental condition on August 11, 1942, than at the time of examination, and he "deemed" that the mental condition of the accused was no different on August 11th than when the board examined him (R. 14-15).

6. It was the ruling of the court that "the accused is sane and was sane at the time of the alleged offense, and may be legally tried by this court, and that the trial proceed" (R. 15).

7. The accused pleaded guilty to the Specification and to the Charge (R. 16). He was found guilty of the Specification and of the Charge. He was sentenced to be hanged by the neck until dead. All of the members present concurred in each finding of guilty, and in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

8. The evidence for the prosecution shows that Eunice Howard, daughter of Mr. and Mrs. Thomas W. Howard, was 12 years old and in grade 7B at school. On August 11, 1942, at about 3 or 3:30 p.m., she left her home in Tucson to go downtown to buy some things for her mother, go to the library, and take a document to the Judd Realty Company at 257 Stone Avenue. After going to the store and the library, she visited a girl friend. About 4:30 p.m. she left the home of her friend to go to the Judd Realty Company. As she passed a drug store the accused came up and started talking to her. She walked a little faster when she noticed that he was following her. As she came to the Judd Realty Company and started to go in, the accused stuck a knife in her back and told her not to make a false move or he would stick it through her. He told her to lead him to a dark alley. She was so scared that she did not know what to do and walked north on Stone Avenue and east on Fifth Street all the way to the railroad track. Accused told her which way to turn, kept the knife in her back, and told her she was too young to die. She passed people on the street but was too scared to speak to them. She did not know what he wanted to do "until he started in". He led her down the track to a car and told her to climb in. She started to climb in, but it was real hot and she came down again. Accused held the knife in his hand and told her she had better get in the car (R. 17-21, 24).

After she climbed in the car, because she was scared, accused removed her clothing, removed his own clothes, and told her to lie down on her back. She did so because he kept holding the knife and she was scared. Accused then placed his body on top of hers and his private sexual organs entered her private sexual organs. She did not try to run or scream because he kept holding the knife to her back. While they were in the car, another car came up and the engineer moved them up the track. The engineer called to accused but she did not recall what was said. The sexual intercourse which accused had with her was without her consent. When he finished, accused put on his clothes and left the car. He came back, asked her if he could take her downtown to catch a bus home, said he was going to turn himself in to the "M.P's.", and then left her in the car. She was unable to get out of the car alone. After she waited about 5 minutes a man came along and helped her out of the car. When she said she was too dirty to go home on the bus, the man told her to go to his house,and there Mrs. Ricco called her father (R. 21-24).

About 6 o'clock on August 11, 1942, Mr. Ricco, a truck driver, saw a soldier and a girl, or woman, having a "good time" in a car which the switch engine was moving. The accused is the soldier he saw in the car. At that time the soldier was dressed, but the girl did not have her clothing on. About 15 minutes later, when he heard crying which sounded like a young girl, he went over to the car and helped a young girl out of the car. She was all dirty, nervous, and excited. When he asked her what was the matter, all she would say was "some soldier". When the girl said that she could not go home because she was so dirty, he sent her to his home two blocks away (R. 26-29). At about 7 p.m., August 11, 1942, a frightened, upset girl came to the door of Mrs. Ricco's house, said someone had sent her, that she met with an accident with a soldier. While the girl was washing, Mrs. Ricco called the girl's father on the telephone (R. 26-30).

On the evening of August 11, 1942, Mr. Thomas W. Howard received a telephone call about his daughter Eunice, who had not returned from an errand. He went down to a house near the railroad track and found his daughter nervous, excited, and her clothes dirty. She would not talk then, but after he had taken her home, she told them what had happened (R. 17-18).

Eunice Howard was examined at about 10 p.m., August 11, 1942, by Dr. Boris Zemsky. He found a ruptured hymen, the lips of the vagina red and swollen, and that it was impossible to get into the vaginal tract.

He examined her again the next morning, found the hymen definitely torn, and that it had been done within 24 hours (R. 25-26).

At about 9:20 p.m., August 11, 1942, Sergeant Albert Nocella, on military police duty in Tucson, responded to a call to pick up a drunk soldier at the Grand Cafe, Tucson, and took accused into a car. Accused said that Nocella looked like a good fellow and could have a knife which accused handed Nocella. The knife was turned over at the station to Lieutenant McCoy. The accused then was brought before Lieutenant Adrian H. McCoy of the Guard Squadron, who was investigating a report of an attack on a girl by a soldier. The accused made a voluntary statement that he met this girl and had intercourse with with her. Lieutenant McCoy was not satisfied with that statement because he thought accused might have been drunk or "doped up". Lieutenant McCoy gave Detective James C. Herron of the Tucson Police Department the knife (Ex. 3) which he had received from Sergeant Nocella or Sergeant Koenig. On August 13th accused admitted to Herron that that knife belonged to him. Lieutenant McCoy came to the station again on August 15th, warned accused of his rights, and the accused then made a voluntary written statement, which was taken down by a stenographer. After reading the statement, the accused signed it in the presence of Lieutenant McCoy, Mr. Herron, and Sergeant Nocella (R. 30-35; Ex. 2).

The confession of accused fully corroborates the testimony of Eunice Howard and adds many details. He met the girl, held a knife to her back, threatened her if she should cry out, directed her to the railroad track, forced her over her objections to get into a gondola car, made her take her clothes off, told her to lay down, and then had intercourse with her. He had not completed the intercourse when the car was moved and had her put on her clothes. When the movement of the car ceased, he made her undress again and get down on the floor, and completed his intercourse. She knew that he still had the knife in his possession, and was still scared (Ex. 2).

9. It was stipulated that accused was in the military service of the United States on August 11, 1942, and a member of the 376th Base Headquarters and Air Base Squadron, Davis-Monthan Field, Tucson, Arizona (R. 35).

10. The plea of guilty by the accused, the clear testimony of the victim, and the confession of accused establish his cold-blooded rape of this 12 year old girl.

The report of the Board of Medical Officers, supplemented by the testimony of each of the members, establishes that the accused was

sane at the time of his examination, September 25 to October 1, 1942, and at the date of his offense, August 11, 1942, was a constitutional psychopath of inadequate personality type, that a constitutional psychopath knows the difference between right and wrong, would be mentally capable of choosing the right, but may at times choose to do the right, and at other times choose not to do the right because he does not want to do so.

The record is void of any extenuating or mitigating circumstances. The only excuse offered by accused was that he had been drinking, he had the knife, and just wanted to show his authority, to be boss over somebody. The testimony of the girl, his skillful method of frightening the girl into carrying out his instructions, and his own story of the assault, negative any suggestion that he was so drunk as not to know what he was doing.

11. Among the papers accompanying the record is a letter from the Chief of Police, Salt Lake City, Utah, to the Chief of Police, Tucson, Arizona, stating that a man named Francis Albert Line was arrested on July 10, 1942, charged with rape, pleaded guilty to carnal knowledge, and given a suspended sentence of from one to five years in the Utah State Prison.

The Federal Bureau of Investigation, Department of Justice, advises The Judge Advocate General that the fingerprints of Francis Albert Line arrested in Salt Lake City, have been compared with the fingerprints of this accused, A.S.N. 36172096, enlisted on February 13, 1942, at Camp Custer, Michigan, and that the fingerprint records are identical.

12. The Board of Review has given careful consideration to the letter of Mr. Audley Rawson, Cass City, Michigan, in behalf of the mother of accused, to a letter from the mother of accused, and to letters from several other persons, all addressed to the President, urging commutation of the sentence of death to life imprisonment.

13. The charge sheet shows that accused is 27 years old and that he enlisted at Camp Custer, Michigan, February 13, 1942, to serve for the duration and 6 months.

14. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial

is legally sufficient to support the findings of guilty, and the sentence, and to warrant confirmation of the sentence. A sentence of death or imprisonment for life is mandatory upon conviction of rape, in violation of the 92nd Article of War.

_____, Judge Advocate.

Chas. L. Larsson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 227335 1st Ind.

War Department, J.A.G.O., [illegible] 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Francis A. Line (36172096), 376th Base Headquarters and Air Base Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The plea of guilty of accused, the clear testimony of the victim, and the confession of accused establish his cold-blooded rape of a 12-year old girl. The accused overtook the girl on the streets of Tucson, Arizona, forced her through threats and the application of a knife to her back to accompany him to a gondola car, where he made her take off her clothes and had intercourse with her. He was identified by his victim and by a truck driver who aided the girl in getting out of the car. The doctor who examined the girl that evening and the next day, found a recently ruptured hymen and the lips of the vagina red and swollen. A board of medical officers found accused sane. There are no mitigating or extenuating circumstances. The papers accompanying the record, and a comparison of fingerprints by the Federal Bureau of Investigation show that upon a charge of rape, the accused pleaded guilty to carnal knowledge, in Salt Lake City, Utah, in July 1942, and received a suspended sentence to prison. He is 27 years old and enlisted in the Army in February 1942. I recommend that the sentence, to be hanged by the neck until dead, be confirmed and carried into execution.

3. Inclosed are a draft of letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 10, 1 Mar 1943)

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

SPJGH
CM 227353

DEC 7 1942

UNITED STATES v. Second Lieutenant GEORGE T. STOVALL (O-1291721), Company K, 28th Infantry.	8TH MOTORIZED DIVISION Trial by G.C.M., convened at Lebanon, Tennessee, October 24, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Second Lieutenant George T. Stovall, 28th Infantry, did, in the vicinity of Tullahoma and Manchester, State of Tennessee, on or about September 17, 1942, in company with an enlisted man, search for women for immoral purposes.

Specification 3: (Finding of not guilty.)

Specification 4: In that Second Lieutenant George T. Stovall, 28th Infantry, did, in the maneuver area, State of Tennessee, on or about September 17, 1942, in company with an enlisted man, search for women companions, this being to the prejudice and good order of the military service.

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

Specification: In that Second Lieutenant George T. Stovall, 28th Infantry, did, without proper

leave, absent himself from his organization at the maneuver area, State of Tennessee, from about 11:00 P.M. September 18, 1942, to about 3:00 A.M. September 22, 1942.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 2 and 4, Charge I, and of Charge I, and of Charge II and the Specification thereunder, but not guilty of Specifications 1 and 3, Charge I. He was sentenced to be dismissed the service. The reviewing authority approved the findings and sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution upon the Specifications of which accused was found guilty is substantially as follows:

a. Specifications 2 and 4, Charge I.

At about 7 p.m., September 17, 1942, the accused drove up to the Blue Lantern Cafe, Manchester, Tennessee, came up the steps and said to the proprieter, Mr. Joseph Shaler, "I want some beer and I want some women". Mr. Shaler replied that he did not serve soldiers as his place was off limits. When the accused put his arm around a girl who was sitting outside, Mr. Shaler told him to quit. The accused replied that he could do as he pleased. A little later the accused came back in a private car driven by a red-headed soldier (R. 14-20).

Private Albert F. Jones, a military policeman, was on guard at the Blue Lantern Cafe when accused came up in a private Chevrolet sedan driven by a soldier and asked if Jones could get accused some beer. Jones told accused that he could not because the place was off limits. When accused asked who the two girls sitting out in front were, Jones stated that he did not know. Jones then talked to the officers in another car for five minutes. Accused then asked again if Jones could get him some beer and Jones said that he positively could not because the place was off limits. The driver then stated that accused was an M.P. officer. Jones referred accused to the sergeant who was in charge of the detail in Manchester. The accused left and Jones did not see him any more up to the time he was relieved at 10 p.m. (R. 20-24).

At around 7 p.m., September 17, 1942, the accused drove up to Joe's Place in Manchester, in a car with an enlisted man as chauffeur. The accused asked Private John M. Gotschall, a military policeman on duty, whether beer could be obtained at Joe's Place. Gotschall stated that it could not be obtained, because the place was off limits. The enlisted driver then asked if there were any women or liquor about the place. Gotschall replied in the negative. The driver then said that the accused was an M.P. officer and could enter the place.

Gotschall replied that he would have to talk to Sergeant Kelleher and get his OK in order to come into the place. This conversation was in the presence of accused. Upon examination by the court, Gotschall stated that the question of accused was whether he could get any women or whiskey around the place (R. 24-28).

At about 7:30 p.m. that evening the accused, in a private 1937 Chevrolet driven by an enlisted man, came to the front of a service station on Main Street in Manchester. The accused asked Sergeant Vincent T. Kelleher, in charge of the military police detail, for an OK to enter places on the highway where he had been stopped by an M.P. and told that he must have permission of Kelleher before he could enter. Sergeant Kelleher stated that he could not give accused an OK but could escort him to the places he desired to visit. The accused stated that he was a health officer. The driver stated that accused was an M.P. Officer. Kelleher took the license number of the car and told accused that he was not allowed to drive his car in the maneuver area (R. 28-34).

b. Specification, Charge II.

The accused absented himself without leave from his organization from 11 p.m., September 18, 1942, to 3 p.m., September 22, 1942. He did not have permission to be absent during that period (R. 7-8, 9-13; Exs. 1, 2, 3).

4. Defense.

Lieutenant F. Francis, Corps of Military Police, testified that both the Blue Lantern and Joe's Place were off limits and had a bad reputation and that women whom he believed were of an immoral nature were around Joe's Place (R. 34-36).

Captain David Summer testified that accused had taken over command of a company in his battalion, and had done an excellent, efficient job. He was much impressed with the excellent behavior of accused and would choose to have accused with him in combat as a leader in any capacity that might be necessary (R. 36-38).

First Lieutenants C. K. Hollingsworth and John H. Harding, under whom accused had served, testified that accused was a hard, conscientious worker, and an intelligent leader of men with a good personality. Both would desire to have accused serve under them in combat. Second Lieutenant Jack Friedman expressed the opinion that accused was an intelligent officer and of a fine disposition (R. 39-41).

The accused elected to testify for limited examination upon his military record. He enlisted in the Army on July 13, 1934, for three years. He again enlisted in December, 1940, was sent for

training to Fort McDowell and then went to the 32nd Infantry where he instructed new recruits. He attended an Officer Candidate School at Fort Benning, and was discharged on August 27, 1942, to accept his commission. He was assigned to the 28th Infantry, and heard that his record was excellent. He is over age in grade. As an enlisted man he had reached the grade of sergeant and each discharge was with character excellent.

5. Specifications 2 and 4, Charge I, allege that accused did, in company with an enlisted man, search respectively "for women for immoral purposes" and "for women companions".

With respect to Specification 4, the Board of Review is of the opinion that the allegation that accused in company with an enlisted man searched for women companions fails to state an offense. It is certainly no offense for an officer to permit an enlisted man to drive his official car, or to drive the private car of the officer in off-duty hours. Neither is it an offense for an officer to search for women companions. There is no allegation of any immoral or improper purpose.

With respect to Specification 2, the record contains no evidence that the search for women was for immoral purposes. The only evidence bearing upon that issue is the proof that accused told Mr. Shaler that he wanted some women and put an arm around a girl sitting outside of Mr. Shaler's cafe, and his inquiry of the military policeman there as to who the girls were; the inquiry of the enlisted driver of the military policeman at Joe's Place if there were any women there; and the testimony of Lieutenant Francis, a defense witness who, upon examination by the court, stated he would say that women who hung around Joe's Place were of an immoral nature. In so far as the record is concerned, there is nothing to show the purpose for which the women were wanted.

6. The record does show that the accused absented himself from his organization about 11 p.m., September 18, to about 3 a.m., September 22, 1942.

7. The accused is 32 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service from July, 1934, to July, 1937, and from January, 1941; appointed second lieutenant, Army of the United States, from Officer Candidate School, Fort Benning, Georgia, August 27, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during

the trial. In the opinion of the Board of Review the record of trial is, for the reasons stated, legally insufficient to sustain the findings of guilty of Specifications 2 and 4, Charge I, and of Charge I; legally sufficient to support the findings of guilty of Charge II and the Specification thereunder; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 61st Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 227353 1st Ind.

War Department, J.A.G.O., DEC 28 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George T. Stovall (0-1291721), 28th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 2 and 4, Charge I and of Charge I; legally sufficient to support the findings of guilty of Charge II and the Specification thereunder; and legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the findings of guilty of Specifications 2 and 4, Charge I and of Charge I be disapproved.

3. The only offense of which approval of the findings of guilty is recommended is absence without leave for four days. Although dismissal is authorized for this offense, it is in my opinion too severe a penalty in this case. I recommend that the sentence be confirmed, but commuted to forfeiture of $25 per month for a period of four months, and that the sentence as thus modified be carried into execution.

4. Inclosed herewith are a draft of letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Findings of guilty of Specifications 2 and 4, Charge I, and of Charge I, disapproved. Sentence confirmed but commuted to forfeiture of $25 pay per month for four months. G.C.M.O. 46, 20 Mar 1943)

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

SPJGK
CM 227364

DEC 3 1942

UNITED STATES v. First Lieutenant MATTHEW F. BECKER (O-407559), 71st Infantry.	)))))))	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Fort Lewis, Washington, October 16 and 17, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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.

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

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

Specification 1: (Finding of not guilty.)

Specification 2: In that 1st Lt. Matthew F. Becker, 71st Infantry, did, at Salem, Oregon, on or about July 10, 1942, in an affidavit make under oath a statement in substance as follows: that he had never asked an enlisted man for a loan of money, which statement he did not then believe to be true.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: (Finding of not guilty.)

Specification 6: (Finding of not guilty.)

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

Specification 1: In that 1st Lt. Matthew F. Becker, 71st Infantry, did, at Corvallis, Oregon, on or about April, May, June, and July, 1942, borrow money from certain enlisted men of his command, to wit: Staff Sergeant James A. Gibson, Jr., Staff Sergeant George Buker, 1st Sergeant George O. Gilead, Pvt 1/Cl Pedro Martinez, and Pvt 1/Cl Raymond G. Burgess to the prejudice of good order and military discipline.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specification 2 thereunder, guilty of Charge II, and guilty of Specification 1, Charge II, except the words, "Staff Sergeant James A. Gibson, Jr., Staff Sergeant George Bukur, 1st Sergeant George O. Gilead", of the excepted words, not guilty, and not guilty of Specifications 1, 3, 4, 5 and 6, Charge I, and Specification 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence pertaining to the Specifications of which he was found guilty shows that accused was in command of the Headquarters Company, 2nd Battalion, 71st Infantry, from about December, 1941, to about the end of July, 1942 (R. 8, 85). About May 1, 1942, the company went to the neighborhood of Corvallis, Oregon, for duty (R. 15). At Salem, Oregon, about July 10, 1942 (R. 16, 23), Colonel John F. Landis, 71st Infantry, conducted an investigation of reports that accused had borrowed money from enlisted men and had not repaid the loans (R. 17, 19). In the course of the investigation Colonel Landis questioned accused (R. 19), incorporated the resulting statements of accused in a typewritten sheet in the form of an affidavit and handed it to accused(R. 19, 20, 28; Ex. 1). Accused, in turn, handed the sheet to the regimental adjutant, Captain Salvatore Pampinella, 71st Infantry (Rifle), signing it before or after delivery (R. 23, 28), whereupon Captain Pampinella signed the jurat (R. 22). Accused then delivered the affidavit to Colonel Landis (R. 16). In the affidavit accused stated among other things:

> "In April of this year I borrowed $100.00 from Staff Sergeant George Bukur. At the time Sergeant Bukur advanced me this money I thought it was his own, but later when I spoke to him

about repaying it I found out that he had gotten it from other enlisted men (PFC Burgess, PFC Martinez, Staff Sergeant Gibson) as follows: Burgess $30.00, Martinez $40.00 and Gibson $30.00.

"Later I borrowed an additional $40.00 from PFC Martinez and $120.00 from PFC Burgess; this was the total extent of my borrowings from enlisted men. On the occasion of my borrowing from PFC Martinez he came to me and stated voluntarily that he had additional money should I need it; he volunteered this information and it was not in response to my having asked him for it. The same thing is true as regards PFC Burgess. All the money borrowed by me has been repayed except that owed the latter. At no time did I ever go to any enlisted man and ask him for money; all money borrowed was in response to their having volunteered to loan it to me" (Ex. 1).

Private First Class Raymond G. Burgess, Headquarters Detachment, 2nd Battalion, 71st Infantry (Rifle), testified that he had at one time served under the command of accused and had later become the "officers' orderly". At a date not specified a Sergeant Bukur told witness that accused needed money and suggested that witness lend it to accused, making his "own business arrangements". Witness subsequently met accused (R. 40) and after accused had remarked, "I guess you know what this is all about", witness said he would lend accused $100, delivered to him $30 in money and agreed to produce the remaining $70 later (R. 41). A second loan was made by witness to accused. Witness testified that still later, on a pay day, while witness was at Corvallis, Oregon (R. 42), acting as an officer's orderly (R. 42), accused

"hastened up to me while I was working at the time. As I looked up I seen he was bewildered and he had tears in his eyes. He said, 'Burgess, I want you to let me have fifty dollars in a hurry.' I realized just at that moment that, it being pay day, he had to meet obligations or something, so I didn't do any questioning whatsoever. I says, 'All right,' and I reached in my pocket and give it to him. That's all there is to it" (R. 52).

Private First Class Pedro Martinez, Headquarters Detachment, 2nd Battalion, 71st Infantry, (Rifle), testified that he had at one time served under the command of accused (R. 43). About April 20, 1942, witness received from Seargeant Bukur a request for a loan to "some lieutenant" and witness thereupon delivered $40 (R. 46) to his company clerk (R. 44), for which witness received a receipt from accused (R. 47). Witness testified that about twenty days later, in barracks at Fort Lewis, Washington, accused "just ask me for more money", without any offer having been made by witness, and that witness then loaned him (R. 45) an additional $40. Accused repaid the loans (R. 46).

Lieutenant Colonel James M. Davidson, Inspector General, Headquarters 44th Infantry Division, testified that in the course of an investigation, after he had been warned that he might remain silent and that whatever he said might be used against him, accused made statements concerning the Burgess and Martinez loans (R. 49). In regard to the Burgess loan witness testified:

> "The question I asked the accused was, 'You are willing to testify under oath that you did not ask Private Burgess for the second $50.00?' In answer to that question, the accused stated to me, 'Here's the story, Colonel. The way he puts it, I asked him for it. That would be one way of putting it. I told him I needed it and I had to have it.'" (R. 51).

Witness asked accused if he had asked Martinez for a loan and accused replied:

> "in effect that he had called Private Martinez in, told him that Sergeant Bukur had told him (accused) that he had obtained forty dollars for him from Private Martinez, and that the accused had told Private Martinez that if he had any more the accused could use it" (R. 50).

Witness also testified that accused stated that he had borrowed $50 from Burgess after reading a letter indicating that Martinez had written to Colonel Landis in connection with a loan to accused by Martinez (R. 59, 80).

With respect to the execution of the affidavit submitted by accused to Colonel Landis (Ex. 1) Captain Pampinella testified that when accused presented it witness asked if accused "swore to that as

being the truth" and that accused replied in the affirmative whereupon witness signed the jurat (R. 23). Witness did not recall that any other formalities such as raising the hand were followed while taking the oath (R. 25). The paper was signed by accused in witness' presence (R. 35). Accused testified that Colonel Landis instructed him to have the statement typed and "to follow him to Corvallis" (R. 29). Accused signed the statement when typed and took it to Captain Pampinella for the purpose of having it sworn to and "for him to sign" (R. 28, 33). Captain Pampinella did sign it but did not in any way administer an oath to accused (R. 28). When accused signed the statement he believed it to be true to the best of his knowledge (R. 30).

Major Charles F. Bisenius, 71st Infantry (Rifle), testified for the defense that he had known accused as an officer and enlisted man for about four years and that accused had been under witness' command since about July 15, 1942. Accused had performed his duties in a very satisfactory manner while under witness' command (R. 82). Lieutenant Colonel Arthur Huddelson, Jr., Headquarters 156th Field Artillery, testified that he had known accused for about a year and a half. During a period of about four months in which witness had official contacts with him accused appeared to have "done his job very well" (R. 84). Lieutenant Colonel Thatcher Nelson, 2nd Battalion, 71st Infantry (Rifle), testified that accused had been under his command since about April 25, 1942, and had performed his duties in an "energetic and loyal manner" (R. 85).

4. The evidence shows that at the place and time alleged in Specification 2, Charge I, in the course of an investigation, accused signed a paper in the form of an affidavit which contained a positive statement that he had never asked an enlisted man for a loan of money. This statement was untrue, as appears from the testimony of Privates First Class Burgess and Martinez that some two or three months prior to the execution of the affidavit accused had solicited and obtained loans of substantial sums from them. Accused testified that when he made the affidavit he believed it to be true, but the circumstances, together with accused's admissions prior to the trial, compel a conclusion that when making the affidavit accused knew that he had solicited the loans and that he did not believe his statement was true in this respect.

Accused contended that an oath was not taken by him at the time of his execution of the affidavit, but there is positive testimony that concurrently with his act in signing the document Captain Pampinella, who had authority under Article of War 114 to administer oaths, asked accused if he "swore to that as being the truth" and that accused replied in the affirmative. No further formality, such as raising the hand, was required to complete the taking of the oath.

