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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXXIV

including

CM 252115 to CM 253597

(1944)

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CONTENTS OF VOLUME XXXIV

CM No.	Accused	Date	Page
252115	Buck	29 Mar 1944	1
252133	Spainhour	30 Mar 1944	
252224	Anderson	9 May 1944	--
252236	Lucas	25 Apr 1944	17
252273	Clark	1 Jun 1944	25
252298	Moore	12 Apr 1944	35
252378	Cox	6 Apr 1944	41
252389	Davison	14 Apr 1944	45
252439	Peros, Johnson	19 May 1944	55
252442	Olsen	10 Apr 1944	63
252521	Groat	20 May 1944	67
252536	Bastian	7 Apr 1944	79
252576	Smith, Shields	14 Apr 1944	83
252620	Watterson	12 Apr 1944	95
252626	Scanlon	16 May 1944	105
252628	Earle	12 Jun 1944	111
252646	Miller	19 Apr 1944	119
252657	Crumpecker	22 May 1944	127
252683	Thomas	28 Apr 1944	141
252710	Bates	21 Apr 1944	147
252725	Thompson, R.	8 Apr 1944	161
252768	Holibaugh	12 May 1944	173
252772	Gentry	20 May 1944	181
252773	Jonas	12 Apr 1944	189
252812	Scott	28 Apr 1944	197
252835	Milleisen	22 Apr 1944	203
252929	Thompson, S.	26 May 1944	207
252937	Sutton	21 Apr 1944	217
252961	Martin	11 May 1944	223
252981	Eames	6 Apr 1944	229
253054	Howard	8 May 1944	235
253058	Dane	21 Apr 1944	257
253070	Moran	11 May 1944	265
253104	Stryker	22 May 1944	271

CM No.	Accused	Date	Page
253134	Frieson	22 Jun 1944	275
253202	McClure, K.	6 May 1944	285
253207	Elliott	14 Apr 1944	293
253209	Davis	6 May 1944	297
253252	Steele	21 Apr 1944	313
253254	Robertson	26 May 1944	321
253311	Presley	5 Jan 1944	335
253322	Smith	15 Jun 1944	337
253323	McClure, C.	26 May 1944	347
253339	Brandt	26 Apr 1944	359
253467	Vander Molen, Maddalena	9 Jun 1944	367
253556	Goddard	15 May 1944	385
253578	Kosaveach	6 Jun 1944	389
253597	Goggin	2 May 1944	399

b

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

SPJGN
CM 252115

29 MAR 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Gardner Field, California, 4 March 1944. Dismissal and total forfeitures.
Second Lieutenant CHARLES F. BUCK (0-579836), 63rd Base Headquarters and Air Base Squadron.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Charles F. Buck, 63rd Base Headquarters and Air Base Squadron, Gardner Field, California, while stationed at Headquarters, Army Air Forces Western Flying Training Command, Santa Ana, California, did, without proper leave, absent himself from his organization at Santa Ana, California from on or about 2 February 1944 to on or about 6 February 1944.

Specification 2: In that Second Lieutenant Charles F. Buck, 63rd Base Headquarters and Air Base Squadron, Gardner Field, California, did, without proper leave, absent himself from his organization at Gardner Field, California from on or about 8 February 1944 to on or about 14 February 1944.

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

Specification: In that Second Lieutenant Charles F. Buck, 63rd Base Headquarters and Air Base Squadron, Gardner Field, California, having received a lawful order from Brinley M. Hall, Captain, Air Corps, Assistant, A-1, Duty Assignment Officer, Army Air Forces Western Flying Training Command, Santa Ana, California, to report to the Commanding Officer, Gardner Field, California by the most direct route immediately and without delay, the said Brinley M. Hall, Captain, Air Corps, being in the execution of his office, did, while enroute from said Army Air Forces Western Flying Training Command, Santa Ana, California to said Gardner Field, California, on or about 8 February 1944, fail to obey the same.

He 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 accused was absent without leave from his assigned organization at Santa Ana, California, from 0001 o'clock on 2 February 1944 until 0950 o'clock on 6 February 1944 when he reported for duty and assignment to Captain Brinley M. Hall, Assistant A-1, Headquarters, Army Air Forces Western Flying Training Command, Santa Ana, California, to receive orders assigning him, the accused, to his station in the command. Captain Hall delivered orders to him whereby he was assigned to Gardner Field, Taft, California, and gave him a direct order to report there, after signing out not later than 1700 o'clock on 7 February 1944, by 1700 o'clock on 8 February 1944, within which time the accused could easily have reached his new station. The accused was advised that a violation of the direct order would subject him to punishment therefor and acknowledged receipt of the order and that Captain Hall was his superior

officer. Thereafter the accused did not report to Gardner Field as ordered and was not present there until 14 February 1944 although neither the commanding officer nor the adjutant at Gardner Field had given him either leave or permission to be absent at any time. Appropriate extract copies of the organizations' morning reports showing such absences without leave were admitted into evidence without objection (R. 6-7, 7-9, 9-9a, 9a-10, 16-17; Exs. 1-5).

4. The evidence for the defense shows that between 20 July 1943 and 18 February 1944 the accused had been in three different hospitals for various periods of time for psychiatric observation which, according to the trial judge advocate, had not been called to the attention of the appointing authority (R. 12-14, 14-15).

The accused, after explanation of his rights as a witness, elected to make an unsworn statement as follows:

> "I have elected to make an unsworn statement not because I have any desire not to be cross-examined but I have absolutely no reasonable excuse. I admit that the days stated I was absent without leave. The only reason I would like to make this statement is that the time I was absent without leave I never wilfully thought it out and figured 'to hell with it' without giving it any consideration. I can't say why I was absent without leave or why I went absent without leave and I can say I have no excuse for it. I guess it goes without saying that I am sorry that I did. I realize that it was a mistake, and I don't think I'll ever do it again. That's all I have to say, sir." (R. 15-16).

5. Specifications 1 and 2, Charge I, allege two separate periods of absence without leave by the accused from his assigned organization, the first from 2 February 1944 to 6 February 1944 and the second from 8 February 1944 to 14 February 1944. The elements of the offense of absence without leave and the proof required for conviction thereof, according to applicable authority, are as follows:

> "* * * (a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The evidence for the prosecution consisting of the organization's morning reports and the testimony of appropriate witnesses conclusively shows the accused's guilt of the offenses as alleged. The unsworn statement of the accused, furthermore, contains an outright admission of his guilt which was also properly before the court as evidence (M.C.M., 1928, par. 76). All of the evidence, therefore, shows beyond a reasonable doubt that the accused committed the offenses as alleged and amply supports the findings of guilty of Charge I and the two Specifications thereunder.

6. The Specification, Charge II, alleges that the accused, having received a lawful order from a named superior officer, who was in the execution of his office, to report to the commanding officer of a designated station "by the most direct route immediately and without delay" on or about 8 February 1944 failed to obey such order. The offense is alleged as a violation of Article of War 96 of which it is clearly violative as being prejudicial of good order and military discipline (M.C.M., 1928, par. 152a). The failure to obey is not alleged as a willful disobedience within the condemnation of Article of War 64 (M.C.M., 1928, par. 134b). In essence the offense is that of failure to report contrary to express orders so to do which was occasioned by the accused going absent without leave as charged in Specification 2, Charge I. Two distinct and separate offenses were thereby properly alleged (CM 221591 (1942) JAG Bull., August 1942 Sec. 49b).

The evidence for the prosecution conclusively shows that the accused was given a direct order by his acknowledged superior officer to proceed directly to his assigned station which the accused failed, for undisclosed reasons, to obey by going absent without leave for about six days while enroute. Inherent in the accused's unsworn statement is, likewise, an admission of his guilt of the offense. The evidence adduced by the defense showing former hospitalization for psychiatric observation is without evidentiary value either in defense or mitigation because no showing was made of exculpatory or extenuating findings as a result of such observation. Consequently, the evidence establishes beyond a reasonable doubt the accused's guilt as alleged and fully supports the findings of guilty of Charge II and its Specification.

7. The accused is about 28 years old. The War Department records show that he has had enlisted service from September, 1941, until 29 May 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William H. Trambrell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(6)

SPJGN
CM 252115

1st Ind.

War Department, J.A.G.O., 12 APR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles F. Buck (0-579836), 63rd Base Headquarters and Air Base Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 312, 17 Jun 1944)

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

SPJGQ
CM 252133

30 MAR 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 2 March 1944. Dismissal.
Second Lieutenant RALPH A. SPAINHOUR (0-1640030), Headquarters and Plotting Company, 576th Signal Air Warning Battalion.	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 Ralph A. Spainhour, Headquarters and Plotting Company, 576th Signal Aircraft Warning Battalion, Drew Field, Tampa, Florida, did, without proper leave, absent himself from his organization at Drew Field, Florida from 2 February 1944 to about 7 February 1944.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of one previous conviction was introduced at the trial. On 15 October 1943 accused was sentenced to restriction to the limits of Drew Field, Florida, for three months and forfeiture of $50.00 of pay for three months upon conviction of failure to repair to the properly appointed place of duty on 31 August, 1, 6, 7 and 8 September 1943 and of absence without leave from 9 to 18 September 1943. In the instant case 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 only evidence introduced by the prosecution to prove the alleged offense was a certified extract copy of the morning report of Headquarters and Plotting Company, 578th Signal Aircraft Warning Battalion, submitted at Drew Field, Florida.

An entry in the morning report submitted on 2 February 1944 shows that the accused absented himself without leave at 0730 on that date. On the morning report submitted 7 February 1944 the accused is shown to have returned to military control and was, at 0745, on said date, placed under arrest in quarters (R. 3; Pros. Ex. A).

4. The accused, having been informed of his rights, elected to remain silent and offered no evidence of any kind.

5. Unquestionably the extract copy of the morning report was competent prima facie evidence to prove the charge as alleged (par. 117, MCM 1928).

By pleading, the accused admitted his own identity with the person described in the Specification as the offender, (Winthrop, Military Laws and Precedents, 1920 Reprint, page 276) and the name "Spainhour . . . 2d Lt." upon the morning report, though insufficient to properly describe and identify the accused except for the addition of his Army serial number "0-1640030", is competent proof of his connection with the military service in the grade and with the organization specified.

While it is always helpful to the reviewing and confirming authority to be advised of the facts and circumstances surrounding the commission of an offense charged and it is, therefore, the better practice to adduce such evidence so that it may appear in the record of trial, failure to do so constitutes no violation of any substantial right of the accused. The accused did not avail himself of the privilege of offering any matter in mitigation or extenuation and failure of the prosecution to show matters in aggravation, if there were any, is clearly beneficial and not injurious to the accused.

It, therefore, appears without contradiction that the accused did absent himself without leave from his organization at Drew Field, Florida, from 2 February 1944 to about 7 February 1944, as alleged and the evidence thereof, scant though it may be, is legally sufficient to support the findings and sentence.

6. Records of the War Department disclose that the accused was born in Winston-Salem, North Carolina and is now 24½ years of age. He was graduated from Reynolds High School in 1936. He was inducted into federal service on 15 March 1941 and after completing the prescribed course in the Eastern Signal Corps School, Fort Monmouth, New Jersey, he was commissioned a second lieutenant, Signal Corps, Army of the United States, on 30 November 1942 and was assigned to Air Warning Units, Training Center Third Fighter Command, Drew Field, Florida. On 6 January 1944 he was recommended for reclassification and he thereupon tendered his resignation with the request that, if accepted, he be permitted to enlist in the Army of the United States. The acceptance of the resignation was recommended by the Commanding Officer, 4th

Training Regiment, Air Warning Units Training Center and by all higher commands to, and including, the Commanding General of the Army Service Forces. The following is contained in the initial indorsement: "This officer has displayed a tendency to be unduly influenced by others and has shown immaturity in judgement (sic) to an extent which makes his continuance in the Army of the United States as a commissioned officer undesirable". Upon request of the Commanding General of the Third Air Force, Tampa, Florida, dated 11 February 1944 further action on the voluntary resignation was ordered withheld at the direction of the Secretary of War because of pending general court-martial charges.

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

William A. Pounds, Judge Advocate.

Carle Stephens, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 APR 1944 - 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 Ralph A. Spainhour (0-1640030), Headquarters and Plotting Company, 576th Signal Air Warning Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer.

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

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Dft. ltr. for sig. S/W.
Incl. 3 - Form of action.

(Sentence confirmed. G.C.M.O. 280, 10 Jun 1944)

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

SPJGV
CM 252224

9 MAY 1944

UNITED STATES	91ST INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Adair, Oregon, 11 March 1944. Dismissal and total forfeitures.
Second Lieutenant WARNER L. ANDERSON (0-1183656), Field Artillery.	

- - - - - - - - - - - - - - - - -

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant Warner L. Anderson, Headquarters Battery, 346th Field Artillery Battalion, having received a lawful order from Major General William G. Livesay, Commanding General of the 91st Infantry Division, his superior officer, to proceed to Fort Ord, California through Benicia, California and to determine at Benicia Arsenal, Benicia, California the number of arms that the said arsenal desired to repair and to then take the remainder of the load and any empty trucks to Fort Ord, California, and to remain at the Camp Ordnance at Fort Ord, California until he received instruction by telephone to return to Camp Adair, Oregon, did at Benicia Arsenal, Benicia, California, on or about 10 February, 1944 fail to obey the same.

Specification 2: In that Second Lieutenant Warner L. Anderson, Headquarters Battery, 346th Field Artillery Battalion, did at Benicia Arsenal, Benicia, California, on or about 14 February, 1944, with intent to deceive Lieutenant Colonel Campbell W. Newman, Headquarters 91st Infantry Division, officially state to the said Lieutenant Colonel Campbell W. Newman in a telephone conversation that he, Second Lieutenant Warner L. Anderson, had received authority from Charles B. McDonald, Captain, Ordnance Department, Army Service Forces,

Benicia Arsenal, Benicia, California, for a one-day pass for certain enlisted men then under his, Lieutenant Anderson's, command to go to San Francisco, California, which statement was known by the said Second Lieutenant Warner L. Anderson to be untrue.

Specification 3: In that Second Lieutenant Warner L. Anderson, Headquarters Battery, 346th Field Artillery Battalion, wrongfully used government property, namely, an army truck, by driving said truck without authority and for his personal use and benefit from Benicia, California to San Francisco, California, and from San Francisco, California to Benicia, California during and between the dates of February 10, 1944 and February 14, 1944.

Specification 4: In that Second Lieutenant Warner L. Anderson, Headquarters Battery, 346th Field Artillery Battalion, did at San Francisco, California on or about 10 February, 1944 wrongfully fail to provide adequate security for government property, namely, an army truck, by parking said truck on the streets of San Francisco, California without posting guards or attendants therefor.

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

Specification: In that Second Lieutenant Warner L. Anderson, Headquarters Battery, 346th Field Artillery Battalion, while enroute from Camp Adair, Oregon to Fort Ord, California, did without proper leave absent himself from his duties at Benicia, California from about 10 February, 1944 to about 14 February 1944.

He pleaded not guilty to and was found guilty of all 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 two years. The reviewing authority disapproved that part of the sentence relating to confinement at hard labor, approved the sentence of dismissal and total forfeitures, recommended that the sentence as approved be commuted to a forfeiture of $50 per month for 12 months, and forwarded the record of trial for action under Article of War 48.

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

Accused on 9 February 1944 was attached to the 346th Field Artillery Battalion, 91st Infantry Division. On that date, in accordance with paragraph 4, Special Orders No. 37, Headquarters 91st Infantry Division, dated 9 February 1944, he was ordered to proceed from Camp Adair, Oregon to Fort Ord, California, through Benicia, California, for the purpose of carrying out certain verbal orders of the Commanding General. The testimony of Major Frank Hawkins, Assistant Division Ordnance

officer, introduced by deposition, disclosed that said verbal orders directed accused to proceed from Camp Adair, Oregon with a convoy of four trucks loaded with small arms to Benicia Arsenal, Benicia, California; upon arrival at Benicia to determine from the Arsenal the number of weapons they could handle and unload such weapons; then, to proceed to Fort Ord, California, with the balance of the shipment of arms as well as any empty trucks and to remain at Fort Ord until accused received orders from Major Hawkins by telephone (R. 7; Pros. Ex. B).

In accordance with the above orders, accused, about 1600, 9 February 1944, proceeded to Benicia, California, with the four truckloads of small arms and a detail of enlisted men, arriving there about 2000 on 10 February 1944 (R. 9, 15). Upon accused's arrival at Benicia Arsenal, the foreman of the machine shop telephoned Captain Charles B. McDonald, Ordnance, officer in charge of the Ordnance Maintenance Division, and advised him of the arrival of the convoy. Accused, at this time, talked with Captain McDonald over the telephone and Captain McDonald directed him to unload one truck of the small arms. Accused told Captain McDonald that he (accused) was to proceed to Fort Ord but that the convoy was ahead of schedule due to day and night driving and he had promised the men a day in San Francisco. Captain McDonald replied that if accused could supply the labor to unload the truck, he would not be held at Benicia Arsenal more than 30 minutes (R. 22, 23). The accused unloaded the one truck of small arms and then inquired of First Lieutenant Paul G. Musser, officer in charge of the Warehouse Unit at Benicia Arsenal, the distance to San Francisco and the availability of a staff car. Being informed that no staff car was available, accused said he would take the unloaded truck (R. 27, 28). Accused and his detail of seven enlisted men then drove to San Francisco. Arriving there at about midnight, 10 February, they registered at the Whitcomb Hotel and parked the Army truck, without guard, across the street from the hotel. No guard was placed on the truck which remained at this spot from about midnight, 10 February to 0600 hours, 14 February. Accused then gave his enlisted detail written passes from "Feb 10-12-44" and directed them to meet him at the Whitcomb Hotel at 0600 Monday, 14 February, for the return trip to Benicia Arsenal (R. 10, 13, 16, 17; Ex. A). Accused and his detail arrived at Benicia Arsenal about noon, 14 February (R. 18).

At 1645, 14 February, Lieutenant Colonel Sucher, commanding officer of the Benicia Arsenal, in the presence of accused, telephoned Lieutenant Colonel Campbell W. Newman, General Staff Corps, G-4, 91st Infantry Division at Camp Adair, Oregon (accused's home station), advising that accused had originally reported at Benicia Arsenal the evening of 10 February, that there was apparently some confusion with reference to the shipment of arms. Accused then spoke over the telephone to Colonel Newman and was asked the reason for the delay in reporting to Fort Ord, whereupon accused stated that he had received permission from Captain McDonald to take one day of leave in San Francisco and that he was expecting additional instructions at Benicia. In the course of the conversation, accused was asked if he did not realize the value of each minute of time in accomplishing his mission. Accused replied that "he didn't know * * * hadn't given it any thought" (R. 21). Colonel

Newman then requested Colonel Sucher to direct accused to proceed to Fort Ord with the three remaining truckloads of small arms in accordance with original orders. After his return from Fort Ord to Camp Adair accused again told Colonel Newman he had been granted a leave at Benicia Arsenal by Captain McDonald (R. 20, 21). Captain McDonald denied this, stated accused had never requested a leave and that he (Captain McDonald) had no authority to grant such a leave (R. 21, 23).

4. After an explanation of his rights accused made a sworn statement substantially as follows: Accused stated that he left Camp Adair, Oregon with the convoy at 1620, 9 February 1944,

> "Then we proceeded on to Benicia, California. My orders read to Fort Ord through Benicia. We drove that evening stopping for a couple of hours rest at Camp White and then we went on to Benicia Arsenal arriving there on Thursday the 10th at about 1900. I looked for the foreman at the samll arms plant and I met Mr. McAllister and asked for Captain McDonald. He said that he had gone home and that he would get him on the telephone. He got him on the telephone and I talked with Captain McDonald, told him my name, Lieutenant Anderson, and that we had brought some small arms from Camp Adair, Oregon. I also told him that our orders were to check in at Benicia and to proceed on to Fort Ord. He told me that I should leave one truck load there and then he asked for McAllister again. I asked him before this happened if it was all right with him if we got a day and a half pass in San Francisco and I'm very sure I thought I heard him say it would be all right. I then set about making arrangements for a guard to be put on the three trucks that evening, after the one truck was unloaded. I then reported back on the 14th. With the day and a half pass, the pass was up Saturday noon and I didn't think the civilians were working Saturday afternoons and Sundays at Benicia Arsenal. That is why I was gone three days instead of the day and a half and got back on the 14th to report to Captain McDonald. He sent me up to the adjutant and he called Colonel Newman and the conversation I had with him was just as the colonel said and finally I went on down to Fort Ord." (R. 43).

