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VOL. 17

1943

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XVII

including

CM 228971 to CM 230674

(1943)

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CONTENTS OF VOLUME XVII

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
228971	Tatum	4 Feb 1943	1
228972	Witherby	5 Jan 1943	7
228975	Parks	26 Jan 1943	11
228976	Reeves	5 Jan 1943	17
228982	Iverson	4 Jan 1943	21
229031	Heine	15 Jan 1943	25
229059	Gilbert	11 Feb 1943	31
229061	Bradshaw	30 Jan 1943	37
229062	Irskens	28 Jan 1943	43
229063	Bresky	28 Jan 1943	51
229141	Allen	20 Jan 1943	57
229156	Bradford	11 Mar 1943	61
229158	Gold	11 Jan 1943	69
229162	McNatt	7 Jan 1943	73
229183	Milock	26 Jan 1943	79
229228	Griffin	12 Feb 1943	85
229268	Smith	4 Mar 1943	91
229279	Robinson	26 Jan 1943	105
229280	Payne	16 Feb 1943	109
229343	Fields	16 Jan 1943	119
229366	Long	13 Mar 1943	125
229411	Ferrell	15 Jan 1943	133
229412	Munson	8 Mar 1943	139
229461	Ray	17 Feb 1943	145
229477	Floyo	30 Jan 1943	149
229479	Lax	30 Jan 1943	159
229480	Mayo	30 Jan 1943	163
229525	Sower	12 Feb 1943	167
229526	Van Winkle	11 Feb 1943	173
229549	Granosky	18 Feb 1943	193
229562	Bangs	20 Jan 1943	197
229635	Farris	27 Jan 1943	205
229638	Kehoe	17 Feb 1943	211
229652	Brown	2 Feb 1943	217

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
229681	Brooks, Fraser, Fuller, Henry, Hubbard, Lovings, Pearson, Pitts, Quarles, Robinson, Waters, Williams, Rufus, O'Neal	23 Jan 1943	223
229813	Turner	24 Feb 1943	225
229844	Willey	20 Feb 1943	229
229845	Martin	23 Jan 1943	235
229958	Abrahams, Belford, Bradford, Clark, Hampton, Parker, Riddick, Rollins, Roy, Smalls, Tilghman, Thompson, Williams, Young, Carrol, Allen, Toney, Williams, Smith	29 Mar 1943	241
229963	Guy	29 Jan 1943	255
229977	Proctor	2 Jun 1943	259
230008	Post	12 Feb 1943	273
230026	Bullard	23 Feb 1943	279
230070	Henry, Thompson, Nalls	25 Feb 1943	291
230193	Hudak	13 Mar 1943	299
230196	Kennedy	3 Apr 1943	305
230201	Eubanks	20 Mar 1943	311
230222	Daly	5 Mar 1943	331
230239	Marks	31 Mar 1943	337
230265	Garst	20 Feb 1943	343
230278	Gunning	8 Feb 1943	349
230290	Crouch	9 Mar 1943	355
230377	Wilson	15 Mar 1943	361
230379	Kenney	29 Sep 1942	373
230478	Maynor	22 Apr 1943	375
230484	McGinnis	26 Feb 1943	379
230541	Daniel	17 Apr 1943	385
230582	Pace	4 Mar 1943	393
230674	Wood	18 Feb 1943	399

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

(1)

SPJGK
CM 228971

FEB 4 1943

UNITED STATES)

9TH ARMORED DIVISION

v.)

Trial by G. C. M., convened at
Fort Riley, Kansas, December 4,
1942. Dismissal and confine-
ment for one (1) year.

Second Lieutenant JOHN E.
TATUM (O-1576725), Quarter-
master Corps.)

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, 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.

Specification: In that 2nd Lt. John E. Tatum, Hq., Supply Bn., 9th Armd Division, Fort Riley, Kansas, did, without proper leave absent himself from his post at Fort Riley, Kansas, from about November 8, 1942, to about November 22, 1942.

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

Specification: In that 2nd Lieutenant John E. Tatum, Hq., Supply Bn., 9th Armd Division, did at St. Charles, Missouri, on or about July 17, 1942, commit the crime of bigamy by willfully and feloniously entering into a contract of marriage with one, Margaret Anna Bloom of St. Louis, Missouri, while still legally married to one Pearl Jones of Cheyenne, Wyoming.

Upon arraignment accused entered a special plea to Charge II and its Specification in the form of a demurrer upon the ground that the Specification did not "constitute a cause of action". The special plea was

(2)

overruled. Accused thereupon pleaded guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced in support of Charge I and its Specification shows that accused was on leave of absence from his command, the Supply Battalion, 9th Armored Division, Fort Riley, Kansas, from November 2 until November 7, 1942 (R. 14). He failed to return upon the expiration of his leave and was thereafter absent without leave until November 22, 1942 (R. 14, 15, 17).

The evidence in support of Charge II and its Specification shows that accused was married to one Pearl Jones Tatum on June 21, 1941, in Pierce County, Washington (R. 19, 22, 23; Ex. 3), and that while married to her (R. 19, 22, 23) he married one Margaret Anna Bloom on July 17, 1942 (R. 22), at St. Charles, Missouri (Ex. 4). He first met Margaret Anna Bloom, a woman 29 years of age (R. 23), on July 16, 1942 (R. 24).

For the defense it was shown that the marriage of accused to Margaret Anna Bloom, the second wife, had been annulled in a proceeding brought by her for that purpose in the District Court of Marshall County, Kansas, on December 4, 1942, following accused's disclosure that he was married to Pearl Jones Tatum (R. 25, 26; Ex. 5). Three character witnesses were called by the defense. Captain Milton E. Rose, Supply Battalion, 9th Armored Division, testified that he had observed accused while the latter was serving in the battalion and had found he displayed initiative and was diligent and efficient. Witness rated his performance of duty as excellent (R. 28). Major Carl Edmonds, Supply Battalion, 9th Armored Division, testified that he had known accused "three or four weeks" and would rate him as a superior officer (R. 29). First Lieutenant James L. Kaiser (organization not shown) testified that he had known accused about five and a half months and had observed him in the performance of his duties. Witness would rate him as "a superior officer, with possibilities of being one of the best that I have seen" (R. 30).

Accused declined to testify or make an unsworn statement.

4. In addition to the pleas of guilty to the Charges and Specifications, the evidence introduced by the prosecution was adequate to

justify the findings of guilty.

The bigamous marriage was proved beyond reasonable doubt by the certificates of both marriages (sec. 395 (17), Dig. Op. J.A.G., 1912-1940), by the presence at the trial of the first wife who testified that she was then the wife of accused and by the appearance of the second wife who testified to her marriage to accused on a date which was subsequent to that of his first marriage and who also testified to an admission made to her by accused after their wedding that he was then married to another woman and not divorced. The first wife did not expressly testify that her marriage to accused was still subsisting at the time of the second marriage. She did at the time of the trial, however, identify accused as her husband. A marriage once contracted is presumed to continue in the absence of proof of death or legal dissolution. Such a presumption is factual and may be inferred if warranted by all the circumstances (par. 112a, p. 110, M.C.M.). The circumstances here warranted such an inference by the court. Thus it was proved that accused committed bigamy by contracting a second marriage while his first wife was alive and at a time at which the first marriage had not been dissolved (sec. 2030, Wharton's Criminal Law, 12th Ed.; sec. 601, Title 22, D. C. Code; 10 C.J.S. 359). The Specification was properly laid under Article of War 95 (CM 217931, Jenkins).

5. As noted above accused entered a special plea to Charge II and its Specification upon the ground that it did not sufficiently state an offense. The court properly overruled the plea. The Specification alleges that accused contracted a bigamous marriage "while still legally married" to another. It was contended that the Specification should have expressly stated, in addition, that the first wife was still alive. A warrantable inference from the words "while still legally married" is that the first wife was alive at the time of the second marriage (sec. 454 (17), Dig. Op. J.A.G., 1912-1940). The record shows that accused was not taken by surprise or otherwise prejudiced by any lack of clarity in the Specification.

6. In the course of the cross-examination of Margaret Anna Bloom, the second wife, the court sustained an objection by the prosecution to a question designed, according to a statement by the defense counsel, to prove "the state or condition they were in when the marriage was consummated" (R. 25). Proof of the circumstances under which the bigamous

(4)

marriage was contracted might have been material in mitigation and the objection should have been overruled. The defense did not make any further offer of proof in the premises. It does not appear that the error could have injuriously affected the substantial rights of accused in so far as the findings of guilty were concerned.

7. The only sentence authorized by Article of War 95 for violation of that Article is dismissal. The forfeitures and confinement adjudged are not therefore legally authorized for the offense of bigamy found under Charge II and its Specification as a violation of Article of War 95 (CM 224286, Hightower). The forfeitures and confinement are legally authorized for the offense of absence without leave found under Charge I and its Specification. The maximum limitations upon punishment fixed by paragraph 104 of the Manual for Courts-Martial are not applicable in the cases of officers.

8. Attached to the record is a recommendation by the trial judge advocate that the execution of the sentence be suspended, this on the grounds that the bigamous marriage had probably been contracted "under circumstances over which the accused did not have full control" and had been annulled by the time of the trial, and that the prior service of accused had been excellent.

9. War Department records show that accused is 26 years of age. He attended college for two years. He had been in the accounting business for four years prior to his entry into the military service on October 9, 1940. He was commissioned a second lieutenant, Army of the United States, July 15, 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 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 61.

Robert W. Pearce, Judge Advocate.
Andrew S. Copp Jr., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

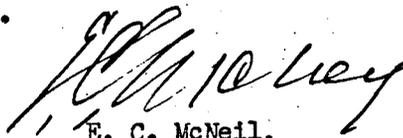
War Department, J.A.G.O., FEB 10 1943

- 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 John E. Tatum (O-1576725), Quartermaster 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. Accused was found guilty of absence without leave for fourteen days, in violation of Article of War 61, and of bigamy, in violation of Article of War 95. The bigamous marriage was entered into one day after accused became acquainted with the woman involved. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. Dismissal only is authorized as punishment for violation of Article of War 95 but the forfeitures and confinement adjudged are legally authorized for violation of Article of War 61. Three officers testified that the military record of accused had been creditable. The court erroneously rejected an offer by the defense to prove the circumstances under which the bigamous marriage was contracted but in a recommendation for clemency the trial judge advocate stated that the marriage had probably been contracted under circumstances over which accused "did not have full control". Ordinarily I should not recommend confirmation of a sentence to total forfeitures and confinement for absence without leave over a relatively short period, but the bigamy committed by accused, though technically charged only as a violation of Article of War 95, was a very serious offense in the nature of a felony. Its commission is a circumstance that cannot be overlooked in determining appropriate punishment. The sentence should not be modified. I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

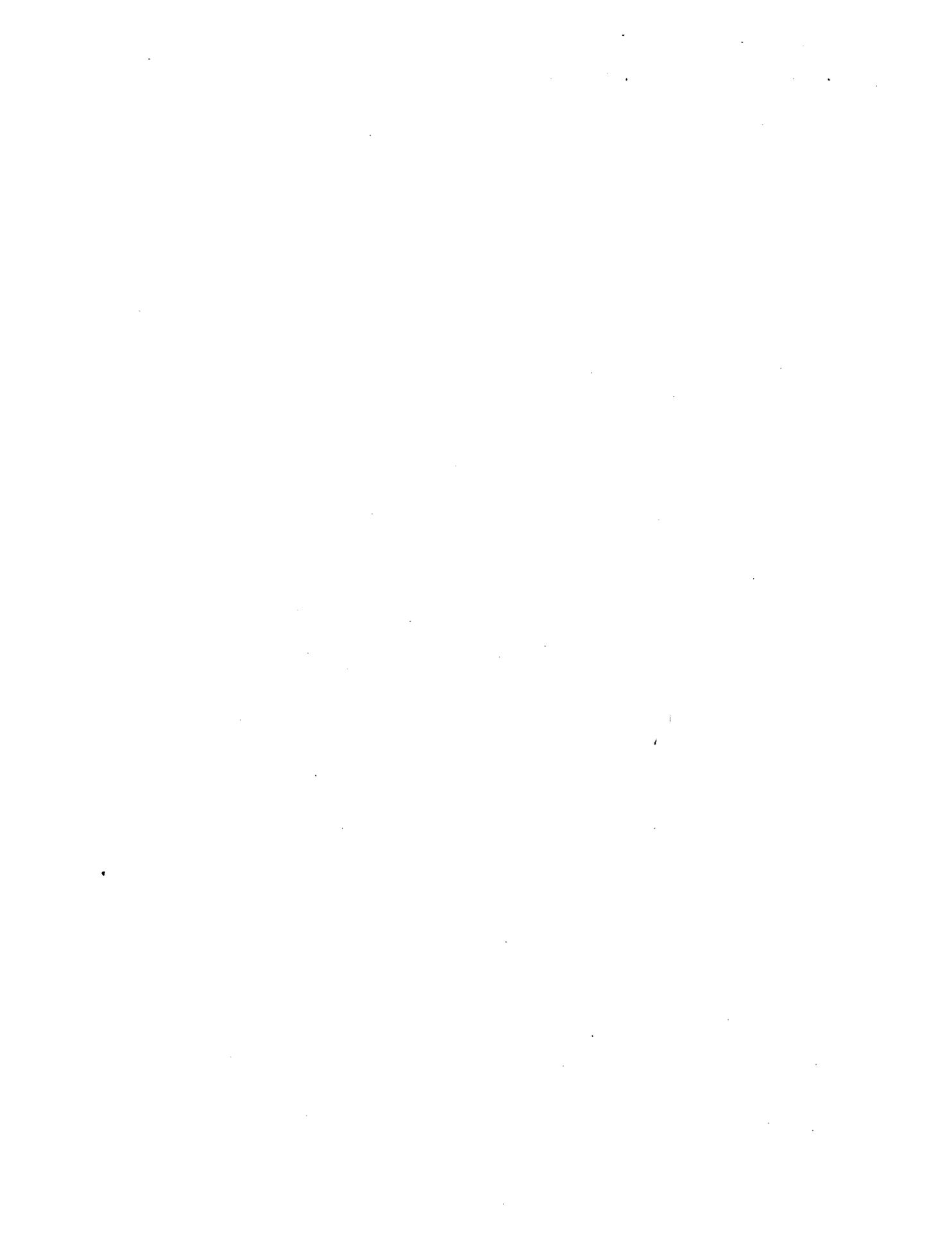
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

- 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. 68, 29 Mar 1943)



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

(7)

SPJGN
CM 228972

JAN 5 1943

UNITED STATES	)	38TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Carrabelle, Florida,
Second Lieutenant ROBERT H.	)	December 9, 1942. Dismissal.
WITHERBY (O-375778), Com-)	
pany A, 149th Infantry.)	

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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 2nd Lieutenant Robert H. Whitherby, Company "A", 149th Infantry, did, without proper leave absent himself from his organization at or near Burr Ferry, Louisiana, from about November 6, 1942 to about November 30, 1942.

The accused pleaded guilty to and was found guilty of the Charge and Specification. 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 the accused, as an officer of the 149th Infantry, was detailed on November 6th to attend a critique at Camp Polk, Louisiana, and to return thereafter to his organization. On the morning following the critique the accused was not present with his organization but remained absent without leave, or without permission of any kind, until he returned to his organization on December 2, 1942 (R. 7-10; Ex. A,B).

4. The only witness for the defense was the accused, who testified that he has served in the Army for 10 years. During the major part of that time he served as an enlisted man in the regular Army but for the past 18 months he has been a commissioned officer. The accused testified that as an enlisted man his record was good, that he had never been court-martialed, or received company punishment, or lost any time under the provisions of the 107th Article of War, and that his discharge showed his character to be excellent. The accused also testified that as an officer his record had been good except for the present incident. The accused stated that he liked the Army and that he wanted to get back to service with parachute troops and that he was willing to serve there in any capacity.

The accused then explained his dissatisfaction with several assignments and concluded his testimony with the following statement:

*** I feel like I have been kicked around like a military football ever since being an officer and I got tired of it. I definitely do want to stay in the Army and that is the only purpose I have in telling the story, to stay in the service. ***" (R. 16).

5. The accused pleaded guilty to both the Charge and the Specification thereby admitting that he was absent without leave from his organization from November 6, 1942, to about November 30, 1942. This plea is fully corroborated by direct testimony showing his absence, and by an extract copy of a morning report of his organization. The testimony of the accused has no bearing either on his guilt or his innocence, but tends only to show his dissatisfaction with his recent treatment as an officer.

6. The accused is 28 years of age. The records of the Office of The Adjutant General show that he accepted commission as second lieutenant, Infantry, Reserve, April 10, 1939; was discharged from the Regular Army on May 9, 1941, to accept active duty as a reserve officer, and entered on active duty on May 10, 1941.

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 of the sentence. A sentence of dismissal is authorized upon conviction of a violation of the 61st Article of War.

Charles B. Bresson, Judge Advocate.
Dorrence D. Smith, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.

1st Ind.

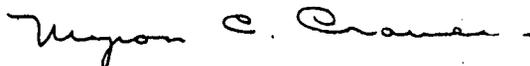
War Department, J.A.G.O., JAN 11 1943 - To the Secretary of War.

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 Robert H. Witherby (O-375778), 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 the sentence, and to warrant confirmation of the sentence.

At the time of this offense, the accused had served approximately 18 months as an officer and 8 years as an enlisted man. His action, therefore, in absenting himself without leave for 24 days represents a serious breach of duty and discipline. In addition, the dissatisfaction which the accused expressed with his several assignments as an officer indicates his unfitness for commissioned service. I recommend, therefore, 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 - Draft ltr. for
sig. Sec. of War
Incl 3 - Form of Executive
action

(Sentence confirmed. G.C.M.O. 41, 17 Mar 1943)

Accused was in uniform. While the two were seated in the latter place an unidentified person in the uniform of an enlisted man (R. 7) with sergeant's chevrons (R. 20), passed them. This person "glared pretty hard" at accused (R. 6) in apparent anger (R. 8). Miss Salov testified that she did not see the man touch accused (R. 55). Accused asked his companion to excuse him, said he would "be back in a minute" and followed the man from the building (R. 6). A civil police officer, about 200 feet away (R. 20), saw the two men emerge and as they were "approaching the sidewalk" saw them attempting to exchange blows with their hands and then saw them "grappling with one another" (R. 19). Miss Salov went outside and saw accused on his back on the sidewalk. His antagonist was "choking him" and the two were "fighting". There were eight or nine bystanders gathered about. (R. 9) The police officer arrived on the scene, laid his hand on the man who was apparently a soldier and said, "I am a police officer, break it up". The soldier arose. Accused started to do so and then seized the police officer by the legs. (R. 19) A scuffle lasting from four to ten minutes ensued (R. 11, 19). The policeman got accused's head between his legs, bent accused's arm back in a "hammerlock" (R. 22, 23), and told him he was in arrest (R. 51). With the help of a bystander handcuffs were placed on accused (R. 19, 43) who was then taken to a police station (R. 19).

Accused testified that when he and his companion entered the restaurant he ordered soup. While speaking to a waiter as to delay in filling the order a "Sergeant" with a Coca-Cola bottle in his left hand, struck accused in the face with his right arm, and after walking three or four steps, turned and "looked at" accused. He again went forward a few steps and turned and looked at accused a second time. Accused testified;

"I thought at first it was accidental, but when he kept glaring I felt it must have been intentional, so I asked the lady with me to excuse me, that I would be back in a minute. I went outside and he set the coca-cola bottle down first quite close to the door, and I asked the Sergeant, 'Sergeant, was that intentional or accidental?' and he called me Lieutenant Williams, and once more during the fighting he referred to me as Lieutenant Williams. He stated something about something that happened some previous time, and said, 'I told you if I ever met you in town I would get even with you.' The first thing I knew, he struck me, and of course I struck back" (R. 28, 29).

Accused was struck in the face. The two "went into a clinch on the concrete", accused beneath. The assailant had his hand on accused's throat

and choked him. (R. 29) The police officer pulled the assailant away and accused "raced for his feet", but was told "it is an officer" and discovered he had seized the policeman (R. 30). Accused did not place the sergeant in arrest because he acted "so quickly that nothing could be done about it" (R. 34). If accused had not returned the blow struck by his assailant, "He would have been all over on top of me if I hadn't. He was a big man, anyway". Accused did not believe he could have escaped. (R. 37)

A witness testified for the defense that at about the time accused left the D. and W. Sandwich Shop some soldiers who had been looking at him also left the shop (R. 40).

4. The evidence shows that at the place and time alleged in Specification 1 of the Charge, accused engaged in a quarrel and fist fight with an unidentified person dressed as an enlisted man. The scene of the encounter was a public street. Accused resisted arrest by a civil police officer. The quarrel and fight were accompanied by sufficient commotion to draw the attention of spectators. Characterization in the Specification of the quarrel as a "brawl" was justified. The entire proceeding was disorderly. Accused asserted that the fight was provoked by the other man and that accused did not resort to force until he had been assailed. It does not appear that accused attempted to arrest the enlisted man or that he entered the fight to quell an affray. Upon accused's own testimony it is clear that he aggressively accepted whatever challenge had been made and voluntarily engaged in the fight and altercation. This voluntary participation in the fight and brawl, with the attendant disorders, was obviously to the prejudice of good order and military discipline.

In view of the circumstance that the transaction was initially provoked by the unidentified man and the circumstance that accused acted impetuously and in sudden anger, his behavior cannot properly be considered disgraceful or dishonorable. His conduct did not demonstrate moral unfitness to be an officer (par. 151, M.C.M.). Violation of Article of War 95 is not, therefore, established.

5. One of the seven members of the court recommended that the sentence to dismissal be suspended, this in view of the youth of accused and the circumstances of the case. Three additional members recommended that the "findings be remitted, and the officer restored to duty", this because he had not previously been tried by court-martial and because the members considered it "questionable" whether accused did not act in self-

(14)

defense.

6. War Department records show that accused is 22 years of age. He graduated from high school in 1939. He enlisted March 5, 1940. He was appointed a second lieutenant, Army of the United States, on August 12, 1942.

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 only so much of the findings of guilty of the Charge and Specification 1 thereunder as involves findings of guilty of this Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Hubert C. Kauer, Judge Advocate.
Andrew G. Goff, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 29 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 Lewis E. Parks (O-1289955), 301st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and Specification 1 thereunder as involves findings of guilty of this Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Accused voluntarily engaged in a fight and brawl with an unidentified soldier on a public street of Battle Creek, Michigan. The soldier had been guilty of some provoking actions. Accused was sentenced to dismissal. I believe the misconduct of accused was impetuous and prompted by sudden anger and that he is capable of future valuable service. I accordingly recommend that only so much of the findings of guilty of the Charge and Specification 1 thereunder be approved as involves findings of guilty of this Specification in violation of Article of War 96, 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,
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 findings of guilty of the Charge and Specification 1 approved as involves finding of guilty of this Specification in violation of Article of War 96. Sentence confirmed but commuted to reprimand. G.C.M.O. 78, 3 Apr 1943)

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

SPJGN
CM 228976

JAN 5 1943

UNITED STATES)

SAN FRANCISCO PORT OF EMBARKATION

v.)

Trial by G.C.M., convened at Camp Stoneman, Pittsburg, California, October 30, 1942. Dishonorable discharge and confinement for twenty (20) years. Penitentiary, McNeil Island, Washington.

Private CLEVELAND L. REEVES
(13005538), Code 1815-B,
Camp Stoneman, California.)

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Cleveland L. Reeves, Code 1815-B, did, at Camp Stoneman, California, on or about October 22, 1942, with intent to commit a felony, viz, rape, commit an assault upon Second Lieutenant Stephanie Uss, Army Nurse Corps, by willfully and feloniously placing various parts of his body on and against various parts of the person of said Second Lieutenant Stephanie Uss, Army Nurse Corps, against her will and without her consent.

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

(18)

3. The evidence for the prosecution, in brief, is as follows: On the night of October 21-22, 1942, Second Lieutenant Stephanie Uss, Army Nurse Corps, 39th General Hospital, Camp Stoneman, California, was asleep in her room. Before 4:30 in the morning she awakened suddenly, sensed the presence of someone in the room, looked to the side of her bed, saw a man crouched there, distinguished a fatigue hat, sat up on the side of her bed, put her hand out, knocked off his hat and felt short, kinky hair. The covers were off her and after a second he was on the bed. She had her back against the wall and screamed and kicked constantly. When the accused jumped on her bed some part of his body was between her thighs. He grabbed her twice on her shoulders and around her waist, tried to hold her feet and hands, and held one hand against her throat. During this struggle he was on her and right in front of her on the bed. She continued screaming and the accused suddenly got off the bed and ran out of her room. At that time she saw a few girls coming towards her room. After the accused had left she missed a slipper, which was later returned, identified by her, and introduced, without objection, as Prosecution Exhibit A. The prosecution testified that when she first awakened she thought she was dreaming until she felt the accused's head and kinky hair. The door of her room which opened into the corridor had been left open that night because it was fairly warm and accused had no difficulty in getting out of her room. Lieutenant Uss identified as her property, a slipper which had been taken from the accused at the time of his apprehension (R. 11-15; Ex.A).

During the early morning of October 22, 1942, Private Earley, a guard stationed near the nurses' barrack No. 2, (the barrack occupied by Lieutenant Uss) heard screams in that barrack. As he and Sergeant Bowie ran in between the barracks to investigate the cause of the screaming, a man was seen running northeast of the building. Sergeant Bowie called to the man to halt but he continued to run. Sergeant Bowie and Private Earley then ran after this person and caught him after he had stumbled and fallen in a ditch. This person, identified as the accused, had a slipper in his hand. (This slipper was later identified as belonging to Lieutenant Uss).

When thus apprehended the accused was in his stocking feet and was dressed in olive drab trousers and shirt. He was carrying his shoes tied together. His trousers were unbuttoned and his underwear was showing. The accused was wearing no headgear. The accused was not drunk, did not appear to be confused, and was running toward the colored section of the camp. The accused stated "that he had a good time, that he had snuck off". When asked what he was doing in the nurses' barrack, the accused stated that "he thought he was lost" (R. 15-18).

On the morning of October 22, a soldier's fatigue hat was seen on the floor of Lieutenant Uss' room (R. 22).

4. The defense introduced no witnesses except the accused, who, after his rights had been explained to him, testified under oath that on the

evening of October 21st he "snuck out to town and came back through a hole in the fence" about 12 o'clock. After his return to his camp he walked around trying to find his barrack. When he could not find it he lay down in the field and went to sleep. When he awakened he started looking for his barrack again. He went into one barrack and was chased out. He then went into another barrack, sat down, pulled off his shoes and prepared to go to bed. Someone then hit him on the head and he wrestled with that person. Then someone screamed, he became frightened, and ran out. Later he was arrested by the guard (R. 25-26).

The accused testified further that he had gone to town and that while there he smoked one and a half Marihuana cigarettes called "reefers", and some aspirin cigarettes which give the same effect as drinking. He would not tell the names of those he was with in town but stated that he left about 11 p.m. and returned on the bus. He testified that he got off the bus before reaching camp, went through the fence by the same hole he had gone out, and tried to find his barrack. When he took off his shoes he sat on a bed which he thought was his (R. 25-29).

5. Major L. S. Lipchutz, Medical Corps, a witness for the prosecution, testified in rebuttal that he had treated approximately fifty persons who had been under Marihuana, since 1930. He stated if accused smoked one and a half Marihuana cigarettes and four aspirin ones, it would affect him very little and would not impair his faculties, so that he could not find his sleeping quarters (R. 29-31).

6. In order to sustain the findings of guilty, the facts must show that the accused committed an assault upon Second Lieutenant Uss with the intent to ravish her.

An assault with intent to commit rape is defined as -

"* * * an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. * * *"

* * *

"The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice"

"Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted" (par. 1491, M.C.M., 1928).

The facts proved established every element of the crime charged. The accused entered Lieutenant Uss' room about 4 o'clock in the morning

(20)

and committed an assault and battery upon her. The purpose and intent of the assault is clearly shown by the manner in which the assault was made, by the fact that part of the body of the accused was inserted between Lieutenant Uss' thighs and by the fact that his trousers were unbuttoned when he was apprehended a few minutes after the attack.

The apprehension of the accused as he escaped from the scene of crime combined with the fact that he had Lieutenant Uss' bedroom slipper in his hand at that time clearly establishes the identity of the accused. The guilt of the accused is shown beyond any reasonable doubt.

7. The accused is about 23 years of age. He enlisted on August 19, 1940, for three years. His record shows no prior service.

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. Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years is authorized upon conviction of an assault with intent to commit rape in violation of Article of War 93.

Charles Bresson, Judge Advocate.

Lorraine D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

(21)

SPJGN
CM 228982

JAN 4 1943

UNITED STATES	)	SAN FRANCISCO PORT OF
	)	EMBARKATION
v.)	
Second Lieutenant IRVIN C.	)	Trial by G.C.M., convened at
IVERSON (O-1288561), In-	)	Camp Stoneman, Pittsburg,
fantry.	)	California, October 23, 1942.
	)	Dismissal and total forfei-
	)	tures.

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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Irvin C. Iverson, Infantry, casual officer, Camp Stoneman, California, did, without proper leave, absent himself from his station at Camp Stoneman, California, from about September 3, 1942, to about October 3, 1942.

The accused pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service and to forfeit all pay and allowances due and to become due. 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, in brief, is as follows:

Extract copies of Special Orders Nos 178 and 201, Headquarters Infantry School, Fort Benning, Georgia, dated respectively July 23, 1942, and August 19, 1942, were placed in evidence without objection (R. 4-6; Exs. A, B). These orders show that the accused had been ordered to report to Camp Stoneman, California.

(22)

An extract copy of a morning report of officers, Camp Stoneman, California, dated September 21, 1942, which was identified and introduced in evidence without objection shows the accused from duty to absent without leave as of September 3, 1942 (R. 6; Ex. C). A similar report dated October 3, 1942, which was also received in evidence without objection, shows the accused from absent without leave to arrest in quarters as of October 3, 1942 (R. 8; Ex. D). In addition, the evidence shows that during the period in which the accused was absent a search was made for him and his whereabouts were not ascertained (R. 8).

4. The defense did not introduce any evidence, and the accused, after his rights were explained to him, elected to remain silent.

5. The accused pleaded guilty both to the Charge and the Specification thereby admitting that he was absent without leave from Camp Stoneman, California, from September 3, 1942, to October 3, 1942. This plea is corroborated by morning reports of officers, Camp Stoneman, and by evidence showing that a search was made for the accused and that his whereabouts could not be ascertained.

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows:

Inducted into Military Service, June 12, 1941; attended Officers' Candidate School, Fort Benning, Georgia; commissioned a second lieutenant in the Army of the United States on July 23, 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 and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of the 61st Article of War.

Shas. B. Bresson, Judge Advocate.

Dorance D. Smith, Judge Advocate.

Abner E. Lifecomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

JAN 9 1943

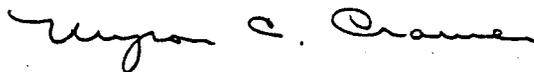
- To the Secretary of War.

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 Irvin C. Iverson (O-1288561), 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 the sentence and to warrant confirmation of the sentence.

Absence without leave for one month on the part of an officer is a serious breach of discipline and duty and since the accused has presented no facts in mitigation of his offense and no facts justifying clemency, I recommend that the sentence 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 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 - Draft of ltr. for
sig. Sec. of War
- Incl 3 - Form of Executive
action

(Sentence confirmed. G.C.M.O. 48, 20 Mar 1943)

Specification 2: In that Private ROBERT T. HEINE, Company "B", 32nd Infantry, while traveling from Camp Haan, California, DS enroute to join Troop "C", 7th recon. squadron, Camp San Luis Obispo, California, did, at Ventura, California, without proper leave, absent himself from his organization, station, and duties from about August 28, 1942 to about September 1, 1942.

Specification 3: In that Private ROBERT T. HEINE, Company "B", 32nd Infantry, did, without proper leave, absent himself from his organization, duties, and station at Camp San Luis Obispo, California, from about 0600 o'clock, September 2, 1942, to about 2300 o'clock, September 4, 1942.

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

Specification: In that Private ROBERT T. HEINE, Company "B", 32nd Infantry, having been duly placed in confinement in the Post Stockade on or about September 5, 1942, did, at Camp Haan, California, on or about 4:15 P.M., September 10, 1942, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private ROBERT T. HEINE, Company "B", 32nd Infantry, a prisoner under guard, did, at Ventura, California, on or about 9:10 P.M., August 28, 1942, escape from his guard by jumping out of a train window, while the train was in the station.

Specification 2: (Finding of Not Guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I, II, and III, and of the Specifications thereunder; guilty of Specification 1, Charge IV; not guilty of Specification 2, Charge IV; and guilty of Charge IV. Evidence of two previous convictions, in violation of Article of War 61, 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 disapproved that portion of Specification 1, Charge I; which provides "until he was apprehended at Los Angeles, California", reduced the period of confinement to four years and six months, 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 50 $\frac{1}{2}$.

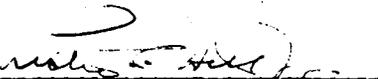
3. The evidence is legally sufficient to support the findings of guilty of all Charges and the Specifications thereunder.

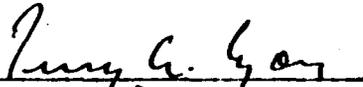
In the Specification, Charge I, and in Specifications 1 and 3, Charge II, the initial absence of accused in each case is alleged to have occurred at Camp San Luis Obispo, California. To prove such initial absences from Camp San Luis Obispo, there were received in evidence extract copies of the morning reports of the organization of accused, stated to have been submitted at the Desert Training Center Maneuver Area, California, containing entries to the effect that accused absented himself without leave from his organization on January 26, July 6, and September 2, 1942 (Exs. A, B, D). No objection was made by the defense to the introduction of this evidence (R. 7-8). Although the morning reports are stated to have been submitted at a place other than that from which accused is alleged to have absented himself, the variance was not material and did not injuriously affect the substantial rights of accused. The accused made no objection to the introduction in evidence of the extract copies of the morning reports and did not claim to have been misled by the variance. There was no evidence that the organization of accused was not at the Desert Training Center Maneuver Area on the dates concerned, or that accused did not absent himself from that station at the times alleged. An examination of the record of trial does not disclose that the entries contained in the morning reports were other than within the personal knowledge of the officer making the reports.

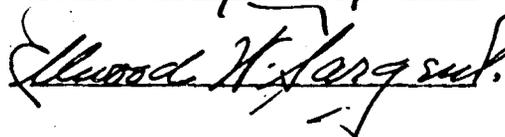
4. The reviewing authority disapproved that portion of the finding of guilty of Specification 1, Charge I, which alleges "until he was apprehended at Los Angeles, California", and reduced the period of confinement to four years and six months. The maximum punishment, therefore, for the offense alleged in Specification 1, Charge I, cannot exceed that fixed for desertion committed prior to February 4, 1942 (Executive Order, Feb. 3, 1942), under similar circumstances terminated by surrender. As accused was absent for

more than sixty days the maximum authorized punishment for desertion terminated in a manner not shown is dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years. The maximum authorized confinement for the other offenses of which accused was found guilty is as follows: 48 days for 16 days' absence without leave alleged in Specification 1, Charge II; 12 days for 4 days' absence without leave alleged in Specification 2, Charge II; 9 days for 3 days' absence without leave alleged in Specification 3, Charge II; one year for escape from confinement alleged in the Specification, Charge III; and one year for escape from his guard alleged in Specification 1, Charge IV, which offense is substantially an escape from confinement. The total confinement authorized for the offenses of which the findings of guilty were approved by the reviewing authority is three years, eight months, and nine days (par. 104c, M.C.M., 1928, pp. 97-98).

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of all Charges and Specifications thereunder, 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 three years, eight months, and nine days.


_____, Judge Advocate.


_____, Judge Advocate.


_____, Judge Advocate.

SPJGH
CM 229031

1st Ind.

War Department, J.A.G.O., FEB 18 1943 - To the Commanding General,
Seventh Motorized Division, Camp San Luis Obispo, California.

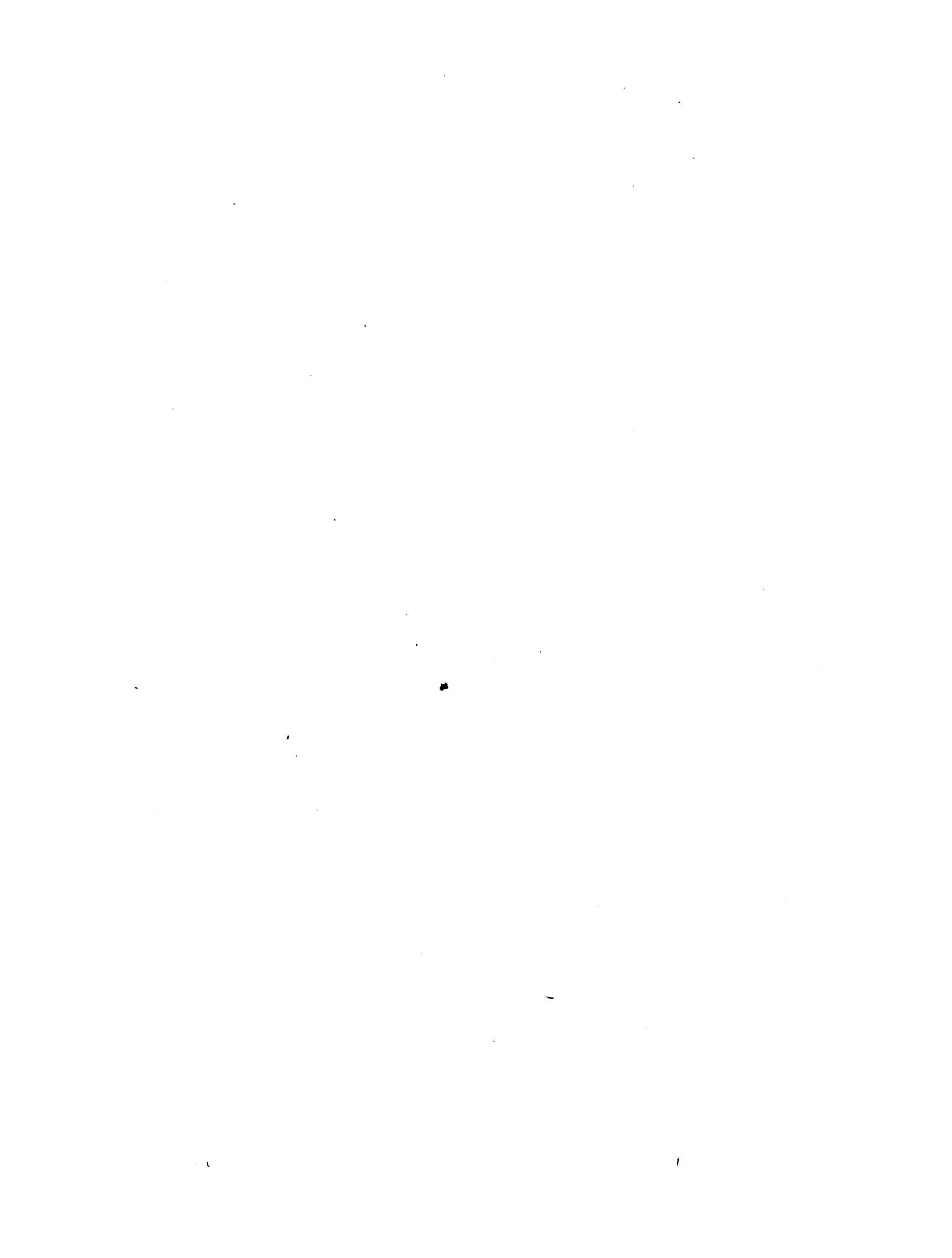
1. In the case of Private Robert T. Heine (39162116), Company B, 32nd Infantry, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons stated therein, that only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, eight months, and nine days be approved. Thereupon, 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 229031).



E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.



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

(31)

SPJGK
CM 229059

FEB 11 1943

U N I T E D S T A T E S	)	76th INFANTRY DIVISION
)	
v.	)	Trial by G. C. M., convened at
	)	Fort George G. Meade, Maryland,
Captain RUFERT T. GILBERT	)	December 11, 1942. Dismissal.
(O-226986), 417th Infantry.)	

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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: Violation of the 96th Article of War.

Specification: In that Captain Rupert T. Gilbert, 417th Infantry, having received a lawful order from Colonel John T. Zellars, 417th Infantry, to remain in his battalion headquarters or his battalion area and not in his quarters during duty hours, the said Colonel John T. Zellars being in the execution of his office, did, at Fort George G. Meade, Maryland on November 25, 1942, fail to obey the same.

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

Specification: In that Captain Rupert T. Gilbert, 417th Infantry, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about December 8, 1942 to about December 9, 1942.

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

Specification: In that Captain Rupert T. Gilbert, 417th Infantry, having been duly placed in arrest at Fort George G. Meade, Maryland, on or about November 25, 1942, did, at Fort George G. Meade, Maryland, on or about December 8, 1942, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to the Charge and its Specification and guilty to the Additional Charges and their Specifications. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures adjudged and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on the morning of November 24, 1942, accused, then in command of the 2nd Battalion of the 417th Infantry, Fort George G. Meade, Maryland (R. 6, 14), was absent from his battalion headquarters when Colonel John T. Zellars, commanding officer of the 417th Infantry, called there while in the battalion area (Ex. B). Shortly thereafter, at about 10:30 a.m., Colonel Zellars, accompanied by his adjutant, Captain George D. Willets, 417th Infantry, made an inspection of officers' quarters and found accused in his room (R. 7; Ex. B). Colonel Zellars thereupon gave accused a "direct order" that thereafter accused would remain at his battalion headquarters or in his battalion area and was not to be in his quarters during duty hours. Accused was asked if he understood this order and replied that he did. (R. 7; Ex. B)

About 3:20 p.m. on November 25 Colonel Zellars went to the 2nd Battalion Headquarters. Accused was not present. About ten minutes later Colonel Zellars directed Captain Willets to proceed to accused's quarters and see if he was there. (R. 7; Ex. B) Captain Willets testified that he found accused in his room sitting on or arising from his cot. Accused was fully clothed, but was not wearing a hat. (R. 7, 8) He "might" have had a field jacket on. It was not a cold day. (R. 8) This occurred during "duty hours" (R. 7). At about 3:40 p.m., accused reported to Colonel Zellars and stated in answer to an inquiry that he was in quarters when Captain Willets found him and that he had gone there for the purpose of securing his overcoat (Ex. B).

Colonel Zellars immediately placed accused in arrest in quarters (Ex. B). The same afternoon a written order of arrest was delivered

personally to accused. According to its terms accused was to leave his quarters only for the purpose of directly going to and from the latrine and officers' mess. (Exs. B, C1, C2) At 7:15 p.m., December 8, 1942, while accused was still in arrest, Captain Willets inspected the quarters of accused, the officers' "lounge" and the latrine. Accused was not in any of these places. (R. 9, 10) Hourly inspections were thereafter made but accused was not found in quarters (R. 9, 12; Ex. D) until 7:05 the following morning (R. 14).

First Lieutenant Charles K. Jolly, 417th Infantry, Commanding Officer, Headquarters Company, 2nd Battalion, testified for the defense that accused came to his company at about 2 p.m., November 25, and was in the company area for 20 or 25 minutes, making a routine inspection, and that on that day the weather was "reasonably cold and a chilly wind was blowing" (R. 11).

Accused testified that on the afternoon of November 25, 1942, he inspected the mess hall of companies of his battalion and, in the course of the inspections, went to his quarters to get his overcoat. The weather was cold and chilly and he felt that he needed an overcoat before he went into headquarters and performed other official duties which he had planned. (R. 15) In his quarters he found a button off his overcoat and sat down on his bed to "try to decide" whether he should sew the button on. He sat there about 5 minutes but did not sew the button on. He was wearing his field jacket, muffler and hat. It had not occurred to him that he should ask Colonel Zellars about returning to his room and getting his coat. (R. 16)

4. The evidence thus shows that as alleged in the Specification, Charge I, accused received a lawful order from his regimental commander, Colonel Zellars, to remain at his place of duty and not to be in his quarters during duty hours, and that at the place and time alleged he failed to obey the order in that he was in his quarters during duty hours. Accused attributed his failure to obey the order to his thoughtlessness or remissness. This was not, of course, a valid excuse (par. 134b, M.C.M.). The order was a positive one and the circumstances indicate that accused was, to say the least, indifferent as to his compliance with it.

The findings of guilty of Additional Charges I and II and their Specifications were fully supported by the pleas of guilty and the evidence.

5. War Department records show that accused is 41 years of age. He graduated from Oregon University in 1926, having majored in financial accounting. He was appointed a second lieutenant, Infantry Reserve, on June 14, 1926, and was promoted to first lieutenant on January 16, 1930. He was ordered to extended active duty with the Civilian Conservation Corps on March 19, 1934. On June 18, 1934, he was promoted to the grade of captain. He remained on active duty until January 31, 1938. He was thereafter employed in a civilian capacity by the Civilian Conservation Corps for about three years. He was discharged "for cause, with prejudice" on October 31, 1941, following reports of inspections of a company of which he was in command, which inspections disclosed an unclean and disorderly condition of camp equipment and property and poor maintenance of company records. He was again ordered to extended active duty on January 21, 1942. On July 13, 1942, stop-pages against the officer's pay aggregating \$151.97, based on reports of survey dating from July 7, 1941, to January 15, 1942, were authorized by the War Department.

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 and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61, 69 and 96.

Andrew Capp Jr., Judge Advocate.
Wm. K. Mitchell, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

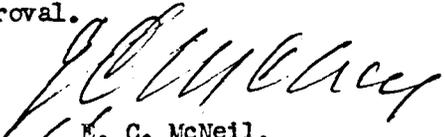
War Department, J.A.G.O., FEB 13 1943

- 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 Captain Rupert T. Gilbert (O-226986), 417th 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 received an explicit order from his regimental commander to remain at his place of duty and not to be in his quarters during duty hours. He failed to obey the order in that on the day after it was given he was found in his quarters during duty hours. Upon discovery of his failure to obey the order he was placed in arrest in quarters. About two weeks later he broke his arrest and absented himself without leave for one day. He was sentenced to dismissal and total forfeitures but the reviewing authority remitted the forfeitures. Accused served with the Civilian Conservation Corps as a reserve officer for somewhat less than four years, and as a civilian employee for about three years. He was discharged from the civilian employment for cause and with prejudice on October 31, 1941, on account of poor administration of his company. In view of the nature of his offenses and his previous record I do not believe that further effort to utilize his services as an officer will be advantageous to the Government. I accordingly 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.


E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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. 66, 27 Mar 1943)

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

(37)

JAN 30 1943

SPJGH
CM 229061

UNITED STATES

N.D

v.

Private KERNEY W. BRADSHAW
(20939059), Battery F, 249th
Coast Artillery.

NORTHWESTERN SECTOR
WESTERN DEFENSE COMMAND

Trial by G.C.M., convened at
Fort Stevens, Oregon, December
2, 1942. Dishonorable discharge
and confinement for four (4)
months and twenty-seven (27)
days. Disciplinary Camp, Ninth
Service Command, Turlock, California.

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. Accused was tried upon the following Charges and Specifica-
tions:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Kerney W. Bradshaw, Battery F,
249th Coast Artillery, did, at Fort Stevens, Oregon, with-
out proper leave, absent himself from his post from about
August 1, 1942 to about August 20, 1942.

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

Specification: In that Private Kerney W. Bradshaw, Battery F,
249th Coast Artillery, having received a lawful order
from Staff Sergeant Donald F. Leaders, to go to bed, the
said Sergeant being in the execution of his office, did at
Fort Stevens, Oregon on or about July 31, 1942, fail to obey
the same.

(38)

He pleaded guilty to the original Charge and Specification thereunder, and not guilty to the Additional Charge and Specification thereunder. He was found guilty of both Charges and of the Specification under each Charge. Evidence of five previous convictions, in violation of Article of War 61, 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 four months and twenty-seven days. The reviewing authority approved the sentence, designated the Disciplinary Camp, Ninth Service Command, Turlock, California as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The pleas of guilty and the evidence support the findings of guilty of the original Charge and Specification thereunder.

4. The only question requiring consideration is with reference to the findings of guilty of the Additional Charge and Specification thereunder. The gist of the offense alleged is that accused failed to obey the lawful order of Staff Sergeant Donald F. Leaders "to go to bed."

5. The evidence for the prosecution shows that on the date and at the place alleged, Sergeant Leaders, Headquarters Battery, 249th Coast Artillery, at 11 p.m. observed a group of men talking in the latrine in the barracks where accused was quartered. Accused, who was in Class "C" uniform, was one of the group. As the men "were supposed to be in bed at bed check at 11 p.m.", accused was not then authorized to be out of bed and dressed. Sergeant Leaders ordered the men to go to bed. He did not give accused a specific order as an individual. The men, including accused, obeyed the order and went to bed. At 11:45 p.m. Sergeant Leaders observed that some of the men to whom he had given the order, "were up and dressed". Accused was one of these men. Sergeant Leaders again ordered the men to go to bed, as did First Lieutenant Richard J. Lindsay, Headquarters Battery, 249th Coast Artillery. The men, including accused, obeyed this order and went to bed. Inspections were made at 12:15 a.m. and 1 a.m. On each occasion the men were in bed. Accused was sober. Lieutenant Lindsay testified that if Sergeant Leaders had given accused an order, such an order would have been lawful, and that Sergeant Leaders would have been carrying out his orders under Lieutenant Lindsay at the time in question (R. 5-12).

A pertinent part of Sergeant Leader's testimony reads as follows:

"Q. Just what did you mean when you directed the accused to go to bed?

"A. I meant for him to go to bed and stay there.

"Q. Did you explain that to any of the men?

"A. Yes, sir, I told them to get to bed and stay there.

"Q. Your sure your instructions to the entire group included that they were not only to go to bed but to remain there for the duration of the night?

"A. As far as I can remember that was my words, sir.

"Q. Did they obey that order?

"A. They went to bed sir.

"Q. Did they stay there?

"A. Some of them did, they got up again.

"Q. Was the accused one of the one's up and around?

"A. Yes, sir.

*

*

*

"Q. How many times did you order the accused to go to bed during the evening of July 31?

"A. Twice, sir.

"Q. Twice?

"A. Yes, sir."

6. The defense offered no testimony. The accused elected to remain silent.

7. It is alleged in the Specification, Additional Charge, that accused failed to obey the command of Sergeant Leaders "to go to bed". It was not disputed that accused went to bed on each of the two occasions when Sergeant Leaders ordered him to do so. Sergeant Leaders testified, however, that he ordered the men "to go to bed and stay there".

The record affirmatively shows that the accused obeyed the order alleged in the Specification. Sergeant Leaders testified that the order which he gave to a group including accused was "to go to bed and stay there." That order was of greater scope than the order "to go to bed" which was included therein, and alleged in the Specification. The accused may not be required to defend himself in this trial with respect to an offense not included within the offense alleged in the Specification. The question whether or not the accused failed to obey the more

(40)

inclusive order stated by Sergeant Leaders is not here in issue. The record of trial is accordingly legally insufficient to support the findings of guilty of the Additional Charge and the Specification thereunder.

8. Evidence of five previous convictions of offenses committed within one year next preceding August 1, 1942, the date on which the offense in the Specification, original Charge was committed, were introduced in evidence (Ex. 2).

9. The maximum confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the offense of which approval of the finding of guilty is recommended (Specification, Original Charge, absence without leave for 19 days) is confinement at hard labor for one month and 27 days and forfeiture of \$60.30 of his pay. Proof of the five previous convictions of accused authorizes dishonorable discharge, forfeiture of all pay and allowances due or to become due, and where the confinement otherwise authorized is less than three months, confinement at hard labor for three months (par. 104c, M.C.M., 1928).

It is assumed that the Disciplinary Camp, Ninth Service Command, Turlock, California, designated in the action as the place of confinement of accused, is a detention and rehabilitation center established pursuant to section VI, Circular 6, War Department, January 2, 1943.

10. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the original Charge and the Specification thereunder; legally insufficient to support the findings of guilty of the Additional Charge and Specification thereunder; 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 three months.

Arthur S. Hill, Judge Advocate.

(on leave), Judge Advocate.

Edward H. Berg, Judge Advocate.

SPJGH
CM 229061

1st Ind.

War Department, J.A.G.O., FEB 2 1943 - To the Commanding
General, Northwestern Sector, Western Defense Command, Fort Lewis,
Washington.

1. In the case of Private Kerney W. Bradshaw (20939059), Battery F, 249th Coast Artillery, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of the Additional Charge and Specification thereunder be disapproved; that 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 months be approved. Thereupon, 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 229061).



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

DISPATCHED
W. A. G. O.
SERVICE
J. A. G. O.

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

(43)

SPJGK
CM 229062

JAN 28 1943

UNITED STATES	)	SIXTH SERVICE COMMAND
	)	SERVICES OF SUPPLY
v.)	
Private JACK J. IRSKENS	)	Trial by G.C.M., convened at
(36605712), Unassigned,	)	Fort Sheridan, Illinois,
1611th Service Unit, Re-	)	November 13 and 14, 1942.
cruit Reception Center.	)	Dishonorable discharge and
	)	confinement for ten (10)
	)	years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOPER, COPP and ANDREWS, Judge Advocates

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

(Dissent), Judge Advocate.

Andrews Copp, Judge Advocate.

Fletcher Andrews, Judge Advocate.

1st Ind.
War Department, J.A.G.O., MAY 11 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$,

(44)

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 Jack J. Irskens, Unassigned, 1611th Service Unit, Recruit Reception Center, Fort Sheridan, Illinois.

2. I do not concur in the holding of the Board of Review (one member dissenting), and, for the reasons hereinafter set forth, am of the opinion that the record of trial is legally insufficient to support the findings and sentence.

3. Accused was tried upon two Specifications and one Charge under Article of War 96. The first Specification alleged that at Fort Sheridan, Illinois, on or about September 21, 1942, accused made, signed, and swore to a certain affidavit, "to the prejudice of good order and military discipline". The Specification sets forth the affidavit in full. The second paragraph of the affidavit states that accused is making the affidavit after much thought and consideration and after a warning that his attitude "might hang him". The third and fourth paragraphs in essence state a belief by affiant that the United States brought about the war with Japan and Germany and is "at fault" with reference thereto. The fifth paragraph states accused's belief that the United States "has no right" in the present war; that the present administration is the cause of the war; and that the administration is "leading us into the slaughter for England and the international bankers". The sixth paragraph states that Germany is the only nation which has a right to fight and that Germany is justified by reason of the denial of an opportunity to exist resulting from the Versailles treaty. The seventh paragraph contains the pronouncement that accused refuses and will refuse "in the future for the duration of this war to bear arms against Germany, Italy, or Japan". The eighth paragraph contains a similar pronouncement and includes a statement that accused realizes that his refusal "may mean jail, concentration camp, or anything else". In the ninth paragraph accused states that when he took the oath of citizenship he did not understand that it entailed a pledge to bear arms against any enemy of the United States. Had he so understood he would not have become a naturalized citizen. He is willing to renounce and does renounce his rights as a citizen rather than to be forced to bear arms. The tenth paragraph states that he has never been a member of a subversive organization, and the eleventh that he is willing to work in any non-combatant unit within the United States. In the final paragraph accused states that he has read the affidavit; that it is true; "that

he understands it fully and that he makes it voluntarily, without any duress, coercion or promise of any kind; that he has been warned of his constitutional rights and that the same may be used against him".

Specification 2 alleges that on September 29, 1942, in the course of an official investigation at Fort Sheridan, Illinois, accused stated verbally to the Post Judge Advocate that when he took the oath of citizenship he did not understand that it entailed a pledge to bear arms against any enemy of the United States; that had he so understood, he would not have become a naturalized citizen, because as previously stated, he would not bear arms; and that he was willing to renounce his citizenship rather than to be forced to bear arms. These statements were alleged to be "to the prejudice of good order and military discipline".

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. 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 ten 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 50 $\frac{1}{2}$.

4. The evidence shows that on September 2, 1942, at the Induction Center, Fort Sheridan, Illinois (R. 99), accused told First Lieutenant Armand Helm, Infantry, Reserve, who was the induction officer, that he would not go into the Army (R. 160, 161), would not take the oath (R. 167) and "saw no reason why he should bear arms, should go to war with an enemy of the United States" (R. 168). He said also that he had a love for Germany, that he had two brothers in the armed forces of Germany, and that he did not intend to "go forth and possibly kill his own brothers" (R. 168). He stated further that he would not leave the continental limits of the United States to bear arms against any country (R. 168), but that he would bear arms if the United States were invaded, which he asserted would not happen (R. 170). Eventually, accused did take "the oath" (R. 162-164). On the same day, during the course of an interview relating to classification, he told the enlisted man conducting the interview that he would not fight or bear arms for "religious reasons" (R. 176). On or about September 19, 1942,

in an interview conducted by the "S-2" at the reception center, accused said that he would not bear arms in defense of the United States and that he had seen and abhorred bloodshed (R. 173, 179, 182). Accused was ordered to report to the Post Intelligence Officer (R. 12, 180), First Lieutenant Sidney L. DeLove, Infantry (R. 10,11), which he did on September 21, 1942 (R. 12). They conversed for an hour and a half to two hours (R. 12), Lieutenant DeLove first explaining to accused that if he wished, he could tell "just exactly how he feels; that he need not tell me" (R. 13), and "that he need not say anything at all; he need not answer any questions that I asked him, because anything that I might ask him may be used against him later on" (R. 14). Accused replied:

"That is all right, I know it, I have been honest all my life and I want to be honest with you and I am glad we are in your office because I feel you are the proper person to talk to and I want to talk to you" (R. 14).

Accused appeared "very calm" and "was very much at ease" and "very rational" (R. 26). Accused, who was born in Germany of German parents, told of his life in Germany and in the United States and discussed various political matters, saying that conditions had been bad in Germany and that he had been glad to get away from there (R. 26-32). He said that although he had no conscientious objections against killing, he felt this was not "our war" (R. 28); that the war was "our own fault" (R. 14); and that we brought about the Pearl Harbor attack by our own conduct (R. 33-35). He stated that "he refuses and will continue to refuse to fight for the United States against Germany, Italy, or Japan" (R. 13, 14, 29), despite his "oath", and that he would renounce his citizenship rather than do so (R. 28). He said he would fight if he considered that the United States were attacked or invaded (R. 34, 35). He was willing to engage in noncombatant duty, but only within the United States (R. 36).

At the end of the discussion, Lieutenant DeLove told accused to go to lunch, "think it over", and come back (R. 22). He came back about 1 or 1:30 p.m. (R. 22), and "appeared to be in good spirits * * *, very calm" (R. 27). Under the direction of Lieutenant DeLove, an affidavit was prepared and typed. Lieutenant DeLove would ask accused questions, accused would state "how he felt" (R. 22, 32), and then Lieutenant DeLove would dictate the statement to the stenographer, accused directing the stenographer "in correcting the different statements" (R. 22, 45). Private First Class Frank Custer, Headquarters Section,

1607th Service Unit, who typed the affidavit, testified that accused "seemed confident and composed. He knew what he was doing while he was helping me at the time he was in the office" (R. 45).

After the preparation of the affidavit, Lieutenant DeLove took accused to the office of the Post Adjutant, where the affidavit was signed by accused and notarized by the Post Adjutant (R. 19, 20, 38, 39, 46). At that time the Post Adjutant read the document to accused and asked him whether he understood what he was signing and whether any coercion had been used (R. 19, 20). Accused replied: "'No, this is my own act and that is the way I feel'" (R. 20). He also said that he "understood the affidavit fully and it was his true statement" (R. 39). Lieutenant DeLove testified that no coercion was used (R. 23) and that accused expressed appreciation at having been given the opportunity to tell his ideas to witness and to put them in writing. Accused further told witness that "he knew just exactly what it meant, but that is the way he felt" (R. 25).

Lieutenant DeLove next took accused to the office of Colonel Frederick C. Rogers, Commanding Officer, Fort Sheridan (R. 41). Colonel Rogers read the affidavit to accused paragraph by paragraph, questioned accused in order to make certain that he understood each statement, and initialed each paragraph (R. 20, 21, 42). Accused stated that the opinions expressed in each paragraph were his "candid, honest opinions, and his beliefs" (R. 42). Colonel Rogers testified that accused was "not excited" at the time (R. 43). The affidavit was admitted in evidence (R. 21; Pros. Ex. 1).

On or about September 29, 1942, Major Edward D. Markham, Judge Advocate General's Department, Staff Judge Advocate at Fort Sheridan, stopped at Lieutenant DeLove's office and "was checking over this so-called affidavit" (R. 47). Lieutenant DeLove and accused were present. Major Markham testified that he "warned" accused "as to his rights, that he did not need to make any statement before me but if he did that sometime in the future it might be used against him" (R. 47). After witness and accused had discussed "the various paragraphs in the affidavit" (R. 47), witness asked accused whether he still felt the same way and "if that was his signature", to which accused answered "Yes" (R. 47). He also stated that "if he had known he was to go all through this that he would not have taken citizenship in this country, as he did not want to fight against Germany" (R. 47). Witness testified that accused was "very calm" (R. 48).

Accused testified that he was born in Berlin, Germany, on May 8, 1910 (R. 62), and that his father was a member of the German Army in the last war and was killed (R. 62, 63). Accused, his mother, and step-father arrived in the United States in 1929 (R. 69, 71). Accused outlined the events of his life in this country (R. 70-74, 108, 109). He became a citizen of the United States about 1938 (R. 76, 111) and did not realize that the oath of citizenship required him "to go out and shoot" (R. 78). He testified that he was unwilling to bear arms unless this country were invaded (R. 79, 104, 112) and that rather than do so he would renounce his citizenship (R. 104). In his opinion "America asked for this war, got it, and I want no part of it" (R. 118). He testified that he was not in sympathy with the Nazi regime (105, 106, 119), but had faith in the German people and would never "double-cross" them (R. 119). In connection with his draft classification, he did not claim to be a conscientious objector because the appeal agent advised him to base his claim for deferment upon the ground of dependency (R. 96), although he did tell the chairman of the draft board that he had conscientious objection to war (R. 94). He testified that his conscientious objection to war was not based on his adherence to a particular religious sect, but on his belief in Christianity (R. 118). He took the oath of allegiance at the induction center only because Lieutenant Helm told him, "We can use you in a band or in office. You will get a break!" (R. 100). He signed the affidavit and it represents his beliefs and convictions (R. 103, 112), except that he also told Lieutenant DeLove that he would bear arms in the event of an invasion of this country (R. 104).

In rebuttal, Lieutenant Helm testified that he did not assure accused that he would be placed in the band or other noncombatant work, and several witnesses testified that accused did not ask to have anything added to the affidavit as prepared (R. 128, 132-136, 138, 139), although Lieutenant DeLove testified that at one point in the discussion accused stated his willingness to take up arms against an invading enemy (R. 139).

5. It is clear from the evidence that at the place and respective times alleged, accused in the course of an official investigation, executed the affidavit as alleged in Specification 1, and in substance made the verbal statement alleged in Specification 2. The majority of the Board of Review were of the opinion that since the verbal and written statements of accused were voluntary and manifested disloyalty to the United States,

he was guilty of a violation of Article of War 96. The dissenting member was of the view that accused simply made honest statements to investigating officers when called upon to speak and that to convict him for making the statements would amount to punishment for abstract disloyalty, that is. for "evil thoughts". I agree with the minority view.

The proceeding was an official investigation resulting from declarations by accused upon his induction. One of its purposes was to encourage accused to tell the truth about his state of mind. This he did, with complete frankness and honesty, as it was his military duty to do. To have lied would have subjected him to trial and punishment. Had he remained silent he would have been guilty of legal fraud in failing to disclose his true feelings. As has been said by a United States District Court (U. S. v. Herberger, 272 Fed. 278, 291):

"Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter."

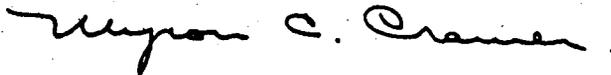
He declared that he refused to take up arms against the national enemies and that he would refuse to do so in the future. He did not, however, disobey any order to bear arms and did not refuse to perform any specific duty required of him. He declared his views upon induction but it was not charged or proved that he made a dishonest or otherwise culpable effort to avoid military service. He merely revealed his sentiments. There was no subversive act or intent on his part, nor any attempt to convert others to his point of view. The statements were not made under such circumstances that a subversive result was to be expected. Federal statutes make criminal only those disloyal utterances which are made with intent to interfere with military operations or involve attempts

(50)

to cause insubordination, disloyalty in others, mutiny or refusal of military duty (50 U.S.C. 33; 18 U.S.C. 9). There was no such intent here.

In my view these honest official statements disclosing the true sentiments of accused, made only because accused was asked by his military superiors to make them, were not of a nature to bring discredit upon the military service and were not to the prejudice of good order and military discipline within the meaning of Article of War 96. In my opinion the record of trial is legally insufficient to support the findings of guilty and the sentence.

6. Inclosed are two forms of action prepared for your signature. Draft "A" will accomplish vacation of the findings and sentence in accordance with my views and Draft "B" will accomplish confirmation of the sentence in accordance with the views of the majority of the Board of Review.



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

3 Incls
Incl 1- Record of trial
Incl 2 - Draft "A"
Incl 3 - Draft "B"

(Findings of guilty and sentence vacated, by order of the Secretary of War, 24 May 1943)

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

SPJGK
CM 229063

JAN 28 1943

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

v.)

Private NORBERT BRESKY)
(32300302), Battery K,)
502nd Coast Artillery (AA))
(Mob).)

SIXTH SERVICE COMMAND
SERVICES OF SUPPLY

Trial by G.C.M., convened at
Fort Sheridan, Illinois,
November 14, 1942. Dishon-
orable discharge and confine-
ment for two (2) years. Dis-
ciplinary Barracks.

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

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

(Dissent), Judge Advocate.

Andrew Copp Jr., Judge Advocate.

F. E. R. Andrews, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. **MAY 11 1943** To the Secretary of War.

1. Herewith transmitted for your action under Article of War
50 $\frac{1}{2}$, 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
Norbert Bresky (32300302), Battery K, 502nd Coast Artillery (AA)
(Mob).

2. I do not concur in the holding of the Board of Review (one member dissenting), and, for the reasons hereinafter set forth, am of the opinion that the record of trial is legally insufficient to support the findings and sentence.

3. Accused was tried upon two Specifications and one Charge under Article of War 96. The first Specification alleged that on October 2, 1942, at Fort Sheridan, Illinois, he made, signed, and swore to a certain affidavit, "to the prejudice of good order and military discipline". The Specification sets forth the affidavit in full. In the affidavit accused states that he was born in Germany; that he came to the United States in 1922 and has lived here ever since; that most of his relatives are still in Germany; and that he was naturalized in 1927 or 1928. He states further that while in Germany (on a visit in 1932) "he solemnly promised never to take up arms against Germany which promise he now and in the future intends to fulfill". The affidavit continues:

"Affiant further states and hereby refuses and will in the future refuse to take up arms against Germany * *".

The affidavit recites further that when accused was naturalized and took his oath of allegiance he did not understand that it involved a promise to take up arms against all enemies of the United States, and had he so understood, he would not have taken out naturalization papers. He states his willingness to renounce his citizenship rather than thus to bear arms, and his willingness to serve in the Army in any capacity in a non-combatant unit. The affidavit concludes:

"Affiant further states that he has read the above affidavit, that the same is true, that he understands it fully and that he makes it voluntarily, without any duress, coercion or promise of any kind; that he has been warned of his constitutional rights and that the same may be used against him."

The affidavit recites that it was subscribed and sworn to on October 2, 1942, before First Lieutenant L. H. Meyer, Adjutant General's Department, Post Adjutant.

Specification 2 alleges that at Fort Sheridan, Illinois, on or about October 2, 1942, in the course of an official investigation, accused stated verbally to First Lieutenant Sidney L. DeLove, Infantry, S-2 Fort Sheridan, Illinois:

"I refuse to take up arms against Germany, Italy,

and Japan because I believe that to take up arms against Japan or Italy is really to take up arms against Germany and, therefore, I refuse to do so and, further, I will blow my brains out rather than take up arms against the aforementioned countries' ***, this to the prejudice of good order and military discipline."

Accused pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge, guilty of Specification 1 thereof except for certain words relating to Italy and Japan, which I have not included in the foregoing description of the affidavit, and guilty of Specification 2 except that part thereof commencing with the word "Italy" and ending with the words "against the aforementioned countries". 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 two 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 50 $\frac{1}{2}$. The Board of Review held, one member dissenting, that the record of trial was legally sufficient to support the sentence.

4. The evidence shows that the organization to which accused was attached was under orders to leave Fort Sheridan, Illinois, and a rumor existed that it was slated for foreign duty (R. 9, 19, 20). First Lieutenant S. L. DeLove, 1607th Coast Artillery Service Unit, called accused into his office for a discussion, having evidently been informed of accused's German origin and possible sympathy toward that country. Lieutenant DeLove instructed accused to fill out "the usual form of factual information" (R. 10) and then invited accused to come into his office. Accused did so and he and Lieutenant DeLove conversed for a period of nearly two hours (R. 10). Sergeant Clayton L. Johnson and Private First Class Frank Custer, both of Headquarters Section, 1607th Service Unit, were in the office during the interview (R. 12, 13, 24, 34). Lieutenant DeLove explained to accused that accused was not required to tell him anything and he "warned him of his rights," to which accused replied, "Yes, I know, I know what I am doing." He also said that he was "glad to do this" (R. 12), especially because he understood that the organization was moving out for foreign service (R. 20).