Article of War 114 does not prescribe a form of oath. It is enough that the person taking it and the officer administering it intend that it be taken and administered and that it be solemnized by some declaration or act expressive of such intention. Even in those cases in which a form of oath is prescribed by law a literal following of the form is not essential (par. 149 i, M.C.M.). The court was fully justified in finding that accused made the affidavit under oath, as alleged.

The making of the affidavit was plainly characterized by a deliberate design to falsify and was therefore conduct unbecoming an officer and gentleman and was violative of Article of War 95.

The evidence is uncontradicted that at the place and at about the times alleged in Specification 1, Charge II, accused borrowed money from enlisted men of his command, Burgess and Martinez, as found. This was to the prejudice of military discipline and was violative of Article of War 96.

5. In the course of his testimony as to the statement made by accused during an investigation by Lieutenant Colonel Davidson concerning the Burgess and Martinez loans, Lieutenant Colonel Davidson was permitted, over objection by the defense, to use his report of the investigation for the declared purpose of refreshing his memory as to what was said. The report had been transcribed by stenographers from testimony taken in the presence of the witness. Whether the report was in fact used to supply facts once known or merely to refresh the memory of the witness, its use was authorized (par. 119 b, M.C.M.).

5. War Department records show that accused is 31 years of age. He is a high school graduate. He served as an enlisted man of the National Guard of New York for about six years and was commissioned a second lieutenant in the National Guard on September 15, 1940. He entered on extended active duty September 16, 1940. He was promoted to first lieutenant on June 14, 1941.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

Hubert A. Hanna, Judge Advocate.

Andrew Copp Jr., Judge Advocate.

Elwood W. Sargent, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Matthew F. Becker (0-407559), 71st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused solicited loans and borrowed money on two occasions from enlisted men of his command. Soon thereafter, in the course of an investigation, he made an affidavit that he had never asked enlisted men for a loan of money. In view of the deliberate dishonesty involved in the false swearing I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 17, 3 Mar 1943)

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

SPJGK
CM 227365

FEB 4 1943

UNITED STATES	)	95TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Camp Swift, Texas, October 11, 20, 21, 22, 23 and 24, 1942. To be hanged by the neck until dead.
Private GEORGE S. KNAPP (37288675), 95th Signal Company.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

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

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

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

Specification 1: In that Private George S. Knapp, Ninety-Fifth Signal Company, did, at Bastrop, Texas, on or about October 6, 1942, forcibly and feloniously, against her will, have carnal knowledge of Lucy Rivers Maynard.

Specification 2: In that Private George S. Knapp, Ninety-Fifth Signal Company, did, at Bastrop, Texas, on or about October 6, 1942, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Lucy Rivers Maynard, a human being by grieviously beating, tearing, and abusing her person.

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

Specification: In that Private George S. Knapp, Ninety-Fifth Signal Company, did, at Camp Swift, Texas, on or about October 7, 1942, feloniously take, steal, and carry away the 1938 Lincoln Zephyr automobile, motor number H-61884, of the value of more than $50, the property of Second Lieutenant George S. Noonan.

Following arraignment, upon joint motion by the trial judge advocate and the defense counsel, the court inquired into the mental condition of accused (R. 6), receiving evidence on the issue (R. 9-100; Ex. 1). The court found, all members concurring, that accused was sane at the time of the commission of the alleged offenses and at the time of trial (R. 100). Further reference is hereinafter made to the issue of insanity thus raised and acted upon. Upon announcement by the court of its action upon the special issue accused pleaded not guilty to the Charges and Specifications. All members present concurring, he was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. All members present concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial stating, "Pursuant to Article of War 48, the order directing the execution of the sentence is withheld". The record has been treated as if forwarded for the action of the President under Article of War 48.

3. The uncontradicted evidence shows that about 2 p.m., October 6, 1942, Lucy Rivers Maynard, a female child eight years of age, disappeared from the vicinity of a school building in Bastrop, Texas (R. 180, 181). She was found by Texas highway patrolmen about 2 p.m., October 7, 1942, near a country road, Piney Road, at a spot about two miles from the school in Bastrop (R. 229; Exs. 5, 6). She was about 40 feet from the road in or near a ravine in an area covered by long grass, briars and brush or undergrowth. A barbed wire fence separated the area from the road. (R. 231, 239; Exs. 6, 9) A Government car had been seen to stop near this place at about 4 p.m., October 6 (R. 193, 198, 200) and two "men" (R. 202), one a large man in khaki and the other in "light blue" clothes had been seen to cross the fence and go into the "pasture" (R. 204). The man in khaki had returned to the car alone (R. 205). On October 7 there were found, between the road and the fence, tire marks indicating that an Army motor vehicle similar to one of which accused had possession on October 6 (R. 184, 185, 301), had been driven off the road (R. 229, 248, 291).

One of the highway patrolmen found a small blue coat near the fence. As he stopped to pick up the coat he heard a "pounding noise nearby" and upon turning, saw the child about 25 feet from where the coat was found. The child was unconscious (R. 248) and in "convulsions, making motions with her hands" (R. 228, 229, 230). "She was lying on her back" with her dress above her waist and "was naked from the waist down" (R. 234). Her head was higher than her feet (R. 244). Her body, arms and legs were scratched (R. 234; Ex. 2), the scratches apparently having been

made by her convulsive movements while in contact with the briars. A fluid that looked like blood was coming from the region of her genitals. She had small bruised blue spots on her neck. (R. 234) Nearby were found a sock, a pair of shoes, a pair of small panties and some school and notebooks. The sock was at the spot where the child was lying. The panties and shoes were near this spot. The coat was near the road. The school books were under the fence, near the road. (R. 232; Ex. 9j) At the place where the panties were found the vegetation had been "trampled down". There was what appeared to be fecal matter on the ground. (R. 233, 236) The distance between this point and the spot where the child was lying was about 27 feet, down a rather steep slope (R. 233). The condition of the grass and shrubs between the place where the panties were found and the place where the child was, indicated that the child had been dragged along the ground or that she had worked herself down an incline by her convulsive movements. There were no footprints or blood spots between these points. (R. 244, 245) The child was placed in a car and taken to a civilian hospital in Bastrop (R. 231). She did not regain consciousness (R. 248), and died at 4 a.m., October 8, 1942 (R. 109).

Shortly after the child was placed in the hospital she was examined and treated by Major Robert C. West, Medical Corps (R. 103), Captain Louis E. Williford, Medical Corps (R. 119) and by another physician (R. 103, 114). She was in a state of shock and gave evidence, largely through the "fixed condition" of her eyes, of brain injury (R. 105, 121). Major West testified:

> "the lower extremities from the level of the hips down were covered with scratches, small cuts, and bruises, some of which appeared fresher than others *** we spread the little girl's legs apart to get to the genitalia region. This region was scratched and appeared like the other regions of the lower body. The genitals were in a condition of swelling with some scratches and evidence of being torn. The child was rolled over on her side and the material obtained from the region of the rectum ***. In the region of her 'privates' there were small white areas which were in my opinion eggs of the blow fly ***. The nostrils were stopped up by pieces of material which appeared to be dirt, weeds, sand, or other debris. There was a slight amount of dirt in the corner of the eyes ***" (R. 103, 104).

He also testified:

> "The birth canal was gaping open. The rectum itself could not well be identified as such, just looking at or in the area. It was just more of a deep hole. About an inch and one half above that, in the little groove or 'crack' that runs up the back of the body was a small hole about the size of the diameter of a cigarette. It had appearances of being punched in from the outside. We did put sulphathiazol ointment in the wounds. The central part of the body between the rectum and the vagina had been torn loose from its moorings or its attachments, so that there was not much difference between the two openings. When I say not much, it is hard to tell. The body was torn and the two places were so closely joined together by the tearing that just a thin web of flesh was left there, that had more or less been pulled and it looked like all one tear. The bulb syringe used to wash these parts with, was not inserted into these cavities, but the fluid was inserted" (R. 104, 105).

From the physical appearances Major West was of the opinion that the tearing in the genitals and rectum could have been caused by an endeavor to "open" the body at that point. In the language of the witness:

> "*** We found that the wound was directed from the rectum upward, as if the rectum was torn with fingers in the rectum. The anus was of such a size that two or three fingers could have been inserted easily. It had much the appearance of a wound caused by childbirth in that in the region in the central part of the body, the muscles were torn and appeared torn from within outward, as if the body had been 'picked up' using the anus as a lifting device" (R. 113).

Major West and Captain Williford each testified that in his opinion the injuries to the anus and vagina could not have been self-inflicted (R. 108, 122) and could not have been caused by the human penis alone (R. 113, 127) but could have been caused by insertion of a finger into the vagina and by a jerking downward or backward movement of the finger (R. 113, 127). Captain Williford testified that insertion of a penis might have contributed to the injuries (R. 122). Major West testified that he could not determine definitely what caused the injuries, that

is, could not "determine whether it was done with an instrument or a stick or a sharp object" (R. 108). Each of the medical officers testified that he found, and the autopsy showed, bruises on the child's neck which indicated that she had been seized forcefully from behind and choked (R. 106, 121, 139). Both Major West and Captain Williford were of the opinion that the unconsciousness and brain injury were caused by the choking (R. 106, 121). There was an "abrasion on the left side of the head just above the ear", but there was no hemorrhage beneath it (R. 136). Major West testified that the body injuries probably occurred from 18 to 36 hours before his examination (R. 108) and that in his opinion death was caused

> "from severe damage and hemorrhages in the brain, bronchial pneumonia, cardiac damages from and the great degree of shock resulting from such tearing of these sensitive parts" (R. 109).

Captain Williford and an officer who performed an autopsy testified to the same effect, adding that exposure to the weather may have contributed to the state of shock (R. 125, 143).

Major West and Captain Williford each testified that in treating and handling the child they detected a pronounced odor of semen, which, they believed, came from fluid which was coming from the vagina or anus (R. 108, 109, 122, 125). Major West further identified the fluid as bearing the "slimy characteristic feel" of semen (R. 114). No fluid could naturally come from the organs of a child which could be confused with or mistaken for semen (R. 109). Captain Williford testified that semen which had been exposed to the air in excess of two or three hours would lose its characteristic odor (R. 131). A microscopic examination was not made (R. 114, 123). In view of the physical evidence noted both medical officers were of the opinion that a penis had been inserted in the "body cavity"(R. 109, 125).

The medical officer who performed the autopsy testified that he found nothing to show definitely that the vagina or anus had been penetrated by the male organ. In his view, however, the injuries to the vagina and anus had been intentionally inflicted (R. 145) and could not have resulted from sliding or falling on the ground

> "because there was dilation of both the vagina and the anus, still there was a bar of skin left between them — so evidently both those orifices were entered" (R. 144, 145).

He did not detect the presence or odor of semen. When the autopsy was made

> "the vagina contained sulfathiozole ointment, so that it would have been impracticable to take material from that orifice and there was nothing in the anus. Also, I had been informed that samples had been taken prior to that" (R. 140).

In this witness' opinion the superficial scratches on the body and legs could have been caused by convulsions while the child lay on the ground with briars between her legs, and some of the abrasions could have been caused by dragging the body (R. 145).

On the afternoon of October 7, 1942, Second Lieutenant George S. Noonan, 378th Infantry, was the owner of a Lincoln Zephyr Club Coupe, Texas license No. N-21747, motor No. 8-61884, of the market value of about $500. Returning to Camp Swift from the field about noon he parked his car. The division had been alerted (R. 223) and he had been "on this search for the girl". No one was authorized to move his car (R. 224). That night, between 8 and 9 o'clock, a patrolman of Austin, Texas, having received information to be on the lookout for a man operating a car with Texas license No. N-21747, who had driven away from a filling station without paying for gasoline purchased, placed accused under arrest while he was driving the car in question. Accused said he was from Camp Swift and that Lieutenant Noonan had given him permission to drive the car to Austin. (R. 226) Accused was taken to the police station at Austin (R. 227) and while there, and after having been warned that he was not required to make a statement and that whatever he said would be used against him (R. 170), stated that he had taken the car without the owner's permission (Ex. 8).

Accused was removed to Camp Swift and questioned by Lieutenant Colonel Haney E. Ihlenfeld, Inspector General's Department, Inspector General of the 95th Division, at about 2:30 a.m., October 8. Before accused was asked any questions the 24th Article of War was read to him. He then voluntarily, without force, coercion or promises, answered questions addressed to him and later signed a transcript of the questions and answers (R. 147, 148). His statement was in substance that on October 6, 1942, he had in his possession an Army motor vehicle, carry-all type. After taking some soldiers to work at a motor pool, he went to Bastrop, Texas, drove about, and at about 2:30 p.m., saw Lucy Rivers Maynard about one block from a school and "picked her up", saying, "'Come on sister, I will take you

home', something like that". She had on "a kind of dark blue coat, and light blue dress, and I think she had blonde hair". She was carrying a notebook, a pencil and some books and papers. He drove about until he reached "a little narrow road". The child became frightened and said she "didn't want to ride so far". He then turned around and drove back the way he came "except when I got to this corner I went straight ahead. I was driving slowly at the time and she said, 'Hurry Up,' and started screaming, and that is when I grabbed her". He choked but did not strike her and "just held her by the neck until she became unconscious". While he was holding the child the car went into a ditch. The child "may have bumped her head". He laid her, unconscious, on the floorboards of the car, pulled out of the ditch and turned the car around but forthwith drove back to the same place. He then rolled or pulled the child under a fence. As he had opened the car door, her books had fallen out so he picked them up and threw them under the fence. Her shoes came off as she was rolled under the fence. He took her coat out of the car and threw it over the fence. He took the child down the hill into a "gully". There he "took her pants off and used my finger". He "got on top of her, but didn't do anything. I quit right then, and left", this for the reason that he "could not get it hard in the first place. I couldn't get it in". The child remained unconscious. Accused did not have intercourse with her although he "attempted to". He "jabbed her" with the middle finger of his left hand five or six times. He took the Noonan car because he was "afraid" and knew "they were looking for somebody". (Ex. 4)

About October 8, subsequent to the investigation by Lieutenant Colonel Ihlenfeld, the charges against accused were investigated by Colonel Marlin C. Martin, 379th Infantry. Accused was again advised of the contents of Article of War 24 and was told that he need not make a statement but that whatever he said might be used against him. (R. 157, 158) He at first declined to make a statement but later, in response to questions, made a statement (R. 157, 158) in substantial conformity with the statement to Lieutenant Colonel Ihlenfeld. He stated that when the child started to scream he "lost control" of himself and seized her about the throat. Asked if he attempted to insert his penis in the child, he replied:

> "No I did not, I got on top of her, that is true, but I could not do any good, as I could not get it hard, and you cannot do it without getting it hard. I stuck my finger in, but I did not hurt her".

He also stated that in getting on top of her he "sort of kneeled down over her". He did not drag the child, did not touch her anus and did not scratch her body. He returned to camp at about 3:30 p.m. He said:

> "In 1927 I was put in the St. Peters Insane Asylum, St. Peters Minnesota, because I choked my sister. I didn't hurt her, but I tried to. A little later, I did the same thing to my mother and they put me in the insane asylum to cure me. I escaped after about eight months and I walked home one day—I hitch-hiked a ride. The same thing happened about six months later and my folks sent me there again. This time, I hitch-hiked home again after I was there about six months and they gave me a release at that time after I got home. It is an impulse—I get angry—I want to grab them by the throat, with men I don't have any trouble at all, but with women, I just want to grab them by the throat. I had the same trouble with my wife. I grabbed her a couple of times by the throat that is why she is getting a divorce. Her divorce will be final the 8th of November. It was the same with Lucy Maynard, when she started hollering all of a sudden, I can't explain it". (Ex. 7)

In the course of his statement accused led Colonel Martin to the scene of the assaults, pointed out the places where certain events occurred and partially reenacted his course of action (R. 161-163; Ex. 7). He stated that blood found on a handkerchief belonging to him was from his nose and that his underwear had "very little blood" on it (Ex. 7).

On October 6, 1942, a Government car had been dispatched to accused for use by him in transporting technicians to and from their work on radio installations at a motor pool at Camp Swift. Accused remained at this motor pool during the morning. Between 2 p.m. and 4 p.m. he could not be found. About 4 p.m. he reported to an officer in charge of the work at the motor pool. This officer had accused take him on a trip consuming about thirty minutes. During this period accused appeared to be calm. (R. 184-186) Some human hair and a "bobby pin" were later found in the car (R. 264). One of the hairs apparently matched the child's hair (R. 269).

Blood stains were found on a handkerchief and on the fly and legs of trousers found among accused's effects (R. 258, 268). Analysis of the blood on the handkerchief showed that it was type "B" (R. 268), the type of the blood of Lucy Rivers Maynard (R. 267). Accused's blood was type "AB" (R. 254). According to the Landsteiner classification there are four types of blood - O, A, B and AB. The percentage of frequency with which the blood type occurs is as follows: O type is the most frequent, 43-45%, A type is next, 40%, B is next, around 5%, and AB is the rarest, 2-3% (R. 266, 267).

Accused declined to testify or make an unsworn statement.

4. The evidence, including the statements by accused, leaves no doubt that at the place and time alleged in Specification 2, Charge I, accused, with his hands, choked Lucy Rivers Maynard into unconsciousness and then dragged her into a field, assaulted her with the purpose of ravishing her, grievously wounded her in the region of her genitalia and anus and left her in the field in a mutilated condition and in collapse. In his statements accused denied that he touched the anus of the child and at least tacitly denied wounding her in this region, but the circumstances, plus his admissions that he repeatedly "jabbed" her genitals with his fingers, establishes beyond any possible doubt that he inflicted the wound. The child died from the results of accused's violence and the shocks attendant thereon. There was no conceivable legal justification or excuse. The assaults were wanton, brutal, malicious and felonious. Whether or not accused intended to kill the child, his acts and the accompanying circumstances inferentially establish knowledge on his part that the assaults would probably be fatal and would in any case result in grievous bodily harm, and establish his utter indifference to such results as well as his positive intention to rape and to do bodily harm. Malice aforethought is the only appropriate characterization of his state of mind. The applicable rule of law is stated by the Manual for Courts-Martial as follows:

> "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. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the

> following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievious 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 grevious bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (par. 148a).

The homicide having been committed with the state of mind indicated, it was murder as denounced by Article of War 92 and as defined by paragraph 148a of the Manual for Courts-Martial as the "unlawful killing of a human being with malice aforethought".

Although there was an "abrasion" on the child's head which might have been caused by a blow, there was little evidence of a "beating" of the victim as alleged in the Specification. There is, however, ample proof that the child was killed through grievous "tearing and abusing" of her person and that the killing was done "with malice aforethought, willfully, deliberately, feloniously" and "unlawfully" as alleged. The essential allegations of the Specification are proved beyond reasonable doubt.

The evidence also establishes rape of the child as alleged in Specification 1, Charge I. Accused admitted and the circumstances show an attempt by him to have carnal knowledge of her by force and without her consent. He denied penetration, but the physical condition of the child and the testimony of the medical officers as to the presence of semen in the body cavities, proves beyond any doubt that he did in fact accomplish his acknowledged purpose.

The circumstances under which the automobile described in the Specification, Charge II, was taken and driven away by accused, show that he intended to and did steal it, as alleged.

5. Upon arraignment, as noted above, an issue as to the sanity of accused was raised and the court thereafter adjourned in order that an inquiry might be made in the premises (R. 6). A board of three medical

officers, all with experience in psychiatry, was convened at Camp Swift, Texas, for observation and examination of accused for the purpose of determining his mental condition. The court was reconvened and a written report of the board was received in evidence (Ex. 1). Each member of the board testified at length (R. 9, 33, 52, 78).

The report of the board and the testimony of the members disclosed a history of accused in substantial particulars as follows: Accused is 38 years of age. He attended high school for two years. He has worked at various occupations and has invented or attempted to invent certain mechanical devices. In 1926 he was convicted in a civil court of the larceny of an airplane which he attempted to operate and received a suspended sentence. In 1929 the suspension was removed and he was imprisoned for about 10 months. In 1931 he had difficulties with his father and "choked and pinched" his mother in apparent retaliation against his father. Following expressions of fear by his mother, he was committed to a state hospital with an accompanying diagnosis of "manic depressive psychosis, manic type because of his physical assaults upon his mother and younger sister". Following early parole from the hospital he was returned thereto, during the same year, because of complaints by the mother that he had "reverted to his old tactics of abusing her by pinching her". In May, 1933, he was discharged from the custody of the hospital with a diagnosis of "manic depressive psychosis, possibly epileptic psychosis". In 1937 and 1938 he was twice convicted by civil courts of larceny and served sentences to confinement.

Two members of the board, Major James S. Scarborough, Medical Corps, and Captain Martin L. Towler, Medical Corps, reached findings respecting accused as follows:

"1.) Diagnosis: CONSTITUTIONAL PSYCHOPATHIC STATE, criminalism and without psychosis. L.C.D.— No E.P.T.I.

"2.) That the prisoner was sane at the time of the commission of the crimes of which he is charged and is sane at the present time.

"3.) That the prisoner is capable of distinguishing between right and wrong and can refrain from doing wrong.

"4.) That the prisoner is fully capable of understanding the nature and significance of his trial, and with the aid of counsel can assist in conducting his own defense" (Ex. 1).

Each testified to the same effect (R. 33, 34, 53). In reference to the possible existence of dementia praecox each of these officers testified that in his opinion accused was not suffering from any mental ailment which could be so classified (R. 36, 55). Major Scarborough testified that accused was emotionally unstable -

> "it is impossible to depend upon him. He is emotionally unstable all through his history, even since as far back as his early life he had many conflicts with civilian authorities" (R. 34).

He also testified:

> "The taking of the plane without permission was an impulsive act. Through his life he was often in conflict with civilian authorities. For instance, Seattle, Washington, for stealing things there. His present crime was an impulsive crime" (R. 35).

Witness did not find any delusions, hallucinations or "ideas of influence" in accused. He appeared to have "insight" without deterioration, although his judgment was defective. His memory was good. Witness found in accused no mental defects of a degree which would indicate dementia praecox, which he described as:

> "a mental illness. In most cases there is a deterioration and discrepancies between thinking and feeling and acting. The majority do have delusions, hallucinations, and are disinterested. Insight is lacking and judgment is defective. Memory is faulty, usually the more remote memory. These are the main things I would look for" (R. 38).

Both witnesses testified that they were convinced that accused had the mental ability to refrain from doing wrong (R. 37, 58). Captain Towler testified in this connection:

> "His history points to the fact that when this individual is under supervision, he can and does and has under repeated previous circumstances, always refrained from doing wrong when it was to his distinct advantage to act in that way" (R. 58).

The third member of the board, Major Henry W. Brosin, Medical Corps, found that accused was suffering from dementia praecox, unqualified type,

and

> "that although 'intellectually' he appears to understand the difference between right and wrong, he does not have the ability to refrain from doing wrong due to his psychosis. The prisoner is not competent to assist his counsel in his own defense due to his psychosis" (Ex. 1).

This member found, and testified, that his conclusions were based on:

> "The well verified blunting and inadequacy of emotional reactions; the inappropriateness of the emotional reactions throughout the period of stress and imprisonment; the disassociation between affect and content; these above findings together with the intellectual failure in the sphere of abstract thinking are often called the primary signs of Dementia Praecox; the long history of egocentricity and selfish unconcern for the rights and feelings of others; the long history of queerness, the suspicion of being a 'peeping Tom', the admission of fellatio, the long history of being a transient, unsuccessful 'inventor' with mild grandiosity, who apparently made a marginal social adjustment between incarcerations; his unwarranted egocentric assumption of intellectual superiority in many fields; his mark elaboration of the obvious; his exaggerated attention to trifles while losing sight of large issues of immediate vital concern; his hyperirritability and violence about apparent trifles; the preservation of intellectual abilities concerning concrete affairs contrasting strangely with his definite failure in the fields of abstract thinking, probably on a congenital or very slowly deteriorating basis or both; the history of petty criminalism up to the time of this crime illustrates extremely poor judgment; history of promiscuity with no ability to make even relatively stable choice; extreme jealously leading to life-threatening violence; long history of violence against women beginning with his mother, sister, and wife; paranoid trends exhibited in the prisoner's explanation of the Larson affair and charges that a newspaper man, and others, attempted to steal his inventions; brutal, pathological and essential 'purposelessness' of the crime itself; the history

> of commitment to St Peter State Hospital, Minnesota, and return there for psychotic acts; the repeated evidence of poor fragmentary judgment and his lack of insight into the essentially pathological nature of his acts" (R. 10, 11).

In the course of Major Brosin's testimony there was read in evidence what purported to be a statement by Dr. Smiley Blanton, M.D., dated May 28, 1926, reciting examination and observation of accused, referring to the incident of the theft of the airplane and otherwise to his early history substantially as appears above, and recording a diagnosis of

> "pre-dementia praecox or hypomanic depressive—all facts point to the fact that patient is a borderline insanity, or real insanity case" (R. 22-25).

Following consideration by the court of the report of the board of medical officers and the testimony of the members as indicated, the president of the court announced that the court,

> "all members concurring, has ruled that at the times of the commission of the several offenses charged and at the present time, the accused is not suffering from any mental disease or defect which would prevent his differentiating between right and wrong; and the court further rules that the trial proceed" (R. 100).