Accused on cross-examination admitted that he knew his mission was of extreme importance and was to be accomplished with "all dispatch", that he was performing "an independent mission for the Commanding General" of the 91st Division through the order given by Major Hawkins (R. 44, 45). He stated that while in San Francisco he had tried to get the truck into a parking lot where it would be watched and, failing in this, had parked it for three days and four evenings without guard or "other means to secure it".(R. 46). He also stated that since another scheduled convoy due at Benicia Arsenal before his had not arrived that he "thought" Benicia Arsenal would take care of all of his trucks (R. 46).

Lieutenant Colonel Calvin E. Barry, accused's battalion commander, and First Lieutenant Lemuel E. Walters of the 346th Field Artillery

Battalion, Camp Adair, testified to accused's good character and his excellence as an officer (R. 49-51).

5. The evidence is conclusive as to accused's guilt of all Specifications and Charges. Accused knew his orders called for him to proceed to Fort Ord following his stop at Benicia Arsenal and of the importance of the prompt accomplishment of his mission. The orders were written, issued in the usual manner, authenticated by the Adjutant General of the division and further supplemented by oral instructions of the Assistant Ordnance Officer. It appears from the record that accused exceeded his driving schedule to Benicia Arsenal, probably with the thought that he could spend some time in San Francisco, Arriving in San Francisco on Thursday night, he decided to remain there over the week end and issued passes to his detail of enlisted men in accordance with this plan. He attempted to justify his action by stating that he understood Captain McDonald had granted him a day and a half pass, that the arsenal would not be operating Saturday afternoon and that it would process the arms without the necessity of proceeding to Fort Ord. The court was justified in refusing to accept these explanations since there was no reason why accused should take his orders from Captain McDonald or that he should substitute his own judgment when he could have easily ascertained the desires of his own command by a telephone call for instructions. It is apparent that accused was more concerned with his own pleasure than the performance of his duty even although he realized the importance of his mission. His conduct shows a lack of responsibility and an utter disregard of his military duties. The offenses of driving a Government truck without authority for his personal use; of failing to provide adequate security for Government property (the truck parked on the street in San Francisco) and the absence without leave of four days, are serious offenses and amply proven but are incidental to the principal offense of failing to carry out the orders relating to his assigned mission.

6. Accused is about 23 years of age and married. He was inducted 11 September 1941 and served as an enlisted man until 8 July 1943 when upon graduation from the Field Artillery School at Fort Sill, Oklahoma, he was commissioned second lieutenant, Field Artillery, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War.

Thomas N. Tappy, Judge Advocate.

Herbert M. Kuduer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 252224

1st Ind.

War Department, J.A.G.O., 18 MAY 1944 - 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 Warner L. Anderson (0-1183656), 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, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. However, the reviewing authority further recommends that the sentence as approved by him be commuted to forfeiture of $50 per month for twelve months. I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a forfeiture of $50 per month for six months and a reprimand, 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but commuted to forfeiture of $50 per month for six months and reprimand. G.C.M.O. 384, 18 Jul 1944)

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

25 APR 1944

(17)

SPJGH
CM 252236

UNITED STATES	)	PERSIAN GULF COMMAND
	)	
v.	)	Trial by G.C.M., convened at Khorramshahr, Iran, 24-25 January 1944. To be hanged by the neck until dead.
	)	
Private RUDOLPH J. LUCAS (34244726), Company D, 380th Port Battalion, Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Rudolph J. Lucas, Company D, 380th Port Battalion Transportation Corps, did, at Khorramshahr, Iran, on or about 19 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Joseph M. Williams, a human being by stabbing him with 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 of breach of restriction was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: Private Joseph M. Williams and accused were members of Company D, 380th Port Battalion, located on 19 December 1943, at Khorramshahr, Iran. Around 1630 on that day Williams was on guard duty while accused was seated in front of Number 8 Barracks. This barracks and the adjoining barracks Numbers 7, 6, and 5 were located on the company street and in front of them was a board walk connecting the latrine and the orderly room. No. 8 Barracks was nearest the latrine. Williams called to some men to "come out of where they were going" and accused told

him he was "taking too much authority". They exchanged words and cursed each other. Williams did not threaten the accused. Williams called the corporal of the guard, who came to the scene with the sergeant, and told them what had happened. Accused went inside No. 8 Barracks saying, "I'm going to fight him, because he's an old man like I am". Shortly after 1700 when Williams came off guard duty, accused was sitting in front of No. 8 Barracks. Williams told accused he was carrying out the orders of the "O.D." and he did not like accused "jarring" him. They were about four feet apart. Williams did not threaten accused. Accused said nothing. Williams continued on down the walk toward the orderly room carrying his rifle at "right shoulder arms". At this time Private Johnnie Gilchrist was in front of Number 7 Barracks and Technician Fifth Grade Prather Hornbeck, Private Bernard K. Morris, and Private Abner E. Kinney, all members of Company D, were in front of Number 5 Barracks (R. 6-16, 19, 22).

Private Gilchrist testified that as Williams passed down the sidewalk, accused got up, said he was tired of Williams "jarring" him and walked "real fast" after Williams, his hands in his pockets. Williams' back was to accused. As Williams got in front of No. 7 Barracks accused "ran into him" and "punched" him. Private Gilchrist could not see what accused had in his hand. Williams turned around and accused "had him with his left hand" while he "punched" Williams with his right hand about three times in the upper left side near his heart. As Williams turned around he brought his rifle down from his shoulder with both hands. Williams tried to get away. The rifle fell to the ground. Accused turned away from Williams and went back to his barracks. He carried a knife with a blade about 5 inches long, "the type that is carried in a sheath", in his right hand (R. 6-15).

Corporal Hornbeck testified that Williams was about even with Number 7 Barracks and accused was walking right behind him when he (Hornbeck) first saw them. It was about 50 feet from Hornbeck to Williams. Williams had his rifle over his right shoulder. Accused "came from the side", "came around under the rifle", "reached across from the right to the left chest", and stabbed Williams four or five times with "a dirk, like a knife sold in the PX". The rifle fell off Williams' shoulder and fell to the ground. Williams did not turn around before accused came in contact with him; the two men did not at any time face each other. Hornbeck did not see Williams strike or attempt to strike accused at any time (R. 15-19).

Private Morris testified that accused approached Williams from the rear. "The first lick he reached under his right arm". Williams turned slightly and accused stabbed him in the chest. They were not facing each other. Accused was at the side of Williams. He struck Williams a number of times, "I could not say how many times". After Williams was cut his rifle fell from his shoulder to the ground. Morris was standing about 50 feet from where the encounter took place (R. 19-21).

Private Kinney saw Williams "coming up the walk", carrying his gun at "right shoulder arms" and then "he stabbed him". Kinney was standing about "20 steps" from the scene. Williams turned around after accused stabbed him. After the stabbing one of the "boys" said, "that man is dying" and accused said, "let him die" (R. 22-23).

Williams walked into Number 6 Barracks, from which he was taken to the station hospital. He was examined by a medical officer about 1720 and pronounced dead. The examination disclosed he had been stabbed three times on his left chest and had a "quite deep" wound approximately 4 to 5 inches running "introversely". Over his right chest were 2 wounds, one penetrating the chest, the other "quite superficial". Death was caused by a stab wound from "a knife,the size of a hunting knife, a blade from 5 to 7 inches in length and of good heavy steel". The body of Williams was viewed and identified by his company commander (R. 23-26).

4. Evidence for the defense: Private Simp Blevins, Company D, 380th Port Battalion, testified that around 1500 on 19 December 1943 he was sitting in Barracks Number 8 and heard an argument between Williams and accused concerning the guard detail. Williams was going on guard duty at that time. About 30 minutes later Blevins heard Williams call accused a "gray haired son of a bitch" and accused called Williams an "old fucker". "Next thing that came about" accused said Williams was an old man like himself and if "he ever tackled him he would not mind fighting him". Accused went into his barracks and lay down on his cot. Williams called the sergeant of the guard and when the sergeant came he talked to accused about being on his bed. About 1700 Williams came off guard duty and walked by on his way to the orderly room carrying his rifle at "right shoulder arms". Private Blevins at that time was standing "6 feet from the door" on the right side of Number 8 Barracks, had come to the door when he heard a "noise", and saw accused walk down behind Williams. When accused got near Williams he (Williams) turned half way around and struck accused with his rifle somewhere around the face. The rifle fell to the ground. The hand of accused went "toward his collar". Private Blevins saw no knife in his hand. Private Blevins "would not say" that accused had time to stab Williams several times between the time he saw the rifle strike accused and the time it fell to the ground. He saw accused stab but one time, "as quick as it was". He did not think accused struck Williams after the rifle fell. He thought accused struck Williams only once, he saw his hand go up once. Accused and Williams were "between Number 7 and 6, just a little bit nearer Number 6", about 50 feet from him. He did not see Private Kinney or Morris at the time (R. 26-30).

Accused testified that he was born in Georgia, in 1901, raised on a farm there until he was 8 when the family moved to Jacksonville, Florida. He did not have much schooling, having left school to help his father when his oldest brother was drowned. He worked in the railroad shops during the last war, joined the church and became a preacher. After the war he worked

in a shipyard, was taken down with "brain fever" and "lost" his mind for about six months. Both he and his father lost their jobs about 1919 so he left home and went to work "helping lay steel" for the railroad. Subsequently he worked on a farm near Miami, and at Tampa. He then went up to Delaware where he worked in a canning house and to Maryland, then returned to Florida, where he married, worked in the shipyards and preached. He volunteered to come into the Army, came in to do good and to do his duty, and not to do harm. "They" kept telling him "they" did not know what he came in for until "they" got him cross and upset. When he went to dump some garbage, "4 or 5" jumped on him and beat him up (R. 30-31).

"This morning this incident happened" accused went to the latrine about noon and "this man" (Williams) was there and said to accused, "I nearly drew the rifle on you" because "I thought you was a drunk man". Accused said that "even if I was drunk I was coming to the latrine" and Williams said, "I'm on duty". Accused told him he should not be in the latrine if he was on duty and Williams replied it was none of his business. "Next day" Williams was on duty. "He called me on this post and I told him 'No, I wasn't coming'". Williams then called him a "gray haired son of a bitch" and repeated it again. Accused called Williams "a gray haired fucker" and accused went into his barracks leaving Williams standing there arguing. Accused was cross and angry but he did not want to hit Williams. Then Williams called the sergeant and corporal of the guard and accused told them about "it". When Williams got off guard he stopped in front of the barracks of accused, cursed accused and said "he had protection". Accused thought Williams cocked his rifle. "I was real mad and scared and I ran into him with a knife in my hand". He did not know he had cut him until he saw the blood on his field jacket. He went back to his barracks and told "him" he was sorry he had done it (R. 31).

On examination by the court accused testified that when Williams came off guard duty, he called accused "a gray haired son of a bitch" again. When Williams said he had "protection" accused thought Williams "was fixing" to kill him. Accused said nothing but after Williams had taken a step away accused said he was tired of Williams "jarring" him. After Williams had gone about 12 feet accused started after him. Williams looked back and saw him coming and accused "thought" he cocked his rifle, "maybe he didn't cock it, none of the witnesses say he did, but that's what I had on my mind". Accused was frightened and "thought" Williams was going to kill him. Accused had a knife in his pocket which he took out when he started down the walk after Williams. Accused ran into him and Williams swung around striking him with the rifle and grabbing accused with one hand. Accused "must have stabbed him, I don't know how many times". It was not his intention to kill Williams. Accused never said, "Let him die" (R. 32-34).

5. Captain George Winton, Medical Corps, Chief of the Department of Neuro-Psychiatry at the 21st Station Hospital, called as a witness by the prosecution at the direction of the court, testified that he had accused under observation

and examination during the period from 16 January to 22 January 1944. His conclusion was that accused does not suffer "from any deep-seated mental disease or psychosis and that he does not manifest any unusual peculiarities of personality, that is not in keeping with his race and environment". "In other words" his diagnosis was "no mental disease". He found nothing "which could be construed abnormal in the psychiatric sense". There was nothing in the examination which led him to believe that accused had suffered from a "brain fever" at age 17 or 19. If such a condition once existed sufficient time had elapsed for recovery. He considered various phases of the "religious fervor" of accused as normal for a colored male with a similar background (R. 34-36).

6. a. The evidence for the prosecution shows that on 19 December 1943 accused and Private Joseph M. Williams were members of Company D, 380th Port Battalion, stationed at Khorramshahr, Iran. Around 1630 on this date accused was seated in front of his barracks, Number 8, and Williams was on guard duty in the vicinity. Company barracks Numbers 8, 7, 6 and 5 faced the company street. In front of the barracks ran a board walk connecting the latrine and the orderly room. An argument arose between accused and Williams over the latter's authority and they cursed each other. (According to witnesses for the defense Williams called accused "a gray haired son of a bitch" and accused called Williams an "old fucker".) Williams called the sergeant and corporal of the guard and reported to them what had happened. Accused went inside his barracks saying, "I'm going to fight him, because he's an old man like I am". Williams came off duty around 1500 and passed by Number 8 Barracks on his way to the orderly room carrying his rifle at "right shoulder arms". Accused was sitting in front of the barracks and Williams told him he did not like to have accused "jarring" him and that he had only been carrying out orders. (Accused testified that Williams again called him "a gray haired son of a bitch".) Accused made no reply and Williams continued down the walk. Accused arose, said he was tired of Williams "jarring" him and walked quickly after him. Accused caught up with Williams as the latter got in front of No. 7 Barracks and reached around him, stabbed him with a knife, about 5 inches long, of "the type that is carried in a sheath". Williams turned partly around and accused stabbed him several times on the upper left hand side of the chest. The rifle which Williams carried fell to the ground.

Williams walked into No. 6 Barracks from where he was taken to the station hospital. Upon examination at about 1720 he was pronounced dead. Medical examination disclosed two stab wounds on his right side, one of which penetrated the chest and the other was superficial; and three stab wounds on the left side of his chest, one of which was 4 or 5 inches deep. A medical witness testified that death was due to a stab wound from a knife the size of a hunting knife, with a blade from 5 to 7 inches long, and of good heavy steel.

Accused admitted that after Williams had passed on down the walk, he started after Williams with his knife. He contended that Williams turned around and he "thought" Williams cocked his rifle but of this he was not certain. He "thought" Williams was going to kill him. Accused then ran into Williams who swung around striking accused with his rifle. Accused then stabbed him.

b. The accused is charged with murder. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought may mean an intention to cause the death of, or grievous bodily harm to, any person (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation), or knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (MCM, 1928, par. 148a). The evidence here shows that accused walked after Williams as he passed down the company street, overtook him and repeatedly stabbed him in the chest with a long, heavy bladed knife causing death within a few minutes. The circumstances show beyond any reasonable doubt the intention of accused to kill Williams or cause great bodily harm.

Although accused testified that he was "real mad" when he attacked Williams the circumstances fail utterly to show adequate provocation. Accused testified that he exchanged words with Williams on the day preceding the killing and they engaged in another argument a short time (a half hour to two hours according to other witnesses) before it. It also appears that immediately before the fatal stabbing, Williams reproached accused about his interference in the performance by Williams of his duties. No blows were struck in any of these encounters, Williams made no threats against accused, and the language used was not particularly violent except that on the last two occasions Williams called accused a "son of a bitch". These events do not constitute adequate provocation for the killing. Accused also testified that he "thought" that Williams turned around and cocked his gun, but "maybe he didn't", as accused advanced upon him. This equivocal statement receives no support from the five eye-witnesses to the killing who testified at the trial for either the prosecution or the defense. Even if it were shown that Williams had attempted to defend himself with his gun as accused attacked him with a knife this would not change the character of the assault made by accused upon Williams.

The question of the sanity of accused was not raised at the trial. However, after accused had testified, in the course of his testimony stating that sometime prior to 1919 he had "brain fever" and "lost" his mind for six months, the prosecution, at the direction of the court, presented the

testimony of the Chief of the Department of Neuro-Psychiatry, 21st Station Hospital, concerning a psychiatric examination given accused prior to trial. In the opinion of the psychiatrist accused had no mental disease and manifested no unusual peculiarities of personality not in keeping with his race and environment. The Board concludes that the record of trial sufficiently shows the sanity of accused at all material times.

The evidence establishes, in the opinion of the Board of Review, beyond any reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation as alleged. Such an act constitutes murder in violation of Article of War 92.

7. The accused is 42 years of age. The record of trial shows that he enlisted at Camp Blanding, Florida, 31 July 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. The death penalty is authorized upon conviction of murder, in violation of the 92nd Article of War.

Samuel M. Drew, Judge Advocate

Robert Clamor, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 22 JUL 1944 - 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 Rudolph J. Lucas (34244726), Company D, 380th Port Battalion, Transportation Corps, Khorramshahr, Iran.

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, a 42 year old colored soldier stabbed to death another colored soldier after a quarrel but without warning. Although two examinations by Medical Corps officers, one shortly before and another after the trial of accused show him to be sane, the reports of such examinations disclose that he spent his early years in rural Georgia, did not progress beyond the second grade in school, has been hyper-religious since 1916 and was a preacher for three years before his induction into the service. In a plea for clemency attached to the record of trial, the District Chaplain, Persian Gulf Command, states that the accused whom he knows personally is abnormally religious and has a "difficult personality" but is not "a rascal or a typical murderer". I recommend that the sentence to be hanged by the neck until dead be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life, that the sentence as thus commuted be carried into execution, and that the appropriate United States Penitentiary be designated as the place of confinement.

3. Attention is invited to a letter from Mr. R. M. Neel, Fort Lauderdale, Florida, dated 22 February 1944, requesting clemency.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of Trial.
Incl.2-Drft. of ltr. for sig. Under S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Mr. Neel, 22 Feb. 1944, w/5 Inds. and incl.
Incl.5-Ltr. fr. Adjutant Gen'l, Persian Gulf Cmd., 2 June 44, w/Sanity Rept.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 482, 5 Sep 1944)

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

1 JUN 1944

SPJGH
CM 252273

UNITED STATES	)	SACRAMENTO AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Reno Army Air Base, Reno, Nevada, 16 February and 9 March 1944. Dismissal and total forfeitures.
Second Lieutenant JOHN W. CLARK (0-802993), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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 Lt. John W. Clark, Hq & Hq Squadron, Reno Army Air Base, Reno, Nevada, did, without proper leave, absent himself from his post and duties at Reno Army Air Base, Reno, Nevada, from about 3 January 1944, to about 6 January 1944.

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

Specification 1: In that 2nd Lt. John W. Clark, Hq & Hq Squadron, Reno Army Air Base, Reno, Nevada, did, at Reno, Nevada, on or about 31 December 1943, wrongfully and dishonorably fail to maintain sufficient bank balance to meet a check issued by him upon which he received a valuable consideration, said check in words and figures, to wit:

Mobridge, S. Dak December 31, 1943 No. GD OK EPG
Citizens Bank of Mobridge
78-120 Mobridge, South Dakota 78-120
Pay to the Order of CASH $ 35 no/100
Thirty Five and no/100 - - - - - - - - - - - DOLLARS
RAAB Temp. Acct Closed /s/ John W. Clark
2nd Lt. 0-802993

Specification 2: Similar to Specification 1; but alleging check in the sum of $15.

Specification 3: Similar to Specification 1; but alleging ~~check~~ dated 1 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

Specification 4: Similar to Specification 1; but alleging check dated 3 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

Specification 5: Similar to Specification 1; but alleging check dated 3 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

Specification 6: Similar to Specification 1; but alleging check dated 3 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

Specification 7: Similar to Specification 1; but alleging check dated 3 January 1944, in the sum of $25.

Specification 8: Similar to Specification 1; but alleging check dated 3 January 1944, in the sum of $50.

Specification 9: Similar to Specification 1; but alleging check dated 3 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

Specification 10: Similar to Specification 1; but alleging check dated 4 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

Specification 11: Similar to Specification 1; but alleging check dated 4 January 1944, in the sum of $25, payable to the order of Hotel El Cortez.