Accused told Lieutenant DeLove that he had already informed the intelligence officer at Fort Bragg of his refusal to fight against Germany and that "he definitely wants that to be known" (R. 10). During the course of the conversation accused reviewed the events of his life, including his German origin and other matters appearing in the affidavit, and he revealed his attitude toward the war (R. 10-20). Accused reit-

(54)

erated that he would not fight for this country against Germany (R. 10 17), and remarked that he still considered all Germans his "fatherland". (R. 17) He also said that during a visit to Germany in 1932 he took an oath never to fight against Germany "which oath he now intends to fulfill" (R. 10). Lieutenant DeLove and Sergeant Johnson testified that accused was "calm" (R. 16) and "normal" (R. 35) during the conversation.

Lieutenant DeLove asked accused whether the latter would care to have a statement prepared for his signature, expressing the facts and sentiments disclosed in the conversation, and said that he would "put it through channels for whatever action higher authority saw fit" (R. 12). Accused replied, "O.K." (R. 12). Lieutenant DeLove told him to come back later on. Accordingly, accused went out to lunch and returned in the afternoon (R. 12). Lieutenant DeLove had taken notes on the morning's interview, and during the preparation of the affidavit the statements which were to be included in it were read by him to accused "to see if he agreed to them" (R. 30, 31). Lieutenant DeLove dictated the affidavit to Custer, who prepared it in typewritten form (R. 13, 24, 27, 30, 31). Accused read the affidavit before signing it (R. 32). Furthermore, First Lieutenant Lawrence H. Meyer, Adjutant General's Department, the Post Adjutant, to whose office Lieutenant DeLove took accused after the preparation of the affidavit, read the document to accused and asked accused whether he understood it. Upon accused's indicating that he did, Lieutenant Meyer took his oath, and the affidavit was then signed by accused (R. 13, 21). Lieutenant DeLove and Custer were present at the time (R. 13, 24, 30), and both testified that accused was calm (R. 15, 16, 28). Lieutenant DeLove added that accused said, "I want to get it off my chest", and thanked witness (R. 15, 16). Lieutenant DeLove testified further that before accused signed, witness "told him about his rights" and explained that he did not have to sign anything or answer any questions and that "if he does it may be used against him" (R. 16). The affidavit was admitted in evidence (R. 14; Pros. Ex. 1).

Accused was sworn as a witness at his own request and outlined the events of his life (R. 38-51, 62-66, 67-70). He stated that he told "the Major" at regimental headquarters at Fort Bragg that he would not fight against Germany (R. 55) and he testified that he was unwilling to bear arms against Germany (R. 58, 73). Although he stated that he did not "believe" in Hitler (R. 75) or approve of the present government in Germany (R. 59), he said that he did not think it right for him to fight against his own people (R. 58); that he had "a strong feeling for Germany" (R. 59); and that he did not want to kill the German people (R. 60, 61). He would not have taken the oath of citizenship had he realized that it included the necessity of bearing arms against Germany (R. 60, 74). He expressed a willingness to fight and serve in the Army even though this would entail fighting against Japan, and even though there might be some German troops fighting with the Japanese, so long as the fighting was not near Germany (R. 62, 73). He stated that if he were living in Germany he would be unwilling to "take arms" against the United States (R. 76). He took out his first citizenship papers in order to serve in

the United States Army (R. 71), which he did from 1923 to 1926, receiving an honorable discharge (R. 41-43, 63,). Accused testified further that while in Germany in 1932 he did not make a pledge not to take up arms against Germany. He misunderstood the provision in the affidavit relating thereto, because he read the affidavit hurriedly. He did not tell Lieutenant DeLove that he had made such a pledge, but merely said that his parents had expressed the hope that it would never be necessary for him to fight against them (R. 57, 58). However, accused stated that he signed the affidavit after either reading it or having it read to him by Lieutenant Meyer (R. 70, 71).

5. It is clear from the evidence that at the place and time alleged, accused, in the course of an official investigation, made the statement attributed to him in Specification 2, as modified by the findings of the court. It is equally clear that he executed the affidavit as alleged in Specification 1. Although some question arises with reference to his supposed promise never to take up arms against Germany, the purport of the affidavit would not be affected materially by the omission of that clause.

The majority of the Board of Review were of the opinion that since the verbal and written statements of accused were voluntary and manifested disloyalty to the United States, he was guilty of a violation of Article of War 96. The dissenting member was of the view that accused simply made honest statements to an investigating officer when called upon to speak and that to convict him for making the statements would amount to punishment for abstract disloyalty, that is, for "evil thoughts". I agree with the minority view.

The proceeding was an official investigation. One of its purposes was to encourage accused to tell the truth about his state of mind. This he did, with complete frankness and honesty, as it was his military duty to do. To have lied would have subjected him to trial and punishment. Had he remained silent he would have been guilty of legal fraud in failing to disclose his true feelings. As has been said by a United States District Court (U. S. v. Herberger, 272 Fed. 278, 291):

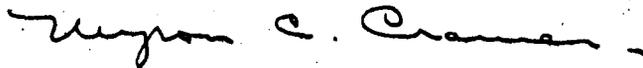
"Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter."

(56)

Accused declared that he refused to take up arms against Germany and that he would refuse to do so in the future. He did not, however, disobey any order to bear arms and did not refuse to perform any specific duty required of him. He merely revealed his sentiments. There was no subversive act or intent on his part, nor any attempt to convert others to his point of view. The statements were not made under such circumstances that a subversive result was to be expected. Federal statutes make criminal only those disloyal utterances which are made with intent to interfere with military operations or involve attempts to cause insubordination, disloyalty in others, mutiny or refusal of military duty (50 U.S.C. 33; 18 U.S.C. 9). There was no such intent here.

In my view these honest official statements disclosing the true sentiments of accused, made only because accused was asked by his military superior to make them, were not of a nature to bring discredit upon the military service and were not to the prejudice of good order and military discipline within the meaning of Article of War 96. In my opinion the record of trial is legally insufficient to support the findings of guilty and the sentence.

6. Inclosed are two forms of action prepared for your signature. Draft "A" will accomplish vacation of the findings and sentence in accordance with my views, and Draft "B" will accomplish confirmation of the sentence in accordance with the views of the majority of the Board of Review.



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

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft "A"
Incl 3- Draft "B"

(Findings of guilty and sentence vacated, by order of the Secretary of War, 24 May 1943)

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

(57)

Board of Review
CM 229141

JAN 20 1943

UNITED STATES)

SAN FRANCISCO PORT OF EMBARKATION.

v.)

Trial by G.C.M. convened at Camp Stoneman, California, October 17, 1942. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.

Private CHARLIE ALLEN)
(35431282), Code No.)
8866-A, Camp Stoneman,)
California.)

REVIEW BY THE BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Charlie Allen, Code No. 8866-A, Camp Stoneman, California, did, on Harbor Road near Pittsburg, California, on or about October 10, 1942, with intent to commit a felony, viz, rape, commit an assault upon Miss Alice MacDonald, by willfully and feloniously striking the said Alice MacDonald in the face and body with his fists and choking her with his hands.

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 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, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that shortly after 11 p.m., October 10, 1942, Miss Alice Louise MacDonald, a white woman, a teacher in an intermediate school of Pittsburg, California, while driving from Camp Stoneman, California, to her nearby home in Pittsburg, stalled her automobile on a newly graded and muddy road near the camp (R. 3, 4; Ex. N). During the evening she had been serving as a USO hostess and just prior to stalling her car had driven an enlisted man acquaintance to the entrance to Camp Stoneman.

(58)

She was 33 years of age, was about five feet five and a half inches tall, and weighed about 115 pounds (R. 3, 4). Being unable to extricate her stalled car, she started to walk from the scene, proceeding along an unlighted street near the camp referred to as Harbor Road (R. 4, 5). This street was about one and one-half miles from the barracks occupied by accused (R. 48) who was a member of Company A, 828th Engineer Battalion, Aviation, Code 8860-A (R. 45). The day had been rainy but at 11 p.m. the sky was clear with small clouds (R. 13).

As she walked along Harbor Road Miss MacDonald passed a colored soldier whom she identified at the trial as accused (R. 13). She noted that he was about her height, that he was wearing a cap and glasses, and that he had a mustache (R. 5, 13, 15). She kept on walking as fast as she could (R. 5), but accused suddenly appeared at her side. He said nothing but "lurched for" and seized her about the waist. She struck him on his arm with her umbrella (R. 6) whereupon accused knocked her down. She got up, ran and screamed as loudly as she could (R. 6). Accused seized her "by the back", knocked her down again and dragged her to a spot near a barbed wire fence (R. 6). Miss MacDonald testified:

"I was rolling on the ground and grappling with him as fast as I could, and yelling for help. I was petrified. * * * I said, 'Mister, please let me go, please let me go,' and he did let me go, and I said 'I'll give you money if you let me go,' and I opened my purse. He had struck me in the eyes before this, especially in this one (indicating left eye). He had given me, while grappling on the ground, two very severe blows. At that time I bit his finger, very severely. We were grappling on the ground and I struggled and screamed for help and shouted and said 'Please let me go, please Mister, let me go. I'll give you money if you let me go.' And he released me for a moment. When I got up he was breathing very heavily. I opened my purse and I took out a bus schedule. I said, 'Here Mister, please.' And he saw it was a bus schedule. I then took out my bank book, and he said 'Your bank book won't do me any good.' Then I tried to get away again. He knocked my purse flying, everything came out of my purse in the scramble, lost on the ground, even my purse."

Witness testified that she continued to scream and to ask accused to desist, but that:

"he got me by the back and dragged me backwards into the grass and I bumped my head against the ground. Then I was ready to faint. He had his hand under my dress and jerked my garter belt and it broke. Then when he had me down at this time he said, 'How about a little cock?', and he passed his hand over me, and I screamed louder still, and I didn't know what to do, and I was screaming so loud that he took me by the throat and squeezed and squeezed me by the throat. In fact, I was just being strangled to death." (R.6)

At this point a military policeman who had heard the woman's calls came to the scene (R. 7, 19). Miss MacDonald exclaimed "God only sent you, You saved my life" (R. 26) and said that a colored man had attacked her and had "gone over the fence" (R. 19). Her face was bloody, her hair was hanging down over her face (R. 26), and her stockings were down over her knees (R. 26). She was taken to a hospital and examined by physicians, who found her eyes swollen and discolored and her lower lip swollen. A lower front tooth was loosened, and her throat and a considerable area "below the neck line" bore abrasions and were reddened. Her jaw was bruised (R. 16-18)..

Miss MacDonald identified in court certain articles of clothing as having been worn by her at the time of the assault. Included among them were her broken garter belt and her panties and stockings (R. 9, 10). The panties were described as "now dirty formerly perfectly clean", and the stockings as "very, very dirty and torn" and as formerly new (R. 11). Articles including her hat, umbrella and gloves and the contents of her handbag were later found strewn over a considerable area in the vicinity of the assault (R. 10, 11, 20). Near the scene, at a place where the grass was trampled, a "regulation overseas cap", size 6 7/8, bearing the number "1282", was found (R. 20). Accused's serial number was 35431282 (R. 45, 55) and numerous articles of his clothing were later found to be marked with the number 1282 (R. 31, 32). There were two other soldiers at Camp Stoneman whose serial numbers ended with the digits 1282, but these soldiers were white (R. 31). Another cap shown to have been issued to accused was size 6 7/8 (R. 31). Near a trampled spot at the scene there was also found a spectacle frame with the left lens broken and detached (R. 21, 37, 38), which belonged to accused (R. 38-40, 56; Ex. V). There were footprints near the barbed wire fence (R. 23) and leading towards an entrance to the camp (R. 23, 24). An officer of the military police testified that he compared the footprints (R. 64) with shoes taken from accused (R. 33) and that the prints and shoes "fit perfectly" (R. 64). The shoes had mud upon the soles and heels (R. 33).

Accused habitually wore glasses. In the course of the evening of October 10 he was seen wearing a cap (R. 49) and his glasses (R. 47, 49, 62). He was in barracks at about 9:00 or 9:30 p.m., October 10, and was in his bunk at 4 or 4:30 a.m., October 11 (R. 50). His bunk was apparently occupied at about 12:30 a.m., October 11 (R. 51). Upon being placed in arrest on October 11 he disclaimed any knowledge of the assault (R. 32). He had several scratches on his hands and "punctures" (R. 42) or "sharp, abrupt cuts" (R. 36) in the palms of his hands (R. 42). There were abrasions resembling teeth marks on his left shoulder (R. 37). There were what appeared to be blood stains on a sleeve of the shirt he was wearing (R. 34). In his effects were a pair of trousers with mud stains and several "three-cornered rips" (R. 33).

4. Accused testified that between 9 p.m. and 12 p.m. on October 10 he was in his barracks (R. 54). Sometime before 9:00 p.m., while running through

a heavy rain, he fell into some mud, soiling his trousers and injuring his shoulder and knee (R. 54, 59). He went to bed about 10 p.m. and remained there (R. 56). He last wore his "garrison overseas cap" on October 4, and last wore his glasses about October 7 or 8 (R. 54). He wore his glasses only occasionally (R. 58). He wore a khaki cap on October 10. He kept his garrison overseas cap on a shelf in barracks. When not wearing his glasses, he kept them also on the shelf. He injured his hand on some barbed wire about a week before October 10. His trousers were snagged at "Fort Leonard Wood" (R. 55). He was unable to account for the blood on his uniform (R. 59). He never saw Miss MacDonald prior to the trial (R. 35).

An officer testified for the prosecution, in rebuttal, that a "show-down" inspection had been held at Camp Stoneman prior to October 10 (R.60), at which accused had been present (R. 62), and that had the tears in accused's trousers been observed the trousers would have been taken up for salvage (R. 60).

5. The evidence is undisputed that at the place and time and in the manner alleged a colored enlisted man assaulted Miss Alice MacDonald, the woman described in the Specification. In view of the nature of the violence used and the remark by accused uttered in the course of the assault; the court was amply justified in finding that the assault was committed with intent to rape, that is, with intent to have carnal knowledge of the woman by force and without her consent. Accused denied that he was the assailant. The identification by the victim, however, was positive and the circumstances connected with the discovery at the scene of the assault of articles of accused's property and connected with his physical injuries, as well as the other circumstances in evidence, fully support her identification.

6. The charge sheet shows that accused is about 23 years of age, and that he was inducted into the military service on May 22, 1942. A report of investigation accompanying the Charges shows that before his induction accused was convicted by a civil court of housebreaking and sentenced to confinement in a penitentiary. He was also convicted by a civil court of driving a motor vehicle without an operator's license, and sentenced to confinement.

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. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 455, Title 18, United States Code.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

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

(61)

9156

MAR 11 1943

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

v.

Private CHARLES BRADFORD
(36014588), Headquarters
Troop, 10th Cavalry.

N/D
SOUTHERN LAND FRONTIER SECTOR
WESTERN DEFENSE COMMAND

Trial by G.C.M., convened at
Camp Lockett, California,
December 2, 1942, and January
18, 1943. Dishonorable dis-
charge and confinement for
life. Disciplinary Barracks.

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charles Bradford, Headquarters Troop, 10th Cavalry, did, at Calexico, California, on or about October 31, 1942, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Lillian Poulter.

He pleaded not guilty to the Charge and Specification. He was found of the Specification, "Guilty, except the words 'have carnal knowledge', substituting therefor the words 'attempt to have carnal knowledge'; of the excepted words Not Guilty; of the substituted words, Guilty". Of the Charge "Not Guilty, but guilty of a violation of the 96th Article of War".

He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor "for the rest of his natural life". The reviewing authority approved the sentence, designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that Private First Class George Pogue, Troop F, 10th Cavalry, Camp Lockett, California, and the accused were in the city of Calexico, California, on the night of October 31, 1942. Pogue drank some whiskey that night and saw the accused drinking, but neither he nor the accused was drunk. The accused was not staggering or talking out of his head, and appeared to be sober at all times. During the evening Pogue and accused went to Tommie Martin's house on the outskirts of Calexico, and on their return, walking up Imperial Avenue, they saw a "white lady" walking down the street, going towards the outskirts of town. The accused said to Pogue "Let's cut across the street here". Pogue and accused then crossed the street and followed her. The accused was walking in front and when accused " * * * got right in about five or ten feet to her he broke out with a run and caught her around the head and carried her behind the sign". Pogue told accused he should not do that, but accused said nothing. When he saw a car approaching Pogue stepped into a dark spot until it passed, and then left. He saw the accused about 45 minutes later at the beer tavern. Accused seemed to be sober and said nothing about the incident (R. 8-11, 14, 15, 19).

Private First Class Robert Nunn, Troop F, 10th Cavalry, Camp Lockett, saw accused and Private Pogue in Calexico, California, on the night of October 31, 1942. He was with them until around 10 o'clock, at which time accused and Pogue left together. Nunn saw them again around 12 o'clock. Pogue returned first and the accused about 45 minutes later. There was nothing unusual about the condition of the accused. He appeared as sober then as he did at the trial (R. 8-11).

Between 9:30 and 10 o'clock on the night of October 31, 1942, Mrs. Lillian Foulter of Calexico, California, was viciously and violently assaulted by a soldier. Immediately before the assault Mrs. Foulter saw two soldiers cross over to her side of the street and observed that they were following her. She saw no one in the street but the two soldiers (R. 28, 35).

In describing the place and the character of the attack, Mrs. Foulter testified -

"* * * when I got up between Temple Court and 9th Street by the billboard, I saw a shadow around behind me, kind of jumping and I tried to duck but with that he got me around the throat with his arm and put his other hand in behind me and I don't know if he carried me over there or if I walked there or if he drug me but anyway, we got over behind the billboard and I caught hold of one of these uprights and I tried to get away from him but -- to scream but I don't remember whether I did or not and he pulled my hand loose from this upright and we fell, kind of stumbled back to the billboard or hit the billboard and when we done that, he kind of put his foot behind me and tripped me and we fell down on the ground and he ripped my pants off -- not off me but ripped them loose between my legs and tore them and then he kept saying he was going to kill me and I kept fighting to get away. I could not do much because he had me down and then he took his arm from around my throat and put his hand on my throat and when he done that is the time he attempted to rape me. * * *" (R. 28-29).

The assailant (later identified as the accused (R. 31)) struck Mrs. Poulter in the face several times and told her to "open up". The penis of accused did not penetrate or touch her genital organ, but she felt it touching her leg. She struggled desperately to free herself - and failing to do so - said to accused, "* * * I have a boy in the Service and I hope he never does that to anybody's mother * * *". Thereupon, the accused took Mrs. Poulter by the hand, lifted her from the ground and said, "* * * You're an old lady * * *. I am going to kill you and going to take you down to the police station * * *". She asked accused to wait until she could find her glasses. Then she saw an automobile approaching, jerked away from accused and ran into the street. The car failed to stop, but accused ran towards the avenue, and the witness ran two and one-half blocks to her home. Upon arriving home she informed her aunt of what had occurred. The police were notified and she was put to bed. As a result of the attack, the witness was under the constant care of a physician and surgeon for several days. Her facial injuries were serious, required two operations, and on the date of the trial, December 2, 1942, she was undergoing treatment. Mrs. Poulter testified that she did not see the face of her assailant, but that she remembered his voice. When she attended the investigation she identified the accused; "Just by his voice, the way his voice sounded. I don't think I could ever forget it. I think as long as I live I will be able to recognize him" (R. 29-34, 38-40).

(64)

Officers Bauer and McCall of the Police Department of the city of Calexico went to the home of Mrs. Lillian Poulter about 11 p.m., October 31, 1942. Mrs. Poulter was in bed - "in very bad shape". In consequence of what was told them, the officers immediately instituted a search for her assailant. Later that night they went to 9th Street and Imperial Avenue, the place of the attack as described by Mrs. Poulter, and found at the south end of the billboard a pair of glasses and a cap, which were identified that night by Mrs. Poulter as her property. Describing the place where the attack occurred, officer Bauer said that it was near the end of a blind street - rather dark. The signboard was about 20 feet high, 30 feet to 40 feet long, and was located approximately 5 feet from the sidewalk (R. 20-23, 26; Ex. A).

4. For the defense the accused testified that he was a member of Headquarters Troop, 10th Cavalry, stationed at Camp Lockett, California. On October 31, 1942, he, Corporal Owsley, Private First Class George Pogue, and another soldier named Humphrey were in a truck transporting supplies from Camp Lockett to Camp Seeley. On the way to Camp Seeley they met a civilian at the Trading Post, from whom they bought a pint of whiskey. The civilian gave accused some dope - "one reefer". They stopped at Cameron's Corners and got another pint of "hundred proof" whiskey, and stopped again at Jachumba where they got a quart of whiskey. Arriving at Camp Seeley they drank some beer. Accused and Private Pogue were given passes and went from Camp Seeley to El Centro, where they purchased another quart of whiskey. Accused remembered nothing from this last purchase of whiskey in El Centro until he awakened next morning at Camp Seeley (R. 47-49).

On cross-examination, accused stated that he did not know how much he drank on October 31, 1942. That there were six in the party. When drinking alone he can drink a pint or two pints without losing control of his senses. He stated -

"Well, sir, I have never lost control of my senses, never before in my life and I have been using whiskey and smoking that stuff for a long time and I never before have been out of my head and get drunk and when I gets drunk I go down like that. When I went to Calexico, someone carried me there. I never went alone" (R. 50).

Accused stated that they left Camp Lockett about 2 o'clock and arrived at Camp Seeley, about 62 miles away, around 4 or 4:15

o'clock. He smoked a part of "the reefer" on the way to Camp Seeley, and the rest of it that night at Camp Seeley. On cross-examination he said he finished smoking "the reefer" on the way from Camp Seeley to El Centro, taking it out of his breeches' pocket (R. 52, 61).

He was accustomed to smoking "reefers", but never smoked more than one a day. One would put him out of his head. He remembered assisting the mess sergeant in serving supper at Camp Seeley for about 16 soldiers, including 8 military policemen. He remembered leaving Camp Seeley for El Centro, a distance of about 8 miles, between 6:30 and 7 o'clock. He remembered getting a quart of Five Crown whiskey at El Centro, which was paid for by Private Pogue, but he had no recollection of going to Calexico. Drinking whiskey and smoking Marijuana had never before caused accused to lose his memory (R. 51-57, 60, 66).

5. The evidence shows that at the place and time alleged, Mrs. Lillian Poulter was the victim of a violent and brutal assault; that her assailant threw one arm around her neck, the other one around her waist, dragged her behind a signboard, tripped and forced her to the ground, tore the crotch out of her pants, exposed his penis which she felt against her leg, and told her to "open up". There can be no doubt that his assault was perpetrated with the intention of having unlawful carnal knowledge of Mrs. Poulter by force and without her consent. It is equally clear that the attack was made by the accused. His identity is established by the testimony of Mrs. Poulter and of Private First Class George Pogue. Indeed the accused did not categorically deny guilt. He testified that he drank an excessive quantity of whiskey and smoked one "reefer" on the afternoon and evening of the attack, and as a result had no recollection of occurrences between his arrival in El Centro and his awakening the next morning at Camp Seeley. In addition to the general rule of law that voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime, the court was fully warranted in rejecting this testimony because of the statements of Privates First Class George Pogue and Robert Nunn, who testified that they were with the accused shortly before and shortly after the attack, and that the accused appeared to be sober (R. 9-11, 14, 19).

6. The accused was tried for rape, in violation of the 92nd Article of War. By exceptions and substitutions the court found that accused did forcibly and feloniously, against her will, "attempt to have carnal knowledge" of Mrs. Lillian Poulter, in violation of the 96th Article of War. The approved sentence was dishonorable discharge, total forfeitures, and confinement at hard labor for life at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

The Manual for Courts-Martial states -

"An attempt to commit a crime is an act done with the 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. (Clark.)" (par. 152c, M.C.M., 1928).

It having been shown by the evidence that the accused forcibly and feloniously assaulted Mrs. Poulter with the intent to rape, under circumstances which necessarily involved an attempt to have carnal knowledge of her, it follows that the evidence is legally sufficient to support the finding of guilty of an attempt to rape, in violation of the 96th Article of War.

7. There is no maximum limit of punishment stated in the Executive Order for the offense of an attempt to commit rape (par. 104c, M.C.M., 1928). The maximum penalty, however, for the most closely related offense - assault with intent to commit rape - is dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review holds the record of trial legally sufficient to support the findings of guilty, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years.

Arthur E. Hill, Judge Advocate.
Tracy C. Lyon, Judge Advocate.
Wood H. Sargent, Judge Advocate.

SPJGH
CM 229156

1st Ind.

War Department, J.A.G.O., **MAR 13 1943** - To the Commanding General,
Southern Land Frontier Sector, Western Defense Command, Camp Lockett,
California.

1. In the case of Private Charles Bradford (36014588), Headquarters Troop, 10th Cavalry, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. I concur in the holding by the Board of Review, and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. Upon reduction of the term of confinement to twenty years 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 229156).



E. C. McNeil
E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

MAR 13 '43 AM



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

unlawfully, carry upon his person during the period between June, 1942, and November 12, 1942, a paper upon which was recorded secret information, to wit: a list of code words designating certain geographical locations material in the movement of troops and supplies, in words and figures as follows:

* * * * *
Specification 5.-"In that Second Lieutenant David B. Gold, Machine Records Unit, Headquarters, Western Defense Command and Fourth Army, did, at San Francisco, California, on or about September 6, 1942, wrongfully and unlawfully, discuss with and reveal to one Mildred June Arana, a civilian not authorized to receive such information, in substance, that one Lieutenant * * *, Air Corps, did embark for * * * on the 'U.S.S. * * *', on or about September 3, 1942."

Specification 6.-"In that Second Lieutenant David B. Gold, Machine Records Unit, Headquarters, Western Defense Command and Fourth Army, having knowledge that a material part of a secret document containing code words designating certain geographical locations material in the movement of troops and supplies had been, on or about July 25, 1942, communicated to one Emita Sosa, a civilian not authorized to receive such information, did, then and thereafter, at San Francisco, California, wrongfully and unlawfully fail and neglect to report to the custodian of such secret document the fact that a material part of said document had been subjected to compromise."

Specification 7.-"In that Second Lieutenant David B. Gold, Machine Records Unit, Headquarters, Western Defense Command and Fourth Army, having knowledge that a material part of a secret document, containing code words designating certain geographical locations material in the movement of troops and supplies had been, on or about September 15, 1942, communicated to one Jacquelyn Sinclair, a civilian not authorized to receive such information, did, then and thereafter, at San Francisco, California, wrongfully and unlawfully fail and neglect to report to the custodian of such secret document the fact that a material part of said document had been subjected to compromise."

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

Specification 1.-"In that Second Lieutenant David B. Gold, Machine Records Unit, Headquarters, Western Defense Command and Fourth Army, did, at the Presidio of San Francisco, California, on or about November 20, 1942, in his testimony before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer conducting an official investigation, testify under oath in relation to an alleged compromise of a secret document in which the word * * * was designated as the code word for * * *, in substance, as follows:

(Question) Have you at any time communicated to any person not entitled to the information the word * * * and converting it into * * *?

(Answer) No, Sir.

which testimony was false and untrue and known by him to be false and untrue in that he, the said Second Lieutenant Gold, well knew that he had informed Emita Sosa and Jacquelyn Sinclair, each then being a civilian not authorized to receive said information, in substance, that the word * * * was the official code designation for * * *."

Specification 2.-"In that Second Lieutenant David B. Gold, Machine Records Unit, Headquarters, Western Defense Command and Fourth Army, did, at the Presidio of San Francisco, California, on or about November 28, 1942, in his testimony before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer conducting an official investigation, state under oath, that he, the said Second Lieutenant Gold, did not, on or about September 30, 1942, while acting as officer courier for the Machine Records Unit, ask to see the List of Code Designators for the purpose of converting the code words * * *, * * * and * * *, the said code names appearing on a secret War Department radiogram, No. * * *, to their respective geographical locations, or words to the same effect, which statement was false and untrue and known by him to be false and untrue, in that, the said Second Lieutenant Gold, well knew that he had, on or about September 30, 1942, while acting as officer courier for said Machine Records Unit, ask Warrant Officer (JG) Harrell R. Coffey, chief clerk of the Classified Records Section, Headquarters, Western Defense Command and Fourth Army, to see the List of Code Designators for the purpose of converting the code words * * *, * * *, and * * *, to their respective geographical locations."

Specification 3.-"In that Second Lieutenant David B. Gold, Machine Records Unit, Headquarters, Western Defense Command and Fourth Army, did, at the Presidio of San Francisco, California, on or about November 28, 1942, in his testimony before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer conducting an official investigation, state under oath, that he, the said Second Lieutenant Gold, did not, at the Classified Records Section, Headquarters, Western Defense Command and Fourth Army, on or about September 30, 1942, see the classified Key List of Code Designators for Western North America, Pacific and East India Areas, or words to the same effect, which statement was false and untrue and known by him to be false and untrue, in that, the said Second Lieutenant Gold, well knew that he did, at the Classified Records Section, Headquarters, Western Defense Command and Fourth Army, on or about September 30, 1942, see the Classified Key List of Code Designators for Western North America, Pacific and East India Areas."

(Opinion of the Board of Review is SECRET)

(Sentence confirmed. G.C.M.O. 44, W.D. 18 Mar 1943)



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

(73)

SPJGN
CM 229162

JAN 7 1943

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sam Houston, Texas, Dec-
Second Lieutenant RODERICK	)	ember 11, 1942. Dismissal.
L. McNATT (O-462464), Cavalry,)	
95th Reconnaissance Troop.)	

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 96th Article of War.

Specification 1: In that Second Lieutenant Roderick L. McNatt, 95th Reconnaissance Troop, did, at Camp Swift, Texas, on or about November 26, 1942, take and wrongfully use a 1942 Oldsmobile Sedan, Motor number L461401, 1942 Michigan license, number MNL176, the property of Captain Owen S. Hendren, Medical Corps, without the consent of the owner.

Specification 2: In that Second Lieutenant Roderick L. McNatt, 95th Reconnaissance Troop, did, near Camp Swift, Texas, on or about November 27, 1942, violate the speed laws of the State of Texas by driving at an excessive rate of speed, to wit: sixty miles per hour.

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

Specification: In that Second Lieutenant Roderick L. McNatt, 95th Reconnaissance Troop, did, at

Camp Swift, Texas, on or about November 27, 1942, with intent to deceive Lieutenant Colonel H. E. Ihlenfeld, Inspector General's Department, 95th Infantry Division, officially state to the said officer, that an automobile which he had taken for his own use was mistaken by him for another automobile which he had permission to use, which statement was known by the said Second Lieutenant Roderick L. McNatt to be untrue.

The accused pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on November 26, 1942, the accused took possession of a 1942 Oldsmobile Sedan, the property of Captain Owen S. Hendren, which was parked with a key in it near the officers' mess at Camp Swift, Texas. Although the accused had no permission to use this automobile, he drove it to Austin, Texas. On the way to Austin, the accused invited Private Charles M. Cotter and three other soldiers whom he saw on the highway to ride with him. On the following day, at approximately 2 a.m. the accused, accompanied by the same soldiers, left Austin and returned to Camp Swift. Both on the way to Austin and on the return trip at night to Camp Swift, the accused drove the car at a speed in excess of 60 miles per hour (R. 6-9).

When the accused entered the main gate at Camp Swift he was stopped by the military police who informed him that the car was stolen. Private Cotter then asked the accused if the car was not his and he replied with the statement, "they say it aint" (R. 9).

Thereafter on the same day the accused, after having been warned of his rights, made a sworn statement before Lieutenant Colonel Ihlenfeld in which he stated that he had been given permission to drive the car by an officer whom he did not know by name. Later, however, when confronted by that officer, the accused admitted that he had not had permission to use that officer's car or any other car, and that he had taken the car which he had without the consent of anyone (R. 11-25)

Subsequently the accused, after again having been warned of his rights, made another sworn statement before Major Alfred W. Pierce in which he admitted that his first statement to Lieutenant Colonel Ihlenfeld was not true. The accused, in his statement to Major Pierce, asserted that he gave Lieutenant Colonel Ihlenfeld an

incorrect statement because he had given that type of statement to the sergeant at the gate upon his return to camp, and he knew that Lieutenant Colonel Ihlenfeld would have that statement (R. 26-29).

4. The accused testified that he was 19 years of age and was commissioned a second lieutenant in the Army upon graduation from the New Mexico Military Institute. On November 26, the accused desired to go to Austin because he wished to get married to a girl who lived there. When he could not find someone to take him to Austin the accused proceeded to take a 1942 Oldsmobile which was parked near the Medical Battalion Club and drove it to Austin. On the following day he drove this car back to Camp Swift. On both the trip to and from Austin the accused drove the car at an excessive rate of speed. When the accused returned to Camp Swift and was stopped at the main gate he told the sergeant there that the car he was driving belonged to a lieutenant in the medical battalion.

The accused admitted that his first statement to Lieutenant Colonel Ihlenfeld "was a falsehood". The accused explained his false statement by saying,

"*** I was afraid to say anything else. I had made the statement to the Sgt. at the Main Gate and I knew Col. Ihlenfeld would have it, and I was afraid to say anything else" (R.36).

The accused testified further that he had had one or two of the Articles of War read to him but that he was not "acquainted" with the Manual for Courts-Martial (R. 31-38).

5. Specification 1, Charge I, alleges that the accused, on November 26, 1942, wrongfully took an automobile, the property of Captain Owen S. Hendren, without his consent. Both the plea of guilty by the accused as well as the evidence presented by the prosecution and by the defense fully sustain the findings of guilty of the offense alleged.

Specification 2, Charge I, alleges that the accused did violate the speed laws of the State of Texas on November 27, 1942, by driving at an "excessive rate of speed, to wit: sixty miles per hour". The evidence presented both by the prosecution and by the accused, shows that the accused, on the date alleged, drove an automobile in excess of 60 miles per hour upon the public highways of the State of Texas. In view of these facts and the State Law of Texas restricting the speed of automobiles to 55 miles per hour at nighttime (the accused returned to Camp Swift from Austin during the night), it is clear that the accused violated the speed laws of the State of Texas (Art. 827 a,sec. 8, Vernon's Annotated Penal Code of the State of Texas). It necessarily follows that the court's findings of guilty under this Specification are sustained by the proof and that the offense is a clear violation of the 96th Article of War.

(76)

The Specification of Charge II alleges that the accused, with intent to deceive Lieutenant Colonel H. E. Ihlenfeld, officially stated to him that an automobile which he had taken for his own use was mistaken by him for another automobile which he had permission to use, which statement was known by the accused to be untrue. The plea of guilty as well as the uncontradicted evidence sustains the finding of guilty under this Specification. Furthermore, the making of a false official statement has repeatedly been held to involve such conduct as seriously compromises the character and standing of an officer and gentleman and to constitute a violation of the 95th Article of War (CM 217538, Kelly; CM 224049, Burnham; par. 151, M.C.M., 1928).

6. The accused is 19 years of age. The records of the Office of The Adjutant General show that he was appointed second lieutenant, Cavalry, Reserve, while a student at the R.O.T.C., New Mexico Military Institute, June 2, 1942; ordered to active duty June 3, 1942, and assigned to duty at the Cavalry Replacement Training Center.

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 of the sentence. A sentence of 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.

Shas. B. Besson, Judge Advocate.

Dorran D. Smith, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

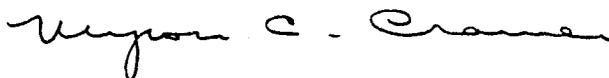
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War Department, J.A.G.O., JAN 13 1943 - To the Secretary of War.

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 Second Lieutenant Roderick L. McNatt (O-462464), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and legally sufficient to warrant confirmation thereof. Although the conduct of the accused in driving an automobile at an excessive rate of speed is a relatively minor offense, his conduct in taking an automobile without the consent of the owner, and in making a false, official statement concerning his right to use the car, are serious offenses involving moral turpitude and show the accused to be unfit for the responsibility of an officer. I recommend, therefore, 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 designed to carry into effect the foregoing recommendation.



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 but in view of the youth of the officer and the fact that he corrected his false statement the following morning, execution thereof suspended. G.C.M.O. 51, 22 Mar 1943)

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

(79)

SPJGK
CM 229183

JAN 26 1943

UNITED STATES)	THIRD AIR FORCE)
v.)	Trial by G. C. M., convened at)
Private PAUL C. MULOCK)	Fort Knox, Kentucky, November)
(36318150), 28th Obser-)	16 and 17, 1942. Dishonorable)
vation Squadron.)	discharge and confinement for)
)	thirteen (13) years. Discip-)
)	linary Barracks.)

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Paul C. Mulock, 28th Observation Squadron, Godman Field, Ft. Knox, Kentucky (then attached to Headquarters and Headquarters Squadron, 73rd Observation Group, Godman Field, Ft. Knox, Kentucky), did, at Godman Field, Ft. Knox, Kentucky, on or about July 16, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Rockford, Illinois, on or about September 3, 1942.

Specification 2: In that Private Paul C. Mulock, 28th Observation Squadron, Godman Field, Ft. Knox, Kentucky, did, en route from Camp Grant, Illinois, to Fort Knox, Kentucky, on or about September 8, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Aurora, Illinois, on or about October 9, 1942.

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

Specification 1: In that Private Paul C. Mulock,

28th Observation Squadron, Godman Field, Ft. Knox, Kentucky, did at Rockford, Illinois, on or about September 3, 1942, impersonate a commissioned officer by wearing 2nd Lieutenant bars, silver wings over his shirt pocket, U.S. insignia on his right collar, wings on his left collar, and Warrant Officers insignia on his service cap, such conduct being to the prejudice of good order and military discipline.

Specification 2: In that Private Paul C. Mulock, 28th Observation Squadron, Godman Field, Ft. Knox, Kentucky, having received a lawful order from Major W. E. Donaldson, Adjutant, Headquarters Camp Grant, Illinois, to report to the Commanding Officer, Godman Field, Ft. Knox, Kentucky, the said Major W. E. Donaldson being in the execution of his office, did, at Camp Grant, Illinois, on or about September 8, 1942, fail to obey the same.

He pleaded not guilty to Charge I and its Specifications and to Specification 1, Charge II, and guilty to Charge II and Specification 2 thereunder. He was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61, 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 thirteen 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 for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on July 16, 1942, at Godman Field, Fort Knox, Kentucky, accused, a member of the 28th Observation Squadron, Air Corps, attached to the 73rd Observation Group, absented himself without leave (R. 7, 8; Exs. A, B). On July 17 he returned to the 73rd Observation Group and asked for help in securing some travel allowances and was sent to a chaplain (Ex. D). The chaplain secured a small amount of money for him from the Army Emergency Relief (R. 22), Accused again disappeared (Ex. D) and remained absent until apprehended by a member of the military police on September 3, 1942, while sitting with his wife in a stalled automobile on a street of Rockford, Illinois (R. 12, 13). At

the time of his apprehension he was wearing a pair of khaki slacks, khaki colored shirt and field jacket. He had small silver wings over his breast pocket, "U.S." insignia and a small pair of wings with propeller on his collar, warrant officer's insignia on his service cap and gold bars on his shoulders (R. 13, 14). (Specification 1, Charge I; Specification 1, Charge II).

Accused was confined at Camp Grant, Illinois (R. 14). On September 7, 1942, he received orders issued by Headquarters Camp Grant directing him to proceed without delay to Fort Knox, Kentucky, and to report upon arrival to the commanding officer (Exs. G, H). Accused did not comply with these orders (Ex. C) but absented himself without leave and remained absent until apprehended by the civil police at Aurora, Illinois, on October 9, 1942. When apprehended he gave his name as Kenneth Mulberry. He was wearing civilian clothes. (R. 16) (Specification 2, Charge I; Specification 2, Charge II).

In the course of the investigation of the charges, after his "rights" had been explained to him "in full" and without having been subjected to force or coercion (R. 9), accused made a statement which was reduced to writing and signed by him (R. 11). Without objection that it was not voluntarily made, the statement was received in evidence (R. 10). In it accused denied any intent to desert and stated that his "whole idea was to get my wife settled financially *** and then to return". He stated he impersonated an officer but could give no reason for doing so. He failed to obey the order given him at Camp Grant. He had two children by a wife whom he had divorced. He also stated:

"The chronological chain of events in my case begins on July 15, 1942. I was paid on the 15th and left for Lexington, Kentucky, with four other soldiers to go swimming and have a big time. On the evening of the 16th, I brought the men back that were with me, and then I went to Louisville to see my wife. My wife is twenty-two years old, four months pregnant, and at that time was living on Brook Street in Louisville, Kentucky. I was and am the sole means of her support. On the night of July 17, 1942, I had the doctor for my wife, and he said the best thing for her would be complete relaxation, since she was in a run-down condition. On the morning of July 18, 1942, I came back to Headquarters of the 73rd Observation Group of Godman Field in order to collect some travel money that was due me. I came back for two reasons; one was

to raise money for my wife. The second was to turn myself in to the 73rd. However, the 1st Sergeant, after telling me that I was AWOL and that I should report to the Group Commander, ordered me to go on KP until such time as the Group Commander was available. I reported to the Mess Sergeant and then went to work trying to get this money that was due me. I finally managed to get a little money from the Enlisted Mens' Relief, and then I went back to Louisville and my wife.

"Sunday my wife and I left for Dixon. We arrived at Dixon and stayed with friends of my wife. Later I left Dixon and went to Rockfort, Illinois. During the time I was traveling I was in uniform. I wore it in order to prevent the authorities from stopping me and asking me for my registration card. I also wore it because it was improper to get out of uniform. I was arrested at Rockford, Illinois, September 3, 1942, at the Kishwaukee Street Auto Wreckers by an M.P. Sergeant. At that time, I was wearing the various insignia of an officer, as I have admitted above".

In regard to his subsequent actions he stated:

"*** I was confined at the Guard House at Camp Grant, Illinois, for about three days and then put on a train to come back here. I have already explained that I got off that train at Aurora, Illinois. She was staying with friends and did not have any money. My car was at Rockford with my wife. At Aurora I got a job with an individual whom I do not care to name. I made between \$65 and \$70 a week. I held this job for about three weeks. I was keeping my wife in an apartment and wearing part of my uniform while at work, but not all. At the end of three weeks, a policeman came up and asked me where Ken Mulberry was as I was walking out of a door. I had been going under the name of Ken Mulberry and at that particular time was wearing civilian clothes. I told the policeman my real identity, since I had known him for sixteen years, and they then took me to the city jail. In due course I was returned by the M. P. 's to Fort Knox. I went under an assumed name because too many people in Aurora knew I was in the army. I had lived in Aurora for sixteen years.

"I wish to state that the steps I took to avoid arrest were taken because I intended to turn myself in eventually and knew that it would go bad with me if I were returned involuntarily rather than voluntarily".

He further stated that he had had a slight concussion of the brain after finishing high school. (Ex. F)

Mrs. Bettie Jane Mulock, wife of accused, testified for the defense that she was married on January 17, 1942. She accompanied accused to Chanute Field, Illinois, where she was employed for two or three months while he was on duty at that field. (R. 25) Upon his transfer to Fort Knox, she came with him and worked in the post cafeteria (R. 26, 43). She became ill and about July, 1942, she and accused (R. 27) went to Louisville, Kentucky, and then to "Dixon" where her parents were living (R. 26). Her parents' financial affairs were unsettled at that time, and accused provided her with the necessities of life (R. 27). While absent accused was employed (R. 30). He told witness that he would return to the Army (R. 30, 31) whenever her parents should become able to take care of her (R. 31). He did not return because witness was unable to work (R. 30). Mrs. Mulock's testimony concerning her employment at Fort Knox was corroborated by another defense witness. A chaplain testified for the defense that about July 18 he secured the financial aid (about \$10) for accused upon the latter's statement that his wife was ill (R. 22).

Accused testified in substantial accord with his statement to the investigating officer. About July 15, 1942, he received pay in the sum of \$53.20 (R. 32, 40). In explanation of his absence he testified:

"one reason was I got tired doing K.P. work and all of that stuff and another reason was my wife, she was in Louisville all of the time and she would sit around there and do nothing and lay in bed and feel miserable, so I just decided to leave here and go there and take her home and come back to the army then and see if I could make out an allotment somehow so she could get the money so she would have financial help, so I could come here and go about my business in the army and let civilian life go for the time being" (R. 45).

Prior to absenting himself he had used his car, which he had owned about a year and for which he had paid \$65 (R. 38), for his personal pleasure (R. 32) and to taxi soldiers between Godman Field and Louisville (R. 32, 38, 40, 42). He wore the uniform of an officer (R. 36) "more so as

(84)

camouflage" (R. 26) "as far as the military police were concerned in Rockford, Illinois" (R. 41). During his absence his wife's parents traveled from place to place (R. 37). He testified:

"As far as the army was concerned I wanted to come back to the army but I didn't see how I could possibly come back and leave my wife there to starve to death or live on the mercy of somebody else" (R. 38).

Accused had attended high school for four years and a business college for two years. In civil life he was a "flyer" (R. 43). While in the service he made no allotment for his wife because she was living with him (R. 40).

4. The evidence establishes without dispute that, as alleged in Specification 1, Charge I, accused absented himself without leave at Godman Field on July 16, 1942, and remained absent until apprehended at Rockford, Illinois, on September 3, 1942. When apprehended he was impersonating an officer by wearing an officer's insignia, as alleged in Specification 1, Charge II. As alleged in Specification 2, Charge II, he was ordered to proceed from Camp Grant, Illinois, to his proper station at Fort Knox, but failed to do so and again, on September 8, 1942, as alleged in Specification 2, Charge I, absented himself without leave en route and remained absent until apprehended at Aurora, Illinois, on October 9, 1942. When apprehended the second time he was dressed in civilian clothes and gave a fictitious name. He was employed during his absences. Accused contended that he did not intend to desert but intended to remain absent only until he could make provision for his wife. There was, however, ample basis in the evidence for an inference by the court that during each period of his absence he did not intend to return to his place of duty or to the service.

5. The charge sheet shows that accused is 24 years of age. He enlisted February 13, 1942. He previously served about two years and seven months as a member of the National Guard.

6. 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.

Walter H. ..., Judge Advocate.
Andrew S. ... Jr., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

3. The evidence shows that on November 22, 1942, accused was a member of the 125th Armored Engineer Battalion, stationed at Camp Chaffee, Arkansas (R. 29). At about 1:55 a.m. on this date Technician 4th Grade Conrad C. Iber, 154th Armored Signal Company, who was marching post as a sentinel in his company area, saw accused approaching him. Iber was unarmed except for a small wooden club (R. 9). When accused had reached a point about 12 feet distant Iber ordered him to halt (R. 7, 8) but he did not obey and "walked into" Iber (R. 8). Accused asked, "'By what authority do you halt me?'" and Iber replied, "'I halt you by my authority as a guard in this company area'". (R. 8) Iber testified:

"accused called me a number of names, including a 'gun-shy bastard', and in general he attempted to bemean me, and he made such statements as 'I shouldn't even be allowed to talk to him', and statements of that sort".

Iber also testified that at one time accused said, "'fuck you'". (R. 8) Iber recognized accused as a commissioned officer and resumed walking his post (R. 8). Accused remarked that he was going to walk guard with Iber and followed the sentinel "for some distance" (R. 8), then turned and went toward an unused mess hall (R. 8, 9). Iber testified:

"He mounted the stairs, and the first tried the knob and it didn't open, so he tried pulling violently on the door, and it didn't open, and he hammered a few times, and kicked a few times, and at that time I went back toward the mess hall and told him to stop it or I was going to call the Sergeant of the Guard".

Accused came down the steps of the mess hall toward the sentinel and told him to call the sergeant of the guard. (R. 9) Iber did not do so and accused drew a knife from his pocket, opened the knife (R. 10), waved the knife about (R. 15), got behind Iber and told him to "march over and report him to the Sergeant of the Guard" (R. 10). The knife had a blade about three inches in length (Ex. 3). Accused told Iber he would "slit" his coat. Iber testified that he saw the knife flash and "naturally assumed I might be slit a little myself". (R. 10) He complied with accused's instructions and walked directly (R. 13) ahead of him for some 30 paces (R. 10, 11, 14). Iber then took a quick step ahead and to the side, seized accused's arm and told accused to put the knife away. Accused

complied. The sentinel then walked in the direction of the orderly room, followed by accused. Upon reaching the orderly room accused forbade the sentinel to call the sergeant of the guard and drew his knife again. Iber seized accused's arm, prevented him from opening the knife, removed his glasses and threw him down. Iber threatened to break accused's arm if he did not release the knife, but accused did not release it and Iber called the sergeant of the guard. (R. 11)

In response to the call, the sergeant of the guard, Technical Sergeant John M. England, 154th Signal Company, came to the scene and after telling accused to give up the knife took it from him by force (R. 12, 16). Accused arose and put on an enlisted man's cap belonging to England. He kept the cap on his head for 20 to 30 minutes. (R. 18, 21) While standing about and "mumbling" he removed his bars from his shoulders, threw them on the ground (R. 18, 21) and said to Iber and England, "I am no better than you are" (R. 18). At about the same time he called the men "sons of bitches" and "gun-shy bastards" and used other profane epithets (R. 17). Accused was taken into the orderly room shortly after 2 a.m., and kept there until about 4 a.m. (R. 18). While there he "mumbled" words such as "Hello men!" and "What d'ya say, men!" (R. 21). His speech was disconnected (R. 18) and incoherent (R. 21; Ex. 2).

Iber and England each testified that he detected the odor of alcohol on the breath of accused (R. 10, 18) and that he believed accused was drunk (R. 12, 18). Iber testified that accused's speech was "uncertain" but that he did not stagger (R. 10). England testified that accused's speech was "irrational; very thick" (R. 17). Second Lieutenants Robert A. Crockett and John R. Perrin, Signal Corps, each testified that he saw accused while in the orderly room and observed that his speech was somewhat incoherent. Both believed he was drunk. (R. 21, 22; Ex. 2) Second Lieutenant Marvin E. Parsons, Infantry, who saw accused in the orderly room, testified that his "speech was thick" and that witness believed he was drunk (R. 23).

Upon investigation of the charges, after he had been told that he could remain silent and that whatever he said might be used against him (R. 26), accused stated:

"On November 21, 1942, I had returned from a two-day bivouac. I started drinking in my room at 2:30 P.M. on that afternoon. I drank approximately all of two-fifths of rum from that time until 9:00 P.M. Lieutenant Thomas McGurkin and I had dates in

Barling at 9:30, but when we stopped there we were not able to locate them. We went on to Fort Smith by bus. Lieutenant McGurkin called the girls with whom we had dates, and I decided that I did not want my date, so I left him at the phone and went to the Goldman Hotel. I went to the room of Lieutenant DeWitt and started to drink. This was about 10:45 P.M. or a little later. I stayed in his room drinking for quite a while. I do not remember leaving the hotel, but he tells me I left about 1:15 A.M. I do not remember coming to camp or anything else after being in the hotel room until I remember being in an orderly room some place. It turned out to be the orderly room of the 154th Signal Company. After that I began to get sober, and remember going to my quarters and going to bed" (Ex. 4).

Major John R. Jannarone, 125th Armored Engineer Battalion, executive officer of the battalion, testified that he considered accused above average in efficiency and that he was "generally regarded as being 'a ball of fire' if I may say so". He was dependable and secured excellent results when "given a job to do". Witness deemed him "of considerable value to the service" when exercising supervision over enlisted men in the field. Witness expressed the opinion that accused should be retained in the service notwithstanding "the current difficulty". (R. 28) Major Dean E. Swift, 125th Armored Engineer Battalion, accused's battalion commander, testified that accused was above average in efficiency, with energy, initiative and ability - "When he is in the field he can be given a job and be depended upon to carry it out" (R. 29). Witness believed accused had "distinct value to the service, as an officer" and recommended that "he be retained" (R. 30).

Accused declined to testify or make an unsworn statement.

4. The evidence clearly shows that accused was drunk at the place and time alleged. He had the odor of liquor on his breath. His speech and behavior were abnormal. Officers and enlisted men who observed him believed he was drunk. He stated that he had been drinking heavily and did not recall what occurred. While so drunk he walked into a sentinel, drew and presented a pocket knife under such circumstances that his acts amounted to an assault upon the sentinel, and threatened to cut the

sentinel's coat. He addressed argumentative, vulgar, demeaning and intimidating remarks to the sentinel and vulgar and demeaning remarks to other enlisted men, tried improperly to enter a public building and with a drawn knife compelled the sentinel to walk before him. His behavior was such that members of the guard had to overpower him and take the knife from his hand. Accused's drunkenness was gross and his indecorum and lawlessness were conspicuous and of a disgraceful nature. His conduct was unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. War Department records show that accused is 32 years of age. He attended college for four years. He enlisted in the Army on January 4, 1942, attended officers' candidate school at Fort Belvoir, Virginia, and was commissioned a second lieutenant, Army of the United States, on September 30, 1942.

6. 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 95.

Andrew C. Capps, Jr., Judge Advocate.
Alvin Tommison, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

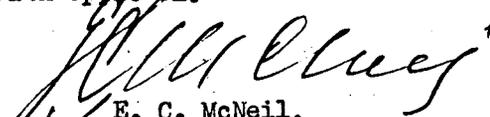
1st Ind.

War Department, J.A.G.O., FEB 17 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 William M. Griffin (O-1104184), Corps of Engineers.

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 entered his camp late at night in a drunken condition, addressed vulgar, demeaning and intimidating remarks to a sentinel, attempted improperly to enter a public building, drew a heavy pocketknife and by an offer of violence therewith assaulted (but did not strike or cut) the sentinel. He so conducted himself that it was necessary for enlisted men to overpower and disarm him. He was sentenced to dismissal. There was testimony to the effect that accused had previously performed his duties in a very creditable manner. The sentence is appropriate but in view of the probability that accused is capable of further valuable service I believe the sentence need not be executed at this time. I 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.


E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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. 31, 10 Mar 1943)

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

SPJGH
CM 229268

MAR 4 1943

U N I T E D S T A T E S	)	NINTH SERVICE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Vancouver Barracks, Washington,
Second Lieutenant GEORGE E.	)	November 16, 1942. Dismissal
SMITH (O-304220), Infantry.	)	and confinement for two (2)
	)	years. Disciplinary Barracks.

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 61st Article of War.

Specification: In that 2nd Lieutenant George E. Smith, Infantry-Reserve, did, without proper leave, absent himself from his proper station at Barnes General Hospital, Vancouver, Washington, from about May 1, 1942 to about August 4, 1942.

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

Specification 1: In that 2nd Lieutenant George E. Smith, Infantry-Reserve, did, at Vancouver Barracks, Washington, on or about April 29, 1942, with intent to defraud, wrongfully and unlawfully

make and utter to the Post Exchange, Vancouver Barracks, Washington, a certain check, in words and figures as follows, to wit:

96-338 Pendleton Branch 96-338
The First National Bank of Portland
Pendleton. Oregon 4/29 1942 No.112

PAY TO THE
ORDER OF Post Exchange \$25.00
Twenty-five and no/100 ----- Dollars

George E. Smith
2nd Lt. Ord Dept. U.O.D. Hermiston, Ore.

and by means thereof, did fraudulently obtain from the Post Exchange, Vancouver Barracks, Washington, Twenty Five Dollars (\$25.00) in cash; he the said George E. Smith, then well knowing that he did not have and not intending that he should have sufficient funds in the Pendleton Branch, The First National Bank of Portland, for the payment of said check.

Specification 2; In that 2nd Lt. George E. Smith, Infantry-Reserve, did, at Fort Lewis, Washington, on or about July 7, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Fort Lewis, Washington, a certain check, in words and figures as follows, to wit:

Pendleton, Ore
Seattle, Washington 7/7 1942
First Nat'l Bank of Portland Seattle
(Insert name of Bank)
Pendleton, Ore. Branch
(If drawn on a branch insert name of branch)

PAY TO Cash Or Order \$10.00
Ten and no/100 -----Dollars

Lt. Ord Depot
Hermiston, Ore Geo. E. Smith
(Said check being a counter check)

and by means thereof, did fraudulently obtain from

the Post Exchange, Fort Lewis, Washington, Ten Dollars (\$10.00), in cash, he the said 2nd Lieutenant George E. Smith, then well knowing that he did not have and not intending that he should have sufficient funds in the Pendleton Branch of the First National Bank of Portland for the payment of said check.

Specification 3: In that 2nd Lieutenant George E. Smith, Infantry-Reserve, did, at Fort Lewis, Washington, on or about July 10, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Fort Lewis, Washington, a certain check, in words and figures as follows, to wit:

Pendleton, Ore
~~Seattle, Washington~~ 7/10 1942
 FIRST NATIONAL BANK OF PORTLAND Seattle
 (Insert name of Bank)
 Pendleton Branch
 (If drawn on a branch insert name of branch)

PAY TO Cash Or Order \$2.55
 Two and 55/100 ----- Dollars

Lt., Ord. Depot,
 Hermiston, Ore (Said check being a counter check) Geo.E.Smith

and by means thereof, did fraudulently obtain from the Post Exchange, Fort Lewis, Washington, merchandise to the value of Two Dollars and Fifty-five cents (\$2.55), he the said 2nd Lieutenant George E. Smith, then well knowing that he did not have and not intending that he should have sufficient funds in the Pendleton Branch of the First National Bank of Portland for the payment of said check.

Specification 4: In that 2nd Lieutenant George E. Smith, Infantry-Reserve, did, at Fort Worden, Washington, on or about July 7, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Fort Worden, Washington, a certain check, in words and figures as follows, to wit:

(94)

Pendleton, Ore
~~Seattle, Washington~~ 7/7 1942
 FIRST NATIONAL BANK OF PORTLAND Seattle
 (Insert name of Bank)
 Pendleton, Ore Branch
 (If drawn on a branch insert name of branch)

PAY TO Cash Or Order \$25.00
 Twenty-Five and no/100 -----Dollars

Lt., Umatilla Ord Depot
 Hermiston, Ore (Said check being a counter check) Geo.E.Smith

and by means thereof, did fraudulently obtain from the Post Exchange, Fort Worden, Washington, Twenty-five Dollars (\$25.00), in cash, he the said 2nd Lieutenant George E. Smith, then well knowing that he did not have and not intending that he should have sufficient funds in the Pendleton Branch of the First National Bank of Portland for the payment of said check.

Specification 5: In that 2nd Lieutenant George E. Smith, Infantry-Reserve, did, at Fort Worden, Washington, on or about July 11, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Fort Worden, Washington, a certain check, in words and figures as follows, to wit:

Pendleton, Ore
~~Seattle, Washington~~ 7/11 1942
 FIRST NATIONAL BANK OF PORTLAND Seattle
 (Insert name of bank)
 Pendleton Branch
 (If drawn on a branch insert name of branch)

PAY TO Cash Or Order \$25.00
 Twenty-five and no/100 -----Dollars

Lt., Ord. Depot
 Hermiston, Ore (Said check being a counter check) Geo.E.Smith

and by means thereof, did fraudulently obtain from the Post Exchange, Fort Worden, Washington, Twenty-five dollars (\$25.00), in cash, he the said 2nd

Pendleton Oregon
Washington 7/13 1942
FIRST NAT'L BANK OF PORTLAND Pendleton, Ore
(Fill in name of Bank) (City) Branch

PAY TO Cash Or Bearer \$15.00
Fifteen and no/100 ----- Dollars

Lt. Ord. Depot
Hermiston, Ore (Said check being a counter check) Geo. E. Smith

and by means thereof, did fraudulently obtain from the Fort Lewis Branch, National Bank of Washington, Fifteen Dollars (\$15.00), in cash, he the said 2nd Lieutenant George E. Smith, then well knowing that he did not have and not intending that he should have sufficient funds in the Pendleton Branch of the First National Bank of Portland for the payment of said check.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to be confined at hard labor for two 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 the 48th Article of War.

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

a. Charge I: The accused, a patient at the Barnes General Hospital, Vancouver, Washington, absented himself without leave at 8:15 a.m. on May 1, 1942. He was apprehended at the Center Hotel, Salem, Oregon, August 4, 1942 (R. 11-16; Ex. 1).

b. Charge II: The accused, on April 10, 1942, opened a new account in the Pendleton Branch of the First National Bank of Portland by a deposit of \$100, and executed a signature card in the presence of James Campbell, new account teller. The balance in the account was \$16.05 on April 26, was reduced to \$11.05 on April 30, to an overdraft of \$3.95 on May 1, and so remained until the deposit of \$192.17 on May 5, 1942. That deposit was the only deposit made by accused after the deposit of \$100 which opened the account. The account again became overdrawn on June 4, 1942, in the amount of \$1.93, and the overdraft increased to \$12.39 on June 12, 1942. When no action was taken upon notification sent to accused by mail to the address on

his signature card, Umatilla Ordnance Depot, Hermiston, Oregon, the account was balanced by a deposit of that amount by the bank, and the account closed on June 18, 1942, and remained closed (R. 18-22; Ex. 2, 3).

The checks described in Specifications 1 to 7 were, with the consent of the defense, received in evidence as Exhibits 4 to 10, respectively (R. 24-25).

On April 29, 1942, the check for \$25 (Ex. 4; Spec. 1), was cashed by the Vancouver Barracks Exchange. The check was returned by the bank unpaid. The exchange has not been reimbursed for the amount of that check (R. 30-31).

In July 1942, the check for \$10 (Ex. 5; Spec. 2), was cashed in the main store of the Fort Lewis Exchange, and the check for \$2.25 (Ex. 6; Spec. 3), was received in payment for merchandise in the clothing store. Both checks were returned unpaid by the bank - Exhibit 5 on July 17, and Exhibit 6 on July 22. The exchange has not been reimbursed for the amount of those checks (R. 31-34).

The Fort Worden Exchange cashed for accused two checks in the amount of \$25 each, on July 7, 1942, and on July 11, 1942, respectively (Ex. 7; Spec. 4; Ex. 8; Spec. 5). The first check (Ex. 7, Spec. 4), was signed by accused in the presence of the assistant cashier of the exchange. Both checks were returned by the bank with the notation "Account Closed". The exchange has not been reimbursed for the amount of the checks (R. 34-37; Exs. 7, 8).

The Fort Lewis Branch, National Bank of Washington, cashed the check for \$10 (Ex. 9; Spec. 6), on July 10, 1942, and the check for \$15 (Ex. 10; Spec. 7), on July 13, 1942. Both checks were returned marked "Account Closed". The bank has not been reimbursed for the amount of these checks (R. 35-38; Exs. 11, 12).

Stanley MacDonald, Superintendent of the Multnomah County Bureau of Criminal Identification at Portland, Oregon, was qualified as a handwriting expert, and testified that the signature on the bank signature card of accused (Ex. 2), and the signature upon each of the seven checks (Exs. 4-10, incl.; Specs. 1-7), were in the handwriting of the same person. He testified further that there was no tremor in any of the signatures shown on these exhibits (R. 23-29):

4. In opening the case of the defense, counsel stated that it was intended

"* * * to establish, not that the accused is an insane man, but it shall be our attempt to establish that he is constitutionally psychopathic, subject at times to depression, which, in turn, has led to excessive use of alcohol, which in turn renders the man incapable of realizing the consequences of what he has done or said" (R. 39).

Upon offer of the defense, there was received in evidence a "true copy" of the proceedings of a board of officers known as the Neuropsychiatric Board, convened at Barnes General Hospital, Vancouver, Washington, in the case of the accused. The report of the board stated in part:

"1. FINDINGS:

a. Diagnosis: Constitutional psychopathic state, inadequate personality.

* * *

c. That this officer has not been at any time psychotic, either at the time of the examination or at the time of commission of the alleged offenses.

"2. RECOMMENDATIONS:

a. That this officer be returned to the custody of the military authorities to stand trial for his alleged offenses" (R. 40; Ex. 13).

The accused testified that he was called from Government employment on construction work on a TNT project in Chattanooga, Tennessee, to active duty on March 17, 1942, ordered to Charlotte, North Carolina, for final type physical examination, and thence, if qualified, to Aberdeen Proving Ground, Maryland. Rechecks of blood pressure and urinalysis were made for four or five successive days during his examination. He was told to go on to Aberdeen, and believed that he passed the examination. About a week later he was sent to the Umatilla Ordnance Depot at Hermiston, Oregon, where, after about two weeks, his commanding officer told him he was physically disqualified, and that his resignation would be accepted on that basis. This was a distinct shock, as he thought he had passed and had made plans to bring his family to Hermiston. The fact that his commanding officer thought it would be useless to appeal was very discouraging, but as he wanted to stay in the Army as a career he decided to appeal. In about two weeks he was ordered to Barnes General Hospital, Vancouver, for examination. During the interval he was greatly depressed because he did not know just what

the future held. He drank excessively at Hermiston for a week or so before he arrived at the hospital on April 29th. A preliminary examination when he entered the hospital showed that his blood pressure was high and he was instructed to be present for examination the following morning. His request for permission to spend the night in Portland was granted. He was further depressed by the statement that his blood pressure was still high, and got something to drink. He left the hospital on May 1, went to Portland, where he stayed from two to four weeks, to Seattle, Spokane, Tacoma, and arrived in Salem a few days before he was apprehended on August 4, 1942. He kept drinking and staying under the influence of alcohol, continued drinking until apprehended, and did not realize at all what he was doing. He had been drinking to excess since 1933, when he was disappointed and discouraged "in what happened after he got out of school". He was not drunk all the time during the period following 1933, but he started drinking after disappointments in that period. When something happened which went against his wishes, it would give him a feeling of depression and he would resort to drinking. When he left the hospital he intended to return, but his depression and the liquor caused him not to realize the consequences of what he was doing. He was under the influence of liquor every day. There was no time during the three months period of absence that he did not drink excessively. He did not recall writing to his family during the period, although he ordinarily would do so daily (R. 41-50, 56, 59).

The accused opened an account with the First National Bank of Portland, Pendleton Branch, about the middle of April, with a deposit of \$100, and ordered his pay check sent there for credit to his account. He had no knowledge of the balance to his credit during his absence, used only counter checks, kept no other record of his account, and had no recollection of drawing any checks during that period. The signature on each of the checks was his own. He never received a letter from the bank notifying him that he had insufficient funds in the bank. He evidently used the money from the checks for living costs and liquor (R. 51-59).

5. With respect to Charge I, the evidence shows, and the accused admits, absence without leave from May 1, 1942, to August 4, 1942, a period of three months and three days. The accused stated, however, that he fully intended to return to the hospital from Portland on May 1, but due to his depression over his physical examination and his drinking to brace himself up, he did not realize what he was doing or the consequences of his actions.

6. With respect to Charge II, the evidence shows, and the accused admits, that the seven checks alleged in Charge II were drawn by accused. The evidence shows that either money or merchandise was

delivered in return for the checks. In one instance (Spec. 4), the accused was identified as the person who signed the check and to whom the proceeds in cash were delivered.

The accused opened his account by a deposit of \$100 on April 10, 1942. His balance was reduced to \$16.05 on April 26, 1942, to \$11.05 on April 30, 1942, and to an overdraft of \$3.95 on May 1, 1942, which remained until his deposit of \$192.17 on May 5, 1942. The balance on April 29, 1942, the date of the \$25 check (Ex. 4; Spec. 1), was insufficient to pay that check, and was insufficient on May 4, the date on which the Portland Branch of the Federal Reserve Bank of San Francisco cancelled its prior indorsement of May 1, 1942.

There were no further deposits to the account. It was reduced on June 4 to an overdraft of \$1.93, and successively to an overdraft of \$12.39 on June 12, 1942. The bank notified the accused by mail to the address stated by accused when the account was opened. In the absence of any action by accused, the bank on June 18, 1942, balanced and closed the account by making a deposit of \$12.39. The checks alleged in Specifications 2 to 7, inclusive, were drawn after that date, on July 7, 10, 11, or 13, 1942. The accused admits that he used only counter checks, had no knowledge of the balance in his account during his absence, kept no other record of his account, and had no recollection of drawing any checks during that period.

7. The record states -

"The accused was then arraigned upon the following charges and specifications:

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

* * * * *
"Specification 6. In that 2nd Lieutenant George E. Smith, Infantry-Reserve, did, at Fort Lewis, Washington, on or about July 10, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Lewis Branch, National Bank of Washington, a certain check, in words and figures as follows, to wit:

Pendleton, Ore.

Seattle, - Washington 7/10 1942

FIRST NATIONAL BANK OF PORTLAND Seattle

(Insert name of bank)

Pendleton Branch

(If drawn on a branch insert name of branch.,

LAW LIBRARY
JUDGE ADROGATE GENERAL
NAVY DEPARTMENT

(101)

PAY TO Cash Or Order \$10.00
Ten and no/100 ----- Dollars

Lt. Ord. Depot
Hermiston, Ore. (Said check being a counter check)
GEO. E. SMITH." (R. 5-8)

Specification 6, Charge II, as set forth in the record of trial, does not include the further allegation contained in Specification 6 on the charge sheet, that by means thereof accused fraudulently obtained the amount of the check in cash, well knowing that he did not have and not intending to have sufficient funds in the bank upon which the check was drawn for the payment of the check. Without determining whether resort may be had to the charge sheet for the purpose of supplying the missing portion of the Specification, the Board of Review is of the opinion that the Specification set forth in the record of trial sufficiently alleges an offense chargeable under the 95th Article of War. It is alleged, in substance, that accused, with intent to defraud, wrongfully and unlawfully made and uttered to the bank, the check described. Although the Specification contained in the record of trial is not in the form set forth on page 253 of the Manual for Courts-Martial, 1928, this Specification does allege an offense which the evidence shows was committed by accused. Moreover, should the Specification be deemed defective, the finding of guilty of this Specification by the court need not be disapproved.