Immediately after the announcement was made the trial judge advocate inquired as to whether the court unanimously concurred in the findings of the majority of the board. The law member thereupon stated:

> "Subject to objection of any member of the court, the law member rules that the court does concur with the findings of the majority report of the Medical Board" (R. 100).

The trial then proceeded.

It is noted that in the announcement by the president of the court as to the court's findings of sanity and ability to distinguish between right and wrong, it was not expressly stated that the court found that accused was mentally capable of adhering to the right. The subsequent

ruling by the law member that the court concurred in the findings of the majority of the board was comprehensive and embraced the specific finding that accused "can refrain from doing wrong". This ruling doubtless expressed the unanimous conclusion of the court. In any event, all issues relating to sanity were interlocutory questions (par. 75a, M.C.M.) properly determinable by the law member (A.W. 31; par. 51, M.C.M.). No error appears.

6. After preliminary examination of the record of trial in this office accused was examined and observed as to his mental condition by a second board of medical officers convened at Brooke General Hospital, Fort Sam Houston, Texas. Observation extended from December 11, 1942, to January 16, 1943. This board, composed of Lieutenant Colonel James B. Polka and Majors E. J. Palmer and P. C. Talkington, all Medical Corps, found as follows:

> "(a) Diagnosis: Constitutional Psychopathic State; Criminalism (without psychosis).
>
> "(b) That there are no features of abnormality which render him not susceptible to ordinary human motives or influence the normal control of his actions.
>
> "(c) That he does have the proper appreciation of right and wrong and is capable of adhering to the right and refraining from the wrong.
>
> "(d) That he was sane at the time of commission of the alleged wrongful act.
>
> "(e) That he has no disqualifying physical disability which would warrant discharge from the military service under the provisions of Section II, AR 615-360".

The clinical record attached to the proceedings of the board contains the following summarization:

> "This is a rather self-satisfied type of individual who is anxious to please and cooperate with his examiners. His attitude and general behavior is within limits of normal on the ward. Attention is easily gained, maintained and directed. Stream of mental activity, flow of thought and psychomotor activity are well within limits of normal. Spontaneity and initiative are unimpaired. Emotional reaction is found to be in keeping with the content of thought. There is no evidence of delusions, hallucinations, illusions, compulsions or phobias. Sleep is unimpaired except by occasional dreams. Sensorium is clear in all

modalities. The patient is oriented as to time, place and person and has a good grasp on his surroundings. All tests for memory, retention, immediate recall, counting, calculation, reading, writing and school and general knowledge are well performed. Thinking capacity is unimpaired. He is of a bright normal intellectual level and has a good insight into his present situation.

"Pasthistory is that of a nomadic type of existence, inability to profit by experience, repeated anti-social acts, lack of respect for the personal and property rights of others with most of his aggressive tendencies directed against women instead of men.

"In the opinion of the examiners, there are no features of abnormality which render him not susceptible to ordinary human motives and influence the normal control of his actions. He does have the proper appreciation of right and wrong, has a normal control over his actions and is capable of adhering to the right and refraining from the wrong".

In consideration of the case this board had before it copies of the proceedings and findings of the earlier board and of documentary evidence considered by that board, a copy of Major Brosin's findings, and a statement of salient facts concerning the offenses by accused involved in the present record of trial.

7. Upon the whole record the Board of Review entertains no doubt th accused was mentally responsible for his offenses and was and is sane.

8. The charge sheet shows that the accused is 38 years of age. He served in the Regular Army from April 1, 1927, to April 15, 1927. He was inducted into the military service on July 8, 1942.

9. The court was legally constituted and had jurisdiction of the person and offenses involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of violation of Article of War 92.

[signature], Judge Advocate.

Andrew Scopp, Jr., Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., [illegible] 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private George S. Knapp (37288675), 95th Signal Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused, a white soldier 38 years of age, attacked a female child eight years of age, choked her into unconsciousness, tore the tissues separating her vagina and anus, raped her and left her in a field where she was found, still unconscious, on the following day. Soon after she was found the child died as a result of the assaults and the shocks attendant thereon. Accused stole an automobile in an effort to escape detection. He was sentenced to death by hanging. The issue of insanity was raised, but the court after consideration of the report of a board of three medical officers two of whom found accused sane and one of whom expressed the opinion that accused was insane, found accused sane and mentally responsible for his offenses. A second board of three medical officers convened following the trial has unanimously found accused sane and mentally responsible for his acts. I recommend that the sentence to death be confirmed and that it be carried into execution at a time and place to be designated by the reviewing authority.

3. Consideration has been given to the attached letter, dated November 18, 1942, from Mrs. Grace Burton, 1520 Westlake Avenue, Seattle, Washington, addressed to the President, referred to this office by The Adjutant General.

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

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-Brooke General Hosp. medical board proceedings.

(Sentence confirmed. G.C.M.O. 6, 18 Feb 1943)

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

SPJGK
CM 227459

DEC 5 1942

UNITED STATES v. Private CHARLES C. WICKLUND (37141129), Medical Detachment, 6th Armored Infantry, Fort Dix, New Jersey.	SECOND SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Fort Dix, New Jersey, July 15, 1942. Dishonorable discharge and confinement for three (3) years (suspended).

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Pvt Charles C Wicklund, Med. Det., 6th Armored Infantry, attached Task Force Replacement Pool, Station Complement, NYPE, Fort Dix, N.J. did, at Fort Dix, N.J. on or about May 19, 1942, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination, and did remain absent in desertion until he surrendered himself at Fort Dix, N.J. on or about June 7, 1942.

He pleaded guilty to the Specification of the Charge except the words,

> "'desert', 'by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination', and 'in desertion'",

substituting therefor, respectively, the words, "'absent himself without leave from'" and "'without leave'", to the excepted words not guilty, to the substituted words guilty, and not guilty to the Charge but guilty of violation of Article of War 61. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years. The reviewing authority approved the sentence and suspended the execution thereof. The proceedings were published in General Court-Martial Order No. 719, Headquarters Second Service Command, Services of Supply, November 6, 1942.

3. The evidence shows that accused's organization arrived at Fort Dix, New Jersey, on April 7, 1942, and was placed in a staging area and given a task force number. It left Fort Dix May 30, 1942, and embarked and sailed from the New York Port of Embarkation, Brooklyn, New York, on May 31, 1942 (R. 9). Accused absented himself without leave from his organization on May 19, 1942 (R. 8; Ex. 1), and remained absent until he surrendered at Fort Dix in uniform on June 7, 1942 (R. 9).

The prosecution offered in evidence a "signature of accused stating that charges were served upon him on a certain date", for the purpose of "comparison of signatures only" (R. 10). The document was received in evidence as Prosecution Exhibit 2 (R. 10). A witness, called as a handwriting expert by the prosecution, upon being shown a certain document, testified that the document was signed by the same person who signed Prosecution Exhibit 2 (R. 10-11). The prosecution then stated:

> "May it please the court, the prosecution desires to offer in evidence this statement signed allegedly by the accused stating that he knew what would happen to him if he went absent without leave" (R. 11).

This second document was received in evidence as Prosecution Exhibit 3 (R. 12). Neither Prosecution Exhibit 2 nor Prosecution Exhibit 3 is attached to the record of trial. Correspondence accompanying the record of trial indicates that they are not now available.

Accused testified that he was born December 7, 1912. He never intended to desert or to shirk important service. During his

absence he visited his mother in Macey, Nebraska (R. 15) - "she is all I have. That is the longest I've ever been away from home". He did not know that his organization was shortly to move, and would not have absented himself had he known of this fact (R. 15, 16). He knew he was a member of a task force but he did not realize the significance of it (R. 16). He knew that a task force may be in a staging area. Asked the definition of a staging area accused stated,

> "that is the place they put you when you get sick or where the men come when they are being transferred. Men that are sent to the hospital or AWOL" (R. 17).

He did not sign a safe arrival card. Although he realized that he was going to leave he did not know when the organization would depart. Accused had unsuccessfully attempted to get a pass. While home, he wore his uniform at all times and was not employed (R. 17).

4. The evidence shows that on the date alleged accused absented himself without leave from his organization which had previously been placed in a staging area and assigned a task force number. He remained absent until a week after his organization had departed for overseas. Embarkation for overseas was, of course, important service. Accused testified that he knew that his organization was to leave Fort Dix but denied that he knew that movement of the organization was imminent or knew that his absence would avoid the movement.

In CM 226374, Collins, it was stated that,

> "Intention by a soldier to shirk a specific service may of course be proved by circumstantial evidence, that is, may be inferred from other facts. It is a matter of common knowledge, of which judicial notice may be taken, that while an organization is in a staging area certain routine dispositions are made preparatory to departure overseas. Accused's company having been in the staging area for a considerable period it may be inferred, therefore, that by such routine dispositions knowledge of some prospective overseas movement was brought home to accused. Judicial notice could not be taken, nor can it be inferred from the facts in evidence, however, that accused was informed of the normally secret detailed plans and orders for the movement. There is nothing in the facts of which judicial notice may be taken or in the evidence from which it may

> reasonably be inferred that accused knew that the movement of his company was imminent or that his absence would result in avoidance of the movement".

The principles of law so stated appear to be applicable in the present case.

Assuming, however, that the record of trial contains some evidence of an intent to shirk important service as alleged, the record is fatally defective with respect to proof of such intent in that it does not contain Prosecution Exhibit 3 which purported to be a written statement by accused relative to his knowledge of the prospective movement of his organization and to the effect of his absence. The exact contents of this statement by accused are not known to the Board of Review and cannot be ascertained but there is contained in the staff judge advocate's report upon the charges, attached to the record of trial, a reference to a written statement by accused,

> "to the effect that he has been informed that his organization will shortly leave for embarkation, which constitutes 'hazardous duty', or 'important service'; that absence without leave would constitute desertion, etc. ".

If, in fact, as appears probable, the missing exhibit contained admissions of this kind the exhibit was a vital and material part of the record of trial, for it embodied substantial evidence that accused intended to shirk the service of embarkation. In any case, Article of War 33 and Paragraph 85 b of the Manual for Courts-Martial require that each record of trial by general court-martial contain a complete history of the proceedings in open court. The following remarks by the Board of Review in a case in which, through omission from the record of a deposition received in evidence, there had not been a full compliance with this requirement, are pertinent and controlling here:

> "The sentence to dishonorable discharge having been suspended, it was not necessary, prior to a finding by the office of The Judge Advocate General of its legal insufficiency, that the record of trial be passed upon by the Board of Review and The Judge Advocate General, but under the 6th subparagraph of Article of War 50½, examination of the record in the office of The Judge Advocate General was required for the purpose of determining, on appellate review, its legal sufficiency to support the findings and sentence.

> It is evident that this statutory review could not be performed in this case with respect to the convictions of the offenses involved in Charges I and II and their specifications for the reason that there is no complete record of trial upon these charges and specifications within the contemplation of either Article of War 33 or Article of War 50½. * * * Through no fault of his, accused has been, by the deficiency of the record, deprived of the right conferred by law to have the complete proceedings at his trial upon these charges and specifications reviewed in an appellate capacity. This right is of a highly substantial character, and it must be concluded that its denial to him is fatally injurious within the contemplation of the 37th Article of War. In cases in which records of trial were incomplete in the sense that it appeared that they had been in part prepared from unauthorized sources, it has been held by the Board of Review, with the concurrence of The Judge Advocate General, that the records were legally insufficient to support the findings and sentences adjudged (C.M. 156085, Mayo; 156084, Alsup). It has been held by state courts in cases in which there was not an automatic appellate review as is provided for by Article of War 50½, that if, by reason of the loss of an important part of a record, a defendant is unable through no fault of his to perfect his appeal, the judgment will be reversed (State vs. McCarver, 20 S.W. (Mo.) 1058)" (CM 192451, Hajek).

The record of trial is complete with respect to the offense of absence without leave, included in the offense of desertion charged.

The record is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of absence without leave between the dates alleged, in violation of Article of War 61, and only so much of the sentence as is authorized by paragraph 104 c of the Manual for Courts-Martial for the period of absence involved.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization and did remain absent without leave until he surrendered at the place and time alleged, in

violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for 57 days and forfeiture of $33.33 per month for a like period.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Charles C. Wicklund (37141129), Medical Detachment, 6th Armored Infantry, Fort Dix, New Jersey.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of the Charge and its Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave at the place and time alleged, terminated by surrender at the place and time alleged, in violation of Article of War 61, that so much of the sentence be vacated as is in excess of confinement at hard labor for 57 days and forfeiture of $33.33 per month for a like period, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(So much of the findings of guilty of the Charge and Specification is vacated as involves findings of guilty of an offense by accused other than absence without leave at the place and time alleged, terminated by surrender at the place and time alleged in violation of Article of War 61, and so much of the sentence is vacated as is in excess of confinement at hard labor for 57 days and forfeiture of $33.33 per month for a like period. G.C.M.O. 127, 28 Dec 1942)

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

SPJGH
CM ~~275545~~
227545

DEC 24 1942

UNITED STATES	)	76th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, October 16, and November 5, 1942. Dismissal, total forfeitures, and confinement for one (1) year.
Second Lieutenant PAUL L. FOLK (0-1283748), 417th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1. (Not Guilty).

Specification 2. In that 2nd Lt. Paul L. Folk, 417th Infantry, did, at Fort Geo. G. Meade, Maryland, on or about 5 September, 1942, attempt tp procure 2nd Lt. Gardner B. Cullinan, 417th Infantry, to utter a false official statement, by attempting to induce him, the said Lt. Cullinan, to state in substance to Major Charles G. Groseclose, 417th Infantry, who was at that time the Commanding Officer of the said Lt. Cullinan, and acting in his official capacity as such, that the said Lt. Folk had repaid to him, the said Lt. Cullinan, a loan of $70.00, and that he, the said Lt. Folk, was not then indebted to the said Lt. Cullinan, which statement was false, was a material matter, and was known by the said Lt. Folk and the said Lt. Cullinan to be false.

Specification 3. In that 2nd Lt. Paul L. Folk, 417th Infantry, being indebted to 2nd Lt. Gardner B. Cullinan, 417th Infantry, in the sum of $70.00, which amount became due and payable on or about August 10, 1942, did, at Fort Geo. G. Meade, Maryland, from about August 10, 1942 to Sept. 10, 1942, dishonorably fail and neglect to pay said debt.

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

Specification. In that 2nd Lt. Paul L. Folk, 417th Infantry, did, at Ft. Geo. G. Meade, Md., on or about 31 July, 1942, borrow from Corp. Sidney S. Rosen, Co. K, 417th Infantry, an enlisted man whom he, the said Lt. Folk, had known but a short time and then only in the course of official intercourse between officer and enlisted man, the sum of $10.00, to the prejudice of good order and military discipline.

Specification 2. In that 2nd Lt. Paul L. Folk, 417th Infantry, being indebted to Corp. Sidney S. Rosen, Co. K, 417th Infantry, in the sum of $10.00, which amount became due and payable on or about 31 July, 1942, did, at Fort Geo. G. Meade, Maryland, from about 31 July, 1942 to 10 Sept., 1942, dishonorably fail and neglect to pay said debt.

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

Specification 1. In that 2nd Lieutenant Paul L. Folk, 417th Infantry, did, at Fort George G. Meade, Maryland, on or about July 18, 1942, feloniously take, steal and carry away $25.00, lawful money of the United States, the property of 2nd Lieutenant Gardner B. Cullinan, 417th Infantry.

The accused pleaded guilty to Specification 1, Charge II, and not guilty to all Charges and to all other Specifications thereunder. He was found not guilty of Specification 1, Charge I, and of Specification 2, Additional Charge; guilty of all other Specifications and of all Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The

reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that during the time mentioned in the Specification the accused and Second Lieutenant Gardner B. Cullinan were quartered in the Third Battalion Officers' Barracks, 417th Infantry. During the month of June 1942, the accused procured two loans from Lieutenant Cullinan, totaling a sum of $50. The first loan was in the sum of $20, and the second loan in the sum of $30. The $30 loan consisted in the lending of three ten-dollar bills to the accused. Thereafter, on August 9, the accused requested an additional loan from Lieutenant Cullinan, but Lieutenant Cullinan declined to make the loan and reminded the accused that he had already borrowed $50. The accused thereupon requested Lieutenant Cullinan to cash a $20 check for him. Lieutenant Cullinan agreed to do so, but the accused then suggested that Lieutenant Cullinan might have difficulty in cashing the check, and suggested that if Lieutenant Cullinan would give him $20 he would cash the check and give Lieutenant Cullinan the $20 the next day. Lieutenant Cullinan agreed to this suggestion and handed the accused $20. The accused, however, failed in his promise to refund the $20 on the following day and despite repeated requests has failed to repay both the $50 loan and the additional $20 procured in the manner above described (R. 8-9).

Subsequent to the above events, the accused approached Lieutenant Cullinan and told him that he was "in a peck of trouble", and requested him to sign a statement that the account which the accused owed him had been paid. The accused at once modified his request by suggesting that the statement be worded so as to provide that the account "had been settled". Lieutenant Cullinan declined, however, to make the requested statement, and told the accused that if he were asked about the transaction between them, he would tell the truth, but otherwise he would say nothing (R. 9, 14, 15).

On July 18, 1942, when Lieutenant Cullinan was ascending the stairs of his barracks, he heard someone in his room. Lieutenant Cullinan then proceeded to peek through a crack in the wall, observed the accused with Lieutenant Cullinan's pocketbook in his hand, and saw him take some bills from it. Lieutenant Cullinan testified that he stood for a time in amazement. After observing the conduct of the accused, Lieutenant Cullinan went back downstairs with out entering his room because, as he testified, he was afraid that if he entered the room he would lose his temper and attack the accused, and thus get in trouble. Shortly thereafter, however, Lieutenant Cullinan returned to his room and found that his purse, which only a short time before had contained $252, contained only $227. Lieutenant Cullinan proceeded to announce

throughout the barracks, and in the presence of accused, that someone had stolen $25 from his pocketbook. Lieutenant Cullinan did not, however, personally accuse Lieutenant Folk of the theft until about September 10 (R. 9-11, 17-18).

During the investigation of the charges against the accused, the accused stated that he had gone in Lieutenant Cullinan's room on the occasion concerning which Lieutenant Cullinan claimed to have watched him through the crack, and that he had handled the Lieutenant's purse and looked at the money therein, but that he had taken none of it. He further stated that his purpose in doing this was to see how much the lieutenant had in order that he might know "how much to touch him for" (R. 26-38).

Concerning Specifications 1 and 2, Charge II, the evidence shows that on or about July 1, 1942, the accused approached Sergeant Sidney S. Rosen and told him that he was having difficulty in cashing a check, and requested a loan of some money. Thereupon, Sergeant Rosen lent the accused $10, and the accused promised to repay the loan as soon as he could cash a check. Sergeant Rosen never requested a repayment of the loan, and the loan had not been paid on the date of the trial of this case (R. 36-37).

4. The accused testified that on the occasion when he was alleged to have attempted to procure a statement from Lieutenant Cullinan, that he had merely suggested to the latter that they come to an understanding as to when the money owed the lieutenant was to be paid, and that he wanted the lieutenant to make a statement that some arrangement had been made. The accused denied that he had taken $25 from Lieutenant Cullinan's purse, but testified that he had merely looked in the purse to see if the lieutenant had money to lend him. The accused testified further that the loan of the $50 from Lieutenant Cullinan was procured in three separate amounts of $15, $10, and $25. The accused stated that his relationship with Lieutenant Cullinan was entirely friendly. The accused testified that he had exhibited to Lieutenant Cullinan a check for $79.99 which he had made out in payment of his post exchange bill, but he did not promise, and had not promised, to pay his indebtedness to Lieutenant Cullinan at any particular time. Accused admitted that he had never repaid to Lieutenant Cullinan the $70 which he had borrowed from him, or the loan of $10 from Sergeant Rosen. He asserted, however, that he had never made any promise concerning the loan to Sergeant Rosen (R. 41-47).

5. Specification 2, Charge I, alleges that the accused did attempt to procure Lieutenant Cullinan to utter a false statement by attempting

to induce him "* * * to state in substance to Major Charles G. Groseclose * * *", his commanding officer, that the accused had repaid to Lieutenant Cullinan a loan of $70. The evidence shows merely that the accused requested Lieutenant Cullinan to sign a statement to the effect that the amount which the accused owed Lieutenant Cullinan was settled. The accused, in making this request of Lieutenant Cullinan, told him that he was "in a peck of trouble". The evidence, however, does not show that the requested statement was to be used as an official statement, or that it was to be addressed to Major Groseclose or that it was to be used to deceive Major Groseclose or any other person. The evidence, therefore, fails to sustain the finding of guilty under this Specification.

6. Specification 3, Charge I, alleges that the accused, being indebted to Lieutenant Cullinan in the sum of $70, which indebtedness became due and payable on or about August 10, 1942, did "* * * dishonorably fail and neglect to pay said debt". The evidence clearly establishes the fact that the accused borrowed $50 from Lieutenant Cullinan during the month of June 1942. The evidence further shows that, on August 9, the accused attempted to borrow an additional $20 from Lieutenant Cullinan, and that when Lieutenant Cullinan refused to lend the money, the accused, under the pretext of getting Lieutenant Cullinan to cash a check, tricked Lieutenant Cullinan into lending him the amount originally requested, upon the promise that it would be repaid the following morning. Although the evidence does not show when the fifty-dollar loan was to be repaid, the clear implication from the circumstances surrounding the transaction and the request for its repayment, indicate that it was understood by both the accused and Lieutenant Cullinan that the loan was for a short period only, and the court was clearly justified in drawing the inference that the loan was past due on August 10, 1942. In view of the deceitful manner in which the original loan of $50 was increased to $70, the conclusion must be drawn that the conduct of the accused in not repaying the loan must be considered as dishonorable conduct, unbecoming to an officer and gentleman in contemplation of the 95th Article of War (Winthrop's Military Law and Precedents, Reprint p. 715; CM 221833, Turner, and cases therein cited).

7. Specification 1, Charge II, alleges that the accused did, on or about July 31, 1942, borrow $10 from Corporal Sidney S. Rosen, an enlisted man of his organization, to the prejudice of good order and military discipline. Specification 2, Charge II, alleges that accused "* * * did, * * * dishonorably fail and neglect to pay said debt". The evidence shows that the transaction occurred in the manner alleged, and that the accused was the platoon leader of the platoon in which the enlisted man

was serving at the time the loan was made. The action of the accused in so obligating himself to a non-commissioned officer of his own organization, was conduct which was clearly prejudicial to good order and military discipline, within the meaning of the 96th Article of War (CM 221833, Turner). The accused promised the enlisted man that the loan would be repaid as soon as he, the accused, could cash a check, and his failure to fulfill that promise shows that it was made with a deceitful purpose. Such conduct clearly violated the 96th Article of War (CM 221833, Turner).

8. Specification 1, Additional Charge, alleges that the accused did "* * * feloniously take, steal and carry away $25.00, * * *" the property of Lieutenant Cullinan. The uncontradicted testimony shows that the accused entered the room of Lieutenant Cullinan during his absence and examined the contents of Lieutenant Cullinan's purse. In addition, the evidence shows beyond a reasonable doubt that the accused took $25 from the purse. The testimony of the accused that he only examined the contents of the purse for the purpose of determining if Lieutenant Cullinan had money to lend him, is unworthy of belief. Every element of the offense alleged is clearly established (M.C.M., 1928, par.149 g).

9. The accused is 22 years of age. The records of The Adjutant General show his service as follows: Inducted into Federal service as enlisted man, National Guard, October 15, 1940; appointed second lieutenant, Army of the United States, and extended active duty, May 15, 1942.

10. The court was legally constituted. 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 finding of guilty of Specification 2, Charge I; legally sufficient to support the findings of guilty of Charge I and Specification 3 thereunder, Charge II and Specifications 1 and 2 thereunder, and the Additional Charge and Specification 1 thereunder; and legally sufficient to support the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War, and is mandatory upon conviction of the 95th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 227545

1st Ind.

War Department, J.A.G.O., JAN 2 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Paul L. Folk (0-1283748), 417th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge I, legally sufficient to support all other findings of guilty, legally sufficient to support the sentence, and to warrant confirmation of the sentence.

In view of the moral turpitude involved in stealing money from a brother officer, confinement at hard labor for one year is deemed appropriate in addition to dismissal and total forfeitures. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for one year be confirmed and ordered executed.

3. Inclosed herewith are the 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 that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Finding of guilty of Specification 2, Charge I, disapproved. Sentence confirmed. G.C.M.O. 28, 8 Mar 1943)

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

SPJGK
CM 227546

DEC 3 1942

UNITED STATES	)	101ST AIRBORNE DIVISION
	)	
v.	)	Trial by G. C. M., convened at Fort Bragg, North Carolina, October 26, 1942. Dismissal and confinement for five (5) years. Disciplinary Barracks.
	)	
Second Lieutenant DELANO T. SHIRLEY (O-1283151), 502nd Parachute Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that 2nd Lieutenant DELANO T. SHIRLEY, 502nd Parachute Infantry, did, at Fort Benning, Georgia, on or about July 6, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at the Marine Corps Base, San Diego, California, on or about July 31, 1942.