He 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 only so much of the findings of guilty of the Specification, Charge I, and of Charge I as involved a finding of guilty of absence without leave from about 3 January 1944 to about 5 January 1944, approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Charge I: Two orderlies on duty in "BOQ" No. 5410, Reno Army Air Base, Reno, Nevada, testified that accused came there and "checked in" about the last of December or the first of January, stayed over night and was gone for five or six days or a week. During that time they did not see accused and his bed was not slept in. They stated on cross-examination that accused could have come in and out without their knowing it. The building, which contained 39 rooms and 78 bunks for officers, was pretty well filled (R. 15-23).

When Lieutenant Colonel Edson E. Dailey became commandant of student officers at Reno Army Air Base on 4 January 1944, accused was attached to the student officers' section, but he did not know accused until 6 January. Colonel Dailey testified that the regulation with respect to the time when student officers were required to be on the base had been changed a few weeks before the trial and was not the same as that in force about 4 January. He did not have a copy of the old regulation and the trial judge advocate stated that he had been unable to obtain one. Colonel Dailey had read the regulation in effect between 3 January and 6 January and believed that he knew what it was. He stated that under that regulation: "the student was required to be on the base from 0800 o'clock in the morning until five at night. He could then get a student pass and that was good until 1245 the next morning. As far as classes were concerned he was required to be here". Colonel Dailey did not know the practice in regard to issuance of passes at the time accused came on the base as he was not there. Between 3 January and 6 January he tried several times unsuccessfully to find accused, principally through "Captain Mak", who had been commandant of students (R, 9-12).

On cross-examination Colonel Dailey identified the first paragraph of the former regulation (Def. Ex. 1), which he stated was only part of it. This paragraph was as follows: "All Student Officers will be privileged to retain their passes and may use them at their discretion unless restricted by this office. Student Officers will return to the base not later than 0045 hrs. Guards will be instructed to take up passes of those returning to the base after this hour". Colonel Dailey testified that he did not issue any special leave or special pass to accused. Captain Mak, who was his assistant on 4 and 5 January, signed all passes that were issued on those days, and could have signed a pass for accused without the knowledge of Colonel Dailey. Student officers did not have a place to sign out when on pass. Colonel Dailey thought that accused was enrolled in one of the classes at that time, but he did not know whether accused was marked absent, nor whether he had started school. When asked whether accused "was there one day" he replied "He did come in once in a while" (R. 13-15).

b. Charge II: It was stipulated (Ex. D) between the prosecution, defense counsel and accused that if Gertrude Mortensen, head cashier at Harold's Club, Reno, Nevada, were present in court she would testify that accused presented to her four checks, drawn on the Citizens Bank of Mobridge, Mobridge, South Dakota, payable to the order of cash, and that she cashed the checks and gave accused the full face value therefor, as follows: check (Ex. D-1) dated 31 December 1943, for $35; check (Ex. D-2) dated 31 December 1943, for $15; check (Ex. D-3) dated 3 January 1944, for $25; and check (Ex. D-4) dated 3 January 1944 for $50. The checks were promptly deposited and were returned by the drawee bank marked "Account closed" (R. 8).

The prosecution, defense counsel and accused also stipulated (Ex. C) that if Gladys G. Reuter, cashier at the El Cortez Hotel, Reno, Nevada, were present, she would testify that the accused issued seven checks to the El Cortez Hotel, each in the sum of $25, drawn on the Citizens Bank of Mobridge, on the following dates: one check (Ex. C-4) dated 1 January 1944; four checks (Exs. C-1, C-5, C-6 and C-7) dated 3 January 1944; and two checks (Exs. C-2 and C-3) dated 4 January 1944. On 5 January 1944 the accused identified the checks he had issued and stated in the presence of Miss Reuter that he had received cash for them. The checks were deposited in the bank and were returned by the drawee bank marked "No Funds" (R. 8).

It was further stipulated (Ex. E) that at all times from 31 December 1943 to 16 February 1944 the account of accused in the Citizens Bank of Mobridge was insufficient in amount to cover a $15 check, or any of the eleven checks issued by him between 31 December 1943 and 4 January 1944, and that no deposits were made from 31 December to the date of trial (R. 8).

4. For the defense:

The accused testified that he attended Yankton College, Yankton, South Dakota, for two and one-half years in order to qualify for training as an aviation cadet. He then served as an enlisted man in the Air Forces for approximately six months, attended radio school at Scott Field, was an aviation cadet for about nine months, and was commissioned 29 April 1943 (R. 26).

Accused stated that he arrived at Reno Army Air Base on the afternoon of 30 December 1943, registered at Headquarters, received his "check-in" sheets from the personnel office, and spent the night in the officers' quarters. The following day while he was "checking in" at various places on the base he met a friend, and at about 5:00 p.m. they decided to go to Reno, Nevada, for New Year's Eve. Before leaving the base accused obtained a pass (Def. Ex. 2) from Captain Leo L. Mak which entitled him to enter and leave the base when not on duty, subject to such limitations as might be prescribed by base regulations. He was also given an "Overnight Privilege" pass (Def. Ex.3)

which permitted him to remain overnight in Reno, Nevada. Neither pass specified any time or date. He did not receive any instructions with reference to regulations governing his conduct at the Reno Army Air Base nor did he "believe" that Captain Mak gave him any instructions regarding the use of the passes (R. 27-30).

When accused arrived in Reno that evening he purchased some liquor, rented a room at the El Cortez Hotel, and from there went to Harold's Club where he "decided" to do some gambling. He had "poor luck" and lost about $25 that he had with him. He was drinking "steadily" but remembered cashing a check for $35, the proceeds of which he lost at the dice table. He cashed another check for $15 at Harold's Club and went to one of the night clubs to celebrate the New Year. He cashed more checks at Harold's Club and El Cortez Hotel the next day, and lost the money gambling. Accused stated that he wrote "those checks" because he "figured" his luck would change and he wanted to win back the money he lost. He was drinking "quite a bit" and "it" seemed the best thing to do at the time. Accused could not "fix a time or place" as to the majority of events that happened from New Year's Day to 3 January 1944 because of the liquor he had consumed. On 5 January accused realized that the checks issued by him were in excess of his bank account which contained a balance of about $50 prior to 31 December 1943. He then went to Harold's Club where he made satisfactory arrangements to take care of the checks he had given them. He also went to the El Cortez Hotel and told the manager he did not have money in the bank to pay the checks he had given the hotel. The manager gave him three days to cover the checks but accused was unable to obtain the money within that time. While in Reno, accused had arrangements with "Lt. Damon" to notify accused if he was scheduled for any duty or flying classes. He had the "blue pass" (Def. Ex. 2) and the "overnight" pass (Def. Ex. 3) with him "at all times". On 6 January 1944 accused was placed in arrest in quarters. He took flight training from about 6 January to about 4 February 1944, qualified for an instrument card, and was "checked out" as a pilot on "C-46 and C-49". On 13 January 1944 accused received permission to go to Reno where he attempted to obtain a loan to pay the checks he had cashed at the El Cortez Hotel (R. 27-32, 41).

On cross-examination the accused testified that he stopped at Mobridge, South Dakota, en route to the Reno Army Air Base and ascertained that his bank balance was $50. He wrote two checks in a total amount of $40 before arriving at the base. Accused recalled writing the $35 and $15 checks (Specs. 1 and 2, Chg. II) but could not say when he issued the other checks or in what amounts. He stated that if he had "stopped and thought" he would have known that the checks were not good, but he did not give "the matter any thought at all". On 2 or 3 January he went to the base, picked up his pay check for $145 and returned to Reno. He intended to mail the check to his bank the following day but lost the money gambling. Late in the afternoon of 5 January he returned to the base. He did not redeem any of the checks he had issued to the El Cortez Hotel or to Harold's Club. The accused believed that

he would not get into trouble by staying away from the base as long as he possessed the passes and did not miss any duties. When he did not hear from Lieutenant Damon he returned to the base on 5 January to find out "what was the matter". He learned that he had not been scheduled to attend any classes during his absence, but had missed a "screening" examination, which he made up. The accused further stated that he did not read all of the papers he received from the personnel office his first day at the base, other than going over the check list, and did not know whether they included a set of memorandum instructions addressed to student officers. He did not complete his check list before leaving for Reno on 31 December. The only instruction he received in the personnel office was to complete the check list and return it (R. 32-40, 42-44).

5. a. Charge I: The evidence shows that accused arrived at the Reno Army Air Base on 30 December 1943, to start training as a student officer. The next day he obtained a pass permitting him to enter and leave the base subject to limitations prescribed by base regulations. He was also given a pass to remain in Reno, Nevada, overnight. Base regulations in force at the time required student officers to be on the base between 8:00 a.m. and 5:00 p.m. and when away from the base on pass to return by 12:45 a.m. The accused went to Reno on 31 December, returned to the base on or about 3 January 1944, left again the same day and stayed away until 5 January 1944.

Though the evidence shows that accused was absent from about 3 January to 5 January 1944, there is no direct proof that he was absent without permission. Direct proof, though highly desirable, is not in all cases requisite. Like any other fact, want of permission to be absent may be inferred from the circumstances (Dig. Op. JAG, 1912-40, sec. 419(2), CM 126112, Robstack). The accused testified that as long as he had the passes in his possession, and did not miss any classes at the school, he did not believe he would get into trouble by remaining away from the base. It is obvious from the evidence that accused did not have nor claim any special leave other than such as was granted by his student pass and his overnight pass. When he left the base for the second time, on 3 January, he apparently had the right to do so by virtue of his student pass, since it was not shown that he left at an hour when he was required to attend classes or perform any other duty. Although this pass authorized him to remain away from the base only until 12:45 a.m. accused possessed an undated overnight pass which authorized him to remain in Reno the remainder of the night. However, it was the duty of accused to report back at the base by 8:00 a.m. on 4 January, as under base regulations the overnight pass was clearly ineffective after that hour. As accused admittedly did not return to the base until the afternoon of 5 January, it is the opinion of the Board that his absence without leave began at 8:00 a.m. on 4 January and continued until he returned to duty.

b. Charge II: The evidence shows that between 31 December 1943 and 4 January 1944 the accused drew and cashed eleven checks in the aggregate amount of $300 and received full face value in cash therefor. All of the checks were drawn on the Citizens Bank of Mobridge, Mobridge, South Dakota. Four of the checks made out to the order of cash were cashed at Harold's Club, Reno, Nevada, and were for amounts as follows: $35 on 31 December 1943 (Spec. 1), $15 on 31 December (Spec. 2), $25 on 3 January 1944 (Spec. 7), and $50 on 3 January (Spec. 8). Seven of the checks were issued to the El Cortez Hotel, Reno, Nevada, in the following amounts: $25 on 1 January (Spec. 3), four checks for $25 each on 3 January (Specs. 4, 5, 6 and 9), and two checks for $25 each on 4 January (Specs. 10 and 11). All of the checks were returned unpaid because of insufficient funds. Although accused had a checking account in the Citizens Bank of Mobridge, it was less than $15 in amount on the several dates when the checks were issued and when presented to the bank for payment.

It is uncontradicted that accused drew and cashed the checks at a time when he knew his bank account was not sufficient to cover them and that he failed to maintain a sufficient bank balance to meet the checks when presented for payment as alleged. A failure to maintain a sufficient balance in the bank to meet outstanding checks is recognized as a violation of the 96th Article of War even though an intent to defraud be neither alleged nor proved (CM 250484, Hebb).

6. The checks described in Specifications 1, 2, 7 and 8, Charge II, were made payable to cash and the Specifications do not set forth the names of the persons to whom they were issued. It would have been better practice to set out the names of the actual payees in order to identify the offenses with greater accuracy. The Board of Review is of the opinion that, though the Specifications as drawn are defective, the allegations contained therein are sufficient fairly to apprise accused of the offenses intended to be charged.

7. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 11 May 1942; aviation cadet from 24 September 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 29 April 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification, Charge I, as involves absence without leave from 4 January to 5 January 1944; legally sufficient to support the findings of guilty of

Charge I, of all Specifications of Charge II, and of Charge II; and legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Article of War.

Samuel M. Irwin, Judge Advocate.

Edward Cannon, Judge Advocate.

F. J. Letterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 JUN 1944 - 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 W. Clark (0-802993), 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 finding of guilty of the Specification, Charge I, as involves absence without leave from 4 January to 5 January 1944; legally sufficient to support the findings of guilty of Charge I, of all Specifications of Charge II, and of Charge II; and legally sufficient to support the sentence, and to warrant confirmation of the sentence. The accused was absent without leave for about one day (Chg. I) and wrongfully failed to maintain a sufficient bank balance to pay 11 checks in an aggregate amount of $300 which he issued from 31 December 1943 to 4 January 1944 (Chg. II). Accused went to Reno, Nevada, from his station at Reno Army Air Base, on pass on New Year's Eve, and remained there several days. While partially under the influence of liquor he cashed the 11 checks for the purpose of gambling. Some of the checks were cashed in a gambling house and the others at a hotel. Accused testified that all of the money from the checks was used in gambling and drinking in "those places". In view of the youth of accused and his previous good record, as well as the circumstances under which the checks were issued, I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the execution of the sentence as modified be suspended during good behavior.

3. Consideration has been given to the following papers attached to the record, all dated 23 February 1944: statement by defense counsel and assistant defense counsel recommending clemency, statement by First Lieutenant Millard A. Webb, Air Corps, who was an instructor of accused, recommending clemency, and statement by accused requesting clemency.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Rec. of Trial.
Incl.2-Drft. of ltr. for sig. S/W.
Incl.3-Form of Action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 334, 27 Jun 1944)

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

SPJGK
CM 252298

12 APR 1944

UNITED STATES	)	PANAMA MOBILE FORCE
	)	
v.	)	Trial by G.C.M., convened at Fort Clayton, Canal Zone, 21 February 1944. Dismissal.
	)	
Second Lieutenant RAYMOND E. MOORE (0-1285795), Infantry.	)	

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

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

2. Accused was tried on the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Raymond E. Moore, 150th Infantry, did at the City of Panama, Republic of Panama, on or about 19 January 1944, with intent to defraud, wrongfully and unlawfully make and utter a certain check, of a private nature, in words and figures as follows, to wit:

January 19, 1944

The Chase National Bank
Balboa

Pay to the order of Cash - - - - - - - - - - - - - - $ 25.00

Twenty Five dollars and 00/100 Dollars
U.S. Currency

No_____

Raymond E Moore 2nd Lt
APO 827

and by means thereof, did fraudulently obtain from Douglas Jones, Night Clerk, Hotel Central, Republic of Panama, twenty five dollars ($25.00), he the said Second Lieutenant Raymond E. Moore, then well knowing that he did not have and not intending that he should have any account with The Chase National

Bank of the City of New York, Balboa Branch, Balboa, Canal Zone for the payment of said check.

Specification 2: In that Second Lieutenant Raymond E. Moore, 150th Infantry, did at the City of Panama, Republic of Panama, on or about 23 January 1944, with intent to defraud, wrongfully and unlawfully make and utter a certain check, of a private nature, in words and figures as follows, to wit:

The Chase National Bank 61-54/6

Chase Balboa 1, 23 1944 No. _____

Pay to the order of Cash $15 00/100

Fifteen dollars and 00/100 Dollars

Raymond E. Moore

and by means thereof, did fraudulently obtain from F. T. Albanus, Manager International Hotel, in the City of Panama, Republic of Panama, fifteen dollars ($15.00), he the said Second Lieutenant Raymond E. Moore, then well knowing that he did not have and not intending that he should have any account with The Chase National Bank of the City of New York, Balboa Branch, Balboa, Canal Zone for the payment of said check.

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

3. Summary of evidence.

a. Specification 1.

Due to the failure of the two principal witnesses for the prosecution to be present in court to testify concerning the making and uttering of the check which is the subject of this Specification, testimony was offered by means of stipulations between accused and his counsel and the prosecution with respect to the testimony which would have been given by Mr. Fernando Bunuel and Mr. Douglas J. Jones. They were, respectively, manager and night clerk of the Hotel Central, Panama City, Panama (R. 22,23).

Accused had been at that hotel frequently, and on or about 19 January 1944, he telephoned Jones (presumably from a room in the hotel) asking if Jones could cash a check for him. Jones instructed accused to come to the

office, where upon arrival Jones gave accused a blank, counter-type check, which accused filled in, except for the date. This was filled in by Jones in accused's presence. It was drawn on The Chase National Bank's Balboa branch, in the sum of $25, which sum Jones gave accused in cash. Upon presentation to that bank for payment "a day or so later" it was returned marked "no such account". The check was introduced in evidence as Prosecution's Exhibit B (R. 14,22,23).

Mr. Luis A. Gomez, manager of the Balboa branch of the Chase National Bank of New York, testified that he received this same check from the Hotel Central about 21 January, and that he twice checked the records of the bank for an account in the name of the maker. Accused did not then have, and never had, an account with the bank, and while witness did not know whether accused had ever made application for an account, it was not the policy of the bank to refuse new deposits. The check was returned to the Hotel Central (R. 13-15).

b. Specification 2.

On the evening of 23 January 1944, accused came into the International Hotel in Panama City. He asked Jack Kaultner, the night clerk, to cash a check for $15. The check was made out on the printed check forms of the Anniston National Bank of Anniston, Alabama. Since it was not the practice of the hotel to cash checks drawn on banks in the States, Kaultner called in Mr. F. T. Albanus, the hotel manager, who explained this to accused. Accused then told Albanus that he had an account with the Balboa branch of the Chase National Bank, and Albanus said he would accept such a check. In Albanus' presence, accused crossed out the word "Anniston" in the date line and in the name of the drawee bank, and inserted in its place in the former, "Chase Balboa", and in the latter, "Chase". Albanus gave accused $15 in United States currency in return for the check. The check was introduced as Prosecution's Exhibit A (R. 8-10,11,12).

Mr. Gomez testified that "a day or so" after receipt of the check given by accused to Hotel Central, his bank received that given to the International Hotel, and that it was likewise returned because there was no account in accused's name (R. 14).

Lieutenant Colonel Charles H. Gearhart, 150th Infantry, Fort Davis, Canal Zone, testified that he received the two dishonored checks from "Colonel Monro", commanding officer of the regiment, and that he promptly telephoned accused to tell him of this fact. Witness asked accused to have the $40 in his office by the next morning. He instructed accused to give the money to the color guards participating in a parade at Fort Clayton, so that they could bring it with them on their return. Upon their arrival the guards told witness that accused had not given them any money. Witness again telephoned accused, who explained that the guards had already left

when he had finished the previous day's conversation with witness. Witness then told accused to send the money to him with the courier on the 5:03 train that afternoon, but the courier did not bring any money. The next morning witness again tried, unsuccessfully, to reach accused by telephone, and later learned that accused had been restricted to his station. The checks were later made good, but witness did not know how (R. 16-18).

Captain George E. Murray, 150th Infantry, accused's commanding officer at Boronga Ranch, testified that (apparently on the day when Lieutenant Colonel Gearhart instructed accused to send the $40 with the courier on the 5:03 train) accused had asked him for transportation from Fort Clayton to Boronga Ranch "to get something". Accused refused, however, to disclose the specific purpose of the trip, so witness would not give him transportation. The next morning witness placed accused under restriction upon orders from "Colonel Monro" (R. 19,20).

Prosecution's Exhibit C shows that accused received a partial payment of pay and allowances on 18 January in the amount of $150 (R. 24; Pros. Ex. C).

Major H. B. Alexander, 150th Infantry, testified that "some time ago" he had received $40 from "the commanding officer" (Captain Murray?) for payment of the checks (R. 21).

Evidence for defense.

Defense counsel stated that accused's rights as a witness had been explained to him. Accused took the stand and made an unsworn statement. He stated that "in the month of January" he had won a considerable sum of money playing cards, and that not wanting to lose it again, he had given $250 of it to "a young lady whose name is Rodais", telling her to "put it in the bank" for him. He "assumed" that she had banked it in the Chase National Bank in Balboa "as there is where all other officers have their accounts". He therefore wrote the two checks (R. 24).

Accused's version of the efforts of Colonel Gearhart to secure restitution corresponded with the testimony of Colonel Gearhart and Captain Murray. He did not explain his request to Captain Murray because he "thought it was a personal matter and none of his concern". He was unable to make the checks good because of his restriction to his post, though he stated that he was not in need of money, since his father "had opened several accou for him "in different banks in the states", and that if he had had the opportunity he would have paid the money back when it was asked for (R. 25).