"* * * No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby. * * *" (par. 87b, M.C.M., 1928, p. 74).

The defense made no objection with reference to the omission of the portion of the Specification under consideration. It is apparent from the record of trial that accused was not misled by the omission, and that his substantial rights were not otherwise injuriously affected by such omission.

In the opinion of the Board of Review, the record of trial is legally sufficient to support the finding of guilty of Specification 6, Charge II

8. The question remains whether the checks covered by the Specifications of Charge II were issued knowingly and with intent to defraud,

01958

as alleged, and constituted an offense denounced by Article of War 95.

"* * * when the doing of a wrongful act is conceded and the innocent intent is in issue, the doing of the same or a similar act upon other occasions is admitted in evidence to negative the innocence of intent" (sec. 14q, Chap. 5, Vol. 1, Greenleaf on Evidence, 16th ed., p. 72).

"It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense" (par. 126, M.C.M., 1928).

The accused drew and uttered one check late in April, and six other checks from July 7 to 13. Although he admits the signatures on the checks are his, he denies any knowledge that he drew them. In view of the knowledge of accused of matters which concerned him prior to absenting himself, of his actions during his absence, of the manner in which he secured cash upon his checks, the appearance of the writing on the checks, and the fact that his correct address was placed upon the face of each check, there is no reasonable basis for belief in the self-serving statements of accused that he was so excessively drunk continuously during the period of his absence that he had no knowledge of the drawing of the checks. While there might be doubt as to his intent with respect to the first check, if that were his only offense, the course of conduct of accused in writing a number of checks within a comparatively short period of time, and his failure to exercise ordinary care with respect to the condition of his account when the checks were negotiated, reflects more than inadvertence, indifference, or carelessness. Such repeated wrongful and unlawful acts can support but one conclusion - that the accused made and uttered the checks with knowledge and intent as alleged. The successive frequency of his acts tends to negative innocence of intent on his part. With respect to the checks other than the first, the accused could not have expected that he would be paid and his pay check deposited to the credit of his account while he was in a status of absence without leave and, in any event, without his signing and presenting a voucher for payment.

Under all of the circumstances of this case, the Board of Review is of the opinion that the record of trial establishes beyond any reasonable doubt that the accused made and uttered the checks specified in the seven Specifications, Charge II, with knowledge and intent

as alleged, and that such conduct was in violation of the 95th Article of War (CM 200248, Briggs; CM 201134, Sullivan; CM 204921, Parsons; CM 207588, Lizotte; CM 210768, Sharp; CM 213993, Casseday; and CM 219428, Williams).

9. The accused is 31 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., May 31, 1933; reappointed May 31, 1938; extended active duty March 17, 1942.

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 all Charges and Specifications, 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 authorized upon conviction of a violation of the 61st Article of War.

Walter F. Hill, Judge Advocate.

Wm. E. Lyon, Judge Advocate.

Edward H. Morgan, Judge Advocate.

(104)

SPJGH
CM 229268

1st Ind.

War Department, J.A.G.O., **MAR 11 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 George E. Smith (O-304220), 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 the sentence, and to warrant confirmation of the sentence.

The accused was absent without leave for three months and three days, in violation of the 61st Article of War. During his absence he made and uttered seven checks aggregating \$112, with intent to defraud, without having or intending to have sufficient funds in the bank for the payment thereof, in violation of the 95th Article of War. Dismissal alone is authorized in punishment of violation of the 95th Article of War. A long absence without leave of an officer warrants some confinement at hard labor. When accused absented himself he had been on active duty less than two months, his physical examination was being rechecked for disqualifying defects, and his ensuing absence was accompanied by continued use of liquor. In view of all of the circumstances, I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, and that the sentence as modified be carried into execution.

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 the recommendation made above.



E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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
order.

(Sentence confirmed but confinement reduced to one year.
G.C.M.O. 64, 27 Mar 1943)

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

(105)

SPJGH
CM 229279

JAN 26 1943

UNITED STATES)
v.)
Private ERNEST ROBINSON)
(37060088), Service Troop,)
10th Cavalry.)

SOUTHERN LAND FRONTIER SECTOR
WESTERN DEFENSE COMMAND

Trial by G. C. M., convened at
Camp Lockett, California,
December 3, 1942. Dishonorable
discharge and confinement for
twelve (12) years. Disciplinary
Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Ernest Robinson, Service Troop, Tenth Cavalry, having received a lawful command from Capt John H. Boehlke, his superior officer, to report to Mess Sergeant Tolson for K. P. duty, did at Camp Lockett, California, on or about November 16, 1942, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by special court-martial for disrespect to an officer in violation of Article of War 63 and for being drunk and disorderly in violation of Article of War 96, 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 twelve 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 for action under Article of War 50¹/₂.

3. The evidence shows that accused, a private in Service Troop, 10th Cavalry, was on November 9, 1942, detailed with other soldiers for

kitchen police duty (R. 13, 16) for a period of two weeks (R. 13). The men were told by their troop commander, Captain John H. Boehlke, 10th Cavalry, that "the best two of them would be relieved at the end of the first two weeks and two more put on" (R. 13). Accused was further informed that the details were being made by roster (R. 13, 14) and were not permanent (R. 13). The troop commander testified that he had found it necessary to require two week details because his kitchen was an "outside kitchen and you can't put new men on each day and still keep the kitchen clean enough and run properly" (R. 13).

On the morning of November 16, 1942, accused remained in bed, refused to get up when ordered to do so by his platoon sergeant (R. 9) and persisted in such refusal until First Sergeant Hollis Ellis of the troop ordered him "to get up and report to his job" (R. 9, 10). Accused arose and said, "'Sergeant, I am not going to do any more K.P.'" (R. 9). He asked and was granted permission to see the troop commander (R. 9, 10, 11, 17) and was taken to the troop commander's office at about 7:30 a.m. (R. 9). Accused asked Captain Boehlke when he would be relieved from kitchen police duty and was told that he would be notified when he would be relieved (R. 12). Captain Boehlke then ordered him "to go back and report to the Mess Sergeant for duty" (R. 12). Accused stated to Captain Boehlke "that he was not going to do any K.P., he would rather go to the guard house" (R. 9, 10, 12, 13). Accused left the office (R. 12).

Captain Boehlke testified:

When he left my office he, shortly after that I would say ten minutes or so, Mess Sergeant Tolson, and Sergeant Ellis brought him back into my office and at that time Sergeant Tolson told me that Robinson would not work and I then told Robinson to go back and work, do his K.P. and he would get seven extra days of it. Robinson then said he was not going to do any more K.P. I then told him, ordered him to go back to the kitchen and do K.P. and asked him if he understood the order and he said that he did but he was not going to do any more K.P. I then told Sergeant Ellis to take him to the guard house" (R. 13).

4. Accused testified that when first detailed for kitchen police about November 9 he was told it was "permanent K.P.". He remonstrated to the troop commander. The troop commander replied,

"Robinson, you are going to go out there and do a week and when you do a week remind me of it and I will take you off of K.P."

Accused testified:

"I went on out and finished my week's K.P. When my week was up I went back and I see the First Sergeant. The First Sergeant gives me permission to speak to the Troop Commander. I went in to see the Troop Commander and asked me will he relieve me off of K.P. He told me, 'Hell no. You get the hell out of here and go back out there and do another week'. That is what he said".(R. 17, 18)

Instead of going back to the kitchen as ordered by his troop commander, he stopped and talked with the captain's orderly (R. 18). The mess sergeant came around the house (R. 18) and asked him, "'Robinson, isn't you supposed to be on K.P.?" (R. 18). Accused told him he was not going to do any more kitchen police and he went back to see the troop commander a second time (R. 18, 20, 21). Accused told his troop commander that he would rather go to the guardhouse than do kitchen police. Captain Boehlke then ordered him confined in the guardhouse (R. 21).

5. The evidence establishes without conflict that at the time and place alleged accused received from Captain John H. Boehlke, Service Troop, 10th Cavalry, his troop commander, a command to report for kitchen police duty, and that accused deliberately and willfully disobeyed the command. By his testimony accused contended, in effect, that the duty in question was unduly onerous. The command to perform the duty was a lawful one and was not unreasonable or tyrannical in its requirements. There is no merit in the contention.

6. The charge sheet shows that accused is 23 years of age. He was inducted on November 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 and sentence.

William H. Kinnear, Judge Advocate.
Andrew G. Goff, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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

(109)

SPJGK
CM 229280

FEB 16 1943

UNITED STATES)

FIRST AIR FORCE

v.)

) Trial by G. C. M., convened at
) Richmond, Virginia, December 21,
) 1942. Dismissal and total for-
) feitures.

) Second Lieutenant WARWICK
) H. PAYNE (O-1103858),
)
) Corps of Engineers.)

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Warwick H. Payne, Headquarters and Service Company, 3rd Battalion, 21st Engineer Aviation Regiment, Army Air Base, Richmond, Virginia, was, at Richmond, Virginia, on or about October 5, 1942, drunk in uniform in a public place, to wit: on Meadows Street near Broad Street, Richmond, Virginia.

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

Specification: In that Second Lieutenant Warwick H. Payne, Headquarters and Service Company, 3rd Battalion, 21st Engineer Aviation Regiment, Army Air Base, Richmond, Virginia, having been duly placed in arrest in quarters at Army Air Base, Richmond, Virginia, on or about October 6, 1942, did, at Army Air Base, Richmond, Virginia, on or about November 11, 1942, break said arrest before he was set at liberty by proper authority.

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

Specification: In that Second Lieutenant Warwick

H. Payne, Headquarters and Service Company, 3rd Battalion, 21st Engineer Aviation Regiment, Army Air Base, Richmond, Virginia, did, without proper leave, absent himself from his organization at Army Air Base, Richmond, Virginia, from about November 11, 1942, to about November 20, 1942.

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

3. The evidence shows that at about 1 p.m. (R. 7), October 5, 1942, in the city of Richmond, Virginia, Margaret M. Black, a member of the Richmond Police Department, while cruising in her police car received word by radio of an accident (R. 10). Answering the call she drove to Meadow Street between Monument and Grace Streets (R. 10), a distance of about one and one-half blocks from the corner of Meadow and Broad Streets (R. 11). There she saw accused sitting in the cab of a truck next to an enlisted man who was the driver (R. 10, 11). The truck "had come to a full stop there" (R. 10). Accused, who was in uniform (R. 15), was "coiled up in the cab of the car" (R. 12) and was "very much intoxicated" (R. 11). The enlisted man also was intoxicated (R. 12). In accordance with regulations Officer Black was not in uniform (R. 11), and she did not show her badge to accused as "he just wasn't in any condition to even pay any attention to a badge" (R. 13). She testified that he "paid no attention to my authority" (R. 11), but that after the arrival of a "Sergeant Griffin" accused "got out of the cab of the car but he was fully intoxicated" (R. 11). He "couldn't balance himself", was "staggering" (R. 12, 13) and "didn't understand us. He just didn't know what it was all about" (R. 13).

W. K. Ford, a police officer of Richmond, Virginia, testified that he saw accused at about 1 p.m. at the place named above (R. 7). In Ford's opinion accused was under the influence of intoxicants (R. 7, 8). He "wasn't his normal self" (R. 9) and "was thick-lipped, his eyes were very blood-shot". He "staggered" and "couldn't talk very plain" - "If you asked him a question he didn't give you a sensible answer to the question". (R. 7, 9)

Accused was turned over to William E. Hall, a police officer of Richmond (R. 18), who testified that accused had been drinking and "was pretty well under the influence of intoxicants" (R. 14), that he could not express himself clearly (R. 16), and that he "didn't seem to know what he was doing" except that he "wanted to come back to the base" (R. 17). His eyes were "right well blood-shot" and, although he "could stand up", he was "wobbling" (R. 15). Witness found about two-thirds of a bottle of wine on the seat of the truck (R. 15, 16, 17). All three police officers smelled alcohol on accused's breath (R. 8, 11, 12, 15). Accused was "well behaved" and "orderly" (R. 16) and made no disturbance when asked by Hall to enter the police car (R. 17, 18), but was very anxious to get away and to get back to the base (R. 8, 15), and "tried to get away two or three times" (R. 17). Accused told Hall that he "had been drinking wine, beer and whiskey" (R. 14). Accused was driven to the "station house" (R. 18) where he was still "very groggy" (R. 11) and was still staggering (R. 13). He was "trying to keep the private from talking and didn't want him to say anything" (R. 18). The police made accused sit down but "he wanted to get up and we kept him sitting down" (R. 18).

Accused was then brought to Military Police Headquarters in Richmond where he was interviewed about 2:40 p.m. by Captain William W. Ackerly, commanding officer, 1345th Service Unit, Richmond Military Police Detachment (R. 38, 39). Captain Ackerly testified that there was

"no question about Lieutenant Payne being drunk. He admitted frankly that he had been drinking that day and the night before and he showed every evidence of prolonged drinking. His speech was fuzzy, his face was flushed, his eyes were bleary, and he had very vague recollection of details of anything that had happened that day. Lieutenant Payne, I might say, in fairness to him, was polite and courteous and frankly admitted that he had been drinking entirely too much" (R. 39).

About 5:45 p.m. Captain Ackerly turned accused over to his superior officers who had arrived from the air base together with the "doctor from the Base" (R. 39, 40). The doctor, Captain Robert C. Elitzik, Medical Corps, examined accused about 6 p.m. Accused told Captain Elitzik that at 2 p.m., October 4, he had commenced to drink beer and that he had a "vague recollection" of riding in a vehicle, after which he remembered nothing until his apprehension the following day at noon (R. 19). Captain Elitzik testified that accused's "eye pupils were dilated and

reacted sluggishly to light", and that there was a "mark tremor of his hands", and that "standing at attention there was a slight swaying" (R. 20). He testified further that accused "was able to walk across the length of the room in a straight line by an obvious concentration of effort" (R. 20). His diagnosis was that accused was "recovering from a bout of acute alcoholism" (R. 20). At this time accused was coherent (R. 20) and seemed to have a good idea of the events which had transpired since his apprehension (R. 21).

On or about October 6, 1942, accused was placed in arrest by a "Major Sawin" (R. 25), regimental executive officer and acting commanding officer of the 21st Engineer Aviation Regiment. Major Sawin informed accused that he was in arrest in quarters, explained the meaning of arrest in quarters, and asked accused if he "thoroughly understood that" (R. 25). Accused replied that he did. Major Sawin told accused that he was to stay in his quarters and go only to the mess hall. (R. 25) On October 24 or 25, Lieutenant Colonel George Kumpe, Corps of Engineers, commanding officer of the 3rd Battalion, 21st Engineer Aviation Regiment, and, as such, accused's superior officer (R. 23), issued an order through First Lieutenant Albert Juillerat, Adjutant, 3rd Battalion, 21st Engineer Aviation Regiment (R. 29, 35), enlarging the limits of accused's arrest to include the post exchange and the moving picture theater in the Engineer Area (R. 29). Lieutenant Juillerat wrote, signed, and delivered the order to accused (R. 33). On or about November 11 Lieutenant Juillerat, whose room was next to that of accused (R. 33, 34), noticed that accused was not there (R. 33). He reported this to Lieutenant Colonel Kumpe who, with Lieutenant Juillerat, searched the area, including barracks, the officers' mess, the theater and the post exchange, but did not find accused (R. 29, 30, 34). Another search was made later in the day by Lieutenant Juillerat and two other officers (R. 34) and, thereafter, daily checks were made until the receipt of notice that accused had been apprehended in New York City (R. 34, 35). Thereupon, on November 20, accused was taken from the Provost Marshal's Office in New York City to Mitchel Field, where he was turned over to the medical officer of the day at the new cantonment hospital (R. 36, 37). Subsequently he was returned to his station (R. 31). Neither Lieutenant Colonel Kumpe nor First Lieutenant Juillerat authorized accused's departure and, although higher authority was competent to have done so, it appeared that no such action had ever been taken (R. 30, 31, 35).

Major Harry C. Kroon, Medical Corps, testified for the defense that accused was admitted to the station hospital, Army Air Base, Richmond, Virginia, on December 4, 1942, and was still a patient at the time of his trial (R. 49). In the opinion of witness accused was perfectly normal during his stay at the hospital (R. 50). Based solely on accused's statements to witness, and without opportunity to verify those statements, witness believed that during the period of his arrest accused probably suffered from depression and melancholia (R. 51, 52). This witness also testified that according to hospital records a diagnosis of "acute alcoholic hallucinations" had been reached at a station hospital at Mitchel Field, New York, following accused's treatment there subsequent to his apprehension (R. 52).

Accused testified that he was an engineer by profession, that he had been engaged in the building of Army air bases in Panama, the West Indies, British Guiana and Dutch Guiana, acting as assistant superintendent for a construction company. Believing that by reason of his experience he might be of service to the Army, he had returned to the United States and enlisted (R. 42), subsequently receiving a commission as second lieutenant on September 16, 1942 (R. 41). On the morning of October 5, with permission, he started for Richmond to make some purchases (R. 42). Having missed a bus he entered a "tavern", where he remained for two hours and drank "probably seven or eight bottles of beer" and some wine (R. 43). He then left for town in a truck which was in the custody of two enlisted men. On the way he "realized that the beer and wine were getting the best of me so I wanted to come back to the Base, and I went to sleep" (R. 43). The next thing he remembered was "when we were stopped and I realized that we had hit this truck. The police car came". Evidently referring to Policewoman Black, he recalled that "this lady" who "testified a while ago" came up to the car, but he did not know that she was a police officer. (R. 43) When the police came he "got out of the cab of the truck and I was primarily interested in getting the truck to a place of safety, back to the Base" (R. 44). He realized that although he "wasn't drunk" he was "more or less dopey from the effects of beer and wine". He remembered the trip to the police station and to Captain Ackerly's office, the examination by "this Captain in the Medical Corps" and the return to "the Base". The next morning Major Sawin placed him in arrest in quarters. Accused understood what that meant. (R. 44) In the latter part of October Colonel Kumpe "very kindly sent down a note by Lieutenant Juillerat that I could go to the P.X. and to the show" (R. 44). During the period

of approximately six weeks in which accused was in arrest he began to brood about previous marital difficulties and the pending court-martial charges. He testified:

"I understood the charges had been preferred but that no action had been taken. I think I let those charges magnify themselves to such an extent that I worried over that a great deal and I worried over the other things". (R. 45)

Accused further testified that when he left he "didn't intend to ever come back". He liked the Army but "felt that I would rather be dead than face disgrace and court-martial". (R. 46) After staying in Richmond for a while he went to New York (R. 46, 47). While there he considered "whether the disgrace of suicide would be better than the disgrace of a court-martial" but finally determined to return to Richmond. He was "picked up" by the military police in a bus station in New York. (R. 47) While at the hospital at Mitchel Field accused, realizing the extent of his difficulties, tried to commit suicide by hanging himself. He remembered nothing further until the next afternoon when a doctor told him that he had come very close to doing away with himself. He then decided that the best thing to do was to come back and "face" his difficulties. (R. 48) He testified further that he had not been released from restriction to quarters except by Colonel Kumpe's order allowing him to go to the post exchange and the "picture show" (R. 49).

4. The evidence clearly establishes that at the place and time alleged in the Specification, Charge I, accused was drunk in uniform in a public place. His eyes were bleary and bloodshot, his face was flushed, his speech was "fuzzy", he staggered, he seemed not to know what he was doing, and his breath smelled strongly of alcohol. Three police officers and the commanding officer of the Military Police Detachment of Richmond testified that in their opinion he was drunk. By his own admission he had been drinking to such an extent that his memory was virtually non-existent. Violation of Article of War 96 was established.

The evidence for the prosecution and accused's own testimony establish that accused, having been placed in arrest in quarters, broke his arrest before having been set at liberty by proper authority, as alleged in the Specification, Charge II, and that he absented himself without leave and remained absent until apprehended, as alleged in the Specification, Charge III.

5. It is not entirely clear from the testimony that accused was told the reason for his arrest (R. 26, 27). Under the circumstances, however, he undoubtedly knew that his arrest resulted from his drunkenness of the previous day. In any case, there was no legal necessity for telling him the reason for the arrest (Dig. Op. J.A.G., 1912, p. 481).

6. The record and accompanying papers show that, between the time of his arrest on October 6 and the time of his departure on November 11 no charges had been preferred against him. No reason for this delay is presented. Article of War 70 contains the following:

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him."

Paragraph 19, Manual for Courts-Martial, provides:

"*** The character and duration of the restraint imposed before and during trial *** will be the minimum necessary under the circumstances."

The delay in preferring charges did not convert the originally legal arrest into an illegal arrest. Although accused may have been entitled to release from arrest or earlier action on the charges, he was not authorized to release himself (Dig. Op. J.A.G., 1912, p. 153).

7. Attached to the record of trial is a recommendation signed by all members of the court that the confinement be remitted, this for the reason that, in the opinion of the members, "the entire story of the accused as it appears in the record", his services "in assisting war activities prior to his entry into the service, the short period of military service, and the stigma attached to his dismissal" warranted clemency. In his review of the record of trial the staff judge advocate recommended remission of the confinement and suspension of the remainder of the sentence for the reasons that "accused is now perfectly normal", that

"the impression to be gathered from his testimony, together with the rest of the testimony in the record, would seem to justify a belief that accused could still render satisfactory service, and probably behave himself in the future",

and that "informal inquiry from a reliable source discloses that accused

is not an habitual drinker." The reviewing authority remitted the confinement and, for the reasons stated by his staff judge advocate, recommended that so much of the sentence "as provides for dismissal and forfeiture of all pay and allowances, be suspended."

8. War Department records show that accused is 35 years of age. He attended North Carolina State College for three years. He enlisted March 5, 1942, and served as an enlisted man until September 16, 1942, when, after completion of a course at the Engineer Officer Candidate School, Fort Belvoir, Virginia, he was commissioned a second lieutenant, Army of the United States. Accused's 201 file contains a report by the Federal Bureau of Investigation which reveals that accused was convicted of the following offenses by civil courts: Drunkenness, August 19, 1939, at Montgomery, Alabama; vagrancy, October 17, 1939, at Memphis, Tennessee; intoxication and disturbing the peace, November 29, 1940, at Cristobal, Canal Zone. In his application for appointment as an officer, in response to the question, "Have you ever been convicted by a civil or military court?", he stated, "No".

9. 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 violation of Articles of War 61, 69 and 96.

Andrew J. Capps Jr., Judge Advocate.
Wm. Summerville, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

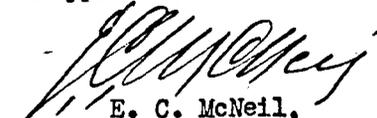
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War Department, J.A.G.O., FEB 18 1943 - To the Secretary of War.

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 Warwick H. Payne (O-1103858), Corps of Engineers.

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. Less than three weeks after he was commissioned accused was drunk in uniform on the streets of Richmond, Virginia, and subsequently, having been lawfully placed in arrest, broke his arrest and absented himself without leave until apprehended nine days later. His drunkenness did not involve any boisterous or disorderly conduct. He was sentenced to dismissal, total forfeitures and confinement at hard labor for six months. The members of the court unanimously recommended that the confinement be remitted. The reviewing authority remitted the confinement and further recommended that the dismissal and forfeitures be suspended. During 1939 and 1940, while a civilian, accused was three times convicted in civil courts, once for drunkenness, once for drunkenness and breach of the peace, and once for vagrancy. In his application for a commission in the Army he stated that he had never been convicted by a civil court. It does not appear that the reviewing authority was acquainted with the civil record of accused. In view of the circumstances of this case and of the civil record of accused I believe that useful service as an officer cannot be expected of him. I accordingly 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.



E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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. 59, 26 Mar 1943)

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

(119)

SPJEN
CM 229343

JAN 16 1943

UNITED STATES)

v.)

Private ROBERT FIELDS)
(6985921), Battery H, 19th)
Coast Artillery.)

SOUTHERN CALIFORNIA SECTOR
WESTERN DEFENSE COMMAND

Trial by G.C.M., convened at
San Diego, California, Decem-
ber 4, 1942. Dishonorable
discharge (suspended) and con-
finement for five (5) years.
Detention and Rehabilitation
Center.

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

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

Specification 1: In that Private Robert Fields, Battery H, 19th Coast Artillery, Fort Rosecrans, California, was in Coronado, California, on or about October 23, 1942, drunk in uniform in a public place, to wit La Avenida Cocktail Lounge.

Specification 2: (Finding of Not Guilty.)

CHARGE II: Violation of the 63rd Article of War.

Specification: In that Private Robert Fields, Battery H, 19th Coast Artillery, Fort Rosecrans, California, did at Coronado, California, on or about October 23, 1942, behave

(120)

himself with disrespect toward Second Lieutenant Herman A. Morvant, 19th Coast Artillery, his superior officer, by saying to him, "It's you I'm talking to, you goddamned gold bar son-of-a-bitch. Come on outside and I'll beat hell out of you," or words to that effect.

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

Specification: In that Private Robert Fields, Battery H, 19th Coast Artillery, did at Fort Rosecrans, California, on or about October 23, 1942, lift up a weapon, to-wit, a loaded service rifle against Captain Earl R. Gooding, 19th Coast Artillery, his superior officer, who was then in the execution of his office.

He pleaded guilty to Specification 1, Charge I, and Charge 1, and not guilty to all other Charges and Specifications. He was found not guilty of Specification 2, Charge I, and guilty of all other Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of ten years. The reviewing authority approved the findings and the sentence but reduced the period of confinement to five years and suspended the dishonorable discharge. The proceedings were published in General Court-Martial Orders No. 139, Headquarters Southern California Sector, Western Defense Command, December 24, 1942.

The record being legally sufficient to support the findings of guilty of Specification 1, Charge I, and guilty of Charge II and its Specification, the sole issue is whether the record is legally sufficient to sustain the finding of guilty of Charge III and the Specification thereunder.

3. The evidence for the prosecution as related to Charge III and the Specification thereunder shows that at about 10 p.m., October 23, 1942, Captain E. R. Gooding discovered the accused holding a number of soldiers at bay with a service rifle in what seemed to him a threatening manner. The accused was holding the rifle in the position of "low port" with the muzzle pointing in the general direction of the group of soldiers. Captain Gooding stepped out in front of the men and ordered the accused to surrender the rifle. The evidence shows that the accused was drunk and that he remarked that if he, the accused, fired, he would take the Captain with him, or words to that effect. The order was repeated by the Captain and the accused then ejected the cartridges and threw his rifle to the ground. He had not pressed the Captain personally (R. 8-15). During the entire incident he had not changed his position, his rifle remained fixed at "low port" and he made no physical move either himself or with the rifle in the Captain's direction or elsewhere. The Captain was about 25 yards distant from the accused

at the time (R. 15 to 22). The evidence shows that the accused made no threatening motion toward him (R. 30-37).

4. The accused testified he had left the battery area for San Diego at about noon, had gone to a friend's house and had him purchase two pints of whiskey for him. He drank one pint, left for Coronado, remembered boarding the ferry but did not recall getting off. He next remembered getting out of a weapons carrier truck in front of the guardhouse. He did not recall having seen any of the witnesses who testified for the prosecution (R. 38-40).

5. The Specification, Charge III, alleges that the accused lifted up a loaded service rifle against Captain Gooding but there is nothing in the evidence disclosing any such act. It does not appear that he lifted his rifle, pointed it or moved it against or toward his superior officer. On the contrary he remained in a fixed position from the time his superior appeared on the scene until he threw aside his rifle after first ejecting the cartridges. The Captain upon discovering the disorder deliberately placed himself in front of the accused and in such a position that the rifle was pointed in his general direction. The accused remained in the same position, his rifle at "low port", and Captain Gooding himself testified he was not personally pressed. Other witnesses corroborate this fact. There was no threatening motion nor any overt act by the accused whereby he actually attempted to inflict injury upon his superior. Although the accused did make a remark to the effect that if he, the accused, fired, he would take the Captain with him there was not a present offer of violence accompanying his words and no "lifting up" of his rifle as alleged. The finding of guilty under the Specification is unwarranted.

The Manual for Courts-Martial, 1928, Paragraph 134, states that the phrase "draws or lifts up any weapon against" covers any simple assault. It also states that the phrase "offers any violence against him" comprises any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up".

The violence where not executed, must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article (Winthrop, Military Law and Precedents, Reprint, 570).

6. The maximum authorized punishment for the offense of being drunk in uniform in a public place in violation of the 96th Article of War is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period. The authorized maximum punishment for the offense of behavior with disrespect toward

(122)

his superior officer in violation of the 63rd Article of War is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

Since the accused was properly found guilty of two offenses for neither of which dishonorable discharge is authorized, and as the authorized confinement without substitution for such offenses is nine months, dishonorable discharge and total forfeitures is authorized. (Page 101, Table of Maximum Punishments, Sec. B, M.C.M. 1928).

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge I, and Charge I; legally sufficient to support the finding of guilty of Charge II and the Specification, thereunder; legally insufficient to support the finding of guilty of Charge III and the Specification thereunder; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, suspended, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for nine months.

Shas. E. Gieson Judge Advocate.

Thomas D. Smith Judge Advocate.

Abner E. Lipcomb Judge Advocate.

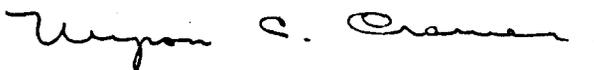
1st Ind.

War Department, J.A.G.O., JAN 19 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Robert Fields (6985921), Battery H, 19th Coast Artillery.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge III and the Specification thereunder be vacated, and that so much of the sentence as is in excess of dishonorable discharge, suspended, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for nine months be vacated.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made.



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

2 Incls

Incl 1 - Record of trial

Incl 2 - Form of action

(Findings of guilty of Charge III and the Specification thereunder vacated. So much of the sentence vacated as is in excess of dishonorable discharge, suspended, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for nine months, by order of the Secretary of War. G.C.M.O. 5, 13 Feb 1943)

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

(125

SPJGH
CM 229366

MAR 13 1943

UNITED STATES)

v.)

Private CHARLES F. LONG)
(20613710), Service Battery,)
210th Field Artillery)
Battalion.)

33rd INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Lewis, Washington,
November 23, 1942. Dishonor-
able discharge and confine-
ment for ten (10) years.
Disciplinary Barracks.

HOLDING by 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 soldier named above.

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

CHARGE I: (Findings disapproved by reviewing authority).

CHARGE II: Violation of the 65th Article of War.

Specification 1: In that Private Charles F. Long a Private in Service Battery, 210th Field Artillery Battalion, did at Camp Forrest, Tennessee, on September 5, 1942, strike Technical Sergeant Harold A. Coulson, a noncommissioned officer, with his fist while said Sergeant Harold A. Coulson was in the execution of his office.

Specification 2: (Finding of not guilty).

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

Specification: In that Private Charles F. Long, 20613710, Service Battery, 210th Field Artillery Battalion, did at 33d Division Artillery Guardhouse, Fort Lewis, Washington, on or about November 5, 1942, with intent to do bodily harm, commit an assault upon Private Bernard L. Wingert, ASN 37113448, 210th Field Artillery, by wilfully and feloniously striking the said Private Bernard L. Wingert in the face with his fist.

ADDITIONAL CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Charles F. Long, Service Battery, 210th Field Artillery Battalion, did at Fort Lewis, Washington, on or about November 13, 1942, assault Corporal John DeJonge, Headquarters Battery, 124th Field Artillery Battalion, a noncommissioned officer of the guard, who was then in the execution of his office, by striking him on the chest with his fist.

ADDITIONAL CHARGE III: (Finding of not guilty).

The accused pleaded not guilty to Charge I and the Specification thereunder, but guilty of absence without leave, in violation of Article of War 61; guilty of Charge II and Specification 1 thereunder; and not guilty of Specification 2 of Charge II. He pleaded not guilty to Additional Charges I, II, and III and their respective Specifications. He was found guilty of Charge I, Additional Charges I and II and the Specifications thereunder; guilty of Charge II and Specification 1 thereunder; not guilty of Specification 2, Charge II; and not guilty of Additional Charge III and the Specification thereunder. Evidence was introduced of one previous conviction by general court-martial for absence without leave, threatening a noncommissioned officer, and disobeying the lawful order of a noncommissioned officer. 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 disapproved the findings of guilty of Charge I and the Specification thereunder, 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 50 $\frac{1}{2}$.

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

a. Charge II: Violation of the 65th Article of War.

On the morning of September 5, 1942, Harold A. Coulson, Battalion Supply Sergeant and member of Service Battery, 210th Field Artillery Battalion, Fort Lewis, Washington, observed that the accused, a member of Service Battery, did not stand reveille. After the battery left to police the area, Sergeant Coulson stopped in front of the tent of the accused. The accused was lying on his bunk. The sergeant admonished accused for shirking his duties and told him he should stand reveille with the rest of the battery. The accused "got very mad", told the sergeant to "mind his own business", and "then he threatened me to take off my stripes and he would take me outside". The sergeant told accused not to be bothered by his stripes. The sergeant reported the incident to First Lieutenant Lowell B. Hyett who was close by, and asked the lieutenant if he would get into trouble by having a fight with the accused. While the sergeant was reporting to the lieutenant, the accused came up and struck the sergeant in the face with his fist. Five minutes elapsed from the time the sergeant told accused not to let his stripes bother him until accused struck the sergeant (R. 15-23).

First Lieutenant Lowell B. Hyett, Battery C, 210th Field Artillery Battalion, stated that on the morning of September 5, 1942, while Sergeant Coulson was reporting to him that accused had not attended reveille, the accused, without any apparent provocation, walked up and struck Sergeant Coulson a hard blow on the right cheek. Lieutenant Hyett stated that it was one of the duties of Sergeant Coulson to report to him absences from reveille (R. 22, 24-25).

b. Additional Charge I: Violation of the 93rd Article of War.

On November 5, 1942, accused and Private Bernard L. Wingert, Headquarters Battery, 210th Field Artillery Battalion, were in the guardhouse. Accused and Wingert were "wrestling around, just for fun". Wingert struck accused on the forehead with a stocking. The accused picked the stocking up "and kind of rubbed it" over Wingert's face. After tussling a while accused threw Wingert on the floor; "a little argument" followed, and accused struck Wingert in the mouth with his fist. Accused told Wingert if he reported the incident to the officer of the day they would carry him (Wingert) out on a stretcher. Wingert and accused had been wrestling and playing several days (R. 25-28).

Private Fred Jacobsen, Battery A, 124th Field Artillery, a prisoner in the guardhouse, was present when the incident occurred, and thought it "Horse-play" - just "a wrestling match". He did not see accused strike Wingert, but heard the "bump". Wingert had a split lip. The tussle began when Wingert said that accused had bothered Wingert's personal effects (R. 32-38).

c. Additional Charge II: Violation of the 65th Article of War.

On November 13, 1942, the accused, a prisoner in the guardhouse, was out on a trash detail. He returned to the guardhouse and complained about the removal of certain civilian clothing, which he had placed on the truck. Corporal John DeJonge, the acting corporal of the guard, informed the accused that he had removed the clothing. The accused told Corporal DeJonge that he had no right to take the clothing and that this was his only means of getting cigarette money. Corporal DeJonge ordered the accused back to his work detail. A few minutes later Corporal DeJonge found the accused in the prisoner's quarters. The corporal asked him why he was there, and the accused replied that he was not going to work. In substance, accused told Corporal DeJonge that he "was a dog in taking the things away from him and depriving him of the cigarettes". Accused then struck Corporal DeJonge in the chest and attempted to strike him a second time, but DeJonge blocked the second blow with his elbow (R. 44-49).

4. For the defense, the accused made an unsworn statement, in substance as follows:

He had been intoxicated the night of September 4, 1942, and was intoxicated on the morning of September 5, 1942. He was awakened that morning when someone doused him with a bucket of ice-cold water. Sergeant Coulson had a "sort of a guilty look on his face and I said 'So you are the one that did it', and he said, 'Yes, so what if I am.' I struck him * * *" (R. 51, 52).

Referring to the alleged assault upon Private Wingert, accused said they were "horse playing around, sort of sparring or wrestling, all in fun". Wingert called him a couple of names that made him mad, accused him of going into his (Wingert's) drawer and stealing. Accused stated, "* * * it got on my nerves and I hit him. * * *" (R. 54).

Concerning the assault upon Corporal DeJonge, the accused stated that on the morning of November 13, 1942, he was a prisoner and a member of a trash detail. While working at the trash dump, he picked up some old clothing that he intended selling for ciga-

rette money. The clothing was placed in a box and left on the truck. Shortly after returning to the guardhouse, he noticed that the box of clothing had been taken from the truck. The driver told him that the corporal of the guard had taken the clothing. This made accused very mad -

"* * * I just walked downstairs and said 'Why should I work'. The Corporal of the Guard came down and he walked over to me with * * * a smart smirk on his face. * * * and I attempted to strike him and he raised his arm and the punch was blocked. * * *. I was in sort of a rage at the time. * * *" (R. 55, 56).

5. a. With respect to Specification 1 of Charge II, to which the accused pleaded guilty, the undisputed evidence clearly establishes that the accused on the morning of September 5, 1942, was reprimanded or admonished by Sergeant Harold A. Coulson for failure to attend reveille. The accused "got very mad", told the sergeant to mind his own business, and invited him to take off his stripes. While the sergeant, in the execution of his office, was reporting the incident to First Lieutenant Lowell B. Hyett, the accused struck the sergeant in the face with his fist.

b. Additional Charge I: Violation of the 93rd Article of War.

As to this Charge and the Specification thereunder, alleging a felonious assault with intent to do bodily harm, the evidence shows that the accused and Private Bernard L. Wingert were prisoners in the guardhouse at Fort Lewis, Washington. They had been wrestling and "horseplaying" for several days. On November 5, 1942, while "wrestling around, just for fun", Wingert struck accused on the forehead with a stocking. The accused picked up the stocking and rubbed it over Wingert's face. A little argument followed, and accused struck Wingert in the mouth with his fist, splitting his lip.

The Manual for Courts-Martial defines an assault with intent to do bodily harm as -

"* * * an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. * * *" (par. 149n, M.C.M., 1928).

Applying this definition to the undisputed facts in this case, it is

apparent that there is a failure of proof of one of the essential elements of the offense charged, to wit - intent to do bodily harm.

The Specification does not allege and the evidence does not prove any acts by the accused which would warrant the legal inference that he intended to do bodily harm. The proof does establish beyond a reasonable doubt that the accused, at the place and time alleged, committed an assault and battery upon Private Bernard L. Wingert. The Board of Review, therefore, holds as to Additional Charge I and the Specification thereunder, that the evidence is legally insufficient to sustain a finding that accused committed a felonious assault, in violation of the 93rd Article of War, but legally sufficient to support a finding of guilty of assault and battery - a lesser included offense - in violation of the 96th Article of War.

c. Additional Charge II: Violation of the 65th Article of War.

The findings of guilty of this Charge and the Specification thereunder are supported by clear and convincing proof that the accused, on November 13, 1942, while a prisoner in the guardhouse at Fort Washington, assaulted Corporal John DeJonge, corporal of the guard, who was then in the execution of his office, by striking him on the chest with his fist.

d. The accused in his unsworn statement admitted striking Sergeant Coulson, as alleged in Specification 1, Charge II; admitted striking Private Wingert, as alleged in the Specification, Additional Charge I; and, in effect, admitted an assault upon Corporal DeJonge, as alleged in the Specification, Additional Charge II.

6. The reviewing authority having disapproved the findings under Charge I, alleging desertion, the maximum authorized punishment imposable in this case for striking a noncommissioned officer while in the execution of his office, in violation of Article of War 65 (two Specs.), and for assault and battery, in violation of Article of War 96, is dishonorable discharge, total forfeitures, and confinement at hard labor for two years and six months (par. 104c, M.C.M., 1928).

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 1, Charge II, and of Charge II; legally sufficient to

support the findings of guilty of Additional Charge II and the Specification thereunder; legally sufficient to support only so much of the findings of guilty of Additional Charge I and the Specification thereunder as involves findings of guilty of assault and battery by accused, as alleged, and at the time and place alleged, in violation of the 96th Article of War; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for two years and six months.

Arthur S. Hudd, Judge Advocate.

Langdon, Judge Advocate.

Edward W. Hargrett, Judge Advocate.

(132)

SPJGH
CM 229366

1st Ind.

War Department, J.A.G.O., **MAR 13 1943** - To the Commanding General,
33rd Infantry Division, Fort Lewis, Washington.

1. In the case of Private Charles F. Long (20613710), Service Battery, 210th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge II, and of Charge II; legally sufficient to support the findings of guilty of Additional Charge II and the Specification thereunder; legally sufficient to support only so much of the findings of guilty of Additional Charge I and the Specification thereunder as involves findings of guilty of assault and battery by accused, as alleged, and at the time and place alleged, in violation of the 96th Article of War; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for two years and six months, which holding is hereby approved. Upon approval of only so much of the findings of guilty of Additional Charge I and the Specification thereunder as involves findings of guilty of assault and battery by accused, as alleged, and at the time and place alleged, in violation of the 96th Article of War, and upon reduction of the term of confinement to two years and six months you will have authority to order the execution of the sentence.

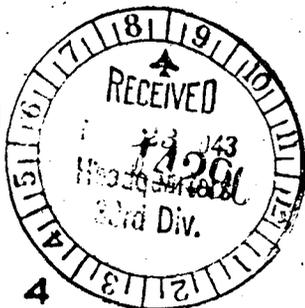
2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of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

(CM 229366).

MAR 16 43 AM



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



E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

JAN 15 1943

SPJGH
CM 229411

UNITED STATES	)	BERMUDA BASE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Bermuda Base Command, November
Private WILLIAM FERRELL	)	2, 3, 4, and 5, 1942. Dis-
(6924973), Battery B, 27th	)	honorable discharge and con-
Coast Artillery Battalion	)	finement for fifteen (15) years.
(Comp) (HD).	)	Penitentiary.

REVIEW by 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 soldier named above.
2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William Ferrell, Battery B, 27th Coast Artillery Battalion (Comp) (HD), Bermuda Base Command, U. S. Army, did, at or near Warwick Parish, Bermuda, on or about October 6, 1942, forcibly and feloniously, against her will, have carnal knowledge of Susan Olive Packwood.

ADDITIONAL CHARGE: (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded not guilty to the Charges and Specifications, and was found guilty of the original Charge and Specification, and not guilty of the Additional Charge and Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, reduced the period of confinement to fifteen 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 50 $\frac{1}{2}$.

3. The pertinent evidence for the prosecution shows that on October 6, 1942, Mrs. Susan Olive Packwood, a colored housewife, weighing about 105 to 110 pounds, left the home of her sister between 10:45 and 11 p.m. to return to her home in Paget Parish, Bermuda. She passed her father's house at about 11 p.m. and arrived at "Amen Corner", which was the boundary line between Paget and Warwick Parishes. "Amen Corner" is about 3.25 miles from the camp at which the accused was stationed. Upon arriving at the corner, a man, later identified as the accused, struck Mrs. Packwood's eye, and dealt her several hard blows on the chest and shoulder blades. She fell to the ground. Accused's hands were on her mouth and throat and he threatened to choke her, stating that he would kill her if she made any noise. She "screamed a little. I couldn't do it very much. He had his hands around me. One hand to my throat and one hand was to my mouth". She offered him her purse and said she would do anything he wished if he did not hit her again. With his hands still on her throat and mouth, he dragged her along the road to a hedge. He ordered her to get under the hedge, stating that if she did not, he had a gun and would kill her. Mrs. Packwood was thrown on the ground. She "hollered" and was sobbing, but he made her stop. With his hands on her throat, he ordered her to take off her "pants". When she refused he threatened to kill her. "The grasp became tighter and tighter everything I refused to do". He then ordered her to put her leg up. When she hesitated, he threatened to choke and kill her. She did so, and he started to "finger me". She asked how he would like such a thing to happen to his mother and sisters, and he told her to "shut up". "There was nothing else but threats going on all the time." He then ordered her to raise her legs. "Whenever I refused anything he threatened me". Accused then had intercourse with her. During this time his hands were on Mrs. Packwood's throat "off and on". When he had threatened to shoot her, he took out of his pocket what she thought was a gun and laid it on the ground by his side. Mrs. Packwood pretended

she "was having a good time", but was "on the alert" in order to scream if there was an opportunity. However, at the slightest sound, accused would put his hands on her throat and threaten her. She thought it useless to scream unless she heard someone approaching, and believed accused would kill her if she screamed, with no one nearby to aid her. She did not attempt to strike him because she was too frightened and her life "would have been gone". After accused had intercourse with her, she heard voices which she recognized. She told accused that it was her husband and to remain quiet or she would not be able to meet accused again. "He seemed to fall for this", said "All right", and rolled over to ascertain the direction from which the voices were coming. Mrs. Packwood then screamed "Governor, come to me quick. Catch that man". Accused got up and ran. Mrs. Packwood arose, "tidied" herself, and went out to the road. Accused was later brought back between two friends of Mrs. Packwood, named "Governor" Lightbourne and Roger Tucker. Mrs. Packwood identified accused at the trial as the man who had assaulted her (R. 4, 6-8, 10, 11, 14, 16-21, 30, 31; Ex. A).

The evidence further shows that at about 11:20 p.m., three men (colored) named "Governor" Lightbourne, Buchanan L. Johnston, and Daniel Wilson were walking in the vicinity of the attack. Johnston had left the other two men at a nearby corner. They heard a woman's voice, which sounded hysterical, calling "Governor", or "Governor, come here". A man who was later identified as the accused, ran out on the road, and seized a bicycle. Lightbourne chased him, calling to Johnston to stop him. As accused rode toward Johnston, the latter turned his light directly on his face. Accused lost control of his bicycle and crashed into a wall. Lightbourne fell on top of the man, who then arose, said "I haven't done anything", got on his bicycle, and started to ride off. Lightbourne caught him again, they exchanged blows, and the man escaped. Lightbourne caught accused a third time and brought him back to Mrs. Packwood, who was sitting on a wall. The accused was there under a street light. One side of his face was covered with blood, and he had blood on his shirt. He had a gray, American-made, United States Army bicycle with large tires, equipped with a light. Mrs. Packwood was nervous, excited, and angry. Her head was "banged up", and she had a bump on her face or head. Her dress was "crumpled up behind". She said that accused had hit and threatened to choke her, taken advantage of her, and requested the men to "beat him up" (R. 8, 32-39, 40, 42, 45-53, 57).

Accused denied to Lightbourne that he had taken advantage of

Mrs. Packwood, and stated that he did have a date with her and gave her \$4. He stated to Private Roger Tucker, Bermuda Military Infantry, a nephew of Mrs. Packwood who had arrived on the scene, that his name was William Ferrell. Tucker jotted down on a card a number which he secured from accused's identification tags which were hanging on a chain around his neck. The number was 6924973, serial number of accused, and the name on the identification tags was William Ferrell. Tucker further identified a blood-spattered, dirty, blue, civilian sport shirt and pair of blood-spattered khaki trousers which were introduced in evidence, as being similar to the ones worn by accused on that evening. On the shirt appeared the number 3290, and on the trousers the number 4973 (the latter number comprising the last four digits of accused's serial number). He also identified the card admitted in evidence as the card on which he had jotted down the number from the identification tag. At the trial, Lightbourne and Tucker identified accused as the man whom they had apprehended. Lightbourne and Tucker had previously promptly identified accused in an identification parade held three days after the commission of the offense alleged. Accused was placed in line with five other men. Mrs. Packwood at first failed to identify accused at the line-up, but did so hesitantly after the six men in the parade had removed their hats at her request (R. 4-5, 8, 19, 36, 38, 42, 45-46, 50-52, 60-63, 133; Exs., B, D, E).

When Oscar Packwood, Mrs. Packwood's husband, arrived home at midnight, she was crying, and appeared "very nervous" and "very badly shocked". She told him that an American soldier had attacked and raped her (R. 9, 22-24, 60).

On the morning following the attack, Mrs. Packwood was examined by a doctor who discovered no visible evidence of bruises or marks on her neck, eyes, head, or face. She complained of a tender neck and shoulders. Three days later he examined her again and found a discoloration under the left eye. During his second visit he examined her genital organs and found no signs of injury (R. 26-30, 130, 131).

Between 12 and 12:30 a.m., October 7, 1942, accused was observed by several witnesses in or near his tent. He had on a blue sport shirt and khaki trousers similar to those introduced in evidence. His face was scarred, freshly cut, and bleeding. His shirt and trousers were blood-spattered. Accused stated to some witnesses that he had fallen from a bicycle. To others he had stated that he had had sexual intercourse with a colored woman who had "squawked", that he was then attacked by two

colored men and had to fight his way out. Accused stated that he planned to hide the shirt and trousers. He did hide the shirt near a tent under a barrel. The shirt and trousers introduced in evidence were later found by a soldier under some lumber situated about 35 or 40 feet away from a row of tents. The shirt was identified as his by a Private Kendall, who had last seen it in his foot locker a few days prior to October 6. The last four digits of the serial number of Kendall, "3290", were stamped on the shirt (R. 4, 65, 69-77, 79, 81, 83-86).

Accused had a pass to go to Hamilton on the evening of October 6. According to the pass list, he left the post at 4:30 p.m., and returned at 9:45 p.m. His destination was Hamilton. Private Louis Brown, Battery B, 27th Coast Artillery Battalion, who was the charge of quarters on October 6-7, 1942, testified that he did not sign accused in or out (R. 66-68; Ex. F).

4. The pertinent evidence for the defense was as follows:

Accused testified that on October 6 he used his pass and checked out between 4 and 4:30 p.m. "The person on duty" signed him out. He went to Hamilton on a Government issue bicycle, and returned at 9 p.m. to the Empire Bar, where he bought a pint of whiskey. He hid the whiskey not far from camp in order that no one could detect it on his person when he returned to camp. He then "checked in", and Private Brown, who was charge of quarters, signed him in at 9:45 p.m. He did not actually see Brown make the entry, but Brown had a pencil in his hand and he saw him "make the motions". After going to the latrine, he borrowed a bicycle belonging to a soldier named Martin, and began to ride down a trail to the place where he had hidden the whiskey. He did not know what time it was when he started. While riding down the trail his bicycle struck an object in the path, he was thrown off, his face, hands, and arms were "skinned", and he was stunned. Accused returned to camp and bathed his face. It was then about a half hour since he had signed in. He went to his tent, where he engaged in some conversation with his tentmates. He slept, and was later awakened because his face was throbbing with pain. After going to the latrine, he hung his shirt and trousers on a rope outside the tent. The following morning he put them at the head of his bed or in his barracks bag. He did not see them again, and could not explain why they were later found in the lumber pile. Accused identified Exhibits B. and D. as the shirt and trousers he was wearing when the bicycle accident occurred. He denied having stated that he was going to hide his clothes. He further denied being at the

scene of the alleged crime on that evening, and stated that he had not assaulted a colored woman, and had not seen either Lightbourne or Tucker (R. 107-111, 113-117).

Major Arthur J. Hanna, Provost Marshal, who questioned some of the witnesses prior to trial, testified that during the course of his questioning, Private Brown, Charge of Quarters, had stated to him that he did not sign accused out, but that he did, in accused's presence, sign him in at 9:45 p.m. Captain Ralph A. Jones, Jr., who investigated the charge of rape, testified that Brown made a sworn statement that he signed accused in at 9:45 p.m., that he had looked at the clock at that time, and that accused was then personally present (R. 88, 105, 106).

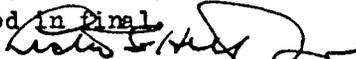
5. The evidence plainly shows the commission by accused of the offense of rape as found by the court. The circumstances preclude any possibility that the woman consented to the act. Accused denied that he had committed the crime, but his identification by Mrs. Packwood, Lightbourne, and Tucker, both at the identification line-up and at the trial, was positive. Further, he admitted to Tucker that his name was William Ferrell, and the serial number which Tucker obtained from his identification tags corresponded with that of accused. The motion by the defense for a finding of not guilty to both Charges and Specifications was properly overruled by the court (R. 87).

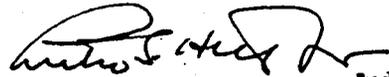
6. Consideration was given to the attached request for clemency by accused addressed to the Commanding General, Bermuda Base Command, dated December 5, 1942.

7. The charge sheet shows that accused is 24 7/12 years of age. During prior service in the Infantry he was unassigned from January 13, 1938, to May 26, 1940. He currently enlisted on May 27, 1940.

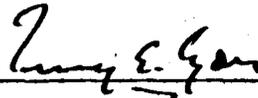
8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 22-2801, District of Columbia Code, 1940.

DTE: Lieut. Col. Ellwood W. Sargent signed the rough copy of this review (contained in file), but left for an overseas station before the review was retyped in final.


Lester S. Hill, Jr.,
Colonel, J.A.G.D.,
Chairman, Board of Review No. 1.



_____, Judge Advocate.



_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 229412

MAR 8 1943

U N I T E D S T A T E S	)	98th INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Breckinridge, Kentucky,
Second Lieutenant SMITH F.	)	December 10, 1942. Dismissal.
MUNSON (O-1289778), 390th)	
Infantry.)	

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 95th Article of War.

Specification: In that Second Lieutenant Smith F. Munson, 390th Infantry, was, on or about November 22, 1942, in a private residence of Frank Moorman, Highway 60, Morganfield, Kentucky, found drunk in bed with an enlisted man, viz Sergeant Howard Bentley, Company H, 390th Infantry.

CHARGE II: (Findings disapproved by reviewing authority).

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge I, except the word "found", and substituting the words "owned by" for the word "of"; guilty of Charge I; and guilty of Charge II and the Specification thereunder. He was

sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Charge II, and of the Specification thereunder, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that on the afternoon of Sunday, November 22, 1942, the accused stayed in the mess hall of Company H, 390th Infantry, after a 12:30 dinner. Between then and 2:30 p.m. the accused and Sergeant Howard Bentley, a cook, had been in the storeroom drinking some liquor which belonged to Bentley. Some other cooks in the company were drinking in the kitchen. The accused had approximately three drinks. Sergeant Bentley had an engagement to go to Morganfield with accused. At about 2:30 p.m., Sergeant Bentley and accused entered the car of another officer and were driven to town. Sergeant Bentley brought from camp a quart of whiskey which the accused had bought with money furnished by Bentley. The officer carried them as far as the Rainbow Tavern. They then went to a cabin nearby where two girls, Miss Brady and Miss Sheridan, lived, and then went to Waverly to see if the girls were down where they worked. They took a cab and arrived at the Orange Front, a restaurant, about 4 p.m. Sergeant Bentley had some whiskey and got drunk in the Orange Front, but did not remember whether the accused drank any there. The next thing Sergeant Bentley remembered was going to bed. He next saw accused when the military police woke him up in a cabin in which the girls lived. Miss Brady had given Bentley permission "to be in this cabin at any time". Bentley had arranged for accused to meet Miss Sheridan downtown to have a date with her, and she was with them a part of the time. Bentley had previously had dates with the two girls (R. 33-43).

Corporal Doyle M. Doneghue of the Military Police, at about 10:45 p.m., November 22, in response to a call, went with three enlisted men of the Military Police to a house on route 60, behind the Liberty Filling Station, which was owned by Frank Moorman and rented to a Miss Sheridan. He picked up a lady and a man en route. Corporal Doneghue found accused and Sergeant Bentley in the house in bed asleep under the covers. Both were dressed in pants and khaki shirts. Corporal Doneghue shook and woke accused, who then refused to accompany him to the police station. In response to the request of accused, he called Lieutenant Joseph G. Burgess of the Military Police (R. 4-12, 12-13, 14-19, 20-24, 25-27).

When Lieutenant Burgess arrived with Officer J. C. D. Hopgood of the Morganfield police, the accused was sitting on the bed putting on his shoes, and Sergeant Bentley was lying across the bed. Lieutenant Burgess asked the accused to dress, told Bentley to get up and

dress, and directed Corporal Doneghue to take both of them back to their organization. After finishing with his shoes, the accused put on his blouse (R. 27-30, 31-33).

Lieutenant Burgess saw no indications which led him to believe that the accused was under the influence of liquor. The accused talked sensibly, and his eyes were clear. Lieutenant Burgess did not smell the odor of liquor on the breath of accused. In the opinion of Lieutenant Burgess the accused was conducting himself in a very gentlemanly manner. When the accused gave Lieutenant Burgess an unopened quart bottle of whiskey, Lieutenant Burgess told him that he could have the bottle the next time he came to Morganfield (R. 28-30).

On the other hand, the four enlisted men present and the civil policeman, Mr. Hoppood, testified that the accused was drunk. The enlisted men based their opinions on the fact that accused staggered once when he got up, was antagonistic, argued, talked very rough in a loud voice and in a manner in which a sober officer would not talk, failed to cooperate with the military police, grabbed a paper from Corporal Doneghue, and did not have full control of his mental faculties. Officer Hoppood stated that accused was "under the influence of whiskey, right sharply", had the odor of whiskey on his breath, was "like a man getting over a drunk", his speech was not that of a sober man, he was argumentative, and did not want to put his clothes on, "get out, or anything else". If Lieutenant Burgess had not been along, officer Hoppood would have taken accused to jail and placed a drunk charge against him (R. 5, 15, 21, 26, 31-32).

4. The defense presented no testimony. The accused elected to remain silent (R. 32-33).

5. It is clear that the accused was found in bed with Sergeant Bentley in the house owned by Mr. Moorman. The Board is of the opinion that the record shows that accused was drunk at the time, notwithstanding the contrary opinion of Lieutenant Burgess. Winthrop cites as an instance of conduct unbecoming an officer and a gentleman in violation of the 61st (95th) Article of War -

"Drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by accused" (Winthrop's Military Law and Precedents, 2d ed., p. 717).

There is no suggestion in the record that the accused was

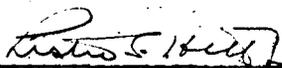
(142)

grossly drunk. There is nothing to indicate that there had been any unnatural relations between the two men. Regardless of their purpose in entering the house, the fact that they were found asleep in the only bed in the room indicates that they were sleeping off the results of earlier drinking. The conduct of accused in consorting with an enlisted man under the circumstances stated by Sergeant Bentley, was entirely inappropriate to his position as an officer. Such conduct, in the opinion of the Board, was not of a character to come within the purview of the 95th Article of War. It was, however, conduct prejudicial to good order and military discipline, and constituted a violation of the 96th Article of War.

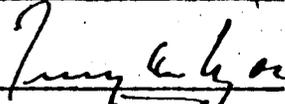
6. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service, National Guard, 1929 to 1937, and in 1940; active service from October 15, 1940; appointed temporary second lieutenant, Infantry, Army of the United States, from Officer Candidate School, and extended active duty, August 11, 1942.

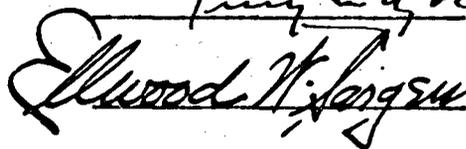
7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Specification of Charge I; legally sufficient to support only so much of the finding of guilty of Charge I as finds the accused guilty in violation of the 96th Article of War; 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 229412

1st Ind.

War Department, J.A.G.O., MAR 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 Smith F. Munson (O-1289778), 390th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of the Specification, Charge I, legally sufficient to support only so much of the finding of guilty of Charge I as involves a finding of guilty in violation of the 96th Article of War, and legally sufficient to support the sentence, and to warrant confirmation of the sentence. I recommend that only so much of the finding of guilty of Charge I be approved as involves a finding of guilty in violation of the 96th Article of War.

The accused was drunk in bed with an enlisted man in a private house, to which the enlisted man had access. The accused was not grossly drunk. Both were dressed in pants and shirts. There was no suggestion of any unnatural relations between them. It appeared as though both were sleeping off the effects of being drunk. In view of all of the circumstances I recommend that the sentence to dismissal be confirmed, but 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 the above-made recommendation.



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 Charge I approved as involves finding of guilty of violation of the 96th Article of War. Sentence confirmed but execution suspended. G.C.M.O. 85, 13 Apr 1943)

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

(145)

SPJGK
CM 229461

503 17 1943

UNITED STATES)	79TH INFANTRY DIVISION
v.)	Trial by G. C. M., convened at
Second Lieutenant ROBERT)	Camp Blanding, Florida, November
H. RAY (O-1283135), 313th)	30, 1942. Dismissal.
Infantry.)	

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 96th Article of War.

Specification: In that 2nd Lieut. Robert H. Ray, 313th Infantry, having been restricted to the limits of Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about November 1, 1942, break said restriction by going to Jacksonville, Florida.

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

Specification: In that 2nd Lieut. Robert H. Ray, 313th Infantry, did, without proper leave, absent himself from his organization at Camp Blanding, Florida, from about November 2, 1942 to about November 5, 1942.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction for absence without leave from September 5, 1942, to September 7, 1942, in violation of Article of War 61, was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

(146)

3. The evidence shows that on September 19, 1942, accused was sentenced by general court-martial to be restricted to the limits of Camp Blanding, Florida, for two months. The sentence also included forfeitures of pay and a reprimand. (Ex. 1) On or about October 24, 1942, accused received and read a copy of the general court-martial orders publishing the sentence (R. 16, 44). The orders included the reprimand (Ex. 1). Despite the fact that the restriction had not been removed (R. 15, 19, 20, 21), accused absented himself without leave on November 1 and remained absent until November 5 (R. 17, 18; Ex. 2). During this period his bed was "unmade" (R. 23) and he was not seen in his hutment or anywhere else in camp (R. 22, 23, 25, 26). On November 1 he was seen by Second Lieutenant Myron H. Murley, 313th Infantry, in the Patio Grill, Hotel Roosevelt, Jacksonville, Florida (R. 29, 30, 37, 38), at which time, in the opinion of Lieutenant Murley, he was drunk (R. 30). At the time of accused's unauthorized absence he was in command of a rifle platoon for which a training schedule had been "made up" (R. 46, 47). As a result his time had "all been scheduled" (R. 47).

Accused testified that on Saturday night (October 31, 1942) he was drinking in the officers' club (R. 43). He testified further:

"From a period some time Saturday night, everything is hazy. I don't remember exactly where I went. I couldn't swear as to where I went. Then the next I remember, actually remember, is some time Thursday when Captain Butscher woke me and told me I was under arrest ***" (R. 43).

He testified also that he could remember "different spots and a crowd and something like that" but could not "answer exactly where I was or what I was doing" (R. 45).

Captain Stephen D. Butscher, Company F, 313th Infantry, a witness for the defense, testified that accused had performed his duties "in an excellent manner", had never caused any trouble and, while on duty, had never acted in a manner unbecoming an officer and a gentleman (R. 34).

4. The evidence thus shows that having been lawfully restricted to the limits of Camp Blanding, accused broke the restriction by going to Jacksonville, Florida, as alleged in the Specification, Charge I, and that he absented himself without leave from November 2, 1942, to November 5, 1942, as alleged in the Specification, Charge II. His

testimony that during his entire absence he was so drunk that he did not remember what occurred is not convincing. In any case, his drunkenness, even though so great as to impair his mental faculties to the extent claimed by him, does not constitute a defense, for specific intent is not an element of the offenses with which he was charged (par. 126a, M.C.M.).

5. War Department records show that accused is 23 years of age. He graduated from high school. He enlisted October 5, 1939, and served as an enlisted man until May 1, 1942, when, after completion of a course at the Infantry Officer Candidate School, Fort Benning, Georgia, he was commissioned a second lieutenant, Army of the United States.

6. 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 violation of Articles of War 61 and 96.

Andrew Lepp, Jr., Judge Advocate.
Wm. Trummel, Judge Advocate.
Fletcher B. Andrews, Judge Advocate.

(148)

1st Ind.

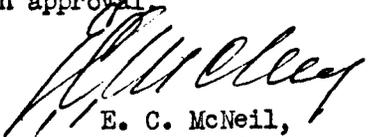
War Department, J.A.G.O., FEB 20 1943

- 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 Second Lieutenant Robert H. Ray (O-1283135), 313th 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. Having been restricted to camp limits under a court-martial sentence accused broke the restriction and absent-ed himself without leave for three days. He was sentenced to dismissal. He had previously been convicted by general court-martial of absence without leave and sentenced to forfeiture of pay, restriction and reprimand, and his present offenses occurred only a few days after receipt of the order promulgating the previous sentence. His company commander testified that he had performed his duties in an excellent manner. Ac-cused's repeated offenses evidence indifference and irresponsibility incompatible with effective service as an officer. I do not believe that future useful service as an officer can be expected of him. Ac-cordingly I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmit-ting 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.

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. 76, 2 Apr 1943)

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

(149)

SPJCK
CM 229477

JAN 30 1943

UNITED STATES)

UNITED STATES ARMY
FORCES IN LIBERIA

v.)

Private WILBER FLOYD)
(34100031), Company A, 41st)
Engineers.)

Trial by G. C. M., convened at
Harbel, Liberia, September 14
and 15, 1942. Dishonorable dis-
charge and confinement for two
(2) years. Task Force Guard-
house.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Wilber Floyd, Company "A", Forty First Engineers, having been restricted to the limits of the company area, did at Snafu Dock, Liberia, on or about July 25, 1942, break said restriction by going to Marshal, Liberia.

Specification 2: In that Private Wilber Floyd, Company "A", 41st Engineers, at Marshal, Liberia, on or about July 26, 1942, did by threatening to do bodily harm to J. W. Marshal, a citizen of Liberia, conduct himself in such a manner as to bring discredit upon the military service.

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

Specification: In that Private Wilber Floyd, Company "A", Forty-first Engineers, did, at Harbel, Liberia, on or about August 1, 1942, desert the service of the United States and

did remain absent in desertion until he surrendered himself at Harbel, Liberia on or about August 6, 1942.

He pleaded guilty to Charge I and Specification 1 thereunder, and not guilty to Specification 2, Charge I and to Charge II and its Specification. He was found guilty of Charge I and its Specifications, guilty of the Specification, Charge II,

"except all the words of the specification, substituting therefor the specification 'In that Private Wilber Floyd, Company "A", Forty First Engineers, having duly been placed in confinement in the Task Force Guard House, Task Force 5889, on or about August 1, 1942, did, near Harbel, Liberia, on or about August 1, 1942, escape from said confinement before he was set at liberty by proper authority'. Of the excepted specification, Not Guilty; Of the substituted specification, Guilty",

and not guilty of Charge II but guilty of violation of Article of War 69. 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 two years. The reviewing authority approved the sentence, directed its execution, and designated the "Force Guardhouse" as the place of confinement. The record of trial has been treated as if forwarded for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence, together with the pleas of guilty, is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder.

4. The evidence relating to Specification 2, Charge I, shows that on July 25, 1942, while stationed in Liberia, accused went to the town of Marshall, Liberia (R. 3). He had previously made several calls there on one Caroline Green (R. 4). John Marshall testified that Caroline was his niece and that she had told him that

"she didn't want to go with Robert (sic) Floyd anymore because he tried to give her some bullets as a souvenir and she was afraid of him".

This witness further testified;

"Later my wife told me that Floyd brought a revolver to my house and she was afraid of it and hid it, but a friend of Floyd's found it and gave it back to him. On the 25th of July my wife came and got me from my work and told me that Robert Floyd was at my house and had said that if Caroline wouldn't have him he would kill Caroline, my wife and myself, and then kill himself. When I got there Floyd told me he hadn't said anything like that, then later he told me that he wouldn't do it again. I was afraid of Floyd then so I told Mr. Killian about what had happened".

Marshall also testified as follows:

"Q. Did Private Floyd threaten you with a revolver?

"A. Yes, he had a revolver.

"Q. Did he have the revolver in his hand?

"A. No, he didn't take the revolver out of its case.

"Q. What time did this incident happen?

"A. About 10:30 or 11:00 at night on July 25th". (R. 4)

The prosecution offered, and without objection by the defense the court received in evidence (R. 7) a letter dated September 14, 1942, signed by "Caroline Green Marshall", containing the following:

"On the night of the 25th of July 1942 Robert Floyd visit Mr. & Mrs. John Marshall's home and said to them, that in-as-much as I don't care to love him any more, I am not to have another man, he'll shoot me there would be (5) five graves, a joker, Mr. Marshall, Robert Floyd, myself and any other who be present. And I ran from the home and slept out. Say about 7:30 that very night he send me a bullet, for what reason he never said, by one Jones his friend" (Ex. F).

The defense offered another letter written by Caroline (the contents do not appear), but the prosecution objected to its admission on the

(152)

ground that "this letter has not been properly identified before the court", and the court sustained the objection (R. 7).

Accused declined to testify or make an unsworn statement.

4. It thus appears that in response to a double question as to whether accused had threatened him with a revolver, quoted above, the witness Marshall gave an answer which might be construed as a statement that at the time and place alleged in Specification 2, Charge I, accused did threaten him. The answer may also be construed merely as a statement that accused had a revolver on his person. Accused did not, according to the testimony, present the weapon in a threatening manner.

The only unequivocal testimony that a threat was made consisted of Marshall's statement that his wife had told him of such a threat, and of the letter by Caroline in which she asserted that threats were made. The statement by Marshall's wife was of course pure hearsay and its admission was error. It does not appear from the record that the defense intended to stipulate that Caroline would testify in accord with the contents of her letter if called as a witness. The letter, as such, was wholly incompetent and should not have been received in evidence or considered by the court. It not appearing that the defense understood its right to object the failure of the defense counsel to object to the letter did not amount to a waiver as to its competency (par. 126c, M.C.M.).