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

Specification: In that 2nd Lieutenant DELANO T. SHIRLEY, 502nd Parachute Infantry, did, at New Orleans, Louisiana, on or about July 15, 1942, by willfully concealing the fact that he was then a 2nd Lieutenant in the Army of the United States, 502nd Parachute Infantry and stationed at Fort Benning, Georgia, procure himself to be enlisted in the military service of the United States by enlisting in the United States Marine Corps.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification. He was found guilty of the Specification, Charge II, except the words, "military service", substituting therefor the words, "naval service", of the excepted words not guilty, of the substituted words guilty, and guilty of Charge II. 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 but reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused absented himself without leave from his organization, the 502nd Parachute Infantry, at Fort Benning, Georgia, on July 6, 1942 (Ex. A), and remained absent until returned to Fort Benning, in arrest, on September 17, 1942 (Ex. B). He enlisted in the Marine Corps at New Orleans, Louisiana, on July 15, 1942, under the name of Delano Thaddeus Shirley, stating in his application for enlistment that he had never served in or deserted from the Army (R. 24, 25; Exs. D, E). An entry from the morning report of his organization at Fort Benning reciting his confinement at the Marine Corps Base at San Diego, California, on July 31, 1942, and his confinement at Fort Rosecrans, California, on the same day, was received in evidence upon the statement of the defense that it had no objection thereto (R. 7; Ex. C). It was stipulated that accused was apprehended at Fort Rosecrans (Ex. F), and that he had not been discharged from his commission as an officer of the Army (Ex. G).

Accused testified that on July 4, 1942, after some drinking, he went to a night club in Columbus, Georgia, and did not recall leaving (R. 20, 21). The following morning he drank rum from about 9 o'clock on, went to Columbus and "drifted to New Orleans, Louisiana". He did not recall how he went to Columbus, and had no recollection of buying a ticket to New Orleans or of leaving Columbus. He wore a khaki uniform and jump boots, and had no other clothes (R. 22). He drank heavily in New Orleans and stayed at a hotel but did not recall its name or the fact of registering there. He stated that he had no intention of leaving Columbus to enlist in the Marine Corps, did not know why he went to New Orleans and did not realize he was en route to that city. When asked what he did about clothes in New Orleans, he stated that he did not recall but that he "must have bought some"

(R. 23,27). He had no recollection of events from July 4 until he enlisted in the Marine Corps on July 15. He was not rational and did not remember "very much of the enlisting" on July 15 or of his physical examination at that time (R. 24, 28, 29). He did not distinctly recall taking the oath of enlistment but remembered that it was administered by an officer (R. 33). He was sent by train with other recruits to San Diego and drank rather heavily en route (R. 24). The second day on the train he was "fairly well sober", realized that he had deserted and had enlisted in the Marine Corps. He did not know what to do but upon arriving in San Diego about two days later asked the sergeant in charge as to the possibility of sending a telegram. He was told that he probably could not send one while in San Diego (R. 25). He thought of surrendering to the military authorities but "it seemed like a bad idea" and he postponed taking any action (R. 27). He was in civilian clothes when he enlisted in the Marine Corps and did not have his Army uniform with him at the time (R. 29, 30). He kept his Army uniform rolled up inconspicuously by his bed in the Marine barracks at San Diego (R. 31, 32).

Second Lieutenant Francis Rainey, 502nd Parachute Infantry, a witness for the defense, testified that he saw accused at 2 a.m., July 5, 1942, in a night club at Columbus, Georgia. In witness' opinion accused was then under the influence of liquor. He borrowed $10 from accused (R. 9). First Lieutenant Bernard J. McKearney, 502nd Parachute Infantry, testified that he saw accused at the night club at about 3 a.m., July 5. Accused was "pretty intoxicated" (R. 11). The following morning accused was "still a little bit groggy". Witness borrowed $20 from accused (R. 12). First Lieutenant Leo Denny, 502nd Parachute Infantry, roommate of accused, testified that accused appeared to be very much satisfied with his work, and had stated to other officers that he believed there was nothing dangerous in parachute jumping and that therefore he was not afraid (R. 13). Accused was not in the habit of drinking so as to impair his usefulness. He was very conscientious in his work, was proud of being a parachutist, and was an all around good soldier (R. 14). First Lieutenant John D. Hanlon, 502nd Parachute Infantry, platoon leader of accused's company, testified that after observing accused he requested that accused be made witness' assistant platoon leader. Accused was a capable officer. Witness would give him an efficiency rating of excellent (R. 15). First Lieutenant James J. Hatch, 502nd Parachute Infantry, accused's company commander, testified that accused performed his duties capably and that he was well dressed, neat and well liked by

the men. He would rate accused's efficiency as excellent (R. 6, 16). Captain Richard Manning, 502nd Parachute Infantry, commander of the company to which accused was assigned upon his return from San Diego, testified that accused had been in arrest in quarters since that time, and that he had been attending drill and assisting in instruction. Accused had been very efficient (R. 17). Lieutenant Colonel Ducat McEntee, 502nd Parachute Infantry, who had been commanding officer of accused's battalion, testified that accused had done excellent work in connection with a demonstration parachute jump for a class of general officers, for which demonstration several commendations were received (R. 18, 19). Accused was a "very fine shot" and an excellent coach. He was punctilious, diligent, and was a "very superior officer" (R. 19).

Major David A. DeArmond, 504th Parachute Infantry, testified for the defense that he commanded the company in which accused was formerly a sergeant. He was promoted to platoon sergeant and witness recommended him for officers' candidate school on the basis of leadership and sincerity. He was very well qualified as a weapons instructor (R. 34, 35). On one occasion witness selected accused to assist at a battalion dance as accused "had a clear cut record for being a man who used liquor sparingly and he was never seen intoxicated" (R. 35).

4. The uncontradicted evidence shows that at the place and time alleged in the Specification, Charge I, accused absented himself without leave from his organization and remained absent beyond the alleged date of his apprehension. He was apprehended, as alleged. The date of apprehension is not shown except by hearsay remarks contained in the entry in the morning report of his organization, but this date is immaterial in view of the circumstances of the case. During his absence accused fraudulently procured his enlistment in the Marine Corps by concealing his status as an officer of the Army, as alleged in the Specification, Charge II. Although the provisions of Article of War 28 are not expressly applicable to officers who may enlist without discharge, the circumstances of this case, including accused's enlistment in another armed service, raise the inescapable inference that accused intended to quit his place of service with the Army. Desertion in violation of Article of War 58 is thus established. The act of accused in fraudulently procuring his enlistment in the Marine Corps was a disorder prejudicial to good order and military discipline within the purview of Article of War 96.

Accused contended that he was so drunk during his absence that he was not rational and did not clearly recall all of what had

occurred. His testimony in this regard was self-serving and, in view of the duration of his absence, the distances traveled and his apparently rational acts in connection with his application for enlistment, it would be unreasonable to conclude that he was incapable of entertaining the specific intent involved in his desertion and wrongful enlistment.

5. Three of the eight members of the court recommended clemency "in the form of suspension of so much of the sentence as pertains to confinement at hard labor, because of the excellent record of 2nd Lt. Shirley".

6. War Department records show that accused is 24 years of age. He attended high school for two years. He served as an enlisted man from September 10, 1936, to December 9, 1938, and was discharged as a private, character excellent. On December 9, 1938, he enlisted in the Regular Army Reserve and was honorably discharged April 27, 1939, to reenlist in the Regular Army. He served in the Regular Army from April 27, 1939, to April 30, 1942, on which date he was discharged as a sergeant and accepted appointment as a second lieutenant, Army of the United States.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violations of Articles of War 58 and 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 7 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Delano T. Shirley (0-1283151), 502nd Parachute Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused deserted from his organization, the 502nd Parachute Infantry, on July 6, 1942, and fraudulently enlisted in the Marine Corps on July 15, 1942. He was apprehended about July 31, 1942. He contended that he was drunk when he deserted and enlisted. He has an excellent record as an enlisted man and officer and I believe he is capable of further valuable service. Accordingly I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and that execution of the dismissal be suspended during the pleasure of the President.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence, to remit the confinement and forfeitures, and to suspend execution of the dismissal during the pleasure of the President, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 13, 1 Mar 1943)

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

SPJGH
CM 227629

NOV 21 1942

N.D.

UNITED STATES	)	FOURTH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Camp Wheeler, Georgia, August 24, 1942. Dishonorable discharge and confinement for five (5) years. Federal Reformatory, Chillicothe, Ohio.
Private BOYD S. SMITH (33134662), Company A, 16th Training Battalion, Camp Wheeler, Georgia.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. The accused was found guilty of solicitation to commit sodomy (Spec. 1), of writing and delivering an obscene note (Spec. 2), and of offering $10 to conceal the fact of delivery of the obscene note (Spec. 3), all in violation of Article of War 96. He was sentenced to be dishonorable discharged, 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 fowarded the record of trial under Article of War 50½.

3. Confinement in a Federal reformatory is not authorized in this case. Paragraph 90 b, Manual for Courts-Martial, 1928, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorized confinement in a Federal reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

Penitentiary confinement is not authorized by Article of War 42 for any of the offenses of which accused was convicted. No one of the three offenses is punishable by confinement in a penitentiary for one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by law of the District of Columbia.

Solicitation to commit sodomy is closely related to the offense of attempting to commit sodomy and punishable as are attempts to commit sodomy (CM 145155, Gambrel; CM 145266, Baker). Confinement in a penitentiary is not authorized under the 42nd Article of War for attempted sodomy (CM 147074, Murphy; CM 183510; CM 192456, Ciambrone; CM 196922, Killalea).

4. There is no maximum limit of confinement stated in the Executive order for any of the three offenses of which accused was found guilty (par. 104 c, M.C.M., 1928). Specifications 1 and 2 allege in substance different aspects of the same offense and a single penalty only should be assessed for the two offenses. The penalty for sodomy, the most closely related offense to an attempt or solicitation to commit sodomy, is dishonorable discharge, total forfeitures, and confinement at hard labor for five years.

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

Pietro S. Hill Jr. Judge Advocate.

Chas. C. Cresson Judge Advocate.

Abner E. Lipscomb Judge Advocate.

SPJGH
CM 227629

1st Ind.

NOV 25 1942

War Department, J.A.G.O., - To the Commanding General, Headquarters Fourth Service Command, Atlanta, Georgia.

1. In the case of Private Boyd S. Smith (33134662), Company A, 16th Training Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, Federal correctional institution, or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution, or reformatory 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 227629).

NOV 27 1942

J.A. Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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WAR DEPARTMENT
SERVICES OF SUPPLY
J. A. G. O.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General

SPJGH
CM 227676

DEC 3 1942

UNITED STATES	9th ARMORED DIVISION
v.	Trial by G.C.M., convened at Fort Riley, Kansas, November 2, 1942. Dismissal.
First Lieutenant KERMIT E. KLINE (0-328405), Infantry.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON, and LIPSCOMB, Judge Advocates.

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

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

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

Specification: In that 1st Lieutenant Kermit E. Kline, Infantry Reserve, 14th Armored Regiment, did, at or near Becherer Filling Station Cabins, Lebanon, Illinois, on or about September 17, 1942, attempt to commit a felony, viz, larceny, by attempting to feloniously take and steal and carry away one automobile tire, of some value, the property of Sinclair Prairie Oil Company, Tulsa, Oklahoma.

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

Specification 1: In that 1st Lieutenant Kermit E. Kline, Infantry Reserve, 14th Armored Regiment, did, at or near Becherer Filling Station Cabins, Lebanon, Illinois, on or about September 17, 1942, behave himself in a manner unbecoming an officer and a gentleman by attempting to feloniously take, steal and carry away one automobile tire,

of some value, the property of Sinclair Prairie Oil Company, Tulsa, Oklahoma.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to all Specifications and Charges. He was found guilty of Charge I and the Specification thereunder, and of Charge II and Specification 1 thereunder, but not guilty of Specification 2, Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution upon the Specifications of which findings of guilty were approved, is substantially as follows.

Mr. Victor J. Becherer, the owner of a filling station and tourist camp on Route 50, near Summerfield, Illinois, at about 5 a.m. on the morning of September 18, 1942, saw a man in Army uniform with bars on his shoulders and cap, who said that he had tire trouble and asked if Mr. Becherer had a tire for sale. The car was an Oldsmobile, 1942 Illinois license number 1-425-019, with a bad bulge in one of its four tires and a blown-out spare in the trunk, but no fifth wheel. The name of accused was on a sticker on the windshield of the car and on some credentials which he showed later (Ex. A).

Mr. H. C. Denton and Mr. Glenn E. Larkin, employees of the Sinclair Prairie Oil Company spent the night of September 16-17, 1942, in a cabin at the camp of Mr. Becherer and parked their Pontiac car, which was the property of the company and equipped with its original 6.50 x 16, U.S. Royal tires. While dressing early in the morning, Mr. Denton noticed that the hub cap and the tire lugs were off one wheel. Upon going outside, they found the car jacked up, and the hub cap and all of the lugs except one from one wheel on the ground. Mr. Larkin went to get the camp manager, found him talking with a man in uniform, the accused, whose name he later learned was Kline. When he told the manager that someone had tried to take a tire, the accused said "I'm the man who tried to steal your tires". When they walked back to the car, the accused put the nuts and hub cap on the car, and picked up the jack, the wrenches, and a rim, saying "This is mine". Mr. Denton took them from his hands to take to the sheriff. They all then walked to the front of the tourist camp where the accused said "This sure has messed me up. I was going back to Kentucky. I have been having trouble with my wife and I am out of a tire". The rim painted with red stripes, which was found beside the Pontiac, matched the rims on the Oldsmobile, Illinois tag No. 1-425-019, stipulated to belong to

accused, and the Oldsmobile did not have a spare rim (R. 6-12,14-20).

Mr. Denton stated that the tire on the wheel from which the hub cap and lugs were removed had run a little over 15,000 miles and he estimated its cost as about $10 or $12 (R. 8-9).

4. For the defense, the Chief of Police, Manhattan, Kansas, testified that the accused consulted him on September 16, 1942, and asked cooperation in finding the wife of accused who had not returned home on September 11, 1942, as had been expected, from a visit in Kentucky (R. 20-21).

Captain Beverly E. Ryan, 14th Armored Regiment, and Captain Thomas B. Sheffield, Dental Corps, testified to the good reputation, character, honesty, and integrity of accused (R. 22-24).

The accused testified, in substance, that about September16, 1942, he was very much upset because his wife, who had been away, did not return on September 11th, and notified the police. Through a telephone call he was led to believe that she was in Louisville. He left about 3 p.m. for Louisville, drove continuously and had tire trouble. He stopped in front of a filling station hoping that he could get a tire repaired in the morning. He thought that he might get to Louisville sooner by getting a tire. He decided that one way of getting a tire fixed was to borrow a tire, put it on his car, and drive to somewhere where he could get his tire repaired. He did not intend to take a tire and keep it, but did "* * * proceed to start to borrow the tire". He started to remove the tire, took off some of the lug nuts, decided that he was not going to borrow the tire, and started to put the nuts back on because it would look like he was going to steal it. He did not finish putting the nuts on because he heard a noise in a cabin and did not want to be seen in such circumstances because it would be hard to explain. He went back to his car and when morning soon came, talked to the filling station man, went with the "men from Oklahoma", and thought that he should put the nuts back on. He then unjacked the car and took the jack. He explained to Mr. Larkin that he started to take the tire off, decided that it was not right, and started to put it back on. Larkin took the jack because he wanted it as evidence. Accused explained that he just wanted to get to Kentucky to find his wife but that Larkin was mad and did not care about any explanation. Accused did not have, nor had he asked, permission of anyone to borrow the tire (R. 24-27).

5. The evidence shows that accused attempted to remove and take for his own purposes, a tire from the car of the Sinclair Prairie Oil Company without the knowledge or permission of the employees who had possession of the car, notwithstanding his claim that he intended only to borrow it and drive on until he could get his tire repaired.

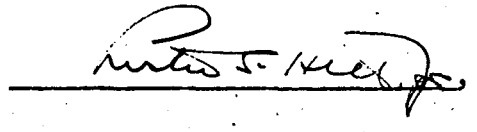
Such action on the part of accused constituted an attempt to steal the tire. His abandonment of his expressed intent to take the tire for his unauthorized use, does not constitute a defense to the offense alleged.

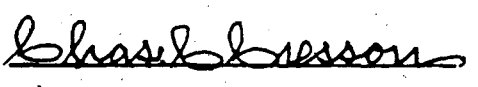
The identical offense is twice alleged, first in violation of the 96th Article of War, and then in violation of the 95th Article of War. While it is true that the accused did violate both Articles of War, the offense should have been charged but once, and in its most serious aspect, and the punishment of accused should be appropriate to that Specification only. In attempting to steal the tire he committed a crime, an offense cited by Winthrop as cognizable under the 95th Article of War (Winthrop's Military Law & Precedents, 2nd Ed., p. 713).

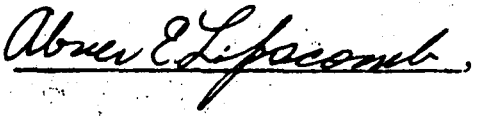
6. The accused is 29 years of age. The records of the Office of the Adjutant General show his service as follows:

Appointed second lieutenant Infantry Reserve, June 10, 1935; appointed first lieutenant February 24, 1939; extended active duty 10 March 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War, and authorized upon conviction of violation of the 96th Article of War.

 , Judge Advocate

 , Judge Advocate

 , Judge Advocate

SPJGH
CM 227676

1st Ind.

War Department, J.A.G.O., DEC 4 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Kermit E. Kline (0-328405), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft.ltr.for sig. Sec.ofWar.
Incl.3-Form of Executive action.

(Sentence confirmed. G.C.M.O. 67, 29 Mar 1943)

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washinton, D. C.

SPJGH
Board of Review

DEC 22 1942

CM. 227736.

UNITED STATES	)	82nd AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, November 4, 1942. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Staff Sergeant HARRY E. PATE (6911002), Company C, 325th Glider Infantry.	)	

REVIEW by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that, Staff Sergeant Harry E. Pate, Company "C",325th Glider Infantry did, at or near Bonnie Doone, North Carolina, on or about October 25, 1942, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Pauline Hewitt Pate.

He pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement at hard labor to 20 years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that Mrs. Pauline H. Pate, who lived about 250 yards behind Jimmie's Cafe at Bonnie Doone, North Carolina, on the evening of October 24, 1942, left the Post Exchange with accused to go to the show. Because of a blister on her heel, accused stated that they had better not go to the show, and suggested that they go to "Jimmie's" and get some supper. They had pigs feet and a bottle of beer apiece. At about 11:30 p.m. they left and started for her home. The accused kept saying that he had something to tell her, but did not know how to go about it. They walked down a road at the side of "Jimmie's". When a woman walking ahead of them went into the last house on the road, Mrs. Pate insisted that they go back. After they had proceeded down a short road to the right she again insisted on turning around but accused would not. Accused then squeezed her, and asked "could we?". She asked what accused meant, but right away understood what he did mean (R. 8-10,21).

The accused then started to make advances to her, which she resisted. Accused threw her down, tussled with her, and began to overpower her. They struggled for about 30 minutes while she begged him to let her get up, but he was unable to do anything to her. Mrs. Pate then loosed one arm and hit accused twice around the head. Accused became mad, straightened up, and hit her about twelve "good hard licks", the first two on her mouth, and the rest all over her face. He held her hands, sat on her about five minutes, then rose up, pulled off her pants, and had sexual intercourse with her by force and without her consent. She acted as though he had knocked her out to keep him from killing her, because he acted for a few seconds more like a mad man than as a human being. When accused finished the first time, he raised up and then started again. When she begged to go, he agreed, and asked what she was going to do about it. She took a match and found that it was about 1:40 a.m. Accused squatted down and started to cry. He then started to walk away, but at her request walked with her to her house. When he asked what she was going to do about it, she said to forget it, that she would stay home, and he could tell Mr. Reary that she was sick and could not come to work. She had been unable to scream during his attack because the blood was almost strangling her (R. 10-12,14).

Mrs. Pate's son, Robert, was waiting for her when she entered her house. Her mouth hurt, her face was all bruised, and her nose was swollen. She told Robert that she had gotten a beating, but would not tell him who did it. Her daughter, Margaret, came to her, helped take her clothes off and get her to bed. Margaret stated that her mother was all right when she had gone to work on the morning of October 24. After Mrs. Pate identified her blouse spotted with blood, and her torn slip and brassiere, as worn that night, they were received in

evidence (R. 12-14, 25-27, 28-30).

Following a call to investigate an assault upon Mrs. Pate, Sergeant James W. Harden, Military Police Detachment, Fort Bragg, saw her at about 3:45 a.m., October 25. Mrs. Pate was lying in bed, her face was "beat up", her eyes were black, and there were some black marks on her face. She was badly beaten up (R. 31-33).

Upon cross examination and upon examination by the court, Mrs. Pate stated that after her first husband died she married again in December 1933. She had not lived with her second husband since he was sent to prison in December, 1938, for rape of little girls. She had been out with accused on one date and he had taken her home from the Post Exchange four times prior to October 24. He had made no advances whatsoever to her on these occasions. Before his attack she had done nothing to lead the accused to believe she might give in to him. She was undergoing treatment for venereal disease at the time of the trial. Captain Riley told her that she had had it ever since her second marriage (R. 14-15, 18-19, 22, 58-61).

It was stipulated that the accused is in the military service of the United States; that he had served a previous enlistment from December 21, 1937, to February 7, 1941, and had been honorably discharged with character "Excellent"; that on October 28, 1942, the investigating officer, Major O. H. Douglass, inspected the hands and knuckles of accused and found no marks or scratches on them; and that the approximate distance from "Jimmie's Place" at Bonnie Doone, to the 325th Glider Infantry area is about 8 miles, and that a vehicle traveling at a speed of from 20 to 25 miles per hour would make the trip in 27 minutes (Pros. Ex. A).

4. Defense:

It was stipulated that if Captain C. W. Mayer, Sr., were present he would testify that accused had been under his command since June 1942, during which time he had had intimate daily contact with accused; that he considered the character rating of accused as excellent; and that the accused was highly regarded in his company by both officers and men (R. 33; Def. Ex. A).

First Lieutenants W. F. McLane and D. R. Stokely, of the company of accused, and Lieutenant J. B. Helmer, formerly of that company testified that the character of accused was excellent, and that his reputation in the company for truth and veracity was excellent. Staff Sergeants T. L. Pickering, V. C. Willis, Harvey Howell,

Jr., and E. C. Wilson of the same company testified to the same effect (R. 34-40, 43).

Sergeant Wilson testified further that the conduct of accused around women was excellent. He had been with accused on a date with Mrs. Pate at her house around October 17. While they were there a man walked in and out of the house several times. Accused and Mrs. Pate left the house together for about half an hour (R. 39-42, 65-66).

The accused testified that he enlisted on March 18, 1942, and had one previous enlistment. He was the acting first sergeant on October 24, 1942. He had met Mrs. Pate at the Post Exchange on the Wednesday after he arrived at Fort Bragg, and had had four dates with her. The first was on a Saturday, when he took her from the Post Exchange to her home, and went with three others to "Roundhouse" where they had some beer. The accused and Mrs. Pate left the other three persons, stopped on the way to her home, and accused had intercourse with Mrs. Pate, to which she submitted willingly. On his second date with her on the next Sunday at her home, nothing happened. His third date with her was on the next Wednesday when he left the Post Exchange with her, went to a restaurant for some beer, took a bus, and went into her home. When he was leaving, she came outside and around the side of the house with him, and he had intercourse with her (R. 46-47).

On his fourth date with Mrs. Pate on October 24, accused met her at the Post Exchange, went up to Bonnie Doone on the bus, and had some beer and pigs feet at "Jimmie's Place". They left at about midnight, and as she did not want to go home, they walked down the road. She led the way and turned to the left at two corners. They began to talk about her shoe, she spread a newspaper, and they both sat down. One thing led to another and they had intercourse there. They moved when she complained about something being under her back. When they were through, accused picked up the newspaper, went down the road toward her house, and left to catch the bus without taking her to her house. It was then about 12:30 a.m. and Mrs. Pate was in just as good condition as when she left the Post Exchange. She did not object in any way to the intercourse that night, took her pants off, and let them hang on her left leg. In response to her query if he had a rubber, he answered yes and used it (R. [illegible]-48).

Upon cross examination and examination by the court, accused stated that while waiting for the bus, two officers, whom he did not know, of the "101st" picked him up and he reached camp about 1:30 or 1:45 a.m. He went in the barracks and to bed, and did not know if he was seen by anyone. Corporal Mason with whom he rooms was not in at

that time. He had not signed out and did not sign in. Her face was not bruised when they were at Jimmie's Place. He did not hit her that night. When he left her about 150 yards from her house, she was in as good condition as when she left the Post Exchange. He had tried but was unable to identify the car in which he rode with the officers (R. 49-54).