4. There is no reasonable doubt of accused's guilt. He admitted uttering both checks. That he had no account in the drawee bank was clearly proved. The only evidence to the effect that he had intent to have any

money in the bank to meet the checks lies in his own statement. This statement the Board of Review deems unworthy of belief. Beyond giving her surname, accused gave no details concerning the Miss Rodais to whom he said he entrusted his gambling winnings. He did not claim to have instructed her as to what bank she should deposit the money in; he merely "assumed" that she put it in the Chase National Bank. He did not, apparently, make any effort to provide that bank with a signature card, nor ascertain whether the money had in fact been deposited. It is significant that as to the second check, he did not propose to draw on that bank, but upon one in Alabama. It can not be said that he honestly believed or intended to have an account there.

Nor, despite his protests to the contrary, did accused show an honest effort to make restitution. Though he offered excuses for his failure to pay, he did not even attempt to get in touch with Colonel Gearhart after his failure to meet the color guards or after Captain Murray's refusal to grant him transportation. His whole conduct impresses one as being thoroughly discreditable, and violative of the standards of honor and integrity expected of an officer and a gentleman.

5. War Department records show that accused is 22 years of age. He attended Hamilton, Ohio, High School for three years, but did not graduate, and enlisted in the 147th Infantry, Ohio National Guard, on 15 October 1940. He attended the Infantry School, Fort Benning, Georgia, and upon graduation therefrom was honorably discharged from the Army and commissioned a Second Lieutenant, Infantry, Army of the United States, on 20 June 1942. In recommending him for attendance at that school, Captain Robert F. Johnson, Infantry, his commanding officer, stated that his character was "excellent" and that he had demonstrated "outstanding qualities of leadership".

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

Terry A. Gore, Judge Advocate.

John Rumsfield, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 APR 1944 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 Raymond E. Moore (0-1285795), 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 thereof. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 340, 1 Jul 1944)

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

SPJGN
CM 252378

6 APR 1944

UNITED STATES	)	11TH ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Cooke, California, 23 February 1944. Dismissal.
	)	
Second Lieutenant JOHN F. COX (0-1311373), Infantry.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Second Lieutenant John F. Cox, Infantry, 63d Armored Infantry Battalion, was, at Ibis, California, on or about 2 February 1944, found drunk while on duty as officer of the day.

He pleaded not guilty to and was found guilty of the Charge and its Specification. 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 the accused by appropriate orders of his organization had been designated as officer of the day for Wednesday, 2 February 1944, with his tour of duty commencing at 1630 o'clock on 2 February 1944 and ending at 1630 o'clock on 3 February 1944. He relieved his predecessor at about 1700 o'clock on 2 February 1944 and undertook the performance of such assigned duty at Ibis, California, where his organization was located. About three hours later, at 2000 o'clock, an officer observed the accused pouring out some water in front of the former's tent. The accused explained this action by stating that he was going to get some fresh water. However, he proceeded across the street to a tent occupied by Captain Ralph G. Leigh, Captain James P. McClenahan and First Lieutenant Gordon D. Petree and was observed a few minutes later, apparently as the result of a friendly scuffle, falling awkwardly out of the tent by the same officer who, nevertheless, was unable to state that the accused was drunk or that his actions had so indicated (R. 6-8, 8-9, 9-11, Pros. Exs."A" and "B").

Upon entering the tent occupied by the above named three officers, the accused asked whether they needed any water and they answered in the negative. He observed a partially filled bottle of whiskey from which the other three officers had each taken a drink shortly before and from which the accused, according to Captain Leigh who was ill with a cold and had retired, also took a drink, stating that if they wanted any rum he had "plenty of it". The other two officers, although present in the tent, did not observe the accused take this drink and, contrary to Captain Leigh, were unable to state that the accused had the odor of liquor on his breath. Although there was some divergence of recollection among them concerning whether they had taken their drink directly from the bottle, and with or without coca cola as a "chaser", they were all agreed that the accused engaged in scuffling with Captain McClenahan and Lieutenant Petree during which he (the accused) appeared to be hesitant in his speech, uncertain on his feet, and apparently intoxicated. During the scuffling he was thrown out of the tent, falling on his face on the ground outside. He reentered the tent with an apple which he attempted to present to Captain Leigh who appeared to have been annoyed by the accused's actions. The accused was not equipped with side arms and in the opinion of all three of these officers was drunk, intoxicated or under the influence of liquor so as not to be able to perform his duties in a proper manner. The organization's assistant adjutant had noticed the scuffling in the tent but had not attributed any importance to it. Later at about 2030 o'clock and at the direction of Captain Leigh he had relieved the accused from duty as "Officer of the Day", characterizing the accused as being "mildly drunk" and unable, in his opinion, to perform his duties (R. 11-16, 16-22, 22-28, 29-33).

4. The accused, after explanation of his rights as a witness, elected to remain silent but the defense by the accused's company commander showed that the accused had a rating of "excellent" and that the officer of the day, who had been relieved by the accused, was of the opinion that at such time and at a shortly subsequent time the accused was not drunk. A medical officer testified that he saw the accused at 1735 o'clock on 3 February 1944 and that at such time the accused was not drunk and that an examination made at the hospital shortly thereafter confirmed such finding. However, such officer was unable to give an opinion concerning the accused's condition on the preceding evening (R. 34-36, 36-37, 37-38, Def. Exs. "A", "B").

5. The Specification alleges that the accused, at Ibis, California, on or about 2 February 1944, was found drunk while on duty as officer of the day. The elements of the offense alleged are being found drunk while in the course of military duty and "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the Article of War" [85] (MCM, 1928, par. 145).

The evidence for the prosecution conclusively establishes that the accused had been duly appointed officer of the day and had entered upon the performance of the duties thereof. The accused was, therefore, in the course of the performance of a military duty. The prosecution's evidence, likewise, by the testimony of four officers established beyond a reasonable doubt that at a designated hour during the accused's tour of duty he was intoxicated to the extent that the full exercise of his physical and mental faculties was sensibly impaired and to the extent that he was unable to properly perform his assigned duties. This evidence was believed by the court and neither it nor the court's finding was in fact challenged or controverted by the evidence for the defense because such evidence merely established his sobriety about three hours before and about 21 hours after the time of the alleged intoxication which manifestly was ineffective to show his condition at the time when the offense was alleged to have been committed. The evidence, consequently, establishes beyond a reasonable doubt the accused's guilt as alleged and amply supports the findings of guilty of the Charge and its Specification.

6. The accused is about 33 years of age. The War Department records show that he has had enlisted service from 20 October 1939 until 17 February 1943 when he was commissioned a second lieutenant upon completion of Officer Candidate School and that he has had active duty as an officer since the latter date.

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 findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction in time of war of a violation of Article of War 85.

Abner E. Lipscomb, Judge Advocate

William H. Gambrell, Judge Advocate

Gabriel H. Golden, Judge Advocate

(44)

SPJGN
CM 252378

1st Ind.

War Department, J.A.G.O., 21 APR 1944 - 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 F. Cox (O-1311373), 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. I recommend that the sentence be confirmed but commuted to a reprimand and a fine of $50 per month for six months and that the sentence as thus modified be 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

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

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

(Sentence confirmed but commuted to reprimand and fine of $50 per month for six months. G.C.M.O. 250, 30 May 1944)

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

SPJGQ
CM 252389

14 APR 1944

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Fort Mason, California, 22 February 1944. Dismissal.
Captain FRANK A. DAVISON (0476231), Transportation Corps.	)	

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OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

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

Specification 1: In that Captain Frank A. Davison (then First Lieutenant) Transportation Corps, did, at San Francisco, California, on or about 30 June 1942, present for payment a claim against the United States, and did secure payment thereof from Colonel R. H. Bradshaw, Finance Department, Finance Officer, United States Army, an officer of the United States Army duly authorized to pay such claims, in the amount of $70.40, for subsistence and rental allowances, by representing that he, the said Captain Davison, was a married man, that one Nova Shaw, claimed by him to be Nova Davison, residing at 295 East Fifteenth Street, Pittsburg, California, was his lawful wife, and that he was entitled to said sum, which claim was known by the said Captain Davison to be false and fraudulent, in that he was not a married man, and the said Nova Shaw was not his lawful wife, and he was not entitled to receive the said sum.

Specification 2: In that Captain Frank A. Davison, (until 9 February 1943 First Lieutenant) Transportation Corps, did, at Camp Stoneman, California, from on or about 31 July 1942,

to on or about 30 June 1943, present for payment claims against the United States and did secure payment thereof from Lieutenant Colonel (then Major) Robert H. Hansen, Finance Department, Finance Officer, United States Army, an officer of the United States Army duly authorized to pay such claims, in the aggregate amount of about $1320.60, for subsistence and rental allowances, by representing that he, the said Captain Davison, (until 9 February 1943 First Lieutenant) was a married man, that one Nova Shaw, claimed by him to be Nova Davison, residing at 295 East Fifteenth Street, Pittsburg, California, was his lawful wife, and that he was entitled to said sums, which claims were known by the said Captain Davison to be false and fraudulent, in that he was not a married man, and the said Nova Shaw was not his lawful wife, and he was not entitled to receive said sums.

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

Specification 1: In that Captain Frank A. Davison, (until 9 February 1943 First Lieutenant) Transportation Corps, did, from on or about 24 June 1942, until on or about 23 June 1943, at Camp Stoneman, California, and Pittsburg, California, introduce one Nova Shaw to fellow officers and civilians as his lawful wife, and did, during this period openly maintain domicile with the said Nova Shaw, he, the said Captain Frank A. Davison then and throughout this period well knowing that the said Nova Shaw was not in fact his lawful wife.

Specification 2: In that Captain Frank A. Davison, Transportation Corps, did, at Camp Stoneman, California, on or about 2 November 1942, for the purpose of securing medical attention at the expense of the Government, arrange for the admission of, and did secure medical care and attention by medical officers of the United States Army for one Nova Shaw, by representing said Nova Shaw to be his lawful wife, when in fact she was not his lawful wife, as he then and there well knew.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

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

Charge I and its Specification

Certified true photostatic copies of the originals of fourteen pay and allowance account vouchers filed by accused from 30 June 1942 to, and including, 30 June 1943, covering the period from 9 June 1942 through

30 June 1943, were introduced into evidence, without objection (Ex. 3, R. 9). The original of each of these was signed by accused, and certified by him to be true and correct. In each of these fourteen vouchers accused named "Mrs. Nova Davison", or "Nova Davison" as his dependent and as his lawful wife, and made claim from the government for the subsistence and rental allowances authorized by law for a married officer (Ex. 3). It was established by documentary evidence, that is, by the certified true copies of the pay vouchers themselves, by certified true copies of cancelled government checks (Ex. 3), by testimony of the Army Finance officers who approved the vouchers and issued the checks in payment thereof (R. 12-13, 16-24), and by stipulations made by accused and his counsel in open court (R. 17, 18, 23) that these same pay vouchers were, in due course, presented to the appropriate Finance officer of the United States Army for approval and payment and were by him respectively approved for payment, and that accused was actually paid the respective amounts claimed by him in each voucher for subsistence and rental allowances, by check or by voucher drawn on the Treasurer of the United States by the Army Finance officer to whom these respective vouchers were presented.

The voucher filed and presented by accused under date of 30 June 1942, was presented to, approved by, and paid by Colonel Robert H. Bradshaw, at the time a Finance officer of the United States Army, who issued to accused a government check over his signature (R. 12-13, 24). The remaining 13 vouchers in question were presented to, approved by, and paid by government checks issued over the signature of Lieutenant Colonel Robert H. Hansen, who was at the time a Finance officer of the United States Army (R. 16-24). It was orally stipulated by the accused, his counsel, and the prosecution in open court that the total amount received by accused, as subsistence and rental allowances for his alleged dependent wife, for the period of time stated upon the vouchers abovementioned, exceeded the sum he would have been lawfully entitled to receive as a single man, for the same purposes and over the same period of time, by the amount of $1,391 (R. 23) [$70.40 of which was approved and paid by Colonel Bradshaw on voucher of 30 June 1942 (R. 24), and $1,320.60 of which was approved and paid by Lieutenant Colonel Hansen on vouchers filed as of, and after, 31 July 1942 (R. 16, 24).] Accused lived with Nova Fontaine [also known as Nova Shaw (R. 69, 70).] from sometime in June 1942 (R. 70), until sometime in May 1943 (R. 77). During all of this time the accused, both by word and action, held the said Nova Fontaine (Nova Shaw (R. 69-70)) out to the public as his lawful wife (R. 59-70). Lieutenant Colonel Willard Kuhn, Inspector General's Department, testified that on 3 December 1943 accused, after having been duly warned and advised of his legal rights, in the premises and in response to the question, where and when he (accused) and "Mrs. Nova Davison" were married, replied, "We are not married. We have an illegitimate child" (R. 66-67). Nova Fontaine (Nova Shaw) testified that she and accused lived together as husband and wife from June 1942 until May 1943, during all of which period she was represented to the public as Mrs. Davison, but that in fact they were never legally married, and during all of said time she was, within the knowledge of accused, married to another, and undivorced (R. 69-71).

The prosecution also introduced into evidence a certified copy of an application for marriage license, subscribed, sworn to, and filed in Washoe County, Nevada, on 24 June 1943, by Frank A. Davison and Maybelle Buno (Ex. 1), and a certified copy of a marriage certificate, showing the marriage of Frank A. Davison, to Maybelle Buno on the same date, at Reno, Nevada (Ex. 2). The application for marriage license declared on its face that a former marriage by applicant Frank A. Davison was terminated by divorce in 1936, and made no reference to any subsequent marriage. There was no direct evidence identifying accused as the same Frank A. Davison who signed the application for marriage license, but in his statement to Lieutenant Colonel Kuhn on 3 December 1943, accused admitted that he married "Mrs. Maybelle Buno" in Reno, Nevada, on 24 June 1943. It was stipulated orally in open court by the prosecution and by defense counsel that accused had before this trial refunded the amount of $1,391, which he had fraudulently drawn as explained above, to the United States Government (R. 23).

Charge II and its Specifications

Accused and Nova Shaw (Nova Fontaine), a married woman who was separated but not divorced from her husband, began living together as husband and wife in Olympia, Washington, in November 1941 (R. 70), at which time accused was an enlisted man (R. 77). Accused left the state of Washington for California during March 1942 (R. 77), and was commissioned a first lieutenant, Army of the United States, effective 9 June 1942 (Ex. 3). Nova Shaw joined accused in Pittsburg, California, 15 June 1942 (R. 77), accused having supplied the money upon which she made the trip from Olympia, and they immediately resumed living together as husband and wife (R. 71). They continued to live together as husband and wife until some time in May 1943, when she returned to the State of Washington for the purpose of getting a divorce (R. 73, 77). During all of the time that accused and Nova Shaw (Fontaine) lived together in Pittsburg, she was introduced as Mrs. Davison and was held out to the public, both civilian and Army personnel, by accused as his wife. She and accused from time to time entertained other officers and their wives in their home, and were occasionally entertained in the homes of other officers, and upon all such occasions, in fact at all times, she was represented by accused to be, and introduced as, Mrs. Davison (R. 71, 72). Accused knew at all times that she was married and undivorced, but they planned to marry when she did obtain a divorce (R. 71, 73, 80).

On 3 November 1942, Nova Shaw gave birth to a female child, of which accused is admittedly the father (Ex. 5, 6; R. 37, 73). Before and during the birth of this child she was cared for in the Army hospital at Camp Stoneman, Pittsburg, California by Army doctors (R. 25-37). Nova Shaw testified that she and accused had discussed in advance arrangements for her prenatal treatment and hospitalization but that some one other than she made those arrangements (R. 79). Accused accompanied her on the first prenatal visit she made to Captain Medley, M.C., Chief of the Out Patients Clinic and in charge of obstetrical cases, and upon virtually all subsequent

trips. He visited her frequently, in the role of husband, at the hospital after the baby was born, and the medical care and hospitalization were supplied her as the wife of accused (R. 28, 31, 35).

In May 1943 Nova Shaw returned to the State of Washington (R. 77) and obtained a divorce decree (R. 74), which became final in December 1943 (R. 77). Accused supplied the money with which she did this (R. 74). During her absence, accused, as above set out, married Maybelle Buno. Upon the return of Nova Shaw (Fontaine) to Pittsburg, accused gave her $600 and continued thereafter for three months to contribute to the support of their baby (R. 78).

4. Evidence for the defense:

Colonel Murray H. Ellis, Commanding Officer of Camp Stoneman (R. 44), Major Edwin W. Barron, Staff Judge Advocate at that post (R. 46), Major Kenneth Peck, former Provost Marshal at Camp Stoneman (R. 53), and Saul Jimno, Chief of Police, Pittsburg, California (R. 56), testified in effect, that accused was an excellent officer (R. 44, 47, 53, 57), very attentive to duty (R. 48, 53), capable of handling difficult situations (R.44,48, 58), and that they would be glad to have him back under their command, or as an associate in their work (R. 44, 54). These witnesses knew little or nothing of accused's home life (R. 45, 50, 54, 61), although two of them had met "Mrs. Davison" (R. 54, 61).

Accused, having been advised of his rights, elected to make an unsworn statement, which was in substance as follows: He first enlisted in the Army in 1920, at the age of seventeen. He served only about eight months of that enlistment, having been discharged in 1921 when the Army was reduced in size. He enlisted again in November 1929 and thereafter continued to serve as an enlisted man until 8 June 1942, at which time he was discharged to enable him to accept a commission as a first lieutenant, Army of the United States. He was a first sergeant at the time he was discharged as an enlisted man, and had been a non-commissioned officer, except for about ten months, during all of the time since his second enlistment in 1929. Accused met Nova Shaw in Olympia, Washington (R. 84). He proposed marriage with her as soon as he learned she was bearing his child, which was while he was still stationed in Washington (R. 85). She was not then free to marry him, but he nevertheless made an allotment in her favor, which continued in effect until he was discharged as an enlisted man (R. 85). After he became an officer, accused established a residence for Nova Shaw (Fontaine) in Pittsburg, California, and sent for her to join him there, with the understanding that she would obtain an interlocutory decree of divorce before leaving the State of Washington (R. 85). She did not obtain the decree of divorce before joining accused in Pittsburg, and so advised him upon her arrival (R. 85). Accused insisted, at various times before the baby was born, that she return to Washington and obtain the divorce, but she was afraid to make the trip in her condition (R. 86). After the child was born and the mother's health improved, accused paid the latter's expenses back to the State of Washington for the purpose of getting a divorce. At the time, he still intended and expected to marry

her (R. 86). However, while she was in Washington, they agreed by letter to separate (R. 86), and upon her return to Pittsburg he gave her approximately $800, in two payments, and made an agreement with her as to the care of the child (R. 87). He carried out his agreement for the care of the child until he was transferred to Fort McDowell. At that time he was saving all the money he could in order to make a refund to the government, and knew that neither the woman nor the child was in need (R. 87).

Accused did not prepare the pay and allowance vouchers in question, but he signed the vouchers knowing that "Mrs. Nova Davison" was listed as his lawful wife and that they were not married (R. 87-88). He intended to marry her just as soon as possible, and believed that marriage would clear up the fact that he had been obtaining money from the government under false pretenses (R. 88). He began in March 1943 to save out of his pay sufficient funds with which to reimburse the government. He had accumulated a sufficient sum to have made the refund in December 1943, but was unable to ascertain the correct amount due. He made the refund on 21 February 1944, the day before his trial (R. 88).

5. It is apparent from the record that the offenses alleged in Specifications 1 and 2, of Charge I, were charged in separate specifications only because of the fact that the vouchers involved were presented to, and paid by, different Army Finance Officers. They do not require separate discussion. The evidence shows conclusively that within the period of time alleged accused either presented, or caused to be presented, to the Army Finance Officers named in the specifications, for approval and payment, fourteen pay and allowance accounts, in each of which he named "Nova Davison" as a dependent and as his lawful wife, and made claim for commutation of rent and subsistence at the rates provided by law for a married man. Each of these signed instruments was a claim against the United States. The evidence leaves no doubt that the person who was being listed in these vouchers as "Mrs. Nova Davison" was in fact Nova Fontaine (also known as Nova Shaw). Accused was not married to this woman and did not believe himself to be married to her. This fact is clearly established by the evidence, and was admitted by accused in his unsworn statement to the court. He admitted that he first proposed marriage to Nova Fontaine in the State of Washington, which was several months prior to the time he was commissioned an officer, and she was not then free to marry him because she was married to another man. This barred them from even contracting a common law marriage. Nova Fontaine informed accused when she joined him in Pittsburg, California, that she had not obtained a divorce, and accused thereafter from time to time endeavored to get her to return to the State of Washington and procure one. Therefore, each time accused presented one of these pay and allowance vouchers, claiming the subsistence and rental allowances provided by law for a married officer, he presented a claim against the United States which was false and fraudulent and which he knew at the time he presented it to be false and fraudulent. Accused admitted this in his statement to the court, and wholly failed to advance any theory which could, under the law, operate as a defense. His acts and conduct fall squarely within the provisions of Article of War 94 (CM

244648 - Tuttle). The fact that the day before trial he refunded to the government all money thus unlawfully obtained by him does no more than extenuate the offense. Each false claim presented by accused constituted a separate offense, but he was benefitted rather than harmed by having 13 of these offenses charged as one offense in Specification 2, and no prejudicial error was committed in this respect.