In view of the ambiguous nature of the competent proof the Board of Review is convinced that the erroneous consideration by the court of the incompetent but unequivocal proof must have influenced the findings to the prejudice of accused. This being so, the record is legally insufficient to support the finding of guilty of Specification 2, Charge I.

5. The only question relating particularly to Charge II and its Specification which requires consideration is whether the offense of escape in violation of Article of War 69, found under this Charge and Specification by exceptions and substitutions, was included in the offense of desertion in violation of Article of War 58 as charged. Findings of an offense different from that charged are authorized only when the offense found is lesser than and necessarily included in the offense charged (par. 78c, M.C.M.).

The reason for the rule that an offense found must have been included in that alleged rests in the axiomatic principle that an accused cannot lawfully be convicted of an offense with which he has not been charged. It is clear that an offense is not charged unless all its elements are charged. In the present case, the escape found involved a breach of physical restraint (par. 139, M.C.M.) whereas the desertion charged might have been committed without such breach of restraint (par. 130, M.C.M.). A clarifying test to be applied is whether in order to prove the desertion charged it was essential to prove the breach of restraint involved in the escape found. Manifestly such proof was not essential. It follows that the offense found was distinct from and not included in that charged.

The record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification.

6. There is nothing in the record of trial and accompanying papers to show that the requirements of Article of War 70 for a pre-trial investigation of the charges were complied with, nor does it appear that the appointing authority referred the charges to his staff judge advocate for consideration and advice prior to reference for trial. Furthermore, before acting upon the proceedings, the reviewing authority, so far as appears, did not refer the record of trial to a staff judge advocate as required by Article of War 46. Ordinarily, a presumption of regularity in the performance of their duties by the officers responsible for the fulfillment of these requirements might be indulged (par. 112a, M.C.M.). The circumstances of this case, however, suggest that the requirements were not in fact complied with.

The requirements for reference of charges and records of trial to staff judge advocates have heretofore been held to be directory only and to have no effect upon the legality of the proceedings (CM 215720, Pool; CM 215721, Klobucher; CM 224823, Grenzebach). However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraph 76a, Manual for Courts-Martial, 1921, relating to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161728, Clark). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather, the theory appears to have been that failure to comply with

Article of War 70 was per se an error injuriously affecting the substantial rights of accused. Although these cases have not been expressly overruled, opinions on analogous points indicate that the first three paragraphs of Article of War 70 have come to be regarded as directory only in all respects and that failure to comply therewith is not fatal error. The following cases represent examples of this view; Sec. 376 (3), Dig. Op. J.A.G., 1912-1940 (failure to swear witness not prejudicial error where facts admitted or otherwise proved); CM 172002, Nickerson (failure to sign or swear to charges); CM 201563, Davis (report of investigation by telephone instead of in writing); CM 202511, Godfrey (no reinvestigation after staff judge advocate had amended charges by changing the article of war and the name of the owner of stolen property); CM 206697, Brown (reference of charges to accuser for investigation). The Nickerson case contains the following apt language:

"The provisions of A.W. 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002. Nickerson).

The reasoning in the Nickerson case applies with equal logic to the present case.

The foregoing cases, together with those holding that failure to make the required references to staff judge advocates is not fatal error, justify the conclusion that the investigation required by Article of War 70 is not mandatory, and that its omission does not constitute fatal error. This conclusion coincides with the apparent Congressional intention in enacting the statute, which was to prevent "unnecessary and unjust trials" based "on flimsy evidence without a prima facie case" (Hearings before the Senate Committee on Military Affairs on S.B. 5320, 65th Cong., 3rd Sess., p. 108; Hearings before the Subcommittee, Senate Committee on Military Affairs, on S.B. 64, 66th Cong., 1st Sess., pp. 101, 1390; Proceedings, Report of Special War Department Board on Courts-

Martial and Their Procedure, July 17, 1919, p. 5). The requirements are wholly procedural and do not affect the processes of courts-martial in their determinations of guilt or innocence. Although the language of a statute is mandatory, it may be regarded as directory if the legislative purpose can best be carried out by such a construction (59 C.J. 1072). Moreover, the Supreme Court has held that the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution, which are mandatory in form and some of which involve procedural matters, are not limitations upon the jurisdiction of the trial court and may be waived (see, for example, Trono v. United States, 199 U.S., 521; Diaz v. United States, 223 U.S. 442; Segourola v. United States, 275 U.S. 106; Johnson V. Zerbst, 304 U.S. 458). In United States v. Gill, 55 Fed (2nd) 399, a United States district court has expressed the view that indictment by a grand jury (a procedure basically similar to investigation of charges) may be waived. In reaching this conclusion the court applied the reasoning of the Supreme Court in Patton v. United States, 281 U.S. 276, a case pertaining to waiver of trial by jury in criminal cases, guaranteed by section 2, Article III of the Constitution. In that case the Supreme Court said, among other things:

"The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege', albeit 'the most transcendent privilege which any subject can enjoy.'

* * * * *

"In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.

* * * * *

"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement" (Patton v. United States, 281 U.S., 276, 296-298).

For the foregoing reasons it is the opinion of the Board of Review that the provisions of Article of War 70 requiring investigation of the charges before trial are not jurisdictional, and that under the circumstances of the present case failure to comply with them did not injuriously affect the substantial rights of accused. To quote from a penetrating review by the staff judge advocate in the Brown case (CM 206697):

"If *** a thorough and impartial investigation is not had, [and] nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is injuria sine damno, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted, and sentenced; and, if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case therefore falls within the exact language of A.W. 37. *** It was no part of the purpose of the authors of A.W. 70 to prevent the trial, conviction, and punishment of a guilty man".

In so far as the Clark, Keller and Claybaugh cases are in conflict with this holding, they should no longer be followed.

It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50 $\frac{1}{2}$ relates entirely to the "record of trial" and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground.

7. The maximum limit of punishment prescribed by paragraph 104c of the Manual for Courts-Martial for the offense of breach of restriction to command is confinement at hard labor for one month and forfeiture of two-thirds pay per month for a like period.

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder, legally insufficient to support the findings of guilty of Specification 2, Charge I, and the findings of guilty under Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for one month and forfeiture of \$33.33.

Michael H. Lawrence, Judge Advocate.
Andrew G. Galt, Jr., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

(158)

1st Ind.

War Department; J.A.G.O., FEB 2 1943 - To the Commanding General,
United States Army Forces in Liberia, APO 601, c/o Postmaster, New York
City, New York.

1. In the case of Private Wilber Floyd (34100031), Company A, 41st Engineers, 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 Specification 2, Charge I, and the findings of guilty under Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for one month and forfeiture of \$33.33, which holding is hereby approved. Upon vacation of the findings of guilty of Specification 2, Charge I, and of Charge II and its Specification, and of so much of the sentence as is in excess of confinement at hard labor for one month and forfeiture of \$33.33, you will have authority to order the execution of the sentence.

2. Inasmuch as the sentence included dishonorable discharge not suspended and was not based solely upon findings of guilty of charges and specifications to which accused had pleaded guilty, you were without authority to order the execution of the sentence in the absence of a prior holding by the Board of Review, with the concurrence of The Judge Advocate General, that the record of trial was legally sufficient to support the sentence. See third subparagraph of Article of War 50½. You should now take additional and corrective action upon the record of trial in accordance with paragraph 1, above. Following such action a corrected general court-martial order setting forth the entire proceedings, including your corrective action and your order for execution of the sentence as modified following compliance with Article of War 50½, should be published.

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
3 4 place the file number of the record in brackets at the end of the published order, as follows:

(GM 229477).

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

1 Incl.
Record of trial.

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

(159)

SPJGK
CM 229479

JAN 30 1943

UNITED STATES)

UNITED STATES ARMY
FORCES IN LIBERIA

v.)

Private First Class BENNY
LAX (34039819), Company C,)
41st Engineers.)

Trial by G. C. M., convened at
Roberts Field, Liberia, October
17, 1942. Dishonorable dis-
charge and confinement for one
(1) year. Task Force Guardhouse.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class BENNY LAX, Company "C", 41st Engineers, did, at Harbel, Liberia, on or about August 24, 1942, with intent to do him bodily harm, commit an assault upon Sergeant SYLVESTER MAYO by cutting him in the chest, with a dangerous weapon to wit, a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61, 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 one year. The reviewing authority approved the sentence, directed its execution and designated the "Task Force Guardhouse" as the place of confinement. The record of trial has been treated as if forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on the night of August 24, 1942, at "Camp 45" in Liberia, Africa, accused came to a house where Sergeant Sylvester Mayo, Company B, 41st Engineers, was conversing with "a girl". Mayo testified as follows:

"when the accused came in, he said to the girl, 'which one of us do you like best?' the girl chose me and Lax went out. He came back later and said, 'Where is my gal?' I told him she was around somewhere. He followed me into another room and said 'I'll tell you one thing, I don't give a good God dam about you or the woman either. I told him not to get excited and get into trouble, that I didn't come all the way over here to fight over a woman anyhow. Lax grabbed me by the collar with his right hand and pulled out a knife with his left. He shoved me out of the room with his right hand and as he shoved me he stabbed me in the chest with his left hand. I broke loose and ran out into the street" (R. 2).

On the street Mayo secured from another noncommissioned officer a pistol and returned to the house (R. 2, 3). When accused saw Mayo he started toward him with the knife in his hand and raised. Mayo then fired the pistol twice, one of the bullets at least striking accused. (R. 2)

Accused declined to testify or make an unsworn statement.

4. The evidence sufficiently shows that at the place and time alleged in the Specification accused committed an assault upon Sergeant Mayo by cutting him in the chest with a knife, a dangerous weapon. The circumstances establish intent to do bodily harm. The assault followed a quarrel over a woman but accused was the aggressor in the resort to violence. There was no element of self-defense.

5. There were many errors in the preparation of the record of trial but the record sufficiently establishes the constitution of the court and contains a complete history of the proceedings. The court was convened by the officer commanding "Task Force 5889" and the action upon the record of trial was taken under the same caption. This Task Force is identical with the United States Army Forces in Liberia, the commanding officer of which has authority to appoint general courts-martial.

6. No report of investigation accompanies the record of trial but there are appended to the record statements of witnesses sworn to before an "Investigating Officer", Second Lieutenant Richard H. Evans, 41st

Engineers, the accuser. It is probable that an investigation in substantial compliance with the requirements of Article of War 70 was made. In any case, the deficiencies in this regard were not fatal (CM 229477, Floyd).

It does not appear that the charges were referred to a staff judge advocate for consideration and advice prior to reference for trial. Neither does it appear that the record of trial was referred by the reviewing authority to his staff judge advocate or to The Judge Advocate General as required by Article of War 46. These omissions were not fatal to the proceedings (CM 229477, Floyd).

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.

Michael H. Moore, Judge Advocate.
Andrew J. Scott, Jr., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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

(163)

SPJGK
CM 229480

JAN 30 1943

UNITED STATES)

v.)

Sergeant SYLVESTER MAYO
(34032699), Company B,
41st Engineers.)

UNITED STATES ARMY
FORCES IN LIBERIA

Trial by G. C. M., convened at
Roberts Field, Liberia, November
23, 1942. Dishonorable discharge
and confinement for six (6) months.
Task Force Guardhouse.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Sergeant Sylvester Mayo, Company "B", 41st Engineers, Harbel, Liberia, did, on or about August 24, 1942, with intent to do him bodily harm, commit an assault upon Pvt. 1cl Benny Lax, by shooting him in the abdomen, with a dangerous weapon to wit, a Caliber 45, revolver.

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 three years. The reviewing authority approved the sentence but reduced the period of confinement to six months, directed the execution of the sentence as thus modified and designated the "Task Force Guardhouse" as the place of confinement. The record of trial has been treated as if forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on the night of August 24, 1942, at "Camp 45", Liberia, Africa, accused encountered Private First Class Benny Lax of his organization in a house where a dance was in progress. Lax testified that while he was in the building he

"talked to a girl who told me she had no boy friend. Sgt Mayo came in and whistled at her and she went over to see what he wanted she came back and told me she was going to dance with him. Mayo later told me we could have intercourse with the girl for a dollar apiece. I said OK. Then later the woman's manager told me Mayo was going to give her four dollars for the night. The manager said he would get me another girl. Mayo then came in and said he was finished and that I could have her. I said I wouldn't follow any man. Mayo then went out and came back with Sergeant Griffen's pistol and shot me twice".

Witness testified that he "threw" a knife at accused after accused had shot him. A noncommissioned officer testified that he heard two shots, that following the shots accused came from the vicinity of the house and stated that he "had shot the soldier". (R. 2)

Accused testified that following a dispute between him and Lax as to who was to have the "native girl" she chose accused. Lax thereupon expressed his indifference in the matter but seized accused and cut him in the chest. Accused ran outside, secured a pistol and returned to the house. When Lax saw accused, Lax "whirled and started for me with the knife again". Accused thereupon fired upon Lax, at a distance of about 15 feet, one of the bullets striking him. (R. 3)

4. The uncontradicted evidence shows that at about the place and time alleged accused committed an assault upon Lax by shooting him with a pistol, a dangerous weapon. The circumstances establish intent to do bodily harm. Although the victim of the shooting had previously committed a serious assault upon accused the court was justified in concluding that accused renewed the affray and that there was no element of self-defense in accused's act in firing the shot which struck Lax.

5. There were many errors in the preparation of the record of trial but the record sufficiently establishes the constitution of the court and contains a complete history of the proceedings. The court was convened by the officer commanding "Task Force 5889" and the action upon the record of trial was taken under the same caption. This Task Force is identical with the United States Army Forces in Liberia, the commanding officer of which has authority to appoint general courts-martial.

6. No report of investigation accompanies the record of trial but there are appended to the record statements of witnesses sworn to before an "Investigating Officer", Second Lieutenant Richard H. Evans, 41st Engineers, the accuser. It is probable that an investigation in substantial compliance with the requirements of Article of War 70 was made. In any case, the deficiencies in this regard were not fatal (CM 229477, Floyd).

It does not appear that the charges were referred to a staff judge advocate for consideration and advice prior to reference for trial. Neither does it appear that the record of trial was referred by the reviewing authority to his staff judge advocate or to The Judge Advocate General as required by Article of War 46. These omissions were not fatal to the proceedings (CM 229477, Floyd).

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.

Richard H. Evans, Judge Advocate.
Andrew Scott, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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

SPJGN
CM 229525

FEB 12 1943

U N I T E D S T A T E S	)	SEVENTH SERVICE COMMAND
	)	SERVICES OF SUPPLY
v.)	
First Lieutenant BOB WATSON	)	Trial by G.C.M., convened at
SOWER (O-427020), Air Corps	)	Army Air Base, Colorado Springs,
	)	Colorado, December 15, 1942.
	)	Dismissal and confinement for
	)	one year.

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 58th Article of War.

Specification: In that BOB WATSON SOWER, First Lieutenant, Air Corps, Seventh Photographic-Reconnaissance Squadron, Second Photographic Group, Army Air Base, Colorado Springs, Colorado did, at the Army Air Base, Colorado Springs, Colorado on or about October 3, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended on the International Bridge between Laredo, Texas and Nuevo Laredo, Mexico on or about October 30, 1942.

CHARGE II: Violation of the 95th Article of War.
(Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

He pleaded guilty to the Specification of Charge I, except the words

"at the Army Air Base, Colorado Springs, Colorado, on or about October 3, 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended on the International Bridge between Laredo, Texas, and Nuevo Laredo, Mexico, on or about October 30, 1942",

substituting therefor the words, "without proper leave absent himself from his station at the Army Air Base, Colorado Springs, Colorado, from about October 3, 1942, to about October 30, 1942," of the excepted words not guilty, of the substituted words guilty, and not guilty to Charge I, but guilty of violation of Article of War 61; and not guilty of Charge II and the Specification thereof. He was found guilty of both Charges and the Specifications thereunder and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Charge II and the Specification thereof, approved only so much of the findings of guilty of Charge I and the Specification thereof as involves a finding of guilty of desertion terminated by surrender, remitted the forfeitures and two years of the confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, insofar as it relates to the Specification of Charge I, is, in substance, as follows: There was introduced in evidence a duly authenticated extract copy of the morning report of the Seventh Photographic Reconnaissance Squadron, Second Photographic Group for the month of October, 1942, containing the following entry: "Oct. 9 * * * 1st Lt Sower, AC, duty to AWOL, 3rd, 12 N * * *(R. 19; Pros. Ex. "B"). By his plea the accused admitted absence without leave from October 3, 1942, to October 30, 1942. Captain Emmett C. Gravitt, commanding officer of the Seventh Photographic Reconnaissance Squadron, Army Air Base, Colorado Springs, Colorado, testified that he saw the accused sometime after the accused had been returned to his station and during the conversation he asked the accused why he did it and the accused replied that "he just didn't know -- it was just one of those things and somebody ought to kick him for it" (R.17). It was stipulated that if Captain Anthony A. Muchelroy, Provost Marshal, Fort McIntosh, Laredo, Texas, were present he would testify that while in arrest in Fort McIntosh the accused told him that while on oral leave from his commanding officer he crossed the border into Mexico at Eagle Pass, Texas, on or about October 21, 1942; that he had a written one-day pass to enter Mexico which had been issued to him by the Provost Marshal at Eagle Pass; that he did not have a passport and when he tried to get back he was detained by the Mexican authorities and turned over to United States authorities at the International Bridge between Laredo, Texas, and Nuevo Laredo, Mexico, at 8:45 P.M., on October 30, 1942 (R.20).

It was further stipulated, as a matter of fact, that the accused was a guest at the home of Private James J. Mitchell, in San Antonio, Texas, from October 10, 1942, to October 17, 1942; that he was at Eagle Pass on or about October 21, 1942; that he was in Anahuac Nuavo, Leon Province, Mexico, from about October 24, 1942, to October 30, 1942; and was escorted to the International Bridge at Nuevo Laredo, Texas, by Mexican immigration authorities (R.20).

Private James J. Mitchell, a member of the 14th Photographic Reconnaissance Squadron, at Colorado Springs, was the traveling companion of the accused during the period in question. He testified that while he and the accused were in Anahuac they were drinking heavily and tried to get money to go back to the United States. They were unsuccessful in getting money from the United States, but with a little money borrowed they traveled by train to the border with the customs officers as escorts and turned themselves over to the military police at Laredo (R. 21-27).

The evidence shows that the distance by rail from Colorado Springs Air Base to Laredo, Texas, is 1160 miles (R.27). During all the time in question they were both in military uniform.

4. The evidence for the defense, insofar as it relates to the Specification of Charge I, is, in substance as follows:

The accused was in the Village Inn and in Murphy's Tavern between 6 and 10 o'clock on the evening of October 3, 1942. He was drinking whiskey and rum cokes. He was drunk (R.30,32). Private James J. Mitchell was recalled as a witness for the defense and testified that he was with the accused from October 3 to October 30, 1942, and that during all that time they were just as drunk as they could possibly get. They were never sober (R. 36).

The rights of the accused were fully explained to him and he elected to remain silent.

5. The evidence shows, and the accused admitted, that he went absent without leave on October 3, 1942, and surrendered twenty-seven days later in uniform at a place 1160 miles from his post. The only question is whether, at the time he left or at any subsequent time during his absence, he entertained an intent to remain away permanently.

The evidence shows that the accused was drunk at the time his unauthorized absence was initiated and that he continued in that state substantially all of the time that he was gone. There was no evidence of any written or oral expressions on the part of the accused tending to show an intent to desert and no evidence of any kind tending to show that he had a motive for desertion.

The absence of twenty-one days is not so prolonged as to reasonably justify an inference that he intended to desert, and, although he surrendered to the military authorities at a place which was 1160 miles from his proper station, that fact, standing alone, and when considered in the light of modern transportation facilities, should not be treated as compelling an inference of such an intent. When considered in their entirety the facts are entirely consistent with innocence of the offense of which he was found guilty.

6. The accused is 24 years of age. The records of the Office of the Adjutant General show that he was appointed second lieutenant, Air Corps Reserve, Army of the United States, on September 26, 1941, and was ordered to extended active duty as of September 27, 1941. He was promoted to first lieutenant, Army of the United States, on February 1, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding of guilty of absence without leave from October 3, 1942, to October 30, 1942, in violation of Article of War 61, and is legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal and confinement for one year is authorized upon a conviction of absence without leave in violation of the 61st Article of War.

Elmer E. Bessy Judge Advocate.

Lawrence D. Snapp, Judge Advocate.

Abner E. Lipscomb Judge Advocate.

War Department, J.A.G.O., MAR 1 1943 - To the Secretary of War.

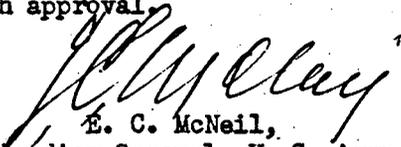
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Bob Watson Sower (O-427020), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that at Colorado Springs, Colorado, the accused absented himself without leave from the service of the United States on October 3, 1942, and remained absent until returned to military control at Laredo, Texas, on October 30, 1942, in violation of Article of War 61, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

There is evidence that during the entire period of his absence accused was in the company of an enlisted man and was drunk. He went into Mexico and was returned to the border by immigration authorities. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three years, but the reviewing authority remitted the forfeitures and reduced the period of confinement to one year. I believe accused has demonstrated himself to be unworthy of the responsibilities of an officer, but I think the confinement is unnecessary. I recommend that only so much of the findings of guilty of Charge I and its Specification be approved as involves findings that accused absented himself without leave from the service of the United States on October 3, 1942, and remained absent until October 30, 1942, in violation of Article of War 61, that the sentence be confirmed but that the confinement adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to attached letters from Mrs. C. L. Sower, mother of the accused, the Honorable John Thomas and D. Worth Clark, United States Senate, and to attached letters from Gertrude Miller, T. S. Kerr, Ben Dunlap, John L. Anderson, J. B. Newport, B. J. Davies, and Carl E. Brown.

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 designed to carry the foregoing recommendation into effect should such action meet with approval.


E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

Incls
Record of trial
Draft of ltr for sig. Sec. of War
Form of Executive action
Ltrs listed in par. 3 above

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement remitted. G.C.M.O. 112, 19 May 1943)



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

(173)

FEB 11 1943

SPJGH
CM 229526

U N I T E D S T A T E S	)	SEVENTH SERVICE COMMAND
v.	)	Trial by G.C.M. convened at
Captain WILLIAM L. VAN	)	Fort Leonard Wood, Missouri,
WINKLE (O-384504), 182nd	)	November 12 and December 22,
Field Artillery Regiment.	)	1942. Dismissal and confine- ment for two (2) years.

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. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.
(Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, with intent to deceive and defraud the Omaha National Bank, Omaha, Nebraska, falsely and fraudulently represent himself to be one Major Warren Allen, and by said false and

fraudulent representation wrongfully and feloniously obtain \$150.00 from said Omaha National Bank, Omaha, Nebraska.

Specification 3: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, with intent to defraud the Fort Leonard Wood Exchange, did, at Fort Leonard Wood, Missouri, on or about September 12 to 18, 1942, unlawfully pretend to Fort Leonard Wood Exchange, that he was Captain Richard W. Kinney, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said Fort Leonard Wood Exchange the sum of \$100.00.

Specification 4: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, with intent to defraud, unlawfully, and willfully alter and commit to his use officers identification card No. 60688, being the property of one Captain Richard W. Kinney.

Specification 5: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 18, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

<u>ROLLA STATE BANK</u>	
Rolla, Missouri 80-289-8	
Rolla, Missouri, Sept. 18, 1942 No. _____	
<u>Pay to the order of Ft. Leonard Wood Exchange \$10.00</u>	
Ten and no/100 - - - - - Dollars	
For _____	O-380881 R. W. Kinney

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 6: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri,

on or about September 12, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
 Rolla, Missouri 80-289-8
 Rolla, Missouri, Sept. 12, 1942 No. _____

Pay to the order of Ft. Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars

For 0-381880 R. W. Kinney

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 7: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 12, 1942, with intent to defraud, willfully, unlawfully, and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
 Rolla, Missouri 80-289-8
 Rolla, Missouri, Sept. 12, 1942 No. 21

Pay to the order of Ft Leonard Wood Exchange \$10.00
Ten and no/100 * * * - - - - - Dollars

For 0-381880 R. W. Kinney

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 8: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 14, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
 Rolla, Missouri 80-289-8
 Rolla, Missouri, Sept. 14, 1942 No. _____

Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars

For 0-381880 R. W. Kinney

a writing of a private nature, which might operate to the prejudice of another, which said check, was as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 9: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 18, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

	<u>ROLLA STATE BANK</u>	
	<u>Rolla, Missouri 80-289-8</u>	
	<u>Rolla, Missouri, Sept. 18,</u>	<u>1942</u>
	<u>No.</u>	<u>_____</u>
Pay to the order of	<u>Ft Leonard Wood Exchange</u>	<u>\$20.00</u>
	<u>Twenty and no/100 - - - - - Dollars</u>	
For	<u>O-380887.</u>	<u>R. W. Kinney Capt. 182 F.A.</u>

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 10: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, on or about September 17, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

	<u>Lawton, Okla. Sept. 17</u>	<u>1942</u>	<u>No.</u>	<u>_____</u>
	<u>THE SECURITY BANK & TRUST CO.</u>		<u>86-78</u>	
Pay to the	<u>Order of Ft. Leonard Wood Exchange</u>		<u>\$20.00</u>	
	<u>Twenty - - - - - Dollars</u>			
For	<u>O-380881</u>	<u>R. W. Kinney</u>		

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 11: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about August 26, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

Lawton, Okla. August 26 1942 No. 17
THE SECURITY BANK & TRUST CO. 86-78

Pay to the
Order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 ----- Dollars
For O-342562 Ben T. Grey

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 12: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 1, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

Lawton, Okla. Sept 1 1942 No. 22
THE SECURITY BANK & TRUST CO.

Pay to the
Order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 ----- Dollars
For O-342562 Ben T. Grey

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 13: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about August 26, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

Lawton, Okla. August 26 1942 No. 17
THE SECURITY BANK & TRUST CO.

Pay to the
Order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 ----- Dollars
For O-342562 Ben T. Grey

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 14: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 3, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Missouri, Sept 3 1942 No. 32
Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-314905 L. A. Shultz

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 15: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 8, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Missouri, Sept 8 1942 No. 27
Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-315463 L. A. Shultz

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 16: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 8, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Missouri, Sept. 8 1942 No. 28

Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
 For 0-356753 L. A. Shultz

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

Specification 17: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 8, 1942, with intent to defraud, willfully, unlawfully and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Missouri Sept 8 1942 No. 27
 Pay to the order of Ft Leonard Wood Exchange \$10.00
Ten and no/100 - - - - - Dollars
 For 0-342562 L. A. Shwartz

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Captain William L. Van Winkle then well knew, falsely made and forged.

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

Specification 1: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 18, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 18 1942 No. _____
 Pay to the order of Ft Leonard Wood Exchange \$10.00
Ten and no/100 - - - - - Dollars
 For 0-380881 R. W. Kinney

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort

Leonard Wood, Missouri, on or about September 12, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 12 1942 No. _____
Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 ----- Dollars
For 0-381880 R. W. Kinney

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 12, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 12 1942 No. 21
Pay to the order of Ft Leonard Wood Exchange \$10.00
Ten and no/100 ----- Dollars
For 0-381880 R. W. Kinney

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 4: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 14, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 14 1942 No. _____
Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 ----- Dollars
For 0-381880 R. W. Kinney

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 5: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort

Leonard Wood, Missouri, on or about September 18, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
 Rolla, Missouri 80-239-8
 Rolla, Mo., Sept 18 1942 No. _____

Pay to the order of Ft Leonard Wood Exchange \$20.00
 Twenty and no/100 - - - - - Dollars
 For 0-380887 R. W. Kinney Capt 182 FA

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 6: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 17, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Lawton, Okla., Sept 17 1942 No. _____
 THE SECURITY BANK & TRUST CO.
 of Lawton

Pay to the
 Order of Ft Leonard Wood Exchange \$20.00
 Twenty - - - - - Dollars
 For 0-380881 R. W. Kinney

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 7: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about August 26, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Lawton, Okla., August 26 1942 No. 17
 THE SECURITY BANK & TRUST CO.
 of Lawton

Pay to the
 Order of Ft Leonard Wood Exchange \$20.00
 Twenty and no/100 - - - - - Dollars
 For 0-342562 Ben T. Grey

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 8: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort

Leonard Wood, Missouri, on or about September 1, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Lawton, Okla., Sept 1 1942 No. 22
THE SECURITY BANK & TRUST CO.
of Lawton

Pay to the
Order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-342562 Ben T. Grey

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 9: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about August 26, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Lawton, Okla. August 26 1942 No. 17
THE SECURITY BANK & TRUST CO.
of Lawton

Pay to the
Order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-342562 Ben T. Grey

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 10: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 3, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 3 1942 No. 32

Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-314905 L. A. Shultz

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 11: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 8, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 8 1942 No. 27
Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-315463 L. A. Shultz
which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 12: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 8, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 8 1942 No. 28
Pay to the order of Ft Leonard Wood Exchange \$20.00
Twenty and no/100 - - - - - Dollars
For 0-356753 L. A. Shultz
which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 13: In that Captain William L. Van Winkle, 182nd Field Artillery, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about September 8, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ROLLA STATE BANK
Rolla, Missouri 80-289-8
Rolla, Mo., Sept 8 1942 No. 27
Pay to the order of Ft Leonard Wood Exchange \$10.00
Ten and no/100 - - - - - Dollars
For 0-342562 L. A. Shwartz
which said check was a writing of a private nature, which might operate to the prejudice of another.

CHARGE IV: Violation of the 95th Article of War.
(Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

He pleaded not guilty to Charge I and Specification 1 thereunder; not guilty to Specification 1, Charge II; guilty to Specifications 2 to 17, both inclusive, Charge II, and of Charge II; guilty to all Specifications, Charge III and of Charge III; and not guilty to Charge IV and the Specification thereunder. He was found not guilty of Charge I and Specification 1 thereunder; not guilty of Specification 1, Charge II; guilty of Specifications 2 to 17, both inclusive, Charge II, and of Charge II; guilty of all Specifications, Charge III, and of Charge III; and not guilty of Charge IV and the Specification thereunder. He was sentenced to be dismissed the service, to forfeit 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 years of the confinement imposed and the forfeiture of all pay and allowances, and forwarded the record for action under Article of War 48.

3. Upon a motion by the prosecution, in which the accused concurred, the court deleted the words "and to be a member of the Air Corps," from Specification 2, Charge II (R. 35-36).

4. The evidence pertaining to the Specifications of which he was found guilty, shows, that on August 24, 1942, Major Richard W. Kinney, 182nd Field Artillery, returned to Fort Leonard Wood from Fort Sill where he had been "in the field". He removed the contents of his watersoaked billfold and placed them on the desk in his room. During the week of September 6th he "presumably" placed the contents in his billfold again, and left the post on September 8th. On September 15, when attempting to cash a check at Shelbyville, Tennessee, he discovered that his identification card (W.D., A.G.O. Form No. 65-1) was not in the billfold. The card was not removed from the billfold between September 6 and September 15. He did not see the card again until the day prior to the trial of accused, when it was in the possession of the trial judge advocate. He did not authorize accused to use the card. Major Kinney identified as his, an officer's identification card No. 60688, which was introduced in evidence. The card bore the name Richard W. Kinney, Capt., FA, serial number O-381880. It was signed "Richard W. Kinney", but Major Kinney did not recognize this signature. He had signed the card when his picture was taken and had received the card at a later date. When introduced in evidence, the identification card contained a picture of

accused. Major Kinney identified certain portions of his own signature appearing beneath the false signature on the card. At the trial, Major Kinney executed his signature which was introduced in evidence. The identification card of accused from which his picture was missing, was also introduced in evidence. It was stipulated that accused "had in his possession altered, used, and represented as his own, a certain Army Identification Card, the property of Captain Richard W. Kinney" (R. 41-44; Exs. 19-22 incl.) (Spec. 4, Chg. II).

Admitted in evidence were six checks in the total amount of \$100, payable to the Fort Leonard Wood Exchange, purportedly signed by R. W. Kinney. The checks were dated during the period September 12 to September 18, 1942. On one check below the signature "R. W. Kinney" were the words "Capt. 182 FA". Major Kinney testified that he did not sign the checks, nor did he authorize anyone to sign his name thereon. It was stipulated that accused, by the use of these checks, obtained from the Fort Leonard Wood Exchange the sum of \$100 in merchandise and money. The checks were returned to the Exchange by the drawee banks "dishonored * * * for one reason or another". Mr. Ralph E. Butler, handwriting expert for the state of Missouri, examined specimens of the handwriting of accused and testified that the handwriting on the checks was identical with the handwriting on Exhibits 19 and 21, the identification cards of Major Kinney and of accused respectively (R. 37-40, 52-61, 62-66; Exs. 4, 18, I-N, incl.) (Specs. 3, 5-10 incl., Chg. II; Specs. 1-6 incl., Chg. III).

There were introduced in evidence three checks in the total amount of \$60, payable to the Fort Leonard Wood Exchange, two dated August 26, and one dated September 1, 1942, purportedly signed by Ben T. Grey; three checks in the total amount of \$60, payable to the Fort Leonard Wood Exchange, one dated September 3, and two dated September 8, 1942, purportedly signed by L. A. Shultz; and one check for \$10, payable to the Fort Leonard Wood Exchange, dated September 8, 1942, bearing the signature "L.A. Shwartz". These checks were also returned to the Fort Leonard Wood Exchange by the drawee banks "dishonored * * * for one reason or another". Mr. Butler, handwriting expert for the state of Missouri, after examining specimens of the handwriting of accused, similarly testified that the handwriting on these checks was identical with the handwriting on Exhibits 19 and 21, the identification cards of Major Kinney and of accused respectively (R. 51-52, 55-61, 63-66; Exs. 4, 18, A-G, incl.) (Specs. 11-17, incl. Chg. II; Specs. 7-13, incl., Chg. III).

It was stipulated that on October 13, 1942, accused went to the Omaha National Bank, Omaha, Nebraska, wrote out a check payable to cash for \$150 and signed the check "Warren Allen, Maj. FA". Accused "was dressed in a Major's Uniform". Accused represented to Mr. John D. Carew, a paying teller at the bank who saw him write the check, that he was Major Warren Allen, Field Artillery, United States Army. Relying on the representation, Mr. Carew cashed the check. On the following day, accused returned to the bank, gave Mr. Carew \$150, and was taken into custody by two members of the Federal Bureau of Investigation. When apprehended, accused "wore major's leaves and observers wings". The evidence further shows by stipulation that Major Warren Allen, Field Artillery, was not acquainted with accused, that Major Allen did not sign the check in question, and that he did not authorize accused to sign the check or to draw on the account of Major Allen at the Omaha National Bank. Accused never had an account at this bank. (R. 30-34, 36; Exs. 9, 12-17 incl., 0) (Spec. 2, Chg. II).

5. For the defense, accused testified that his first marriage consummated 11 years ago, was of a short and unhappy duration. A divorce decree became final during January 1940, and the question of alimony was waived. Accused remarried during the year prior to his induction into the Army on April 7, 1941 (R. 74-75, 78).

After his arrival at Fort Leonard Wood he commanded the Service Battery, First Battalion, 182nd Field Artillery, and was also battalion supply officer. On Sunday, November 9, 1941, the troops were paid and the usual collections were made. Accused locked the battery collections in a strong box, intending to deposit them in the bank on the following morning. During the night the building was entered and the collection stolen. A board of officers was appointed to determine the responsibility for the theft (R. 75).

On December 4, 1941, accused left Fort Leonard Wood and spent about 14 weeks at the Field Artillery School, Fort Sill, Oklahoma, and on the basis of a superior scholastic record was ordered to duty with the staff faculty and detachment at the school. However, at the request of his commanding officer, these orders were revoked and accused returned to the 182nd Field Artillery Battalion at Fort Leonard Wood about March 10, 1942. Upon his return he found that his second wife had been "more or less intimate with a senior officer of the regiment". She had "broken up housekeeping", without his knowledge, and "went to live" with a major of the regiment and his wife. The major was a friend

of "this other officer". On March 17, 1942, accused was ordered to report immediately to the 810th Tank Destroyer Battalion at Camp Forest, Tennessee. This order was also revoked at the request of the commanding officer, 182nd Field Artillery (R. 76-77).

On April 4, 1942, accused received a notice that the board of officers had found him responsible for the theft of the battery collections in the sum of \$547.70. His commanding officer approved a plan whereby accused was to repay this amount at the rate of \$30 a month for 18 months. In the meantime, the first wife of accused had written The Adjutant General, requesting that accused contribute \$20 a month for her support. Accused made an allotment in her favor for that amount. During July 1942, his commanding officer informed accused that his second wife wanted financial arrangements made for her livelihood. On the same day, accused was told by his commanding officer that he and the wife "had decided that an allotment of \$125.00 a month made to her favor would take care of everything" (R. 77-78).

Accused stated that he had worked his way through college and "was also burdened with the subsistence of a younger brother". When he left college accused was "saddled with several thousand dollars worth of unpaid notes * * * that had been advanced toward the furtherance of my education". Although the notes had been gradually settled and accused was beginning to "see my way out of everything", his financial position was "by no means secure" (R. 78-79).

On August 20, 1942, his commanding officer told accused that the arrangement of \$30 per month respecting the battery fund was unsatisfactory, and that he had to pay the balance in 24 hours. Accused paid the balance as directed. About two days later the first wife of accused demanded payment of \$20 per month for the period prior to April 1942, a sum which was "considerably more than \$600.00." The commanding officer of accused urged the immediate disposition of the case. As the result of the findings of a second board of officers, the commanding officer of accused then instituted reclassification proceedings upon the basis of neglect of duty with reference to the previous theft of battery funds (R. 79-80).

Prior to his departure for the reclassification center at Omaha, Nebraska, accused wrote the checks payable to the Fort Leonard Wood Exchange. He was then "literally at a loss", and his thought was

"to just stave this thing off long enough to keep the wolves away from the door so that I could get myself back on my feet. * * * it just so happened that there were too many financial problems that were nipping at my coat tails at that moment."

Accused cashed the check for \$150 at the Omaha National Bank because of a letter he received from his organization in which it was stated that a check which he had previously given in the sum of \$124.60 for all his indebtedness in the regiment had been returned marked "insufficient funds". He was told to make restitution immediately. As he was at a strange station and in a strange town, he thought of this device of trying to obtain money against another man's account and it worked. Accused believed he would never have been detected, but whether "it was a qualm of conscience or just normal dislike for that sort of thing", he returned the \$150 to the bank on the following day. The bank authorities immediately notified the Federal Bureau of Investigation and accused was apprehended (R. 80, 82-83).

6. The pleas of guilty and the evidence fully support the findings of guilty. The accused pleaded guilty to every Specification and Charge of which he was found guilty. Accused falsely and fraudulently represented himself to be Major Warren Allen, and by means of such representation wrongfully and feloniously obtained by means of a forged check \$150 from the Omaha National Bank, Omaha, Nebraska (Spec. 2, Chg. II). He forged and uttered six checks in the total sum of \$100, using the name R. W. Kinney (Specs. 1-6, incl, Chg. III; Specs. 5-10 incl, Chg. II). When uttering the six checks, with intent to defraud, accused unlawfully pretended to the Fort Leonard Wood Exchange that he was Captain Richard W. Kinney, and by means of such representation fraudulently obtained from the exchange the sum of \$100 (Spec. 3, Chg. II). In the forging and uttering of these six checks, and their use in obtaining from the exchange the \$100 alleged, each forging and uttering constituted in substance but a single offense, for which but a single penalty should be assessed.

Accused also forged and uttered seven additional checks in the total sum of \$130, using the names Ben T. Grey, L. A. Shultz, and L. A. Shwartz (Specs. 7-13 incl, Chg. III; Specs. 11-17 incl, Chg II). Similarly, each forging and uttering constituted in substance but a single offense, for which but a single penalty should be assessed.

Accused also, with intent to defraud, unlawfully and willfully altered and committed to his use the identification card of Captain Richard W. Kinney (Spec. 4, Chg. II).

With the exception of the \$150 obtained from the Omaha National Bank (Spec. 2, Chg. II), the evidence does not disclose that any restitution of the funds so obtained by accused was made prior to trial.

Mr. Butler, handwriting expert for the State of Missouri, testified *that the hand that wrote the known check marked Exhibit 'H' signed Wm. L. Van Winkle is the same hand that wrote the checks that have been submitted as evidence in this case * (R. 61). The trial judge advocate, when handing Mr. Butler Exhibit H for the purposes of comparison, stated that it was a check *made out in the known handwriting of accused* (R. 57). Exhibit H was a check which accused was alleged to have made when he had insufficient funds in the bank for its payment (Charge IV and Specification thereunder). Accused was found not guilty of this offense. However, accused admitted that he executed the check in question (R. 80). Therefore, the use of Exhibit H by Mr. Butler for the purpose of comparing the handwriting thereon with the other checks admitted in evidence, was proper.

7. Specifications 2 and 4, Charge II do not contain the dates of the alleged offenses. However, the proof supplies the omitted dates. With reference to Specification 2, it was stipulated that on October 13, 1942, accused represented himself to be Major Warren Allen, Field Artillery, and cashed a check for \$150. Also, the check itself is dated October 13, 1942 (Exs. 12, 0).

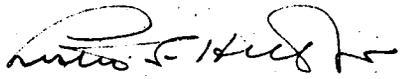
With reference to the offense alleged in Specification 4, Charge II, it was stipulated that accused had in his possession, altered, used, and represented as his own, the identification card of Captain Richard W. Kinney. Major Kinney testified that on August 24, 1942, he removed the contents of his billfold, placed them on his desk, and again *presumably* placed the contents in the billfold during the week of September 6, 1942. The theft of the identification card occurred during this period (R. 43; Ex. 20).

Accused pleaded guilty to these two Specifications, and was not misled by the omission of the dates concerned. No objection was made by the defense either as to the form or substance of the Specifications. The fact that the record of trial contains ample proof with respect to the respective dates of the offenses alleged, provides accused with sufficient protection from any possible future jeopardy for the same

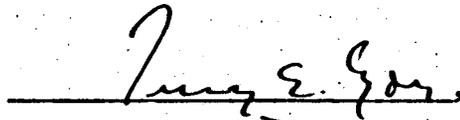
offense. The failure to allege such dates did not injuriously affect the substantial rights of accused within the meaning of Article of War 37.

8. Accused is 30 years of age and was graduated from the University of Michigan. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, National Guard of the United States, September 1, 1939; appointed first lieutenant, National Guard of the United States, and entered extended active duty April 7, 1941; temporarily appointed Captain, Army of the United States, June 27, 1941.

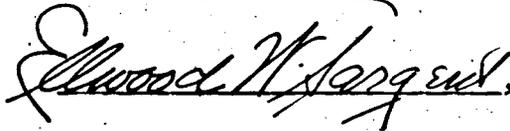
9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61, 93, or 96.



Judge Advocate.



Judge Advocate.



Judge Advocate.

SPJGH
CM 229526

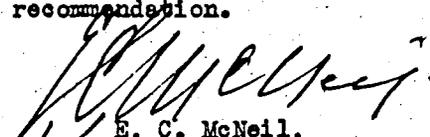
1st Ind.

War Department, J.A.G.O., FEB 15 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 William L. Van Winkle (O-384504), 182nd 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 of the sentence. The conviction of accused of forgery of thirteen checks aggregating \$230, and of obtaining \$150 by false pretenses upon another check which was in fact forged, warrants confirmation of the confinement at hard labor for two years included in the sentence. I recommend that the sentence be confirmed and carried into execution.

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


E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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. 49, 20 Mar 1943)

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

(193)

SPJGK
CM 229549

FEB 18 1943

U N I T E D S T A T E S	)	THIRD AIR FORCE
)	
v.	)	Trial by G. C. M., convened at
	)	Columbia, South Carolina,
Second Lieutenant ANTHONY	)	November 27, 1942. Dismissal.
J. GRANOSKY (O-854809),)	
Air Corps.)	

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 96th Article of War.

Specification: In that Second Lieutenant Anthony J. Granosky, 486th Bombardment Squadron, 340th Bombardment Group, did, on or about October 13th, 1942, in Columbia, South Carolina, publicly associate and drink intoxicating beverages with enlisted men of his squadron, to-wit, Private First Class Walter J. Wiltz, Jr. and Private Robert F. Voss, to the prejudice of good order and military discipline.

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

Specification 1: In that Second Lieutenant Anthony J. Granosky, 486th Bombardment Squadron, 340th Bombardment Group, did, on or about October 13, 1942, at Columbia Army Air Base, Columbia, South Carolina, knowingly and willfully permit an enlisted man of his own squadron, to-wit, Private Robert F. Voss, to wear unlawfully the insignia of a Second Lieutenant, United States Army, to the prejudice of good order and military discipline.

Specification 2; In that Second Lieutenant Anthony J. Granosky, 486th Bombardment Squadron, 340th Bombardment Group, did, on or about October 13, 1942, in or near Columbia, South Carolina, associate publicly with an enlisted man of his own squadron, to-wit, Private Robert F. Voss, while the said Robert F. Voss was wearing unlawfully the insignia of a Second Lieutenant, United States Army, to the knowledge of the said Second Lieutenant Anthony J. Granosky, and to the prejudice of good order and military discipline.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications. He 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 only so much of the findings of guilty of Charge II and its Specifications as involves findings of guilty of the Specifications in violation of Article of War 96, approved the sentence but recommended that it be commuted to forfeiture of \$50 per month for four months, restriction to the limits of accused's post for three months and suspension from promotion for one year, and forwarded the record for action under Article of War 48.

3. The evidence shows that at about 4 p.m., October 13, 1942, accused, Sergeant Robert F. Voss and Private Walter J. Wiltz, all members of the 486th Bombardment Squadron, 340th Bombardment Group, stationed at the Columbia Army Air Base, Columbia, South Carolina, went together in an automobile to a parking lot near a place in Columbia called the "Varsity Inn". While there each, in the presence of the others, took a drink of Canadian Club whiskey. (R. 5, 7, 11) One other car was in the lot at the time (R. 5, 6). Wiltz testified that no one outside the car could have seen the drinking without opening the door and looking inside the car (R. 8).

After leaving the Varsity Inn the party returned to the air base where Wiltz left his companions. Accused and Voss then returned to Columbia. En route (R. 11) Voss placed a gold bar on one side of the collar of his enlisted man's uniform and "wings" on the other side of the collar (R. 11, 15). He kept the insignia on his shirt for several hours (R. 10). In Columbia the two "picked up a girl" and with her went to the "Lookout Club" where they continued to drink while seated

at a table (R. 12, 13). This place was "patronized a great deal by almost all the military personnel." (R. 14) Voss continued to wear the insignia (R. 15) but no conversation was had concerning it (R. 10).

Accused was questioned by another officer about October 30, 1942. After having been warned that he might remain silent and that whatever he said could be used against him (R. 16), he stated that he had drunk liquor with an enlisted man and had been in the company of an enlisted man who wore the insignia of an officer (R. 17).

Accused declined to testify or make an unsworn statement.

4. The uncontradicted evidence shows that at the place and time alleged in the Specification, Charge I, accused publicly associated with and drank intoxicating liquor in the company of enlisted men of his squadron. Part of the drinking was in a public place. During the evening one of the enlisted men unlawfully wore the insignia of an officer but, as alleged in Specification 2, Charge II, accused continued his public association with him and took no measures to stop or prevent the masquerade, thus permitting its continuance, as alleged in Specification 1, Charge II. The conduct of accused was plainly to the prejudice of good order and military discipline. Violation of Article of War 96 was proved under each Specification. The acts alleged in the Specifications, Charge II, are but different aspects of the same transaction.

5. War Department records show that accused is 24 years of age. He attended the University of Kansas for 2½ years. He entered the military service as an aviation cadet on January 12, 1942, and was appointed a second lieutenant, Army of the United States, on August 3, 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 is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Andrew G. P. Jr., Judge Advocate.
John W. ..., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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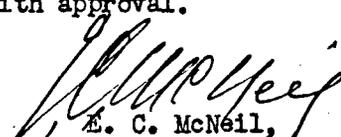
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War Department, J.A.G.O., FEB 26 1943 - To the Secretary of War.

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 Anthony J. Granosky (O-354809), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Accused publicly associated with and drank intoxicating liquor in the company of enlisted men of his squadron. One of the enlisted men, without interference by accused, masqueraded as an officer. Accused was sentenced to dismissal. The reviewing authority, in approving the sentence, recommended that it be commuted to forfeiture of \$50 per month for four months, restriction for three months and suspension from promotion for one year. In view of all the circumstances and the recommendation for clemency, I recommend that the sentence be confirmed but commuted to forfeiture of \$50 per month for four months and restriction to the limits of accused's post for three months and that the sentence as thus commuted 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.


E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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 forfeiture of \$50 per month for four months and restriction to limits of the station where accused may be serving for three months. G.C.M.O. 83, 9 Apr 1943)

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

SPJGH
CM 229562

JAN 20 1943

UNITED STATES)

v.)

Private J. B. BANGS (38037541),)
Service Battery, 132nd Field)
Artillery Battalion.)

36th INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Edwards, Massachusetts,
December 18, 1942. Dishonor-
able discharge and confinement
for ten (10) years. Disciplinary
Barracks.



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. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private J. B. (i.o.) Bangs, Service Battery, 132nd Field Artillery Battalion, while "enroute to join", did, on or about July 5, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended by the Civil Authorities of Delta County, Cooper, Texas at Cooper, Texas on or about October 19, 1942.

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

Specification 1: In that Private J. B. (io) Bangs, Service Battery, 132nd Field Artillery Battalion, having received a lawful command from Elmer R. Hilton, 1st Lieutenant, Infantry, Personnel Officer, Unit Personnel Section, 1866 Corps Area

Service Unit, Camp Wolters, Texas, his superior officer, to report without delay to his organization at Camp Blanding, Florida, did at Camp Wolters, Texas, on or about June 15, 1942, wilfully disobey the same.

Specification 2: In that Private J. B. (io) Bangs, Service Battery, 132nd Field Artillery Battalion, having received a lawful command from T. H. Kern, 2nd Lieutenant, Infantry, Acting Assistant Personnel Officer, 1866 Corps Area Service Unit, Camp Wolters, Texas, his superior officer, to report without delay to his organization at Camp Blanding, Florida, did at Camp Wolters, Texas, on or about July 1, 1942, wilfully disobey the same.

CHARGE II: Additional: (Findings of Not Guilty).

Specifications 1 and 2: (Findings of Not Guilty).

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

Specification 1: In that Private J. B. (io) Bangs, Service Battery, 132nd Field Artillery Battalion, did without proper leave absent himself from his organization at Camp Bowie, Texas, from about February 12, 1942, to about June 6, 1942.

Specification 2: In that Private J. B. (io) Bangs, Service Battery, 132nd Field Artillery Battalion, did, without proper leave, while en route from Camp Wolters, Texas, to Camp Blanding, Florida, absent himself from military control at a place unknown, between the said Camp Wolters, Texas, and Camp Blanding, Florida, from about June 19, 1942, to about June 25, 1942.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the original Charge and the Specification thereunder, guilty of Additional Charges I and III and the Specifications thereunder, and not guilty of Additional Charge II and Specifications 1 and 2 thereunder. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life. The reviewing authority approved only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for ten years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence is legally sufficient to support the findings of guilty of Specification 1, Charge III, and of Charge III.

4. It is alleged in the Specification of the original Charge that while "enroute to join", accused deserted the service on or about July 5, 1942, and remained absent in desertion until he was apprehended by the civil authorities at Cooper, Texas, on or about October 19, 1942. It was established that at Camp Wolters, Texas, an order was published on June 29, 1942, directing accused to proceed without delay to Camp Blanding, Florida, and report to his commanding officer (R. 16; Ex. G). An extract copy of the morning report of the Headquarters Detachment, 1866th Corps Area Service Unit, submitted at Camp Wolters, Texas, was introduced in evidence, and contained the following entry:

"July 1/42 Pvt. Bangs fr atchd restricted to camp to
RPM returned to home station 11:30 AM 7/1/42.
JGR" (R. 13; Ex. C).

There was also introduced in evidence an extract copy of the morning report of the organization of accused submitted at Camp Edwards, Massachusetts, containing, in pertinent part, the following entry:

"August 30, 1942; HCB

"* * * Pvt. Bangs Fr Atchd Restricted To Camp
(Camp Wolters, Tex) To Retd To Home Sta 11:30
AM 7/1/42. Pvt Bangs From Enroute to Join to
AWOL 7/5/42. Erroneously Not Entered Prior
To This Date. HCB

*

*

*

"October 31, 1942; WIS

"Pvt. Bangs Fr Des To Conf 4:45 P.M. HCB"
(R. 10; Ex. A).

The defense stated that it had no objection to the introduction in evidence of these exhibits. The commanding officers of the organization of accused testified that accused was not present for duty with his organization between February 12, and October 19, 1942, that he did not have permission to be absent during this period, and that he reported under guard "Sometime in October". It was established that he was confined at Camp Edwards on October 31, 1942 (R. 10-11, 13, 16; Ex. A).

It was not shown that the organization of accused was at any time stationed at Camp Blanding, Florida. As the morning report of the organization of accused was submitted at Camp Edwards, Massachusetts, it is obvious that the entry to the effect that accused absented himself

For the reasons already stated, it is similarly obvious that since the morning report of the organization of accused was submitted at Camp Edwards, Massachusetts, the entry to the effect that accused absented himself without leave on June 19, 1942, while en route to join his organization at Camp Blanding, was not within the personal knowledge of the officer making the report, was hearsay in character, and not competent evidence of the fact. It was not shown that the organization of accused was ever stationed at Camp Blanding or that accused did not in fact report to that station as directed. The entry in Exhibit C, submitted at Camp Wolters, to the effect that on June 25, 1942, accused was restricted to Camp Wolters, after absence without leave, was not competent evidence that he did not report to Camp Blanding as directed, or that he absented himself on June 19, 1942, while en route to that station.

In the absence of any other and competent evidence, the record of trial fails to establish by competent evidence the initial absences of accused while en route to join on July 5, and on June 19, 1942, as alleged. The evidence is, accordingly, legally insufficient to sustain the findings of guilty of the original Charge and Specification thereunder, and of Specification 2, Charge III

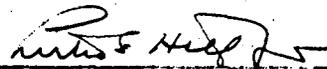
5. In Specification 1, Additional Charge I, it is alleged in substance that accused, at Camp Wolters, Texas, on or about June 15, 1942, willfully disobeyed the lawful command of Lieutenant E. R. Hilton to report without delay to his organization at Camp Blanding, Florida. It is substantially alleged in Specification 2 of Additional Charge I that accused, at Camp Wolters, Texas, on or about July 1, 1942, willfully disobeyed the lawful command of Lieutenant T. H. Kern to report without delay to his organization at Camp Blanding, Florida. Two typed orders dated June 15, and July 1, 1942, purportedly signed at Camp Wolters by Lieutenants Hilton and Kern, respectively, addressed to accused, ordering him to report without delay to his organization at Camp Blanding, Florida, were admitted in evidence. On the face of each order is the purported signature of the officer and of accused, acknowledging its receipt. The defense stated that it had no objection to the introduction in evidence of the orders (R. 15; Exs. D, E). No evidence was introduced as to the genuineness of the signatures of Lieutenants Hilton and Kern, or of accused. Aside from the fact that each order bears the purported signature of accused, there was no proof that he actually received such orders, (R. 16-17).

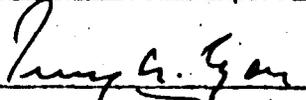
Assuming, but not deciding, that the statement by the defense that it did not object to the introduction in evidence of the two typed

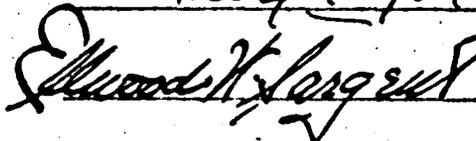
orders constituted a waiver of proof of the genuineness of the signatures of Lieutenants Hilton and Kern and of the accused thereon (par. 116b, M.C.M., 1928, p. 120), there is no proof that accused failed to report at Camp Blanding as directed. Consequently, the evidence was legally insufficient to support the findings of guilty of Additional Charge I and of Specifications 1 and 2 thereunder.

6. The maximum authorized punishment for the offense of which approval of the findings of guilty is recommended (absence without leave for a period of more than 60 days), is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months (M.C.M., 1928, par. 104c).

7. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of the original Charge and Specification thereunder, of Additional Charge I and of Specifications 1 and 2 thereunder, and of Specification 2, Additional Charge III; legally sufficient to support the findings of guilty of Specification 1, Additional Charge III, and of Additional Charge III, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.

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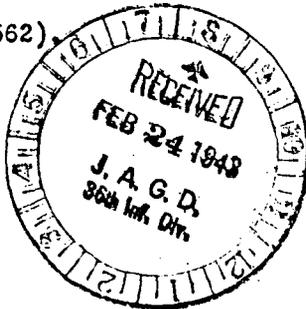
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WAR DEPARTMENT
GENERAL RECORDS SECTION

War Department, J.A.G.O., FEB 19 1943 - To the Commanding General,
36th Infantry Division, Camp Edwards, Massachusetts.

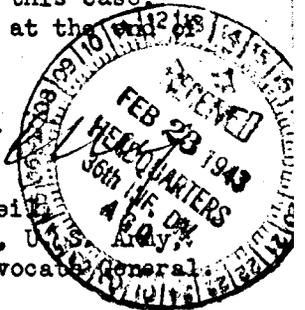
1. In the case of Private J. B. Bangs (38037541), Service Battery, 132nd Field Artillery Battalion, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of the original Charge and of the Specification thereunder, of Additional Charge I and of Specifications 1 and 2 thereunder, and of Specification 2, Additional Charge III be disapproved; that only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months be approved. Thereupon, 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 229562).



E. C. McNeil
E. C. McNeil
Brigadier General, U.S. Army
Acting The Judge Advocate General



FEB 22 '43 AM



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

Private Wilburn L. Henry, 77th Infantry Training Battalion, Camp Roberts, California, and General Prisoner Louie F. Nalls, Camp Roberts, California, prisoners duly committed to his charge.

CHARGE III: Violation of the 84th Article of War.

Specification: In that Private Floyd A. Farris, Corps of Military Police, Service Command Unit 1928, did, on or about September 9, 1942, at or near San Pedro, California, wrongfully dispose of by abandoning the same, a Winchester 12 gauge shotgun, Serial Number 961150, of the value of about \$49.16, issued for use in the military service of the United States.

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

Specification 1: In that Private Floyd A. Farris, Corps of Military Police, Service Command Unit 1928, did, in conjunction with Private S. E. Thompson, 87th Infantry Training Battalion, Camp Roberts, California, Private Wilburn L. Henry, 77th Infantry Training Battalion, Camp Roberts, California, and General Prisoner Louie F. Nalls, at or near San Miguel, California, on or about September 9, 1942, without proper authority, wrongfully take and use, one Ford six-cylinder $1\frac{1}{2}$ ton truck USA Number W-344835, of a value of more than \$50.00, property of the United States furnished and intended for the military service thereof, with intent to temporarily convert the same to his own use and benefit.

Specification 2: (Finding of guilty disapproved by reviewing authority).

Specification 3: In that Private Floyd A. Farris, Corps of Military Police, Service Command Unit 1928, did, in conjunction with Private S. E.

Thompson, 87th Infantry Training Battalion, Camp Roberts, California, Private Wilburn L. Henry, 77th Infantry Training Battalion, Camp Roberts, California, and General Prisoner Louie F. Nalls, Camp Roberts, California, at or near San Miguel, California, on or about September 9, 1942, commit an assault upon Private G. P. Montoya by pointing a loaded gun at the said Private G. P. Montoya.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge IV, 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 50 $\frac{1}{2}$.

3. The evidence is legally sufficient to support the findings of guilty of Charge I and of the Specification thereunder.

4. The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of Charges II, III, and of the Specification under each, of Specifications 1 and 3, Charge IV, and of Charge IV.

The evidence for the prosecution, in pertinent part, shows that on September 9, 1942, at Camp Roberts, California, accused was detailed as a prisoner guard and had in his charge a work party of three prisoners, Private S. E. Thompson, Private Wilburn L. Henry, and General Prisoner Louie F. Nalls. The prisoners were to pick up trash in certain areas, and the Government truck described in Specification 1, Charge IV, was assigned for this purpose. The shotgun described in the Specification, Charge III, and three rounds of ammunition were issued on that day to accused for the purpose of guarding the prisoners. Accused, the three prisoners, and the driver of the truck, Private G. P. Montoya, drove from Camp Roberts to San Miguel, California, to empty the truck. While the truck was being unloaded by the prisoners, Montoya sat in the driver's seat and accused was with the three prisoners. Suddenly, Montoya heard the command, "Move! All right, driver!" He looked up and saw the prisoner Henry pointing a shotgun at him. Montoya stated that the gun introduced in evidence (which gun had been issued to the accused), "looks like" the gun which was held by Henry. After Montoya told Henry

that he was the driver, and therefore responsible for the truck, Montoya was ordered to get out, and did so. Henry removed the key from the ignition. Montoya then obeyed an order to get in the rear of the truck. Montoya found accused already in the rear of the truck, without his gun. One of the prisoners, with the gun in his possession, climbed in with them, and ordered Montoya and accused to "Sit down. Keep quiet". The other two prisoners were in the front seat. The truck was then driven about a mile and stopped. The prisoner who was driving said, "Let the truck driver off". The prisoner in the rear ordered Montoya to get out. He did so. Accused then said, "How about me off?" The prisoner in the rear of the truck ordered accused to remain, and the truck was driven away (R. 15-31, 63).

On September 19, 1942, accused and the three prisoners were, at Phoenix, Arizona, turned over by the United States marshal to Sergeant Frederick F. Brady, Corps of Military Police. Sergeant Brady later found the Government truck at Shandon, California, with a web belt and a pair of fatigue trousers in it. Following directions given by Henry, he found the shotgun which had been issued to accused, together with a box of shotgun shells, in a dump six miles west of San Pedro, California (R. 33, 37-39, 44, 46).

After the accused was warned by Sergeant Brady that he could remain silent and that any statement he made could be used against him, the accused stated to Sergeant Brady that one of the three prisoners had taken his gun, and that another had driven the truck down the road to a place where the driver of the truck was ordered to get out. Accused was ordered to remain in the truck which was later abandoned at Shandon. Accused had discarded his belt and tie in order that he would not be identified as a soldier. At Shandon, a Ford pick-up truck was taken. At Blackwell's Corner, California, two of the prisoners stole some gasoline while accused remained in the truck. Accused and the three prisoners drove to Glendale, then to San Pedro, and then back to Glendale. From there they went to San Bernardino, Big Bear Lake, Blythe, and to Wickenburg, Arizona, where they were arrested. After abandoning the Ford pick-up truck, a Ford coupe and Dodge sedan were taken. The men took turns driving the cars. The cars were later found by Brady and identified by accused, who told Brady that he had sold a spare tire and a radio taken from one or more of the cars (R. 34-36, 40-41, 49-53).

5. For the defense, the accused, in pertinent part, testified that "We hadn't planned -- that is, before this time -- on taking off".

When he and Montoya were in the rear of the truck, accused "was undecided there, but I figured that things had started and if I came back at that time, why, I would just have to serve these other boys' time" (R. 66).

6. There is no competent proof that accused released, without authority, the three prisoners at San Miguel as alleged in the Specification, Charge II, or that he wrongfully disposed of the shotgun at San Pedro as alleged in the Specification, Charge III. Similarly, it was not established by competent evidence that accused, in conjunction with the three prisoners, wrongfully took and used, without proper authority, the Government vehicle described, or that in conjunction with them he committed the alleged assault on Private Montoya (Specs. 1 and 3, Charge IV). The testimony of Private Montoya does not reveal how the gun left the possession of the accused. It was Private Henry who actually pointed the gun at Montoya and ordered him to get into the rear of the truck, where he found accused. Both Montoya and accused were told to sit still and be quiet by another prisoner who acted as their guard. When Montoya was ordered to leave the truck, accused asked if he could get off, and was told to remain. There was nothing in Montoya's testimony to indicate that accused had willingly participated in this occurrence, or that he had entered any conspiracy with Henry, Thompson, or Nalls. In fact, the testimony of the driver would tend to show that accused was, in fact, an unwilling victim.

During the ten days that followed, accused and the three prisoners drove a considerable distance. They took turns driving cars which were stolen en route, and were finally apprehended at Wickenburg, Arizona. Accused sold a tire and a radio taken from one or more of the cars. The evidence does not show who actually stole the cars, whether accused was, during this time, still under the control of the prisoners, or whether he was, in fact, subsequently released from such control and voluntarily participated in the events which occurred. Further, the identity of the person who disposed of the gun near San Pedro, and the circumstances surrounding such disposal were not established. The evidence as to events occurring after Montoya left the truck was not sufficient to prove that accused, in conjunction with the three prisoners, wrongfully took the Government truck involved, or assaulted Montoya. The evidence was also insufficient to establish the release, without proper authority, of the prisoners at San Miguel by accused, or his wrongful disposal of the shotgun at San Pedro.

7. For the reasons stated, the Board of Review holds that the

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record of trial is legally insufficient to support the findings of guilty of the Specification, Charge II, and of Charge II, of the Specification, Charge III, and of Charge III, of Specifications 1 and 3, Charge IV, and of Charge IV; legally sufficient to support the findings of guilty of Charge I and of the Specification thereunder, and legally sufficient to support the sentence.

[Signature], Judge Advocate.

[Signature], Judge Advocate.

[Signature], Judge Advocate.

SPJGH
CM 229635

1st Ind.

War Department, J.A.G.O., JAN 27 1943
General, Camp Roberts, California.

- To the Commanding

1. In the case of Private Floyd A. Farris (19062427), Corps of Military Police, Service Command Unit 1928, Camp Roberts, California, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons stated, that the findings of guilty of the Specification, Charge II, and of Charge II, of the Specification, Charge III, and of Charge III, of Specifications 1 and 3, Charge IV, and of Charge IV, be disapproved. Thereupon, 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 229635).

[Signature]

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

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

SPJGH
CM 229638

FEB 17 1943

U N I T E D S T A T E S)	PUERTO RICAN DEPARTMENT
)	
v.)	Trial by G.C.M., convened at
)	A.P.O. 845, c/o Postmaster,
Private JAMES V. KEHOE)	New York, New York, November
(32201224), Company A,)	25, 1942. Dishonorable dis-
806th Engineer Battalion.)	charge and confinement for
)	life. Penitentiary.

REVIEW by 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 soldier named above.

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

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

Specification: In that Private James V. Kehoe, Company A, 806th Engineer Battalion, Borinquen Field, Puerto Rico, did, at Borinquen Field, Puerto Rico, on or about August 2, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Sergeant Donald I. Fields, Company A, 806th Engineer Battalion, a human being by shooting him with a rifle.

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

Specification: In that Private James V. Kehoe, Company A, 806th Engineer Battalion, Borinquen Field, Puerto Rico, did, at Borinquen Field, Puerto Rico, on or about August 2, 1942, with intent to commit a felony, viz, murder, commit an assault upon 1st sergeant Percival R. McMurtry, Company A, 806th Engineer Battalion, by willfully and feloniously shooting at him with a dangerous weapon, to wit, a rifle.

He pleaded not guilty to and was found guilty of both Charges and Specifications. He was sentenced, all the members of the court present concurring, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that at about 5 p.m., August 2, 1942, accused entered his barracks, obtained his cartridge belt and ammunition from his locker, and took a rifle from the rack. He said that "he was going out to see if these things would pop". Accused inserted a clip of bullets in the magazine of the rifle. Sergeant Percival R. McMurtry, then first sergeant of the company of accused, was immediately summoned. When Sergeant McMurtry appeared, accused had a Garand M1 .30 caliber rifle in one hand and a clip in the other. McMurtry asked accused what he was doing. Accused said he was going to load his rifle and fire it. McMurtry told him that it was not a good idea, that he might get in trouble, and both McMurtry and accused then sat on a bunk. Accused said "he was rotting away down here and wanted to get out and fight". McMurtry told accused "it wasn't our fault he was down here, and there were others just like him. That seemed to quiet him down". McMurtry walked toward the opposite end of the barracks. Accused then aimed the gun down the aisle in the direction of McMurtry and pulled the bolt. His finger was on the trigger. McMurtry noticed that "Everybody was moving around on their beds", turned, and saw accused pointing the gun in his general direction. McMurtry returned and asked accused if he was aiming the gun at him. Accused replied that "he was just getting the feel of the rifle". McMurtry then started to leave, and saw another soldier jump up and dive under a bed. Thinking that "something might happen", McMurtry jumped behind a foot locker. Accused fired and Sergeant Fields, who was at the opposite end of the barracks, shouted and fell to the floor. Accused then laid the gun on a bunk and went toward Sergeant Fields. A soldier picked up an empty .30 caliber shell which was ejected when the gun was fired (R. 7-10, 16-18, 21-22, 24-27, 29-31).

Upon hearing a shot, Major Frederick B. Hall, Jr., 806th Engineer Battalion, entered the barracks. Accused told Major Hall that he had shot Sergeant Fields. He stated that his aim was poor, that he did not mean to shoot Fields, but had intended to shoot the first sergeant. Accused then returned to his bunk, seized his gun and said that he was going to kill everyone in the barracks. One soldier seized

accused as he attempted to load the gun, and another took the gun from accused, who dropped a clip of bullets. Accused "was carrying on a string of invective against Sergeant McMurtry and his position in general. He didn't care what they done with him as long as he got that 'son-of-a-bitch' or something". Accused was then taken to the guardhouse. He struggled a little, but otherwise offered no resistance. On the way to the guardhouse, accused said he "was sorry that he got the wrong guy" (R. 32, 34, 36, 38-42).