5. Witnesses for the court testified as follows:

a. First Lieutenant George W. McBurney endeavored without success to locate in the 101st Division any officer who picked up accused on the morning of October 25, 1942 (R. 55).

b. The accused, when recalled, stated that he could not see the insignia of the two officers in the car as they were slumped down in their seats. He thought that he would know the car, but could not identify the officers. Sergeant Wilson went with accused to Mrs. Pate's house on his first date, but did not go to the "Roundhouse" with them (R. 56, 67).

c. Mrs. Pate, when recalled, stated that she had never dated soldiers before. She had in her pocketbook three pictures of soldiers, two of her stepbrothers, and some of her son. She went out with accused because he wanted to talk over their "relationship", and because he always acted nicely. She denied that accused had intercourse with her on their "first four dates", and denied that they stopped during the intercourse on October 24 and moved because of a root or something under her. She had harsh feelings toward accused because of the way he had treated her, and believed he should be punished because if let off now, he would surely kill the next woman (R. 57-61).

6. There were no actual witnesses as to what happened between Mrs. Pate and accused on the night of October 24-25, other than the two participants. The testimony of accused and of Mrs. Pate is in agreement upon the fact that he had intercourse with her at the time and place alleged. The accused testified that Mrs. Pate did not object in any way to the intercourse, and in support of his assertion that she was willing, states that she had willingly permitted him to have intercourse with her on two previous occasions within the short period since he first met her. Mrs. Pate testified that his intercourse with her on the night of October 24-25 was only by force and without her consent, and after he had overpowered her in a 30 minute tussle, during which he hit her twelve "good hard licks" on the mouth and face resulting in severe bruises and a considerable loss of blood, and she denied any previous intercourse with him. Her statement is furnished support by the proof that her nose was swollen and her face all bruised, "beat up" was the expression used

by the sergeant of military police when observed shortly after the occurrence, and by her torn and blood spotted clothes. The accused admitted that her face was not bruised when they were at Jimmie's Place, and that when he left her by the road 150 yards from her house, she was in as good condition as when she left the Post Exchange.

7. The accused is 26 years of age. He enlisted in March 1941, and had three years' prior service.

The punishment for rape provided by the 92nd Article of War is death or imprisonment for life, as a court-martial may direct.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence.

Justin T. Hill Jr. Judge Advocate,
Chas. C. Cresson Judge Advocate.
Abner E. Lipscomb Judge Advocate.

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

SPJGK
CM 227743

DEC 12 1942

UNITED STATES	)	PANAMA MOBILE FORCE
v.	)	Trial by G. C. M., convened at Camp Paraiso, Canal Zone, September 9, 1942. Dishonorable discharge and confinement for six (6) months. Fort Clayton, Canal Zone.
Private MILTON YOUNGER (15055387), Company H, 5th Infantry.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE I: Violation of the 69th Article of War. (Finding of guilty disapproved by the reviewing authority).

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

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

Specification: In that Private Milton Younger, Company "H", 5th Infantry, did, at Gorgas Hospital, Ancon, Canal Zone, on or about June 22, 1942, feloniously take, steal and carry away clothing, to wit: one (1) shirt money value of about Two Dollars ($2.00), one (1) pair of trousers money value of about Eight Dollars ($8.00) containing one (1) penknife money value of about Twenty Five Cents ($0.25) and seven (7) keys money value of about One Dollar and Seventy-Five Cents ($1.75), Sixty-Five Cents (65¢) in Costa Rican currency money value of about Eleven Cents ($0.11) in U. S. Currency, Four Dollars and Eight-Five Cents ($4.85) in

> U. S. currency, one (1) wallet money value of about One Dollar and Seventy-Five Cents ($1.75), and one (1) worker's badge and personal papers of no money value; said articles total money value of about Eighteen Dollars and Seventy-One Cents ($18.71), the property of Wilfred Henry, La Boca, #905A.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specification, Charge I,

> "with the addition of the words 'and while he was in arrest as a paroled prisoner at Gorgas Hospital, Ancon, Canal Zone,' immediately following the words and figures 'April 21, 1942,' and except the words 'escape from said confinement,' substituting therefor the words 'break said arrest;' of the excepted words, not guilty; of the added and substituted words, guilty",

guilty of Charge I, guilty of the Specification, Charge II,

> "except the words and figures 'containing one (1) pen knife money value of about Twenty Five Cents ($0.25) and seven (7) keys money value of about One Dollar and Seventy-Five Cents ($1.75) Sixty Five Cents (65¢) in Costa Rican currency money value of about Eleven Cents ($0.11) in U. S. Currency, Four Dollars and Eighty-Five Cents ($4.85) in U. S. Currency, one (1) wallet money value of about One Dollar and Seventy-Five Cents ($1.75), and one (1) worker's badge and personal papers of no money value,' and except the words and figures 'Eighteen Dollars and Seventy-One Cents ($18.71),' substituting for the latter words and figures, 'Ten Dollars;' of the excepted words and figures, not guilty; of the substituted words and figures, guilty",

and guilty of Charge II. Evidence of one previous conviction for leaving a station hospital without the permission of a medical officer, in violation of Article of War 96, 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 six months. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, approved the sentence, designated Fort Clayton, Canal Zone, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence shows that while under sentence to confinement but in the status of a prisoner on parole accused was, at some time prior to June 22, 1942, admitted to Gorgas Hospital, Ancon, Canal Zone, as a malaria patient (R. 7, 38). From the time of his admission until June 23, 1942, he was not in confinement or under guard or under any form of physical restraint or kept in any room that was locked (R. 9). He was deprived of his uniform while a patient and was required habitually to wear pajamas consisting of white coat and white pants (R. 24, 27). At no time did he have authority to leave his ward (R. 9).

At about 5 or 5:30 o'clock on the afternoon of Sunday, June 22, 1942, accused and Private David H. Justice, Company C, 41st Quartermaster Regiment, another patient, procured a quart of rum and two Coca-Colas (R. 42). This was paid for by Justice without contribution from accused (R. 42). They spent about thirty minutes drinking their beverages on the hospital ramp steps (R. 42). They were dressed in hospital two-piece pajamas (R. 27). They decided to leave the hospital and go to town. Accused procured civilian clothes for himself and an Army khaki uniform for Justice (R. 41). These articles of clothing and uniform were put on by accused and Justice in a bathroom (R. 42). Justice testified that the civilian clothing worn by accused consisted of a blue striped shirt and brown trousers (R. 22), and were the property of Wilfred Henry, a hospital attendant (R. 27). The attendant placed a value of $10 on them (R. 13). He had hung them on an iron clothes rack in an unlocked room (R. 15, 16) in the basement of the hospital near accused's ward (R. 11), and had last seen them in that location at 5:45 p.m., June 22. He discovered them missing at 6:15 a.m. the following morning (R. 11, 12, 16). He did not give accused permission to take or use the clothing (R. 14). They were found that same morning in a bathroom close to a hamper (R. 11), but a wallet, knife and keys left in the trousers were missing (R. 13, 14).

Justice testified that accused and he went to town together and that both missed bed check at 8:30 p.m. (R. 35). They visited the Army and Navy store in Panama where Justice purchased a hat and necktie

(R. 41). They then went about four or five miles out of town (R. 41). They remained together until about 10 p.m., when they parted (R. 29). Accused told Justice that he had no money and he displayed none while they were together (R. 30, 41). He was not seen taking anything out of the pockets of the civilian clothes he was wearing. Justice returned to his ward about 10:20 p.m. and did not see accused again that night (R. 30). Before retiring Justice hung the uniform he had been wearing on a coat hanger in a bathroom (R. 43) where it was found at 12:10 a.m. (R. 44).

Accused returned to the hospital about midnight, entering by the back door (R. 22), dressed in civilian clothes (R. 22, 43, 44), was met by a civilian employee of the hospital on night duty (R. 20) and asked what he was doing. Accused replied that he was a patient (R. 21).

Accused testified that on June 22, at about 5 or 5:30 p.m., he and Justice were sitting on the steps of a ramp in front of accused's ward (R. 33). A colored orderly came by (R. 33). This orderly, at the request of Justice, procured for them a quart of either whiskey or rum and two Coca-Colas (R. 33). They opened the bottles by hitting them on the steps (R. 37) and sat there drinking from the bottles (R. 37) until about 8 p.m., just a few minutes before 8:15 bed check (R. 33). The two then separated with the understanding that they would meet again on the ramp behind another ward where there was less probability of their being interrupted (R. 35). Accused reached the ramp as planned but Justice did not show up at any time after the separation (R. 33). Accused missed the bed check (R. 35) and drank until he had finished the whiskey which he had brought with him (R. 33). He then dozed off to sleep. On awakening he returned to his ward and was admitted by an orderly (R. 33). The orderly reported accused's late arrival to the nurse on duty (R. 33). Accused immediately got in bed and was asked by the nurse for an explanation. He stated that he had been drinking on the ramp (R. 34) and said, "Don't bother me any more tonight". He then went to sleep (R. 34). Later Justice was brought in and was asked, "Is that the man?". He replied, "Yes" (R. 34). Accused's suitcase, contents and equipment were searched (R. 34). Accused denied that he had worn the civilian blue striped shirt or brown trousers of Wilfred Henry that night (R. 36) or any other civilian clothes (R. 40). He testified that Justice had paid two dollars for the whiskey and two dollars for the orderly's service in procuring it (R. 36, 38), taking the money from his shirt pocket without contribution from accused (R. 36). Justice had been dressed in his white pajamas (R. 36, 39).

4. As to Charge II and its Specification, the evidence, stated most favorably for the prosecution, shows that shortly after 5:45 p.m., June 22, 1942, accused went to an unlocked room in the basement of the hospital and wrongfully took and carried away two articles of civilian clothing, a shirt and trousers of the value of $10, the property of Wilfred Henry, a hospital employee, and used them temporarily for a few hours that night and returned them at about midnight, left them in a bathroom of the hospital not far from where he had procured them and where they would readily be, and in fact were, found the next morning and returned to the owner. The evidence discloses no facts that indicate an intention on the part of accused to make any other use of the clothing than that actually made by him, namely, to enable him to make one trip to a nearby town. The clothing was taken by accused under circumstances which do not allow an inference of intent permanently to deprive the owner of his property therein. It is elementary that unless such intent exists at the time of the taking and carrying away there is no larceny (par. 149g, M.C.M.).

It has been repeatedly held that mere proof of taking and temporary use is insufficient to support findings of guilty of larceny. In such a case the Board of Review said:

> "There is in the evidence, then, proof only that accused wrongfully took and carried away the property, used it temporarily and failed to return it. In the absence of any other circumstances indicative of the required animo furandi, mere trespass, asportation and temporary use of property wrongfully taken have been held insufficient to justify findings of guilty of larceny. CM 193315, Rosborough; CM 194359, Sadler; CM 197795, Hathaway; CM 205811, Fagan; CM 206350, McAdams et al." (CM 207466, Philpott).

To the same effect see also CM 208699, Crowder.

In the opinion of the Board of Review the evidence is legally insufficient to support the findings of guilty of larceny but is legally sufficient to support findings of guilty of the lesser included offense of wrongfully taking and carrying away the shirt and trousers described in the Specification, without the consent of the owner, in violation of Article of War 96. The sentence adjudged is authorized for this offense (CM 208699, Crowder; par. 104c, M.C.M.).

5. 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 Charge II and its Specification as involves findings that accused did, at the place and time alleged, wrongfully take and carry away the shirt and trousers described in the Specification, of the ownership and approximate value alleged, without the consent of the owner, in violation of Article of War 96, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 17 1942 - To the Commanding General, Panama Mobile Force, APO 827, c/o Postmaster, New Orleans, Louisiana.

1. In the case of Private Milton Younger (15055387), Company H, 5th Infantry, I concur in the holding of the Board of Review and, for the reasons therein stated, recommend that only so much of the findings of guilty of Charge II and its Specification be approved as involves findings that accused did, at the place and time alleged, wrongfully take and carry away the shirt and trousers described in the Specification, of the ownership and approximate value alleged, without the consent of the owner, in violation of Article of War 96. Thereupon you will have authority to order the execution of the sentence.

2. In view of the nature of the offense of which accused was properly found guilty and in order that he may be held for future possible military duty, it is recommended that so much of the sentence as involves dishonorable discharge be suspended.

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 227743).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

RECEIVED
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1 Incl.
Record of trial.

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CM 227747

JAN 12 1943

UNITED STATES	PANAMA CANAL DEPARTMENT
v.	Trial by G.C.M., convened at Fort William D. Davis, Canal Zone, October 23, 1942. Dismissal.
Captain RALEIGH L. WESCOTT (0-309401), Medical Administrative Corps.	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Raleigh L. Wescott, Captain, M.A.C., did at the Atlantico Nite Club, Colon, Republic of Panama, on or about September 2, 1942, wrongfully strike Estelle Malinowski, also known as Estella Mack, in the face with his hands.

Specification 2: (Finding of not guilty).

Specification 3: In that Raleigh L. Wescott, Captain, M.A.C., did at the Night Police Court, Colon, Republic of Panama, on or about September 3, 1942, while he, the said Captain Raleigh L. Wescott, was being tried before the judge of said court, wrongfully attempt to strike Orondaste Martinez, a witness then and there testifying against him, with his fists.

He pleaded not guilty to all Specifications and the Charge. He was found guilty of Specification 1, not guilty of Specification 2, guilty of Specification 3, excepting the word "Orondaste" and substituting

the word "one" therefor, and guilty of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution upon the Specifications of which accused was found guilty shows that the accused, at about 10:30 p.m., September 2, 1942, was in the Atlantic Night Club, Colon, Republic of Panama, at a table with Estella Mack, a dancer and entertainer in the Atlantic Cabaret (R. 14). On other occasions at the club the accused drank soft drinks, but on September 2, he was drinking heavily of rum and cokes as they sat together, and was very annoying to her. She refused to accept the invitation of accused to go to breakfast with him after she finished working. As she left his table the accused brushed three glasses with his hand so that they fell on the floor, followed her to the bar, said something in a voice too low to be heard, and slapped her face pretty hard, splitting her lip. The bar and the tables were pretty well occupied (R. 8, 14-24, 25).

A member of the Panama National Police seized the right arm of accused to prevent him from continuing to strike the girl. He found it necessary to use his police club on accused, hitting him two or three times on the right arm. The policeman went outside to find another policeman, and met Corporal Peter Olivo of the military police. As they returned to the club, they saw two captains running out of a side entrance. The two officers stopped upon signal, and returned. The policeman identified the accused and took him to the Panamanian police jail (R. 24-32, 36-40).

Captain W. A. Melcher, Medical Corps, who responded with Corporal Olivo to a call to the military police guardhouse, looked over accused, and found that he had a laceration of the lower lip and a small scalp wound about in the middle of the back of his head. The accused was conscious, able to walk, spoke coherently, and answered clearly and without hesitation the questions asked him. His acts and speech were not reflex actions. In the opinion of Captain Melcher, the accused was under the influence of intoxicating alcoholic beverages. Corporal Olivo expressed the opinion that the accused was drunk (R. 9-12, 35, 36, 39, 40).

The accused was brought into the Panamanian police night court in Colon at about midnight on September 2 before Judge Henriquez, charged with disturbing the peace. A white civilian, whose name First Lieutenant D. D. Schultz, military police, believed was Martinez, was

testifying. The accused attracted the attention of the witness, and said "I'll see you outside later", and struck his fist in the palm of his hand. About 10 minutes later, the witness called the remark to the attention of the judge. When the witness started, in response to the request of the judge, to state exactly what the accused had said, the accused ran in front of Lieutenant Schultz and "threw a blow" at the witness. Lieutenant Schultz saw the blow start, but dove in immediately to separate the two men, and did not see the blow land. The Panamanian policeman saw the accused strike several times the young man, Martinez, who was testifying before the judge. At least a dozen persons became involved separating one person from someone else. Judge Henriquez finally ordered the accused to be taken to a cell for 24 hours for disturbing the court (R. 26-30, 41-43, 68).

4. For the defense, the accused testified that he entered the Atlantic Night Club on September 2 at about 8:30, sat at a table near the stage, and ordered one or more drinks during the 9 o'clock show. After the show Miss Mack came to his table and they had some drinks, and danced. Finally they went to the front near the bar and sat down at a table there. From there on accused had no recollection of striking or attempting to strike the young lady. He would say that such a thing would have been the farthest thing from his mind, as they had always been on good terms. The only thing he could remember, in a hazy way, about the incident with the policeman was picking himself up off the floor. He did not know how he got there or what had happened before he came to his senses in a cell in the Colon jail. He did not have the slightest idea what time it was when he regained complete consciousness in the jail. He paid a fine of $50 to the Panamanian authorities (Ex. 2), and was released from his sentence to confinement for 48 hours in jail through the intervention of the military police, upon the promise of his detachment commander to place him in arrest in quarters for 48 hours (R. 50-54; Ex. 2).

His only explanation of the evidence that he had struck out at other people was that he had been a boxer since he was 14 years old and later a wrestler, and it was only natural if someone grabbed a boxer by the shoulder or handled him roughly, for the boxer to come around with a swing, so that the person would either be struck at or thrown over his head (R. 54).

Upon cross-examination and examination by the court, accused stated that he had no recollection of striking Miss Mack, or of intending to do so, or no particular recollection of walking toward her. He did not know whether he was struck before his lapse of memory. When

he awoke in the jail he had a wound on the back of his head, and a laceration of the lower lip, but he did not remember what led up to the wounds, or how he received them. He could not tell positively how many drinks he had that night, but he would say about six or seven. He usually quits drinking with the second drink (R. 55, 56).

Douglas Patrick, a civilian employee of a contractor, testified that he was drinking at the bar of the Atlantic Night Club on the night of September 2, 1942. He saw a commotion at the end of the bar, saw accused and a policeman scuffling, and saw the policeman hit the accused over the head six or seven times. While a civilian, who had struck accused at the night club, was testifying in the court there was a commotion. It looked to Mr. Patrick "like he swung" at the witness, but he could not be sure. At the night club the witness, whose name he had heard as Pepe Martinez, struck accused full in the mouth, and caused blood to run from his mouth. The accused was definitely not unconscious at the night club, but was in a dazed condition (R. 57-59, 65-57).

It was stipulated that Mr. Harold A. Gould, if present, would testify substantially as had Mr. Patrick (R. 62).

5. The evidence shows that when a dancer and entertainer at the night club left the table of accused after refusing his invitation for breakfast later, he brushed some glasses from his table to the floor, followed her to the bar, and struck her on the face, splitting her lip. After a Panamanian policeman struck accused with his club, and went outside to find another policeman, a member of the military police saw accused run out of a side entrance, and stopped him.

Accused was taken to the Panamanian police jail and later brought before a Panamanian police night court charged with disturbing the peace, While a witness, Martinez, was testifying before that court, the accused said to him "I'll see you outside later", and struck his fist in the palm of his hand. When the witness started to respond to the question as to what accused said, the accused ran over and struck Martinez several times. At least a dozen persons became involved before the judge quelled the disturbance and ordered accused to be confined in a cell for 24 hours for disturbing the court.

The accused disclaimed anything more than a hazy recollection of what happened after the dancer left his table, and explained that any blows he may have struck as a natural reaction of one who had been a boxer for a long period.

Winthrop cites "Engaging in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other

disorderly or violent conduct of a disreputable character in public", as an instance of conduct umbecoming an officer and a gentleman, in violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 718).

In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 3, and of the Charge, in violation of the 95th Article of War.

6. Specification 3 charged that accused attempted to strike "Orondaste Martinez". The court excepted the name "Orondaste" from its finding of guilty and substituted the word "one", because the record failed to establish the first name of the man. From the record there is no doubt that the person intended to be named was the person who in fact was a witness before the police court, or that the accused was in any way misled as to the offense upon which he was called to defend himself, or that his substantial rights were in any way injuriously affected thereby.

7. The accused is 42 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service - Army, 18 years, 4 months, to April 24, 1941; Navy, 5 months; appointed second lieutenant, Medical Administrative Corps-Reserve, May 23, 1933; appointed first lieutenant,,October 2, 1937; extended active duty, April 25, 1941; appointed captain, Army of the United States, May 20, 1942.

8. Six of the eight members of the court recommended clemency, by the permanent suspension of the execution of the sentence of dismissal, contingent upon future good behavoir, by reason of the long, faithful, and meritorious service of accused.

9. The court was legally constituted. 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 of the Charge and of Specifications 1 and 3 thereunder, legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 227747 1st Ind.

War Department, J.A.G.O., JAN 18 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Raleigh L. Wescott (0-309401), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 1 and 3 thereunder, in violation of the 95th Article of War, legally sufficient to support the sentence, and to warrant confirmation of the sentence.

I recommend that the sentence be confirmed, but in view of the recommendation of six of the eight members of the court that clemency be extended by the suspension of the execution of the sentence to dismissal, and of the faithful and meritorious service of accused as an enlisted man for over eighteen years, recommend that the execution of the sentence be suspended during the pleasure of the President.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action; and a form of Executive action carrying into effect that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but execution suspended. G.C.M.O. 86, 14 Apr 1943)

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

SPJGK
CM 227748

DEC 10 1942

UNITED STATES	HAWAIIAN DEPARTMENT
v.	Trial by G. C. M., convened at Fort Shafter, Territory of Hawaii, September 2, 1942. Dismissal.
Captain CLYDE J. ORRISON, JR. (0-322574), Chemical Warfare Service.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE: Violation of the 85th Article of War.

Specification 1: In that Captain Clyde J. Orrison, Jr., Chemical Warfare Service, Hawaiian Chemical Warfare Depot, Schofield Barracks, T. H., was at Fort Shafter, T. H., on or about June 17, 1942, drunk on duty.

Specification 2: In that Captain Clyde J. Orrison, Jr., Chemical Warfare Service, Hawaiian Chemical Warfare Depot, Schofield Barracks, T. H., was at Schofield Barracks, T. H., on or about August 5, 1942, drunk on duty.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the Charge as finds accused guilty of being drunk at the time and place alleged in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on June 17, 1942, accused was on duty (R. 11, 25), attached to the Department Chemical Office, Hawaiian Department, Fort Shafter, Territory of Hawaii, awaiting assignment to

the district of Hawaii as Chemical Officer (R. 10, 11, 24). At about 8 a.m., June 17, 1942, accused telephoned to his office "and asked if they wanted him to come to work that morning". He was told to report at once. (R. 29)

At about 9:30 a.m. accused was observed at his office by Major Ronald Q. Smith, Chemical Warfare Service, over a period of somewhat more than half an hour. Major Smith testified that accused "was not normal" (R. 22). His speech was not wholly coherent and he appeared to be under the influence of intoxicating liquor, although witness did not detect an odor of alcohol (R. 21, 22). Witness did not consider him able to perform his duties (R. 23). At about 3 p.m. that afternoon accused was not at his desk, and an officer, Captain James H. Batte, Chemical Warfare Service, was detailed to search for him (R. 24). He found accused at the bar at the Fort Shafter mess, with a drink in his hand (R. 29). Accused returned to his office (R. 29, 30). Captain Batte testified that en route accused was "a trifle unsteady on his feet", had a "slightly thick tongue" and had difficulty in enunciating his words (R. 30). Upon his arrival at the office accused was observed by First Lieutenant Edward L. Doty, Chemical Warfare Service, for about five minutes. This officer concluded accused was "drunk" (R. 8). He smelled of alcohol and was slightly unstable in his movements. His manner of speech was not normal. (R. 7, 25) He was questioned by Colonel George F. Unmacht, Chemical Warfare Service, Department Chemical Officer. Accused "floundered around" and "didn't intelligently answer". He stated that he had had three drinks at the club. Colonel Unmacht testified that he did not consider accused able to perform his duties at that time and sent him to the Tripler General Hospital for examination. (R. 25)

Two medical officers who examined accused at 4:30 p.m. on June 17 testified that in their opinion he was drunk, that he was garrulous and that he had a heavy odor of alcohol about him, a rather unsteady gait, a flushed face, a rapid pulse and dilated pupils. He was then unfit for military duty. (R. 33, 34, 39, 40) The alcoholic content of his blood was "2.75 milligrams" (R. 35).

On the afternoon of August 5, 1942, accused did not report for duty at his place of duty at Schofield Barracks, Territory of Hawaii. His immediate commanding officer, Lieutenant Colonel James M. McMillin, Chemical Warfare Service, telephoned to him at his quarters at Schofield Barracks and later visited him there. (R. 14, 16) He asked accused why

he had not come to work and accused replied that he intended to work on a training schedule that afternoon.

Colonel McMillin testified that accused, who had been lying on his bed, arose, "appeared to stagger *** and his eyes were shifting". His manner was not normal and, in the opinion of witness, he had been drinking and was not fit for duty. He seemed to lack complete control of all of his physical faculties. A quart bottle of liquor was on his dresser. (R. 15, 18, 19) Major Smith testified that he saw accused at about 6:30 p.m. on August 5 and that accused appeared to be "under the influence of liquor" and was not normal (R. 22). Taken to the Department Chemical Office at about 2:30 p.m., August 5, accused was observed by Lieutenant Doty for four or five minutes. Lieutenant Doty testified that accused appeared to be "definitely *** under the influence of alcohol". (R. 8)

Accused was taken to Tripler General Hospital (R. 15) and examined at about 3:30 p.m. Two medical officers who examined him testified that in their opinion he was drunk (R. 34, 37), that he had a "wobbly and staggering gait" (R. 34) and an alcoholic breath. His speech was slurred, his pulse rapid and his pupils dilated (R. 34, 35, 37). He refused to submit to part of the examination (R. 34). The alcoholic content of his blood was three "milligrams" (R. 35).