The evidence conclusively shows that accused did live openly in Pittsburg, California, with Nova Fontaine (Shaw) as husband and wife, from June 1942 until May 1943, knowing that they were not married and could not be married, the while holding her out to the public and introducing her to fellow officers and their wives as Mrs. Davison, all as alleged in Specification 1, Charge II. The relationship between accused and this woman was adulterous from its inception, and made worse by the birth of their illigitimate child. While the disposition manifested by accused to make provision for his child is no doubt commendable, he violated not only civil law, but the accepted standards of decency and morality prevailing in this country, and the military code of honor, by openly living in adultery and in flouting his mistress before fellow officers and their wives. His conduct in this respect constituted a violation of Article of War 95 (CM 244648 - Tuttle).

The offense charged by Specification 2, Charge II, is, in essence, that accused was guilty of dishonest and dishonorable conduct in providing medical care and hospitalization for Nova Shaw (Fontaine) at government expense, when she was not entitled to receive it. This being so, it is not of great importance that the evidence does not show clearly that accused made formal arrangements with some particular officer for this medical care and hospitalization. He went with this woman to see the doctor the first trip she made, and accompanied her on most of the trips she made thereafter. He was posing as her husband and she as his wife in all of their frequent associations around the hospital, and no contention was made, nor was there any evidence from which one could deduce, that he did not have full knowledge that she was being treated at government expense for the sole reason that she was believed by those administering to her to be the lawful wife of an Army officer. So, even though there may not be evidence showing with certainty that accused made formal arrangements in advance, there is ample evidence to show that he was nevertheless responsible for Nova Shaw's being treated and cared for in a government hospital and at government expense. By consciously being a party to this arrangement, whether actively or passively, he was guilty of practicing a fraud and deceit upon the government, which was conduct unbecoming an officer and a gentleman and a violation of Article of War 95.

While the application for marriage license made by Frank A. Davison and Maybelle Buno in Washoe County, Nevada, on 24 June 1943 was improperly admitted into evidence at the time it was admitted, because there had been no previous evidence connecting the Frank A. Davison named thereon with accused, his identity as such was later sufficiently supplied circumstantially by the marriage license showing the

marriage of Frank A. Davison and Maybelle Buno on the same date at Reno, Nevada, and by proof that accused had told Colonel Kuhn that he married Maybelle Buno in Reno, Nevada, on 24 June 1943. Aside from this inadmissible application there was ample evidence elsewhere in the record of trial sufficient to sustain the findings, so accused suffered no prejudice to any material right by its admission into the evidence.

The court did not err or abuse its discretion in permitting the prosecution to reopen its case and introduce additional evidence to supply certain original deficiencies after the motion by defense counsel, following the close of the prosecution's case, for findings of not guilty was denied. (Par. 71d, MCM, 1928, p. 56).

6. War Department records disclose that this officer is 40 years of age. He is married. No high school training is shown, but it appears that he attended Business College for 1 year and 3 months, studying bookkeeping and accounting. He enlisted in the Army on 22 December 1920 served until 23 July 1921. He reenlisted on 29 November 1929 and thereafter served with the Infantry in various capacities and grades, including first sergeant, until discharged on 8 June 1942 to accept a commission as a first lieutenant, Army of the United States. He entered on active duty 9 June 1942 and became assistant Provost Marshal at Camp Stoneman, California. He was promoted to the grade of Captain on 9 February 1943.

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. Dismissal is mandatory upon conviction of Article of War 95 and is authorized upon conviction of Article of War 94.

William A. Rounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 MAY 1944 - 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 Frank A. Davison (0476231), Transportation 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 the sentence as modified and approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Myron C. Cramer

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

3 Incls.
1 - Record of trial.
2 - Dft. ltr. sig. of S/W.
3 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 375, 18 Jul 1944)

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

SPJGV
CM 252439

19 MAY 1944

UNITED STATES v. Privates NICHOLAS E. PEROS (33417095), Company A, and CHARLES M. JOHNSON (36720295), Company D, both of 1307th Engineer General Service Regiment.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 8 March 1944. Each: Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charles M. Johnson, Company D, 1307th Engineer General Service Regiment, and Private Nicholas E. Peros, Company A, 1307th Engineer General Service Regiment, Camp Claiborne, Louisiana, acting jointly, and in pursuance of a common intent, did, near Alexandria, Rapides Parish, Louisiana, on or about 29 January 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Earl J. Beaty, a human being, by striking him on the head with a piece of wood.

Both accused pleaded not guilty to and were found guilty of the Charge and Specification. Evidence of one previous conviction of accused Peros for absence without leave was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances

due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of their natural lives. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 50½.

3. Competent evidence introduced by the prosecution shows that on the night of 29 January 1944, one Henry D. Murray, a bus driver, was operating an Interurban Transportation bus along the route from Alexandria to Claiborne, Louisiana. Shortly after passing a place called Pug's Filling Station, Murray noticed a man lying just off the highway (R. 17). He investigated and found him sprawled face downward in the middle of a gravel side road about ten or fifteen feet from the highway. Blood was splattered over the back of his head, his face and his body (R. 17, 18, 21, 22). The authorities at Camp Claiborne, a few miles down the highway, were notified and, within a half or three-quarters of an hour, military police from the camp arrived at the scene, followed soon by an ambulance from the station hospital (R. 18, 21, 22). The injured man was removed to the station hospital where it was found that he was suffering from a "severe lacerated and contused wound on the back of the skull" which could have been caused by a blunt instrument (R. 22, 25, 26). He was identified as E. J. Beaty, 63 years of age, a taxi driver employed by F. A. Williams of Alexandria (R. 12, 14, 18-20, 26, 33, 37, 44; Exs. E, F). He had been working that night driving a cab and, when last seen about 8 p.m., he had collected about $12 in fares (R. 9, 10). He had been driving a 1939 Pontiac taxi and all of its windows were intact when he commenced work (R. 13).

At the station hospital the medical authorities decided that Beaty could be safely moved to a civilian hospital (R. 25). A private ambulance was summoned and he was transported to the Huey P. Long Charity Hospital at Pineville, arriving there sometime around 1 a.m. on 30 January (R. 33, 34, 36). There he was found to be in a coma, was restless and had to be restrained. Examination revealed he had a jagged injury at the base of his skull, approximately 4 or 5 inches long and of undetermined depth (R. 37). He was given supportive treatment to overcome shock and decrease the intra-cranial pressure but eventually expired at approximately 9 p.m. on 1 February (R. 38). The cause of death was intra-cranial pressure produced by the skull injury (R. 40; Exs. I, J). No complications had caused or contributed to his death (R. 41).

About the time Beaty was being transported to the Charity Hospital, a state police patrol located an abandoned taxi near

Bringhurst Station on the Alexandria-Camp Claiborne road about 1500 to 2000 feet from, but within sight of, the main gate of the camp to which it was removed (R. 49, 51, 58, 59). The next morning F. A. Williams identified it as the taxicab that Beaty had been driving the previous evening (R. 44, 45). There was blood on the front seat, one driving rod had been burned out and the other was badly damaged. The window glass in the right front door and left back door was shattered (R. 45, 46).

Early on the morning of 30 January, some deputy sheriffs examined the spot where the abandoned car had been found. Footprints were discovered on the right of way bordering the highway indicating that someone had stepped from a vehicle. The deputies followed them some 50 or 60 feet into an adjacent woods and came upon a raincoat thrown upon a pile of blackjack brush (R. 50, 51, 53). There was a man's handkerchief in one pocket of the raincoat with the marking "J-0295" on it (R. 50, 54, 57). The deputies proceeded to the office of the Provost Marshal at Camp Claiborne, and exhibited the handkerchief with its marking and also the raincoat which was identified as Government issue (R. 51, 55, 56, 61). The Provost Marshal's office communicated with The Adjutant General's Office in Washington, and on or about 19 February, received word that there was a Charles Johnson in the 1307th Engineers at Camp Claiborne who had an Army serial number with "0295" as the last four digits thereof (R. 63, 74). Immediately Captain Caston and Sergeant Goldstine of the Provost Marshal's office went to Johnson's barracks where a routine "show down" inspection of clothing was in progress (R. 64). The sergeant noticed a handkerchief among Johnson's effects bearing the marking "J-0295" and with border trimming similar to that on the one found in the raincoat. He also noticed that Johnson's blouse had " a big smudge on it that looked like blood" (R. 64, 65). Johnson was then driven to the Provost Marshal's office and on the way, without any mention being made to him of the reason for the trip, he vouchsafed that "I have an idea what you are taking me in for" (R. 65). He asserted that he had not done it, that he knew who had but was not going to tell. When informed he had better reveal the culprit's name and clear himself, he stated that it was Nick Peros. The latter was then picked up and also taken to the Provost Marshal's office (R. 66, 70).

After brief questioning at the Provost Marshal's office, Peros and Johnson signed written confessions which were admitted in evidence, except for the third paragraph of Johnson's confession (R. 66, 78, 79, 82; Exs. N, O). The confessions were made by each accused separately after their rights had been fully explained to

them and without any threats, promises or inducements being made; each was told he did not have to make a statement and that if he did it could be used against him (R. 71, 75-78). Peros, in his confession, stated in essential particulars that he and Johnson hailed a taxi in Alexandria on the night of 29 January and that, as they got into the cab, Johnson handed him a piece of 2 x 4 lumber. Johnson sat in the front seat and Peros in the rear. It had been previously agreed that, when Johnson began to whistle, Peros was to hit the driver "on the head with the 2X4". After Johnson had whistled several times, Peros summoned "enough nerve" to strike the driver. He struck him on the head several times with the 2 x 4. Johnson reached for the steering wheel and stopped the vehicle. Peros tossed the 2 x 4 into adjacent woods and then searched the driver, removing two billfolds from his pockets which were subsequently found to contain no funds. The driver was then "kicked" out of the cab. Johnson and Peros took the cab about two miles down the road and abandoned it when apparently motor trouble developed. They took to the woods adjacent to the highway, discarded their raincoats and made their way back to Camp Claiborne (Ex. N).

Johnson, in his exculpatory confession, stated in essential particulars that he was in Alexandria with Peros on 29 January and that they engaged a cab to return to camp. Johnson did not have enough money to pay the fare but Peros had stated he would take care of it. When a few miles from camp Peros, who was in the rear seat, struck the driver over the head with a piece of 2 x 4 lumber. Johnson, in the front seat, grasped the steering wheel, admonished Peros for his actions, pulled the taxi to the side of the road and stopped it. Peros borrowed Johnson's handkerchief to wipe some blood from the windshield. Thereafter Johnson followed Peros through the woods and discarded his raincoat on the way (Ex. O).

After the confessions were made, the accused took Captain Caston, Captain Whitt and Sergeant Goldstine of the Provost Marshal's office and some deputies from the sheriff's office to the place where Beaty had been found by the bus driver (R. 83, 84). The accused then took them to the general locality where the piece of 2 x 4 lumber had been hurled from the cab and, after a short search, it was found. One end of it was covered with blood (R. 84, 85, 87).

4. Each of the accused introduced direct evidence of their respective good characters. Also, it was stipulated that if some twelve persons were present they would testify to the good character of the accused Johnson as set forth in their respective statements (Ex. Q).

The accused Peros, after his rights had been fully explained to him, elected to take the stand and testify under oath in his own

behalf. He testified that on the evening of 29 January he and Johnson were strolling about the streets of Alexandria practically without funds, he, Peros, not having been paid for a couple of months. Johnson suggested they "roll" a taxi driver to obtain money. After some discussion the two accused decided to assault a taxi driver, knock him unconscious and then rob him. It sounded like a simple proposition to Peros. Near a filling station Johnson picked up a piece of 2 x 4 lumber about 16 inches long and handed it to Peros who put it under his raincoat. It was agreed that Peros would ride in the back of the cab, Johnson in the front and, when Johnson whistled, Peros was to assault the driver while Johnson took over control of the machine. They then hailed a cab, Johnson seating himself in front and Peros in the rear, and they directed the driver to take them to Camp Claiborne. After they had proceeded several miles Johnson commenced whistling but Peros did nothing. Johnson then whistled more loudly and Peros thereupon struck the driver twice with the 2 x 4. As the driver slumped in his seat, Johnson shut off the ignition. Johnson then pulled the driver from behind the steering wheel, crawled over him, started the motor, and drove the cab off while Peros searched the driver's pockets, removing two old wallets. The stricken man began to move so Peros hit him twice more with the 2 x 4. Shortly thereafter Johnson stopped the cab opposite a gravel side road, searched the driver's shirt pocket and then "kicked" him out of the cab. Peros borrowed Johnson's handkerchief to wipe blood from the windshield, put it in his raincoat pocket and the two accused started off in the cab which soon developed motor trouble. The accused rid themselves of the piece of 2 x 4 lumber, hurling it from the cab, and shortly thereafter the cab was abandoned. The two accused then made their way back to camp through an adjacent woods, discarding their raincoats en route. Peros had not had anything to drink at any time during this evening. The raincoat found by the deputies on the pile of blackjack brush belonged to Peros and the handkerchief found in the pocket was the one Peros borrowed from Johnson to wipe blood from the taxi's windshield (R. 113-130).

The accused Johnson, after his rights had been fully explained to him, also elected to take the stand and testify under oath in his own behalf. He testified that he and Peros hitchhiked a ride from Camp Claiborne to Alexandria on the evening of 29 January, arriving there about 7 p.m. While they were strolling about the town Peros complained that he had no money. Johnson had but little, not having been paid for three months. Peros

suggested they "roll a taxi cab driver". After discussing the matter they agreed "to rob some man, take his money away from him, and just stun him with something so that -- so he wouldn't know who done it." Peros suggested they use a gas pipe as a weapon but Johnson objected that they might kill somebody with such an instrument. Peros finally picked up a piece of 2 x 4 lumber and put it under his coat, Johnson agreeing with him that it would be a sufficient weapon. Since Peros could not drive it was decided that Johnson would take over control of the cab when the assault was made. It was agreed that they would tell the cab driver to take them to the Silver Star, a night club located on the highway to camp, and would then assault him along the route unless, however, traffic was heavy in which event Johnson was to tell the driver to continue on to camp. They hailed a taxi at the railroad depot, Johnson getting into the front seat and Peros into the rear, and directed the driver to take them to the Silver Star. As there was traffic along the road, Johnson told the driver to continue on to camp. Thereafter traffic thinned to negligible proportions and Johnson, waiting for Peros to assault the driver, turned around to look to the rear. Peros then struck the driver on the head with the 2 x 4 and Johnson reached for the steering wheel and cut the ignition. Peros pulled the driver over to the right side of the front seat and Johnson crawled over him, started the cab and drove off. The driver commenced to groan and sob so Peros hit him again "two or three times". Peros ransacked the driver's pockets and took his billfold. Soon Johnson stopped the cab opposite a gravel side road, Peros pulled the driver out and deposited him in the middle of the gravel road, and then took Johnson's handkerchief to wipe some blood from the windshield. Thereafter they drove on a little further, eventually abandoned the cab when the motor became noisy, sought cover in the woods bordering the highway and made their way through them back to camp, discarding their raincoats en route. Johnson was tired that night, he was worried over his wife who was soon to enter a hospital and he was almost without funds, having received no pay for three months. He stated that if at any other time "Nick had suggested anything like that, I don't believe I would ever have done it." (R. 131-145).

5. The evidence conclusively shows that on the night of 29 January the two accused conspired to hire a taxicab, assault the driver by striking him over the head with a piece of 2 x 4 lumber and then rob him of his funds. In execution of this plan

the two accused engaged the cab driven by Beaty and, along a lonely stretch of the highway leading from Alexandria to Camp Claiborne, Peros brutally struck Beaty over the head several times with the club while Johnson, the only one of the two able to drive an auto, took over operation of the cab. Thereafter Peros ransacked the driver's pockets and removed two wallets. The assaulted driver was left lying alongside of the highway and, fatally injured by the vicious attack, died in the hospital within three days thereafter. These facts are all fully established by the prosecution's evidence, the voluntary confessions of the accused and the sworn testimony of each of them given at the trial. Although the confession of one conspirator is not admissible against co-conspirators, a person concerned in an offense such as a conspirator or an accomplice is competent to testify fully as to the offense and the sworn testimony of one conspirator is competent evidence against the other (MCM, 1928, pars. 114c, 120d).

Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148a). "Unlawful" means without legal justification or excuse (MCM, supra). "Malice aforethought" exists if death results from acts done with intent to do grievous bodily harm to a person or with intent to commit a felony (MCM, supra). Robbery is a felony (MCM, 1928, par. 149d). The killing was unlawful since accused had no legal justification or excuse for their brutal assault upon the taxi driver. Malice aforethought is found in the intent of the accused to "stun" the driver by beating him over the head with a piece of 2 x 4 timber in execution of their plan to perpetrate a robbery of his person.

At the inception of the trial, counsel for accused Peros moved that he be tried separately on the ground that the defense of accused Johnson was antagonistic to that of accused Peros, since Johnson's confession was highly prejudicial to Peros (R. 6, 7). The law member denied the motion, ruling that the confession of each accused was applicable only to the confessor and would not be considered by the court as evidence against the other co-accused (R. 7, 78). The ruling of the law member was correct. A motion to sever

> "should be granted if good cause is shown; but in cases where the essence of the offense is combination between the parties - conspiracy, for instance - the court may properly be more exacting than in other cases with respect to the question whether the facts shown in support of the motion constitute a good cause." (MCM, 1928, par. 71b).

In view of the proper ruling of the law member that the confession of each accused would be considered by the court with respect only to

the confessor, it cannot be said that good cause existed for granting the motion. Furthermore, the third paragraph of accused Johnson's confession, the part considered prejudicial as to accused Peros, was stricken from the confession and not admitted in evidence (R. 81, 82). Finally, the sworn testimony given by the accused Peros at the trial conclusively established his complicity in and guilt of the crime thus removing any basis for the motion to sever.

6. The accused Peros is about 23 years of age and War Department records show continuous enlisted service commencing with his induction on 26 December 1942. The accused Johnson is about 21 years of age and War Department records show continuous enlisted service commencing with his induction on 31 December 1942.

7. The court was legally constituted and had jurisdiction of the persons and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentences as to both accused. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 275, Criminal Code of the United States (18 U.S.C. 454).

Thomas H. Tappy, Judge Advocate.

Herbert M. Kridler, Judge Advocate.

Robert B. Harwood, Judge Advocate.

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

(63)

SPJGV
CM 252442

10 APR 1944

UNITED STATES	)	TANK DESTROYER CENTER
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 25 February 1944. Dismissal.
Second Lieutenant DANIEL C. OLSEN (0-1822720), Army of the United States.	)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Daniel C. Olsen, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, attached to Headquarters and Headquarters Company, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, without proper leave, absent himself from his organization at North Camp Hood, Texas, from about 26 November 1943 to about 16 December 1943.

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

3. The evidence for the prosecution shows that on 12 November 1943, the Commanding General, Field Artillery Replacement Training Center, Fort Bragg, North Carolina, where accused was then stationed, issued an order (par. 5, SO 273, Hq. FARTC, Fort Bragg, N. C.) assigning accused to duty with the Tank Destroyer Replacement Training Center at North Camp Hood, Texas, effective 13 November 1943. This order directed accused to proceed to North Camp Hood, Texas, on 13 November 1943, and provided that his necessary transportation be furnished by the Government (Exs. A, C). Upon learning of his transfer accused on 12 November 1943 sent a telegram to

Tank Destroyer Replacement Training Center, North Camp Hood, Texas, requesting ten days leave. On 16 November an order was issued by Headquarters Tank Destroyer Replacement Training Center, Camp Hood, Texas, granting accused ten days leave effective the same date (Ex. B).