On August 8, 1942, Sergeant Fields died because of the gunshot wound inflicted by accused (R. 46-47).

The evidence as to intoxication of accused was conflicting. Accused had a wild look on his face when he entered the barracks, but he did not stagger. A witness who saw accused talking with McMurtry observed nothing unusual about accused, who then acted as a normal person. Sergeant McMurtry thought accused had been drinking, and he seemed to be fumbling with the gun. Accused, however, talked to McMurtry in a natural tone of voice, and appeared to understand what McMurtry told him. Another witness, who did not smell any liquor on the breath of accused, thought that he was "pretty well full". Other witnesses to the occurrence testified that accused did not act as if he was sober, and that he had been drinking (R. 11, 19, 23-24, 27-29, 35).

A soldier who took accused to the guardhouse in a command car, did not smell any liquor on his breath. Accused "looked all right", but the witness would not say that he was sober. When accused informed Major Hall that he had shot Sergeant Fields, his manner was incoherent and restless. His eyes were wild looking and blood-shot, and he was highly excited. Major Hall believed that accused was, to a certain extent, under the influence of liquor. Captain John Arfman, 806th Engineers, who accompanied Major Hall to the barracks, testified that accused appeared quite nervous and uneasy and appeared as though he were suffering from "a severe hangover", but was not in an intoxicated condition and spoke coherently (R. 39-40, 41, 43-46).

4. For the defense, the evidence shows that a soldier had a few drinks with accused on the morning of August 2nd, and left him about 10 a.m. He saw accused again on the same day between 4 and 4:30 p.m. "He had a little more than he had that morning". The police and prison sergeant testified that when accused was confined after the shooting, he appeared to be under the influence of liquor (R. 47-49).

Admitted in evidence without objection as an exhibit for the

(214)

defense was a certificate signed by First Lieutenant P. Quinones-Chacon, Medical Corps, of his examination of accused one and one-half hours after the shooting. Lieutenant Quinones-Chacon died prior to trial. The certificate was as follows:

"STATION HOSPITAL
BORINQUEN FIELD, P. R.

August 5, 1942

C E R T I F I C A T E

"I certify that the time I examined James V. Kehoe, of Co. A, 806th Engrs., Sunday August 2, 1942 on or about 6:30 P.M., he was suffering from acute alcoholism, moderately severe. That his pupils were 4 mm. in diameter reacted to light and accommodation, his knee and ankle reflexes were active and equal, gag reflex was sluggish, coordination test were carried with moderate difficulty. Romberg test was positive, his breath had whiskey odor, was talkative, aggressive, increased psychomotor activity, sense of superiority, disdain to his life, no sense of perspective as to his present situation, disoriented as to time but not as to person or place." (R. 50; Def. Ex. 2.)

The report of the proceedings by a board of medical officers who examined accused under the provisions of paragraph 1b, Army Regulations 600-500, November 20, 1939, was admitted in evidence as an exhibit for the defense, over the objection of the prosecution. The board, in making its findings, considered the certificate of Lieutenant Quinones-Chacon, together with a clinical record pertaining to accused while he was for three weeks under observation at a hospital subsequent to the shooting, and also the Charges and allied papers. In addition, the board considered a communication from the Acting Director, Psychiatric Division, Bellevue Hospital, New York City, New York. This communication disclosed that accused was admitted to this hospital August 18, 1940, as the result of being hit on the head with a baseball bat during a beer house brawl. He was discharged August 20, 1940. The following diagnosis was there made; "Without Psychosis - Acute Alcoholism 000.332 No surgical disease". The board of officers found that accused was mentally irresponsible at the time he shot Sergeant Fields, and that his mental irresponsibility was brought about by acute alcoholism which resulted from his own misconduct. The board further found accused mentally responsible at the time of the report. The report

of the board was approved by the commanding general (R. 51-54; Def. Exs. 3, 4, 5).

Captain Isadore Spinka, Medical Corps, head of the psychiatric service, Station Hospital, San Juan, Puerto Rico, a member of the board of officers, testified that accused was placed in the mental ward of the hospital and observed for a period of about three weeks. Captain Spinka further testified that the blow on the head received by accused about August 18, 1940, might have affected his future behavior, in that he might have become more susceptible to the influence of alcohol, but on the other hand it was possible that the blow might not have so affected the accused. Captain Spinka was of the opinion that the blow did have such an effect and that the blow plus the use of alcohol contributed directly to the commission of the act. The fact that accused might have become more susceptible to the effects of alcohol would have no influence with respect to a declaration by the board that accused was sane or insane. During the time accused was at the hospital he was mentally sound. No mental disease was found, and accused was considered normally responsible and sane, when sober. No criminal tendencies were observed (R. 51, 53-54, 56-59).

Captain Spinka testified that the finding of the board or medical officers to the effect that accused was mentally irresponsible at the time of the shooting, was based in great measure upon the certificate of Lieutenant Quinones-Chacon (R. 56; Def. Ex. 2).

Captain Charles E. Work, Medical Corps, a witness for the prosecution in rebuttal, testified in substance that a diagnosis that accused was mentally irresponsible at the time of the shooting could not be made from an examination alone of the certificate of Lieutenant Quinones-Chacon. Captain Work based his opinion on the fact that the conditions under which the examination took place were not shown in the certificate, and the reactions of various individuals to the tests given would vary (R. 62-63).

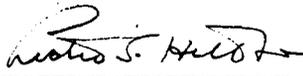
5. The evidence plainly shows the commission by accused of the offenses of murder and of assault with intent to commit murder. Accused twice deliberately aimed the rifle in the direction of Sergeant McMurtry. He admitted to Major Hall that he shot Sergeant Fields. Accused also stated that he did not mean to shoot Sergeant Fields, that his aim was poor, and that he had intended to shoot the first sergeant. Sergeant McMurtry, who had been talking with accused immediately before the incident, was the first sergeant of the company of accused. After the shooting, accused "was carrying on a string

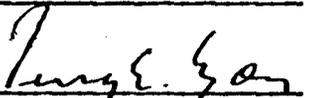
of invective against Sergeant McMurtry and his position in general. He didn't care what they done with him as long as he got that 'son-of-a-bitch' or something". On the way to the guardhouse accused said he "was sorry he got the wrong guy". It was clearly established by the evidence that accused fully intended to shoot McMurtry, but that he killed Fields by mistake. The fact that the bullet missed McMurtry and hit Fields does not provide a defense as to the existence of malice aforethought on the part of accused as to Fields. That fact does not alter the character of the offense of assault with intent to murder McMurtry (Pars. 148a, 1491, M.C.M., 1928, pp. 163-164, 178). Accused was not acting in self-defense, nor was there any evidence of provocation.

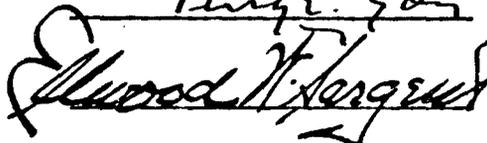
The defense contended, in effect, that accused was too drunk to entertain the specific intent required with reference to the offenses alleged (Pars. 126, 1491, M.C.M., 1928, pp. 135, 179). Although the actions and appearance of accused would indicate that he had been drinking and was possibly, to some extent, under the influence of liquor, it was established in evidence that immediately before the incident accused spoke coherently, in a normal tone of voice, and understood what was said to him. No odor of alcohol was observed, and he did not stagger. The court was fully warranted in determining, as shown by its findings of guilty, that accused was capable of entertaining the specific intent required.

6. The charge sheet shows that accused is 24 years of age. He was inducted January 13, 1942.

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 and the sentence. Confinement in a penitentiary is authorized for the offenses of murder and of assault with intent to commit murder, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, by sections 454 and 455, respectively, Title 18, United States Code.

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.

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

(217)

SPJGK
CM 229652

FEB 2 1943

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

v.

Private Oscar Brown (38052394),
Company A, 733rd Military Police
Battalion.

SOUTHERN LAND FRONTIER SECTOR,
WESTERN DEFENSE COMMAND.

Trial by G.C.M. Convened at Papago
Park, December 7, 1942. Dishonorable
discharge and confinement for twenty
(20) years. Disciplinary Barracks.

REVIEW BY THE BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Oscar (NMI) Brown, Company A, 733rd Military Police Battalion, did at Camp Sibert, Nevada, on or about June 13, 1942, lift up a weapon to wit: A Tompson Sub-Machine Gun, against 1st Lt. George F. Moore, his superior officer, who was then in the execution of his office.

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

Specification: In that Pvt. Oscar (NMI) Brown, Company A, 733rd Military Police Battalion did, at Camp Sibert, Nevada, on or about June 13, 1942, unlawfully enter the supply room of Company A, 733rd Military Police Battalion, Camp Sibert, Nevada with intent to commit a criminal offense, to wit: Misappropriation of Government Property.

He pleaded not guilty to Charge I and its Specification, and guilty to Charge II and its Specification. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor

for twenty (20) 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 for action under Article of War 50½.

3. The evidence shows that at about 11:50 p.m., June 12, 1942, at Camp Sibert, Nevada (R. 25), accused, who had been drinking (R. 28, 12, 17, 35), and had the odor of liquor on his breath (R. 28, 13, 35), seemed a little drunk (R. 28), but was not staggering (R. 28), went alone to the Supply Room of Company "A", 733rd Military Police Battalion (R. 25), in which at that time were stored, among other items, in an unlocked gun rack (R. 29), a Thompson sub-machine gun, caliber .45, property of the United States furnished and intended for the military service (Ex. A), of the value of \$230.94 (Ex. B), and, in an unlocked ammunition box, ammunition for the same (R. 29, 37). Accused, without permission of anyone (R. 26), opened the unlocked door to the supply room, entered, turned on the lights (R. 25, 26) and encountered Corporal Otis C. Green, then Charge of Quarters for Company A, 733rd Military Police Battalion, who was lying down therein but was not asleep (R. 28). Accused was carrying a shot gun (R. 26). Corporal Green testified that accused pointed the gun at him (R. 28) and

"He (accused) just told me to sit down if I knew what was good for me. (R. 28) * * * told me he wanted some ammunition and I told him there wasn't any in there and he said it was, and I got up and tried--asked him what was wrong with him and he said, 'Well, I just want some ammunition', and he looked all around until he found--he found some, some for the sub-machine gun, and he got the sub-machine gun and he went on out. (R. 25, 26) Accused said * * * 'somebody had been messing with him * * * he had been tired of people messing with him.'" (R. 30)

Accused without authority took the Thompson sub-machine gun from the rack and some ammunition from the box (R. 27, 34), loaded the machine gun, left the supply room with the loaded gun (R. 29), and left his shot gun near the front door of the room (R. 29, 30). Corporal Green immediately (R. 37) notified the guard house of the theft (R. 30, 31) and between 11:30 p.m. and 12:00 p.m., talked on the telephone to the Corporal of the Guard (R. 32, 44), who communicated with the Sergeant of the Guard. The Sergeant of the Guard "got a squad of men and went down there on his way down to 'A' Company" (R. 44).

First Lieutenant George F. Moore, 733rd Military Police Battalion, acting officer of the day on the night of June 12-13, 1942, at Camp Sibert (R. 9), engaged in a tour of inspection of the posts (R. 40). He had not

been informed that accused had stolen the sub-machine gun and ammunition or "there had been a riot call from 'A' Company." (R. 39, 40) In the course of this tour he parked his "jeep" across the street from the guardhouse (R. 9, 18) where the area was well illuminated by a street light (R. 18) and talked to the sentry, whose post was around the hospital (R. 9, 40). At about 1.30 a.m., June 13, he observed accused sitting on the seat of the "jeep" beside his driver (R. 10). Lieutenant Moore testified:

"He didn't have a cap on; he didn't have a blouse on. I stepped up to the 'jeep' and saw that he had a Thompson machine against the side of the driver. I asked him what he was going to do. He says, 'I am going out to my post--no, I am going to Las Vegas.' I said to him, I said, 'You are not going any place.' When I said that, he jumped out of the 'jeep' and threw-turned the Thompson machine gun, which was the gun he had, on me, and started backing away. As he started backing away, the gun moved away so he wasn't pointing it directly at me. I said to him, I said, 'Wait a minute, soldier, I want to talk to you', and when I did he threw the gun back on me and started backing away toward the corner of the hospital. I kept walking toward him slowly. I said again, 'Wait a minute, soldier, I want to talk to you', and he just kept the gun back and forth like that (indicating), kept backing away so I told him to halt. He didn't do it and he got around the corner of the hospital and stood there for about a minute, I would judge, not any longer, with the gun kind of throwing it back and forth and then disappeared into the darkness." (R. 10)

Accused was about two feet from the witness when spoken to (R. 10) and should readily have recognized him as his superior officer (R. 10, 16). He held the sub-machine gun in an alert position (R. 11, 12, 17), said nothing while pointing it (R. 11) and did not turn his back on Lieutenant Moore (R. 12). Lieutenant Moore testified that accused's act in covering him with the gun was not accidental (R. 10, 11), and that "at the outset, when he first started, he started to turn sideways, but he did not." (R. 12). His actions indicated to Lieutenant Moore that he meant to do him actual harm (R. 12). Lieutenant Moore followed accused at a distance of 35 or 40 feet (R. 12) but, though armed did not attempt to draw his weapon as he had no chance to do so (R. 13) and he did not know at the time whether the sub-machine gun was loaded (R. 14). The unarmed driver of the "jeep", from that vehicle (R. 13), and the Corporal of the Guard, from inside the guardhouse

saw accused raise his weapon against Lieutenant Moore but did nothing (R. 19).

Accused was later found asleep in his own bunk in barracks. The loaded sub-machine gun "was up on the shelf at the head of the bed" (R. 34, 36). It was taken from the shelf and given to the Charge of Quarters (R. 36). Accused was awakened and confined in the guardhouse (R. 35). Accused made an unsworn statement as follows:

"On or about June 12, 1942, Camp Sibert, Nevada, I had been drinking heavily all evening and late in the evening about 11:50 P.M. I entered the supply room of Company 'A', 733rd Military Police and asked 'Who is there?' The person in the supply room replied 'Green'. I left the supply room the second time I had with me a shotgun, which was unloaded at the time, and after entering I laid the gun on the counter. I asked the C. Q., Corporal Green, for some amunition, and he said that there was none. While I was standing there I saw some sub-machine guns standing there in the racks and also some amunition which was under the counter. I took one of the sub-machine guns and loaded two clips of ammunition for the sub-machine gun. At this time the Corporal made no attempt to stop me, but merely tried to talk me out of it. No physical motion to stop me was made, and no order was given. He merely asked me not to do it and said that I shouldn't. Then I left the supply room and went to the guard house where I saw the O. D.'s 'peep'. When I got to the 'peep' I got in beside the driver and laid the gun across my lap. Then I asked the driver to take me to Las Vegas, but I did not threaten him or point the gun at him. The Officer of the Day then approached the 'peep' and asked me where I was going and I said that I was going back to Las Vegas. Then the Officer of the Day called the Sergeant of the Guard and I got out of the 'peep' and walked away. I was walking away from the Officer of the Day with my back to him and at no time did I point the gun at him.

I realize now that I was doing wrong at the time, but as I was under the influence of drinks, I hardly feel responsible for my actions." (R. 38, 39)

4. The evidence clearly establishes that at the time and place alleged in the Specification under Charge I the accused did lift a weapon, to-wit, a Thompson sub-machine gun, against 1st Lieutenant George F. Moore, his superior officer, who was at the time acting officer of the day, engaged in a tour of inspection of the guard. This was a violation of the 64th Article of War.

The evidence and pleas of guilty to Charge II and its Specification, furnish clear proof that at the time and place specified accused did unlawfully enter the supply room of Company A, 733rd Military Police Battalion, by opening a closed door, and that he effected the entry with the intention of committing a criminal offense, to-wit, misappropriation of Government property, the sub-machine gun and ammunition.

Accused had been drinking but the court was justified in concluding that he was not so drunk as to be unable to entertain the specific intent involved in his offenses.

5. The charge sheet shows that accused is 24 years of age. He entered the military service on February 14, 1941. He served for a time with the 25th Infantry.

6. 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.

Richard W. [Signature], Judge Advocate.

Andrew J. [Signature], Judge Advocate.

Fletcher R. [Signature], Judge Advocate.

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

(223)

SPJGH
CM 229681

JAN 23 1943

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

v.)

Privates WILLIAM BROOKS (36391136),)
JOSEPH F. FRASER (31140240), Corporal)
MAURICE E. FULLER (39013188), Privates)
EUGENE HENRY, Jr. (38063310), LEON J.)
HUBBARD (37131350), Technician Fifth)
Grade ALPHONZO LOVINGS (37131329),)
Privates JAMES W. PEARSON (34099178),)
OLIN PITTS (34065198), ROBERT M.)
QUARLES (32186181), BEN F. ROBINSON)
(34099031), JOHN W. WATERS (32186558),)
HARVEY WILLIAMS, Jr. (38179227), and)
Private First Class WILLIE RUFUS)
(37131308), all of 608th Ordnance)
Company (AM). Private CURLEY O'NEAL)
(12036581), Nolle Prosequi.)

THIRD SERVICE COMMAND

Trial by G.C.M., convened
at Camp Pickett, Virginia,
November 6, 7, and 9, 1942.
As to each; Dishonorable
discharge. Confinement;
as to Brooks, Hubbard,
Pearson, Pitts, Quarles,
Robinson, Rufus, and
Williams - five (5) years;
as to Henry - seven (7)
years; as to Fraser and
Lovings - eight (8) years;
as to Fuller and Waters -
ten (10) years. As to
each; Disciplinary Barracks.

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

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

W. S. Hill, Judge Advocate.
L. E. Lyon, Judge Advocate.
Edward H. Sargent, Judge Advocate.

(224)

SPJGH
CM 229681

1st Ind.

War Department, J.A.G.O., FEB 2 - 1943 - To the Commanding General,
Third Service Command, Baltimore, Maryland.

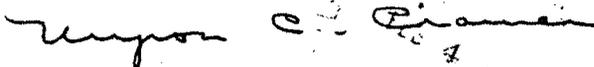
1. In the case of Privates William Brooks (36391136), Joseph F. Fraser (31140240), Corporal Maurice E. Fuller (39013188), Privates Eugene Henry, Jr. (38063310), Leon J. Hubbard (37131350), Technician Fifth Grade Alphonzo Lovings (37131329), Privates James W. Pearson (34099178), Olin Pitts (34065198), Robert M. Quarles (32186181), Ben F. Robinson (34099031), John W. Waters (32186558), Harvey Williams, Jr. (38179227), and Private First Class Willie Rufus (37131308), all of 608th Ordnance Company (AM), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentences.

2. In the case of Corporal Maurice E. Fuller and in the case of Private John W. Waters, the driver of the truck, it is recommended that the sentence of each be ordered executed.

In the case of the remaining accused, Privates William Brooks, Joseph F. Fraser, Eugene Henry, Jr., Leon J. Hubbard, James W. Pearson, Olin Pitts, Robert M. Quarles, Ben F. Robinson, Harvey Williams, Jr., Private First Class William Rufus, and Technician Fifth Grade Alphonzo Lovings, in view of the nature of the offense and in order that each may be held in the Army for possible further military service, it is recommended, as to each, that the execution of that portion of the sentence adjudging dishonorable discharge be suspended, and that the place of confinement be changed from the United States Disciplinary Barracks, Fort Leavenworth, Kansas, to a detention and rehabilitation center (Cir. 6, W.D., Jan. 2, 1942).

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 229681).



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



4

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

(225)

SPJGN
CM 229813

FEB 24 1943

UNITED STATES)

v.)

Private ALBERT C. TURNER)
(38038709), Company A,)
733rd Military Police)
Battalion.)

SOUTHERN LAND FRONTIER)
WESTERN DEFENSE COMMAND)

Trial by G.C.M., convened at
Papago Park, Phoenix, Arizona,
December 24, 1942. Dishonor-
able discharge and confinement
for thirty-five (35) years.
Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and COWLES, 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 63rd Article of War.

Specification: In that Pvt. Albert C. Turner, Co A, 733rd M.P. Battalion did, at Phoenix, Arizona, on or about September 15, 1942, behave himself with disrespect toward 2nd Lt. L.W. Stiles, 364th Infantry, his superior officer, by saying to him "I'm not going to do it" "I'm not going to take any orders from a God dam little Second Lieutenant" "I'm not going to take orders from a little mother fucking Second Lieutenant"., or words to that effect.

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

Specification: In that Pvt Albert C. Turner, Co A, 733rd M.P. Battalion, having received a lawful command from 2nd Lt L.W. Stiles, 364th Infantry, his superior officer, to roll his pants down and his sleeves and button his collar, did at

Phoenix, Arizona, on or about September 15, 1942, willfully disobey the same.

CHARGE I: (Supplemental) Violation of the 69th Article of War.

Specification: In that Private Albert Turner, Company "A", 733rd MP Bn., having been duly placed in confinement in Camp Stockade, Papago Park, Phoenix, Arizona, on or about September 19, 1942, did, at Papago Park, Phoenix, Arizona on or about October 22, 1942, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: (Supplemental) Violation of the 58th Article of War.

Specification: In that Private Albert Turner, Company "A", 733rd MP Bn., did, at Papago Park, Phoenix, Arizona on or about October 22, 1942 desert the service of the United States and did remain absent in desertion until he surrendered himself at Camp Barkeley, Texas on or about October 28, 1942.

The accused pleaded not guilty to Charges I and II, and Supplemental Charge II, and all Specifications thereunder, and guilty to Supplemental Charge I and the Specification thereunder. He was found guilty of all Charges and Specifications. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 35 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on the night of September 15, 1942, the accused was brought into the military police office of the 364th Military Police Detachment at Phoenix, Arizona, with his uniform in a very disorderly condition, his pants and sleeves rolled up, his shirt unbuttoned and his general appearance showing that he had been drinking. Second Lieutenant Lester W. Stiles, the military police officer of the 364th Military Police Detachment, who was on duty at that time, observed the accused as he was brought into the police office, told him that he was a "very sorry looking soldier", and asked him if he were a soldier. The accused replied that he was, and Lieutenant Stiles then ordered him to roll down his pants and sleeves and to button up his shirt. The accused refused to obey the order,

and the order was repeated, but the accused again refused to obey it. As the accused was being conducted from the office he remarked in a loud voice that he was not going to "take orders from any God-damn little 2nd Lieutenant", and "Fuck the white son-of-a-bitch", or "Mother fucking Second Lieutenant". These statements were made in the presence of two military policemen, a woman elevator operator, Captain C. M. Goodnight, and Police Sergeant Wayne Morris. The accused was described as having been drinking but as not being "absolutely drunk" and as not being "the kind of man we would lock up for drunkenness". (R. 7-11, 13-16)

Thereafter on October 21, 1942, the accused was in confinement in the regimental stockade of the 364th Infantry, Phoenix, Arizona. At about 9:30 p.m. on that date he called the sergeant of the guard and requested to be permitted to leave the stockade. He stated to the sergeant of the guard that his name was "Trustee Hall". The sergeant of the guard, believing that the accused was a trusty named Hall permitted him to leave the stockade. The sergeant of the guard soon discovered his error when Hall returned to the stockade. At the time the accused left the stockade he was dressed in fatigue clothes and did not have an overcoat. The evidence shows further that no order had been issued releasing the accused, and that he was lawfully confined on October 21, 1942.

On October 28, 1942, the accused surrendered himself to the military police in the city of Abilene, Texas. At the time of his surrender, the accused was dressed in civilian clothes. (R. 22-23; Ex. C)

4. The accused elected to remain silent and no evidence for the defense was presented.

5. The Specification, Charge I, alleges that the accused "*** did, at Phoenix, Arizona, on or about September 15, 1942, behave himself with disrespect toward 2nd Lt. L. W. Stiles, *** his superior officer, by saying to him 'I'm not going to do it' 'I'm not going to take any orders from a God dam little Second Lieutenant' 'I'm not going to take orders from a little mother fucking Second Lieutenant'".

The Specification, Charge II, alleges that the accused did on the same date as set forth in the above described Specification, wilfully disobey the lawful command of Lieutenant Stiles, his superior officer, by refusing to roll his pants and sleeves down and button up his collar.

The facts show that on the date alleged in the above two Specifications, the accused did behave himself with disrespect toward Lieutenant Stiles by addressing to him the profane and obscene remarks alleged. This same conduct which constituted disrespect to Lieutenant Stiles was also marked by the wilful disobedience of the accused to

obey the command of Lieutenant Stiles to the accused to roll down his pants and sleeves and button up his collar. Although the two Specifications allege two distinct and separate offenses, the two offenses grew out of one transaction, and the accused should, therefore, be punished only for the major offense. The major offense, however, of wilful disobedience provides in time of war for a maximum penalty of death.

6. The Specification, Charge I of the Supplemental Charges, alleges that the accused "*** did, at Papago Park, Phoenix, Arizona, on or about October 22, 1942, escape from said confinement before he was set at liberty by proper authority". The evidence shows very clearly that the accused, by falsely pretending to be another prisoner, escaped from confinement on October 21, 1942.

7. The Specification, Charge II of the Supplemental Charges, alleges that the accused did, on or about October 22, 1942, desert the service and did remain in desertion until he surrendered himself at Camp Barkeley, Texas, on or about October 28, 1942. The evidence clearly establishes the facts that the accused escaped from confinement October 21, and that he traveled to Camp Barkeley, Texas, where he surrendered himself in civilian clothes on the date alleged. The evidence showing the escape of the accused from confinement following his wilful disobedience and disrespect to a superior officer, his act in traveling a considerable distance from his post, and his act of abandoning his uniform for civilian clothes justified the court in drawing the inference that the accused at some time during his absence had the intent to abandon permanently the service (par. 130, M.C.M., 1928).

8. The charge sheet shows that the accused is 23 years of age and that he was inducted into the service on February 14, 1941.

9. 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. In time of war a sentence of dishonorable discharge, total forfeitures and confinement for 35 years or such other punishment as a court-martial may direct, is authorized upon conviction of a violation of Article of War 58 or 64.

Charles Besson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate..

Willard B. Cow, Judge Advocate.

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

(229)

SPJGK
CM 229844

FEB 20 1943

UNITED STATES	)	SOUTHERN CALIFORNIA SECTOR
	)	WESTERN DEFENSE COMMAND
v.)	
Second Lieutenant WADE C.	)	Trial by G. C. M., convened at
WILLEY (O-1042208), Coast	)	Pasadena, California, December
Artillery Corps.	)	17, 1942. Dismissal and total
	)	forfeitures.

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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: Violation of the 61st Article of War.

- Specification: In that Second Lieutenant WADE C. WILLEY, 354th Coast Artillery Searchlight Battalion, Culver City, California, did, without proper leave, absent himself from his duties at First Platoon, Battery C, 354th Coast Artillery Searchlight Battalion, Manhattan Beach, California, from about 4:00 P.M., November 6, 1942, to about 9:00 P.M., November 12, 1942.

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

Specification: In that Second Lieutenant Wade C. Willey, Three Hundred Fifty-fourth Coast Artillery Searchlight Battalion, Los Angeles, California, having received a lawful command from First Lieutenant Louis Taylor, Three Hundred Fifty-fourth Coast Artillery Searchlight Battalion, Los Angeles, California, his superior officer, to return to Headquarters, Three Hundred fifty-fourth Coast Artillery Searchlight Battalion, did, at Beverly Hills, California, on or about November 23, 1942, willfully disobey the same.

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

Specification: In that Second Lieutenant Wade C. Willey, Three Hundred Fifty-fourth Coast Artillery Searchlight Battalion, Los Angeles, California, did, at Los Angeles, California, on or about November 22, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended in Beverly Hills, California, on or about November 24, 1942.

He pleaded guilty to the Charge and its Specification and to Additional Charge I and its Specification, and not guilty to Additional Charge II and its Specification. He was found guilty of the Charge and its Specification and of Additional Charge I and its Specification, guilty of the Specification, Additional Charge II, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself from" and "without leave", of the excepted words not guilty, of the substituted words guilty, and not guilty of Additional Charge II but guilty of violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that on November 6, 1942, upon expiration of a pass that expired at 4 p.m., accused failed to return to his battery then stationed at Manhattan Beach, California. He thus became absent without leave. He remained absent (R. 7, 8; Ex. A) until about 6 p.m., November 12, when he was apprehended at his home about nine or ten miles from his station (R. 7; Ex. A). (Charge and Specification)

Upon return to his station on November 12 accused was placed in arrest (R. 8) in quarters (R. 10). On November 22, 1942, he was given permission by his battery commander to go to his home with the understanding that he was to return to his battery at 1 a.m., November 23. He did not return (R. 10) and remained absent without leave (Ex. B) until apprehended by civil police in Beverly Hills, California, at about 11:15 p.m. on November 24 (R. 24, 25). On November 23, during the absence of accused, First Lieutenant Louis Taylor, adjutant of the 354th Coast Artillery Searchlight Battalion, went to the home of accused in Beverly Hills at the direction of the battalion commander and while there verbally ordered accused to return with Lieutenant Taylor to battalion headquarters. Accused refused to obey the command and did not return as

directed. (R. 15) At about 4:50 p.m., November 23, an officer went to accused's house and told accused that it was his duty to take him back to his organization (R. 18). Accused requested and received permission to make some arrangements for his departure and while temporarily out of sight eluded the officer and disappeared. He later telephoned the officer and expressed his regrets, stating that he "had a few things to take care of and had to manage it that way". (R. 19) As noted, he was apprehended later in the day (R. 24, 25). (Additional Charges and Specifications)

Accused testified that on November 5 he obtained a pass for the purpose of getting married to a Mrs. Gosnell. The couple went to Las Vegas, Nevada, and did not return to the Los Angeles area until November 6. Upon his return accused told his wife that he had been married before and a protracted controversy was precipitated. On November 22 accused returned to his wife's house. At this time an attorney told his wife that her marriage would terminate her income of \$2000 to \$2500 a month and she threatened to apply for annulment of the marriage. The two "had a few drinks. I mean not sociable, just foolish madness". (R. 28) Some relatives of accused protested the marriage (R. 29). Accused refused to obey Lieutenant Taylor's order to return to battalion headquarters (R. 30). The controversy between accused and his wife continued (R. 29-31). The wife was hysterical (R. 33). Accused's absences were the result of his desire and efforts to adjust his difficulties (R. 37).

The wife of accused testified for the defense in substantial corroboration of accused's testimony as to the controversies between them (R. 45-47). She testified that she "wasn't calm" (R. 46). Another witness for the defense testified that the wife was "highly wrought" (R. 39) and that following some drinking she became hysterical and "erratic" (R. 39, 41). An attorney testified for the defense that he saw Mrs. Willey about November 22, that he observed that she was "rather hysterical" and that her behavior was abnormal (R. 43). Captain William J. Schubmehl, 354th Coast Artillery Searchlight Battalion, testified for the defense that he had known accused about six months, that his work as an officer had been satisfactory and that he "was of value to the service" (R. 48).

A copy of a report by a neuropsychiatrist of the station hospital, Camp Haan, California, with respect to accused, was introduced in evidence by the defense (R. 48). The report stated that accused was admitted to the hospital on November 25, 1942, suffering from "psycho-neurosis, reactive depression with agitation and irritability" but

that he was of "sound mind" and mentally responsible for his acts (Ex. 2).

4. The uncontradicted evidence establishes the absences without leave by accused as found by the court under the Charge and its Specification and under Additional Charge II and its Specification. The evidence also establishes that accused deliberately disobeyed the lawful command given to him by Lieutenant Taylor to return to his battalion headquarters, as alleged under Additional Charge I and its Specification. The disobedience was plainly willful and was a violation of Article of War 64. Accused testified that his derelictions were the result of his efforts to adjust his marital difficulties. It was not contended and the evidence does not indicate that he was not mentally responsible for his actions.

5. War Department records show that accused is 29 years of age. He attended the University of Southern California for two years. He entered the military service on November 14, 1941, and, upon completion of a course of instruction at an officers' candidate school, was appointed a second lieutenant, Army of the United States, on July 31, 1942.

6. Attached to the record of trial is correspondence showing that on October 30, 1942, accused was punished under Article of War 104 for absence without leave, the punishment consisting of forfeiture of \$50 pay and a reprimand.

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 violation of Articles of War 61 and 64.

Audrey L. Copp, Jr., Judge Advocate.
Wm. J. Trammell, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

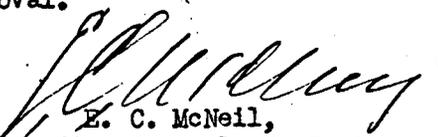
1st Ind.

War Department, J.A.G.O., FEB 22 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 Wade C. Willey (O-1042208), Coast Artillery 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. Accused absented himself without leave on two occasions, the first time for six days and the second time for two days. During his second absence he willfully disobeyed a command by his battalion adjutant to return to his station. He contended that his offenses were occasioned by his efforts to adjust domestic difficulties arising from a marriage contracted just prior to the first absence. He was sentenced to be dismissed and to forfeit all pay and allowances due or to become due. A few days prior to his offenses accused had been punished under Article of War 104, by a substantial forfeiture and a reprimand, for absence without leave. His record while serving as an officer over a period of about four months was satisfactory. Under all the circumstances I do not believe that future useful service by accused as an officer can be expected. Accordingly 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.


E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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. 61, 26 Mar 1943)

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

(235)

SPJGN
CM 229845

JAN 23 1943

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
)	
v.	)	Trial by G.C.M., convened at
	)	West Point, New York, December
Cadet RICHARD C. MARTIN,	)	30, 1942. Dismissal.
Fourth Class, United States)	
Corps of Cadets.)	

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

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

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

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

Specification: In that Cadet Richard C. Martin, Fourth Class, United States Corps of Cadets, did, at New York, New York, without proper leave, absent himself from his command at about 12:30 a.m., November 8, 1942, and did wrongfully so remain absent therefrom until about 12:40 a.m., November 9, 1942.

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

Specification 1: In that Cadet Richard C. Martin, Fourth Class, United States Corps of Cadets, being in New York City pursuant to travel orders to the United States Corps of Cadets issued by Headquarters United States Corps of Cadets, bearing date of November 2, 1942, and entitled Movement Orders No. 12, for the Army-Notre Dame football game at Yankee Stadium, New York City, on November 7, 1942, did, at New York City, on November 8, 1942, wrongfully and wholly fail to

obey the order to said Corps of Cadets to re-assemble at a stated place and time for the return trip to West Point, contained in paragraph 2 and other pertinent parts of said Movement Orders; to the prejudice of good order and discipline of said Corps of Cadets.

Specification 2: In that Cadet Richard C. Martin, Fourth Class, United States Corps of Cadets, did, without proper authority, absent himself from his quarters at West Point, New York, between tattoo on November 7, 1942, and reveille on November 8, 1942, for a longer period than half an hour, to wit, about three and one-half hours, this in violation of paragraph 141, Regulations for the United States Military Academy, 1931.

He pleaded guilty to all Specifications and Charges and was found guilty of all Specifications and Charges. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but recommended it be commuted to suspension without pay and allowances until August 27, 1943, to join the then Fourth Class, and thereafter to be confined to restricted limits for three months and serve sixty-six punishment tours, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution, in brief, is as follows:

On November 7, 1942, Lieutenant Colonel Victor H. King was tactical officer in command of Company G, United States Corps of Cadets, in a movement to the Notre Dame game in New York City. The accused, a member of that company did not have authority to be absent from any formation in New York City on that date, nor on November 8, 1942.

Movement Orders No. 12, dated November 2, 1942, which had been posted on the bulletin board, "put out by Headquarters United States Corps of Cadets", West Point, was introduced in evidence, without objection, as Prosecution's Exhibit No. 1. This gives the place of assembly for the Corps after the game as the foot of West 41st Street, Hudson River Day Line pier. Assembly was at 12:30 a.m., November 8, 1942. The accused was not present at that time and place, nor on the boat for the return trip and did not come back with the company. He did not have authority to be absent from his quarters between tattoo on November 7 and reveille on November 8, 1942. The Corps returned about 4:50 in the morning of November 8, and reveille was about 8:20 a.m. (R. 6-8).

On November 8 and 9, 1942, Lieutenant Colonel Morris K. Henderson was officer in charge of cadet headquarters. The accused reported to him at about 12:40 a.m., November 9 and was placed under arrest (R. 9).

Movement Orders No. 12 were explained to the company of which accused was a member by Cadet Robert L. Evans, First Class. The accused was present and went to New York (R. 10, 11).

The extract copy of the morning report of Company G, 2nd Regiment, United States Corps of Cadets, for November was introduced, without objection, as Prosecutions's Exhibit No. 2, showing accused, duty to A.W.O.L., absent on November 8, 1942, at the 12:30 a.m. formation embarkation for return to West Point, and on November 9, A.W.O.L. to arrest, returned to station about 12:40 a.m., November 9, 1942 (R. 11).

The court took judicial notice of Paragraph 141, Regulations for the United States Military Academy, 1931, relative to cadets absent from their quarters between tattoo and reveille being subject to dismissal or other punishment (R. 12).

4. The defense after stating the accused by his plea had acknowledged he had committed the offenses alleged, introduced evidence to show a reason for the actions. Cadet John G. Wheelock, First Class, commander of Company G, 2nd Regiment, of which accused was a member, was told by him in September or October that he was having trouble with his eyes, thought he had better resign (R. 12-14). Cadet James D. Gould, Fourth Class, a roommate of the accused, had noticed accused was having trouble with his eyes, and had complained about them (R. 14, 15). Cadet Robert A. Evans, Fourth Class, had also noticed that accused was having trouble with his eyes (R. 16-18).

Major Frederick Reid and Captain Patrick H. Drury, Jr., both Medical Corps, testified fully as to accused's trouble with his eyes and the treatment and his mental condition. Captain Drury further stated he had found nothing of a physical nature to interfere with the performance of his duty as a cadet.

5. The accused neither testified under oath nor made a statement.

6. The plea of guilty by the accused is fully corroborated by the evidence and is not qualified in any way.

7. The charge sheet shows that the accused was a private in the 113th Cavalry, Iowa National Guard from August 16, 1939, to June 15, 1942, and that he was admitted to the United States Military Academy on July 1, 1942.

(238)

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 and the sentence, and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Articles of War 61 or 96.

Charles B. Besson, Judge Advocate.

Dorame D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 27 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 Cadet Richard C. Martin, Fourth Class, United States Corps of Cadets.

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 action of the accused in absenting himself without leave from his organization on November 8, 1942, for one day, necessarily included the offense of absence for more than one half hour from his room between tattoo on November 7 and reveille on November 8, 1942. The offense of failure to obey the order to re-assemble for the return trip from New York to West Point was closely related thereto. The accused should, therefore, be punished only for the major offense. The reviewing authority recommended that the sentence be confirmed but commuted to suspension without pay until August 27, 1943, thereupon to join the then Fourth Class, and thereafter be confined to restricted limits for a period of three months, and serve sixty-six punishment tours. I agree with this recommendation and accordingly recommend that the sentence be confirmed but commuted as recommended by the reviewing authority.

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,
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 but commuted in accordance with recommendation of The Judge Advocate General. G.C.M.O. 57, 25 Mar 1943)

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

(241)

SPJGN
CM 229958

MAR 29 1943

UNITED STATES	)	UNITED STATES ARMY FORCES
	)	IN CENTRAL AFRICA
v.)	
Privates HERBERT C. ABRAHAMS	)	Trial by G.C.M., convened
(32190764), FOSTER BELFORD	)	at Nairobi, Kenya, Decem-
(33068724), ROBERT E. BRADFORD	)	ber 4, 5, and 6, 1942. As
(39018350), PRESTON CLARK	)	to Roy: Nolle prosequi to
(12036657), ZEDRICK HAMPTON	)	all Charges; Carrol, Jr.
(35280847), WILLIAM PARKER	)	and Rollins; acquitted;
(34119410), WILLIE M. RIDDICK	)	Clark, Parker, Riddick,
(33044248), JOHN P. ROLLINS	)	Smith, Thompson, and A.O.
(13027773), LUTHER ROY (36123887),	)	Williams: Sentences dis-
ROBERT S. SMALLS (33104175), JAMES	)	approved by reviewing auth-
A. TILGHMAN (33068702), JAMES A.	)	ority; All others: dis-
THOMPSON (14012672), ALONZO O.	)	honorable discharge and
WILLIAMS (35250681), COLLIER YOUNG	)	confinement: Abrahams,
(33068760), and Corporal CLINTON T.	)	Belford, and Young, 15
CARROL, JR. (33068823), all Company	)	years; Toney, 18 years;
C, 812th Engineer Battalion (Avn),	)	Allen, Bradford, Hampton,
and Privates WILLIE A. ALLEN	)	Smalls, and Tilghman, 20
(35210387), WILLIAM E. TONEY	)	years; and L. Williams,
(33062976), LONNIE WILLIAMS	)	25 years. All Disciplinary
(34153956), and Private First Class	)	Barracks.
JOHN F. SMITH (34174690), all)	
Headquarters Company, 812th Engi-)	
neer Battalion (Avn).)	

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

1. The Board of Review has examined the record of trial in the case of the soldiers named above.
2. The accused were tried upon the following Charges and Specifications:

CHARGE 7: Violation of the 89th Article of War.

Specification: In that Private Herbert C. Abrahams, Private Foster (NMI) Belford, Private Robert E. Bradford, Corporal Clinton T. Carrol Jr, Private Preston (NMI) Clark, Private Zedrick (NMI) Hampton, Private William (NMI) Parker, Private Willie M. Riddick, Private John P. Rollins, Private Luther (NMI) Roy, Private Robert S. Smalls, Private James A. Tilghman, Private James (NMI) Thompson, Private Alonzo O. Williams and Private Collier Young, all of Company "C", 812th Engineer Battalion; and Private Willie A. Allen, Private First Class John F. Smith, Private William E. Toney, Private Lonnie (NMI) Williams, all of Headquarters Company, 812th Engineer Battalion; being with the 812th Engineer Battalion in the camp at Nairobi, Kenya, on or about November 21, 1942, did, at Nairobi, Kenya, commit a riot, in that they, together with certain other soldiers, the number of whom and whose names are unknown, did, with force and arms, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the Kenya Police, and having so assembled, did unlawfully, riotously, and in a violent and tumultuous manner disturb the peace of the Kenya Police to the terror and disturbance thereof.

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

Specification: In that Private Herbert C. Abrahams, Private Foster (NMI) Belford, Private Robert E. Bradford, Corporal Clinton T. Carrol, Jr., Private Preston (NMI) Clark, Private Zedrick (NMI) Hampton, Private William (NMI) Parker, Private Willie M. Riddick, Private John P. Rollins, Private Luther (NMI) Roy, Private Robert S. Smalls, Private James A. Tilghman, Private James (NMI) Thompson, Private Alonzo O. Williams, and Private Collier (NMI) Young, all of Company "C", 812th Engineer Battalion; and Private Willie A. Allen, Private First Class John F. Smith, Private William E. Toney, Private Lonnie (NMI) Williams, all of Headquarters Company, 812th Engineer Battalion, acting jointly, and in pursuance of a common intent, did, at Nairobi, Kenya, on or about November 21, 1942, with intent to do them bodily harm, commit an assault upon certain members of the Kenya Police, by shooting at them with dangerous weapons, to wit, service rifles.

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

Specification: In that Private Herbert C. Abrahams, Private Foster (NMI) Belford, Private Robert E. Bradford, Corporal Clinton T. Carrol, Jr., Private Preston (NMI) Clark, Private Zedrick (NMI) Hampton, Private William (NMI) Parker, Private Willie M. Riddick, Private John P. Rollins, Private Luther (NMI) Roy, Private Robert S. Smalls, Private James A. Tilghman, Private James (NMI) Thompson, Private Alonzo O. Williams, and Private Collier (NMI) Young, all of Company "C", 812th Engineer Battalion; and Private Willie A. Allen, Private First Class John F. Smith, Private William E. Toney, Private Lonnie (NMI) Williams, all of Headquarters Company, 812th Engineer Battalion; acting jointly, and in pursuance of a common intent, did, at Nairobi, Kenya, on or about November 21, 1942, feloniously take, steal and carry away ammunition of the value of about \$55.00, property of the United States intended for the Military service thereof.

Each accused pleaded not guilty to the Charges and Specifications thereunder. The prosecution withdrew Charge II and the Specification thereunder as to Corporal Carrol, Jr., Private First Class Smith, and Private Young. The prosecution withdrew all Charges and Specifications against Private Roy. Privates Belford, Bradford, Clark, Hampton, Parker, Smalls, Tilghman, Alonzo O. Williams, Allen, and Lonnie Williams were found guilty of all Charges and Specifications. Privates Abrahams, Riddick, Thompson, and Toney were found guilty of Charges I and II, and the Specifications thereunder, and not guilty of Charge III, and the Specification thereunder. Private Young was found guilty of Charge I and the Specification thereunder. Private First Class Smith was found guilty of Charge III and the Specification thereunder. Corporal Carrol, Jr. and Private Rollins were found not guilty of all Charges and Specifications. As to Privates Abrahams, Allen, Hampton, Thompson, and Williams, evidence of one previous conviction of a minor offense was introduced. Privates Abrahams, Belford, Clark, Riddick, Thompson, and Young were sentenced to be discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for 15 years. Privates Bradford, Hampton, Smalls, Tilghman, and Allen received the same sentence except that the period of confinement was designated as 20 years. Privates Parker, Alonzo O. Williams, and Toney received the same sentence except the period of confinement was designated as 18 years. Private Lonnie Williams received the same sentence except the period of confinement was designated as 25 years. Private Smith was sentenced to be confined at hard labor for 6 months and to forfeit \$40 per month for a like period. The

reviewing authority approved the sentences in the case of Privates Abrahams, Allen, Belford, Bradford, Hampton, Smalls, Tilghman, Toney, Lonnie Williams, and Young, and designated "The United States Disciplinary Barracks at Leavenworth, Kansas," as the place of their confinement. The reviewing authority disapproved the sentences adjudged against Privates Clark, Parker, Riddick, Thompson, Alonzo Williams, and Private First Class Smith, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on the evening of November 21, 1942, Privates Robert Rucker, Herbert C. Abrahams, Lonnie Williams, and Collier Young left their camp at Nairobi, Kenya, and called at the Eastleigh police station of Kenya at about 8:10 p.m. with the purpose of securing the release of a native girl who was confined there. Private Abrahams was permitted to talk with the girl at the police station and while there he endeavored, either by force or by the offer of a cash deposit, to secure her release. The efforts of Private Abrahams to secure the release of the native girl resulted in a fight between Abrahams and his companions and the native police. In the fight, Assistant Inspector Mitchell, a white officer of the Kenya police, received a cut on the side of his head from a blow struck by Lonnie Williams. The American soldiers testified they were outnumbered and took to flight. Private Rucker was, however, arrested and detained by the native police. In a short time, however, a group of American soldiers returned to the police station and demanded Rucker's release. At this time an American military police car came to the station and Rucker was released to the military police and returned to his camp (R. 31-33, 48-49, 51-52, 54-55, 62-63).

The men who were engaged in the fight with the native police in the Eastleigh police station returned to their camp and at about 9:30 p.m. were at the battalion medical tent receiving treatment for their injuries. Three of the men were bleeding. A crowd of soldiers gathered in and about the tent, and the crowd became excited and angry. An officer then ordered the men to disperse and return to their respective quarters (R. 9-10, 35-36).

At about 10:15 on the same evening, Privates James A. Tilghman and Robert E. Bradford left camp carrying rifles in violation of orders issued by the officer of the day. They were accompanied by Privates William E. Toney, Lonnie Williams, and Abrahams, none of whom had rifles (R. 22). Later Private John F. Smith left camp about 10:45 (R. 34).

After the report had been made that a number of soldiers with rifles and ammunition had left camp, First Lieutenant Charles G. Burress accompanied by Second Lieutenant Donald J. Sullivan, the sergeant of the guard, and a military policeman drove in a truck to the Eastleigh police

station for the purpose of preventing further trouble between the American soldiers and the native police. On the arrival of this group at the Eastleigh police station, the lights of the truck which Lieutenant Burress was using were left on in order that American soldiers might recognize the truck as an American truck and the soldiers with Lieutenant Burress as American soldiers. Lieutenant Burress went into the station to confer with the officer in charge, and as he came out shots were fired from the rear of the station. The shots whistled over the heads of Lieutenant Burress and his men who fell to the ground. Lieutenant Burress then crawled to the edge of the police station and called out several times in a loud voice to the men in the rear of the police station to cease firing. Neither Lieutenant Burress nor any of the men with him recognized the men who fired the shots as American soldiers, and at that time no attempt was made to determine who fired the shots. The number of shots fired was estimated by witnesses as from 10 to 60 shots. Lieutenant Burress testified that during the firing, he actually thought the shots were being fired by the native police and that he retained that opinion until he had gone into the station and seen the native police being issued ammunition. The native police were at that time issued 190 rounds of ammunition. In the opinion of witnesses, the Kenya police could not have fired the shots because of the direction from which the firing came. After the firing had ceased, Lieutenant Burress posted four military policemen as guards at the police station and returned to camp (R. 7-9, 11-13, 17, 29-31). Constable John Ododa, of the Eastleigh police testified that he could not identify any of the men who fired upon the police station, and that he did not see any firearms. He testified further, however, that he could tell by the language and uniform of the men who fired the shots that they were American soldiers (R. 58-59).

Constable Elisha of Kenya police, testified that he came on duty at the police station at midnight and that at about 1:30 a.m. 15 American soldiers fired about 20 shots. Several of the shots hit the room in which the witness was stationed. The witness could not identify any individual soldier as being among the group who fired the shots. The following morning the police found five or six bullet holes in the rear of the police station, and four or five bullet holes in the walls of the police dormitory. These bullet holes had not previously been observed. No cartridge shells were found in the area where the firing occurred (R. 56, 59).

After the first shooting at the police station, Lieutenant Burress and the sergeant of the guard returned to camp and checked the battalion ammunition supply. They found ammunition and empty bandoliers strewed on the floor of the supply tent. One half a box of ammunition was missing and another box was open, and five clips were missing. Two cases of 30 caliber and one case of 50 caliber cartridges had been broken open. None of the 50 caliber cartridges were missing, but approximately 1,000 rounds of 30 caliber cartridges were missing. No ammunition had been issued to the

soldiers whose conduct is in question. It was stipulated between the prosecution and the defense that the value of the 30 caliber ammunition which was missing from the 812th Engineering Battalion supply tent was greater than \$20 and less than \$50 (R. 12, 14-17, 19, 71).

A chronology of offense as shown by the "occurrence book" at the Eastleigh police station of Kenya was placed in evidence upon the identification by Louis G. Mitchell, Assistant Inspector of the Kenya police. The witness did not, however, testify to the several occurrences recorded in his "occurrence book" from his personal knowledge but read the entries as they had been made or entered by others. These entries are as follows:

"A. There is an entry in the book numbered 53, 8:10 p.m. on 21/11/42. It reads, 'Four American Negroes to station and caused trouble fighting with the constables. They want to release the prisoners who have been arrested in Mathadi from custody by force.'

"In the remarks column: 'Asst. Inspector in charge informed by phone.' That's myself.

"An entry followed that, numbered 55, at 8:55 p.m. on the same date: 'American Negroes to station and the fight goes on again.'

"No. 58, at 10:15 p.m. on the same date: 'Superintendent in charge visits police station and leaves again for the European lines to see Asst. Inspector Mitchell'

"Entry No. 62 at 10:50 p.m.: 'A message, an American Officer to station and reports that American soldiers who have been making trouble have already left the camp and may be coming.'

"Entry No. 63 at 11:20 p.m. on the same date: 'Police Constable John Ododa, to station and reports that there are some people behind the police lines.'

"Entry No. 64 at 11:30 p.m. on the same date: 'I hear some sounds as of revolvers behind the police station and all constables turn out.'

"Entry No. 65 in the handwriting of the superintendent of police at 11:35 p.m. on the same date: 'Superintendent in charge to station to find Lt. Burress, CG 812th Engineers Battalion and Lt. Sullivan DJ of the same unit present at the police station. Master Sergeant W. H. Bell in charge of 5 military police. Shooting finished at about 11:30 or 11:35 p.m. Lt. Burress states that he arrived at about 11:15 p.m. 12 to 15 shots were fired.'

"Entry No. 4 at 1:25 a.m. on 22/11/42 is marked the departure of the Superintendent from the station.

"Entry No. 5 at 3:30 a.m. on 22/11/42 in the handwriting of the superintendent of police: 'Shooting by American negroes. At about 1:30 a.m. shots were fired in the vicinity of the police station by between 15 and 20 negroes. Some shots are alleged to have hit the portals occupied by the African police. No. 2272, 3rd Constable Elisha, telephoned to the European lines and Asst. Inspector Horn Smith and Denny came to the station with 18 African police'. I arrived about five minutes later. 'And shortly afterwards a detachment of military police and two American officers. Search made around the police station for a radius of about half a mile. On returning Captain Donovan, second in command, 812th Engineers Battalion, arrives and states that the men responsible for the shooting are known. Arrangements made for an identification parade at 10 a.m. today.

"Q. Asst. Inspector Mitchell, will you read entry No. 66?

"A. Entry No. 66, at 12 midnight on 21/11/42. 'Loss of a pocket wallet No. 33106172, Robert E. Newman, of 812th Engineering Battalion American Forces. Reports that while he was in the station earlier this evening he lost a small black book containing American money, \$25.00, some American stamps and assorted private papers.'" (R. 51-52).

4. (1) The evidence for the prosecution concerning Private Herbert C. Abrahams shows that Private Abrahams left camp on the evening of November 21, 1942, in company with several soldiers and that he called at the Eastleigh police station at about 8:10 p.m. for the purpose of securing the release of a native girl who was held there. While he was at the police station, he and his companions became involved in a fight with the native police. Thereafter, the accused was in the crowd at the battalion dispensary. Later, he was seen leaving camp between 10 and 11 o'clock in company with several other soldiers in violation of orders restricting him to the limitations of his camp (R. 22, 32, 35).

(2) The evidence for the prosecution concerning Private Willie A. Allen shows that this accused left camp in company with Privates Bradford, Lonnie Williams, Tilghman, Smith, and Corporal Carrol. Evidence also shows that Allen at that time was carrying a rifle (R. 24).

(3) Evidence for the prosecution concerning Private Foster Belford shows that he was absent from camp at bed check at 12:55 a.m., November 22, 1942, and that he was seen returning to camp carrying a rifle at about 2:30 a.m.

(248)

on that date (R. 17, 25).

(4) Evidence for the prosecution concerning Robert E. Bradford shows that Bradford was at the Eastleigh police station at an early hour on the evening of November 21, 1942, and that he at that time engaged in a struggle with the sergeant major in charge of the station. Later he was seen leaving camp between 10 and 11 p.m. carrying a rifle. He was absent at bed check at 12:45 a.m., but was in camp at 1:15 and 2:05 a.m. (R. 17, 22, 59).

(5) The evidence for the prosecution concerning Private Zedrick Hampton shows that he was absent at bed check at 1:46 a.m. and at 4:02 a.m. on November 22, 1942. He was seen with a rifle slung over his shoulder coming into camp in company with Privates Riddick and Thompson at about 4:30 or 5:00 a.m., November 22, 1942 (R. 17, 26).

(6) The evidence for the prosecution concerning Robert S. Smalls was that he was absent at bed check at 2:12 a.m., November 22, 1942, and that he was in camp at 4:25 a.m. on that date. He was seen coming into camp carrying a rifle at 2:30 a.m. He was found to have one unfired bullet in his rifle. This bullet was of the same type as the ammunition that had been stolen (R. 18, 25).

(7) Evidence for the prosecution concerning Private James A. Tilghman shows that he was seen leaving camp at approximately 10:15 p.m., November 21, 1942, in company with Privates Toney, Lonnie Williams, Abrahams, Bradford, and Young. Tilghman was carrying a rifle. He was in his tent with his clothes on at 1:06 a.m. (R. 18, 22).

(8) Evidence for the prosecution concerning Private William E. Toney shows that he was seen leaving camp in company with the soldiers named in paragraph (7) above at approximately 10:15 p.m. on November 21, 1942. He was not carrying a rifle at the time (R. 22).

(9) Evidence for the prosecution concerning Private Lonnie Williams shows that he, in company with Private Abrahams and other soldiers, went to the Kenya police station during the early evening of November 21, 1942, to secure the release of a girl. He was identified as having assailed Assistant Inspector Mitchell, and as having been with Private Belford at the police station when Belford was scuffling with the sergeant major, on duty there. This accused was also at the dispensary, and had an argument there with one of the guards. At that time this accused had a rifle but it was taken from him by First Lieutenant Paul F. Foskett. This accused at that time stated that he wanted to go back to town because people were doing something. Lonnie Williams passed the camp guard between 10 and 11 p.m. with several others, some of whom had rifles (R. 22). He was absent at bed

check at 2 a.m. and in camp at 4 a.m. On the following day, one rifle in his tent showed that it had been recently fired. This rifle was identified as belonging to Private Young (R. 20, 32, 36, 59).

(10) Evidence for the prosecution concerning Private Collier Young shows that this accused accompanied Private Abrahams to the police station with the purpose of securing a release of some girl. He was injured in a fight with the police. He passed the guard without permission between 10 and 11 p.m., in company with several others, carrying a rifle. At that time he was on his way out of camp. He, however, returned to camp without his rifle after going a few steps outside the gate. A fouled rifle belonging to Young was found in his quarters at 2:45 a.m. (R. 20, 22, 55-58).

5. The following witnesses testified in the interest of one or more of the accused.

(1) Technician 5th Grade George Fletcher, Jr., testified that on the night of November 21, 1942, he was in charge of the battalion quarters book and that it was his duty to give out and take up passes. Upon his identification the quarters book was placed in evidence showing that Privates Alonzo Williams, Belford, Young, and Smalls checked out of camp at 6 o'clock and in camp at 11:30 on November 21, 1942. The witness testified, however, that although he made the entries, he did not know the exact time the above men checked into camp (R. 37, 38).

(2) Private Henry W. Miles testified that on the night of November 21, 1942, he met Belford at the canteen at 11:15 and that they came to camp together and turned in their passes at 11:30 (R. 39).

(3) Private Robert E. Newman testified that he saw Private Toney at the power house at 10:20 p.m., November 21, 1942 (R. 41).

(4) Private First Class Harold H. Johnson testified that he saw Privates Bradford and Toney in camp after taps on the night of November 21, 1942 (R. 42).

(5) Technician 3rd Grade Joshua W. Gill testified that he saw Private Allen in camp at 9 and 11 p.m. on the evening of November 21, 1942. He also saw Private Toney in camp just after 11 o'clock on that date (R. 43).

(6) Corporal Herman L. Haynes testified that he saw Private Bradford in camp about 10:15 on the night of November 21, 1942.

(7) Sergeant Nathaniel Taylor testified that on the night of November 21, 1942, he saw Private James Thompson at the canteen between 10:30 and 11 o'clock. He also testified that he was one of the military police at the police station when the fight occurred between several American

soldiers and the native police. He testified further that the military police did not arrest any of the American soldiers there, but that the soldiers after the fight left the police station in a truck driven by Sergeant Ransom (R. 46).

(8) Private William E. Toney, one of the accused, testified that he did not leave camp during the evening of November 21, 1942, and that he was in bed at 12:05 or shortly thereafter (R. 68, 69).

6. The Specification, Charge I, alleges that accused

"* * * on or about November 21, 1942, did, at Nairobi, Kenya, commit a riot, in that they, together with certain other soldiers, the number of whom and whose names are unknown, did, with force and arms, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the Kenya Police, and having so assembled, did unlawfully, riotously, and in a violent and tumultuous manner disturb the peace of the Kenya Police to the terror and disturbance thereof."

The Specification, Charge II, alleges that the accused

"* * * acting jointly, and in pursuance of a common intent, did, at Nairobi, Kenya, on or about November 21, 1942, with intent to do them bodily harm, commit an assault upon certain members of the Kenya Police, by shooting at them with dangerous weapons, to wit, service rifles."

The Specification, Charge III, alleges that the accused

"* * * acting jointly, and in pursuance of a common intent, did, at Nairobi, Kenya, on or about November 21, 1942, feloniously take, steal and carry away ammunition of the value of about \$55.00, property of the United States intended for the Military service thereof."

In order to sustain the findings of guilty of the above Specifications, the proof must show that each accused participated in the acts alleged.

In examining the evidence it must be observed that the court erred in receiving into evidence the chronology of evidence as presented from the "occurrence book" of the Kenya police. The reading to the court of these various entries offended every principle of proof which the hearsay rule was designed to protect. The separate entries were not made under oath,

the persons who made the entries were not before the court, and were not subject to the inquisitive test of cross-examination. The entries cannot, therefore, be considered as evidence (par. 113, M.C.M., 1928).

The facts show that at about 8:30 p.m., November 21, 1942, Privates Rucker, Abrahams, Lonnie Williams, and Young were involved in a fight with the native police officers at the Eastleigh police station of Kenya, and that several of the soldiers so engaged were injured. The evidence concerning this fight does not, however, show that there was anything more than a sudden affray. The four American soldiers who were involved in this affray were observed by American military police but were not arrested by them or placed in confinement. Furthermore, both the Specification, Charge I, and the Specification, Charge II, allege respectively that 19 named defendants and other unknown persons committed the offenses therein alleged. We must conclude, therefore, since the early evening affray clearly involved only a few American soldiers, and, since it is dealt with in the record as a preliminary or minor disorder only, that the Specification, Charge I, and the Specification, Charge II, placed in issue only the criminal responsibility of the accused for the violent attack which occurred about 11:30 p.m. on November 21, 1942, and that it did not place in issue the criminal responsibility of the accused for the affray which occurred earlier on the same evening.

The facts show that at about 11:30 p.m., following the fight between the soldiers and the native police in the early evening, a group of unknown and unidentified persons made an attack on the Eastleigh police station by firing from 10 to 60 shots in its direction, several of the shots embedding themselves in the outer walls of the building. The American officers and military policemen who were present at the police station at the time the shooting occurred could not identify any of the individuals in the group who fired the shots, nor could they identify the group as American soldiers. A native policeman, however, testified that he saw American soldiers near the station, but that he did not see them with rifles. A native policeman further testified that a similar attack by unidentified American soldiers was made upon the police station about 1:30 a.m. on November 22, 1942.

The only evidence connecting any of the accused with the above described attacks on the police station is contained in the evidence that Privates Allen, Bradford, and Tilghman left camp at about 11 p.m. carrying rifles; that Privates Abrahams, Belford, and Toney left at about the same time without rifles; that Privates Hampton and Smalls were seen returning to camp about 4:30 carrying rifles; and that Private Lonnie Williams left camp at about 11 p.m. with the other soldiers above named, and that the next morning a rifle was found in his tent which had been recently fired.

This evidence serves to place each of the above named accused under a heavy cloud of suspicion, but it does not present any facts from

which it may fairly and reasonably be inferred that the accused fired upon the Kenya police station or engaged in the riotous attack alleged. Although it is recognized that circumstantial evidence may be as trustworthy as so called direct evidence, it is axiomatic that the evidence in any case, in order to justify a finding of guilty, must present a complete chain of facts or circumstances connecting the accused with the crime alleged. The evidence in question shows that six of the accused left camp at about 11 p.m., but the evidence does not show how far they would have had to travel in order to reach the Kenya police station to have engaged in the attack there at 11:30 p.m. In fact, there is no evidence that the men who fired upon the Kenya police station at 11:30 p.m. were American soldiers. Neither the American witnesses nor the Kenya constable identified the persons who made the attack at 11:30 as American soldiers, although the Kenya constable did testify that he had seen American soldiers without rifles near the time when the shots were fired. Moreover, the hearsay record of the Kenya police "occurrence book" states that the shots fired at 11:30 were pistol shots. In view of the confusion in the testimony and the failure of the proof to connect the accused with the crime alleged, we must conclude that the findings of guilty under the Specification, Charge I, and the Specification, Charge II, are not supported by the evidence.

The above principle applies with an equal force to the evidence concerning the Specification, Charge III. Although the evidence concerning this Specification shows that certain ammunition was wrongfully taken from the battalion ammunition supply depot, there is no proof that any one of the accused took such ammunition. Although Private Smalls was found to be in possession of an unfired bullet of a type similar to that which was apparently stolen, this particular cartridge was not identified as having been stolen. The conclusion necessarily follows that the findings of guilty of the Specification, Charge III, is not supported by evidence.

7. For the reasons stated the Board of Review holds, as to each accused, that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

Thomas E. Bresson , Judge Advocate.

Abner E. Lipscomb , Judge Advocate.

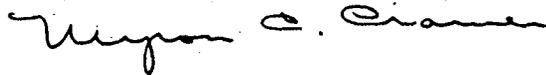
Willard B. Cowley , Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 20 1943 - To the Commanding General,
United States Army Forces in Central Africa, APO #625, c/o Postmaster,
Miami, Florida.

1. In the case of Privates Herbert C. Abrahams (32190764), Foster Belford (33068724), Robert E. Bradford (39018350), Zedrick Hampton (35280847), Robert S. Smalls (33104175), James A. Tilghman (33068702), and Collier Young (33068760), all Company C, 812th Engineer Battalion (Avn), and Privates Willie A. Allen (35210387), William E. Toney (33062976), and Lonnie Williams (34153956), all Headquarters Company, 812th Engineer Battalion (Avn), I concur in the foregoing holding by the Board of Review and, for the reasons therein stated, recommend that the findings of guilty and the sentences be vacated.

2. A radiogram is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith five copies of the published order in this case.



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.

(255)

SPJGN
CM 229963

JAN 29 1943

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

SEVENTH SERVICE COMMAND
SERVICES OF SUPPLY

v.)

Second Lieutenant ALFRED
ROSENEGK GUY (0-1031089),
Cavalry.)

Trial by G.C.M., convened at
Fort Riley, Kansas, January 5,
1943. 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Alfred Rosenegk Guy, Cavalry, did, without proper leave, absent himself from his organization at Fort Riley, Kansas from about December 5, 1942 to about December 17, 1942.

He pleaded not guilty to the Specification and Charge, was found guilty of both, and was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended clemency consideration by the confirming authority and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution, in brief, is as follows:

Without any objection, an extract copy of the morning report of Headquarters, Cavalry Replacement Training Pool, Cavalry Replacement Training Center, Fort Riley, Kansas, was introduced as Exhibit 1, showing, on December 7, 1942, the accused as A.W.O.L. from December 5, 1942 (R. 6). On December 17, 1942, he reported for duty to First Lieutenant

(256)

Robert W. Sapora, Cavalry, assistant adjutant at headquarters (R. 7). The stipulation as to the testimony of Lieutenant Colonel Frederick Streicher, Cavalry, Acting Executive Officer, was introduced, without any objection, as Exhibit 2. This states that the accused on December 17, 1942, was questioned at Headquarters, Fort Riley, Kansas by Lieutenant Colonel Streicher, in the presence of Lieutenant Colonel William Fane, Adjutant General's Department, and Major Russell T. Boyle, Staff Judge Advocate, and that the questions and answers were put into a certificate signed by the accused, prior to doing this he being fully advised as to his rights. This certificate was introduced, without any objection, as Exhibit 3, setting forth that accused had been ordered to report back on December 4, 1942, that between December 4 and 17, for no reason, he was just staying in Kansas City, Missouri, at the President Hotel, drinking heavily, that he realized he was absent without leave, that this was quite a serious thing, worse for an officer than for an enlisted man, but he wanted to give the straight facts. He further stated he was 32 years of age, unmarried, gave his former civil occupations and military record. He came back the evening of December 16, 1942, and signed the book on December 17 (R. 6, 7).

4. The evidence for the defense, in brief, is as follows:

Second Lieutenants Wilber S. Brown and Donald O. Summers, Cavalry, had known the accused since September 1, 1942, and knew his reputation for character, which was good (R. 8, 9).

5. The accused after being advised of his rights desired to remain silent.

6. The testimony shows absolutely that the accused was absent without leave from December 5 to 17, 1942, as alleged in the Specification, and he frankly admitted this, but gave no valid reason or cause for such absence. No previous convictions were shown.

7. The accused is 32 years of age. The records of the Office of The Adjutant General show that he enlisted in the Virginia National Guard October 14, 1940, in Battery B, 111th Field Artillery; was inducted into Federal Service February 3, 1941; discharged from enlisted status November 24, 1942; attended Officers' Candidate School, Cavalry, Fort Riley, Kansas; course completed November 25, 1942, and was commissioned second lieutenant, Army of the United States, November 25, 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 and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

Eliaz. L. Lrosson, Judge Advocate.

Donna D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

(258)

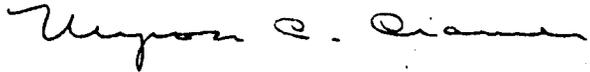
1st Ind.

War Department, J.A.G.O., FEB 1 - 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 Alfred Rosenegk Guy (O-1031089), 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. The act of the accused in absenting himself without leave following his graduation from Officers' Candidate School involves a serious breach of duty and discipline. In view, however, of the inexperience of the accused as an officer and the recommendation for clemency by the reviewing authority, I recommend that the sentence of dismissal be confirmed but commuted to a forfeiture of \$50 per month for six months.