Colonel McMillin was ordered to bring accused to Colonel Unmacht's office at 7 p.m. on August 5 (R. 19). Colonel McMillin complied. He testified that accused's condition at this time was "approximately the same as before" (R. 20). Upon arrival at Colonel Unmacht's office accused was again observed by Lieutenant Doty, this time for fifteen or twenty minutes. Lieutenant Doty testified that accused appeared to be "much more" under the influence of alcohol. (R. 9) Colonel Unmacht testified that when accused appeared before him he was "sort of waving" and failed to salute until prompted. When asked why he did not salute, accused "wavered around and made an attempt to salute and did salute". His commanding officer said, "Drunk again" and accused replied, "Yes, sir". (R. 26) Colonel Unmacht believed accused was not in a proper condition to perform his duty (R. 27).

Accused testified that about noon on June 17 he returned to Fort Shafter from Schofield Barracks where he had been "observing the chemical warfare depot". At the Department Chemical Office he obtained permission to take some data on civilian defense to his

quarters for study and left the office about 2:30 p.m. He stopped at the club and had three highballs. He had started a fourth when he was ordered to report to his commanding officer. Upon appearing before Colonel Unmacht the latter told him, "you are no damn good" and suggested accused had been drinking. Accused stated that he had. Colonel Unmacht accused him of having been responsible for the drunkenness on the day before of another young officer. (R. 42) Accused testified that he was not so drunk that he did not "know what I was doing" (R. 43) and believed that he was capable of performing his duties (R. 47). On August 5 his duties were to supervise two master sergeants who were working on a gas mask anti-contamination can at the depot (R. 43, 47). He was also preparing a training schedule for the depot guard (R. 43). After lunch he returned to his quarters to confer on the training schedule with another officer and made some notes (R. 43, 46). Work at the depot was very light (R. 47). As it was a few minutes before 1 p.m., he went to his room and lay down for "a second". Then his immediate superior officer walked in and told him to accompany him to Fort Shafter (R. 43). Accused believed he was capable of performing his duties on this date (R. 47). Accused testified that at the time of the trial he was suffering from acute conjunctivitis and that this condition had been aggravated by his work with phosgene and mustard gas (R. 43-45). He entered upon extended active duty on August 25, 1940. He had previously served about a year and a half with the Civilian Conservation Corps and had had about five two-week tours of active duty with the Army. (R. 48)

4. The uncontradicted evidence thus shows that on the morning of June 17, 1942, while on duty in the Chemical Warfare Office of the Hawaiian Department at Fort Shafter, Territory of Hawaii, awaiting assignment to the District of Hawaii as District Chemical Officer, accused appeared at his office in a drunken condition and later, when he should have been attending to his duties in his office, was found at a bar drinking and in a drunken condition. Accused testified that he was not so drunk as to be incapable of performing his duties, but admitted that he had been drinking. On all the evidence the court was fully justified in concluding that accused was, in fact, drunk on duty as alleged in Specification 1 of the Charge. Violation of Article of War 85, as charged, was established.

The evidence also shows without contradiction that during the early afternoon of August 5, 1942, accused was found drunk in his quarters at Schofield Barracks and that later the same day he was seen drunk elsewhere in the post. Again, accused contended that he

was not so drunk as to be unable properly to attend to his duties but the evidence leaves no doubt that he was in fact drunk as alleged in Specification 2 of the Charge. Violation of Article of War 96 was proved.

5. On cross-examination defense counsel asked Colonel Unmacht why charges for the offense of June 17, 1942, were not preferred until August 10, 1942. Colonel Unmacht replied that accused had arrived in the Hawaiian Department on May 29, 1942, and that based upon his past experience witness believed that officers coming to Hawaii needed time to "get *** oriented or acclimated" (R. 27). As this was accused's first offense witness desired to give him another chance. However, he felt that accused would not be a desirable officer to send to the island of Hawaii as the sole representative of the Chemical Warfare Service. Accordingly, he requested that orders which had been issued to this effect be countermanded and informed accused that he would assign him to the Chemical Warfare Depot where he would be given a chance to redeem himself. (R. 27-28)

6. War Department records show that accused is 28 years of age. He attended the University of Alabama for one year and Alabama Polytechnic Institute for two years. He was commissioned a second lieutenant, Chemical Warfare Service Reserve, October 10, 1934, promoted to first lieutenant November 20, 1937, and to captain January 29, 1942. He has been on extended active duty since August 25, 1940.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 85 and is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 19 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Clyde J. Orrison, Jr. (0-322574), Chemical Warfare Service.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Accused was found drunk on June 17, 1942, while on office duty at the Department Chemical Office of the Hawaiian Department. On August 5, 1942, he was again found drunk at Schofield Barracks. He was sentenced to dismissal. I believe he is capable of further valuable service and accordingly recommend that the sentence be confirmed but suspended during the pleasure of the President.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 34, 15 Mar 1943)

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

SPJGH
CM 227791

DEC 9 1942

UNITED STATES	)	4th SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Sutton, North Carolina,
First Lieutenant HENRY W. FAHRES	)	October 28, 1942. Dismissal.
(O-274042), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

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

Specification 1. In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, did, at or near Monroe, North Carolina, on or about 18th day of August, 1942, with intent to deceive Rebecca C. Garrison, a person then and there authorized to rent a certain room sought to be rented by the said Lieutenant Fahres, falsely state in substance and represent to the said Rebecca C. Garrison, that one Katherine Gunn was the wife of the said Lieutenant Fahres, which statement was known by the said Lieutenant Fahres to be untrue, in that the said woman was not the wife of the said Lieutenant Fahres.

Specification 2. In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, did, at or near Monroe, North Carolina, on or about the 20th day of August, 1942, rent a certain room for the use of himself and one Katherine Gunn, a woman not his wife, and with the said woman, under and by virtue of such rental did enter into occupancy of, and did occupy, the said

room as husband and wife from on or about August 21, 1942, until on or about September 21, 1942.

Specification 3: In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, did, at or near Monroe, North Carolina, on or about August 21, 1942, wrongfully and falsely introduce a woman, one Katherine Gunn, as his wife, to Rebecca C. Garrison, when in fact the said woman was not the wife of the said Lieutenant Fahres, as he then well knew.

Specification 4: In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, did, at or near Monroe, North Carolina, on or about September 1, 1942, wrongfully and falsely introduce a woman, one Katherine Gunn, as his wife, to 1st Lieutenant Edgar R. Sitler, when in fact the said woman was not the wife of the said Lieutenant Fahres, as he then well knew.

Specification 5: In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, did, at or near Monroe, North Carolina, on or about September 1, 1942, wrongfully and falsely introduce a woman, one Katherine Gunn, as his wife, to Lieutenant Warren A. Butler, when in fact the said woman was not the wife of the said Lieutenant Fahres, as he then well knew.

Specification 6: In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, did, at or near Monroe, North Carolina, on or about September 1, 1942, wrongfully and falsely introduce a woman, one Katherine Gunn, as his wife, to Lieutenant Clifton L. McLaurin, when in fact the said woman was not the wife of the said Lieutenant Fahres, as he then well knew.

Specification 7: (Not guilty).

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

Specification 1: In that 1st Lieutenant Henry W. Fahres, Quartermaster Corps, being then and there a married man, having a lawful living wife, did, at or near Monroe, North Carolina, from on or about August 21, 1942, until on or about September 21, 1942, wrongfully, dishonorably and unlawfully, live and cohabit in a state of open adultry with one Katherine Gunn, a woman not his wife.

Specification 2: (Not guilty).

The accused pleaded not guilty to all Charges and the Specifications thereunder. He was found not guilty of Specification 7, Charge I, and Specification 2, Charge II. He was found guilty of Specification 1, Charge I, excepting the words "with intent to deceive Rebecca C. Garrison, a person then and there authorized to rent a certain room sought to be rented by the said Lieutenant Fahres", guilty of Specifications 2, 3, 4, 5, and 6, Charge I, and of Charge I, and guilty of Specification 1, Charge II, and of Charge II, He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on or about August 18, 1942, the accused, the executive officer in the Quartermaster Office, Camp Sutton, North Carolina, approached Mrs. Rebecca C. Garrison, a civilian employee in the Quartermaster office, and stated to her that his wife was coming to town and that he would like to rent a room for their occupancy during her visit. After looking at a room in Mrs. Garrison's home the accused rented it. Thereafter, on August 21, the accused brought an auburn haired woman, hereinafter called Miss Katherine Gunn, to the home of Mr. and Mrs. Garrison and introduced her to them as Mrs. Fahres. Miss Katherine Gunn and the accused then occupied one room in the Garrison home from August 21 until September 21. During this period Mrs. Garrison observed a telegram on Lieutenant Fahres' desk addressed "Miss Katherine Gunn, c/o Lt. Fahres". A few days prior to September 21, a long distance telephone call came to the Garrison home for a Miss Katherine Gunn. This telephone call aroused Mrs. Garrison's suspicion and she requested an explanation from accused and Miss Gunn, the woman whom she then called Mrs. Fahres. Miss Gunn explained that she was called Miss Katherine Gunn in the firm where she was employed, that she was definitely Mrs. Fahres, and that she would produce proof of that fact. During this explanation the accused neither affirmed nor denied the assertion of Miss Gunn that she was his wife (R. 5, 7; Ex. A).

During the period from August 21 to September 21, the accused introduced the woman called Miss Gunn as Mrs. Fahres to various persons, including First Lieutenant Edgar R. Sitler, First Lieutenant Warren A. Butler, Jr., and First Lieutenant Clifton L. McLaurin. The accused had previously told Lieutenant Sitler that his wife was coming to visit him. The accused and Miss Gunn were accepted and treated by these officers as though they were husband and wife, and were entertained by them in their homes or at social functions, including the officers' mess and an officers' dance on August 24 (R. 9-11, 11-13, 13-17, 26-27).

On September 21, Miss Gunn left the Garrison home, explaining at the time that she was leaving because of business matters at home. A few days later the accused returned to the Garrison home accompanied by a woman with dark hair. The accused opened the conversation by stating, "Mrs. Garrison, I want you to meet the real Mrs. Fahres, and I want to apologize to you". The woman so presented as Mrs. Fahres then stated that she had requested the accused to call upon Mrs. Garrison and apologize to her. She stated further that she loved the accused and that she was going to give him another chance. Thereafter the accused apologized to Lieutenant Butler and to Lieutenant McLaurin for his actions (R. 6, 7, 12, 15).

Thereafter the woman introduced as the real Mrs. Fahres visited the accused in the Quartermaster area accompanied by two young children. Copies of the accused's pay vouchers for the months of April to October 1942, in which he listed his wife, Mrs. Elsie Fahres, of Sheboygan, Wisconsin, as a dependent, were placed in evidence (R. 5, 30; Ex. A).

4. For the defense, Lieutenant Colonel Samuel C. MacIntire, Jr., testified that as the superior officer of the accused he had recommended the accused for promotion. The material part of the recommendation stated that the accused had a very keen sense of duty, required very little direction, and possessed the requisite qualifications to receive complete cooperation of those with or under him. The recommendation concluded with the statement that "I consider this officer capable of greater responsibility and recommend him for promotion with enthusiasm and without reservation". Under cross-examination Colonel MacIntire testified that the accused had introduced two women to him as Mrs. Fahres. He also testified that he would not knowingly recommend for promotion a man who had committed an act such as that with which the accused was charged (R. 31-34; Ex. B).

Upon the offer by the defense, there were received in evidence a letter from The Adjutant General's Office, State of Wisconsin, dated August 2, 1940, transmitting a special report concerning the record of the accused while a student at the Infantry School, Fort Benning, Georgia, with a first indorsement by Colonel F. H. Himes, 127th Infantry, Wisconsin National Guard, congratulating the accused on his splendid record made at that school, an efficiency report from the Infantry School showing a general rating of excellent, a letter from Headquarters V Army Corps, commending the accused for his efficiency during the 1941 Louisiana maneuver (R. 35; Ex. C).

The accused made the following unsworn statement:

"The only statement I have to make is that this whole

affair was personal. I did not harm anyone through it, other than hurt the feelings of a few people. It interfered in no way with my duties at Camp Sutton. As I see it now, the whole affair could have been dropped as far as the officers with whom we were associated with is concerned. Apologies were accepted by the officers and by Mrs. Garrison. I am very sorry that the affair took place. It had me worried at times and I am glad now that it is over with, as far as I am concerned. I realize I have made a big mistake and will certainly see that nothing like it ever happens again. The whole cause of this trouble was that I was separated from my family too long. My wife and I are now in Monroe, N.C. We had intended living here in the future. My wife has been very considerate about the whole affair and has forgiven me entirely" (R. 34, 35).

5. Specification 1, Charge I, alleges that the accused

"* * * did, at or near Monroe, North Carolina, on or about 18th day of August, 1942, * * * falsely state in substance and represent to the said Rebecca C. Garrison, that one Katherine Gunn was the wife of the said Lieutenant Fahres, which statement was known by the said Lieutenant Fahres to be untrue, in that the said woman was not the wife of the said Lieutenant Fahres".

The evidence shows that on or about the date alleged the accused stated to Mrs. Garrison that his wife was coming to town, and that he would like to rent a room for their use during her visit. Subsequent events show that the woman whose visit the accused was contemplating was not his wife but a woman called Miss Katherine Gunn. There is no evidence, however, that on the occasion alleged the accused represented to Mrs. Garrison that Katherine Gunn was his wife, or that Katherine Gunn was the woman for whom he wanted the room. The record is, therefore, legally insufficient to support the finding of guilty of Specification 1, Charge I.

6. Specification 2, Charge I, alleges that the accused

"* * * did, at or near Monroe, North Caroline, on or about the 20th day of August, 1942, rent a certain room for the use of himself and one Katherine Gunn, a woman not his wife, and with the said woman, under and

by virtue of such rental did enter into occupancy of, and did occupy, the said room as husband and wife from on or about August 21, 1942, until on or about September 21, 1942".

The evidence shows that the accused, on or about August 20, 1942, rented one room in the home of Mr. and Mrs. Garrison upon the representation that the room was to be occupied by himself and his wife. Thereafter, on August 21, 1942, the accused entered into the occupancy of the room with a woman later called Miss Katherine Gunn, but who was not the wife of the accused. The evidence shows further that they continued to occupy the room as husband and wife until September 21, 1942. From this evidence the court was justified in concluding that on the day the room was rented it was rented for the use of the accused and a woman not his wife. The record, therefore, sustains the findings of guilty under Specification 2, Charge I.

7. Specifications 3, 4, 5, and 6, Charge I, allege, respectively, that the accused did, on August 21 to September 21, 1942, "* * * wrongfully and falsely introduce a woman, one Katherine Gunn, as his wife, to Rebecca C. Garrison, * * *" and "to 1st Lieutenant Edgar R. Sitler", to "Lieutenant Warren A. Butler", and to "Lieutenant Clifton L. McLaurin", when in fact the said Katherine Gunn was not the wife of the accused "as he then well knew".

The evidence shows very clearly that the accused introduced to Mrs. Garrison a woman later called Miss Katherine Gunn, as his wife, when in fact she was not his wife. The evidence also shows that the accused presented this same woman to Lieutenants Sitler, Butler, and McLaurin, as Mrs. Fahres. Such an introduction and representation was in substance a representation that the woman so introduced was his wife. This evidence, therefore, clearly sustains the findings of guilty of Specifications 3, 4, 5, and 6, Charge I, and shows conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War.

8. Specification 1, Charge II, alleges that the accused did, wrongfully, dishonorably, and unlawfully, live and cohabit in a state of open adultery with one Katherine Gunn, a woman not his wife, from August 21 to September 21, 1942. The evidence shows that the accused shared the same bedroom with a woman called Katherine Gunn, who was not his wife. In view of this fact, and the rule of evidence which permits the court to draw an inference of adultery from circumstances (Wharton's Criminal Evidence, Vol. 1, p. 299), we must conclude that the record is legally sufficient to support the finding of guilty under Specification 1, Charge II.

9. Three of the eight members of the court-martial which tried the accused recommended that in view of the excellent record of the accused, his efficient service, his reconciliation with his wife and family, and the stigma involved in a dismissal from the service, that the sentence "* * * be mitigated to one of fine, and/ or denial of future promotion with severe reprimand and transfer from this post".

10. The accused is 40 years of age. The records of the Office of The Adjutant General show that he was second lieutenant, Infantry, Wisconsin National Guard, from at least January 1, 1930, and first lieutenant from some date in 1938; date of entry in the Federal service is not shown.

The accused stated that he had served as second lieutenant from December 19, 1929, and as first lieutenant from January 18, 1938.

11. The court was legally constituted. 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 finding of guilty of Specification 1, Charge I; legally sufficient to support the findings of guilty of Specifications 2, 3, 4, 5, and 6, Charge I, and of Charge I, and of Specification 1, Charge II, and of Charge II; and legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and is authorized upon conviction of a violation of the 96th Article of War.

Peter S. Hill Jr., Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 227791 1st Ind.

War Department, J.A.G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Henry W. Fahres (0-274042), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I; legally sufficient to support the findings of guilty of Specifications 2, 3, 4, 5, and 6, Charge I, and of Charge I; legally sufficient to support the findings of guilty of Charge II and the Specification thereunder; and legally sufficient to support the sentence, and to warrant confirmation of the sentence.

The brazen conduct of the accused in living in open adultery with a woman not his wife, and of falsely introducing her to his fellow officers as his wife in defiance of the mandates of decent society, is conduct deserving of dismissal. I recommend, therefore, notwithstanding the recommendation of clemency by three of the eight members of the court, that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

(Finding of guilty of Specification 1, Charge I, disapproved. Sentence confirmed but execution suspended. G.C.M.O. 52, 23 Mar 1943)

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

SPJGK
CM 227793

DEC 24 1942

UNITED STATES	)	40TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Homestead Field, Molokai, Territory of Hawaii, October 27, 1942. Dismissal.
First Lieutenant GLENN W. ANDERSON (0-326287), 164th Field Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE I: Violation of the 92nd Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that 1st Lt. Glenn W. Anderson, 164th F. A. Bn. did, at Maalehua, Molokai, T. H., on or about October 4, 1942, unofficially and in a private capacity, dishonor and disgrace himself as a gentleman and seriously compromise his position as an officer by willfully and wrongfully forcing his attentions on and taking indecent and improper liberties with the person of Etta M. Peoples.

CHARGE III: Violation of the 96th Article of War. (Motion to strike out sustained).

Specification: (Motion to strike out sustained).

The defense made a motion, under paragraph 71c, Manual for Courts-Martial, to strike out Charge II and its Specification and Charge III

and its Specification. The court overruled the motion as to Charge II and its Specification , and sustained it as to Charge III and its Specification. (R. 3) Accused thereupon pleaded not guilty to Charges I and II and their Specifications. He was found not guilty of Charge I and its Specification, and 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. The evidence shows that the complaining witness, Miss Etta M. Peoples, is a woman 44 years of age (R. 38) who has specialized in sociology and psychology at Columbia University (R. 12), has been engaged in Girl Scout work, and was at the time of trial director of the Molokai Community Center, Territory of Hawaii, a position which she had held for four years. She was also connected with the local U.S.O. She was five feet, nine inches tall (R. 38). In connection with her work at the U.S.O., she became acquainted with accused (R. 4), who was Special Service Officer for the Island of Molokai (R. 25). Their acquaintance began between one and two weeks prior to October 3, 1942 (R. 4, 25). Accused is 30 years of age (R. 40) and married (R. 33). At the time of the occurrences herein described Miss Peoples lived alone in one of a group of several small houses in the Ranch Camp at Maalehua, Molokai (R. 4, 5).

Miss Peoples testified that on the afternoon of October 3, 1942, as she was sitting in her car at the U.S.O. establishment, accompanied by two other women and a small child (R. 12, 13, 36, 37), accused came up to the car and talked to her in a very low tone (R. 13). A Miss Fukuda, one of the occupants of the car, stated that accused was talking in "almost a whisper" (R. 36). Miss Peoples testified that accused suggested having a steak dinner at her house some evening, to which she replied that she would arrange it for "sometime next week", and that they could have a party of four or six "out to my house and have the steaks" (R. 12). He expressed a desire to come out that evening, and Miss Peoples stated that she could not have a party that evening, as she would be busy preparing food for a U.S.O. picnic (R. 13). He insisted that six were too many for a party "and he only wanted he and I to be there" (R. 13). Miss Peoples did not consent that accused visit her that night (R. 13), and did not expect him (R. 15). The two other ladies in the car corroborated Miss Peoples' testimony that she made no engagement with accused for that evening (R. 36, 37, 38).

Miss Peoples testified further that accused said he "would bring the whisky" if she "had the 'cokes'" (R. 13). This reminded her that her supply of Coca-Colas was low, as a result of which she bought five bottles shortly after her conversation with accused (R. 13, 38).

Miss Peoples testified that at about 8 p.m. accused came to her house (R. 4, 5, 27) and she invited him in (R. 5, 15). She was at the time preparing food for a picnic. Accused mixed two drinks of liquor - Old Crow whiskey which he had brought with him (R. 5). Accused's clothes were wet from his riding in an open car in the rain and Miss Peoples gave him a blue silk shirt to wear, and hung his wet shirt over the stove to dry (R. 6, 15, 28). They went to the living room, where they talked for about an hour and a half about Miss Peoples' work and kindred subjects (R. 6, 15). Then accused went to the kitchen, mixed two more drinks, returned, and gave one of the drinks to Miss Peoples. He lay on the couch and asked her to join him on the couch. She refused. (R. 7) He said that she looked stiff in her white dress which she had worn during the afternoon, whereupon she went into another room and changed into a housecoat (R. 7, 28, 33). She returned and sat in a chair (R. 7). In addition to the housecoat, her clothing consisted of a slip, pants, brassiere, shoes and stockings (R. 18). Accused repeatedly asked her to sit on the couch with him, saying that if they were going to work together they "should know each other better" (R. 7). Finally, she went over and sat on the couch beside him. They talked about "life and love". He told her that he loved her and that he wanted to feel that she "belonged to him". (R. 7) He said "something about the Kaunakakai girls" and she told him to have nothing to do with them (R. 8). He kissed her "with his teeth. More like a wolf. It was a biting kiss, not what I would call a kiss" (R. 7). He asked her whether she enjoyed it. She told him that she might if it were a different man, but that this was only "cheating". She did not respond to his kisses. He seized her, pulled her down to him, and rolled over on top of her. She began to "kick and hammer" accused with her fists. Her right leg was free and she tried to kick him with it, but it did no good - "it was just a sliding blow along the side of his body". She tried to scratch and bite him. Accused was holding her down. His elbow was on her right shoulder, and his forearm across her neck. She "fought and screamed" and tried to get out from under him. She could hear him unbuttoning his trousers and she tried to get away because she was afraid, but he continued to hold her down with his forearm, (R. 8) or by placing both hands on her shoulders (R. 17). He pulled up her housecoat and she "could feel it poking into me all over part of my anatomy" (R. 8) - "he was having quite a bit of difficulty in finding the place" (R. 9).

During this time he kept asking her with whom she was in love and telling her to relax thereby making it "easier for both" of them. Then he hurt her "terrifically". (R. 9)

She further testified that at this point he let her up whereupon she went into the bathroom. She "thought he was going to behave like a gentleman". He went to the kitchen, mixed two more drinks, brought them into the living room, and gave one to her. Having returned from the bathroom she had sat on the couch, feeling "sick". She was "lying back on the couch", with her feet on the floor. She took a sip of the drink and set it down (R. 9). He had removed his clothes (R. 17). Her pants were off (R. 18). She did not remember whether she had removed them but found them on the bathroom floor the next morning (R. 19) and thought she had removed them thinking "he was through" (R. 18). Accused drank his liquor, came to the couch, swung Miss Peoples around lengthwise and "jumped on top" of her. She again tried to kick, scratch, strike and bite him but it did no good. She testified:

> "He was right on top of me and his eyes were all bloodshot and he seemed to be in a frenzy, his face was covered with perspiration, and his eyes were staring at me. He told me that he used to be a wrestler and that it would do no good for me to try to get away from him" (R. 9).

She "kicked harder and screamed" and tried to get away from him. He then asked her whether she wanted him to use a "rubber" or whether she wanted him to make her pregnant. (R. 10) She "cried and pleaded" with him to let her alone. He arose, said he was going to use a "rubber" and entered the kitchen (R. 10). She also arose, discovered she was bleeding and felt so weak and dazed that she again lay on the couch. She lay in the middle of the couch with her legs apart. The light was on. She did not know that keeping her legs together would deny entry, nor did she try to cover herself with her hands to prevent entry because she was hitting accused with her fists (R. 17). She did not put her arms around accused (R. 16). He got on top of her,

> "and seemed to go into a frenzy, moving up and down rapidly on top of me. He told me that if I would relax it would be easier for both of us" (R. 10).