Accused failed to report for duty at Camp Hood upon the termination of his authorized leave (R. 6) and continued to be absent without leave until 16 December 1943 when he was brought under military control at Fort Custer, Michigan. He was returned to Camp Hood, Texas 5 January 1944 (R. 7; Ex. C).

4. After accused's rights as a witness were explained, he elected to remain silent.

The testimony of Mr. William N. Lane, Jr., South Haven, Michigan, formerly commander of Company A, 772nd Tank Destroyer Battalion and Captain Henry H. Webb, commander of Battery A, 15th Battalion, 5th Regiment, Field Artillery Replacement Training Center, Fort Bragg, North Carolina, taken by deposition upon written interrogatories was received in evidence for the defense (Exs. 1, 2). Each of these men testified that accused had formerly been under his command; that his efficiency, leadership, fidelity and subordination to duty and discipline were excellent; and that he was well liked by the officers and enlisted men of the battery.

Defense introduced in evidence a certified true copy of accused's honorable discharge rendered 10 December 1942 at the time accused was appointed second lieutenant in the Army of the United States, following his graduation from Tank Destroyer Officer Candidate School.

5. The evidence shows that accused, while stationed at Fort Bragg, North Carolina, with the Field Artillery Replacement Training Center, was on 12 November 1943 transferred for duty with the Tank Destroyer Replacement Training Center at North Camp Hood, Texas, effective 13 November 1943, and ordered to proceed to that station on the latter date. Accused sent a telegram to the Tank Destroyer Replacement Training Center, Camp Hood, Texas, 12 November 1943 requesting ten days leave, and on 16 November 1943 an order granting accused ten days leave effective 16 November 1943 was issued by Headquarters Tank Destroyer Replacement Training Center. Although not shown in the record proper, the papers accompanying the investigating officer's report indicate that when the order granting accused ten days leave was issued, a telegram was sent to him at Fort Bragg advising him of this fact, but was undelivered because he had departed that station 13 November 1943. Upon learning of his departure from Fort Bragg his leave order was revoked and accused thenceforth carried on the morning report as absent without leave. He was returned to military control 16 December 1943 at Fort Custer, Michigan.

6. Accused is 27 years of age and married. He attended high school for three years at South Haven, Michigan. He served six years (3 separate

enlistments) as an enlisted man in the 106th Cavalry with a character rating of excellent on each of three honorable discharges. He was inducted with the National Guard 7 April 1941 and had attained the grade of staff sergeant at the time he graduated from Tank Destroyer Officer Candidate School, Camp Hood, Texas, 11 December 1942. He was appointed second lieutenant, Army of the United States, and ordered to active duty on the last mentioned date.

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

Thomas H. Tapley, Judge Advocate.

Herbert M. Teicher, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 252442

1st Ind.

War Department, J.A.G.O., 27 APR 1944 - 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 Daniel C. Olsen (0-1822720), Army of the United States.

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, to support the sentence, and to warrant confirmation of the sentence. 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 357, 15 Jul 1944)

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

(67)

20 MAY 1944

SPJGH
CM 252521

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Dale Mabry Field, Florida, 25 February 1944. Dismissal.
Second Lieutenant FRANCIS G. GROAT (O-763572), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

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

Specification: In that 2nd Lt Francis G. Groat, AC, Dale Mabry Replacement Depot Detachment, Dale Mabry Field, Tallahassee, Florida, did at Dale Mabry Field, Florida on or about 8 Feb 1944 negligently (and ~~unlawfully~~) kill S/Sgt Harry N. Bielawski, 306th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Florida, by striking him with the right front fender of an automobile which he the said 2nd Lt Francis G. Groat was then operating (~~in a grossly~~ negligent manner.)

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

Specification 1: In that 2nd Lt Francis G. Groat, AC, Dale Mabry Replacement Depot Detachment, Dale Mabry Field, Tallahassee, Florida, did, at Dale Mabry Field, Florida, on or about 8 Feb 1944 operate a motor vehicle while under the influence of liquor, this to the prejudice of good order and military discipline.

Specification 2: In that 2nd Lt Francis G. Groat, AC, Dale Mabry Replacement Depot Detachment, Dale Mabry Field, Tallahassee, Florida, did, at Dale Mabry Field, Florida, on or about

8 Feb 1944 while operating a motor vehicle leave the scene of an accident without making himself known and without rendering necessary aid and assistance, after striking and fatally injuring S/Sgt Harry N. Bielawski, 306th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Florida, this to the prejudice of good order and military discipline.

He pleaded guilty to Specification 2, Charge II, and to Charge II; and not guilty to the remaining Specifications and Charge. He was found guilty of the Specification, Charge I, except the words "and unlawfully" and "in a grossly negligent manner"; not guilty of Charge I but guilty of a violation of the 96th Article of War; and guilty of Specifications 1 and 2, Charge II and of Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: Second Lieutenant William R. Brock testified that he and accused were members of the same organization and stationed at Dale Mabry Field, Tallahassee, Florida. They left the base on the afternoon of 8 February 1944 at approximately 1600 and drove to Tallahassee in the car of accused. Here they visited a place called the "High Hat" where they consumed a "couple of beers and a sandwich". They also opened a "bottle of whiskey" and each had "three or four" drinks mixed with "coke and lemon juice". They drove back to the base, Lieutenant Brock at the wheel, about 1730, to pick up Lieutenant Brock's raincoat, remained there "20 or 30" minutes and then returned to the "High Hat", "not long after six". They continued drinking until there was "slightly less than half" of the bottle of whiskey left. Each drank about the same amount. About 2000 they returned to the base, accused driving the car. They stopped at the "east gate", were recognized by the guards, and continued "on the road coming into the base". The road was "perfectly straight", about 40 feet wide, with room for two traffic lanes in each direction, and a white line in the middle. It was about 2015 or 2030, dark, the headlights were on and there were some other cars on the road. Lieutenant Brock was "turned in the seat leaning on the door" talking to accused. Accused was watching the road and driving "25 or 30, it wasn't very fast". He (Brock) heard a "thud", saw the "fleeting image" of a man in front of the right fender and told accused they had hit someone. Accused was "dubious of that fact" but Lieutenant Brock "convinced" him. Accused became "highly frightened and excited". Lieutenant Brock told him they would have to stop and pick the man up. Accused drove on "perhaps another block", turned the car around, passed the scene of the accident, said they were going to leave the base and came back to the gate. When he stopped at the gate Lieutenant Brock got out and reported "it to the MP" and then went to the provost marshal. Accused drove off on the "road that leads into town".

Lieutenant Brock further testified that the accident occurred "where the extension of the runway meets the road". There were street lights at the place. Accused had been driving in a "normal" manner and did not change his speed after the accident occurred (R. 7-17).

Photographs (Exs. 2 and 3) of the car driven by accused, taken shortly after the accident, were received in evidence. They disclose a broken lens on the right headlight and a pronounced indentation in the right fender above the headlight (R. 17).

Corporal Steve A. Gornich, 306th Fighter Squadron, testified that he and Staff Sergeant Harry Bielawski worked in the engineering section at the base and finished work at 2000 on 8 February 1944. They had a soda and proceeded up the road toward their barracks. They wore light colored fatigue clothes; those Sergeant Bielawski wore had faded nearly white from washing. They walked on the right hand side of the paved portion of the road, Gornich about six or seven inches from the edge of the pavement and Bielawski close at his left side. There were other pedestrians on the road. Ordinarily there was considerable pedestrian traffic along the side of the road. It was "pretty dark", but it was clear and the road was dry. Gornich noticed the approach of a car to their back by the flash of the headlights, suddenly there was a noise, something brushed along Gornich's thigh, he saw sparks flying, apparently from Bielawski's cigarette, and Gornich realized Bielawski had been hit. His body was thrown about 25 or 30 feet ahead and lay in the gutter next to the pavement. Gornich saw the tail light of the car as it continued up the road without stopping or slowing up. In his opinion it was traveling about 35 or 40 miles an hour. Gornich further testified that they usually marched to work and had been instructed to face the traffic. This night they were walking with the traffic. Bielawski made no sound when he was hit and Gornich did not yell out. He did not know whether Bielawski was thrown or carried forward by the car (R. 22-29).

Bielawski was taken to the station hospital where, according to the death certificate (Ex. 1), he died on 9 February 1944 at 8:40 a.m. An autopsy performed on that date disclosed extensive trauma of the brain and hemorrhage over the surface of the brain, considerable trauma of the chest wall, hemorrhage at the base of the left lung and in some of the lobes of the intestinal tract and fracture of the left knee. These injuries, a medical officer testified, were consistent with his being struck by an automobile, and were the cause of death (R. 6-7, 20-21, 26).

Between "quarter to nine and nine o'clock", "20 minutes to a half hour" after Lieutenant Brock reported the accident at the east gate of the field, accused came up to the sentry and said "he had been drinking and had hit a soldier on the base, and he got excited and went off the base and he

came back to report it". Accused was very nervous and "wasn't walking straight". The sentry testified, however, "I can't say he was drunk". Accused was taken to Major John E. Gross, provost marshal of the base, "about 9:00 o'clock". There was the odor of liquor about accused, he appeared to have been drinking, his nose was red, eyes watery and his step "rather" unsteady. Major Gross thought accused was under the influence of liquor. Accused was taken to the hospital for a sobriety test. On the way to the hospital, after being warned that whatever he said might be used against him, he told Major Gross that he was very much upset, he had been driving a car with Lieutenant Brock and struck a man, he became very frightened and started to leave the base, Lieutenant Brock demanded that he be let out of the car saying "he didn't want to have anything to do with this business", and when the car reached the gate Lieutenant Brock got out while he (accused) went on. Accused also told Major Gross that he had drunk "three or four" bottles of beer and that he and Lieutenant Brock had split a bottle of whiskey between them. Major Gross did not recall whether accused said a "pint or a fifth". The car of accused was examined the next day and Major Gross thought two unopened "fifths" of whiskey were found in it, but no open bottles (R. 29-33, 34-35).

Accused was given an "army intoxication test" at the hospital at about "9:00 o'clock" by First Lieutenant David Frost, Medical Corps. Accused was observed to have the "smell" of alcohol on his breath; he was "quite confused" and "rather hesitating" in repeating "Methodist Episcopal" after the medical officer; he had a "slight amount" of difficulty in walking a straight line; he wavered and had "slight difficulty" maintaining his balance when he stood with heels and toes together, hands behind his back or at his side, with his eyes closed; he had no hand tremors when his arms were stretched out; he "practically fell over" when he placed his right heel in front of his left toe; he stated he had consumed about three bottles of beer and "an unspecified amount" of whiskey; and a blood test given at "9:40" revealed "one mgm percent" of alcohol. Based upon these tests (other than alcoholic content of blood) Lieutenant Frost was of the opinion that accused was under the influence of intoxicating liquor and could not perform his normal military functions. He admitted that a highly excited, extremely frightened man would have difficulty in performing the tests. A report (Ex. 4) summarizing the results of the tests was made out upon their completion and signed by Lieutenant Frost, Major Gross and accused. Lieutenant Frost believed that a man could sign his name and still could not perform his military functions. He did not think "the man was very drunk" (R. 17-22).

Accused, after being informed of his rights, made a sworn, written statement (Ex. 5) to the investigating officer, in which he recounted the events on the night in question substantially as related by Lieutenant Brock in his testimony. Accused stated that they opened a

"fifth" and each consumed about a half pint of whiskey during the afternoon and evening. After returning to the base accused was driving about 25 miles per hour when he heard a "thud" but he did not see anything. Lieutenant Brock said accused had hit somebody. Accused became very frightened, and drove out to the gate where Lieutenant Brock got out while accused drove on. After "10 or 15 minutes" accused realized "what a big mistake" he had made so he returned to the base and reported the accident (R. 33-34).

4. Evidence for the defense: Captain Francis W. Paul, Medical Officer with the 305th Fighter Squadron, identified "Laboratory Methods of the United States Army" (Ex. 6) as a manual of laboratory procedure in use at the station hospital at Dale Mabry Field. The manual states that the amount of alcohol in the urine approximates the amount of alcohol in the blood, and that according to medical research a concentration of one milligram per cubic centimeter of urine indicates a "decent and decorous" condition, two milligrams "distinctly drunk", three milligrams "drunk and disorderly", and four milligrams "dead drunk". Captain Paul was of the opinion that the "shock and realization of what happened" would account for the reactions displayed by accused to the sobriety test recorded on Exhibit 4. On cross-examination Captain Paul stated that the odor of alcohol on the breath of accused and the presence of alcohol in his blood could not be accounted for by shock. He further stated that the figures given in the laboratory manual were "average figures" and that some individuals unaccustomed to drinking would be "dead drunk" with "1% alcohol content in the blood" while others could have more than "4%" and still not be "dead drunk". A person with "1%" alcoholic content is under the influence of alcohol, but normally would remain decorous (R. 35-38).

Lieutenant Brock, recalled as a defense witness, testified that he and accused had each consumed about a half pint of whiskey between 4:30 and 8:00 p.m. on 8 February. Accused gave no indication of being drunk at the time of the accident. Immediately after the accident accused appeared "to not have control of himself" (R. 38-40).

Accused testified that this was "one of the saddest incidents" in his life. He had tried to supply the truth on everything that he could and had made a sworn statement to the investigating officer which was the "exact truth that it is possible for me to tell". The collision with Sergeant Bielawski along with the statement of Lieutenant Brock threw him into a panic, he could not think or do anything that an "intelligent man" should have done at the time, and it was 10 or 15 minutes before he realized what he should have done. As to his condition at the hospital during the examination, he was not drunk, only nervous and upset. He did not drive under the influence of alcohol. He operated the car in a careful manner, was not

negligent, did not exceed the speed limit, did not drive on the wrong side of the road and was in the "usual spot" a car should be in at all times (R. 41, 43-44).

On cross-examination and examination by the court accused testified that his car was in excellent working condition, his headlights were the new sealed beam lights no portion of which was blacked out, and at the time of the accident they were on low beam. There were cars coming from the opposite direction with their headlights on. He was watching the road and driving "at least three or four feet" from the right hand side of the road. He did not see "these two boys" in the street or any other pedestrians. All he heard was "the noise". The impact put out his right light but he did not notice it at the time. After he turned around he made no effort to stop or look for the body. He stopped at the gate to be recognized and not for the express purpose of allowing Lieutenant Brock to alight. After he left the field he drove to Tallahassee, made a circle around the town and came right back (R. 41-44).

5. a. Accused and Lieutenant William R. Brock left Dale Mabry Field at 1600 on 8 February 1944 in a car belonging to accused and drove into Tallahassee where they visited a place called the "High Hat". Between that time and 1730 when they returned to the base to pick up Lieutenant Brock's raincoat each had a couple of bottles of beer and three or four drinks of whiskey mixed with "coke" and lemon juice. They came back to the "High Hat", drank some more whiskey and finally returned to the base about 2000. According to accused and Lieutenant Brock each consumed about a half pint of whiskey during the afternoon and evening. Accused drove the car back to the base, stopped at the gate to be recognized and then continued on the road into the base. The road was straight, paved, about 40 feet wide, with room for two traffic lanes in each direction and a white line in the middle. It was dark, the night was clear and the road dry. About 2015 or 2030 Staff Sergeant Harry Bielawski and Corporal Steve A. Gornich were walking along the road on the way to their barracks from the engineering section where they had been working. They walked on the right hand side of the road, Gornich about six or seven inches from the edge of the pavement with Bielawski close to his left side. They wore light colored fatigue clothes. According to Gornich there were other pedestrians on the road. The car driven by accused overtook the two soldiers, the right hand fender struck Bielawski and carried or threw him a distance of 25 or 30 feet ahead. There were street lights at this place in the road. The car did not change speed but continued down the road at a speed estimated by Gornich at 35 or 40 miles per hour. Bielawski was taken to the station hospital where he died the following morning from the injuries received.

Lieutenant Brock testified that accused was watching the road at the time of the accident and driving around 25 or 30 miles per hour.

Accused testified to the same effect and stated that he did not see the two soldiers or any other pedestrians on the road. The first they were aware of was a "thud" and Lieutenant Brock saw the "fleeting image" of a man in front of the fender. Accused became frightened and excited, drove on a short distance and then returned past the scene of the accident. Lieutenant Brock said they would have to pick the man up but accused did not stop and said they were going to leave the base. When accused stopped at the gate Lieutenant Brock got out of the car and reported the accident to the sentry. Accused, however, drove off the base and into Tallahassee. He returned to the base about "20 minutes to a half hour" after Lieutenant Brock had reported the accident, approached the sentry and said he had been drinking and had hit a man at the base. The sentry noted that accused was not walking straight but testified "I can't say he was drunk". Accused was turned over to Major John E. Gross, the provost marshal, who observed an odor of liquor about accused, nose red, eyes watery and step "rather" unsteady. Accused told Major Gross that he and Lieutenant Brock had split a bottle of whiskey between them. Major Gross could not recall whether accused said a pint or a "fifth". In a statement to the investigating officer accused said they had opened a "fifth" of whiskey.

Accused was given an intoxication test at the hospital about 2100. He was found to have one milligram per cubic centimeter of alcohol in his blood (blood test taken at 2140); there was the odor of alcohol on his breath; he had difficulty in repeating the words "Methodist Episcopal"; he had difficulty in walking a straight line and in balancing himself when he stood with heels and toes together, hands behind his back and eyes closed; and he "practically" fell over when he placed his right heel in front of his left toe. On the basis of these tests the medical officer gave his opinion that accused was under the influence of intoxicating liquor and could not perform normal military functions, although he was not "very drunk".

b. The evidence is sufficient to show beyond any reasonable doubt that accused operated his automobile while under the influence of liquor as alleged (Spec. 1, Chg. II). The evidence also clearly shows, and his plea of guilty admits, that accused left the scene of the accident without making himself known and without rendering necessary aid or assistance (Spec. 2, Chg. II). Such acts were in violation of the 96th Article of War.

c. The remaining Specification (Spec., Chg. I) alleged that accused did "negligently and unlawfully kill S/Sgt Harry N. Bielawski * * * by striking him with * * * an automobile which he * * * was then operating in a grossly negligent manner," in violation of Article of War 93. The court found him guilty of the Specification except the words underscored, "and unlawfully" and "in a grossly negligent manner", in violation of Article of War 96.

The Specification as drawn alleges the offense of involuntary manslaughter defined by the Manual for Courts-Martial (par. 149a), as an unlawful "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law". By its findings that the homicide was not unlawful and his operation of the car not grossly negligent, the court acquitted the accused of manslaughter and found him guilty of negligently killing "S/Sgt Harry N. Bielawski" by striking him with an automobile which accused was then operating. There is ample evidence to show that the homicide was the result of negligence on the part of accused. Accused operated his car while under the influence of liquor and at a speed in excess of that reasonable and proper under conditions then existing. His testimony that he did not see the deceased walking along the road shows that he failed to maintain a proper lookout for pedestrian traffic on the road, in the absence of any factors which might have interfered with his vision. His negligent killing of another soldier on a military post was a neglect to the prejudice of good order and military discipline and a violation of Article of War 96.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 15 March 1943; appointed temporary second lieutenant, Army of the United States, and active duty, 7 January 1944.

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 of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate.

[illegible], Judge Advocate.

(Dissent), Judge Advocate.

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

SPJGH
CM 252521

20 MAY 1944

UNITED STATES	)
	)
v.	)
	)
Second Lieutenant FRANCIS G. GROAT (O-763572), Air Corps.	)

DISSENTING OPINION
LOTTERHOS, Judge Advocate

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1. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge II, and of Charge II, to support the sentence and to warrant confirmation of the sentence. I also concur in the statement that the court by its findings acquitted accused of manslaughter and found him guilty of negligent homicide. Although I agree that the evidence shows that accused negligently killed Bielawski by striking him with the fender of an automobile which accused was driving, I do not concur in the view that the Specification, Charge I, without the words excepted by the court in its findings, charges an offense.

2. That a specification must exclude every reasonable hypothesis of innocence - must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent - may be regarded as the settled law "of this office" as it is the settled law of the land (CM 187548, Burke, citing CM 132905, Osborn, and CM 110347, Denham).

3. Where an act charged is not per se an offense, words must be used in the specification to make it an offense, as "assault", "unlawful" or "wrongful" (See Dig. Op. JAG, 1912-40, sec. 451 (8) (CM 113535 and CM 130811); 1 Bull. JAG 18 (CM 218409, Chadderdon); 2 Bull. JAG 17 (CM 226512, Lubow)). In the Lubow case it was held that an allegation that accused "did * * * drive a motor vehicle while drunk", in violation of the 96th Article of War, did not state an offense, because it was not alleged that the driving was "wrongful or unlawful" nor that the vehicle was driven on a public road or highway.