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,
Major General,
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 forfeiture of \$50. per month
for six months. G.C.M.O. 20, 6 Mar 1943)

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

(259)

JUN 2 1943

SPJGH
CM 229977

UNITED STATES

v.

Private QUENTIN R. PROCTOR
(18006582), 22nd Base Head-
quarters and Air Base
Squadron, Lowry Field,
Colorado.

FOURTH DISTRICT ARMY AIR FORCE
TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened at Lowry
Field, Colorado, December 4, 1942.
Dishonorable discharge and confine-
ment for twenty (20) years.

REVIEW by the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Lowry Field, Colorado, on or about March 22, 1942, feloniously take, steal and carry away one wrist watch and attached bracelet, value about \$60.00, and one gold ring, set with ruby, value about \$40.00, the property of James O. Brawley Jr.; and one gold ring, value about \$25.00, property of general prisoner Oscar M. Cox; and money in the amount of about \$70.00, the property of prisoners then confined in the guardhouse at Lowry Field, Colorado, and in the custody of Lt. Warthen L. K. Hobbs, then custodian of the prisoners fund.

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

Specification 1: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Lowry Field, Colorado, and at Denver, Colorado, during a period of time from on or about October 1, 1940 to on or about December 25, 1940, unlawfully wear the uniform and insignia of a commissioned officer of the Army of the United States.

Specification 2: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Denver, Colorado, on or about May 3, 1942, wrongfully and willfully impersonate a pilot of the Army of the United States, to-wit: By wearing the wings of a pilot of the Army of the United States.

Specification 3: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Lowry Field, Colorado, on or about May 15, 1942, falsely represent himself to be an officer of the Army of the United States, to-wit: A First Lieutenant in the Air Reserve.

Specification 4: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Lowry Field, Colorado, on or about June 6, 1942, unlawfully and in violation of the provisions of AR 380-5, W.D., dated June 18, 1941, have in his possession Volume 9, Number 50, Weekly Notice to Airmen, dated May 21, 1942, classified as restricted information, and official photographs numbered G39.293 33B DP; G39.294 33B DP; O43-17-314M-DP; O43-13-314M-DP; photograph titled "Lowry Field Review July 12, 1941"; photograph of interior of hangar, Lowry Field; photograph of pursuit airplane taken at Lowry Field; all photographs being the property of the United States and classified as restricted.

Specification 5: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Lowry Field, Colorado, on or about June 6, 1942, unlawfully and in violation of the provisions of AR 380-5, W.D., dated June 18, 1941, have in his possession official photographs numbered: G39.475, 314K-DP; G39.455, 314K-DP; G39.463, 314K-DP; G39.471, 314K-DP; G39.458, 314K-DP; G39.462, 314K-DP; G39.451, 314K-DP; G39.454, 314K-DP; G39.452, 314K-DP; G39.447, 314K-DP; G39.466, 314K-DP; G39.450, 314K-DP; G39.456, 314K-DP; G39.456, 314K-DP; G39.459, 314K-DP; G39.452, 314K-DP; G39.450, 314K-DP; G39.472, 314K-DP; G39.457, 314K-DP; G1.153, 314K-DP;

all said photographs being property of the United States and classified as confidential.

Specification 6: In that Private Quentin R. Proctor, 22nd Base Headquarters and Air Base Squadron, did, at Lowry Field, Colorado, on or about June 6, 1942, improperly have in his possession photographs of military installations vital to the national defense as follows: "Bombing Pattern by B-17B's"; three pictures "Target Area after Bombing"; two pictures "Natchitoches, La. Airport before Camouflage"; two pictures "Airport at Natchitoches, La. after Camouflage"; two pictures "Hamilton Field, California"; two pictures "Moffett Field, California"; "Sunny Vale (NACA)"; "Hangar Moffett Field, California"; "Airport Kaycee, Wyoming"; "Casper, Wyoming"; "Las Vegas Airport, New Mexico"; "Curtiss P-36A"; "A-17A Attack (Light bombardment)"; untitled picture of P-40; "San Quentin"; "Dam at Nederland, Colorado"; "U.R. on O-52 Crash, North Platte, Nebraska"; "Lowry Field Building Area from N.E."; "Runways fr N., Lowry Field"; "Lowry Field"; "Hangar No. 2, Lowry Field"; "Temporary Barracks, Lowry Field"; "Airplanes on Line, Lowry Field"; "Fitzsimons General Hospital"; "Bonneville Dam"; "Airport Swan Island, Ore."; "Bridge of the Gods"; "Airport Laramie, Wyoming"; "Headquarters Building, Lowry Field, Colorado"; "North America O-74A"; "San Francisco, California"; "Baker Field, Idaho"; "Lowry Field"; "Lowry Field - Pm. Bcks. from S.E."; "Airport Boise, Idaho"; "Airport Pueblo, Colorado"; "Vancouver Barracks, Oregon"; all official photographs and property of the United States.

The accused pleaded not guilty to, and was found guilty of all Specifications and Charges. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor for twenty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Charge I.

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

At some time between 5:30 p.m., March 20, 1942 and 11 a.m., March 23, 1942, the safe in the prison office, Lowry Field, Colorado,

was opened and all money and valuables removed. The contents of the safe included about \$70; a ruby ring set in a white gold base, the property of Prisoner Cox, and a pink gold Hamilton wrist watch and a yellow gold ruby Army ring, the property of Prisoner Brawley. Captain Hobbs as custodian of the prisoners fund and prisoners records used the safe exclusively for that reason. On Friday night, March 20, 1942, he placed in the safe some money belonging to prisoners who had just come in, and balanced the prisoners fund. All of the property was then in the safe (R. 10, 13, 21-22, Exs. B, G).

The accused was the prison clerk and worked directly under Captain Hobbs, Prison Officer, in an office close to the safe, had access to the safe when it was open and in many instances was present when the safe was opened. Four officers and Staff Sergeant Hoyt, Chief Clerk, had the combination to the safe (R. 10, 22; Ex. G).

When General Prisoner Oscar M. Cox, was confined in the guardhouse at Lowry Field in March, 1942, he delivered to Captain Hobbs pawn tickets for certain jewelry. Cox later furnished the money to redeem upon one ticket, a ruby ring set in a white gold base (Ex. 1), and asked Captain Hobbs to send the ring to Mrs. O. C. House, a sister of Cox. That ring was missing from the safe in the prison office on March 22, 1942. On June 6, 1942, acting under instructions of the Squadron Commander, Staff Sergeant Harold A. Hoyt and Sergeant J. P. Brown opened the foot locker of accused and removed therefrom a ruby and white gold ring (Pros. Ex. 1 introduced as (Ex. FF)) which Hoyt knew was the property of Cox and identified it by the initial "B H" inside the ring. The accused at that time made a voluntary statement to Hoyt that a soldier had stolen it from the safe and turned it over to the accused to be pawned. Hoyt delivered the ring to Captain Musgrove. After the ring was found, the ring was shown to Cox who identified it as his property. The value of the ring (Ex. 1) was given at from \$10 to \$12 by Max Idelberg, clerk in a jewelry store and loan office (R. 11, 17-20, 27, 77-78; Exs. B, G, FF).

Private James O. Brawley, turned over to Captain Hobbs about March 15, 1942, for safekeeping in the prison guardhouse safe, a pink gold Hamilton wrist watch (J 102920-854857) and a yellow gold ruby Army ring. On September 19, 1942, he went to Bills Loan Shop in Denver, Colorado, with Lieutenants Daugherty and Watson and identified there a ring (Ex. H) which was his and which he had delivered to Captain Hobbs. Charles Oppenheim, a clerk in Bills Loan Shop identified a ticket (Ex. J) upon which the ring was pawned, June 1, 1942, and stated that

the person who pawned the ring signed in his presence the name "John D. Burke" upon that ticket. Brawley also went on September 19, 1942, with the same officers, to Arnold Wolfe's, a jewelry store and loan office in Denver and identified a wrist watch as his by the numbers of the watch, which numbers he had secured from his jeweler. Max Idelberg, a clerk at Arnold Wolfe's, identified a pawn ticket (Ex. H) cut from a book of the firm, as the ticket upon which the watch (Ex. I) was pawned June 1, 1942, and identified accused as the man who pawned it. Captain William A. Daugherty in his deposition, identified Exhibit D as a statement written by accused in his presence (R. 21; Ex. C). George H. King, by profession an examiner of questioned handwriting, expressed the opinion that the statement Exhibit D - the known handwriting of accused - the signatures "John D. Burke" on Exhibit H and Exhibit J were all three written by one and the same person. Idelberg appraised the watch at approximately \$50. Charles Oppenheim valued the ring at approximately \$15 (R. 9, 21, 23-28, 29-33; Exs. A, B).

b. Defense:

The accused testified as to Charge I only, that from "December 2 until April 6", when he was relieved as Prison Clerk, his job was to take care of the clerical work. The prisoners property record was in two sections. The top part of the book showed the property such as clothes, while the second part showed the money the prisoner brought into the guardhouse. Articles could be purchased upon the request of the prisoners and the cost deducted from his balance. After February when a desk sergeant and accused were required to make up about \$20 which was missing, every person handling valuables taken from a prisoner was required to sign a receipt until the property came into the hands of the prison office. Valuable articles were not locked up in the safe until after Lieutenant Cavanaugh relieved Lieutenant Hobbs. The only watch that he had pawned for Fitzsimmons other than on June 1, was a Lord Elgin which Fitzsimmons had won from a soldier (R. 94, 96-97).

Lieutenant Hobbs locked the safe on Friday evening, the last time it was opened before the loss was discovered on Monday, March 22, 1942. After the accused completed his duties about 3 p.m., Saturday, he stayed with Corporal Fitzsimmons all Saturday night, and went to the mountains with him on Sunday. Fitzsimmons left accused at the house of his girl at about 7 p.m. where accused stayed until about 11 p.m. (R. 93, 95-96).

The accused testified further that on the Monday morning when the robbery of the safe was discovered, he arrived at the guardhouse at

7 a.m. and Lieutenant Hobbs, the Prison Officer, arrived about 8:30 a.m. When Lieutenant Hobbs opened the safe to get money for a prisoner who was to be released, Lieutenant Hobbs discovered that the money was gone. The accused told Lieutenant Hobbs that the last time they had been in the safe was on the previous Friday, that the safe was then locked and that accused had no occasion to go into it up to the time Lieutenant Hobbs opened it Monday morning (R. 93).

On June 1, 1942, Corporal Fitzsimmons, had lost money gambling and asked accused for a loan. Accused did not make a loan. On the way in town later that day, Fitzsimmons pulled out a ring, which he had previously shown accused about March 16, and a Hamilton watch. Fitzsimmons asked accused to pawn the ring and suggested that it be pawned in the name of some other person. They went into a place together and accused pawned the ring. Accused went into another place alone and pawned the watch in the name "John D. Burke" suggested by Fitzsimmons. Fitzsimmons then tore up the "pawn ticket", and accused gave Fitzsimmons in the presence of Fitzsimmons' girl, \$12, one-half of the proceeds from the pawning of the two articles (R. 93-97).

On June 5, after accused was placed in arrest in quarters by Major Neilson, he went to the guardhouse where Sergeant Hoyt asked him about the ring which Sergeant Hoyt had found in the locker of accused. He admitted to Hoyt that the ring had been in his foot locker but denied that the ring belonged to Prisoner Cox (R. 94).

Staff Sergeant Lowe B. Swanson, on April 1, 1942, succeeded the accused as prison clerk and took over his desk. He found in the desk some personal letters, pictures, keys, fountain pen and a pencil which belonged to accused, placed them in an envelope and gave them to accused. He did not put any other property in the envelope (R. 84-87).

Corporal James W. Fitzsimmons in March, 1942, was running the supply system at the guardhouse. On Saturday night of the week end when the safe was robbed, the accused spent the night at the house of Fitzsimmons. On Sunday they went to the mountains with their girls and returned at about 7 p.m. The accused stopped at the house of his girl. He gave the accused on the day Lieutenant Hobbs was relieved as Prison Officer, an Elgin watch to pawn because the prison fund was short and the accused was short quite a bit of money. On June 1, 1942, a pay day, the accused paid him ten dollars for hocking the watch.

Fitzsimmons never gave accused a Hamilton watch or a ring to pawn (R. 87-89).

c. For the prosecution, in rebuttal, Corporal Fitzsimmons denied that he gave to accused on June 1, 1942, a Hamilton wrist watch and a gold ruby ring, the property of Private Brawley, and directed accused to pawn them. Fitzsimmons had no knowledge that accused pawned that watch and ring (R. 98-99).

d. Charge I alleges the larceny by accused of a wrist watch, bracelet, value about \$60, and a gold ring set with a ruby, value about \$40, the property of J. D. Brawley Jr.; of a gold ring value about \$25, the property of general prisoner O. M. Cox; and money in the amount of about \$70, the property of prisoners in the guardhouse, and in the custody of Lieutenant W. L. K. Hobbs, custodian of the prisoners fund. The evidence shows that the property alleged was taken from the locked safe in the prison office between 5:30 p.m., Friday, March 20, and 11 a.m., March 23, 1942. The accused was prison clerk, had access to the safe when it was open, and had an opportunity to learn the combination by observing the opening of the safe by the four persons who knew the combination. The Cox ring was found in the foot locker of accused. The accused was identified as the person who pawned the Brawley watch and the name written on the ticket on which the Brawley ring was pawned was shown by a handwriting expert to have been written by accused. The market value of the watch and two rings was shown to be \$75. There is no direct proof as to the money except that a sum of about \$70 was in the safe and was missing with the watch and rings. Proof of unexplained possession of the watch and rings approximately two months after they were missing warrants the presumption that the accused stole them (Dig. Ops. JAG 1912-40, sec. 451 (37)). Possession by accused of a part of articles stolen at one time tends to show his guilt of the larceny of all of the articles (Dig. Ops. JAG 1912-30, sec. 1575 (5)).

In the opinion of the Board the evidence supports the findings of guilty of the Specification, Charge I and of Charge I.

4. Specification 1, Charge II:

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

Dr. Neal D. Bishop, a chiropractor, Denver, Colorado, became acquainted with accused during the Christmas holidays, 1940, and saw him often until the late summer of 1941. When he saw accused from about

October 1 to December 1940, the accused was dressed as a "flying officer", a first lieutenant and had the flyer's insignia, wings, on his breast. The accused told his rank many times, stated that he was a flyer and had made frequent trips all around the world in the latest type planes (R. 57-61).

Mrs. Mildred Spitzer, an employee in the "sub-depot", met accused in September 1940, when he came to her home and was introduced to her as Lieutenant Proctor. The accused came to her home many times until shortly after Christmas, 1940 and always represented himself as a first lieutenant. Mrs. Spitzer identified a photograph, Exhibit EE, as a picture of accused. He was dressed as in that picture every time he visited her home, except that once he wore his "tunic" and on others a flying jacket (R. 67-68).

An Army officer's summer weight blouse, with the bars of a first lieutenant and the wings of a pilot found in the wall locker of accused in July 1942 was admitted in evidence (Ex. S) (R. 48-52).

b. Defense: No testimony was introduced by defense upon this specification. At the close of the case of the defense the court granted the request of the defense that the accused be permitted to put on the blouse, Exhibit S, to show that it was too "big" to be worn by accused (R. 99).

c. The evidence shows that frequently during the period from October 1 to December 25, 1940, the accused, a private, wore the uniform and the insignia of a first lieutenant of the Army, and was introduced and represented himself during that period as Lieutenant Proctor.

The wrongful conduct alleged in this specification is alleged to have occurred during the period from about October 1, 1940 to about December 25, 1940. The accused was arraigned on December 4, 1942. The accused did not take advantage of his right to plead the statute of limitations in bar of that portion of the offense committed prior to December 5, 1940 (A.W. 39). The court was under no obligation to advise accused as to his right to plead the statute (CM 201537, Fouts).

The record supports the finding of guilty of Specification 1, Charge II.

5. Specification 2, Charge II.

a. The evidence for the prosecution shows that Mrs. Helen Stroud of Denver, Colorado, first met accused in May, 1941, and saw him

on quite a few occasions until about June 1942. The accused wore an officers uniform and wore large silver wings—about two or three inches wide and like Exhibit No. 12 (later introduced as Ex. X. R 51)—on his left breast (R. 33-37).

b. Defense: No testimony was introduced by the defense upon this specification.

c. The evidence is legally sufficient to support the finding of guilty of Specification 2, Charge II that accused wrongfully impersonated a pilot of the Army of the United States by wearing the wings of a pilot, on or about May 3, 1942. The date upon which he was seen wearing the wings of a pilot is not stated except that it was some time between May 1941, and June 1942. The offense however occurred within the statute of limitations, two years, and before the date of execution of the charge sheet (CM 203112, Burk).

6. Specification 3, Charge II:

a. Prosecution:

Captain Thomas E. Atchison identified a document (Ex. Y) as found around the middle of July in the foot locker of accused when it was examined by Captain Schumacher, Captain Atchison and Lieutenant Pidgeon. Captain Atchison turned the document over to Captain Schumacher. The envelope bore the address "Quentin R. Proctor—1st Lt., Air Base, Box 26, Lowery Field, Denver, Colorado", the printed name "Aero Leather Clothing Co., Inc., 79 Ferry Street, Beacon, N.Y." and postmarked "Beacon, N.Y., May 22, 1942" (R. 48-50).

Staff Sergeant Jay P. Brown, a clerk for Captain Schumacher, identified a carbon copy of a letter to the Aero Leather Clothing Company (Ex. Z) of which he wrote the original for Captain Schumacher, and after it was signed by Captain Schumacher, deposited it in the post office. He had known the accused since September 1940. In June 1942, the accused was a sergeant and not a first lieutenant flight officer or first lieutenant pilot (R. 53-54).

Captain R. P. Schumacher delivered to First Lieutenant John C. Watson, who was then Assistant S-2, Exhibit Z, Exhibit Y, a letter (envelope) addressed to Quentin R. Proctor, First Lieutenant, Air Base, Box 26, Lowry Field, Denver, Colorado, and Exhibit AA, the letter sent Captain Schumacher by the clothing company. The letter Exhibit AA, was

directed to Aero Leather Company, dated May 15, 1942, and signed "Quentin R. Proctor". Immediately below the signature was the type-written name of the sender followed by "1st Lt., Air-Res." Mr. George H. King, the handwriting expert, testified that in his opinion the signature "Quentin R. Proctor" on Exhibit AA was written by the same person who wrote Exhibit D, which Captain Daugherty testified was written by accused in his presence (R. 55-57; R. 21, Ex. C).

b. No testimony was introduced by the defense upon this specification.

c. The record supports the finding of guilty of Specification 3, Charge II.

7. It is alleged in Specification 4, Charge II that on or about June 6, 1942, accused unlawfully and in violation of AR 380-5, had in his possession a certain number of the Weekly Notice to Airmen, and certain listed official photographs, property of the United States, all classified as restricted; in Specification 5, Charge II, that on or about the same date, he unlawfully and in violation of AR 380-5 had in his possession certain listed official photographs, property of the United States, classified as confidential; and in Specification 6, Charge II, that on or about the same date he improperly had in his possession certain listed official photographs of military installations vital to the national defense, property of the United States.

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

At sometime in June, 1942, during a "show-down" in the barracks of the 22nd Base Headquarters and Air Base Squadron, the attention of First Lieutenant Arthur R. Pidgeon, Jr., A.C., was directed to the foot locker of accused in the day room when certain items were found in it. The locker was locked and moved to the squadron room and at a later date moved, while locked, to the supply room. About July 15, the locker was opened in the supply room by Supply Sergeant Black with keys brought by Lieutenant Pidgeon, and the contents examined in the presence of Lieutenant Pidgeon, Lieutenant Brennan and Sergeant Black. It was then locked and brought to the squadron room where Lieutenant Pidgeon examined it thoroughly with Colonel Nealy and Captain Schumacher. Lieutenant Pidgeon put his initials on the back of all of the photographs taken out of the locker, some of which were classified as restricted and some as confidential. The photographs were given into the possession of Lieutenant John C. Watson, Assistant S-2, Lowry Field, who also

initialed them. The seven photographs listed in Specification 4 (Exs. BB) each marked restricted and the weekly notice to Airmen dated May 21, 1942, published by the Department of Commerce (Ex. V) and marked restricted, identified by Lieutenant Watson, were found in the foot locker of accused (R. 37-39, 48-53, 61-63, Ex. E, BB, V). The twenty photographs listed in Specification 5 (Exs. CC) each marked confidential, identified by Lieutenant Watson, were found in the foot locker of accused. A group of some 44 photographs listed in Specification 6 (Ex. DD), identified by Lieutenant Watson, were found in the foot locker of accused. This group consisted of photographs of numerous airports and airfields, certain planes and bombing patterns. None were marked secret or restricted (R. 37-47, 48-53, 61-67; Exs. E, V, BB, CC, DD).

Technical Sergeant A. E. Hawkridge, noncommissioned officer in charge of the photographic portion of the Lowry Field Reproduction Division, identified some of the photographs in the BB group (Spec. 4) and all of the photographs in the CC group (Spec. 5) and some in the DD group (Spec. 6) as photographs from the files of his office and that all of the pictures from his department were the property of the United States. He testified that the photographs in Exhibit CC were classified as confidential, those in Exhibit BB were classified as restricted, and that those in Exhibit DD, although not so marked on the photographs, were classified as restricted because they were photographs of military installations, examples of equipment or of things vital to the national defense. The assignment of accused did not give him the right to take photographs from the photographic department. Accused had never submitted a request for or signed for any of the pictures in evidence (R. 69-74).

b. For the defense Sergeant Hawkridge testified that he had seen two sergeants in the photographic division give accused photographs but had no knowledge that accused was ever given any restricted or confidential photographs R. 90-91).

Private Leslie L. Teague testified that while a prison chaser on the trash run he had at different times seen torn photographs and something similar to the Weekly Notice to Airmen in the ash cans (R.81-83).

The accused did not testify with respect to Charge II.

c. The evidence shows that the photographs and documents listed in Specifications 4, 5 and 6, Charge II, were all found in the foot locker of accused; that those listed Specification 4 were restricted

and so marked, and some of the photographs were from the files of the Lowry Field Reproduction Division and the property of the United States; that those listed Specification 5 were confidential and so marked and were all from the files of the Lowry Field Reproduction Division and the property of the United States; and that some of those listed in Specification 6, although not so marked, were restricted because of their nature and from the files of the Lowry Field Reproduction Division and property of the United States.

Paragraph 13, AR 380-5 provides that classified military information will be entrusted only to those who need it in the performance of their official duties and to insure teamwork and efficient instruction of personnel proper planning, or proper maintenance of equipment.

The evidence is legally sufficient to support the findings of guilty of Specifications 4, 5 and 6, Charge II.

8. When the trial judge advocate requested the members of the court to disclose any ground for challenge the record shows:

"LT. ROWLAND: Colonel, I went down to Fort Leavenworth accompanying Capt. Daugherty to take depositions in something similar to this case, involving the same facts. I understand the accused is from the 33rd Squadron, and I am assigned to the 33rd at this time.

"PRESIDENT: Did you assist in taking the depositions?

"LT. ROWLAND: That is correct, Sir.

"PRESIDENT: In this case or a parallel case?

"LT. ROWLAND: It is a case involving this accused but I don't know which one. I have not seen it.

"PRESIDENT: Very well. Lt. Rowland will be excused.

"Thereupon, Lt. Alfred B. Rowland was excused and withdrew.

"CAPT. ERWIN: May it please the court, I might make it known to the court that in the past I have been associated with the accused in that he and I were in the same organization. I know nothing of this particular charge, but I would like to make

that plain to the court. I do not feel that I am prejudiced but I want to make the situation clear to the accused.

"The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and, upon being opened, the president announced that the challenge not sustained, and the challenged member thereupon resumed his seat." (R. 3)

Upon the convening of the court at its next session the prosecution stated that "all of the members of the court that were present when court adjourned at the previous hearing are present" and the record recites the presence of both Captain Erwin and Lieutenant Rowland (R. 21-22). A similar statement and a like recital were made upon reconvening twice at later sessions (R. 47-48; 75-76).

Although the record does not state directly that Lieutenant Rowland was the challenged member who withdrew and, after the challenge was not sustained, resumed his seat, a consideration of the above facts in the opinion of the Board of Review shows that Lieutenant Rowland was the challenged member and that he was one of the "members of the court * * * sworn" (R. 4) and properly shown as present at the succeeding sessions of the court.

9. The maximum limit of punishment under Charge I, larceny of property of a value of more than \$50 is dishonorable discharge, total forfeitures, and confinement at hard labor for five years (par. 1026, MCM 1928).

There is no limit stated in the table of maximum punishments for the offense of unlawfully wearing the uniform and insignia of a commissioned officer of the Army of the United States (Spec. 1, Chg. II). A penalty of imprisonment for not exceeding six months or a fine of \$300, or both, is provided for this offense by 10 U.S.C. 1393.

There is no limit stated in the table of maximum punishments for wearing the wings of a pilot of the Army (Spec. 2, Chg. II), for falsely representing oneself to be an officer of the Army (Spec. 3, Chg. II), nor for having in possession information or official photographs classified as restricted (Spec. 4, Chg. II), official photographs classified as confidential (Spec. 5, Chg. II), or official photographs of military installations vital to the national defense (Spec. 6, Chg. II). There is no punishment prescribed for any of these offenses by any

statute of the United States. It follows that the record of trial is legally sufficient to support the sentence including confinement for 20 years.

10. The charge sheet shows that the accused is 24 years of age and has served since September 1940.

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 the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42, for the offense of larceny of property of a value of \$50 or upward (Spec., Chg. I) recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 22-2201, Code of the District of Columbia, 1940.

Wm. S. Wood, Judge Advocate

Samuel M. Druce, Judge Advocate

J. F. Lott, Judge Advocate

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

(273)

SPJGN
CM 230008

FEB 12 1943

UNITED STATES	)	90TH MOTORIZED DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Barkeley, Texas, January
Garrison Prisoner WESLEY E.	)	15, 1943. Dishonorable dis-
POST (37055654), Company F,	)	charge and confinement for
357th Infantry.	)	twenty (20) years. Disciplinary
	)	Barracks.

HOLDING by 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.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Garrison Prisoner Wesley E. Post, having received a lawful command from Captain Norman C. Carter, his superior officer, to accompany his organization to the field on Regimental Combat Team #8, did at Camp Barkeley, Texas, on or about December 21, 1942 wilfully disobey the same.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. Evidence of two previous convictions was introduced. 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 pursuant to Article of War 50½.

3. On December 21, 1941, Captain Norman C. Carter, the Commanding Officer of Company F, directed that the accused, a member of his company who was then a garrison prisoner in the local stockade, be brought to his company so that he might be taken to the field for training purposes. On his arrival at company headquarters, the accused requested the privilege of talking with his company commander. When the request was communicated to Captain Carter, he asked the accused why he wished to talk to him. The accused replied that he did not wish to accompany the organization to the field. Thereupon Captain Carter informed the accused that he had orders to take him to the field with the rest of the company for training purposes. Captain Carter told the accused to go to the supply room and get his equipment preparatory to going to the field. Accused, however, stated that he did not want to go to the field and that he had been told that he could not be forced to go to the field if he didn't want to. Captain Carter thereupon advised the accused that he had orders to see that he, the accused, went to the field, to which the accused replied "I still don't want to go". The accused added that he did not want to carry a pack for \$17 a month. Captain Carter thereupon warned the accused of the consequences of failing to obey an order.

Captain Carter then directed his executive officer to go to regimental headquarters to seek information as to whether or not the accused should be required to drill. In the meantime Captain Carter left the accused and attended a battalion commander meeting. While at this meeting Captain Carter conferred with a Colonel Anderson, who appears to have been Captain Carter's battalion commander, concerning what should be done with the accused. When Captain Carter returned to his company, he stated to his executive officer in the presence of the accused, that Colonel Anderson had advised him that the accused "could go back to the stockade". Either just before or just after this statement by Captain Carter, the executive officer who had returned to his company headquarters warned the accused that his refusal to obey an order in time of war would subject him to the possibility of a death penalty. The executive officer advised the accused "to reconsider his former statement that he desired to go to the stockade". After some hesitation the accused replied "he still preferred to return to the stockade" (R. 10). The executive officer again told the accused that he was ordered to accompany the troops to the field and asked the accused first for his answer. To this question the accused replied that he "would rather return to the stockade". The accused was thereupon returned to the stockade, and did not accompany his company to the field for training (R. 4-7; 8-11).

4. The accused elected to remain silent, and no evidence for the defense was introduced.

5. The Specification alleges that the accused "having received a lawful command from Captain Norman C. Carter, his superior officer, to accompany his organization to the field * * * did * * * wilfully disobey the same". In order to sustain the findings of guilty under this Specification it is necessary to show first that a lawful command was given to the accused and secondly that he wilfully disobeyed the command.

The evidence shows that the accused, at the time he was brought to the company headquarters, contended that he was a garrison prisoner and that he could not be required to drill with the company. Although the accused was mistaken as to his legal rights in this particular, he nevertheless insisted upon those rights before his company commander. Apparently as a result of the contentions of the accused or of doubt as to his authority in the matter, Captain Carter dispatched his executive officer to regimental headquarters in order to seek advice on what should be done. Furthermore, the company commander sought advice from Colonel Anderson, and returned from conferring with Colonel Anderson with the advice that the accused should be returned to the stockade. Although during the time the accused was at his company headquarters he was given a command to draw equipment from the supply sergeant preparatory to accompanying Company F to the field for drill, the evidence does not show that the accused wilfully disobeyed such an order. In reply to each order given to him, the accused stated in substance that he believed that he did not want to go or that he still did not want to go. Although it is true that conduct may constitute "wilful disobedience" even in the absence of specific verbal expressions indicative thereof, still, facts must exist from which a reasonable inference may be drawn that wilful disobedience was actually intended. When the evidence in the present case is considered in its entirety the absence of such an evidentiary showing is clearly manifest. The original command or direction of Captain Carter to the accused was followed by what amounted to a discussion as to the legality of the order. After Captain Carter had left the accused and consulted higher authority at battalion headquarters, he returned and instead of repeating his former order to the accused, he merely stated to him that Colonel Anderson had said that the accused might go back to the stockade. From this statement and the entire circumstances of the case, the accused may

(276)

reasonably have inferred that his remonstrances had been considered as justifiable. When the evidence is considered in its entirety, the conclusion is impelled that the evidence shows no such unqualified refusal to obey an order as constitutes wilful disobedience within the purview of the 64th Article of War.

6. For the reasons stated the Board of Review holds that the record of trial is not legally sufficient to support the findings of guilty of the Charge and Specification thereunder and not legally sufficient to support the sentence.

Charles Bresson, Judge Advocate.

Dorance D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., FEB 17 1943 - To the Commanding General,
90th Motorized Division, Camp Barkeley, Texas.

1. In the case of Garrison Prisoner Wesley E. Post (37055654),
Company F, 357th Infantry, 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 230008).



E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.



FEB 18 '43 PM

He pleaded guilty to Specifications 1 and 2, Charge I; guilty to Specification 3, Charge I, except the words "did thereby bring discredit upon the military service"; not guilty to Charge I, but guilty of violation of the 96th Article of War; and not guilty to Charge II and the Specification thereunder. He was found guilty of Specifications 1, 2, and 3, Charge I, and of Charge I, and not guilty of Charge II and the Specification thereunder. 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. With reference to Specification 1, Charge I; the evidence for the prosecution shows that about midnight, October 21, 1942, a accused was seen in his pajamas on a "cat-walk" between two barracks "holding to the rail". He was observed in his bathrobe with a towel over his shoulder having difficulty in getting out of a door. Accused walked up and down the hallway, pounding on the various doors in the barracks "getting in everybody's hair". Although he was told to get out of a room, it was difficult to get him to leave, and he would then enter another room. He was acting in a loud and boisterous manner, and his actions were so disorderly and obnoxious that officers in the barracks could not get their rest (R. 54-55, 58-59).

Between 12 m. and 12:30 a.m., as the result of a telephone call, Lieutenant Colonel Jerrold E. Dufort, Dental Corps, went to the barracks of accused. He testified, without objection, that several officers who were in the hallway said that they had been trying to get to bed for the last half hour, but that accused kept them up by banging on the doors. Colonel Dufort found accused in bed. Accused promised to be quiet and to remain in bed. Colonel Dufort returned to his quarters, but within five minutes was again called to the quarters of accused. He told accused, whom he again found in bed, that he would give him a cold shower unless he behaved. Accused promised he would remain in bed. After Colonel Dufort had remained in the corridor for a few minutes, accused "stuck his head out again". When he saw Colonel Dufort, "he acted like a child, jumping back in his room". With the aid of another officer, Colonel Dufort gave accused a cold shower bath for fifteen minutes. Accused then promised to remain in bed, but after Colonel Dufort left his room, accused "stuck his neck out again". Colonel Dufort then threatened to tie accused to his bed. Another officer offered to take care of accused, and Colonel Dufort left the barracks (R. 47-49, 53-55, 59).

Accused was "drunk" and "quite intoxicated". His eyes were "pretty blurry" and his voice was "kinda thick". He was "very tottery on his feet" and his conversation was not clear. He staggered around.

in his room and down the hallway, "bouncing from one side to another". It was necessary to support him to the shower, and there place him in such a position that he could not fall down. There was a distinct odor of liquor in his room, and a bottle of "Scotch", about one-third full was on the chair. "The smell was awful". Accused had vomited on his pajamas which were on the floor (R. 49-50, 52-53, 56, 59).

With reference to Specification 2, Charge I, the evidence shows that at about 10 a.m., October 13, 1942, Lieutenant Colonel James E. Knighton, Medical Corps, saw accused in his quarters. The appearance of accused was then "somewhat disheveled" and he was "pretty well drunk" (R. 78, 91).

At about 10:45 a.m. Major Haywood L. Moore, Medical Corps, saw accused in his quarters. A bottle of liquor "with a little bit out of it" was on the floor. Major Moore took accused to the hospital. Accused "was unable to walk straight", his breath smelled of alcohol, and his eyes were bloodshot and watery. Accused was also "a little untidy". A blood alcohol test was taken which showed "1.2 m.g.m. per cc". Accused "was drunk. Anything over 1 is said to be drunk". After examining accused, Major Moore made a diagnosis of "Alcoholism acute". Major Moore further testified that there was "a scale of 1 to 5. When they are considered drunk 5 is out, or dead drunk". On the following afternoon accused told his commanding officer that he was sorry for what had occurred, and that it would not happen again (R. 83-84, 86-87, 89).

With reference to the offense alleged in Specification 3, Charge I, the evidence shows that at about 12:45 or 1 a.m., November 1, 1942, as the result of a telephone call, two members of the military police took accused from a street in Birmingham, Alabama, to the police station, and from there to his room at the Bankhead Hotel in that city. Accused was drunk and in a "very staggering condition". His breath smelled of liquor and his conversation was not coherent. He was not able to help himself. Accused was in uniform (R. 26-29, 38-39, 44-46).

At about 5 a.m. on November 1st, in response to a telephone call, accused, in uniform, was taken by a member of the military police from a nearby cafe to the Bankhead Hotel. He was then under the influence of liquor. Although accused "could have made it", he was assisted when walking from the cafe to the hotel (R. 41-43).

During the day of November 1st, accused, in uniform, came to the office of the manager of the Bankhead Hotel, at the end of the hotel lobby and separated from the lobby by a panel partition. Ac-

cused leaned against the door panel and talked with the manager for fifteen or twenty minutes. Accused "was just a little bit silly", kept saluting and saying that he was Captain Bullard. "There was little or no conversation that made sense". A bellboy called a taxi and accused left the hotel. Accused was "evidently under the influence of liquor", and "showed the effects of having done some drinking". He was able to walk out to the taxi unassisted (R. 19-23).

At about 5 p.m. on November 1st, in response to a telephone call, First Lieutenant James E. Watson, Corps Military Police, and Private First Class Albert DeMaria, Military Police Detachment, Fort McClellan, Alabama, went to the Bankhead Hotel. Together with two bellboys and the manager of the hotel, they went to the fourth or fifth floor of the hotel where they found accused sitting on the floor in the public corridor, about five doors or rooms around the bend in the hallway from his own room, with his hands and head between his legs. In about two minutes the manager and the two bellboys departed. Lieutenant Watson made three or four attempts to arouse accused, and then with the aid of Private DeMaria got him up on his feet. When they leaned him against the wall the accused would fall away. Lieutenant Watson asked accused his name "and he apparently couldn't remember what it was". Accused said, "Boy, this is the Army. Ain't this a great Army? Oh, boy, this is the Army". Accused "was grumbling, asking for a cigarette and a match, then he would fall away, and kept on grumbling". Lieutenant Watson and DeMaria then assisted accused to the elevator. They passed through the lobby where several civilians were present. A car was parked before the main entrance. Accused "apparently didn't want to get in, or couldn't get in". It was necessary to assist accused into the car and to place him on the seat. The evidence further shows that some people, soldiers or civilians, were at the front entrance. Accused was in uniform (R. 7-9, 15, 16-19, 31-32, 35-36).

Accused was drunk and "very much under the influence of intoxicating liquor". He did not realize the situation. His room at the hotel was in a very disorderly condition, with about a half dozen empty whiskey bottles on the dresser, a floor lamp had been turned over and its shade broken. "The bed apparently had been slept on, but not in". There were a few cents in the wallet of accused (R. 8, 12-15, 17, 32-33).

Accused was taken from the hotel to the police station where he said his name was Smith. His true identity, however, was soon discovered. Lieutenant Watson kept accused at the police station for an

hour and a half, thinking that he could avoid placing him in jail. Accused kept sliding out of the chair onto the floor. As a last resort accused was booked on a charge of drunkenness and taken to the Southside jail. At the jail, the breath of accused smelled of whiskey and he was still very much under the influence of liquor. Lieutenant Watson told accused that if he would "snap out of it" he would not place him in jail. Accused was "very shaky on his feet" and continued, as at the police station, to slip from his chair onto the floor. Finally, he was placed in a cell and remained in the jail overnight. The following morning he was released and taken to his hotel. Accused then told the manager at the hotel that he would be glad to pay for any damage to the hotel room (R. 9-11, 24-25).

4. For the defense, Captain William B. Malcolm, Medical Corps, testified that on the night of October 12, 1942, he, another officer, and accused went to the officers' club after a meeting, had two drinks, and went to the barracks at about 11 p.m. Accused showed the effects of having been drinking. Captain William H. Darden, Medical Corps, testified that shortly after 8 a.m., October 13th, accused talked a lot, and more fluently than usual (R. 95-96).

Major Besell N. Bennett, Medical Corps, testified that after Colonel Dufort left accused in his care on the night of October 21st, accused went to bed after a little persuasion. Accused was acting in an abnormal manner, and there was a definite difference in the pupils of his eyes. Witness understood that accused had a "Horner's Syndrome", "a destructive disease somewhere along the course of the cervical sympathetic chain". Such a condition would not necessarily interfere with a person's efficiency, but was frequently associated with an unstable, sympathetic nervous system, which would interfere with one's vital physical adjustment to any physical strain, or reaction to any medication or toxic agent (R. 98-100).

Accused testified that he was 49 years of age, was married, and had a daughter 22 years of age, and a son 14. His son-in-law and four nephews were in the military service. Accused was graduated in June 1917 from Medical College in Richmond, Virginia, immediately passed the State Board of Medical Examiners, and in the same month enlisted in the Medical Officers Reserve Corps. He practiced medicine in North Carolina till September 1917, during which month he was ordered to active duty at his own request. He reported to the Medical Officers Training School, Fort Oglethorpe, Georgia, where he remained until December 1, 1917. Accused was then ordered to the Port of Embarkation, Hoboken, New Jersey, where he was later appointed Inspector of Infectious and Contagious Diseases, a position which he

held until the armistice. After the armistice he requested and obtained transport service duty. He was honorably discharged in June 1919, and, at the time, received a letter of commendation from the surgeon, Port of Embarkation (R. 101-105, 117; Exs. A, B).

Accused then returned to Richmond, Virginia, practiced as assistant to a prominent physician in that city for three years, and then practiced alone until 1926, when he was appointed Associate in Medicine at the Medical College in Virginia, an institution with which he had been associated since 1920. There the accused became chief of the allergy clinic. He also continued his practice in Richmond, Virginia. He gave up his clinical work in 1937, and his practice in 1939. From 1939 until June 1942, accused did neuro-psychiatric work in New York and New Jersey state hospitals. He then became a civilian specialist in the neuro-psychiatric division of the induction board at Newark, New Jersey. He received his commission September 15, 1942, and reported to the Fourth Service Command, Atlanta, Georgia, September 30, 1942 (R. 105-107).

On the evening of October 12, 1942, accused went to a lecture and then to the officers' club with some other officers, where "some drinks were taken, just how many I don't remember. Not a tremendous amount, however, Not to excess". Upon his return to his barracks accused and another officer ate a can "of some kind of succotash". Accused then undressed and "decided to take some more whiskey". He got in bed and began to feel the effects of the liquor. He became nervous, and he "did not want to get off, so to speak, on the wrong foot". After midnight he dressed, and walked for about an hour on the drill field. He then went to bed. He drank no liquor from midnight on (R. 107 $\frac{1}{2}$ -108, 110, 116-117).

The following morning he awakened at 8 a.m., dressed hurriedly, and decided that his physical appearance was satisfactory. His head was clear and he considered himself fit for duty. However, fearing that other people would criticize his physical appearance he took "the back way" to the hospital. Accused later left the hospital and went to his barracks where, because of an occurrence at the hospital, he "just had a physical blow-up. I was nearly crazy". He began to drink some bourbon whiskey. He did not recall that Colonel Knighton came to his room at 10 a.m. because he "had had too much to drink". He did not recall being taken to the hospital, because when he had returned to his room from the hospital he had "started guzzling" the whiskey (R. 108, 110-111, 117).

Accused further testified that there was considerable drinking going on in the barracks from time to time and that he joined, trying to be a good fellow and to make new friends. He did not recall dis-

tinctly when or with whom he began to drink on the evening of October 21, 1942. He would not be surprised if he took a drink or two in his own room. He had no recollection of events with reference to Colonel Dufort, or of having been given a cold shower (R. 112).

On October 31, 1942, accused went to Birmingham, Alabama. On his arrival he took a taxicab to a barber shop, and bought a pint of whiskey on the way. He took two drinks of whiskey at the barber shop, and was driven to the Bankhead Hotel, where he registered. He paid the taxi driver at the door, but the driver, uninvited, later came to the room of accused, where the driver and a bellboy accepted an invitation by accused to take a drink. Accused also had one drink, and then ordered an "old fashioned" with a double jigger of whiskey. He last recalled finishing this drink and his mind became a total blank until he awakened in jail. He did remember being taken to his hotel the following morning (November 2nd), but recalled no other occurrences in Birmingham. When he went to Birmingham, accused had \$150 to \$160. He had deposited \$100 of this amount in the hotel safe, but lost the balance (R. 113-116).

5. The evidence shows that accused was, as alleged in Specification 1, Charge I, drunk and disorderly in his quarters on October 21, 1942. At midnight, in a loud, boisterous, and obnoxious manner, he kept other officers in his barracks awake by pounding their doors and by entering their rooms. He paid no attention to repeated requests by these officers that he cease such actions. It became necessary to call a superior officer of accused to the barracks. Although accused promised this officer to remain in bed, the officer was again called within five minutes after he left the barracks. Upon being warned that he would be given a cold shower, accused promised that he would remain in bed. However, he "stuck his head out again" shortly after the officer who had warned him, left the room. Accused was then given a cold shower. He promised for a third time to stay in bed, "but stuck his neck out again". After accused had received a warning that he would be tied to his bed, a fellow officer volunteered to take care of him. Accused was "drunk" and "quite intoxicated". His eyes were "pretty blurry", his voice rather thick, and he was very unsteady on his feet. He staggered around in his room and was "bouncing from one side to another" in the hallway. It was necessary to support him to the shower and to place him in such a position that he would not fall down. There was a distinct odor of liquor in the room of accused and the smell was "awful" because he had vomited.

The evidence shows, with respect to Specification 2, Charge I, that accused was, on October 13, 1942, drunk in his quarters. At 10 a.m. he was "somewhat disheveled" and "pretty well drunk". At

10:45 a.m., when taken from his quarters to the hospital he "was unable to walk straight", his breath smelled of alcohol, and his eyes were bloodshot and watery. He was also "a little untidy". After examination, a diagnosis of "Alcoholism acute" was made.

It was established, with respect to Specification 3; Charge I, that on November 1, 1942, accused was drunk in uniform in a public place, to wit, the Bankhead Hotel. At about 12:45 a.m. he was taken from a street in Birmingham to the police station and then to the hotel. He was then drunk, and in a "very staggering condition". His breath smelled of liquor, and his conversation was not coherent. At about 5 a.m. on the same day, he was taken from a nearby cafe to the hotel and was, at the time, under the influence of liquor.

During the same day, he appeared at the office of the hotel manager at the end of the lobby, leaned against the door panel, kept saluting the manager and stating that he was Captain Bullard. His conversation did not make sense and he was evidently under the influence of liquor.

At 5 p.m. on the same day, accused, sitting on the floor of the fourth or fifth floor corridor, was observed by the manager, two bellboys of the hotel, and by an officer and soldier. Three or four attempts to arouse accused proved unsuccessful, he was assisted to his feet, and placed against the wall. He would, however, "fall away". He could not recall his name, and said "Boy, this is the Army. Ain't this a great Army? Oh, boy, this is the Army". The officer and soldier assisted accused to the elevator. They then passed through the lobby where several civilians were present. It was necessary to assist accused into a car parked before the main entrance, and to place him on the rear seat. Several persons were at the front entrance, but whether they were military or civilian personnel was not shown. Accused was drunk, "very much under the influence of intoxicating liquor", and did not realize the situation. In his room there were about a half dozen empty whiskey bottles, a floor lamp had been turned over and the shade broken. Accused was later placed in the city jail.

Accused testified that he had been drinking on the three occasions and admitted, in substance, that he could not recall what had occurred.

6. The question arises whether the behavior alleged in Specifications, 1, 2, and 3, Charge I, was of such an aggravated nature as to amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. In Winthrop's Military Law and

Precedents, it is stated that the word "unbecoming" as used in Article of War 95, " * * * is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety * * * but morally unbefitting and unworthy" (Reprint p. 711). The conduct contemplated by Article of War 95 -

" * * * must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents" (Reprint, pp. 711, 712).

Winthrop cites, as an instance of an offense chargeable under Article of War 61 (95), "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Reprint, p. 717).

With reference to the drunk and disorderly conduct of accused in his quarters, alleged in Specification 1, Charge I, the Board of Review believes that although accused was intoxicated, loud, boisterous, and inconsiderate of his fellow officers, his conduct did not constitute a violation of Article of War 95. The Board of Review is likewise of the opinion that the drunkenness of accused in quarters on October 13, 1942, alleged in Specification 2, Charge I, was not of a character denounced by the 95th Article of War.

The drunkenness at the Bankhead Hotel on November 1st, alleged in Specification 3, Charge I, was, however, of a more serious character. On that day, accused had been returned to the hotel while under the influence of liquor by members of the military police at about 1 a.m. and again at 5 a.m. During the day, while still in a drunken condition, he was observed in the hotel by civilian personnel. At 5 p.m. he was sitting on the floor of a public corridor of the hotel in a stuporous condition, where he was observed by both civilian and military personnel. Accused was aroused with difficulty, assisted to the elevator, through the lobby, and out the front entrance of the hotel where other persons were present. Because of his drunkenness on this occasion it was necessary to confine him in the city jail. The drunkenness of accused was, on this occasion, gross in character and he made a disgraceful exhibition of himself in the presence of both military inferiors and civilian personnel. His standards of behavior were below the standards to be expected of an officer and a gentleman.

The Board of Review is of the opinion, with respect to Specifications 1 and 2, that the evidence is legally sufficient to support only so much of the findings of guilty under Charge I as involves violation of Article of War 96, but with respect to Specification 3, that the evidence is legally sufficient to support the finding of guilty under this Charge in violation of Article of War 95.

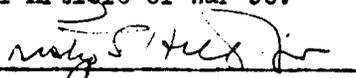
7. Specifications 1 and 2, Charge I, do not contain an allegation of the location of the quarters of accused. There is, however, no doubt but that the quarters of accused were at Fort McClellan, Alabama, as all of the officers who testified as to his actions in the quarters gave Fort McClellan as their address. Accused pleaded guilty to both Specifications. No objection as to the form or substance of these Specifications was made by the defense. Accused was not misled by the omission of this allegation from the Specifications, and is amply protected with reference to any possible future jeopardy.

8. The accused is 49 years of age. The records of the Office of The Adjutant General show his service as follows:

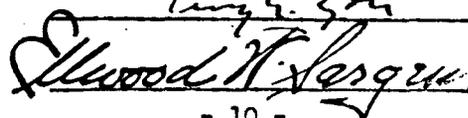
Appointed temporary captain, Medical Section, Army of the United States, September 15, 1942; extended active duty September 29, 1942.

The accused testified that in 1917, following his graduation from the Medical College of Virginia, he enlisted in the Medical Officers' Reserve Corps, and during September 1917 was ordered to extended active duty at his own request. He went to the Medical Officers' Training School, Fort Oglethorpe, Georgia, until December 1, 1917, and was then ordered to the Port of Embarkation, Hoboken, New Jersey, where he remained until the armistice. He was honorably discharged as a first lieutenant in June 1919.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2, Charge I, as involve findings of guilty of these Specifications in violation of Article of War 96; legally sufficient to support the findings of guilty of Charge I and Specification 3 thereunder, and legally sufficient to support the sentence and to warrant confirmation of the sentence. 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.

SPJGH
CM 230026

1st Ind.

War Department, J.A.G.O.,

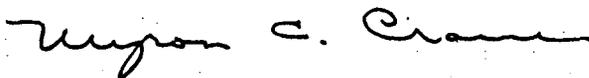
MAR 27 1943

- 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 John B. Bullard (O-496272), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2, Charge I, as involves findings of guilty of those Specifications in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Accused was drunk in his quarters on October 13, 1942; drunk and disorderly in his quarters on October 21, 1942; and on November 1, 1942, was conspicuously drunk in uniform in a hotel in Birmingham, Alabama. I recommend that only so much of the findings of guilty of Specifications 1 and 2, Charge I, be approved as involves findings of guilty of those Specifications in violation of Article of War 96, and, in view of the repeated offenses, and the conspicuous and disgraceful behavior of accused in a public place on November 1, 1942, 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 carrying into effect the recommendation made above.



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.

(Resignation accepted by the President 26 Apr 1943)

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

(291)

SPJGK
CM 230070

FEB 25 1943

UNITED STATES)

CAMP ROBERTS, CALIFORNIA.

v.)

Privates WILBURN L. HENRY)
(37014334), Company A, 77th)
Infantry Training Battalion,)
S. E. THOMPSON (6955305),)
Company D, 87th Infantry)
Training Battalion, and)
General Prisoner LOUIE F.)
NALLS.)

Trial by G. C. M., convened at
Camp Roberts, California,
December 2 and 4, 1942. Each;
Dishonorable discharge and con-
finement for ten (10) years and
three (3) months. Disciplinary
Barracks.

REVIEW by the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

2. Accused were tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Wilburn L. Henry, Company A, 77th Infantry Training Battalion, Private S. E. Thompson, Company D, 87th Infantry Training Battalion, and General Prisoner Louie F. Nalls, Camp Roberts, California, acting jointly and in pursuance of a common intent, did, in conjunction with Private Floyd A. Farris, Corps of Military Police, SCU 1928, at San Miguel, California, on or about September 9, 1942, without the proper authority wrongfully take and appropriate to their own use, one Ford, six cylinder 1½ ton truck, serial #344835, of a value of more than Fifty Dollars (\$50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Wilburn L. Henry, Company A, 77th Infantry Training Battalion, Private S. E. Thompson, Company D, 87th Infantry Training

Battalion, and General Prisoner Louie F. Nalls, Camp Roberts, California, acting jointly and in pursuance of a common intent, did in conjunction with Private Floyd A. Farris, Corps of Military Police, SCU 1928, at Shandon, California, on or about September 9, 1942, wrongfully take and use without the consent of the owner, a certain automobile, to-wit; a 1941 Ford V-8 Pickup Truck, the property of the Pinole Carissa Wheat Company and in the possession and under the control of Eben McMillan of Shandon, California, of a value of more than Fifty Dollars (\$50.00).

Specification 3: In that Private Wilburn L. Henry, Company A, 77th Infantry Training Battalion, Private S. E. Thompson, Company D, 87th Infantry Training Battalion, and General Prisoner Louie F. Nalls, Camp Roberts, California, acting jointly and in pursuance of a common intent, did in conjunction with Private Floyd A. Farris, Corps of Military Police, SCU 1928, at or near San Miguel, California, on or about September 9, 1942, commit an assault upon Private G. P. Montoya by pointing a loaded gun at the said G. P. Montoya.

Each accused pleaded not guilty to and was found guilty of the Charge and Specifications. In the case of accused Henry there was introduced evidence of three previous convictions by summary courts-martial for absence without leave in violation of Article of War 61, one previous conviction by special court-martial for absence without leave in violation of Article of War 61 and for breach of parole in violation of Article of War 96, and one previous conviction by special court-martial for escape from confinement in violation of Article of War 69. In the case of accused Thompson evidence of one previous conviction by special court-martial for desertion in violation of Article of War 58 was introduced. No evidence of previous convictions was introduced in the case of accused Nalls. Each of the accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years and three 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 50 $\frac{1}{2}$.

3. The evidence relating to Specifications 1 and 3 of the Charge shows that on September 9, 1942, at Camp Roberts, California, the three

accused, prisoners in the post stockade, were engaged in "cleaning up" a certain area of the camp (R. 12) under the supervision of Private Floyd Farris, Corps of Military Police (R. 13, 34, 38), who was armed with a shotgun (R. 13, 18, 33). The detail was hauling trash from Camp Roberts and unloading it at the dump or incinerator at San Miguel (R. 12, 13, 14), using a Ford ton and a half truck (U.S.A. No. W-344835) (R. 10, 12), property of the United States and issued to the police and prison officer (R. 10, 11). The truck was driven by Private George P. Montoya, Quartermaster Detachment (R. 12). Montoya testified that while sitting in the cab of the truck he overheard one of the prisoners ask the guard when he was "going over the hill" (R. 13, 18). During the afternoon, when the truck was backed into the dump preparatory to unloading the trash (R. 14), accused Henry approached the cab of the truck at the driver's side door (R. 20), loaded the gun (R. 19), pointed it at Montoya (R. 14, 15, 19) who was in the driver's seat (R. 14), said, "All right, driver" (R. 14) and ordered him to get out of the cab and into the back of the truck (R. 14, 15). Montoya testified further that accused Henry was "ready to shoot" and in shooting position (R. 19). At this time the other two prisoners were "on the right side of the truck" (R. 20). Montoya complied with accused Henry's demand and moved to the back part of the truck with the unarmed guard and Henry, who held the gun (R. 15). Accused Thompson and Nalls occupied the cab (R. 15, 16). The truck was then driven "over the hill" to a point about one mile from San Miguel where Montoya was required to descend and make his way back to Camp Roberts (R. 16). On September 10 the truck was found near Shandon, California. The three accused eventually were apprehended and placed in the county jail at Phoenix, Arizona (R. 21). First Lieutenant William M. Wilson, Quartermaster Corps, motor officer at Camp Roberts, testified that the value of the truck was "around \$1,000.00" to the best of his knowledge (R. 11). First Sergeant Frederick F. Brady, Corps of Military Police, stated that although he did not know the value of the truck it "would be" worth over \$50 (R. 21).

Upon their return to Camp Roberts and after it had been explained to them that they had the right to remain silent or to make a voluntary statement and that any statement which they made might be used against them, accused Thompson and Nalls each made a statement which was reduced to writing, signed and sworn to. The statements were received in evidence without objection (R. 27-32; Exs. E, F). Accused Henry declined to make a statement under oath or in writing (R. 27). The law member correctly advised the court that each statement might be considered as evidence solely against the particular accused making it (R. 40; par. 114c, M.C.M.).

In his statement accused Thompson admitted planning with others to "go over the hill" (Ex. E, p. 4). He also admitted procuring the gun from Farris, the guard, handing it to another prisoner, driving the Army truck away from the dump in San Miguel, leaving the original driver (Montoya) en route, and later traveling by other misappropriated automobiles to Wickengburg, Arizona, where he and his companions were apprehended (Ex. E, pp. 1, 4-6).

According to accused Nalls' statement he knew nothing of any plan to escape until about four o'clock on the afternoon on which the escape occurred (Ex. F, p. 4). Farris told accused Nalls that the Government truck was to be used to effect the escape (Ex. F, p. 5). While the truck was in the dump at San Miguel, Farris handed his gun to one of the other prisoners who told the driver to get out of the truck (Ex. F, pp. 2, 3). The driver did so and accused Nalls and his companions entered the truck and drove away, leaving the driver at the dump (Ex. F, pp. 2, 3). Accused Nalls stated further that he was riding in the cab of the truck. After the truck had been driven to various places it was abandoned near Shandon late at night (Ex. F, p. 3). Accused eventually was "picked up" by the police in Arizona and placed in jail in Phoenix (Ex. F, p. 5).

Accused Henry made an unsworn statement at the trial, in which he admitted that he agreed with Farris to "go over the hill" and that Farris gave his shotgun to another prisoner who "came around on the left side of the truck, the driver's side" (R. 35). Accused Henry stated further: "I come out of the rear of the truck and told the driver to get out of the cab and get in the rear of the truck which he did" (R. 35). Accused Henry and his companions then drove away and Henry subsequently ordered the driver (Montoya) "to get out which he did" (R. 35). He stated further that they then "went on" to Phoenix, Arizona (R. 35).

Accused Thompson also made an unsworn statement reciting substantially the same facts as in his statement to the military police (R. 36). In addition he stated that "we told the driver to come out of the car and get in the back" (R. 37). Thereafter accused Thompson handed the "shotgun" to one of the others and they "drove to Shandon" (R. 37).

The evidence relating to Specification 2 of the Charge shows that the Pinole Carissa Wheat Company owned a Ford "pickup" truck bearing license number 38C-328 (R. 6, 7). On September 9, 1942, Eben L.

McMillan, manager of the company, drove the car into Shandon and "left it parked outside the house *** at 10 o'clock that night" (R. 6, 7). He left the keys in the car. In "the bed of the car" were a box of .12 guage shotgun shells, a spare tire and wheel and a small piece of tarpaulin. The next morning he discovered that the car had disappeared (R. 7) and he did not see it again until about a month later in "the garage at San Luis Obispo when it was returned" (R. 8). He stated that "somewhere in the neighborhood of between \$550.00 and \$600.00 would be the value I would have placed on it" (R. 7). The truck eventually was located in "Shidler's Garage", San Bernardino, California (R. 23, 25; Ex. C).

At the county jail in Phoenix, Sergeant Brady and other members of the military police talked with the three accused (R. 21), Brady first having told them that

"any statement they may make might be used against them and if they desired to make a statement it must be voluntary on his part and in case they were tried by court-martial their statements could be used." (R. 22)

The nature of the conversation does not appear in evidence but during the return trip to Camp Roberts the three accused were taken by Sergeant Brady and Captain Robert Anderson, commanding officer of the military police, to Shidler's garage, where they were confronted with the Ford pickup truck. In response to questioning each accused admitted having taken and driven the truck from Shandon, California, without permission (R. 23-25). In the sworn statements already referred to, made by Thompson and Nalls to members of the military police, both of these accused admitted taking and driving the pickup truck from Shandon (Ex. E, p. 2; Ex. F, p. 2). Furthermore, Brady testified that accused Henry pointed out to him the place where Farris' shotgun and "a box of shot gun shells" had been abandoned (R. 26, 27). Witness obtained the gun and the shells (R. 26). They were located about six miles from San Pedro, California, "in what appeared to be a dump on top of a hill" (R. 26). In his unsworn statement at the trial Henry corroborated the facts about the shotgun and box of shells but denied having said at Shidler's garage that he had taken the pickup truck or having identified it (R. 35, 36). In his unsworn statement at the trial Thompson also denied having identified the pickup truck at San Bernardino (R. 37).

4. The competent evidence thus shows that at the place and time alleged in Specification 1 of the Charge the three accused, acting

jointly and in pursuance of a common intent, in conjunction with Private Floyd A. Farris, wrongfully took and appropriated to their own use a Ford one and a half ton truck valued at more than \$50, property of the United States and furnished and intended for the military service thereof. The evidence relating to Specification 3 shows that at the place and time alleged one of the three accused pointed a loaded shotgun at the driver of the truck and forced him to leave the driver's seat and go to the back of the truck. This constituted an assault upon the part of the accused who pointed the gun, and since his action clearly was part of the common design to misappropriate the truck, the two other accused were equally guilty of the assault regardless of whether they had planned it in advance (sec. 1674, Wharton's Criminal Law, 12th ed.).

The competent evidence relating to Specification 2 clearly proves that, as alleged, the three accused, acting jointly and in pursuance of a common intent, wrongfully took and used the Ford pickup truck without the consent of the owner and that the truck was more than \$50 in value. The statements made by accused at Shidler's garage, confessing to the offense, were properly admitted in evidence since accused previously had been warned of their rights. That the warning was not given immediately prior to the confessions does not affect their admissibility.

5. Specification 2 alleged that Eben McMillan owned the Ford pickup truck. During the course of the trial the law member, at the prosecution's request, amended the Specification so as to allege that the Pinole Carissa Wheat Company owned the car and that it was in the possession and under the control of Eben McMillan (R. 9). The defense made no objection and did not request a continuance. Since the variance was not fatal (par. 451 (41), Dig. Op. J.A.G., 1912-40) the amendment was proper. The question was interlocutory and the law member's ruling was subject to objection by any member of the court (A.W. 31; par. 51d, M.C.M.). No such objection appears in the record, and although the president apparently failed to inform the members of their right to object, his omission did not prejudice accused.

6. The charge sheet shows that accused Henry is 24 years of age, and Thompson and Nalls 21 years of age. Henry was inducted on October 6, 1941. Thompson enlisted on February 8, 1940. Nalls was inducted on May 9, 1941.

7. 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 and sentence.

Andrew Cappo, Judge Advocate.
John W. Wainwright, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.



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

SPJGN
CM 230193

MAR 13 1943

UNITED STATES)

v.)

Second Lieutenant JOSEPH
J. HUDAK (O-1291279), Infantry.)

NEW YORK PORT OF EMBARKATION

Trial by G.C.M., convened at
Camp Kilmer, New Jersey, Jan-
uary 5, 1943. Dismissal and
total forfeitures.

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and COMLES, 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 96th Article of War.

Specification: In that 2nd Lt. Joseph J. Hudak, Task Force Replacement Pool, Camp Kilmer, New Jersey, then 2nd Lt. Joseph J. Hudak, 175th Infantry, 29th Division, did, at Camp Kilmer, New Jersey, on or about October 3, 1942, violate Memorandum No. 108, Headquarters Camp Kilmer, New Jersey, October 1, 1942, the same being an order of the Commanding Officer, Camp Kilmer, New Jersey, confining all Task Force Officers to the limits of the post, by leaving the limits of said post without authority.

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

Specification 1: In that 2nd Lt. Joseph J. Hudak, Task Force Replacement Pool, Camp Kilmer, New Jersey, then 2nd Lt. Joseph J. Hudak, 175th Infantry, 29th Division, did, without proper leave, absent himself from his organization at Camp Kilmer, New Jersey, from about October 3, 1942, to about October 19, 1942.

Specification 2: In that 2nd Lt. Joseph J. Hudak, Task Force Replacement Pool, Camp Kilmer, New Jersey, did, without proper leave, absent himself from his organization at Camp Kilmer, New Jersey, from about November 10, 1942, to about November 21, 1942.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the 175th Infantry Regiment, to which the accused was assigned (Testimony of accused R. 41), was stationed at Camp Kilmer, New Jersey, on October 3, 1942, preparing for service overseas. On that date all of the task force personnel, including the accused, were under restrictions by an order of the Commanding Officer, Camp Kilmer, Memorandum No. 108, which confined them to the limits of the post and which excluded all visitors. (R. 11; Ex. 3) The accused, however, on October 3, 1942, in violation of the above described restrictions, absented himself from his organization at Camp Kilmer without authority. On the same day and while in an absent without leave status, he was transferred to the Task Force Replacement Pool (Exs. 1, 2). On October 4, 1942, during his absence, the 175th Infantry Regiment departed from camp for a port of embarkation (R. 31-36; Ex. 7)

The accused in a statement in which he admitted his unauthorized absence explained that he left camp on October 3, 1942, for New Brunswick; that he met a "congenial" lady, had a few drinks and returned to camp the next day at about 9 p.m.; that he had no knowledge of the pending departure of his unit but learned upon his return that it had moved out in his absence. He explained further that he became panicky and had little recollection of what followed; that he deeply regretted his actions, was ready to accept punishment but prayed to be permitted to remain in the service (R. 34-39; Ex. 8).

On November 9, 1942, the accused again absented himself without authority and remained absent until November 21, 1942 (R. 46; Ex. 6).

4. The accused, after being advised of his rights, testified that he had left his organization on October 3, 1942, for the purpose

of purchasing a trench coat; that he met a lady he had never seen before and had a few drinks with her; that he stayed at a hotel overnight and returned to camp at about 9 p.m., October 4, 1942. The accused testified further that upon his return to camp he found that his organization had left. He then reported to post headquarters, then to the overseas staging area and then the task force replacement pool in order to obtain instructions but learned nothing. On November 10, 1942, he again left camp without authority and obtained a room at a hotel in New Brunswick, remaining there for a few days, then proceeded to his parents home in Messina, New York, where he stayed until November 18, 1942, and then returned to camp. (R. 40-46)

The accused admitted he had knowledge of the restriction order at the time he left camp and that he absented himself without leave on both occasions. He admitted he knew that his trunk had already been shipped and that he should have obtained authority before leaving camp (R. 46-52).

5. The Specification, Charge I, alleges that the accused violated the order of the Commanding Officer, Camp Kilmer, confining all task force officers to the limits of the post by leaving the limits of said post without authority. The order referred to in the Specification was published October 1, 1942, to become effective at reveille, October 3, 1942. The accused left camp on October 3, 1942, and did not return until 9 p.m. the following day. The accused then learned his unit had departed for a port of embarkation. The accused admitted he had knowledge at the time he absented himself from camp of the order restricting him to the limits of Camp Kilmer and that he knew he should have obtained permission to leave camp. This evidence supports beyond a reasonable doubt the finding of guilty of the charge and Specification.

6. Specifications 1 and 2, Charge II, allege that the accused absented himself without leave from his organization from October 3, 1942, to October 19, 1942, and from November 9, 1942, to about November 21, 1942. The evidence, including the admissions and testimony of the accused shows that he left Camp Kilmer without permission on the dates alleged in the Specifications and that he remained absent therefrom until October 19, 1942, and November 21, 1942, respectively. The accused admitted that he had absented himself without permission as alleged, and that he knew he should have obtained permission before leaving the post. The evidence shows that the accused left Camp

Kilmer on October 3, 1942, and remained absent therefrom until October 19, 1942, and again left on November 9, 1942, and remained absent to November 21, 1942. During these absences he remained a few days in both New Brunswick and New York and then returned to camp. The evidence clearly supports the findings of guilty.

8. The records of the Office of The Adjutant General show that the accused is 27 years of age and that he was inducted into the Army on April 3, 1941. He entered officers' candidate school at Fort Benning, Georgia, May 27, 1942, and was commissioned a second lieutenant on August 25, 1942.

9. 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 is legally sufficient to support the findings of guilty of the Charges and Specifications and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of Article of War 96 or 61.

Charles B. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cowle, Judge Advocate.

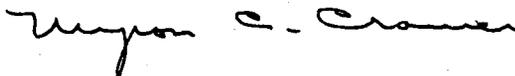
1st Ind.

War Department, J.A.G.O., MAR 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 Second Lieutenant Joseph J. Hudak (O-1291279), 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 thereof. The accused was found guilty of violating an order restricting the personnel of his organization to the limits of Camp Kilmer, New Jersey, in violation of Article of War 96, and of absenting himself without leave from his organization from October 3, 1942, to October 19, 1942, and from November 10, 1942, to November 21, 1942, in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The evidence shows that on October 3, when the accused first absented himself without leave, his organization was preparing for entrainment for a port of embarkation and that it departed on the following day. Under the circumstances, therefore, the action of the accused in absenting himself without leave from his organization on October 3 involves a serious breach of discipline and duty. I recommend, therefore, that the sentence of dismissal and total forfeitures 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 carry into effect the foregoing recommendation, 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 ltr. for
sig. Sec. of War
- Incl 3 - Form of Executive
action

(Sentence confirmed. G.C.M.O. 79, 5 Apr 1943)

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

(305)

SPJGN
CM 230196

APR 3 1943

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

v.)

Private HARVEY M. KENNEDY)
(31104120), Company A, 802nd)
Signal Service Regiment.)

EASTERN SIGNAL CORPS
TRAINING CENTER

Trial by G.C.M., convened at
Fort Monmouth, New Jersey,
December 29, 1942. Dishon-
orable discharge (suspended)
and confinement for one (1)
year. Detention and Rehabili-
tation Center, Camp Upton,
New York.

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

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 in part, 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 on the following Charges and Specifications:

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

Specification: In that Private Harvey M. Kennedy, Company A, 802d Signal Service Regiment, did, at Fort Monmouth, Red Bank, New Jersey, on or about October 6, 1942, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Monmouth, Red Bank, New Jersey on or about November 7, 1942.