He had his hands in the small of her back, lifting her up to meet him. At the beginning her hips were against the wall, but he lifted her

away from the wall and over to him. She testified:

> "Then he hurt me again, and kept telling me that he wanted me for his very own, so that when he saw me at the U.S.O. he could think I belonged to him. All of a sudden he seemed to have worked himself up to a pitch then he suddenly relaxed. Then he got up and stood beside me and took off the rubber, and said 'There's little Junior, if it had gone in you, you would have been pregnant" (R. 10).

She told accused to go home and he started to put on his shirt and trousers (R. 10). She lay on the couch, "wondering what was left in life for me. I thought my life was in ruins. I felt crushed" (R. 11). He said he would leave the bottle of whiskey until he came again. She said he "needn't come again". (R. 11) On cross-examination she admitted stating to the investigating officer that she thought she asked accused whether she should put his name on the bottle and that she then said it would not be necessary as she had no other bottles (R. 16). Accused put his arms around her, kissed her goodnight, and told her that "now we were married and that we would enjoy it again" whenever they had a chance (R. 11). She did not remember whether she responded to these kisses, but said it "would have been only natural" had she done so "because he was so gentle" (R. 11, 16). She told him never to come back again (R. 11). He left between 1:30 and 2:30 in the morning (R. 11, 17). About 7:30 in the morning, as soon as it was light, she went to a hospital (R. 17).

The houses to the left and right of Miss Peoples' house were vacant. A house across the street, but not directly opposite, was occupied by a Mr. and Mrs. Sakai (R. 14). Miss Peoples testified that the distance from her house to the Sakai house was 200 or 300 yards. Defense counsel stated that the exact measurement was 209 feet. The prosecution disagreed, asserting that it was at least 250 feet. (R. 19) There was no telephone in Miss Peoples' house, but she knew that there was a telephone in the Sakai home. Miss Peoples stated as her reason for not going to the Sakai house that she was not sure anyone would be at home. (R. 14) She did not attempt to leave the house or go out and scream for help. This was because she was "so weak". (R. 16)

Lieutenant Colonel Clarence M. Olsen, Field Artillery, testified that in a statement made to him and other officers on October 4, 1942, accused said, "she didn't want to do it, but I out talked

her" (R. 39). The evidence shows that Miss Peoples was examined at a hospital on October 4. She had "small discolorations" (R. 20), or "black and blue" spots on her body (R. 22). One small spot was near the right shoulder and another on the "right lower abdomen near the waist" (R. 21) or on "the right groin at the outer portion of the angle of the pubic hair". There was also "a small, recent bruise on the anterior surface of the right shoulder" and " a minute excoriation on the right back in the region of the upper ridge of the pelvis". (Ex. 3) There were two small lacerations on each side of the labia minora, some contusion and bruising of the right lip of the labia minora, and a laceration about one-half inch long on the ventral, external portion of the vaginal opening. There were multiple small lacerations of the hymen, and evidence of considerable contusion of the hymen. The internal portion of the vagina was small in diameter and difficult to inspect without causing considerable pain. No lacerations could be found in the inner portion of the vagina, but there was some blood in the vaginal tract. (Ex. 3)

Accused testified that on the afternoon of October 3 he talked with Miss Peoples at a U.S.O. dance. They talked about "parties and cock-tails" and "alcoholic beverages" (R. 26). He suggested having steaks and a few drinks at her house. She agreed and thought it "an excellent idea" (R. 26). With reference to the subsequent conversation at the car, he testified that both talked in low tones (R. 26, 32). He did so because he "didn't want the other ladies in the car to hear the conversation" (R. 26). Miss Peoples and accused made a date for him to call on her that evening (R. 26, 32). She said that she would get some more "cokes" and that they would have highballs (R. 26). He had "a few drinks" at the officers' club, secured some whiskey and went to Miss Peoples' house. She met him at the door and made a remark about his being late. (R. 27).

With reference to their conversation in the living room after he had donned the dry shirt and she had put on the housecoat, accused testified that they talked about her four years on the islands and the parties she had attended while in Honolulu. She said it had been four years to the day since she had come to the islands (R. 28) and that she felt like celebrating. They mixed drinks and she tried to smoke a cigarette but "looked awkward" (R. 29). They talked about "life and love and the association with people" (R. 29). He asked her to sit on the couch beside him and "be sociable" (R. 29). She did so and they "were soon loving, just like any couple would have done" (R. 29). They began to make love about 9:30 (R. 31). Accused did not pull her down on the couch, did not abuse her, and did not use

force to get her to lie down on the couch beside him. When prone they made love and kissed each other. After they had been "loving" for about 30 minutes accused could see that "she was getting pretty well 'steamed up'" and he started to roll over between her legs. She started to "fuss a little bit" (R. 29) about "being a virgin" (R. 30) and he told her it would have to be a "mutual agreement". At that time her pants were on. (R. 29) Accused then went to get two more drinks, came back and lay on the couch and she came and lay beside him. They "loved" more (R. 30) and he rolled over between her legs again (R. 30). She continued "fussing" about being a virgin (R. 30, 32, 34). They had some conversation about the possibility of her becoming pregnant, after which he went to the kitchen and got a "rubber" from his shirt pocket (R. 30).

He testified that when he returned she was not in the room, but she came back and "spread out" on the middle of the bed. At this time her pants were off. (R. 30) She did not complain of any bleeding (R. 33). He started to "make" her, and "she guided it in very slowley" (R. 30). She did not attempt to push down her housecoat, although she could have done so had she wished (R. 34). During the act of intercourse she was "just lying still", so accused suggested that she "move up and down in order to get the thrill out of it" (R. 34). She said, "You are going too fast, I can't meet you each time you come down" (R. 34). She did not kick, bite, scratch or scream (R. 30), nor did she ask accused to desist from the act of intercourse (R. 31). There was only one act of intercourse (R. 31, 34). It was over about 1 o'clock (R. 31). She was "almost as strong as a man when she had her arms around" accused (R. 33). Accused weighed about 168 pounds (R. 34) and had been a wrestler (R. 32). After finishing the intercourse they talked for about 25 or 30 minutes. She said it "wasn't as thrilling as she thought it was going to be". Accused went to the kitchen and had another drink and she poured a "chaser" for him. He jokingly told her that he would rather leave the whiskey if she and her lady friends would not drink it. (R. 31) Then they stood in the kitchen in each other's arms for several seconds. He kissed her. He thought she returned the kisses. At no time during the evening did she appear to be angry with him. (R. 31, 32, 34) He did not state to Colonel Olsen that the woman "didn't want to do it" (R. 32).

An officer, a physician, testified for the defense that a diagram received in evidence (Ex. 3) represented the vaginal organs of a female person 44 to 46 years of age, a virgin, weighing about 160 pounds,

rather stoutly built, approximately five feet, nine inches tall (R. 35). This witness also testified that he did not notice any cuts, bruises or scratches on the face or other parts of accused's body early in October (R. 35).

4. The evidence is conflicting in some particulars. If the accused is to be believed, he did not force his attentions upon or take improper liberties with the person of Miss Peoples, for he contended that despite her verbal protestations she consented to and cooperated in all his acts. The contrary is true if credence is to be given to her story. Under the circumstances great reliance must be attached to the findings of the court which had the witnesses before it and was able to observe them and judge of their credibility and accuracy.

It is evident from the findings that the court accepted as true the woman's testimony that at least during a certain phase or phases of the incident accused forced his attentions upon her and without her consent took indecent liberties with her person, but did not accept her assertion that her consent to carnal knowledge was finally withheld. These conclusions strike a reasonable balance as between the conflicting versions of what occurred and comport with the probabilities inherent in human character. Many of the woman's acts - her voluntary change to a housecoat, her removal of her underwear after the initial scenes on the couch, her voluntary return to the couch, her assumption of a prone and receptive position on the couch, her submission to caresses just before accused's departure from the house, tended to belie her avowals as to the persistence of her resistance and as to her ultimate non-consent. On the other hand, her testimony as to her original unwillingness to yield to the importunities of accused and as to her resistance when accused first forced her to a prone position on the couch and got on top of her, is convincing under the circumstances. Accused conceded that she protested her virginity and that he did not at once succeed in his objective. As much as three hours elapsed from the time Miss Peoples first sat on the couch with accused until the two finally left it. Such a lapse of time is inconsistent with any theory of unopposed conquest. The external bruises on the woman's body were indicative of physical compulsion which went quite beyond the seduction implied in accused's remark that he merely "out talked her".

Although accused did not exercise force to the point of rape, the Board of Review has no real doubt that he did at the place and time

alleged willfully and wrongfully force his attentions upon Miss Peoples and take indecent and improper liberties with her person, and that these actions were in their nature disgraceful and unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. The motion to strike out Charge II and its Specification was properly overruled. The precise ground for the motion does not appear. Without doubt this Specification stated an offense under the 95th Article of War. To force one's attentions upon and take indecent and improper liberties with a woman is conduct unbecoming an officer and a gentleman. If it be contended that the Specification fails to allege want of consent, the answer is obvious. The phrases "forcing his attentions on" and "taking *** liberties with" connote non-consent as clearly as though it were explicitly alleged. If it be suggested that the Specification fails sufficiently to apprise accused of the offense charged, the answer is equally obvious. It is neither necessary nor proper to plead evidentiary facts. No other possible defects of a substantial nature appear in the Specification.

6. Colonel Olsen testified that at the time accused made the statement, "she didn't want to do it, but I out talked her", accused was neither advised of his right to remain silent nor warned that the statement might be used against him (R. 39). The statement was an admission only. As such it was properly received in evidence without any showing of its voluntary nature (par. 114b, M.C.M.).

7. War Department records show that accused is 30 years of age. He graduated from the University of Missouri with the degree of Bachelor of Science, was commissioned a second lieutenant, Field Artillery Reserve, on May 25, 1935, was promoted to first lieutenant on August 12, 1938, and was ordered into active military service on December 26, 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., [illegible] 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Glenn W. Anderson (0-326287), 164th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused, an officer 30 years of age, was found guilty of willfully and wrongfully forcing his attentions on and taking indecent and improper liberties with the person of a woman 44 years old, an employee of the Molokai Community Center and U.S.O. of Molokai, Territory of Hawaii. The woman was about the same size as accused and was a virgin. She resisted accused's advances for some time but finally yielded to him. Both had been drinking to some extent. He was sentenced to dismissal. Although accused's actions were reprehensible I believe the circumstances were such that his separation from the service at this time is not required. I accordingly recommend that the sentence be confirmed but suspended during the pleasure of the President.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 56, 25 Mar 1943)

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

(375)

SPJGK
CM 227831

DEC 12 1942

UNITED STATES v. Private WALTER T. GREGORY (6979847), 422nd Coast Artillery Battalion, Composite AA.	SECOND SERVICE COMMAND SERVICES OF SUPPLY Trial by G. C. M., convened at Fort Jay, New York, October 27, 1942. Dishonorable discharge and confinement for six (6) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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 58th Article of War.

Specification: In that Private Walter T. Gregory, Battery D, 422nd Sep CA Bn Comp AA, did, at Camp Edwards, Mass, on or about March 28, 1942, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Jay, New York on or about July 12, 1942.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. The only evidence of absence without leave consists of what purports to be an extract copy of the morning reports of Batteries A and D, 422nd Separate Coast Artillery Battalion, Composite Antiaircraft.

The copy of the morning report of Battery A recites accused's absence without leave on March 28, 1942, and his transfer on April 3, 1942, to Battery D in the status of absent without leave. The copy of the morning report of Battery D recites the transfer to that battery on April 3 and a change of status of accused on April 15, 1942, from absent without leave to desertion. The purported extract copy is authenticated by a certificate signed by First Lieutenant John N. Talbert, Coast Artillery Corps, "Pers Adj" and reciting that the signer was custodian of the morning reports concerned. (Ex. 1) The defense objected to the introduction in evidence of this purported extract copy upon the ground that the officer authenticating it was not the custodian of the original records (R. 7, 8). The objection was overruled by the court. It was stipulated that accused surrendered in New York, New York, about July 12, 1942, in uniform. (R. 9)

Accused did not testify or make an unsworn statement.

4. Inasmuch as the only proof of absence without leave consists of the purported copy of the morning report entries received in evidence over an objection by the defense that the purported copy was not authenticated by the custodian as required by paragraph 116a of the Manual for Courts-Martial, it is necessary to consider whether the authentication by the Separate Battalion Personnel Adjutant met the requirements of the Manual. The holding by the Board of Review in CM 218201, Witkowski, in which The Judge Advocate General concurred, is controlling here. The Board said:

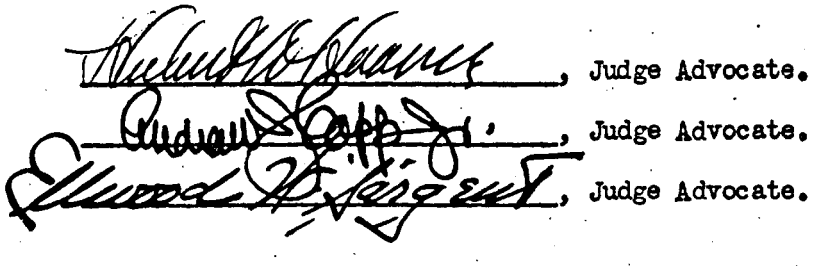
> "The extract copy dated September 18, 1941, of the morning report (Ex. 1) is also defective in that it is certified and signed by the Regimental Personnel Adjutant, Lieutenant Peterson, who states therein that he is the 'Official custodian of the morning reports of Battery "B", 198th CA (AA)' and that it is a 'true and complete copy ***'.
>
> * * * * * *
>
> "The unit personnel officer of a regiment is not the official custodian of the company morning reports. Those reports are retained by the company commander as basic records (par. 13 a (1), AR 345-5, Aug. 15, 1941).
>
> "The certification of the extract copy (Ex. 1) as a true and complete copy of the morning report by

Lieutenant Peterson as regimental personnel adjutant is not such an authentication as makes the extract copy admissible in evidence, notwithstanding his statement therein that he is the official custodian of the morning reports of Battery B, 198th Coast Artillery (AA)".

It is true that paragraph 13b (1) AR 345-5, April 15, 1942, provides that a company commander will daily submit to the unit personnel officer his completed morning reports, or extracts therefrom, for the purpose of enabling the personnel officer to obtain data therefrom, but this authorization does not make the personnel officer custodian of the morning reports. Paragraph 13a (1) of the same regulation explicitly excepts morning reports from the company records of which the unit personnel officer is custodian.

The rule of paragraph 116a of the Manual for Courts-Martial authorizing the introduction in evidence of copies of War Department records when authenticated by the custodians is an exception to the best evidence rule. As an exception it may not properly be extended by implication beyond its terms. To permit authentication of a copy of a record by an officer into whose hands the record may temporarily come for limited and defined purposes but who is not the custodian as recognized by law or regulations would not only amount to an extension by implication of the exception to the general rule, but would be an innovation apt to endanger the substantial rights of accused persons.

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



, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Commanding General, Second Service Command, Services of Supply, Governors Island, New York.

1. In the case of Private Walter T. Gregory (6979847), 422nd Coast Artillery Battalion, Composite AA, I concur in the holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be vacated.

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

(CM 227831).

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

DEC 17 '42 PM

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY
J. A. G. O.

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

SPJGN
CM 227845

FEB 5 1943

UNITED STATES	)	2ND ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, November 12, 1942. To be shot to death with musketry.
Private ROBERT E. SAPP (14038711), Company E, 66th Armored Regiment.	)	

OPINION of the BOARD OF REVIEW
CRESSON, SNAPP and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert E. Sapp, Company E, 66th Armored Regiment, having knowledge of the fact that, as a member of the 3rd Landing Team, which was being equipped for combat duty, he would depart from Fort Bragg for a port of embarkation on short notice, did, at Fort Bragg, North Carolina, on or about October 12, 1942, with intent to avoid hazardous duty and to shirk important service, to-wit: entrainment for a port of embarkation, desert the service of the United States and did remain absent in desertion until he was apprehended at Atlanta, Georgia, on or about October 19, 1942.

The accused pleaded not guilty to and was found guilty of the Specification and the Charge. He was sentenced to be shot to death with musketry. Evidence of one previous conviction was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that during September, 1942, the First Battalion, 66th Armored Regiment, was organized into a unit called Landing Team No. 3. This newly organized unit was increased to a five percent over-strength by the assignment to it of men from various companies of the 66th Armored Regiment. The accused, as a member of this group, was assigned to Landing Team No. 3 on October 1, 1942. Prior to his assignment to the landing team he had been a

member of Company E, and his company commander had personally explained to him the meaning of the 28th and 58th Articles of War. When Landing Team No. 3 was organized it was moved into an area apart from the other units at Fort Bragg. New and different equipment appropriate for a landing team was issued to the members of the unit including the accused, and modifications were made in the construction of the tanks used by the unit. During the period in which it was being trained, Landing Team No. 3 made a trip to Norfolk, Virginia, where actual landing operations were practiced. The accused accompanied the organization on this trip and participated in the practice drills. When equipment was being issued to the organization, the work of issuing it was carried on both night and day. The supply officers of the organization, including the supply sergeants, were told that the organization should be fully equipped for combat in 48 hours. The vehicles of the organization were prepared for loading and shipment to a port of embarkation. During this time there existed within the organization a "more or less common knowledge that the organization was due for an early departure". On October 14, 1942, Landing Team No. 3 entrained for a port of embarkation, and thereafter men of the organization were checked on shipboard at a port of embarkation. On October 10 or 11, just prior to the departure of the organization for a port of embarkation, a passenger list of the men who were to embark with Landing Team No. 3 was prepared. The name of the accused was included on this passenger list but when his absence was discovered at the port of embarkation, his name was stricken from the list, and a notation was made thereon that he was absent without leave (R. 8, 9, 11, 16, 18-20).

The evidence shows further that one or two days before the entrainment of Landing Team No. 3 for a port of embarkation, accused absented himself without leave and his absence necessitated the assignment of another man to take his place (R. 19-20).

4. The accused testified that when he was assigned to Landing Team No. 3 he was given no instructions.

> "* * * They just told me to put up my tent and stay around there. I stayed a couple of days and then went to the hospital and stayed five days and came back, and it was very indefinite whether I was to go with them or not to go with them, and that's the way it stayed as long as I was there" (R. 23).

The accused, however, did receive new equipment and except for the possible exception of a few small items he was fully equipped. The accused also participated in the training of the landing team and accompanied the organization on a training trip to Norfolk, Virginia, where the organization practiced loading and unloading ships. The accused also testified that he did not know where Landing Team No. 3 was going but stated that "they seemed to be going someplace." "* * * I wasn't sure, sir, just like

everyone else, when we were to go." The accused added that he thought that "* * * it probably would be like it did when we went to Norfolk to get on the training schedule". The accused testified further that a few days after he had returned from the hospital, and while he was drunk, he left camp without permission. The accused explained that he continued drinking during his entire absence. The accused added that he had intended to return to his organization and that he was on his way back to it when he was apprehended in Atlanta, Georgia, on October 18. At the time of his apprehension he was in a car with another soldier and some girls (R. 23-28).

5. The Specification alleges that the accused "* * * having knowledge of the fact that, he would depart from Fort Bragg, for a port of embarkation on short notice, did, with intent to avoid hazardous duty and to shirk important service, to-wit: entrainment for a port of embarkation, desert the service of the United States".

Since no one can have knowledge of the events of the future, the words "having knowledge of the fact that, he would depart from Fort Bragg, for a port of embarkation on short notice" must be construed as meaning that the accused had "knowledge" of certain facts which impelled him to a reasonable belief that his organization would depart for a port of embarkation on short notice. Furthermore, the Specification describes the "hazardous" duty which the accused sought to avoid as, "entrainment for a port of embarkation". Although such an entrainment, as a separate incident, cannot reasonably be regarded as hazardous, as the first step toward embarkation for foreign service, it obviously did involve hazardous service. Since the record shows, however, that the hazardous service contemplated by both the prosecution and the defense and the service which was actually avoided by the absence of the accused was hazardous, the deficiency in the Specification is immaterial.

In order to sustain the findings of guilty under this Specification the evidence must show that the accused believed that his organization would depart on short notice for a port of embarkation and that he absented himself without leave in order to avoid the hazardous duty which would normally follow such a departure.

The facts show that just prior to the act of the accused in absenting himself without leave on October 12, a passenger list had been prepared for Landing Team No. 3, and that the organization was teeming with activity. Some of the officers and men of the organization had worked both night and day in the issuance of equipment. A common belief prevailed in the organization that it was about to depart for

foreign service. Even the accused admitted that the organization seemed to be going some place but despite his belief in the impending departure of the organization, the accused absented himself without leave and traveled to Atlanta, Georgia. All of these facts including his timely departure just two days before the entrainment of his organization, combined with his subsequent conduct in traveling to Atlanta, Georgia, where he remained until apprehended, present a logical justification for the inference that the purpose of the accused was to avoid the important and hazardous service upon which his organization was entering. The evidence, therefore, supports the findings of guilty beyond a reasonable doubt.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. A sentence of death is authorized in time of war upon conviction of a violation of Article of War 58.

Chas. C. Cresson, Judge Advocate.

Dorrance D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., FEB 20 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Robert E. Sapp (14038711), Company E, 66th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The accused was properly found guilty of desertion by leaving his organization when it was preparing to embark for overseas service. He was sentenced to be shot to death with musketry. Although such a desertion is a serious offense, I am of the opinion that military necessity at the present time does not require the execution of the death penalty. I recommend, therefore, 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 twenty years. I also recommend that the dishonorable discharge be suspended and that a detention and rehabilitation center be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendations.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowance due or to become due and confinement at hard labor for twenty years. Execution of that part of sentence adjudging dishonorable discharge suspended until soldier's release from confinement. G.C.M.O. 73, 2 Apr 1943)

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

SPJGN
CM 227863

JAN 9 1943

UNITED STATES V. First Lieutenant DON C. KIPLINGER (O-159774), Company A, 798th Military Police Battalion.	)	FIFTH SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Fort Benjamin Harrison, Indiana, October 23, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
CRESSON, SNAPP and LIPSCOMB, Judge Advocates.

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

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

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

Specification: In that 1st Lt. Don C. Kiplinger, 798th Military Police Bn., was at Fort Benjamin Harrison, Indiana, on or about October 1, 1942, in a public place, to wit, the Reception Center loading area, drunk while in uniform, and while on duty as Train Commander of the Serial 1062 train movement.

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

Specification: In that 1st Lt. Don C. Kiplinger, 798th Military Police Bn., having been duly placed in arrest in quarters at Camp Edwin F. Glenn, Fort Benjamin Harrison, Indiana, on or about October 3, 1942, did at Camp Edwin F. Glenn, Fort Benjamin Harrison, Indiana, on or about October 5, 1942, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of the Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I, and of Charge I as involves findings that

the accused was, at the place and time alleged, drunk while in uniform and while on duty as train commander of serial 1062 train movement, in violation of the 96th Article of War, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on October 1, 1942, the accused was assigned to the duty of train commander for serial 1062 train movement. At 1:30 p.m. the accused reported to First Lieutenant Reiser, Reception Center Transportation Officer. After Lieutenant Reiser had given the accused certain instructions he accompanied him to the Classification, Records and Assignment Officer where the accused made a check of certain records. At the time the accused reported for duty Lieutenant Reiser detected the odor of liquor on his breath. He observed that the accused was listless, that he did not appear to comprehend the instructions which were given him, and that he did not properly check the records which he was required to check. Because of these observations Lieutenant Reiser thought that the accused was incapable of properly performing his duties and consequently reported his observations to Major Carrigan, his superior officer (R. 26-36).

Later, at about 4 p.m., Major Carrigan, the Post Transportation Officer observed the accused standing beside one of the train coaches. After some time the accused observed Major Carrigan and introduced himself. Major Carrigan told the accused that he was drunk. The conversation of the accused was not exactly coherent and his walk was not very steady. The accused, in response to questions, stated that he had no liquor but a few minutes later when a bottle of liquor was found in his drawing room he admitted that it was his.

Major Carrigan, who had accompanied the accused to his drawing room on the train, informed the accused that he was relieved from duty and the accused replied, "It will take written orders to get me off". An argument ensued and Major Carrigan called for the Provost Marshal who placed the accused in arrest. The accused still refused to leave the train. He was forced by the Provost Marshal and Major Carrigan out of his drawing room. The accused then backed into a corner and further force was necessary to get him off the train. After the accused was taken from the train he accompanied the Provost Marshal without the further use of force. The arrest of the accused took place where it could be seen by a number of enlisted men and "a few standing outside saw" the accused being dragged off the train. (R. 11) Major Carrigan testified that in removing the accused from the train he was acting within his authority as Post Transportation Officer (R. 7-14).