4. The thing which accused was found guilty of doing was negligently driving a car. As I see it, neither the fact that accused was driving his car on a military post nor the fact that the death of a pedestrian resulted

from his negligence, can convert into an offense that which otherwise was not. There is no special limitation (absent some regulation, which was not shown) applicable to a driver on a military post which subjects him to punishment for operating his car in a manner which outside the post would not constitute an offense. The death of Bielawski was a result, not an element, of the offense, if any. This is not an instance of willful conduct where the result might be considered as a part of the act intended by an accused. The death was an unintentional consequence of the negligent operation of the automobile.

The question is whether negligent operation of a car is an offense. It is my opinion that it may be, or it may not be, depending on the circumstances. Negligence may be a very trivial deviation from absolute care, or it may be a gross deviation. Under the rule first stated above, the specification must necessarily exclude innocence. Since it is clear to me that a person may be negligent to some extent in driving a car, and yet be innocent of an offense, I can reach no other conclusion than that this specification, not including any allegation of wrongfulness nor of facts showing that the negligence was of such character as to constitute an offense, does not charge an act for which accused may be punished.

In effect, the court found that the death of Bielawski was accidental, though resulting from simple negligence, when it found accused not guilty of an unlawful act or gross negligence, without substituting any words alleging wrongful conduct in less degree.

F J Lotterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 MAY 1944 - 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 Francis G. Groat (0-763572), 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 of guilty and the sentence, and to warrant confirmation of the sentence. The accused, while under the influence of alcohol, drove his car on a road inside an air base at night (Spec. 1, Chg. II) and struck an enlisted man walking along the road causing injuries from which he died the following morning. The accused was tried for involuntary manslaughter but the court found him guilty only of negligently causing the death of the enlisted man in the operation of his automobile (Spec., Chg. I). After striking the deceased, the accused did not stop but drove away from the scene of the accident without rendering assistance or making himself known (Spec. 2, Chg. II). Although the accused, in the language of a medical officer who examined him shortly after the accident, was not "very drunk", he was sufficiently under the influence of alcohol to be unable to drive his car in a careful manner and through his negligence caused the death of an innocent soldier. The court might well have convicted the accused of manslaughter under the circumstances of the case. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. of ltr. for sig. of S/W.
Incl.3-Form of Action.

(Sentence confirmed. G.C.M.O. 403, 27 Jul 1944)

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

SPJGK
CM 252536

7 APR 1944

UNITED STATES	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Butner, North Carolina, 17 March 1944. Dismissal and total forfeitures.
	)	
Second Lieutenant WILLARD J. BASTIAN (O-1169855), Field Artillery.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Willard J. Bastian, 161st Field Artillery Battalion, did, without proper leave, absent himself from his organization at Camp Butner, North Carolina, and West Virginia Maneuver Area from about 19 February 1944 to about 29 February 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced "to be dismissed from 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. Summary of evidence.

The prosecution introduced as its Exhibit A an extract copy of the Morning Report of accused's battery, which showed that he absented himself without leave on 19 February, 1944 and returned to duty on 29 February 1944 (R. 6). Captain Leslie M. Greiner, commanding officer of Battery B, 161st Field Artillery Battalion, Camp Butner, North Carolina, testified that he was accused's commanding officer, that accused was absent without leave at the time he took command of the battery in the West Virginia

winter maneuver area, that the organization had left Camp Butner for that area on 20 February 1944, and that accused reported to him on Mozark Mountain in the maneuver area on 2 March 1944. He did not give accused permission to be absent from the battery (R. 6,7).

Evidence for defense.

Defense counsel informed accused of his rights as a witness, and accused elected to be sworn and testify. He reported for duty with the 35th Infantry Division on 9 February 1944. He did not ask for or receive any delay en route to this organization, though other members of the group who reported at the same time did so. He had already been on maneuvers in the same area, with a tank destroyer outfit, for five weeks during November and December of 1943. He wanted and applied for a leave a week after reporting to the Division, but it was refused. Since other officers were obtaining leaves at that time, and since he had already had five weeks of mountain training, he "felt justified I wouldn't be missing anything" by absenting himself without leave. He told "Lieutenant Kauffman" of his battery on the evening of 18 February that he was going absent without leave for ten days, and asked Lieutenant Kauffman to take his bedroll with the unit so that it would be there when he reported for duty. He knew the maneuvers were an important part of his training (R. 8-10).

Accused stated that his reason for absence without leave was "personal" and that he desired not to divulge it (R. 10).

Captain Greiner, recalled as a witness for the defense, stated that he had known accused for about fifteen days, that accused had done a good job, that he "could make good use of" accused as a battery officer, and would take him back in the battery.

4. The findings of the court are substantiated by prosecution's evidence, accused's plea of guilty, and by his testimony as a witness.

5. War Department records show that accused is 25 years of age and single. He graduated from the University of Syracuse, New York, with an A.B. degree in 1941, and entered the Army in July of 1941. He attended The Field Artillery School, Fort Sill, Oklahoma, and was commissioned a Second Lieutenant, Field Artillery, Army of the United States, on 17 September 1942.

6. The court was legally constituted and had jurisdiction of the person and the offense. 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 Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 17 APR 1944 - 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 Willard J. Bastian (O-1169855), 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 the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 319, 22 Jun 1944)

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

SPJGN
CM 252576

14 APR 1944

UNITED STATES	NEWFOUNDLAND BASE COMMAND
v.	Trial by G.C.M., convened at U.S. Army Air Base, A.P.O. 865, c/o Postmaster, NYC, 29 February to 2 March 1944. Dismissal.
Captain WALTER T. SMITH (0-560533) and First Lieutenant ANDREW J. SHIELDS (0-580215), Air Corps.	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Captain Walter T. Smith (then known as First Lieutenant Walter T. Smith), 71st Base Headquarters and Air Base Squadron, having received a lawful command from Lieutenant Colonel William F. Fletcher, 71st Base Headquarters and Air Base Squadron, his superior officer, to leave the

club, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, willfully disobey the same.

Specification 4: In that Captain Walter T. Smith (then known as First Lieutenant Walter T. Smith), 71st Base Headquarters and Air Base Squadron, having received a lawful command from Captain George A. Seitz, 71st Base Headquarters and Air Base Squadron, his superior officer, to leave the club, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, willfully disobey the same.

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

Specification 1: In that Captain Walter T. Smith (then known as First Lieutenant Walter T. Smith), 71st Base Headquarters and Air Base Squadron, was, at United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944; in a public place, to wit, the Officers' Club, during a social function, disorderly while in uniform.

Specification 2: In that Captain Walter T. Smith (then known as First Lieutenant Walter T. Smith), 71st Base Headquarters and Air Base Squadron, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, wrongfully use defamatory, disrespectful, insubordinate, vile, and insulting language to Lieutenant Colonel William F. Fletcher, 71st Base Headquarters and Air Base Squadron, a superior officer, who was then in the execution of his office, in the presence of women, civilians, enlisted personnel, officers of an allied and friendly nation's armed forces, officers of the base, and transient officers, to wit: He was "just another phoney, * * * full of chicken shit too. * * * Arrest my ass. That is chicken shit. * * * The hell with you. You are just chicken shit. You guys are trying to run this place to suit yourself," or words to that effect.

Specification 3: In that Captain Walter T. Smith (then known as First Lieutenant Walter T. Smith), 71st Base Headquarters and Air Base Squadron, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, wrongfully use defamatory, disrespectful, insubordinate, vile, and insulting language to Captain George A. Seitz, 71st Base Headquarters and Air Base Squadron, a superior officer, who was then in the execution of his office, in the presence of women, civilians, enlisted personnel, officers of an allied and friendly nation's armed forces, officers of the base, and transient officers, to wit: "Some God damn people are trying to run this place the way they see fit. I'm fed up with this chicken shit. You are a fucking Joe. You are just a phoney. * * * Hey, you big Joe, you chicken shit. Hey, you big Joe, I want to talk to you. You bastard. You are full of shit. Fuck you—you bastard. * * * You chicken shit," or words to that effect.

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

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

Specification 1: In that First Lieutenant Andrew J. Shields, 71st Base Headquarters and Air Base Squadron, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, offer violence against Lieutenant Colonel William F. Fletcher, 71st Base Headquarters and Air Base Squadron, his superior officer, who was then in the execution of his office, in that he, the said First Lieutenant Andrew J. Shields, did wrongfully push, bump, and pin the said Lieutenant Colonel William F. Fletcher against a wall of the Officers' Club.

Specification 2: In that First Lieutenant Andrew J. Shields, 71st Base Headquarters and Air Base

Squadron, having received a lawful command from Lieutenant Colonel William F. Fletcher, 71st Base Headquarters and Air Base Squadron, his superior officer, to leave the club, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, willfully disobey the same.

Specification 3: In that First Lieutenant Andrew J. Shields, 71st Base Headquarters and Air Base Squadron, having received a lawful command from Captain George A. Seitz, 71st Base Headquarters and Air Base Squadron, his superior officer, to leave the club, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, willfully disobey the same.

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

Specification 1: In that First Lieutenant Andrew J. Shields, 71st Base Headquarters and Air Base Squadron, was, at United States Army Air Base, APO 865, c/o Postmaster, New York, New York, on or about 9 January 1944, in a public place, to wit, the Officers' Club, during a social function, disorderly while in uniform.

Specification 2: In that First Lieutenant Andrew J. Shields, 71st Base Headquarters and Air Base Squadron, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, wrongfully use defamatory, disrespectful, insubordinate, vile, and insulting language to Lieutenant Colonel William F. Fletcher, 71st Base Headquarters and Air Base Squadron, a superior officer, who was then in the execution of his office, in the presence of women, civilians, enlisted personnel, officers of an allied and friendly nation's armed forces, officers of the base, and transient officers, to wit: "The same thing goes for you (Referring to

conversation with Captain George A. Seitz in which accused said, "President my ass, what makes you think you can put me out of here," or words to that effect). * * * God damn it don't be pushing me. Take your hands off me. * * * God damn it you are here in a good safe place. What did you ever do God damn it. God damn it you are no soldier. Who the hell do you think you are? * * * God damn it if you were twenty years younger, I would punch your God damn head off," or words to that effect.

Specification 3: In that First Lieutenant Andrew J. Shields, 71st Base Headquarters and Air Base Squadron, did, at the Officers' Club, United States Army Air Base, APO 865 c/o Postmaster, New York, New York, on or about 9 January 1944, wrongfully use threatening, defamatory, disrespectful, insubordinate, vile, and insulting language to Captain George A. Seitz, 71st Base Headquarters and Air Base Squadron, a superior officer, who was then in the execution of his office, in the presence of women, civilians, enlisted personnel, officers of an allied and friendly nation's armed forces, officers of the base, and transient officers, to wit: "You bastards are trying to run this place. * * * President, my ass. What makes you think you can put me out of here," or words to that effect.

Both accused pleaded not guilty to all Charges and Specifications. The accused Smith was found not guilty of Specifications 1 and 2, Charge I; guilty of Specifications 3 and 4, Charge I, except the word "willfully" of which excepted word he was found not guilty; not guilty of Charge I but guilty of violations of Article of War 96; guilty of Specifications 1, 2 and 3, Charge II; and guilty of Charge II except as to Specification 1 thereunder of which he was found not guilty of Charge II but guilty of a violation of Article of War 96. The accused Shields was found guilty of Specification 1, Charge I; guilty of Specifications 2 and 3, Charge I, except the word "willfully" of which excepted word he was found not guilty; not guilty of Charge I but guilty of violations of Article of War 96; guilty of Specifications 1, 2 and 3, Charge II; and guilty of Charge II except as to Specification 1 thereunder of which he was found not guilty of Charge II but guilty of a violation of Article of War 96. Each accused was sentenced

to be dismissed the service. The reviewing authority as to the accused Smith approved only so much of the findings of guilty of Specifications 2 and 3, Charge II; as involves findings of guilty of the use as alleged of the following language respectively: "full of chicken shit too. * * * Arrest my ass. That is chicken shit. * * * You are just a chicken shit" and "You are a fucking Joe. You are just a phoney. * * * Hey, you big Joe, you chicken shit. Hey, you big Joe, I want to talk to you. You are full of shit. * * * You chicken shit". The reviewing authority as to the accused Shields approved only so much of the finding of guilty of Specification 3, Charge II, as involves a finding of guilty of the use as alleged of the following language: "* * * President, my ass. What makes you think you can put me out of here". The reviewing authority approved the sentence as to both accused and forwarded the record of trial for action under Articles of War 48 and 50½.

3. The evidence for the prosecution shows that on the night of 8-9 January 1944 a cabaret party was held at the Officers' Club, APO 865, New York City. The party was attended by civilians of both sexes, officers of allied and friendly nations' armed forces, officers of the base and transient officers. Liquor was served both at the bar and at the tables in the room used for dancing. Enlisted personnel were present to serve the drinks and to clean up the premises after the party. At about 0100 o'clock, 9 January 1944, the orchestra finished playing, the bar was closed and most of the guests within a few minutes thereafter departed. However, several of each category of those present still remained, sitting at their various tables where most of them had been drinking and milling around preparatory to leaving. At one end of the room some transient officers around a table had become somewhat boisterous. Captain George A. Seitz, President of the Officers' Club, and First Lieutenant Moses S. Koch Jr., Officer of the Guard, attempted to quell the disturbance with the latter remaining near the transients' table and the former proceeding back across the dance floor toward the entrance of the hall leading past the check rooms and to the exit (R. 10-12, 20-22, 48-50; Ex. A).

Near the middle of the dance floor Captain Seitz was intercepted by the accused Shields who complained about the transient officers monopolizing the club. An argument developed between them notwithstanding an attempt by Captain Seitz to change the subject which was participated in by the accused Smith who had come from a nearby table for such purpose. Both accused had been drinking but neither was drunk, and at this and all subsequent material times both were talking in a loud, angry and boisterous manner. The accused

Smith, then a first lieutenant, began to abuse Captain Seitz using the language towards him described in Specification 3, Charge II, as approved by the reviewing authority. Captain Seitz then attempted to leave the two accused by engaging in conversation with First Lieutenant Annis G. Thompson, a member of the club's entertainment committee, who had just approached. The two accused, however, persisted in the argument and were thereupon ordered to leave the club by Captain Seitz. Lieutenant Colonel William F. Fletcher, the Executive Officer and Provost Marshal at the base, having observed and heard the argument from his nearby table then approached the group just as the accused Shields was uttering the language described in Specification 3, Charge II, to Captain Seitz and just in time for such accused to apply it by reference to him, Lieutenant Colonel Fletcher, who thereupon assumed command and ordered both accused to leave the club. The accused Shields then withdrew to the check room and secured his parka but the accused Smith followed Lieutenant Colonel Fletcher and Captain Seitz, who proceeded toward the transients' table and continued to abuse the latter with language as above mentioned. The transient officers were ordered to leave and Lieutenant Colonel Fletcher and Captain Seitz were pressing them and the accused Smith toward the door where the accused Shields was again encountered and he, upon being turned toward the door by Lieutenant Colonel Fletcher, used the following language: "God damn it don't be pushing me. Take your hands off me". The transient officers continued their disturbance and it, augmented by the actions of both accused, continued into the hall, past the check rooms and to the exit. In the crowded hall the accused Shields bumped, pushed and pinned Lieutenant Colonel Fletcher against the wall and was again ordered to leave but instead of going, he made the profane remarks reflecting upon the executive officer's valor as stated in Specification 2, Charge II, before finally leaving in company with another officer after being again ordered to leave. While in the hall the accused Smith continued his abuse of the executive officer making his remarks concerning his threatened arrest as stated in Specification 2, Charge II, as approved by the reviewing authority, after the Officer of the Guard had been directed to summon the military police to eject him from the club. He left, however, before their arrival. The hall was crowded with civilians of both sexes and military personnel (R. 12-20, 22-29, 29-41, 43, 50-62).

After reaching the barracks both accused congregated with other officers in various rooms and discussed the affair. During their discussions both accused appeared to be boastful about their

remarks addressed to Captain Seitz and Lieutenant Colonel Fletcher. At this time they both appeared to be sober. During the ensuing investigation both accused had admitted that they had been drinking, that their judgment consequently was impaired, that they recognized Captain Seitz and Lieutenant Colonel Fletcher as their superior officers, and that they had probably used some foul language (R. 41, 42-44, 45-48, 62-66).

4. The evidence for the defense shows that two officers, friends of the accused, witnessed the entire episode. They believed the accused were both intoxicated to a greater degree than attributed to them by other witnesses and, while failing to recall the use by the accused of the alleged foul language or that Lieutenant Colonel Fletcher had been pushed, bumped or pinned against the wall, otherwise substantially corroborated the evidence for the prosecution, adding, however, that Lieutenant Colonel Fletcher's actions and words, such as referring to the accused Shields as "a no good drunk" and to the accused Smith as "yellow", had served as provocation. An enlisted man who had stood near the door characterized the episode as an argument in which all concerned had spoken loudly which he thought would result in a fight and denied hearing foul or profane language but admitted hearing both accused being ordered to leave the club. The Commanding Officer at the base had not attended the party but rated both accused as "excellent" and had by recommendation secured both of them a promotion (R. 68-75, 75-84, 84-91, 107-108).

Each of the accused, after explanation of their rights as witnesses, testified in their own behalf. Their testimony concerning the actions of all persons involved did not vary substantially from that depicted by the evidence for the prosecution except that they denied that Lieutenant Colonel Fletcher had been bumped or pinned against the wall. They had not considered the directions to leave the club as orders so to do and felt aggrieved at some of the language, hereinabove mentioned, directed to them by Lieutenant Colonel Fletcher. They admitted using the greater part of the language alleged but failed to recall the use of that portion thereof composed of vile and foul words although admitting it was both possible and probable that they had used them. They had both recognized Captain Seitz and Lieutenant Colonel Fletcher as their superior officers and contritely attributed their actions and words to the unusual prevailing circumstances and the indulgence in intoxicants to the extent that their innate cautious judgment was somewhat debilitated. They both contended that they had neither willfully disobeyed the orders to leave the club nor even

failed to obey such orders as they in fact had left the club, although a little delayed, in response thereto. Their conversations with other officers at the barracks after they left the club had not been disrespectful to anyone and consisted largely of remarks about whether they were under arrest or not (R. 91-101, 101-107).

5. Specification 1, Charge I, as to the accused Shields alleges that he at a described time and place offered violence against his named superior officer who was then in the execution of his office in that he, the accused, wrongfully pushed, bumped and pinned such superior officer against a wall of the officers' club. Specifications 2 and 3, Charge I, as to the accused Shields and Specifications 3 and 4, Charge I, as to the accused Smith allege separately that the respective individual accused at a named time and place willfully disobeyed a lawful order of two different superior officers directing them, the accused, to leave the club. The offenses alleged by these Specifications were charged as violations of Article of War 64 but were found by the court as violations of Article of War 96 excepting from the Specifications alleging willful disobedience the word "willfully". "A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A.W. 96" because such disobedience does not manifest an intentional defiance of authority (M.C.M., 1928, par. 134b). Engaging in an "altercation with another officer in the presence of an inferior" is also violative of Article of War 96 (Military Law and Precedents, Winthrop, 1920 Reprint, Vol. 1-2, p. 727).

The evidence for the prosecution conclusively shows that both accused were repeatedly ordered by two of their superior officers to leave the club under circumstances impelling the conclusion that they intended and the accused understood that immediate compliance therewith was contemplated. Defense witnesses corroborate the prosecution's evidence that the orders were repeatedly given and the accused themselves acknowledge the receipt thereof but contend that they did not interpret them as orders. Implicit in the multiplicity of the orders is the failure of the accused to obey them because otherwise no necessity would have arisen for more than one order. The delayed compliance after threat of arrest together with the other attendant circumstances strongly indicate, however, that the accuseds' failure to obey the orders was occasioned through remissness, heedlessness and forgetfulness rather than intentional defiance of authority. The evidence further shows that, in that part of the altercation between the accused Shields and Lieutenant Colonel Fletcher which took place in the hall, the accused Shields bumped, pushed and pinned his superior officer against the wall. The accused's words at such time disavowed explicitly an intent to cause bodily harm but such acts nevertheless are clearly

prejudicial to good order and military discipline. The effect of both accuseds' admitted drinking of intoxicants sounds only in mitigation and not in defense. The evidence, therefore, shows beyond a reasonable doubt the guilt of both accused of the offenses alleged in the hereinabove mentioned Specifications and amply supports the court's findings of guilty thereof in violation of Article of War 96.