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

Specification: In that Private Harvey M. Kennedy, Company A, 802d Signal Service Regiment, did, at Fort Monmouth, Red Bank, New Jersey, on or about July 2, 1942, feloniously take, steal, and carry away

one shirt, khaki value about \$2.17 and one hat, denim, value about \$.34, the property of Private Robert L. Ussery, Company A, 802d Signal Service Regiment, Fort Monmouth, Red Bank, New Jersey.

The accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, reduced the period of confinement to one year and designated the Second Service Command Detention and Rehabilitation Center, Camp Upton, New York, as the place of confinement. The result of his trial was published in General Court-Martial Order No. 2, Headquarters, Eastern Signal Corps Training Center, January 13, 1943.

3. The evidence for the prosecution concerning the Specification, Charge I, shows that the accused absented himself without leave from his organization on October 6, 1942, and remained in unauthorized absence until, after a period of 32 days, he, dressed in uniform, returned with his father and surrendered himself to his organization on November 7, 1942 (R. 6-8, 21; Ex. P-1).

The evidence for the prosecution concerning the Specification, Charge II, shows that the accused lived in a tent with four other soldiers, including one Private Ussery who was supply clerk of the company (R. 8, 12, 13). All five soldiers hung their clothes on the same rack but had separate places for them (R. 12). On or about July 3, 1942, over three months before the accused left, Ussery missed a cotton shirt, which he had not lent to anyone (R. 9). Ussery went on a furlough in September. During this period the company was moved from its tents to another area (R. 10, 12). When Ussery returned his denim fatigue hat was missing (R. 10). He had lent it to no one. In a routine post AWOL check-up of the accused's clothing late in October, Ussery, in his capacity as supply clerk, found both his shirt and his fatigue hat among the accused's belongings (R. 9-11). The testimony does not make it clear whether they were in the accused's barracks bag or his foot locker. Ussery stated that the shirt and hat were "emptied out of the barracks bag" (R. 11). Another witness testified that they were in the accused's foot locker (R. 15). Ussery also testified that "during the check of the clothing we put all the stuff on the floor, all in a big pile" from both the barracks bag and the foot locker (R. 10).

4. The accused testified that he wore his uniform at all times while away; that he never obtained civilian employment; that he surrendered himself; and that he never intended to desert the service. With regard to the missing articles of clothing the accused declared that while the clothes of each soldier should have been on a specified part of the

stand, they were, in fact, "all mixed up"; and that he did not put Ussery's shirt or hat in his foot locker (R. 16-17). On cross-examination pertaining to the Specification, Charge I, the accused stated that he lived in Stamford, Connecticut; that he went to New York City, where he stayed in a Y.M.C.A.; that he had \$105 when he left his organization, which by the time he returned he had spent; that his father found him in the Y.M.C.A., and told him that the best thing for him to do was "to turn in"; that he intended to return and so told his father; and that he was intoxicated most of the time while away (R. 17-21). Upon cross-examination by the court regarding the Specification, Charge II, the accused said that he did not know that the shirt and the hat were in his possession; that he had a similar cotton shirt and a fatigue hat of his own; and that he usually kept his foot locker open. He admitted that his clothes should have been separated from Ussery's by those of the three other soldiers (R. 21-23).

5. The Specification, Charge I, alleges that the accused did, on or about October 6, 1942, desert the service, and remained absent in desertion until he surrendered himself at Fort Monmouth, New Jersey, on or about November 7, 1942. In order to sustain the findings of guilty under this Specification, it is necessary that the evidence show that the accused absented himself without leave from his organization, and that he intended to remain away permanently (par. 130, M.C.M., 1928).

The evidence clearly shows that the accused absented himself without leave from his organization at Red Bank, New Jersey, as alleged. The evidence shows further that the accused went to New York City, a distance of only approximately 35 miles, and that he remained in New York City until he voluntarily returned to his organization after an absence of 32 days. During the period of his absence, the accused appears to have worn his uniform. On the other hand, there is no evidence that the accused sought employment or wore civilian clothes.

It is well settled that mere absence without leave is not sufficient evidence of an intent to desert unless such absence is much prolonged. In a similar case in which the evidence showed that the accused was apprehended in uniform after having been absent without leave for one month and six days, it was held that the record was not legally sufficient to sustain the finding of guilty of desertion (CM 123404; CM 122759 (1918), Dig. Op. JAG, 1912-40, sec. 416 (8)). In another case involving absence of 23 days, a similar decision was rendered (CM 196867 (1931)).

Under the facts of the present case, and in view of the above authority, the Board is of the opinion that the record is legally sufficient to support only so much of the findings of guilty as involves a finding that the accused absented himself without leave for the period alleged, in violation of Article of War 61.

The Specification, Charge II, alleges that, on July 2, 1942, the accused feloniously took, stole, and carried away a khaki shirt and a denim hat belonging to one Private Ussery. In order to sustain the finding of guilty of this Specification and Charge, it is necessary that the evidence establish that the accused took the property; that he carried it away; and that he intended permanently to deprive the owner of the property (par. 149, p. 173, M.C.M., 1928). None of these elements are established in the present case. The only affirmative evidence that the accused took or carried away these articles is the fact that they were found among his belongings. While this would be damaging under most circumstances, it is not in this case. There is no evidence that the accused took Ussery's shirt or hat or that he intended to deprive Ussery of them. The statement by the accused that the clothes were "all mixed up" is supported by Ussery's testimony, who believed they had been "misplaced". Ussery stated that when he returned from his furlough "everything was sort of mixed up" and, in his opinion, his fatigue hat "was misplaced at the time the company moved". There is no evidence in the record that the accused took or carried away the items nor do the surrounding circumstances show an intent to deprive the owner thereof. The accused testified that he had a similar hat and shirts of his own. This was not denied. It was possible, and not improbable, that the shirt and hat were put into the accused's barracks bag or his foot locker by mistake during the moving. The shirt which had been kept on a common rack, had been missing over three months.

The Specification alleges that the accused feloniously took the denim fatigue hat on or about July 2, 1942, whereas the evidence shows that it was not missing until Ussery returned from his furlough in September. The evidence fails, therefore, to sustain the findings of guilty.

6. For the reasons stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II, and its Specification; and legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that the accused, at the place alleged, absented himself without leave from his organization on or about October 6, 1942, and remained absent without leave until he surrendered himself on or about November 7, 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 three months and six days and forfeiture of two-thirds of his pay per month for a like period.

Bhas. L. Benson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cowles, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 10 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended, is the record of trial in the case of Private Harvey M. Kennedy (31104120), Company A, 802nd Signal Service Regiment, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of Charge II and its Specification be vacated; that so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of an offense by accused other than absence without leave from his organization at Fort Monmouth, New Jersey, on or about October 6, 1942, until he surrendered himself on or about November 7, 1942, in violation of Article of War 61, be vacated; that so much of the sentence as is in excess of confinement at hard labor for ninety-six days and forfeiture of sixty-four days' pay be vacated; and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings so vacated be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made should it 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

(Findings of guilty of Charge II and its Specification vacated. So much of the findings of guilty of Charge I and its Specification as involve findings of guilty of an offense by accused other than absence without leave from his organization at Fort Monmouth, New Jersey, on or about October 6, 1942, until November 7, 1942, in violation of Article of War 61, vacated. So much of the sentence as in excess of confinement at hard labor for three months and six days and forfeiture of \$33.32 per month for a like period, vacated. By order of the Secretary of War. G.C.M.O. 89, 16 Apr 1943)



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

(311)

SPJGK
CM 230201

MAR 20 1943

UNITED STATES	)	ALASKA DEFENSE COMMAND
v.	)	Trial by G. C. M., convened at
Major ELBERT E. EUBANKS	)	Fort Glenn, Alaska, November 30-
(O-288552), 153rd Infantry.	)	December 1, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 85th Article of War.

Specification: In that Major Elbert E. Eubanks, 153rd Infantry, was, at Fort Glenn, Alaska, on or about the 25th, 26th and 27th of October, 1942, found drunk while on duty as Executive Officer of the Third Battalion, 138th Infantry.

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

Specification: In that Major Elbert E. Eubanks, 153rd Infantry, did, at Fort Glenn, Alaska, on or about October 25th, 1942, render himself unfit to perform his duty as Battalion Executive Officer by the intemperate use of intoxicating liquor, and did remain unfit for said duty until 4:00 PM, October 27th, 1942.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of both 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, including in his action the following:

"Pursuant to Article of War 48 the order directing the execution of the sentence is withheld."

The record of trial has been treated as if forwarded for action under Article of War 48.

3. The evidence shows that on October 21, 1942, accused was assigned to special duty as Executive Officer of the 3rd Battalion, 138th Infantry (R. 7, 9, 18, 23, 41). Due to crowded conditions no office had been established for him at that time (R. 23). He and several other officers occupied a "hut", accused being the senior officer therein (R. 14, 18, 24). Prior to Sunday, October 25, accused was up for reveille daily and performed his duties in a normal and rational manner (R. 14, 18, 24, 27). Second Lieutenant Gordon E. Van Tassel, 138th Infantry, an occupant of the same hut, testified that he saw accused at about 11 p.m., Saturday, October 24, at which time accused's condition was "normal" (R. 14). On Sunday morning, October 25, however, accused did not appear at reveille or breakfast (R. 24, 27). About 10:30 a.m. he fell out of bed or fell in endeavoring to get out of bed (R. 15, 18, 27). In attempting to arise he fell again and First Lieutenant William J. Fitzgerald, Medical Corps, Battalion Surgeon and an occupant of accused's hut, helped him back to bed (R. 15, 18, 27). First Lieutenant William K. Moors, 138th Infantry, who was Adjutant of the 3rd Battalion (R. 17) and occupied accused's hut (R. 18, 21, 22), was present at the time. He testified that accused appeared to be "unsteady on his feet" and did not say anything (R. 19). Lieutenant Fitzgerald "did not detect" the smell of liquor on accused's breath (R. 30). He noted a "small abrasion" over accused's forehead, "just over the left eye", which in his opinion was slight, superficial and not "of a very serious nature" (R. 27). Witness did not ascribe accused's failure to perform duty on Sunday, Monday or Tuesday to this fall (R. 27).

Between 10:30 and 11 a.m. (R. 11), Captain Carl H. Wells, 503rd Coast Artillery, went to accused's hut to get some cigarette lighters which accused, while on leave, had procured for him (R. 10, 12). Accused was in bed (R. 10). When witness tried to arouse and waken him there was "just a series of mumbling and grumbling" (R. 13). Witness asked accused "how he was feeling or something like that", and could

not understand accused's reply, which was "just a mumbling, more or less" (R. 11). Witness testified further that accused's speech was "not clear" and "was not very coherent" (R. 10, 12), that he "was more or less in a coma" (R. 12), that it was not "worth while" to attempt to carry on a conversation with him, and that he did not appear to have full and rational control of his mental and physical faculties (R. 11). Witness stated that there was an odor of whiskey in the hut, that some whiskey bottles were present (R. 13, 14), and that "from all appearances" accused's condition was "attributable to an excess consumption of intoxicating beverages", although witness could not "state that" (R. 11). From "having seen persons previously with a hangover" witness "assumed that that was the trouble" (R. 12). He stated also that accused was either "in a drunken stupor or something else was wrong with him" (R. 10). When asked whether there was any similarity between accused's actions and those of a person waking from a sound sleep rather than from a "hangover", witness replied: "I would say it was a combination of both." (R. 12)

Witness left the hut and returned about an hour later. Accused was in bed (R. 11) but, complying with a request from witness, arose and procured the cigarette lighters (R. 12, 13). Accused was "somewhat" unsteady, but "he was on his feet" (R. 11). In the opinion of witness accused did not have full control of his mental and physical faculties at the time (R. 12). Witness had no conversation with accused other than to ask him for the lighters (R. 13). On this occasion also witness noticed whiskey in the hut, but he did not see accused take any (R. 13). Witness did not notice any cuts or abrasions on accused's forehead or over either eye (R. 10).

Lieutenant Colonel Galen A. Gorrill, Commanding Officer, 3rd Battalion, 138th Infantry (R. 7), testified that he was in accused's hut during the forenoon of Sunday, October 25. The time of his visit does not appear in the testimony. Accused was on his bunk and said that he did not feel well but did not think he had anything serious. Witness suggested that accused take care of himself so as to be ready for duty on Monday (R. 8). He testified that accused's condition was apparently "nothing more than, perhaps, a head-ache...not feeling well" (R. 9). Lieutenant Moors saw accused from time to time during the day and, on each occasion, accused was in bed (R. 20). Neither Lieutenant Moors nor Lieutenant Van Tassel considered accused fit for duty on that day (R. 15, 19). In the opinion of Lieutenant Moors the cause of accused's unfitness was "intoxication" or "post-intoxication" (R. 19).

On Monday, October 26, 1942, accused did not appear at reveille, breakfast or drill call (R. 8, 15, 24, 27). As a consequence, about 7 or 7:15 a.m. (R. 19), Lieutenant Colonel Gorrill went to accused's hut and found him in bed. Accused said he had overslept (R. 8). Lieutenant Colonel Gorrill testified that he asked accused whether he was able to get up and dress. Accused answered that he was (R. 8, 19). Believing accused in condition for duty (R. 9) witness, after reprimanding him for not being up (R. 8), told him to get up, dress, go outside, and inspect the area (R. 8, 19). Witness did not think that accused was under the influence of liquor at the time (R. 10). After ordering him to get up witness left the area (R. 9, 19). Although Lieutenant Moors tried to help accused comply with the order (R. 19) accused "declined to get up" (R. 20). Lieutenant Moors regarded accused as "intoxicated" (R. 20) and unfit for duty "because of either alcoholism or post-alcoholism" (R. 21).

First Lieutenant George E. Pollock, Commanding Officer, Headquarters Detachment, 3rd Battalion (R. 23, 24), who also lived in accused's hut, was present on the morning of Monday, October 26, and testified that accused was in bed, that apparently he was sick (R. 24), that his speech was not clear, and that in the opinion of witness he was unfit for duty (R. 26). About 8:30 a.m. (R. 24), witness summoned Lieutenant Fitzgerald, who came to the hut to examine accused (R. 27). Lieutenant Fitzgerald testified that accused was "in a comatose state" (R. 31), that his reactions were "sluggish", that he was "unable to answer questions and to speak coherently" (R. 30), that his mental and physical faculties were impaired (R. 27), and that he was "in no condition to do duty" (R. 30) or "to take the field" (R. 28). Although the symptoms were such that accused "could have been" suffering from coma, concussion or fractured skull (R. 30), witness diagnosed the condition as resulting from acute gastritis solely and stated that it did not result from "over indulgence" (R. 32). However, witness also stated that there were no indications as to what might have produced the acute gastritis and that consumption of large quantities of alcohol is a "common" reason for acute gastritis (R. 32). In answer to the question, "Was he intoxicated?", witness replied, "I can't answer that", and he also claimed his inability to tell what caused the impairment of the mental and physical faculties of accused (R. 28).

After Lieutenants Fitzgerald and Pollock had discussed the matter they decided to enter accused's name in the "sick book", and about 9 a.m.

they made the entries (R. 24, 25, 27; Ex. 1). He was listed as sick in quarters, not in line of duty, and the entries were signed by Lieutenant Pollock as detachment commander and Lieutenant Fitzgerald as medical officer (R. 25; Ex. 1). Lieutenant Fitzgerald testified that he marked accused "Line of Duty; No" because it was his opinion at the time that the illness had not been incurred in line of duty (R. 28, 30).

Apparently accused remained in bed during the whole of Monday (R. 15, 26), although in the afternoon he answered the telephone in an intelligible manner (R. 15). Lieutenant Fitzgerald testified that he did not see accused drinking on Monday night, that accused was not drunk on Monday night (R. 33), and that if he had been, witness believed he would have "noted" it (R. 32).

On Tuesday, October 27, accused did not appear for drill call and, shortly thereafter, Lieutenant Colonel Gorrill went to accused's hut (R. 8). He found accused in bed, unable to talk coherently (R. 8), "in a stupor", and "definitely" under the influence of liquor (R. 10). "There was a strong odor of liquor" (R. 8). Lieutenant Colonel Gorrill "called the regiment immediately and requested that Major Eubanks be relieved from duty" (R. 8). Lieutenant Colonel William F. Schweikert, Regimental Executive Officer, 153rd Infantry (R. 35, 36), received the call and reported the matter to "Colonel Hallowell", Commanding Officer of the regiment, who directed Lieutenant Colonel Schweikert to get in touch with the regimental surgeon and investigate (R. 35). Accordingly, Lieutenant Colonel Schweikert, Lieutenant Colonel Gorrill and Captain Fred H. Lundgren, Jr., Medical Corps, Regimental Surgeon, visited accused about 9 a.m. (R. 33, 35, 36). Lieutenant Colonel Schweikert testified:

"In my opinion, at that time he was intoxicated. I judged that by his appearance, his actions, his speech, etc." (R. 35)

Witness testified further that he would classify accused as "drunk" at the time (R. 36).

Captain Lundgren testified that he examined accused and found his speech "thick and somewhat incoherent" and his movements slow (R. 33)

"In response to my questions, he was slow and methodical in his speech and also in his movements; and in regards to reflexes, they were present but slow andslower than normal."
(R. 34)

Accused was not "fit for duty" (R. 34). Witness detected "what I thought to be the odor of vomitus and alcohol" (R. 33). Witness testified that he "would say" that accused was "partially comatose" and that he "would not know" whether accused was suffering from the effects of having consumed an excess of intoxicating beverages (R. 34). When asked whether he considered accused drunk or sober, witness replied: "My opinion was not based on fact. I had no proof. My opinion would be merely inferential" (R. 34). He was then asked, "What would that inferred opinion be?", to which he answered:

"My own inferred opinion was that Major Eubanks was in a semi-comatose condition, the actual cause of which I did not know. He was depressed and lethargic. The actual cause I could not clearly infer. He was in a state of more or less profound depression." (R. 34)

Witness was then directed to answer the question whether in his opinion accused was drunk or sober. He answered:

"I will state this then; It is my opinion that his state resembled that of drunkenness. There was the odor of alcohol in his breath; but whether it was the total cause, I have no way of proving it, and I can't jump at the conclusion because the injection of a sedative might have been the cause. It could have been uremia or a number of states, poisoning of the food. Merely the fact that there was the odor of alcohol on his breath would not be enough for me to state that he was drunk. I mean by drunk, purely from the injection of alcoholic liquors"
(R. 34).

Lieutenant Fitzgerald, who also was present, stated that accused was still suffering from acute gastritis (R. 32), and that his "muscular reactions were sluggish, his speech was not coherent, and he was

still in bed" (R. 28). Witness did not detect the odor of alcohol on accused's breath. "There was a strong, foul-smelling breath but I would not declare it was alcohol". (R. 29) Witness stated that his own sense of smell was none too acute. Witness' sinuses were

"not in good condition. If it were strong enough, I believe I could have recognized it."
(R. 29)

When asked to what witness ascribed the physical impairments of accused, he stated: "I can't answer that" (R. 29) and gave exactly the same reply to the question, "Was he intoxicated?" (R. 28). However, at another point in his testimony witness asserted that accused was not suffering from "alcoholism" (R. 32).

Captain Lundgren recommended that accused remain in quarters and that he be given "caffeine-sodio-benezoate" every three or four hours "because he was depressed and in a semi-comatose condition" (R. 34). Accordingly, Lieutenant Fitzgerald "prepared a hypodermic of seven and one-half grains of caffeine" and administered one hypodermic at about 10 a.m. and another at about 2 p.m. (R. 29). The effect was "slightly stimulating *** there was also a slight diuretic reaction" (R. 29). When asked whether caffeine was "considered excellent as a sobering agent for persons suffering from over indulgence", Lieutenant Fitzgerald replied:

"It is an excellent stimulant for any condition of shock, low blood pressure or if you wish to get elimination in the kidneys. I would not go on record as declaring it an excellent sobering agent. I will go on record as declaring it an excellent stimulating agent" (R. 29).

He also stated that any stimulant would be "good medicine" in the case of acute gastritis (R. 33).

After receiving the report from Lieutenant Colonel Schweikert (R. 35), Colonel Hallowell issued a verbal order at about noon on Tuesday, October 27, relieving accused from duty (R. 8, 18). Subsequently a written order was issued confirming the verbal order (R. 18). Between 1 and 2 p.m., Lieutenant Colonel Howell Brewer, Medical Corps, Commanding Officer, 186th Station Hospital, Fort

Glenn, examined accused (R. 5, 6). He testified that accused "was in a state which we call post-alcoholism. He was not drunk at the time. He was in a post-alcoholic state" (R. 6). The symptoms leading witness to this conclusion were a flushed face, a slight slurring of the speech, and a slowness of movement - characteristics of the condition. Such symptoms might have been produced by drugs or sickness of certain types, but no such sickness was present. Witness did not think that they would have been produced by "any exterior application" (R. 7). Accused "passed" certain tests given to determine "whether or not a man has coordination of his muscular reflexes" (R. 6). Witness testified that caffeine would have a sobering effect on a person under the influence of intoxicating liquors, as such persons "need more oxygen than a normal person and caffeine naturally hastens the flow of oxygen and aids the man in breathing" (R. 5).

During the course of the examination by Lieutenant Colonel Brewer accused, having been warned by a "Major Rice", who was present, that "anything he might say might be used against him" and that he had the right to remain silent (R. 5), made the following "voluntary statements", no objection to their admission being made by the defense:

"He stated that he had brought back with him from a recent leave he had been on a quart of Four Roses and that he had gotten drunk the night before at about ten o'clock and that he was relieved from duty on the morning of the 27th of October about six o'clock." (R. 5)

At about 5:30 p.m., as directed by Lieutenant Colonel Schweikert, Captain Lundgren took accused to the station hospital (R. 35). Entries were made in the Daily Sick Report for October 27, showing "Quarters transferred to Hosp.", and "In Line of Duty No", signed by Lieutenant Pollock and Lieutenant Fitzgerald (Ex. 1).

During October 25, 26 and 27, accused did not perform any duty (R. 8, 16). His physical and mental faculties were impaired (R. 27) and he

"was in bed most of the time and at times some of the occupants of the hut would ask questions

and the replies would not be coherent. Sometimes it was. It was quite apparent that the Major could not do duty." (R. 16)

Lieutenants Fitzgerald and Van Tassel testified that there was whiskey in the hut (R. 16, 30), but neither they nor Lieutenant Moors saw accused take a drink (R. 16, 21, 23, 30), and Lieutenant Moors testified that he did not smell whiskey on accused's breath during the three-day period (R. 22) and did not see any empty bottles or any evidence of drinking in the hut (R. 23). Lieutenant Pollock testified that on either Sunday or Monday night he was awakened by a noise, and saw accused "evidently lighting a stove or adjusting it" (R. 24). Lieutenant Van Tassel testified that he (witness) had a quart bottle of grain alcohol in the hut (R. 15, 17). Shortly after noon on Sunday, October 25, he noticed that it had been "disturbed". He continued:

"I don't know where it went. I have no idea. I can't say the Major took it. The fact remains it was missing." (R. 15)

Witness made a note of the level of the contents of the bottle. On Monday morning he "noticed that more alcohol was gone" (R. 15). About one-half pint was missing (R. 17).

Over the objection of the defense the court admitted certain indorsements to a basic letter, which was not in evidence (R. 37, 38; Ex. 2). The 1st Indorsement was from the Commanding General, Fort Glenn, to accused,

"For remark as to whether or not you should be carried on Sick Report, 'Not in Line of Duty' between dates October 26 through October 30, 1942". (Ex. 2)

The 3rd Indorsement, signed by accused, reads:

"The remark in the sick book 'Not in Line of Duty' between dates October 26, 1942 through October 30, 1942 is correct". (Ex. 2)

4. Upon the issue of whether accused was "on duty" during the period in question, the prosecution requested the court to take

judicial notice as follows:

"*** of the fact that a state of war exists between the United States of America and Japan; that Kiska Island, an enemy occupied base, is only six hundred air miles from Fort Glenn, Alaska; That bombers and fighter planes have been able to take off from this station, attack Kiska Island and return on a non-stop flight; that on June 3rd & 4th, 1942, the enemy successfully attacked Dutch Harbor, a United States base approximately seventy miles to the East of this base; that on other occasions United States bases on other islands have been bombed in this vicinity; that enemy submarines have been observed to be operating in the waters surrounding this base; that the tactical situation at this station is such that we are required to be constantly ready to repel enemy sea and air attacks." (R. 39)

No objection was made by the defense. No action by the court appears in the record. Presumably it took judicial notice of the facts as requested.

Without objection by the defense the court took judicial notice of

"Field Order Number One, Headquarters, Alaska Defense Command, Fort Richardson, Alaska, Secret, dated 9:15 a.m., 30 January, 1942, paragraph one, which designates the Alaskan Sector, Western Theater of Operations, as being in the Combat Zone." (R. 43, 44)

Without objection by the defense the court received in evidence a "Schedule of Calls" for Fort Glenn (R. 38, 39; Ex. 3). Captain Charles L. Bosley, Adjutant, Provisional Infantry Regiment, Fort Glenn, testified that the only differentiation in calls between Sundays and other days was "Church call" (R. 38). Lieutenant Colonel Gorrill, when questioned as to whether the battalion was on "the alert" between Saturday, October 24 and Monday, October 26, 1942, asked defense counsel what he meant by alert, to which counsel replied:

"That is, what the regiment calls an alert--when every man is in readiness". Witness then stated: "We were not advised by the regiment during that time that we were on what I consider an alert". (R. 39) However, witness stated that he considered himself on duty twenty-four hours every day (R. 9) and that

"In my opinion, there is a degree of watchfulness at this time right now...a different degree of watchfulness at this time right now than there was prior to a recent warning." (R. 39)

Even though permitted a half or full day for purposes of relaxation witness considered himself "available for duty" during that period (R. 9). He testified further that on Sundays, the organization did not form for drill (R. 40) and that, if possible, men not on detail were permitted to be in quarters and "their time is their own" (R. 39). Announcement to this effect had often been made but witness did not definitely remember making any such announcement on Friday, October 23, 1942 (R. 39). Witness stated also that if an enlisted man wished to leave the area on Sunday "to go fishing" permission "would be granted, all right, but he would have to get it" (R. 40). Lieutenant Colonel Schweikert, who, it will be recalled, was executive officer of the regiment, testified that the officers of the regiment had "hours of leisure" but were "subject to call" at all times (R. 36, 37). In answer to the question, "Would you say the hours were off duty?", he replied: "If you are speaking of a specific duty, I would say they are off duty." (R. 37)

5. Called by the defense, Lieutenant Colonel Gorrill testified that he did not see accused take a drink and that on Sunday morning, October 25, when he saw accused he "was not at that time of the opinion that Major Eubanks was drunk" (R. 40).

Accused testified that on October 23 the Commanding Officer, 3rd Battalion, told the battalion officers

"that the coming Sunday would be a day of rest for all troops except the necessary fatigue and details as ordered",

and that, as directed, accused made an announcement to that effect at officers' mess (R. 41). On Saturday evening, October 24, accused supervised some road work in the battalion area, returning to his quarters about 10:30 p.m. Several officers were present and accused

took a drink of grain alcohol and grape juice. "We messed around there and I took two or three more drinks then. I was getting pretty full." (R. 42) He went to bed about 12:30 a.m. and awoke about 8 a.m. Sunday, "feeling pretty bad, and still slightly intoxicated" (R. 42). He "took another little drink", which "nearly knocked me out" (R. 42). Then he took one more drink and went back to bed. He stayed in bed all day and during the day had "two or three more drinks of grain alcohol" (R. 42).

When he awoke Monday morning at about 7 he was "deathly sick" and his sickness continued "all day". He stayed in bed the entire day except for getting up to "relieve" himself and to "vomit" (R. 42). He was informed that he had been entered on the "sick book", but was not told the reason (R. 42). He had no drinks Monday evening and did not remember having any during the day (R. 43). On Tuesday morning, the 27th, he felt "somewhat better" and "felt that a small drink" would help him to "feel better". Accordingly, he took one, and it "knocked" him out again (R. 42).

6. By his plea of guilty to Charge II and its Specification accused admitted that at the place and time alleged he rendered himself unfit to perform his duty as battalion executive officer by the intemperate use of intoxicating liquor, and remained unfit for duty until late afternoon, October 27, or thereafter. In addition to his plea the evidence substantiates the allegations beyond peradventure of doubt. By his own testimony he admitted getting "pretty full" on Saturday night as a result of several drinks of grain alcohol; still feeling slightly intoxicated on Sunday morning; and continuing to drink grain alcohol periodically during the day despite his knowledge of its deleterious effects. Admittedly he was "deathly" sick all day Monday, and in his statement to Lieutenant Colonel Brewer and Major Rice he admitted getting drunk Monday night, apparently on "Four Roses" whiskey. He testified that he continued to drink on Tuesday, October 27. The evidence for the prosecution shows that accused was unfit for duty and forced to remain in bed in quarters from Sunday, October 25, through the major part of Tuesday, October 27, and then was removed to the hospital. On Sunday morning he fell out of bed, was unable to get to his feet unaided, was incoherent, semi-comatose, and, in the opinion of some of his fellow officers, in a state of intoxication or post-intoxication. He was in a similar condition on Monday morning, and his name was entered in the Daily Sick Report as sick in quarters, not in line of duty. Although he improved during

the afternoon, he was in very bad condition on Tuesday morning, - so bad that he was relieved from duty as battalion executive officer and transferred to the hospital later in the day. Although the testimony reveals a reluctance upon the part of some witnesses to openly declare that accused was drunk, and a desire to protect him by evasion, the evidence for the prosecution, coupled with accused's testimony and admissions, leaves no doubt that he was drunk on Saturday night and on Sunday, Monday and Tuesday, during at least a part of each day. To render himself unfit for duty by the intemperate use of intoxicating liquor is a violation of Article of War 96 (par. 152a, M.C.M., 1928; sec. 454 (91), Dig. Op. J.A.G., 1912-40).

7. It being established that accused was found drunk at the place and on each of the days alleged in the Specification, Charge I, it is necessary to determine whether he was "on duty as Executive Officer of the Third Battalion, 138th Infantry", as alleged. In the opinion of the Board of Review he was not "on duty" after having been entered as sick in quarters on the Daily Sick Report at about 9 a.m. on Monday, October 26. For administrative purposes accused evidently was attached to Headquarters Detachment, 3rd Battalion, 138th Infantry, and the entries were signed by the detachment commander and by the battalion surgeon. The procedure conformed to the applicable regulations (pars. 1a, 1d, 3a (1), A.R. 345-415, Nov. 23, 1933), and effectively placed accused on a non-duty status. Sick in quarters is the antithesis of duty. However, the Board of Review is of the opinion that accused was on duty at all times prior to his transfer to sick in quarters. This conclusion has been reached despite the fact that after completing the supervision of the road work on Saturday night, accused was not required to perform any specific duty during the balance of the night and during Sunday. Paragraph 145 of the Manual for Courts-Martial provides:

"In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article."

Under conditions of modern warfare the concept of "active hostilities" is enormously enlarged. The sector in question had been designated as within a combat zone. War Department Field Manual 100-5, entitled "Field Service Regulations; Operations" (May 22, 1941), at page 1 defines "combat zone" as follows:

"A combat zone comprises that part of a theater of operations required for the active operations of the combatant forces."

This definition appears to place the modern combat zone within the "region of active hostilities" category quoted from the Manual for Courts-Martial. It is possible that even in a locality designated as a combat zone the potentiality of active hostilities may be so remote that the command should not be regarded as continuously "on duty" in the absence of definite orders to that effect. But the situation at Fort Glenn was not of that character. Several incidents of enemy activity had already occurred in the vicinity. The enemy had established bases within easy flying distance. Naval bombardment and attempted invasion were entirely feasible. The danger was too real and too obvious to warrant any relaxation of the vigilance expected of our officers and men. As battalion executive officer accused was in a position of great responsibility. We hold that under the circumstances he was continuously "on duty" within the meaning of Article of War 85. In thus deciding that accused was "on duty", we are in harmony with a prior Board of Review decision (CM 222739, Seemes, decided July 28, 1942). In that case a few shells from a hostile submarine had been fired early in the morning on an island about 49 miles distant. The commanding officer of the force had issued orders to be especially alert and had terminated pass privileges. There was no change in the hours of duty for personnel engaged in administrative work. A "stand-to" status existed in the early evening until 8 p.m., and, thereafter, an "alert" status. All officers were released from their posts at approximately 8 p.m., but were considered available for immediate call in case of enemy activity. Accused, executive officer of the force, proceeded to get drunk during the balance of the evening. The Board upheld a finding that he was drunk on duty in violation of Article of War 85. Although the Seemes case differs from the present case in some details, the Board of Review believes that the essential elements demand the same solution.

Our decision that accused was not on duty after his transfer to sick in quarters does not affect the court's finding of guilty. The resulting variance in dates is immaterial, and the offense is punishable by dismissal even though committed on only one day.

8. During a closed session of the court, the trial judge advocate was called into the courtroom (R. 13). In open court the

president explained that the court's purpose was to instruct the trial judge advocate to keep in mind the elements of proof as set forth in the Manual; that there was no discussion of the evidence; and that no assistance was rendered the trial judge advocate in connection with the required evidence (R. 17). Subsequently, the law member was sworn as a witness for the court and testified to the same effect with reference to the closed session (R. 43). Article of War 30 requires that when a court-martial sits in closed session the trial judge advocate "shall withdraw" and that when his assistance in referring to the evidence is required it "shall be obtained in open court, and in the presence of the accused and of his counsel-***." However, paragraph 87b, page 74, of the Manual for Courts-Martial, provides as follows:

"If through mistake or inadvertance the trial judge advocate should be present during all or part of the closed session of a court, such irregularity is not a ground for a disapproval, unless it appears that such presence of the trial judge advocate injuriously affected the substantial rights of an accused."

It has been held that although the presence of the trial judge advocate at a closed session of the court is erroneous, the explanation of the president may be taken into consideration with a view to determining whether the substantial rights of accused were injuriously affected (sec. 1418, Dig. Op. J.A.G., 1912-30). In the present case it is clear that accused was not prejudiced and the error therefore is harmless.

9. The admission in evidence of the indorsement whereby accused attested to the correctness of the notation, "Line of Duty; No", in the Daily Sick Report was proper. This was an admission against interest and not a confession. Besides, the other evidence was amply sufficient to sustain the findings.

10. War Department records show that accused is 35 years of age. He graduated from Arkansas State College (a two-year course) and attended the University of Arkansas for one year. He served as an enlisted man in the Arkansas National Guard from 1925 to 1931. On June 10, 1931, he was appointed a second lieutenant, Infantry, Arkansas National Guard. He was promoted to first lieutenant on August 4, 1937, and to captain on December 12, 1940. He was ordered to active duty on December 23, 1940, and promoted to major, Army of the United States, on October 1, 1942.

11. 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 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.

Andrew G. Capp, Judge Advocate.

(Concurring opinion attached), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

MAR 20 1943

SPJCK

CA 230201 - Major Elbert E. Eubanks (O-288552), 153rd Infantry.

CONCURRING OPINION of Major
JOHN WARREN HILL, Judge Advocate.

1. I agree with the findings of the other members of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

2. I am not convinced by the evidence that Fort Glenn had been designated as within a combat zone, as found by the other members of the Board of Review, and that the fact of such designation had been communicated to the accused. Lieutenant Colonel Gorrill, the commanding officer of the accused, testified: "We were not advised by the regiment during that time that we were on what I consider an alert" (R. 39).

However, I find myself in ultimate agreement with the opinion of the other members of the Board for the following reasons:

Members of a command may be considered as being continuously on duty within the meaning of Article of War 85 in a region of active hostilities (par. 145, M.C.M., 1928).

A region may be established as a combat zone, thereby requiring a status of continuous duty, either by appropriate orders or by combat activities which are apparent and known.

In marginal areas, when hostile activities are not seen or heard, a commanding officer should issue specific orders concerning the necessities of the situation, leaving no doubt as to what is required of officers and men in the line of duty.

In the instant case, regardless of whether or not suitable orders had been issued and communicated placing all on an alert status, Fort Glenn was, at the time of the offenses charged, the scene and geographical center of hostilities. This was an apparent fact. Under the rule stated no order was required to establish the region as one of active hostilities or the obligation that ensued.

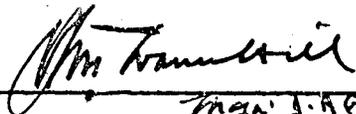
 _____, Judge Advocate.

MEMORANDUM in re CM 230201, Major Eubanks.

In this case, in consideration of

- a the relatively youthful age of the accused,
- b his grade earned while young, which points to a commendable record,
- c his previous good record which covers a long period of service in the National Guard,
- d the abnormal living conditions at this outpost,
- e the accused's honesty and frankness during the trial,
- f the fact that the start of this episode, as well as the finish, can be attributed to grain alcohol mixed with grape juice, in itself enough to lead to unexpected results,
- g the fact that accused did not drink on Monday, but made an honest effort to straighten himself out,
- h the fact that the offense finds its seriousness because it occurred in a region of active hostilities, which may not have been known to accused,
- i his apparently honest belief that his time was his own until Monday, and
- j the fact that he did not intentionally incapacitate himself for duty on Monday and Tuesday,

it is recommended that clemency be extended and that the sentence of this accused be suspended during the pleasure of the President. This officer over a period of years has demonstrated his capacity for useful service. It is not believed that this lapse proves him unfit for or incapable of rendering effective military service hereafter. His attitude at the trial in admitting that he was drunk on Sunday and his refusal to hide behind testimony favorable to him as to his condition on that day point to qualities which are good and which are redeeming. This experience in itself has been severe punishment. It is believed that clemency in this case will save for the Army an officer who will hereafter extend himself to prove worthy of the further chance thus afforded him.


Wm. Tamm
Major J. A. G. U

1st Ind.

War Department, J.A.G.O., APR 3 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 Major Elbert E. Eubanks (O-288552), 153rd 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 was executive officer of a battalion stationed in an area in Alaska which had been designated a combat zone, and in which actual hostilities were an imminent and constant possibility. He was drunk on Sunday and Monday. Sunday had been set apart as a day free of specific duties. He was however subject to call at all times and because of the geographical and tactical situation was "on duty" in fact and legal contemplation. By reason of excessive drinking he unfitted himself for his duties for three days. He was sentenced to dismissal. His previous service had been satisfactory. Under circumstances demanding extreme vigilance, his conduct was inexcusable. I recommend that the sentence be confirmed and carried into execution.

3. Careful consideration has been given to the attached copies of letters from Honorable Wilbur D. Mills, House of Representatives, Washington, D.C., dated December 28, 1942, addressed to Colonel Herbert A. Friedlich, and from Mr. J. T. Eubanks of Little Rock, Arkansas, father of accused, dated December 24, 1942, addressed to Congressman Mills, which copies of letters were transmitted to this office by Colonel Friedlich on December 29, 1942.

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,
Major General,

The Judge Advocate General.

5 Incls.

Incl. 1 - Record of trial.

Incl. 2 - Copy let. fr.

Hon. Wilbur D. Mills, H. of R.

Incl. 3 - Copy let. fr. Mr.

J.T. Eubanks

Incl. 4 - Draft let. to President

Incl. 5 - Form of Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 118, 5 Jun 1943)



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

(331)

SPJGH
CM 230222

MAR 5 1943

UNITED STATES	)	103rd INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Claiborne, Louisiana,
Second Lieutenant THOMAS E.	)	January 18, 1943. Dismissal.
DALY, Jr. (O-1172B27),)	
Field Artillery.)	

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 93rd Article of War.

Specification: In that Second Lieutenant THOMAS E. DALY JR., Headquarters Battery, One Hundred Third Infantry Division Artillery, did, at Alexandria, Louisiana, on or about January 2, 1943, with intent to do bodily harm, commit an assault upon Corporal LLEWELLYN M. CHILSON, Cannon Company, One Hundred Twelfth Infantry, by willfully and feloniously striking the said Corporal CHILSON in the face with his fist.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant THOMAS E. DALY, JR., Headquarters Battery, One Hundred

Third Infantry Division Artillery, was, at Alexandria, Louisiana, on or about January 2, 1943, in a public place, to wit, Hotel Bentley, Alexandria, Louisiana, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant THOMAS E. DALY, JR., Headquarters Battery, One Hundred Third Infantry Division Artillery, was, at Alexandria, Louisiana, on or about January 2, 1943, in a public place, to wit, Hotel Bentley, Alexandria, Louisiana, drunk and disorderly while in uniform.

He pleaded not guilty to all Specifications and Charges. He was found guilty of all Specifications and Charges except Specification I, Charge II. 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 from the service, and forwarded the record for action under the 48th Article of War.

3. The evidence is substantially as follows:

On Saturday evening, January 2, 1943, Private O. L. Dougherty, his wife, Corporal Llewellyn M. Chilson, and Miss Joyce L. Harper were seated at a table in the Canteen Room of the Hotel Bentley, Alexandria, Louisiana. The accused was at the bar and attempted to attract the attention of Mrs. Dougherty. He came to the table with a glass in his hand, sat down between Mrs. Dougherty and her husband, and asked Mrs. Dougherty for a kiss. When Mrs. Dougherty told him no, he walked around the table, and put his arm about Miss Harper's neck. Corporal Chilson protested, asked accused to leave, and told the accused that he would call the manager if accused did not leave. Corporal Chilson walked over to the cigarette counter and started to talk to the house officer, Mr. H. M. Dear. The accused followed him, turned him around, and struck him on the mouth with his fist, loosening two of his teeth. Mr. Dear told them that they could not fight in the Canteen Room, and that they must go outside or the military police would be called. The accused then left the room. Corporal Chilson offered no physical resistance to the unprovoked assault upon him by the accused. The accused, Corporal Chilson, and Private Dougherty were all in uniform. The attention of

other persons present was attracted to the conduct of the accused. A few minutes after the accused left the Canteen Room he was placed in arrest by First Lieutenant James H. Bash of the Military Police, and taken to Military Police Headquarters. He was there examined by Lieutenant Colonel H. R. Heath, Provost Marshal within about ten minutes after the accused hit Corporal Chilson (R. 6-9, 10-13, 16-17, 19-20, 22, 24-25, 27, 30, 32-33, 35-36).

Captain Robert A. Walborn, Dental Corps, examined the oral cavity of Private Chilson on January 4, 1943, and found the four upper front teeth loosened, the surrounding soft tissue swollen, and inflamed, and the upper lip swollen and its under surface tissue broken. He had previously examined Private Chilson the latter part of December and found his teeth and soft tissue normal (R. 34; Ex. A).

Warrant Officer Robert A. Bullard was of the opinion that accused was so drunk that he did not know what he was doing, because an officer would not have conducted himself as the accused did if he realized what he were doing (R. 17). Lieutenant Bash stated that accused was intoxicated, but that he seemed to understand what was said to him and obeyed Lieutenant Bash (R. 19-20). Private Dougherty thought accused was drunk because of his actions, although he did not stagger (R. 36). Corporal Chilson based his opinion that accused was drunk upon the actions of accused and his difficulty in answering the questions of the provost marshal (R. 34). Colonel Heath did not think that accused was drunk to the point where he did not know what he was doing. (R. 23). Mrs. Dougherty stated that accused was drunk, but that he knew what he was doing because he had an answer for everything that was said to him (R. 9). Miss Harper believed that the accused was drunk because his eyes were heavy, he talked slowly, and he did not sit down as would a sober person (R. 12). In the opinion of Mr. Dear, the accused was not drunk, might have had some drinks, but he would not say that accused was sober. Mr. Dear defined a "drunk" as a man who "can't walk and staggers over everything" (R. 28-29).

4. The defense called no witnesses. The accused elected to remain silent.

5. The evidence shows that the accused was drunk in uniform in a public place and, while in that condition, made a violent, unprovoked, physical assault upon Corporal Chilson, striking him a severe blow in the face with his fist, loosening four teeth. His conduct in forcing himself upon the party of enlisted men and his familiarity with the two women in the party, together with the violent attack upon Corporal

Chilson in a public place where both civilians and members of the military service were present, sustain the allegation that he was disorderly in a public place while in uniform.

The proof shows that he was drunk within the definition that any intoxication sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness (p. 160, M.C.M., 1928), but that he was not so drunk as to be unable to entertain the specific intent to do bodily harm in his assault upon Corporal Chilson.

Winthrop cites as an instance of offenses cognizable under Article of War 61 (95) -

"Drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Winthrop's Military Law and Precedents, Reprint p. 717).

While the accused was not grossly drunk, he did make a disgraceful exhibition of himself in intruding upon a party of enlisted men and their friends, and in violently assaulting one of them in the presence of civilians and military personnel in a public room in the hotel. In the opinion of the Board of Review his conduct warranted the finding of guilty in violation of the 95th Article of War.

6. The accused was charged with assault with intent to do bodily harm upon Corporal Chilson in two identical specifications, one charged in violation of the 93rd (Chg. I), and the other in violation of the 95th Article of War (Chg. II): He was found guilty of the Specification and Charge under the 93rd Article of War, but not guilty of the Specification under the 95th Article of War. There is no inconsistency in these findings because proof of facts which would support a finding of guilty under the 93rd Article of War would not necessarily support a finding of guilty under the 95th Article of War.

He was likewise charged with being drunk and disorderly upon two identical specifications, one charged in violation of the 95th (Chg. II), and the second in violation of the 96th Article of War (Chg. III). There is no inconsistency in the two findings of guilty under the two Articles of War as the proof supports conviction under each Article of War. A conviction under both the 95th and the 96th Articles

of War is not illegal as placing accused twice in jeopardy for the same offense (McRae v. Hincker, 267 Fed. 276), The offense should, however, be considered as but a single offense in fixing the appropriate punishment under the two Charges.

7. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service from May 11, 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and extended active duty November 5, 1942.

8. The court was legally constituted. No errors 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 the Specification, Charge I, and of Charge I, of Specification 2, Charge II, and of Charge II, and of the Specification, Charge III, and of Charge III, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Arthur E. Hurd

, Judge Advocate.

Wm. G. Lyon

, Judge Advocate.

Elwood H. Bergman

Judge Advocate.

(336)

SPJGH
CM 230222

1st Ind.

War Department, J.A.G.O., . MAR 12 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 Thomas E. Daly, Jr. (O-1172827), 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 of guilty, and legally sufficient to support the sentence and to warrant confirmation of the sentence.

The accused was drunk and disorderly in uniform in the presence of military personnel and civilians in the Canteen Room of the Hotel Bentley, Alexandria, Louisiana, and while there made an unprovoked assault upon a noncommissioned officer by striking him a severe blow on the mouth, loosening four teeth. The identical charge of being drunk and disorderly was duplicated, in violation of the 95th and the 96th Articles of War, but only a single penalty should be assessed in considering the appropriate punishment under the two charges. I recommend that the sentence to dismissal be confirmed and carried into execution.

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.



E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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
order.

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 69, 29 Mar 1943)

class rationing book value about \$.03 and, one "B" class gasoline rationing book value about \$.03, the property of 2nd Lieutenant William A. Brady, Signal Corps, Army of the United States, Officers Signal Corps Replacement Pool, Camp Murphy, Florida.

The accused pleaded not guilty to and was found guilty of both 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 the Specification, Charge II, as in each instance involved a finding of guilty of larceny of one Class "A" gasoline ration book of some value less than 3¢, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution relative to the findings of guilty for which approval is recommended by the reviewing authority shows that the accused was, on October 10, 1942, at about 10:30 p.m. one of a party of six dancing and drinking at the George Washington Hotel, West Palm Beach, Florida. Lieutenant W. A. Brady, one of the party, paid for a round of drinks with money from his wallet. There is evidence that he left the wallet lying on the table while he danced, although he denied that he did. The wallet contained about \$100 in cash, a Class "A" gas ration book, and miscellaneous cards. The value of the "A" book was shown to be of about 3¢. After the accused had left the party Lieutenant Brady ordered another drink, and paid for it with money from his wallet. At about 1:30 or 2 a.m., he left the George Washington Hotel and returned to his barrack. He hung his trousers on a clothes rack near the head of his bed, and at that time felt his wallet in the pocket of his trousers. When he awoke the following morning, his wallet was missing. Later on that day, Lieutenant Nau, Lieutenant Brady's roommate, told Lieutenant Brady in the presence of the accused that the accused had been in Lieutenant Brady's room late on Saturday night. The accused then admitted his visit to Lieutenant Brady's room and explained that he was there looking for a cigarette. Lieutenant Brady reported his loss to the George Washington Hotel, but his wallet could not be found there. He later advertised in the newspaper and over the radio, and mentioned its loss to the accused on several occasions (R. 18, 27, 25, 28, 117; Ex. A).

During the ensuing week, Lieutenant Brady observed the accused and others, and his suspicions were aroused when the accused appeared to be living beyond his income. Lieutenant Brady then reported the circumstances to the provost marshal who ordered the quarters of the accused searched (R. 31, 32, 42). The search revealed four gasoline ration books, one of which was identified as the property of Lieutenant Brady (R. 10-13) The wallet, empty excepting certain cards, was subsequently found on the lawn of a church (R. 34).

The accused thereafter pleaded with Lieutenant Brady to assist him, explaining that he had taken the "A" gasoline ration book from the wallet while it was on the table during the party at the George Washington Hotel, merely to teach him, Lieutenant Brady, a lesson. He offered to see that the missing money was returned (R. 36-39).

4. The accused after being advised of his rights testified that he had invited Lieutenant Brady to join his party at the George Washington Hotel, West Palm Beach, on Saturday evening, October 10, 1942; that at about 10:30 p.m. Lieutenant Brady and three others did join him; that they danced and Lieutenant Brady left his wallet lying on the table most of the evening; that he, the accused, mentioned to his companion that it was a bad habit and that it was a good time to teach Lieutenant Brady a lesson; that he then removed the "A" book from the wallet to demonstrate to the accused how easy it would be for someone else to take the wallet and all its contents. The accused testified that he intended to return the gasoline ration book, but that after the wallet was missing he felt that he was in a bad position, and feared that his return of the ration book would create the appearance that he had also taken the wallet (R. 44-47).

The woman companion of the accused corroborated the statement that Lieutenant Brady left his wallet lying on the table the entire evening; that the accused took the "A" book, and that the accused stated to her he intended to teach Lieutenant Brady a lesson, and to return the gasoline ration book later (R. 104-110). The two other women members of the party corroborated the statement that the wallet was lying on the table for at least part of the evening. There was evidence of several drinks having been consumed during the party (R. 87-94).

5. That part of the Specification, Charge I, and that part of the Specification, Charge II, concerning which the findings of guilty were approved by the reviewing authority, allege that the accused "**** did *** feloniously take, steal and carry away *** one gasoline class "A" rationing book value about \$.03 ****".

The evidence shows that Lieutenant Brady and the accused were together at a party at the George Washington Hotel on Saturday evening, October 10, 1942; that following the party at the George Washington Hotel, Brady returned to his room and went to sleep; that he hung his trousers, which contained his wallet, on the clothes rack near the head of his bed; that later during that night the accused entered Lieutenant Brady's room and searched his clothing; and that on the following morning, Lieutenant Brady's wallet which had contained about \$100 and the class "A" gasoline rationing book in question were missing. Subsequently, the gasoline rationing book was found in the possession of the accused. The accused admitted that he took the class "A" gasoline rationing book from Lieutenant Brady's wallet but stated that his only purpose in doing so was to teach Lieutenant Brady a lesson in the careful handling of his wallet. He further explained that he took the gasoline rationing book while the

wallet was laying on a table during the party at the George Washington Hotel, and that he had intended to return it. On several occasions, however, Lieutenant Brady had mentioned the loss of his wallet and the gasoline rationing book to the accused, but the accused had never admitted having the book and did not admit having taken it until it was discovered in his possession. These facts warrant the inference that the accused took Lieutenant Brady's class "A" gasoline rationing book with the intent not to return it, and supports beyond a reasonable doubt, the approved findings of guilty.

6. It should be observed that the Specification, Charge I, alleges the offense in question to be a violation of Article of War 93, whereas the Specification, Charge II, alleges the same identical transaction to be a violation of Article of War 95. Although the offense does violate both Articles of War, this coincident should not be considered in the assessment of punishment and the punishment should be limited to the maximum punishment authorized for the single transaction. In the present case, however, the punishment of dismissal which was assessed by the court is authorized upon a conviction of Article of War 93 and is mandatory upon conviction of a violation of Article of War 95.

7. The records of the Office of the Adjutant General show that the accused is 22 years of age, that he was inducted into the Army on July 31, 1941, and that he was commissioned a second lieutenant, Signal Corps, on April 10, 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 only so much of the findings of guilty of Charge I and its Specification and Charge II and its Specification as involve findings that the accused, at the time and place alleged, did feloniously take, steal and carry away one class "A" gasoline ration book of some value less than 3¢, legally sufficient to support the sentence, and to warrant confirmation thereof.

Shas. L. Brown, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cowley, Judge Advocate.

1st Ind.

(341)

War Department, J.A.G.O., APR 7 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 Donald V. Marks (O-455524), Signal 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 as approved by the reviewing authority, and legally sufficient to support the sentence. In view, however, of the inconsequential value of the article taken, a gasoline ration book, I do not believe punishment by court-martial is necessary or appropriate and accordingly recommend that the sentence be disapproved.

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, 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 ltr for
sig. Sec. of War
Incl 3 - Form of Executive
action

(Sentence disapproved. G.C.M.O. 100, 7 May 1943)



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

(343)

SPJGK
CM 230265

FEB 20 1943

UNITED STATES)

THIRD ARMY

v.)

Trial by G. C. M., convened at
Fort Sam Houston, Texas, January
5, 1943. Dismissal.

First Lieutenant DALE E.
GARST (O-405325), Infantry.)

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 95th Article of War.

Specification 1: In that First Lieutenant Dale E. Garst, 31st Infantry Division, was at San Antonio, Texas, on or about September 6, 1942, in a public place, to wit, at or near El Patio Restaurant, drunk and disorderly while in uniform.

Specification 2: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Upon arraignment he entered a plea in bar of trial upon Specification 2, Charge I, and Charge II and its Specifications, on the ground that he had previously been punished under Article of War 104 for the same offenses (R. 5). The plea in bar of trial was overruled (R. 6). Accused thereupon pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specification 1 thereunder and not guilty of Specification 2, Charge I, and 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. The evidence relating to the Specification of which accused was found guilty (Specification 1, Charge I) shows that at about 2 a.m., September 6, 1942 (R. 22, 46), accused was seen in the El Patio Restaurant, or "Dine and Dance Place", at 2604 Fredericksburg Road, San Antonio, Texas (R. 21, 22). He was in khaki uniform (R. 29, 34, 45). About 100 customers were present. Accused went to three different tables at each of which he "would take a drink". About 45 minutes later (R. 23) while outside the restaurant, he was observed opening automobile doors and looking into three different parked automobiles. A civil police officer, Wilbur J. Robitsch, saw that accused had a "woman's purse" in his hands, and inquired as to what he was "looking for". Accused answered that he was looking for his automobile and asked Robitsch "was that any of my business". Robitsch remarked that accused should be able to identify his car from its external appearance and asked accused to go inside the building. Accused complied. Robitsch testified that accused then appeared to be "under the influence of liquor" (R. 24), that his breath bore the odor of alcohol and that his speech was irrational, but that he was steady on his feet. Robitsch also testified that he believed accused was not drunk, explaining that "My term of being drunk is 'down' and not being able to take another drink." (R. 30)

Robitsch testified that after entering the building he asked accused to whom the purse belonged. Accused handed it to witness and remarked, "You've got me. Let's go." The two went to the cashier's desk and an unidentified "lady screamed and said, 'There is my purse.'" (R. 25) (A repetition, in substance, of the testimony relating to this latter remark was subsequently excluded by the court upon the apparent theory that ownership of the property could not be proved by hearsay (R. 25-27)). Robitsch testified that accused did not create a disturbance (R. 28) except such as resulted from the "bystanders coming to see what was going on" (R. 31), but that accused

"was very sullen *** and dejected in behavior, not caring to give a decent or correct answer to any questions asked him" (R. 28),

and that "It was his actions that brought the heavy suspicion upon him." (R. 28) Witness took accused outside again and as he did so accused tried to run away but witness caught him within a few steps (R. 31, 32).

Witness turned accused over to another civil police officer, William Otis Walker (R. 28, 33).

Walker testified that when he reached the scene Robitsch was holding accused. Witness thought accused had been drinking - "there was something wrong with him." (R. 35, 39) Accused seemed to "have good normal body actions" but did not talk (R. 35). Witness did not detect the odor of alcohol on the breath of accused (R. 43). Witness escorted accused to witness' car and placed him in the front seat preparatory to taking him to the provost marshal in San Antonio. En route to the office of the provost marshal witness slowed down whereupon accused jumped from the car (R. 36) and ran across the road and across a stream about 20 feet wide. Witness pursued him and fired two shots but accused did not stop. (R. 37) A short time later accused was recaptured while hiding in some bushes near the stream (R. 38). After some resistance he was taken to Major Herman H. Spoede, Corps of Military Police, Provost Marshal in San Antonio (R. 38).

Major Spoede testified that he saw accused at about 2:30 a.m. Accused staggered somewhat and his speech was "silly" (R. 50) and incoherent (R. 45, 50). Witness concluded he was drunk. Accused was confined in a jail until the "next morning" (R. 45). Later in the day accused told witness "the story of having had trouble with a girl" (R. 46). In the course of an investigation by an inspector general, after he had been informed that he might remain silent, accused stated that:

"he was in company with some young lady he had been going with; that they had had a personal difference, and as the result she had gone home by herself and he had a bottle of liquor in his car and had drunk it, and that it seemed to just black out everything for him, and he remembered nothing with reference to his going to the El Patio Club, or his presence there."
(R. 52)

First Lieutenant Norman A. Irby, Infantry, testified for the defense that he had served with accused for about one year and two months and believed that accused was an "average" officer (R. 54). Major Albert B. Cooke, Jr., Infantry, testified for the defense that accused had served under him for about one month while awaiting trial and had given willing and "very satisfactory" service. Witness believed he

(346)

"would just as soon have him as a junior officer as almost any officers I have known, and I would a good deal rather have him than some."
(R. 85, 86)

Accused testified in reference to the charges of which he was found not guilty but did not testify in direct reference to the transactions involved in Specification 1 of the Charge (R. 67).

4. The evidence thus shows that at the place and time alleged in Specification 1 of the Charge accused was seen drinking and that thereafter he behaved himself in an abnormal manner. His speech was irrational or incoherent and his breath bore the odor of alcohol. The police officers testified that he had been drinking and an officer of the Army who saw him soon after the events at the restaurant testified that he was convinced that accused was drunk. Accused stated that he had been drinking heavily because of differences with a young lady and that he did not recall what occurred. Upon all the evidence there can be no doubt that accused was in fact drunk, as found. He was in uniform. While drunk he opened the doors and looked into some automobiles under such circumstances that a police officer interfered. He was thereafter seen with a lady's purse in his possession and in response to an inquiry made by a police officer concerning his possession of the purse accused inferentially, at least, admitted wrongdoing in the premises. The colloquy concerning the purse resulted in a gathering of bystanders. A woman asserted a claim that the purse was hers, but whether accused's possession of it was in fact wrongful does not fully appear. Following the incidents accused attempted to run away from the police officer. The evidence supports the allegation of disorderly conduct. Accused's drunkenness was not of gross degree but his disorders were conspicuous. In the opinion of the Board of Review his conduct as a whole must be characterized as disgraceful and unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. All members of the court joined in a recommendation that the sentence be suspended, this in view of the youth of accused, his "previous good record" and the fact that his offense "did not involve moral turpitude." In a subsequent communication forwarded to The Judge Advocate General, however, the members of the court requested that their recommendation be withdrawn from the record in view of "certain facts and circumstances" brought to their attention after the recommendation was submitted.

6. War Department records show that accused is 24 years of age. He graduated from the University of Nebraska in 1941 and, upon graduation and completion of R.O.T.C. work at the University, was appointed a second lieutenant, Infantry Reserve, on June 9, 1941. He was ordered to extended active duty on July 1, 1941. He was promoted to first lieutenant on July 30, 1942. In recommending his promotion his regimental commander stated that he had demonstrated his fitness for the higher grade by "superior performance and attention to duty".

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

Gudmund Capp Jr., Judge Advocate.
Wm Tomlin Hill, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

(348)

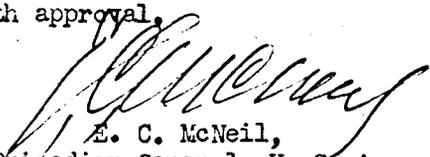
1st Ind.

War Department, J.A.G.O., FEB 22 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 Dale E. Garst (O-405325), 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. While in uniform and while drunk in and near a public restaurant, accused was taken into custody by a civil police officer after he had been observed opening the doors of parked automobiles and after he had been seen with a woman's purse under his arm. A woman claimed the purse belonged to her but whether accused's possession of the purse was in fact wrongful does not fully appear. After being taken into custody accused attempted to run away. He was sentenced to dismissal. All members of the court recommended that the sentence be suspended but subsequently withdrew their recommendation in the light of "certain facts and circumstances" (not otherwise described) which had been brought to their attention. Accused's previous service has been satisfactory. Accused's conduct was on the whole disgraceful and I find nothing in the circumstances or in his previous military record to justify an expectation that his retention in the service would be of advantage to the Government. 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.


E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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. 90, 20 Apr 1943)

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

SPJGH
CM 230278

FEB 8 1943

UNITED STATES	)	NORTHWESTERN SECTOR
	)	WESTERN DEFENSE COMMAND
v.	)	Trial by G.C.M. convened at
	)	Fort Lewis, Washington, Janu-
Private THOMAS J. GUNNING	)	ary 11 and 12, 1943. Dis-
(20226234), Company K,	)	honorable discharge and con-
114th Infantry.	)	finement for two (2) years.
	)	Disciplinary Barracks.

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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Pvt Thomas J. Gunning, Co K, 114th Infantry did, at Fort Dix, N.J., on or about July 30, 1941, desert the service of the United States and did remain absent in desertion until he surrendered himself at Ft. Dix, N.J. on or about January 5, 1942.

Specification 2: In that Pvt Thomas J. Gunning, Co K, 114th Infantry did, at Bay Minette, Alabama, on or about January 15, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Philadelphia, Pa, on or about Aug. 3, 1942.

CHARGE II: Violation of the 94th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Charge I; guilty of Specification 2, Charge I, except the words "apprehended at Philadelphia, Pa", substituting therefor the words "placed in confinement at Fort Dix, New Jersey"; guilty of Charge I, and not guilty of Charge II and of the Specification thereunder. Evidence of one previous conviction for violation of Article of War 61 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 only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for two 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 50 $\frac{1}{2}$.

3. The only question requiring consideration is whether the evidence is legally sufficient to establish the initial absences of accused from Fort Dix, New Jersey, on or about July 30, 1941, as alleged in Specification 1, Charge I, and from Bay Minette, Alabama, on or about January 15, 1942, as alleged in Specification 2, Charge I.

To prove such initial absences there were received in evidence morning reports of the organization of accused for the months of July 1941, and January and August 1942, for which an extract copy was substituted. The defense consented to the introduction in evidence of the reports and to the substituted extract copy (R. 7-8, 10; Ex. 1).

The extract copy contained the following pertinent entries:

"EXTRACT COPY OF MORNING REPORT OF
Company K 114th Infantry
(Organization)

July 30/41	Pvt Gunning Duty to AWOL 5:45 AM E.M.M.
*	* *
Jan 15/42	Pvt Gunning in Arrest to AWOL 1/15/42 4 A.M. W.R.J.
*	* *

Aug 9/42 Pvt Gunning desertion to Ab
in Conf Ft. Dix, N.J. 8-4-42
W.R.J.*

The extract copy stated that the morning reports were submitted at Fort Lewis, Washington (Ex. 1).

Captain William R. Jost, commanding officer of Company K, 114th Infantry, testified that he had commanded Company K since October 13, 1941. Prior to the time Captain Jost became commanding officer of Company K the company had left for maneuvers on September 13, 1941, as the advance detachment for the regiment. The regiment returned from maneuvers, and when Captain Jost took command of Company K (October 13, 1941), accused was not present with the company. Accused returned one day prior to the departure of the company for Camp Claiborne, Louisiana, on January 5, 1942. Captain Jost did not state the name of the place from which the company departed. Accused was furnished equipment in order that he might go to Camp Claiborne. Captain Jost, after refreshing his recollection from the morning report, testified that accused was dropped as absent without leave on January 15, 1942. The personal effects of accused "were gathered up when we got to the end of the trip". The initials "W.R.J." appear after the entry reciting the absence without leave of accused on January 15, 1942. Those initials constitute the initials of the name of Captain Jost and evidently are his initials, although there is no proof that he subscribed the initials on the original report.

Private Charles W. Plunkett, Company G, 114th Infantry, testified that on the night of January 15, 1942, he and accused "left our company" and walked along the road at Bay Minette, Alabama. They then took a bus to Montgomery, and separated about thirty-six hours later (R. 24).

The record discloses no other evidence of the initial absences without leave of the accused from Fort Dix, New Jersey, and Bay Minette, Alabama, on the dates alleged.

4. With reference to the offense alleged in Specification 1, Charge I, the original morning report of the organization of accused for the month of July 1941, was received in evidence and withdrawn. Whatever this report may have shown as to the place where it was submitted, it is obvious that the entry in the extract copy of the morning report of July 30, 1942, stated to have been submitted at Fort Lewis, Washington (Ex. 1), of events occurring at Fort Dix, New Jersey, were not within the personal knowledge of the officer making the report. The entry is not competent evidence of the desertion or absence without leave of accused on July 30, 1941, at Fort Dix, New Jersey. (Dig. Ops. JAG, 1912-1930, sec. 1507). The fact that the defense consented to the introduction in evidence of

the morning report does not cure the error in its admission. (Dig. Ops., JAG 1912-1940, sec. 395 (21)).

5. With reference to the offense alleged in Specification 2, Charge I, Captain Jost, company commander of accused, testified that accused, who had returned to his company on January 4, 1942, was dropped as absent without leave on January 15, 1942. He stated that the effects of accused "were gathered up when we got to the end of the trip". Private Plunkett testified that he and accused, on the night of January 15, 1942, "left our company", walked along the road at Bay Minette, Alabama, took a bus to Montgomery, and separated about thirty-six hours later. Plunkett testified that he was a member of Company G, 114th Infantry, at the time of the trial. In view of the testimony of Captain Jost that accused was dropped as absent without official leave on January 15, 1942, that Company K left for Camp Claiborne, Louisiana, on January 5, 1942, and the testimony of Plunkett that he and accused on the same night "left our company" at Bay Minette, Alabama, the court was fully warranted in finding that accused absented himself without leave from his organization at Bay Minette, Alabama, on January 15, 1942. Any objection to the admissibility of the extract copy of the morning report on the ground that it did not show that the absence entered in the report was within the personal knowledge of the officer making the report, is overcome by the fact that the initials "W.R.J.", evidently those of Captain Jost, appear after the entry, and the fact that Captain Jost was the commander of Company K when accused absented himself without leave on January 15, 1942.

In the finding upon this Specification the court excepted the words "apprehended at Philadelphia, Pa", substituted therefor the words "placed in confinement at Fort Dix, New Jersey", and found accused not guilty of the excepted words, but guilty of the substituted words. The court, therefore, made no finding in fact whether accused was apprehended or whether he surrendered prior to his confinement at Fort Dix. The record is legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, and of Charge I, as finds accused guilty of desertion at the time and place and for the period alleged, terminated in a manner not shown, the maximum punishment for which cannot exceed that fixed for desertion under similar circumstances terminated by surrender. As the accused was absent for more than sixty days, the authorized punishment for his offense is dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years. (Par. 104c, M.C.M., 1928, p. 97).

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support the findings of guilty of Specification 2, Charge I, and of Charge I, and legally

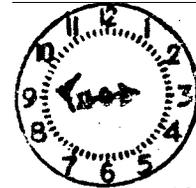
sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

Robert E. Hill, Judge Advocate.

Henry C. Goss, Judge Advocate.

Edward H. Berg, Judge Advocate.

(354)



SP JGH
CM 230278

1st Ind.

SELECTIVE
WAR DEPARTMENT
GENERAL RECORDS SERVICE

War Department, J.A.G.O., FEB 9 1943 - To the Commanding General,
Northwestern Sector, Western Defense Command, Fort Lewis, Washington.

1. In the case of Private Thomas J. Gunning (20226234), Company K, 114th Infantry, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the finding of guilty of Specification 1, Charge I, be disapproved; that only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years be approved. Thereupon, 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 230278).



E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(355)

SPJGN
CM 230290

MAR 9 1943

UNITED STATES)

THIRD AIR FORCE

v.)

) Trial by G.C.M., convened at
) Morris Field, Charlotte, North
) Carolina, December 18, 1942.
) To be shot to death with
) musketry.

) Private JAMES E. CROUCH
) (35427310), Headquarters
) Squadron, 29th Service
) Group, Morris Field,
) North Carolina.)

OPINION of the BOARD OF REVIEW
CRESSON, LIPSGOMB and COWLES, 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 James E. Crouch, Hq. Squadron 29th Service Group, Morris Field, Charlotte, N.C. did, at Morris Field, Charlotte, N.C. on or about September 26, 1942 desert the service of the United States and did remain absent in desertion until he was returned to military control at Fort Hayes, Ohio on or about October 8, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. All of the members of the court concurring he was sentenced to be shot to death with musketry. The reviewing authority approved the sentence, but recommended it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years. He further recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement and forwarded the record of trial for action under the provisions of Article of War 48.