First Lieutenant Geroge T. Stewart, Provost Marshal, Fort Benjamin Harrison, testified that when he arrested the accused on the troop train he detected the odor of liquor on the accused and that he

again observed the odor of liquor when he was driving with the accused from the transportation center. The Provost Marshal took the accused to his quarters at Tent City. Within 45 minutes he returned and found the accused asleep but the accused was easily awakened. The accused was then taken to the Station Hospital. Upon arrival he was so sound asleep that he had to be carried into the hospital (R. 39-41).

At the Station Hospital the accused was examined at about 6:50 p.m. by First Lieutenant William S. Garner. Lieutenant Garner testified that the accused had a blood alcohol of 3.8 milligrams per cc whereas a person with 1.5 milligrams per cc is considered intoxicated. In the opinion of Lieutenant Garner the accused was "dead drunk". On the following morning the accused was again examined and found to be quite nervous with tremors of the lip, tongue and fingers.

On October 3, 1942, the accused was placed in arrest in quarters by a written order from his commanding officer (R. 37-39; Ex. C). On October 5, 1942, at about 5 o'clock the accused requested Captain William M. Sailors, the Executive Officer of his Battalion, to release him from arrest. Captain Sailors advised the accused that he did not have authority to release him and advised him that he (the accused) would be in serious trouble if he broke arrest (R. 49-50). At about 6:30 of the same day, Captain Sailors returned to the tent which had been occupied by the accused and discovered that the accused was not there. (R. 49-53)

Later in the evening the accused was found in a bar within the City of Indianapolis where he was waiting for a meal. When questioned by the Provost Marshal who had found him as to why he, the accused, had left his quarters the accused replied "they should tell me if I am going to have charges against me, if they are going to file charges against me". The accused also stated that he was restless and had to do something. He admitted that he had broken arrest (R. 47-49).

4. The defense introduced no evidence and the accused after being advised of his rights remained silent.

5. The reviewing authority approved so much of the finding of guilty of the Specification, Charge I, and Charge I as involves a finding that the accused was, at the place and time alleged, drunk while in uniform, and while on duty as train commander of serial 1062 train movement, in violation of the 96th Article of War.

The evidence shows very clearly that the accused was drunk during the early afternoon of October 1, 1942, when he was receiving instructions concerning his duties from Lieutenant Reiser, the Reception Center Transportation Officer. The facts further show that the accused did not check his records properly, that he did not appear to comprehend instructions, that he was listless and that his breath had the

odor of liquor. The accused was also drunk at 4:30 p.m. and liquor was found in his drawing room on the train. Although the accused was relieved of his duties by Major Carrigan, the Post Transportation Officer, and placed under arrest by the Provost Marshal, he resisted being removed from the train. The drunken conduct of the accused occurred in the presence of enlisted men and while the accused was on duty. The drunkenness of the accused apparently grew in intensity until in the early evening he was described by a medical officer as being "dead drunk". Although the evidence does not show directly that the accused was in uniform during the afternoon of October 1, the inference that he was in uniform was justified from the description of his duties during that time and from the evidence describing his conduct and appearance. The proof, therefore, sustains every element of the finding of guilty of the offense charged.

Although the language of the finding under the Specification as approved by the reviewing authority shows in substance an offense which might properly have been charged under the 85th Article of War, the designation by the reviewing authority of the 96th Article of War, as the appropriate article under which to approve the findings, does not affect the legal sufficiency of the findings or the sentence (par. 28, M.C.M., 1928; 394 (2) Dig. Ops. J.A.G., 1912-40).

The Specification, Charge II, alleges that the accused did, on or about October 5, 1942, break his arrest before he was set at liberty by proper authority. The evidence shows that the accused was officially placed in arrest on October 3, 1942, and that thereafter he was warned by the executive officer of his battalion not to break his arrest. Despite this warning the accused breached his arrest by leaving the area of his confinement and going into the City of Indianapolis. These facts clearly sustain the finding of guilty of the offense as charged.

6. The accused is 47 years of age. The records of the Office of The Adjutant General show that the accused accepted appointment as a second lieutenant, Field Artillery Reserve Corps November 27, 1918; appointment terminated November 26, 1923; reappointed first lieutenant Army of the United States, June 23, 1942; entered on extended active duty July 12, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 69 or 96.

Charles L. Lawson, Judge Advocate.

Dorrance D. Snoph, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 13 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Don C. Kiplinger (O- 159774), Company A, 798th Military Police Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. The conduct of the accused in breaking his arrest, especially after just previously having been warned of the consequences of such an act, and in being drunk while on duty as a commanding officer of a troop train shows an abandoned disregard for duty and discipline, and the unfitness of the accused to remain an officer. I recommend, therefore, that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft ltr. for sig. Sec. of War
Incl 3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 22, 6 Mar 1943)

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

SPJGK
CM 227864

DEC 31 1942

UNITED STATES	)	76TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Fort George G. Meade, Maryland, October 20 and 21, 1942. Dismissal.
Lieutenant Colonel ERNEST T. HAYES (O-10221), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Lieutenant Colonel Ernest T. Hayes, Field Artillery, was, at Fort George G. Meade, Maryland, on or about September 10, 1942, found drunk while on duty as S-3, 76th Infantry Division Artillery.

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, concurred in a recommendation for clemency submitted by the members of the court, and forwarded the record for action under Article of War 48.

3. The evidence shows that on September 10, 1942, and for some time prior thereto accused was on duty at Fort George G. Meade, Maryland, as S-3 of the 76th Infantry Division Artillery (R. 5, 16). He had been on sick report for two two-day periods during the two weeks prior to September 10, suffering from diarrhea and bleeding hemorrhoids (R. 13, 34, 37, 39). At about 3. p.m., September 9, he had requested permission to go to his quarters "because he was bleeding pretty badly"

(R. 14, 46). On arrival at his home he had gone to bed (R. 37). On the morning of September 10 he was scheduled to accompany the division artillery on a practice march to Indiantown Gap, Pennsylvania. He was to precede the column and, among other things, was to make arrangements for police convoys in Baltimore (R. 5, 9). He left his home in Elkridge, Maryland, in the early morning of September 10 in the company of his assistant S-3, Second Lieutenant Claire W. Lyke, 302nd Field Artillery Battalion, and the latter officer's wife, and was driven in an automobile to his office at Fort George G. Meade (R. 34, 38), arriving at about 5:45 or 6 a.m. (R. 40).

On arrival at his office accused inquired of Master Sergeant Charles M. Grabe, Headquarters Battery, 76th Division Artillery, as to whether Grabe had secured the equipment necessary for an operations section at Indiantown Gap (R. 52), spoke to another officer (R. 42), and sat down at his desk (R. 42, 49) wearing his field equipment (R. 17, 54). At about 6:15 a.m. he went to sleep while sitting in his chair (R. 43, 45). He remained asleep until about 7:10 a.m., when he was awakened (R. 16, 49). He left the building in the company of Major Raymond J. Bork, 76th Division Artillery (R. 45), and Grabe (R. 50) and walked along a "duck board walk" toward the street. As he started down some steps leading to the street he fell, striking his head and face in some gravel. Major Bork helped him to his feet and brushed away some gravel "imbedded" in his cheek. (R. 45, 46). Major General E. F. Reinhardt, Commanding General, 76th Infantry Division, saw accused fall and gave instructions to Major Bork to arrange to have accused taken to a hospital to ascertain whether he had been injured. The instructions were repeated to accused. (R. 45) Grabe, however, assisted accused into the car he was to use on the march (R. 50), a quarter ton truck or "jeep" (R. 10).

At about 7:35 a.m., while riding in the front seat of the truck, "slouched down in the seat" (R. 5) and leaning against the safety strap (R. 10), accused was observed by Brigadier General Jerome J. Waters, division artillery commander, and Colonel Arthur M. Sheets, Field Artillery, division artillery executive officer (R. 5, 10). The truck had reached the vicinity of an "initial point" (R. 13) at the intersection of McArthur Street and Annapolis Road in Fort George G. Meade (R. 5, 10). The truck was halted at General Waters' command. Accused alighted and approached General Waters, staggering as he walked. General Waters formed the conclusion that accused was drunk. He told accused to go to his quarters and accused asked, "Do I understand this as an arrest?". General Waters replied in the affirmative and ordered Colonel Sheets to place accused in arrest and take him to the hospital and have him examined for sobriety. (R. 6, 11) Colonel Sheets took

accused to the station hospital where Lieutenant Colonel Emery E. Alling, Medical Corps, and a soldier assisted accused into the building (R. 11) where he was observed by Colonel Alling and given a "blood alcohol" test (R. 18, 23). The test showed an alcoholic content of 3.25 milligrams of alcohol per cubic centimeter of blood (R. 23). After the sample of blood was drawn accused lay on a bed (R. 24) sleeping until about 2 p.m. (R. 26). Accused was physically examined at about 2 p.m., September 10, by a medical officer who, finding a fracture of the left cheek bone, the zygomatic arch, arranged for accused's admission to the hospital as a patient (R. 55). Accused was hospitalized and treated for the fractured bone and for his other ailments (R. 59). Upon the first routine examination of accused following his hospitalization "sugar" was found in his urine. On the following morning another test for sugar was made but none was found. Medical officers testified that the sugar content may possibly have been brought about by concussion or brain injury, and that the presence of sugar in the urine denoted sugar in the patient's blood. (R. 56, 59, 62, 63).

General Waters and Colonel Sheets each testified that in his opinion accused was drunk when he alighted from the quarter ton truck and when he was observed at about that time on the morning of September 10 and on that account was not in proper condition to perform his duties (R. 6, 11). General Waters testified that he based his opinion solely upon his observation of accused and upon accused's appearance and his staggering (R. 6, 8). Colonel Sheets testified that accused required assistance in alighting, and that he "staggered and couldn't stand up". This witness testified that he based his conclusion of drunkenness on accused's "actions, appearance, the way he talked and then the smell of liquor around him" (R. 11). Accused was not "belligerent" toward anyone in witness' presence (R. 13). Colonel Alling testified:

> "When I went out to the car he was very belligerent about getting out of the car and had to be assisted from the car and was unable to talk distinctly and staggered down the hallway and was belligerant when they attempted to remove his equipment and he attempted himself to remove it and fumbled very badly and had a strong odor of alcohol on his breath" (R. 19),

and that accused was "very evidently drunk". Witness observed accused for four or five minutes but did not make a clinical examination. (R. 21)

He considered the results of the blood alcohol test to be indicative of drunkenness. In his opinion the condition of accused as he observed it could not have been brought about by a fall and fracture of the zygomatic arch. (R. 19) Witness testified that a blow of sufficient force to fracture the zygomatic arch would be likely to produce a concussion, and that if there was a concussion, "A man would be out cold" - the victim might be "dazed, but that is not concussion" (R. 21). Major Roger D. Reid, 1322nd Service Unit, chief of the laboratory in the station hospital, testified that he took the specimen of blood from accused. Witness did not at the time observe any belligerency in accused but believed that he was drunk -

> "he spoke rather incoherently and was when I first went into the office, he was already seated on the chair with his head very much lowered and scarcely recognizing what was going on about him and of somewhat unsteady gait when he went to the room where the bed was". (R. 24)

Major Reid testified that he thought that consumption of at least three or four ounces of whiskey would be required to produce a blood alcohol content equivalent to that shown by the test of accused's blood. Normally such a content would be "burned" and would disappear within about eight hours after its inception. Witness made a second blood alcohol test at about 6 p.m., September 10, and then found two milligrams of alcohol per cubic centimeter of blood. (R. 25) Witness assumed accused had consumed more liquor in the interim but excluding this possibility, witness believed that accused's inactivity following the first blood alcohol test may have retarded the elimination of the alcohol (R. 26). Witness believed the blood alcohol test confirmed the outward physical manifestations of drunkenness (R. 28).

Accused testified that on September 9 he suffered acutely from diarrhea and hemorrhoids and upon arrival at his home went to bed. He ate very little that night. (R. 86) After dinner he drank one highball and one bottle of beer and went to bed between 9 and 9:30 p.m. He got up the next morning at approximately eight minutes after five. He did not have a drink at home that morning. He did not have a drink at his office, and had no liquor in his luggage. He suffered some dizziness. Upon arrival at his office he sat at his desk and put on his revolver and full equipment. He reached to the rear for his leggings and when he bent over suddenly became dizzy and "practically blacked out" for a few minutes. He remained in the chair until time

to leave the office. He slipped and fell over the steps, striking the side of his face. (R. 87) He testified:

> "I don't remember anything after that fall until later on, and the next thing I remember after that fall was when Colonel Sheets tapped me on the shoulder down at the IP and he says I have to take you to the hospital and I don't recall what I said except that it was 'O.K.' or 'all right'; that's the next thing I remember after the fall" (R. 87-88).

There was no question in his mind but that he was on duty on the morning of September 10, 1942 (R. 88).

Lieutenant Lyke testified for the defense that he and his wife had lived in the home of accused for some months. He was with accused during the evening of September 9. Accused drank one highball. (R. 33) Accused ate very little dinner - a small glass of fruit juice (R. 34). He showed no signs of intoxication when he retired. Witness next saw accused the following morning at about 5 a.m. Accused appeared to be weaker than usual but did not have a drink before leaving for his office. (R. 33) He did not have any breakfast to witness' knowledge (R. 34). Before leaving home witness had occasion to see the contents of accused's handbag, having replaced some cigarettes therein. There was no liquor in the bag. About half of a quart bottle of liquor was in the house but it was left there. (R. 33) Witness, Mrs. Lyke and accused went to the post together. Witness drove the car. He did not observe anything abnormal about accused. Accused appeared "perfectly sober". Witness' sense of smell was normal (R. 36) but he did not notice any odor of whiskey on the breath of accused. Accused's speech was "perfectly understandable". Witness observed accused walk to his office in his normal "rolling gait" (R. 34). Witness carried the bag to accused's desk (R. 36). It would not have been possible for accused to obtain liquor from any source after leaving the house and before arriving at the post, without witness' knowledge (R. 34). About two weeks after September 10 witness searched accused's home but did not find any liquor other than that above described (R. 35, 36).

Mrs. Claire M. Lyke, a graduate nurse, testified for the defense that she saw accused when he came to his home early on September 9. He appeared to be weak and ate very little dinner. When he went to bed there was nothing unusual regarding his sobriety. He was logical in all his conversation. (R. 37) On the following morning accused seemed normal. Witness sat between Lieutenant Lyke and accused as they drove from their home to the post. Accused appeared to be normal when he left the car. Witness did not notice any odor of whiskey on his breath. (R. 38, 39)

Major Edward C. Green, Jr., Field Artillery, testified for the defense that he saw accused at the 76th Infantry Division Artillery Headquarters between 5:45 and 6 a.m., September 10, while accused was sitting in the Lyke car. Accused asked "how things were going". He appeared to be "perfectly normal" and sober. Witness did not detect the odor of liquor, but was standing possibly a foot outside the car on the driver's side. (R. 40) Accused's speech was not "thick" (R. 41). Witness had observed on September 9 that accused was weak and not "his normal self" (R. 40). In walking accused habitually "throws his body forward and walks more on his toes than the normal man walks and throws his body out of balance" (R. 41). Captain Frederick C. Zunsteg, Field Artillery, testified for the defense that he saw accused about 5:50 a.m., September 10, while accused was sitting behind his desk. They had a brief conversation. Later accused appeared to fall asleep. Witness knew he was ill and weak and assumed that he fell asleep on this account. Witness did not observe any evidence of drunkenness. He did not get close enough to accused to smell his breath. (R. 42-44)

Major Bork testified that he saw accused at approximately 7:10 a.m., September 10, while accused was seated in his chair behind his desk apparently asleep. When accused left the room witness walked out behind him, followed him down the walk, and assisted him to his feet when he fell. It did not occur to witness that accused was under the influence of liquor. (R. 45) He did not smell anything on accused indicating alcoholic drink, but was not directly in front of him or in a position in which his breath would be blown in witness' face (R. 47). To witness' knowledge accused had some months before fallen on some steps. Witness believed accused was sober at that time. Accused normally walked with a gait which "would border on doddering". (R. 46) Grabe testified for the defense that he was in the room with and observed accused from about 6:15 a.m., September 10, to the

time he was aroused and left. There was no evidence of drinking by accused during this period. (R. 49, 50) Witness believed that if accused had taken a drink witness would have noticed it. When accused fell witness helped him to his feet. He appeared to be in a dazed condition. Witness did not at any time detect any odor of whiskey on the breath of accused (R. 50, 52) and observed nothing to indicate that accused was drunk (R. 53). His speech was clear and coherent (R. 51). Witness entered the quarter ton truck with accused (R. 50). When accused left the truck at General Waters' direction he "wavered a little bit" in walking (R. 53). When accused walked into the hospital "there was just a slight wavering" (R. 54).

Captain Bernard D. Stack, Medical Corps, testified for the defense that at about 2 p.m., September 10, he examined accused at the station hospital. In witness' estimation accused was sober at that time. His speech was normal, he answered all questions rationally, he carried on a normal conversation and he walked normally and on a straight line. (R. 55, 58) It was possible that the fracture suffered by accused might have produced a concussion. Ordinarily a concussion is "manifested by unconsciousness or if it is not that severe it effects the speech, incoordination of the movements and slow motion". (R. 56)

Major Frank Meyers, Medical Corps, 23rd General Hospital, testified for the defense that accused was hospitalized under witness' care (R. 58). A man in the physical condition in which accused was found upon admission to the hospital would be subject to spells of weakness or fainting spells. A fracture such as was suffered by accused might produce a concussion or brain injury. (R. 59, 62) Regarding the sugar found in the urine of accused witness testified that he thought at the time of the hospitalization that the sugar might suggest a possible brain injury (R. 62). No brain injury was, however, found (R. 60). Witness also testified:

> "Associated with increased blood sugar occasionally are what we call ketone bodies that arise due to lack of, or improper, burning of sugar and they may misinterpret or falsify an alcohol blood report" (R. 63).

Major Irving Hyman, 23rd General Hospital, a neurologist, testified for the defense that a blow on the head sufficiently hard to

fracture the zygomatic arch might produce a concussion with symptoms which might be confused with symptoms of drunkenness. Concussion "may have" an effect on the sugar content of the blood. Witness testified in regard to the blood alcohol test that,

> "sugar in the blood stream interferes with the proper reading of the test. In the first place, sugar and alcohol; alcohol is a sugar and the sugar delays the oxidation of the alcohol and if there is a high content of sugar in the blood there is apt to be an interference of the content of alcohol in the blood and I would be hesitant of the test taken upon a patient with a high sugar content in the blood" (R. 66).

Witness testified that the presence of sugar in the blood "may delay the absorption of alcohol and give an abnormally high reading". Witness also testified that loss of blood may result in anemia and consequently in possible dizziness and drowsy spells. (R. 67) In response to a question as to what the medical profession generally thought of the blood alcohol test, this witness testified:

> "Well in general it shows that the person has been drinking some alcohol but in so far as the decision over the question of sobriety there is a great deal of controversy" (R. 68).

In witness' opinion a clinical examination, that is, a complete physical and neurological examination, would be the best method of determining drunkenness (R. 66). A blood alcohol test would be only corroborative (R. 69). Although the presence of sugar in the blood would change the "reading" of the test, a showing of 3.25 milligrams of alcohol per cubic centimeter of blood would show that the person "must have had some" drinks of liquor (R. 73).

Captain William F. Beswick, Medical Corps, chief of the "Neuro-Surgical Section, 23rd General Hospital, and First Lieutenant Joseph E. Muse, Jr., Medical Corps, testified for the defense in substantial corroboration of Major Hyman as to the effect of blood sugar upon blood alcohol tests (R. 77, 79). Captain Beswick also testified in corroboration of Major Hyman as to the possibility that a concussion may cause sugar in the blood, as to the effect of such sugar on normal elimination of alcohol, and as to the relative value of blood alcohol tests to prove drunkenness (R. 76-78).

4. The evidence thus shows that on September 10, 1942, while accused was on duty at Fort George G. Meade, Maryland, as S-3 of the 76th Infantry Division Artillery, his physical condition, actions and appearance were such that superior officers who saw him concluded that he was drunk and took steps to relieve him from the duty on which he was engaged. His breath bore the odor of liquor, his speech was impaired and he staggered when he walked. He exhibited some degree of belligerency toward a medical officer to whom he was taken for examination. A blood alcohol test indicated a heavy content of alcohol in his blood. General Waters and Colonel Sheets, as well as an experienced medical officer and a laboratory technician, expressed the opinion that accused was drunk. It is undisputed that, regardless of the relative accuracy of the readings of the blood alcohol tests as affected by blood sugar and its derivatives, the blood alcohol test confirmed the use of liquor to some extent.

Accused testified that he did not consume any liquor on September 10 and had only one drink of spiritous liquor during the evening of September 9, and that he remembered little of what occurred following his fall on the steps and consequent injury. Other witnesses who were with him or saw him testified in his behalf that they did not observe in him any evidence of drinking or of drunkenness. Expert witnesses testified, in effect, that his injuries might have brought about a concussion with symptoms similar to those of drunkenness and that the blood alcohol test was unreliable and possibly erroneous. There was evidence, also, that the results of the urine test were indicative of a possible concussion. No medical witness who saw or examined accused on September 10 testified, however, that accused did in fact suffer a concussion.

Neither the odor of liquor on the breath of accused nor his belligerency toward the medical officer can be attributed to any possible concussion. No witness saw accused drink excessively but he had recently consumed liquor in an appreciable amount for otherwise its odor would not have been detected. He had alcohol in his blood. His staggering and his difficulties with his speech were characteristic of drunkenness. Experienced and mature officers who saw accused believed he was drunk. Under the circumstances any conclusion that his abnormal condition, actions and appearance were the result of physical injury would be conjectural and contrary to the dictates of common sense. The evidence establishes guilt beyond a reasonable doubt.

5. Paragraph 12, Special Orders No. 98, 76th Infantry Division, October 13, 1942, convening the court, indicates that seven members of the court and the trial judge advocate were not within the general command of the convening authority but were members of the Third Service Command. By letters dated October 10 and October 13, 1942, which accompany the record of trial, authority had been "delegated" by the Commanding General, Third Service Command, to the Commanding General of the 76th Infantry Division to designate the officers as members and trial judge advocate respectively of the general court-martial to be convened for the trial of accused.

The Services of Supply Organization Manual (1942) provides (401.00) that,

> "The principal objective of the commanding general of each service command (hereinafter referred to as the service commander) is to render assistance in all matters of supply and administration to all elements of the Army within the geographic limits of the service command".

It is further provided therein (403.03) that,

> "the mission of service commanders in respect to Army Ground Forces units located within their physical boundaries is to perform administrative *** functions for such units thus permitting those units to devote their full attention to their primary mission of training".

The 76th Infantry Division being within the territorial limits of the Third Service Command, there was no legal impropriety in the action of the service commander in conformity with the purpose of the directives noted, in making the officers available for detail on the court. The detail of the officers by the division commander was valid.

6. All members of the court joined in a communication to the reviewing authority recommending that the sentence be commuted to a reprimand. The letter contained the following:

> "The court was compelled to adjudge a sentence of dismissal by the mandatory provisions of A.W. 85. However, all members feel that the circumstances of

the accused's weakened physical condition and his long record of satisfactory service justify the exercise of clemency. The members all consider that Lt. Col. Hayes can still render valuable service to the Government, particularly in the present emergency".

The action of the reviewing authority contains the following:

"For the reasons stated therein, I concur in the unanimous recommendation to clemency submitted by the court that the sentence be commuted to an official reprimand".

7. The Army Register shows the service of accused as follows:

"1 lt. Inf. Sec. O.R.C. 27 Nov. 17; accepted 27 Nov. 17; active duty 27 Nov. 17; hon. dis. 11 July 19.— 1 lt. of Inf. 1 July 20; accepted 27 Nov. 20; trfd. to F. A. 29 May 27; capt. 23 Oct. 29; maj. 1 Oct. 38; lt. col. 4 Feb. 41".

War Department records show that accused is 49 years of age. During his service as an officer 62 efficiency reports upon him have been rendered. 19 reports covering aggregate periods of about 6 years and 6 months, show general ratings of superior. 35 reports covering about 13 years show ratings of excellent or above average. 8 reports covering about 7 months, show ratings of very satisfactory or average. The efficiency reports contain numerous remarks attesting to accused's general efficiency and devotion to duty. His battery received the Knox Trophy for 1931. He has been specially commended on four occasions. His 201 file contains nothing of a derogatory nature.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 85.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 5 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Ernest T. Hayes (0-10221), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused was found drunk at Fort George G. Meade, Maryland, while on duty as S-3 of the 76th Infantry Division Artillery. He was sentenced to dismissal. For some time prior to being found drunk he had been ill with diarrhea and bleeding hemorrhoids and was physically weak at the time of his offense. His military record is on the whole excellent. All members of the court and the reviewing authority recommended that the sentence be commuted to a reprimand. In view of all the circumstances and the recommendations for clemency, I recommend that the sentence be confirmed but commuted to a reprimand to be administered by the reviewing authority and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action

(Sentence confirmed but commuted to reprimand. G.C.M.O. 33, 12 Mar 1943)

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TITLE

DATE	BORROWER'S NAME	EXT.