3. The evidence for the prosecution shows that early in September, 1942, the members of Headquarters Squadron, 29th Service Group were called together and informed that their organization was being placed on the alert preparatory to being sent to a port of embarkation. The members of the organization were warned to get their personal belongings and families ready to be returned to their homes. They were also told that they would be given an A.P.O. number a day or two before they were sent to a port of embarkation. The commanding officer of the organization, Major Franklin R. Reyher, read the Articles of War to them, and explained to them the seriousness of desertion (R. 6-9).

In August there had been a similar alert, but no instructions as to personal belongings had been given at that time. On the occasion of the second alert the first sergeant had announced to the commanding officer that the members of the organization were "all present and accounted for". About three weeks prior to the entrainment of the organization for a port of embarkation, the organization had been very busy packing boxes, painting them olive drab, marking barracks bags with large A and B letters, turning in old helmets in exchange for ones of a new type, and eight buildings were filled with boxes being built. Every member of the organization had a physical examination approximately ten or twelve days before the organization departed. The members of the organization turned in all their woolen clothing except field jackets about two weeks before leaving and a day or two before leaving all beds and coverings were marked, carried to the supply room, and turned in. There was a general belief that the organization was leaving, but the men of the organization did not know its destination (R. 6-9).

On December 8, 1942, Corporal Jack Chernof, a clerk in the Provost Marshal's Office at Morris Field, asked the accused if he would like to make a statement regarding his confinement in the guardhouse. The accused stated that he would, but before the accused was permitted to make a statement he was warned of his rights in that respect. Corporal Chernof testified that he told the accused that he did not have to make any statement and that no one would force him to do so, but that anything the accused said would be used either for or against him. Corporal Chernof testified further concerning the statement made by the accused as follows:

"He told me he was notified by Captain Reyher, Commanding Officer of the 29th Service Group, that his organization was on the alert. He stated the organization was on the alert and that he left the same day this notice was given they were leaving. I asked him where he went and he said he went to his home, and then from there he went to Columbus, Ohio, with intention of getting a job and staying there." (R. 10,11)

Private Joseph J. McMonagle, clerk in the Provost Marshal's Office testified that he was present and saw the accused with Corporal Chernof on the occasion when the above statement was made. He also testified that he heard the warning given the accused by Corporal Chernof and that he heard the accused say that Captain Reyher had told him the 29th Service Group was on the alert. (R. 12)

In addition, the absent without leave status of the accused from September 26, 1942, to October 8, 1942, is shown by the introduction into evidence of two extract copies of morning reports which were introduced without objection as the Prosecution Exhibits 1 and 2. The first morning report shows the accused as absent without leave from an organization described as "6194A" as of September 26, 1942, whereas the second morning report submitted by the commanding officer of General Prisoners Detachment, Fort Hayes, Ohio, shows the accused from AWOL to confinement as of October 8, 1942.

4. The defense did not introduce any evidence and the accused, after being fully advised of his rights as a witness, stated that he would remain silent.

5. The Specification alleges that the accused did, on or about September 26, 1942, desert the service of the United States, and remain absent in desertion until he was returned to military control on or about October 8, 1942. Desertion is defined as " * * * absence without leave accompanied by an intention not to return, * * * ". It is necessary, therefore, in order to sustain the findings of guilty under the above Specification, that the proof establish the following facts:

- (a) that the accused absented himself without leave from his place of service as alleged, and
- (b) that he intended, at the time of absenting himself or at some time during his absence to remain away permanently (par. 130, M.C.M., 1928).

The evidence shows very clearly that the organization to which the accused was assigned was placed on the alert in August and again early in September, and that the men of the organization were warned that the organization would soon depart for a port of embarkation. Furthermore, prior to the departure of the organization, the men of the organization were busily engaged at various activities incident to such a departure. The accused, according to his own admissions, was informed by Captain Reyher that the organization was on the alert and that it was leaving. The accused further admitted that on the day that he received notice that his organization was leaving he left the organization. The intent of the accused to remain away permanently from his organization is shown not only by his conduct in leaving the organization when it was preparing for entrainment for a port of embarkation, but also

by his admission that after leaving the organization he had gone to his home, and had then gone to Columbus, Ohio, with the intention of getting a job and staying there.

The admissions of the accused are corroborated by the circumstances showing the preparation of the organization for departure, by the evidence of its departure, and by the authenticated extract copies of the two morning reports. Although the first morning report entry showing the accused as absent without leave on September 26, 1942, does not expressly show that organization 6194A was the same as Headquarters Squadron, 29th Service Group, the entry nevertheless plainly relates to the accused and it may be presumed, nothing to the contrary appearing, that it was regularly made by the commander of the unit of which the accused was a member, the Headquarters Squadron, 29th Service Group. The second morning report shows the accused as absent from his organization, and as in confinement on October 8, 1942. The above facts show beyond a reasonable doubt that the accused deserted his organization as alleged.

6. The charge sheet shows that the accused is 37 years of age, and that he was inducted into the service at Huntington, West Virginia, on April 15, 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 death is authorized in time of war, upon conviction of a violation of Article of War 58.

Charles B. Besson, Judge Advocate.

Abner E. Lifecomb, Judge Advocate.

Willard B. Cowles, Judge Advocate.

War Department, J.A.G.O., 22 APR 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 James E. Crouch (35427310), Headquarters Squadron, 29th Service Group.

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 occurring when his organization was preparing to embark for overseas service. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. Although wartime 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 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, should such action meet with approval.



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 allowances due or to become due and confinement at hard labor for twenty years. Dishonorable discharge suspended until release from confinement. G.C.M.O. 74, 2 Apr 1943)



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

(361)

SPJGN
CM 230377

MAR 15 1943

UNITED STATES)

96TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Camp Adair, Oregon, January 15,
1943. Dishonorable discharge
and confinement for one and one-
half (1½) years. Disciplinary
Barracks.

Private J. C. WILSON, JR.
(38227442), Company G,
382nd Infantry.)

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private J. C. (I.O.) Wilson, Jr., Company G 382nd Infantry did, at Camp Adair, Oregon, on or about November 28, 1942, feloniously take, steal, and carry away Five Dollars (\$5.00), lawful money of the United States the property of Private Edward J. O'Gorman, Company G 382nd Infantry.

Specification 2: In that Private J. C. (I.O.) Wilson, Jr., Company G 382nd Infantry did, at Camp Adair, Oregon, on or about December 5, 1942, feloniously take, steal, and carry away Twenty Dollars (\$20.00), lawful money of the United States, the property of Private Shawnee Y. Murphy, Company G 382nd Infantry.

Specification 3: In that Private J. C. (I.O.) Wilson, Jr., Company G 382nd Infantry did, at Camp Adair, Oregon, on or about December 23, 1942, feloniously take, steal, and carry away Forty Dollars (\$40.00), lawful money of the United States, the property of Private Arthur L. Watts, Company G. 382nd Infantry.

Specification 4: In that Private J. C. (I.O.) Wilson, Jr., Company G 382nd Infantry did, at Camp Adair, Oregon, on

(362)

or about December 24, 1942, feloniously take, steal and carry away Ten Dollars (\$10.00), lawful money of the United States, the property of Private Edward J. O'Gorman, Company G 382nd Infantry.

Specification 5: In that Private J. C. (I.O.) Wilson, Jr., Company G 382nd Infantry did, at Camp Adair, Oregon, on or about December 26, 1942, feloniously take, steal, and carry away Two Dollars (\$2.00), lawful money of the United States, the property of Private Edward J. O'Gorman, Company G 382nd Infantry.

The accused pleaded not guilty to and was found guilty of the Charge and the Specifications thereunder. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence but reduced the period of confinement to one and one-half 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on the morning of November 28, 1942, Private Edward J. O'Gorman missed \$5 from his billfold which he had placed under his pillow that night (R.6). On the morning of December 5, 1942, Private Shawnee Y. Murphy missed \$20 from a total of \$65 which he had left in his wallet when he had gone to bed (R.13). On the morning of December 23, 1942, Private Arthur L. Watts missed \$40 from his pocketbook (R. 14). On the morning of December 24, 1942, Private Edward J. O'Gorman missed \$10 from his billfold which he had hid in his trunk locker (R.6). On each of the above dates, Privates O'Gorman, Murphy, and Watts were members of the same organization, and together with the accused, slept in the same barrack (R. 7, 13, 16).

In view of the above facts Private O'Gorman on December 25, 1942, recorded the serial number of four one-dollar bills which he placed in his foot locker. On the morning of December 27, 1942, two of the four one-dollar bills were missing. This loss was at once reported to Corporal Summers (R. 6). All of the men in the barrack, including the accused, submitted to a search, and the two missing one-dollar bills were found in the billfold which was taken from the pocket of the accused (R. 6-7).

Shortly after the recovery of the two one-dollar bills, the accused was taken to the company orderly room and questioned concerning the five thefts alleged in the specifications. This questioning ultimately led to the signing of a confession by the accused in which he admitted the five thefts alleged (Ex. 2). In laying the predicate for the introduction of this confession, four witnesses testified that it was voluntarily made. The confession was signed in the presence of First

Lieutenant John P. Hecimovich, First Lieutenant Grady H. Jones, First Sergeant Howard Saylor, and Private Seymour Rubinoff. The substance in Lieutenant Hecimovich's testimony is contained in the following question and answer:

- "Q. Did you warn the accused of his rights before questioning him?
- "A. Yes, sir. He was told that before he had any questioning and after the statement was written. He stated that he had taken the two one dollar bills as marked, and I read the serial numbers and he said they were the two one dollar bills. Then I knew that money had been missing previous to this time. I asked him if he had taken the money that was missing from Privates O'Gorman and Murphy. He said no, sir. Then I told him, I says this is for our benefit. If you took it I want you to admit it frankly. He nodded his head, and he said, Sir, I didn't take it. I said, now Private Wilson, if you took it I want you to be honest. Then he nodded his head again and admitted taking it from Private O'Gorman and Private Murphy. I asked him why he took it. He said at the time to shoot craps. I said when did you take it. He said after lights out. How did you take it. He said he got out of bed, went to the foot locker of Private O'Gorman, opened his billfold and took the money out. Asked him how did he take the money from Murphy. He said Shawnee Murphy's clothes were on the bed at the time and his billfold was in his pants. He went into the billfold and took out the one twenty dollar bill. Then I further questioned him in regard to the \$40.00 which Private Watts had missed. I said, did you take that Private Wilson. He said, sir, I didn't take it. All I took was the money from the other two. Then I told him, I said, now it hangs upon you. You admitted taking some money from O'Gorman and Murphy and that all hangs on you. I want you to be frank and tell me. He nodded his head and said he took it, all of it. I said, how did you take the money from Private Watts. He said the pants were under the bed with the billfold. After lights out, he stepped over, took the billfold, and took the money out. Then after that was all said to me, he admitted it. Then again I explained his rights. I said now what you have said will be used as evidence in court. The statement was written up. The rights fully explained. He signed in the presence of the First Sergeant, Executive Officer, and my company clerk." (R. 20, 17-23)

Lieutenant Jones and Private Rubinoff likewise testified that the accused was warned of his rights against self-incrimination, and that his confession was voluntarily made (R. 24-27; 15-17).

When First Sergeant Saylor was presented as a witness for the prosecution, the defense offered to stipulate that his testimony would be the same as the other witnesses. The prosecution, however, insisted

upon examining him. In addition to other questions Sergeant Saylor was asked the following question and gave the following answer:

"Q. Was anything said to the accused in the Orderly Room prior to his making any statements regarding the alleged losses of money before he was questioned concerning those?

"A. He was advised that any statement he would make would more than likely be used against him. Private Wilson admitted stealing the \$2.00 at first. He admitted stealing that much money. As I have stated previously, the other series of thefts, I said to Private Wilson, if you have taken money from any one else you might as well admit it. The penalty won't be any more severe. I stated that, at that time. I said it would clear up the situation. He admitted stealing another sum of money. That is the actual time I warned him to make a statement admitting all of the money that he had taken and no more, and then he admitted taking the money on each of the four or five times, whatever it was" (R. 29, 27-29).

4. The accused elected to remain silent and no evidence for the defense was presented.

5. Since the evidence independent of the statements and confession of the accused clearly sustains the finding of guilty of the theft of \$2 as alleged in Specification 5, the only question requiring discussion involves the correctness of the court's action in receiving the confession in evidence as proof of the facts alleged in the Specifications 1, 2, 3, and 4.

The two commissioned officers who examined the accused and directed the securing of his confession testified that the confession was voluntarily made. First Sergeant Saylor also testified that the confession was voluntarily made. He testified further, however, as follows:

"*** if you have taken money from any one else you might as well admit it. The penalty won't be any more severe. I stated that, at that time. I said it would clear up the situation. He admitted stealing another sum of money. That is the actual time I warned him to make a statement admitting all of the money that he had taken and no more, and then he admitted taking the money on each of the four or five times, whatever it was" (R. 29).

Since the above statement or advice of Sergeant Saylor was made to the accused in the presence of two commissioned officers, and since neither of them contradicted or corrected the statement, or sought to impeach

the testimony of Sergeant Saylor, it must be assumed that his testimony presented a truthful recitation of what actually occurred.

From the above quoted testimony, it is apparent that the accused was misinformed as to the legal effect of his confession and the effect it would have upon the punishment which he would otherwise receive for the theft of \$2 which had been found upon his person. Furthermore, the accused appears to be an ignorant soldier who could not read the confession which he signed, and to have been induced by the false statement or advice which he received from First Sergeant Saylor to confess to the four thefts alleged in Specifications 1, 2, 3, and 4.

The Manual for Courts-Martial states that -

"The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior.

"Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strong-minded soldier might not be influenced by words and circumstances which might influence an ignorant, dull-minded recruit" (Par. 114, MCM, 1928).

In accordance with the principle above expressed, it was held in CM 183917, that the confession by an accused private which was induced by the promise of a sergeant to the effect that if he would produce certain articles alleged to have been stolen, he would receive immunity, was held inadmissible in evidence. Also in CM 152444, in which a sergeant obtained a confession from a private by telling the latter, in substance, that he was under suspicion, and it would be best for him to tell the truth and "come clean", since otherwise this offense would be found out sooner or later and then the penalty would probably be

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

(367)

SPJGN
CM 230377

MAR 15 1943

UNITED STATES

v.

Private J. C. WILSON, JR.
(38227442), Company G,
382nd Infantry.

96TH INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Adair, Oregon, January
15, 1943. Dishonorable dis-
charge and confinement for
one and one-half (1½) years.
Disciplinary Barracks.

DISSENTING OPINION by CRESSON, Judge Advocate.

1. It is my opinion that the findings of guilty and the sentence should be approved. The majority of the Board holds that the confession of the accused was not proper and should not have been admitted in evidence, as the accused was not fully advised of his rights and the confession was not voluntary. With the confession excluded the majority holds only the findings of guilty of Specification 5 and the Charge legally sufficient and of the confinement imposed only six months to be legal.

The evidence relative to the confession is as follows:

Private Seymour Rubinoff, present while accused was being questioned, testified that the accused was advised by Lieutenant Hecimovich of his rights against self-incrimination before he made the statement (R. 17). Lieutenant John P. Hecimovich, Company Commander of the accused, saw him in the bachelor officers' quarters orderly room, left there, took the accused with him to his office, where he questioned the accused in regard to the moneys, first advising him fully of his rights; before he made any statement Lieutenant Hecimovich told him that the statement made need not be signed, it was entirely voluntary, he repeated that about four or five times, said the statement would be used as evidence in court, asked if the accused understood it, and he said yes. Lieutenant Hecimovich read the statement twice, put it before the accused, told him he could sign, or did not have to, it would be voluntary and would be used before the court. He said he would sign it; no promise of leniency was made if he would make the statement. The accused said he could not read, so Lieutenant Hecimovich read it to him slowly, in the presence of three witnesses, explained each statement, and asked questions, then reread the statement, and the accused said he understood. No force whatsoever was used, it was signed entirely voluntarily, and it was then received in evidence as

Prosecution's Exhibit 2 (k. 20) and read to the court.

Lieutenant Hecimovich warned the accused of his rights before any questioning and after the statement was written, asked him if he had taken the money that was missing from Privates O'Gorman and Murphy, told him it was "for our benefit", if he took it to be honest, and he nodded his head and admitted taking it after "lights out". The accused said he got out of bed, went to the footlocker of Private O'Gorman, opened his billfold and took the money. He said Shawnee Murphy's clothes were on the bed, the billfold in the pants, and from it he took out one twenty dollar bill. The accused also said that Private Watts' pants with the billfold were under the bed, after "lights out" he took the billfold and took out the money. Lieutenant Hecimovich then told him the statements would be used as evidence in court, then it was written up, his rights fully explained and he signed in the presence of the first sergeant, the executive officer and the company clerk. Lieutenant Hecimovich before the statement was signed read it all very slowly, explaining it in detail, then read it once more all through, the accused said he understood. Lieutenant Hecimovich told him the statement was going to be used in court, it is entirely voluntary, he could sign, or he did not have to, shoved the paper before him, the accused said he would sign and did. Lieutenant Hecimovich did not try to influence the accused to say the words wanted, some were his, some those of accused, as the name and serial number and help relative to dates. The accused used the word "stealing" throughout his written confession. He told accused the sooner he admitted taking it the sooner he would be dismissed, it would be for the good of both of them. The dismissal was to be so the accused could go down for dinner in the mess, and he could be questioned further after dinner. Lieutenant Hecimovich warned accused twice, first when he was brought into the office of Lieutenant Hecimovich, before any questioning, he was notified first about the Article of War, then warned again after the statement was typewritten and before he signed, was told he did not have to sign it (R. 17-2B).

First Lieutenant Grady H. Jones was in the barracks the morning of December 27, 1942, when the accused was brought into the orderly room. Before the questioning began he was advised of his rights, before he made any statement, it was to be written and that he did not have to sign it. Lieutenant Jones was there before the statement was written up, heard the accused warned as to his rights before he was questioned. He was told the penalty for such an act, advised of his rights, that he was not to sign anything unless he absolutely thought it was correct, if he did not take the money to say so, to tell the truth and he would get a fair and square deal.

The accused answered in a voluntary manner, Lieutenant Hecimovich, the Company Commander, who was doing the questioning, did not use any coercion, force, or promise of leniency. He read the Article of War to the accused

during the course of the conversation. Sergeant Saylor did not ask the accused any questions. In the orderly room were Sergeant Saylor, the accused and the charge of quarters, when Lieutenant Jones arrived, the company commander was not there then. When he came in he told the accused he was going to talk to him about stealing money, anything he said might be used against him, he did not have to say anything (R. 24-27).

First Sergeant Howard Saylor testified the accused made a statement after he was warned of his rights by Lieutenant Hecimovich, who told him the statement more than likely would be used against him, if there was a court-martial, then went over this a second time. Sergeant Saylor repeated to the accused what the company commander said, told him he did not have to sign the confession, not to do so unless everything in it was the truth. The accused admitted stealing the \$2.00 at first. Sergeant Saylor had stated previously the other series of thefts, so he said to accused, if he had taken money from anyone else, he "might as well admit it. The penalty won't be any more severe", it would clear up the matter. Of course, such a statement was not correct, neither could Sergeant Saylor make any promise or agreement with the accused, since there were two commissioned officers present conducting the investigation.

That is the actual time he warned the accused "to make a statement admitting all of the money that he had taken and no more, and then he admitted taking the money on each of the four or five times". Sergeant Saylor was present when the statement was typed up, read it, before which the accused was warned of his rights, the pertinent Article of War was read, the statement was voluntary, no force or coercion was used, no promises of leniency were made.

Sergeant Saylor asked the accused some questions, but not being a commissioned officer did not warn him of his rights. The answers accused gave to Sergeant Saylor were not reported, they were not any part of the investigation. After the accused admitted taking the \$2.00 from Private O'Gorman, Sergeant Saylor deemed it necessary for a commissioned officer to be present, so he sent for the company commander, who arrived in about twenty minutes, during which time the accused was not asked any questions, except as a means of explanation. He did not tell he had taken money from other people before the arrival of the company commander, who conducted the investigation (n. 27-32).

From this evidence it appears that the accused was fully warned, knew his rights and what he was doing, no force was used, no real leniency promised. The statement by Sergeant Saylor that, "The penalty won't be any more severe" was improper, unauthorized and not correct, still the accused was fully advised by two commissioned officers, who were conducting the investigation and were superior to Sergeant Saylor, who stated as he was not a commissioned officer he did not warn the accused of his rights, but

(370)

deemed it necessary for a commissioned officer to be present.

As to all the Specifications the three owners of the money stolen all testified as to their respective losses, it was shown the accused slept in the same barracks with them, their cots not far apart, so he had the opportunity to steal the money. As to Specifications 1, 2, 3 and 4, the confession is needed in order to sustain the findings of guilty of them. As to Specification 5, two of the dollars in currency stolen from Private O'Gorman were taken from the person of the accused and were positively identified by their serial numbers, so the confession is not needed to sustain the findings of guilty of Specification 5 and of the Charge. With the confession, properly admitted, all findings of guilty and the sentence are legally sufficient and should be sustained.

Charles B. Besson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., ^V**MAR 25 1943** - To the Commanding General, 96th Infantry Division, Camp Adair, Oregon.

1. In the case of Private J. C. Wilson, Jr. (38227442), Company G, 382nd Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1, 2, 3, and 4 of the Charge, legally sufficient to support the findings of guilty of the Charge and Specification 5 thereunder, 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 months. Upon disapproval of the findings of guilty of Specifications 1, 2, 3, and 4 of the Charge and approval of only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months, you will have authority under Article of War 50½ 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 230377).



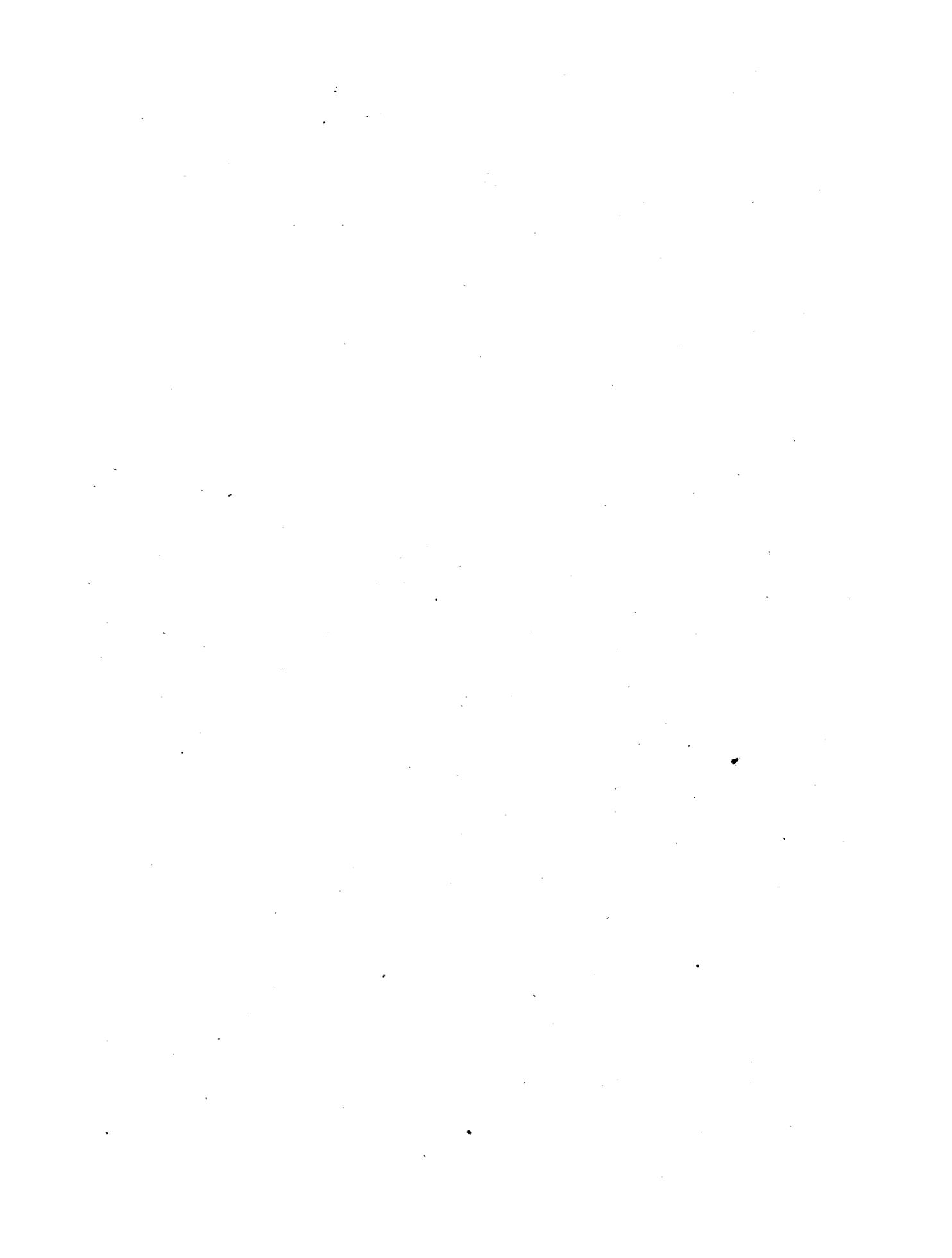
E. C. McNeil

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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DISPATCHED
WAR DEPARTMENT
SERVICES BY
J.A.G.O.



(373)

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

C.M. 230379
(ETO 25)

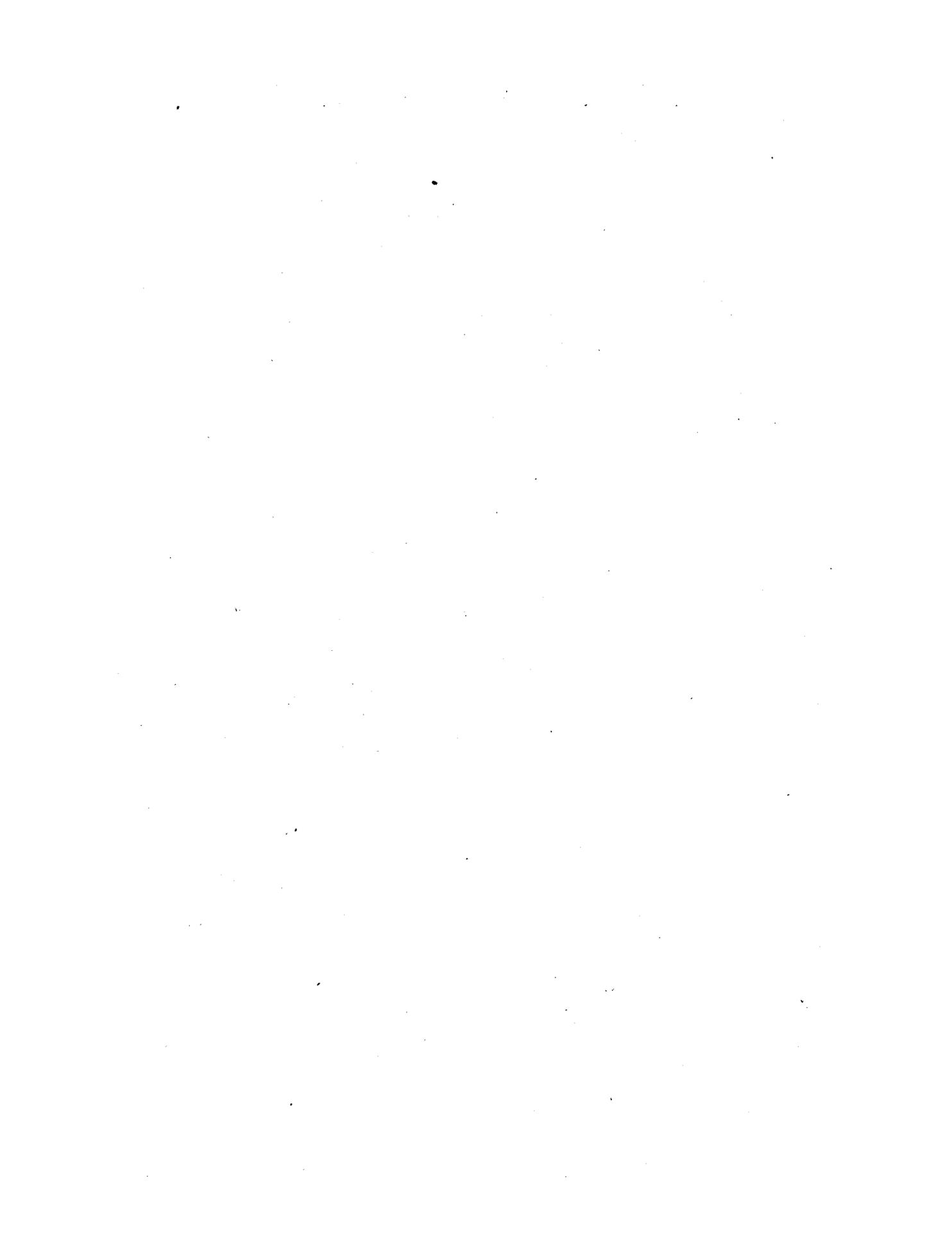
29 Sep 1942

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

v.

Captain JOHN F. KENNEY,
(O-904840)

(This opinion will be included in compilation of ETO cases)



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

SPJGH
CM 230478

APR 22 1943

UNITED STATES	)	ALASKA DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at
Private ROBERT L. MAYNOR	)	Fort Richardson, Alaska,
(6778361), Service Company,	)	December 16, 1942. Confine-
4th Infantry.	)	ment for five (5) years.
	)	Dishonorable discharge and
	)	four (4) years of the confine-
	)	ment suspended. The Guard-
	)	house, Fort Richardson, Alaska.

HOLDING by the BOARD OF REVIEW
HILL, LYON and DRIVER, 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 sentence in part, has been examined by the Board of Review.

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

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

Specification: In that Private Robert L. Maynor, Service Company, 4th Infantry, did, at Anchorage, Alaska, on or about November 8, 1942, with the intent to do them bodily harm, commit an assault with a dangerous weapon upon Sergeant Vernon E. Williams and Private Olvis W. Day, Battery "K", 75th Coast Artillery (AA), by willfully and feloniously pointing a loaded pistol at the said Sergeant Vernon E. Williams and Private Olvis W. Day.

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

Specification: In that Private Robert L. Maynor, Service Company, 4th Infantry, did, at Anchorage, Alaska, on or about November 8, 1942, unlawfully carry a concealed weapon, viz., a caliber .380 Colt automatic pistol.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority disapproved the findings of guilty of the Specification, Charge II, and of Charge II, approved only so much of the findings of guilty of the Specification, Charge I, and of Charge I "as involves a finding of guilty of assault with a dangerous weapon, at the time and place and upon the persons named in the specification, in violation of the 96th Article of War"; approved the sentence, suspended the "dishonorable discharge and four years of the sentence to confinement", designated the guardhouse, Fort Richardson, Alaska, as the place of confinement, and directed the execution of the sentence as modified. The proceedings were published in General Court-Martial Order No. 10, Headquarters Alaska Defense Command, January 8, 1943.

3. The only question requiring consideration is the legal sufficiency of the record of trial to support the sentence.

The only offense of which a finding of guilty was approved is assault with a dangerous weapon, in violation of the 96th Article of War. That offense is not listed in the table of maximum punishments found in paragraph 104c, Manual for Courts-Martial, 1928, which, however, does provide that offenses for which the punishment is not otherwise prescribed "remain punishable as authorized by statute or by the custom of the service". The "statute" thus mentioned has heretofore been construed to include "any Federal statute of general application or * * * the Code of the District of Columbia * * * in the order named" (CM 212505, Tipton).

The offense in the instant case is not specifically denounced in the Criminal Code of the United States. It is, however, denounced in the Code of the District of Columbia, 1940, in section 22-502, reading as follows:

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years".

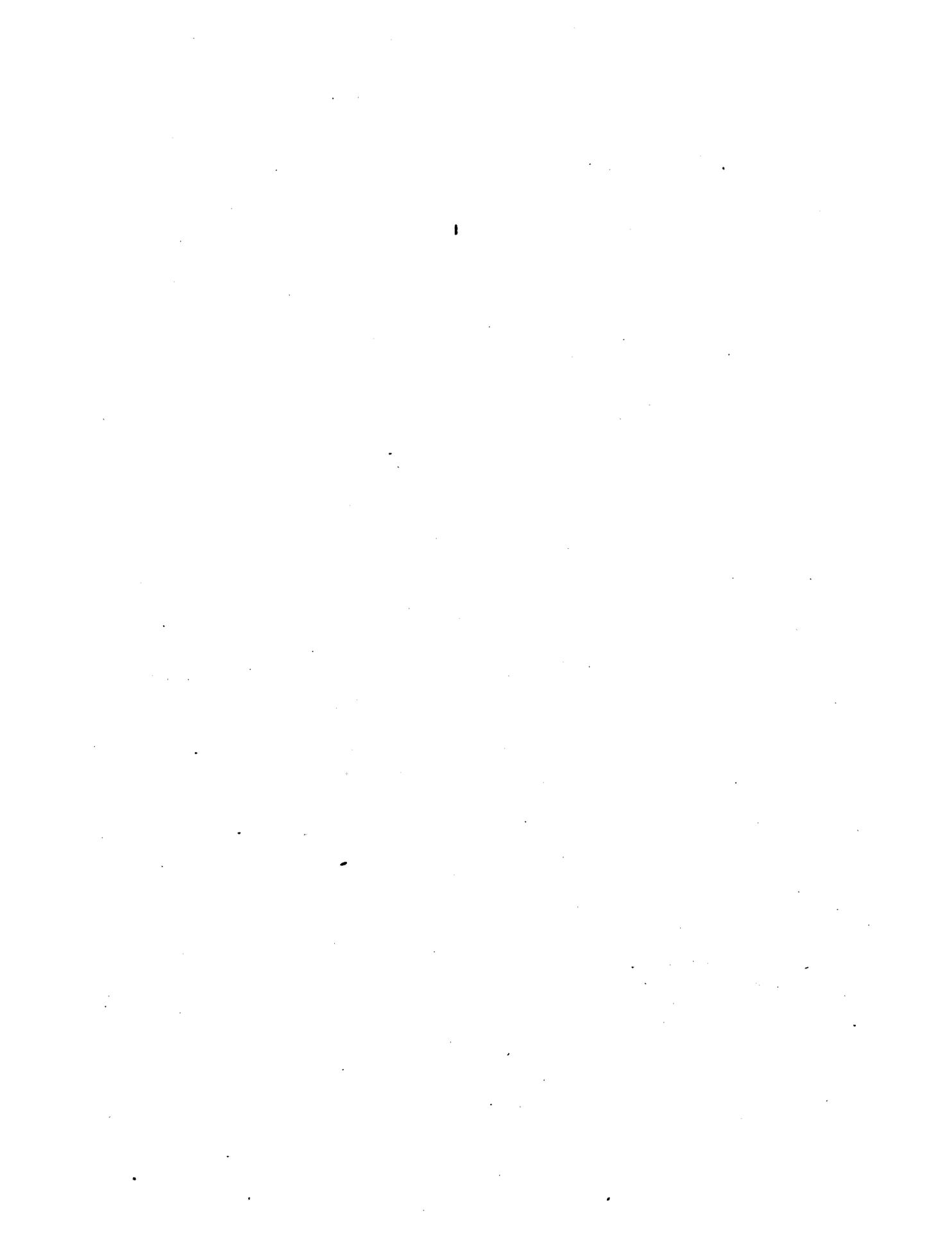
The maximum authorized confinement authorized for the offense of which the finding of guilty was approved, assault with a dangerous weapon, is confinement at hard labor for ten years, authorized by section 22-502 of the Code of the District of Columbia, 1940.

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

Robert S. Hill, Judge Advocate.

Ray E. Gore, Judge Advocate.

Samuel M. Dwyer, Judge Advocate



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

(379)

SPJGK
CM 230484

FEB 26 1943

UNITED STATES)

SIXTH AIR FORCE

v.)

Private ROBERT C. MCGINNIS)
(6979574), 19th Service)
Squadron, 15th Service Group.)

Trial by G. C. M., convened at
Albrook Field, Canal Zone,
December 10, 1942. Dishonorable
discharge and confinement for
fifteen (15) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert C. McGinnis, 19th Service Squadron, 15th Service Group, did at Albrook Field, Canal Zone, on or about September 2, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended in Panama City, Republic of Panama, on or about November 2, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by general court-martial for escape from confinement in violation of Article of War 69 and of two previous convictions by summary courts-martial for absence without leave in violation of Article of War 61, 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 fifteen years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that accused, a member of the 19th Service Squadron, 15th Service Group, on duty at Albrook Field, Canal Zone, was absent without leave from his organization from 11 p.m., September 2, 1942 (Ex. A) until 7:30 p.m., November 2, 1942 (R. 6-9; Ex. B). His

unauthorized absence was terminated by apprehension at the "Chicago Bar" (R. 9, 11, 16); Panama City, on November 2, 1942 (R. 8, 11, 12). At the time of his apprehension he was dressed in civilian clothes (R. 8, 12, 16) and was sitting at a table with an enlisted man drinking beer, rum and "coke" (R. 8, 11). He was not drunk (R. 8, 12). When searched by the military police he was found to have on his person an identification card issued by the central labor office for civilian employees of the Army (R. 8). The card bore the name of Roberto Benavides, a Colombian (R. 8, 9) and designated him as an employee at Albrook Field (R. 9, 25). Accused had taken the card without permission (R. 25).

Accused's commanding officer, Captain Ernest H. Powell, Air Corps, who had apprehended accused, interviewed him at the guardhouse (R. 9) after first informing him of his rights under Article of War 24 (R. 10). Captain Powell testified:

"While Private McGinnis was in the guard house I asked him several questions what he did and various other questions and he also stated that he told Benevides that he did not belong to the Army any more and that he was a civilian. He then made a confession in the presence of myself and stated he wanted to clear the whole matter up and Private McGinnis admitted that he had actually deserted the Service and I asked why and he stated 'I will tell you personally and nobody else'. At that time the stenographer excused himself and Private McGinnis told me the reason is on account of you Captain and I asked why and he stated I was too tough on the squadron and that he, Private McGinnis, had been court martialed twice in my squadron and that I gave a pay day lecture and that he did not like it. At that time my squadron consisted of either two or three hundred men and I said 'McGinnis, nobody else deserted my squadron' and he said, 'I just got tired of being in the Army and I wanted to quit.'" (R. 9)

Accused told the witness that he had been living on 17th Street at the Y.M.C.A. and at No. 40 Avenida Norte (R. 9) and that while living at the Y.M.C.A. he had assumed the alias of "Sergeant Bissell" (R. 10, 12), had been known by that name (R. 10) and had used it when registering at the Y.M.C.A. (R. 10, 12). On November 4, 1942, accused was taken to the Base Intelligence Office and interviewed by Major Spencer W. Raynor, Air Corps, Base Intelligence Officer (R. 13). Major Raynor testified that he advised accused

"that he was not required to make any statement, and that if he did, and should his case come to trial, anything he said might be used against him." (R. 13)

Major Raynor further testified:

"At the office, during the course of questioning, Private McGinnis stated he had left Albrook Field on or about September 2nd and stayed at the Y.M.C.A. for about four days and that during that time he had decided to desert, and that during the remainder of the time, which was approximately two months, up to the time he was apprehended by the Military Police, that he was a deserter." (R. 13)

In this interview accused stated that he had used the alias of "Bissell" while living at the Y.M.C.A., and had registered there under that name (R. 13). He had falsely pretended to "Sergeant Lucas" that he could secure for Lucas a Colombian passport for approximately \$85 (R. 14). He had obtained the identification card from Benavides with whom he was living in Panama (R. 14) and the civilian clothes from a friend named "Rios" (R. 14) who was a "queer" or sex pervert (R. 37).

Technician 3rd Grade Raymond L. Lucas, Detachment Finance Department, Albrook Field, Canal Zone, testified that accused, when asked what his plans were (R. 18), offered to procure for witness a Colombian passport for \$85 (R. 16, 17, 27), said nothing about returning to the military service and asserted that he was working as "short order cook" in a café in the lower part of Panama (R. 16). Accused also told witness that he wanted to go to Colombia to avoid apprehension as a deserter in Panama (R. 18) and to work as foreman of a coffee plantation (R. 18, 27) under an employment that had been procured for him by a friend with whom he was then living (R. 27).

There was evidence to the effect that accused left his military clothing and equipment "in very bad condition" (R. 20). He was seen in Panama by various witnesses during his period of absence dressed in civilian clothes (R. 16, 22, 24, 26) and on one occasion in khaki Army uniform (R. 28, 29). A few days before his apprehension accused told Humberto Zafrane, a civilian, that he was not going back to the Army but "desired to know" Colombia (R. 24).

Accused testified:

"On September 2nd, 1942, I got my pass from Sergeant Crooks of the Fire Department and went to Panama City and went to Rio Abajo to the 'Blue Goose' and started drinking. That evening I went upstairs with a girl for intercourse and then came down and went back to the Y.M.C.A. at about 11:00 o'clock. I remained at the Y.M.C.A. for about four days, the first time under my own name and in uniform. After that I went to Thomas Rios's house where I stayed for three days and he gave me money and bought my food and after three days I went back to the Y.M.C.A. and stayed for about four days. I don't remember the exact days, during the days at the Y.M.C.A., that I used the name of Bissell. After leaving the Y.M.C.A. I went to Rios's house and stayed for ten days and he let me have one dollar a day for spending money. Rios is a 'queer', and after those ten days he let me use some civilian clothes of his and after I left Rios's place, I had been drinking all this time, I went and stayed at Benavide's place for a period of several weeks. They gave me no money and occasionally they let me borrow a civilian shirt. My uniform is still in that house, that is I had on a pair of khaki Army trousers with a civilian shirt at the time of my apprehension. That night I was apprehended in the Chicago Bar, Vezina placed me under arrest followed by Captain Powell. I did not make any attempt to conceal my identity to them and went to Quarry Heights. *** I told several people I had left the Army, but I made no statement I was going to leave. *** I just mentioned I severed my relations with the Army for a definite period." (R. 31, 32)

He had no intention of going to Colombia (R. 32, 33) but mentioned it to Sergeant Lucas as "I thought it would be a good way to get money." (R. 32, 33, 34) The whole Colombia affair was a fabrication (R. 33). He wore his Army uniform during the first month of absence and civilian clothes "off and on" during the second month. He did not use the pass but would have if necessary for identification. (R. 32) He explained his second month of unauthorized absence by stating; "I did not like what Captain Powell

was saying on pay day speeches" and that he was dissatisfied with his organization but not with the service (R. 33). He did not work in Panama or try to get work. He had no definite time in mind for his return to the service - "I was coming back, but I didn't know when." (R. 34) He would have returned even if he "could have gotten a job" in Panama City. When he told Major Raynor that he was a deserter he did not know the meaning of the word "desertion" and told Major Raynor so. (R. 34, 35) He borrowed a pair of civilian shoes from "J. D. Martin" and used the alias Bissell to evade apprehension by the military police as his true name was known to them. He obtained the civilian clothes he was wearing at the time of apprehension from Rios and did not return them as he had been told by Rios to keep them. (R. 35) Neither did he return the pass to Zafrane (R. 35, 36) but put it in back of the car when taken into custody. He made no use of the pass to get a job. He told no one that he intended to return to the service. He made no attempt to be transferred to another outfit. (R. 36) He stated that the Articles of War had been read to him four times, the last time about fourteen months previously (R. 37).

Captain Powell testified that he had read the Articles of War to accused's organization four times in the months of January and July in 1941 and 1942 and that accused was present on three of those occasions.

4. Absence without leave during the period and at the place alleged in the Specification is established by the evidence without conflict. Furthermore, by his acts and words accused clearly manifested an intention not to return to his organization. He testified frankly that he was dissatisfied with his organization and stated to others that he was through with the Army. He used the alias "Sergeant Bissell" to evade arrest by the military police who knew him by his true name. He wore civilian clothes and lived and associated with Panamanians, one of whom was a "queer" or sex pervert. He did not associate with the men of his organization and when he encountered one of them on the street fled from him. He engaged in civilian employment, disclosed to Sergeant Lucas plans to go to Colombia and work as foreman of a coffee plantation, and endeavored to persuade Sergeant Lucas to desert the service and accompany him. The bad condition in which he left his military clothing and equipment indicated a want of intention to return to resume their use. Accused's assertion of an intention to return at some indefinite, undetermined future time is too vague and uncertain for serious consideration. The evidence amply justified the court in finding accused guilty of desertion in violation of Article of War 58.

5. The charge sheet shows that accused is 21 years of age. He enlisted October 10, 1939, for a period of three years.

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 and sentence. Confinement in a penitentiary is authorized by Article of War 42 upon conviction of desertion in time of war in violation of Article of War 58.

Andrew Scott Jr., Judge Advocate.
Wm. Wainwright, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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

(385)

SPJGN
CM 230541

APR 17 1943

UNITED STATES	)	SOUTHERN LAND FRONTIER SECTOR
	)	WESTERN DEFENSE COMMAND
v.)	
Private NAIMON DANIEL	)	Trial by G.C.M., convened at
(34061237), Company A,	)	Papago Park, Phoenix, Arizona,
364th Infantry.	)	January 6, 1943. Dishonorable
	)	discharge and confinement for
	)	thirty (30) years and seven (7)
	)	months. Disciplinary Barracks

HOLDING by the BOARD OF REVIEW,
CRESSON, LIPSCOMB and SLEEPER, 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 93rd Article of War.

Specification 1: In that Private Naimon (NMI) Daniel, Company "A", 364th Infantry, did, at Scottsdale, Arizona, on or about December 6, 1942, in the nighttime feloniously and burglariously break and enter the dwelling house of Martha Munguia, with intent to commit a felony, viz rape therein.

Specification 2: In that Private Naimon (NMI) Daniel, Company "A", 364th Infantry, did, at Scottsdale, Arizona, on or about December 6, 1942, with intent to commit a felony, viz, rape, commit an assault upon Martha Munguia, by willfully and feloniously, without her knowledge and consent, getting into bed with said Martha Munguia.

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

Specification 1: In that Private Naimon (NMI) Daniel, Company "A", 364th Infantry, having been restricted to the limits of Papago Park, Phoenix, Arizona, did, at Papago Park, Phoenix, Arizona, on or about December 5, 1942, break said restriction by going to Scottsdale, Arizona.

(386)

Specification 2: In that Private Naimon (NMI) Daniel, Company "A", 364th Infantry, having received a lawful order from Lieutenant Colonel Frederick W. Ellis to return to the post at Papago Park, Phoenix, Arizona, the said officer being in the execution of his office, did, at Scottsdale, Arizona, on or about December 5, 1942, fail to obey the same.

The accused pleaded not guilty to and was found guilty of all Specifications and Charges. Evidence of one previous conviction by summary court-martial for breach of restriction, in violation of Article of War 96, 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 30 years and 7 months. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas, 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 on the evening of December 5, 1942, the accused was in the town of Scottsdale, Arizona, in violation of an order restricting him, and the members of his organization, within the limits of Camp Papago. At about 9 o'clock in the evening, as the accused was coming out of a pool hall, he was met by Lieutenant Colonel Frederick W. Ellis, Officer of the Day at Camp Papago. The accused at once recognized Lieutenant Colonel Ellis, came to attention, and saluted. Upon request, the accused told Lieutenant Colonel Ellis his name and presented his identification tags for inspection. The accused appeared to have been drinking but he was not drunk. Lieutenant Colonel Ellis ordered the accused to return to Camp Papago and pointed out to him the road which he should follow. (R. 11-17, 18; Ex. A)

On the same night Martha Munguia, a Mexican woman, and her husband were in their home in Scottsdale. The door to their house had been closed but not locked. Their baby had been crying during the evening, and they had left a lighted lamp beside their bed with a few matches near it. Their baby was sleeping in the bed with them. At about 4:30 in the morning, December 6, 1942, Mrs. Munguia felt the baby slipping down to the foot of the bed. She pulled the child back to its normal position, and immediately felt it slipping down to the foot of the bed again. Mrs. Munguia then became aware of the fact that some intruder was in the bed. She reached out her hand, and a cold hand grasped hers and squeezed it. At the same time the intruder indicated to her that she was to remain quiet. Mrs. Munguia at once called her husband. The lamp which had been burning when they went to sleep was out, and the matches near it had been removed. When Mrs. Munguia told her husband that someone was in the bed with them "he pulled his feet over there and kicked him," and said "I think it's your sister," and Mrs. Munguia replied "No, my sister couldn't have turned the light off, my sister would have talked to us." Mrs. Munguia then added,

for the matches which he had left by the lamp and finding that they had been removed, went to the kitchen for more. When he returned to the room he sat on the side of the bed. Upon lighting a match he said, "There is a nigger soldier there." Mr. Munguia forthwith went back to the kitchen in search of a stick of wood as a protective weapon against the intruder. When he returned to the room the negro soldier ran from the house. Mrs. Munguia, in describing the intrusion of the accused, testified that there was no one else in the house besides herself, her husband, and the child, and no one else could have removed the matches by the lamp other than the accused.

A short while after the above described incident Mr. and Mrs. Munguia accompanied Mr. A. L. Frederick, the local deputy sheriff, to a place near Mrs. Jasper L. Tamm's apartment house where the accused had been apprehended and was being held. When Deputy Sheriff Frederick and Mr. and Mrs. Munguia arrived at the scene of the apprehension they found the accused tied with a rope. Mrs. Munguia at once identified the accused as the soldier who had gotten in bed with her a short time before. Mrs. Tamm who was present when the local deputy sheriff and Mr. and Mrs. Munguia arrived made the remark that the rope which was tying the hands of the accused was in the wrong place, and that it should be around his neck. When this remark was made the accused quickly replied with the statement "No, sir; no ma'am, don't you do that. I wouldn't rape nobody." Prior to this statement no person had been heard to make any remark about rape. Deputy Sheriff Frederick asked those present if the accused had a knife in his possession and he was told that a knife had been taken away from the accused. The deputy sheriff then reached into the pockets of the accused and pulled out another knife. The deputy sheriff in describing the arrest of the accused stated that the accused was not drunk but that the accused endeavored to impress him with the fact that he had been drinking heavily and was, in fact, drunk. (R. 47, 61-68)

On this same night, and within a few hours of his apprehension, the accused had appeared and sought admission at the apartments occupied by Mrs. Jasper L. Tamm, Mrs. Lela Tucker, and Miss Wilma Hudson, all of whom lived in apartments near the scene of the apprehension of the accused. When the accused first appeared at the apartment of Mrs. Tamm he requested to be let in and said, "Let me in. You are supposed to be good to a soldier." When he was refused admission he went away, and did no violence. A short time later he again returned and sought admission. Upon his return to Mrs. Tamm's apartment, the accused talked to Mr. Tamm through the window and was detained by Mr. Tamm, while Mrs. Tamm called for the sheriff. (R. 43-47)

At about 3 a.m. the accused opened the screen door and tried to gain admission to the apartment of Mrs. Tucker. Mrs. Tucker ordered him to get out and pushed the divan against the door to keep him from getting in. (R. 50-56).

At about 4 a.m. the accused came to the door of the apartment occupied by Miss Wilma Hudson and requested to be directed to his camp.

The accused said he would get in trouble if he went back to camp at that time in the morning. He was informed that he would get in trouble there unless he left. He then stated that he was a soldier and that "I should be good to a soldier." The accused then offered to give Miss Hudson a dollar if she would let him in. He assured Miss Hudson that he would not hurt her, but that he just wanted to come in and spend the rest of the night. He finally decided to go but just before he left he said, "I will give you four dollars if you will let me come in." When Miss Hudson refused the accused said "Well, will you come out and shine the lights so I can get across this ditch without falling." Miss Hudson then shone a light as best she could on the outside and the accused left. (R. 56-60).

Evidence was also introduced showing that a negro soldier closely resembling the accused entered the home of Mrs. Betty Dubois at Tempe, Arizona, on the night of November 22, 1943. Mrs. Dubois was asleep at the time and was awakened by her lamp being turned up. She arose and saw the soldier leaving her bedroom. As he left the room he pushed the screen door off its hinges. At the time of this occurrence Mrs. Dubois' husband was away from home. (R. 68-69)

The prosecution introduced a sworn statement of the accused in which the accused stated that he left camp on December 5, 1942 at about 2100 o'clock after having a drink. He asserted that when he drank it always went to his head. After leaving camp he met two Indians who gave him some wine to drink, which made him drunk. The two Indians went with him to Scottsdale where they got liquor and drank together. After the Indians left him he went to a pool room where he met Lieutenant Colonel Ellis who told him to go back to camp. After starting back to camp he lost his direction and the only place he remembered going was the place where he was arrested. (R. 23, Ex. B)

4. The accused elected to remain silent and no evidence was introduced for the defense.

5. Specification 1, Charge I, alleges that the accused did, on or about December 6, 1942, feloniously and burglariously break and enter the dwelling house of Martha Munguia at nighttime with the intent of committing the felony of rape therein. Specification 2, Charge I, alleges that the accused committed an assault upon Mrs. Munguia with intent to commit rape by willfully and feloniously getting into bed with her.

In order to sustain the findings of guilty of housebreaking with intent to commit rape as alleged in Specification 1, or the findings of guilty of assault with intent to commit rape as alleged in Specification 2, it is necessary that the evidence show that the accused had the specific intent to rape both at the time he entered the house, and at the time he got into bed with Mrs. Munguia. Rape is defined

as " * * * the unlawful carnal knowledge of a woman by force and without her consent." (par. 148b, M.C.M. 1928) It follows, therefore, that the existence of an attempt to have carnal knowledge by force and without consent was an essential element of both offenses alleged. The evidence shows very clearly that the accused unlawfully entered the home of Mrs. Munguia. It is equally clear that the accused made an assault upon Mrs. Munguia by his conduct in willfully and feloniously getting into bed with her without her knowledge and consent. Furthermore, although the accused had been drinking during the night in question, the evidence shows that he was not drunk when he entered Mrs. Munguia's home, and that he was mentally capable at that time of having a specific intent. This fact is shown by his conduct in leaving Mrs. Munguia's house when threatened by her husband, and by his intelligent response to fear under the circumstances surrounding his apprehension.

Although the evidence affords a rational basis for the inference that the accused, at the time of his entry into the house, and at the time of his getting into bed with Mrs. Munguia, had an intent to do an unlawful act, the facts do not support the court's conclusion that the accused, either at the time of his entering the house or at the time of his getting into the bed, intended to forcibly have carnal intercourse with Mrs. Munguia. On the other hand, the facts show that the accused had wandered to at least three other homes on the night in question and had offered no violence at any one of the places visited. We must conclude, therefore, that although the inference may be warranted that the accused may have been seeking an illicit sexual relationship, the facts do not justify the conclusion that he intended to accomplish such a design by ultimate force.

It does not follow, however, that the accused is not responsible for the offenses committed by him. The facts afford a reasonable basis for the inference that the accused at the time he entered Mrs. Munguia's house had the intent of committing an assault therein and that such an assault was, in fact, committed.

The record, therefore, is legally sufficient as to Specification 1, Charge I, to support only so much of the findings of guilty as involves the findings of guilty of the lesser included offense of breaking and entering the dwelling house of Martha Munguia with intent to commit a criminal assault therein in violation of Article of War 93, and as to Specification 2, Charge I, the record is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of the lesser included offense of an assault, in violation of Article of War 96. (CM 220805 Peavy)

6. Specification 1, Charge II, alleges that the accused, having been restricted to the limits of Papago Park, did, on or about December 5, 1942, break the said restrictions by going to Scottsdale,

(390)

Arizona. The uncontradicted evidence shows that the accused did break the restrictions in the manner alleged.

7. Specification 2, Charge II, alleges that the accused, after having received a lawful order from Lieutenant Colonel Frederick W. Ellis to return to his post at Papago Park did, on or about December 5, 1942, fail to obey said order. The uncontradicted evidence establishes beyond a reasonable doubt the guilt of the accused of this offense as alleged.

8. For the reasons stated, the Board of Review holds that the record is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I, as involves findings that the accused, at the place and on the date alleged, broke and entered the dwelling house of Martha Munguia, in the nighttime, with the intent to commit a criminal offense therein, viz., an assault, in violation of Article of War 93; legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, as involves the findings that the accused, at the place and on the date alleged, committed an assault upon Martha Munguia by willfully and feloniously, without her knowledge and consent, getting into bed with said Martha Munguia, in violation of Article of War 96; legally sufficient to support Charge I, legally sufficient to support Charge II, and Specifications 1 and 2 thereunder; 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 ten years and ten months.

Israel Husson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin K. Sleeper, Judge Advocate.

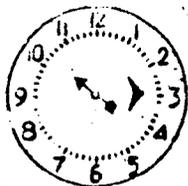
1st Ind.

War Department, J.A.G.O., **APR 24 1943** - To the Commanding General,
Southern Land Frontier Sector, Western Defense Command, Camp Lockett,
California.

1. In the case of Private Naimon Daniel (34061237), Company A, 364th Infantry, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the finding of guilty of Specification 1, Charge I, as involves a finding that the accused, at the place and date alleged, broke and entered the dwelling house of Martha Munguia in the night-time with the intent to commit a criminal offense therein, viz., an assault, in violation of Article of War 93, and approval of only so much of the finding of guilty of Specification 2, Charge I, as involves a finding that accused, at the place and date alleged, committed an assault upon Martha Munguia by willfully and feloniously, without her knowledge and consent, getting into bed with said Martha Munguia, in violation of Article of War 96, and upon 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 ten years and ten months, you will have authority to order the execution of the sentence.

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

APR 24 '43 PM (M 230541).



4

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

1 Incl - Record of trial

Myron C. Cramer

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.

(393)

SPJGN
CM 230582

MAR 4 1943

UNITED STATES	)	SOUTHERN SECTOR
	)	EASTERN DEFENSE COMMAND
v.)	
Second Lieutenant ALBERT E.	)	Trial by G.C.M., convened at
PACE (O-456059), 104th	)	Camp Bell Haven, Miami, Florida,
Infantry.	)	January 16, 1943. Dismissal and
	)	total forfeitures.

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and COWLES, 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 96th Article of War.

Specification: In that 2nd Lieutenant Albert E. Pace, 104th Infantry, Camp Bell Haven, Miami, Florida, was at Camp Bell Haven, Miami, Florida, on or about December 12, 1942, drunk in camp.

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

Specification: In that 2nd Lieutenant Albert E. Pace, 104th Infantry, Camp Bell Haven, Miami, Florida, having been duly placed in arrest at Camp Bell Haven, Miami, Florida, on or about December 12, 1942, did at Camp Bell Haven, Miami, Florida, on or about December 16, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2nd Lieutenant Albert E. Pace, 104th Infantry, Camp Bell Haven, Miami, Florida, did, without proper leave, absent himself from his

(394)

camp at Bell Haven, Miami, Florida, from about December 16, 1942 to about December 20, 1942.

The accused pleaded not guilty to and was found guilty of all of the Charges and Specifications. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial stating that such action was taken pursuant to Article of War 50 $\frac{1}{2}$. Action, however, has been taken pursuant to the provisions of Article of War 48.

3. During the early afternoon of December 12, 1942, the accused staggered along the street of Company I, 104th Infantry Regiment, in view of the enlisted men of that organization. The accused was observed by his company commander, Captain Howard C. Dellert, First Lieutenant Harry G. Wiberg, Jr., and Major Charles D. Shaw, Executive Officer, 3rd Battalion, 104th Infantry Regiment, who were standing together near the head of the company street. Captain Dellert called to the accused and requested him to join the group. When the accused joined the group Captain Dellert asked him if he had been drinking and the accused replied that he had not. Major Shaw then said, "I believe you have", and requested the accused "to blow out" his breath. The breath of the accused had a strong alcoholic odor, and Major Shaw forthwith suggested to Captain Dellert that the accused should be placed in arrest in quarters. Thereupon Captain Dellert informed the accused that he was in arrest, and that he was not to leave his quarters except "to go to the latrine and the mess hall to eat". Lieutenant Wiberg then escorted the accused to his quarters. (R. 4-5, 7-8, 12-13)

The accused was described as being under the influence of liquor, as having those characteristics of one under the influence of liquor, as not walking in a straight line, and as going first to the right and then to the left as he staggered down the street (R. 5, 8, 11-16, 21). Captain Dellert testified that he knew that the accused had been treated for a sprained ankle prior to December 12, but he also testified that he had observed that the accused had not staggered in his walk prior to the occasion in question (R. 6).

At about 1:30 or 1:45 p.m. following his arrest the accused was examined by Captain Anthony J. Zaia, Medical Officer. Captain Zaia testified that in his examination of the accused he observed that his speech was not normal, that his tongue seemed to be thick and that he appeared to be "on the verge of drunkenness". The accused was further described as being sufficiently intoxicated as to impair "the rational and full exercise of his mental and physical faculties". Captain Zaia further testified that a person who had a sprained ankle might limp but that such a person would walk in a straight line, whereas

a person who was intoxicated would not walk in a straight line. (R. 15, 16, 17, 20)

Immediately after the accused had been sent to his quarters by Captain Dellert, Captain Dellert and Major Shaw reported the conduct of the accused to Lieutenant Colonel James B. McIntyre and informed him that the accused had been placed in arrest in his quarters. Colonel McIntyre approved Captain Dellert's action in placing the accused in arrest. Thereafter on December 14, following the action of Captain Dellert on December 12, the accused asked Captain Dellert if he might accompany Company I on maneuvers. Captain Dellert refused the request of the accused, and informed him that Colonel McIntyre had placed him in arrest. During this time the 3rd Battalion, 104th Infantry Regiment, was designated as Combat Team 104-3, and was located about 300 miles from the Headquarters of the 104th Infantry Regiment. Also during this time the 3rd Battalion was acting as a separate battalion and was under the command of Lieutenant Colonel McIntyre. (R. 5-7, 9, 10-11)

On the afternoon of December 15, when Captain Dellert returned to his company area from maneuvers he found that the accused was not in his quarters, and that he could not be found in the area to which he had been restricted. It was also shown that the accused did not sleep in his quarters on December 15, 16, 17, and 18, and that his clothes and possessions did not appear to have been touched during the period of December 15 to December 19. (R. 5, 17-18) Captain Dellert testified that the morning report of his organization showed the accused "from duty to AWOL on the 16th" and "from AWOL to arrest in quarters" on the 20th (R. 20).

4. Second Lieutenant Robert T. Howling, a witness for the defense, testified that his val-o-pak was used by the accused as a place to keep his dress uniform. He testified further that the dress uniform of the accused was in the val-o-pak on December 14, but that he, the witness, was in the hospital from December 14 to January 3, and that he, therefore, did not know whether the accused had kept his uniform in the val-o-pak during that time. (R. 18-19)

The accused made an unsworn statement as follows:

"I took one drink on December 12th in the morning. I did not leave Camp Belle Haven during the period I was confined. I had on coveralls and was feeling sick so I went out in the thicket by the motor pool. This was about 100 yards back of my tent. This was the only place I went. I was in camp, on the reservation, during the period December 15 to the 18th. I did not leave the limits of the camp during that time" (R. 19).

(396)

5. The Specification, Charge I, alleges that the accused was drunk in camp on December 12, 1942. The evidence shows that on the day alleged, the accused staggered from right to left as he walked upon the street of Company I, that there was an odor of alcohol on his breath; that his speech was heavy, that he was described as being intoxicated and that the medical officer who examined him testified that the accused was sufficiently intoxicated to have his normal mental and physical faculties impaired. This evidence shows beyond a reasonable doubt that the accused was drunk in camp as alleged.

6. The Specification, Charge II, alleges that the accused, "*** having been duly placed in arrest at Camp Bell Haven, Miami, Florida, on or about December 12, 1942, did *** on or about December 16, 1942, break his said arrest before he was set at liberty by proper authority".

The evidence shows that the accused was placed in arrest by his commanding officer, Captain Dellert, on December 12, 1942. On the same day Lieutenant Colonel McIntyre who was then commanding the 3rd Battalion, 104th Infantry Regiment, as a separate organization, approved the action of Captain Dellert, and stated that the accused was in arrest. Since Colonel McIntyre was the commanding officer of a separate battalion, which was located about 300 miles from the headquarters of the regiment of which it was a part, he had the authority to place the accused in arrest (par. 20, MCM, 1928). Furthermore, notification of the confirmation of the arrest by Colonel McIntyre was transmitted to the accused on December 15, 1942, and the arrest of the accused was legally effective from that date. Shortly thereafter, the accused absented himself from the area to which he had been restricted. This evidence clearly sustains the findings of guilty under the above Specification.

7. Specification 1, Charge III, alleges that the accused, "*** did, without proper leave, absent himself from his camp at Camp Bell Haven, Miami, Florida, from about December 16, 1942 to about December 20, 1942".

The evidence clearly shows that the accused was absent without leave from Camp Bell Haven, Miami, Florida, and from his organization from December 16 to the evening of December 19, and is, therefore, legally sufficient to sustain the findings of guilty.

8. The records of the Office of The Adjutant General show that the accused is 28 years of age and that he was inducted on June 25, 1941. He was appointed to officers' candidate school on January 13, 1942, and was commissioned a second lieutenant in the Army of the United States on April 11, 1942.

9. 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 and forfeiture of all pay and allowances due or to become due, or the imposition of such punishment as a court-martial may direct is authorized upon conviction of a violation of Article of War 96, 69, or 61).

Charles B. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Bowles, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAR 29 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 Albert E. Pace (O-456059), 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 thereof. Accused was found drunk in camp whereupon he was placed in arrest. He broke arrest and absented himself without leave for four days. He was sentenced to dismissal. War Department records show that he was previously convicted by general court-martial of absence without leave for four days in June, 1942, and of loss through neglect, on June 19, 1942, of a Government pistol, and sentenced to a reprimand. In December, 1942, he was also punished under Article of War 104, by forfeiture of pay, for being drunk in quarters and failing to repair to appointed places of duty. In view of the repetition of offenses I believe it is clear that accused is unworthy of the responsibilities of an officer. I recommend, therefore, that the sentence be approved 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 should it meet with approval.



Myron C. Cramer,
Major General,
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. G.C.M.O. 95, 30 Apr 1943)

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

(399)

SPJGH
CM 230674

FEB 18 1943

UNITED STATES)

v.)

Private FRED WOOD (6973553),)
Headquarters Company, 3rd)
Battalion, 67th Armored)
Regiment.)

SECOND ARMORED DIVISION

) Trial by G.C.M., convened at
) Headquarters Second Armored
) Division, APO 252, c/o Post-
) master, New York, New York,
) January 15, 1943. Dishonor-
) able discharge and to be
) shot to death with musketry.

OPINION of 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, 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 Fred Wood, Private Hq Co. 3rd Bn. 67th Armored Regiment did at Wadesboro, North Carolina on or about August 3, 1942, desert the service of the United States and did remain absent in desertion until apprehended at Fort McPherson, Georgia on or about November 8, 1942.

He pleaded not guilty to the Specification and the Charge, in violation of Article of War 58, but guilty of absence without leave, terminated by apprehension, in violation of Article of War 61. He was found guilty of the Charge and the Specification thereunder. He

was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority approved the sentence, recommended that if confirmed it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for five years, and that execution of the dishonorable discharge be suspended until the soldier's release from confinement, designated the Casablanca Military Prison, Camp Casablanca, French Morocco, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on or about August 3, 1942, accused absented himself without leave near Wadesboro, North Carolina. About November 8, 1942, he was apprehended by the civil authorities at Decatur, Georgia, for being drunk and disorderly, and was returned to military control at Fort McPherson, Georgia. After being warned of "his constitutional rights" by his company commander, accused stated that when he absented himself without leave, "he didn't like his company commander at that time" (R. 4-6).

4. The absence of accused for approximately 96 days, his apprehension at a place distantly removed from his home station, together with the statement of the accused indicating his dislike of his commanding officer, support an inference of an intent to desert.

5. The reviewing authority recommended in his action that the sentence, if confirmed, be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for five years, and that execution of the dishonorable discharge be suspended until the soldier's release from confinement.

6. The charge sheet shows that the accused is 25 years of age. He enlisted October 17, 1939, with no prior service.

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 of the sentence. The death penalty is authorized upon conviction of the desertion committed in time of war by this accused.

Walter S. [Signature], Judge Advocate.

Wm. G. [Signature], Judge Advocate.

Edward H. [Signature], Judge Advocate.

SPJGH
CM 230674

1st Ind.

War Department, J.A.G.O., FEB 23 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 Fred Wood (6973553), Headquarters Company, 3rd Battalion, 67th 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 of the sentence. Accused was found guilty of desertion on August 3, 1942, terminated by apprehension on November 8, 1942. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority approved the sentence but recommended that if confirmed it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for five years, and that execution of the dishonorable discharge be suspended until the soldier's release from confinement, designated the Casablanca Military Prison, Camp Casablanca, French Morocco, as the place of confinement, and forwarded the record of trial for action under Article of War 48. 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 five years, and that the sentence as thus commuted be carried into execution but that the dishonorable discharge be suspended.

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 carrying into effect the recommendation made above.



E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

2 Incls.

Incl.1-Record of trial.
Incl.2-Form of Executive
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 five years. Dishonorable discharge suspended until release from confinement. G.C.M.O. 71, 1 Apr 1943)