6. Specification 1, Charge II, as to both accused, respectively, alleges that each of them at a designated time and place was disorderly while in uniform during a social function. The offenses were alleged as violations of Article of War 95 but were found by the court to have been committed in violation of Article of War 96. The alleged conduct is clearly conduct of a nature to bring discredit upon the military service and therefore violative of Article of War 96 (M.C.M., 1928, par. 152b).

The evidence for the prosecution conclusively shows that both accused during a protracted episode engaged in boisterous conduct attended by their loud use of vile and profane language during a social function while in the presence of civilians of both sexes, other officers not only of their own organization but likewise of allied and friendly nations, and enlisted personnel. This, although failing to recall particularly the vile language used, both accused admit. The evidence, consequently, beyond a reasonable doubt shows the guilt of the accused as alleged in the Specifications and fully supports the court's findings of guilty thereof in violation of Article of War 96.

7. Specifications 2 and 3, Charge II, as to both accused, respectively, allege that each of them at a designated time and place wrongfully used "defamatory, disrespectful, insubordinate, vile and insulting language" which is alleged with particularity toward two of their superior officers while in the presence of "women, civilians, enlisted personnel, officers of an allied and friendly nation's armed forces, officers of the base, and transient officers". The offenses are charged in violation of Article of War 95 and allege conduct and behavior that is clearly disgraceful and ungentlemanly and therefore within the condemnation of such Article because "using insulting or defamatory language to another officer in his presence, or about him to other military persons" is violative thereof (M.C.M., 1928, par. 151).

A mere reading of the alleged language leaves no room for question of its foul, vile, defamatory, disrespectful, insubordinate, and insulting character. The evidence for the prosecution conclusively shows that such language, at least to the extent that the findings of guilty of the use thereof were approved by the reviewing authority, was used by the accused under the circumstances as alleged and that the utterance thereof was in a loud and boisterous fashion. Both accused in their own testimony admit the use of substantially all of the language for the use of which they stand convicted but disavow a recollection of the use of the foul portions thereof even while con-

ceding both the possibility and the probability of their use of even such vile phrases. Such words and acts under the circumstances shown fall without the tolerance permitted to officers in their personal expressions and definitely brand such conduct as both disgraceful and unbecoming an officer and a gentleman. Adequate provocation, even if ever possible to serve as an excuse for the use of such language, under such circumstances, was not shown and laxity of expression engendered by social drinking serves not in defense but only in mitigation, if at all. The evidence, therefore, beyond a reasonable doubt shows the commission of the offenses alleged and supports the findings of guilty of the Specifications as approved by the reviewing authority and the Charges.

8a. The accused Smith is about 26 years old. The War Department records show that he has had no prior enlisted service but was appointed a temporary second lieutenant on 24 June 1942 since when he has been on active duty as an officer and that he has been promoted twice, on 1 March 1943 to first lieutenant and on 31 December 1943 to captain.

b. The accused Shields is about 28 years old. The War Department records show that he has had enlisted service from 4 December 1940 until 29 May 1943 when he was commissioned a temporary second lieutenant upon completion of Officers' Candidate School and since when he has been on active duty as an officer and that he was promoted to first lieutenant on 23 November 1943.

9. 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 findings of guilty of the Charges and Specifications as found by the court and approved by the reviewing authority and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon a conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

William A. Bamberell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 252576

1st Ind.

War Department, J.A.G.O., 26 APR 1944 - 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 Walter T. Smith (0-560533) and First Lieutenant Andrew J. Shields (0-580215), 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, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence as to each accused be confirmed but that the execution thereof be suspended during good behavior.

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

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

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

(Sentence as to each confirmed but execution suspended. G.C.M.O. 229, 29 May 1944)

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

SPJGQ
CM 252620

12 APR 1944

UNITED STATES v. Captain RAYMOND P. WATTERSON (0-372297), Medical Administrative Corps.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Wolters, Texas, 10 March 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

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

Specification 1: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 13 February 1944, wrongfully take, carry away, and convert to his own use five heads of lettuce, value about 9¢ each, total value about 45¢; five stalks of celery, value about 18¢ each, total value about 90¢; and one gallon of mayonnaise, value about $1.05, all property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

Specification 2: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 30 January 1944, wrongfully take, carry away, and convert to his own use eight beef-steaks, value about 30¢ each, total value about $2.40; one-half lamb, value about $5.00; and one-half bushel of potatoes, value about $1.20, all property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

Specification 3: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 31 January 1944, wrongfully take, carry away, and convert to his own use one liverwurst, value about $1.25; one bologna, value about $1.25; and two hams, value about $3.50 each, total value about $7.00, all property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

Specification 4: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 23 December 1943, wrongfully take, carry away, and convert to his own use two dressed turkeys, value about $6.50 each, total value about $13.00, and two fruitcakes, value about $3.53 each, total value $7.06, all property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

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

Specification 1: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 13 February 1944, wrongfully order Technician Fifth Grade Michael R. Rinaldi to deliver to his, the said Captain Raymond P. Watterson's, automobile, foodstuffs and groceries, property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

Specification 2: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 30 January 1944, wrongfully order Technician Fifth Grade Michael R. Rinaldi to deliver to his, the said Captain Raymond P. Watterson's, automobile, foodstuffs and groceries, property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

Specification 3: In that Captain Raymond P. Watterson, Medical Administrative Corps, Station Hospital, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 23 December 1943, wrongfully order Private Joseph Luback to deliver to his, the said Captain Raymond P. Watterson's, automobile, foodstuffs and groceries, property of the Enlisted Patients' Mess (Hospital Mess No. 1), Station Hospital, Camp Wolters, Texas.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 Article of War 48.

3. Captain Watterson, the accused, was, during the period between December 1943 and February 1944, Chief of the Medical Supply Section, Medical Detachment, Station Hospital at Camp Wolters, Texas (R. 23, 60) and was also utility officer of the Station Hospital (R. 28). He had, however, no official duties in connection with the various hospital messes in the hospital area other than those pertaining to the care of some of the equipment such as painting in the three mess halls on the post and supervised the operation of the various post utilities (R. 23, 28, 38, 60).

There were at the time of the alleged offenses three hospital messes in the Station Hospital area at Camp Wolters, Texas (R. 19), one of which was identified by the title, Enlisted Patients' Mess Hall No. 1 (R. 6), also commonly referred to as Hospital Mess No. 1 (R. 20). The mess officer in charge of all three of these messes in the hospital area which included the Enlisted Patients Mess, or Hospital Mess No. 1, was Captain Luther Graham, M.A.C. (R. 65), who alone was responsible for all items of subsistence which came into all these messes, including Mess Hall No. 1 (R. 65). Captain Watterson was granted permission "a time or two" by Captain Graham as mess officer to collect scraps for his dog from the Enlisted Patients' Mess but was never permitted by him to remove therefrom items of edible subsistence (R. 66), nor did Captain Graham permit any officer stationed at the hospital to store food supplies in the ice boxes in any of these mess halls for safekeeping (R. 69). Captain Watterson did, however, have permission from the Commanding Officer of the hospital to eat his noonday meal in the Enlisted Patients' Mess because he was on a "fat free" diet, which required special preparation in cooking (R. 27, 67, 38).

For each soldier who eats in the Enlisted Patients' Mess the government allows and pays about .79 cents per day (R. 25, 26, 67). Most of the food consumed therein is bought from the Quartermaster commissary on the post, but items not carried there are purchased in the open market. The storeroom where staple supplies for the Enlisted Patients' Mess are kept is about half a block from the mess hall of that unit and is under lock and key. The key was kept hanging up in the mess hall (R. 15, 35). However, items which require to be chilled, such as meats and poultry, are kept in the ice boxes just beside the mess kitchens (R. 36). The mess sergeant of the Enlisted Patients' Mess, Sergeant Thomas J. Cooper, purchased the food for this mess under the general supervision of Captain Graham, the Mess Officer (R. 17). Captain Watterson's office is about 100 yards from the Mess Hall of the Enlisted Patients' Mess (R. 27).

As to Specification 1, Charge I, and Specification 1, Charge II: Corporal (T/5) Michael A. Rinaldi is the first cook at the Enlisted Patients' Mess (R. 40). On Sunday, 13 February 1944, while working in the kitchen he was told by Captain Watterson, in person, that the latter wanted a gallon of mayonnaise, five heads of lettuce and five stalks of celery, and he told Rinaldi to get them for him (R. 53). Accordingly, Rinaldi took a glass gallon jar of mayonnaise out of the small store room in the mess kitchen and procured the lettuce and celery from the vegetable ice box in the mess kitchen, put these three items in a box and put the box on the floor in the back seat of Captain Watterson's car in the latter's presence (R. 54-55). Also acting on Captain Watterson's order Rinaldi covered the box with a car blanket taken from the front seat of Watterson's car (R. 54-57). Captain Watterson, referring to this box, told Rinaldi, "cover it up, so it won't be seen" (R. 58). Lots of others, including the cooks, were present at the time. These enlisted men talked about the situation lots of times but "were afraid to say anything about it." In Rinaldi's words, "after all he was an officer * * * who was going to take our word?" (R. 59) Rinaldi regarded Captain Watterson as his superior officer and as such he accepted and obeyed his orders to take these things and put them in Watterson's car (R. 55). This property belonged to the Enlisted Patients' Mess (R. 54).

As to Specification 2 of Charge I: On 30 January 1944, Captain Watterson told Corporal Rinaldi, in the kitchen of the Enlisted Patients' Mess Hall (R. 40) that he wanted eight steaks, half a bushel of potatoes, half a lamb and a round roast. He told Rinaldi to get these things and put them in the back trunk of his car (R. 40, 41). Rinaldi took half a lamb, the hind saddle, off a hook in the kitchen and put it in a box (R. 42) in Watterson's presence. The balance of the meats he got from pans in the ice box in the Enlisted Patients' Mess. Rinaldi "took it as he ordered and did just what he told me, fixed the box up and put it in the back trunk of his (Watterson's) car" (R. 42), which was then parked behind the Enlisted Patients' Mess Hall. Watterson went out of the mess hall with Rinaldi to his car. Watterson opened the trunk of the car and Rinaldi loaded the box in it. Watterson then closed the door, got in the driver's seat and drove off. This food was all the property of the Enlisted Patients Mess, also known as Hospital Mess No. 1, Station Hospital, Camp Wolters, Texas (R. 43). Rinaldi knew Captain Watterson as his superior officer and he did exactly what he was told to do (R. 44). Staff Sergeant Willard W. Wentz, who is the memorandum receipt clerk in the Medical Supply office, and works under Captain Watterson (R. 60), was told in the latter part of January 1944 by Watterson to drive his car to his (Watterson's) home in Mineral Wells, Texas; that there were two packages in the trunk of the car, to take them out and put them in his (Watterson's) house (R. 61). Before this Wentz had often seen Watterson's car back of the Enlisted Patients' Mess (R. 61). Wentz did as he was told and on arrival at the house, at Mrs. Watterson's direction, he carried both boxes from Watterson's car into the dining

room of Watterson's house, where he left them. When he put down the larger one of the boxes on the floor, the top fell in, and Wentz saw a full saddle of mutton (R. 62).

As to Specification 3, Charge I: On 31 January 1944 Captain Watterson told Rinaldi that "he was all out of stuff and wanted a couple of hams". Rinaldi went to the ice box, got on top of a box, and pitched two hams down to Watterson (R. 44), who was then standing on the steps at the ice box door. The hams weighed 18 or 20 pounds each. Captain Watterson on this same occasion picked up a liverwurst, weighing about six or seven pounds and about three feet long and a bologna about 18 inches long (R. 49) and of the same weight, and added this meat to the hams which Rinaldi put altogether in a box which he carried out behind the mess hall and put inside the back trunk of Captain Watterson's car (R. 45). This property belonged to the Enlisted Patients Mess (R. 46). Watterson got in the car and drove off (R. 46). Rinaldi did this because he regarded Watterson as his superior officer and as such his order was to be obeyed.

> "Lots of times Captain Graham (the mess officer) would be around when Captain Watterson came there and I was afraid to get the stuff for him, and he would tell me he would go in and bull with Captain Graham and keep him busy while I got the stuff and for me to wink at him when it was ready".

As to Specification 4, Charge I and Specification III, Charge II: On 23 December 1943 Captain Watterson approached Private Joseph Luback, a cook in the Enlisted Patients' Mess, Station Hospital, Camp Wolters, and asked him to get accused a couple of turkeys (R. 6-7). The turkeys were hanging in the ice box for the mess but the butcher of the Enlisted Patients' Mess, Private Carl DeGuire, refused to let Luback have them (R. 7, 21). Luback then talked to Sergeant Cooper, the mess sergeant (R. 17), who told DeGuire to deliver the couple of turkeys to Luback (R. 21), which he did (R. 8). The turkeys weighed about 18 to 20 pounds each and came out of the ice box in the Enlisted Patients' Mess Hall, Hospital Mess No. 1. Luback put them in a cardboard box and took them to the warehouse where the groceries for the mess are kept. He then, by prearrangement, called Captain Watterson on the telephone and said the turkeys were ready (R. 9). Watterson told Luback to meet him at the warehouse which the latter did immediately thereafter. At the warehouse Luback showed him the turkeys and Watterson said "Put in a couple of fruitcakes too". So Luback put in a couple of five pound fruitcakes, which were stored there, in the same box with the two turkeys and at his request (R. 14) carried out the box and contents and put it in the trunk of Captain Watterson's car (R. 10), a black Ford V-8 two-door coach (R. 35), which was then and there standing at the side of the storehouse (R. 12). These fruitcakes and turkeys were the property of the Enlisted Patients' Mess (R. 12,25).

Luback did these things in obedience to what he understood to be the order of his superior officer (R. 12). Sergeant Cooper corroborated Luback's testimony. He testified that just before Christmas 1943 Captain Watterson told him he would like to have two of the turkeys which Cooper had coming in for the mess at Christmas (R. 23), and subsequently Private Luback told Cooper he wanted two turkeys for Captain Watterson. Cooper then went back to the Mess Hall meat box and told the butcher, Private DeGuire, to let Luback have two turkeys (R. 24).

By written stipulation signed by accused, and agreed to by the defense counsel and the prosecution, the values of the various items alleged in each of the four specifications of Charge I were accepted as charged by both sides and by the court (R. 70, 71) as follows: Specification 1, $2.40; Specification 2, $8.60; Specification 3, $9.50; Specification 4, $20.06.

Having been advised of his rights as a witness in open court by the law member, and also prior to the trial by his defense counsel, accused elected to make an unsworn oral statement in open court through his counsel (R. 71). In substance his defense counsel stated that accused had been married for 14 of his 22 years of service in the Army, and, for the past seven years, his wife had been virtually an invalid due to a chronic acute asthma following an attack of pneumonia (R. 72); and that she is also afflicted with a severe type of arthritis. Furthermore, Watterson's elder daughter, age thirteen, suffers with an arthritic condition of her arm (R. 72). Defense counsel offered to call a medical officer to verify these statements by an unsworn statement but the court very properly denied this request on the grounds that the expected testimony was not material to the issues in the case and that the privilege of making an unsworn statement to the court was limited to the accused only (R. 73). The defense offered no other witness nor any affirmative evidence in denial or extenuation of the offenses charged, but throughout the trial attempted, on cross examination of the prosecution's witnesses, to insinuate or infer that other persons than accused had access to the foodstuffs in question; that the various messes borrowed food, one from the other, and that accused might have used the mess hall ice boxes and storeroom as a place to keep his own personal property, and further that his actions with respect to the food designated in the Specification of Charge I were merely suspicious circumstances but did not, in fact, constitute distinctly wrongful acts.

4. The four offenses alleged in the four Specifications under Charge I are charged as acts of wrongful conversions in violation of Article of War 96 rather than, as they may legally have been, charged as larcenies under Article of War 93. The method of pleading chosen

was adopted apparently for the reason that, prior to reference for trial, some doubt arose as to accurately alleging ownership of the foodstuffs in question, resulting in further doubt as to whether two of the essential elements of proof under larceny, namely trespass (taking from the owner's possession without his consent) and definite ownership of this property, could be legally established by the prima facie evidence as then interpreted. In other words, were the foodstuffs to be considered as property of the United States furnished or intended for the military service, making the offense a violation of Article of War 94, or did they belong to individuals or groups as their personally owned property, which situation would require a charge of larceny under Article of War 93?

A wrongful conversion, as defined in law and as distinguished from the equitable doctrine of that name, consists of the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition, or, the exclusion of the owner's rights" (Black's Law Dictionary, 1933 Ed., p. 430 and numerous cases cited thereunder).

The accused, neither by virtue of his office nor of his official duties, exercised any lawful authority over the property he took and converted to his own use, nor was it property of the United States within the terms of the 94th Article of War. Ownership of this property was rightfully alleged, and sufficiently established by competent evidence as in the Enlisted Patients' Mess. This mess was maintained by funds obtained through receipt from the local disbursing officer of commutation of rations allowed by the government to each patient who ate therein at a daily rate computed on the actual cost of the ration plus 50 percent (par. 11, AR 40-590). This amount was payable to the custodian of the hospital fund (par. 12, 2(a), AR 40-590) where, upon receipt from the government, such payments became a part of the hospital fund (3a (4) AR 210-50). It is well established that this latter fund is not the property of the United States but is the property of the organization receiving it which, in the instant case, is the Enlisted Patients' Mess (Sec. 452, par. (2) and (8), Dig. Ops. JAG 1912-1940). Therefore, the ownership of the food purchased from that fund is properly alleged as in that organization or unit.

Accused assumed and exercised ownership over the property in question through the unlawful connivance of members or agents of the rightful owner (the mess) in the first instance; that is, by exercising an unlawful control over them by means of his superior rank, they being enlisted men and he an officer, he succeeded in making them his tools, although unwilling ones, in unlawfully taking this property from their own organization storehouse, supply room or kitchen. It is this phase of the offense which evidently, and

with good reason, raised a doubt as to whether or not a larceny in violation of Article of War 93 could be successfully charged and proven, for the reason that to constitute larceny the taking and carrying away must be by trespass; that is the property must be taken from the owner's possession without his consent. In unlawful conversion, however, it is immaterial whether the converter acquired possession of the property by trespass or otherwise - trespass is not an essential element of proof. To receive property from one who has no right to part with it and thereafter to use, sell or exercise dominion over it, whether with knowledge of the owner's rights, or even in good faith without such notice, constitutes wrongful conversion (International Agr. Corp. vs. Lockhart Power Co., 188 S.E. 243, 246, 181, S.C. 501). When accused, as shown by undisputed evidence of record, secured the foodstuffs in question and carried them from the Army post to his own home, he dealt with this property in a manner wholly inconsistent with the right of the organization to the immediate possession and use of such property and with the intent, in so doing, to assert a dominion over it adverse to that right. The evidence of record is sufficient to sustain beyond a reasonable doubt the findings of guilty of Specifications 1 to 4 inclusive of Charge I and the offenses of which he stands convicted are obviously prejudicial to good order and military discipline, and as such are violations of Article of War 96.

The competent and legal evidence of record as to the three offenses laid under Article of War 95 reveals a flagrant abuse of his office by a commissioned officer in compelling enlisted subordinates to assist him in the commission of wrongful acts. Such abuse of authority is so obviously conduct unbecoming an officer and a gentleman as to require no further argument here (C.M. 237521 (1943) cited in J.A.G. Bul. Vol II, Act 1943, p. 385 and Winthrop, p. 715).

5. War Department records disclose that accused is now 40 years of age, with nearly 19 years enlisted service and 5 years as a commissioned officer. He first enlisted in the Field Artillery 24 February 1922 and was honorably discharged 27 April 1925. During this enlistment he was convicted by special court-martial of violation of Article of War 61 (absence without leave) and again by special court-martial of violation of Article of War 96. He enlisted the second time on 28 April 1925 in the Medical Department and was discharged 22 June 1928. During this second enlistment he was convicted by special court-martial of a violation of Article of War 61. He enlisted a third time on 23 June 1928 and was discharged as a corporal of the Medical Department on 24 June 1931 with no record of trials by court-martial. His fourth enlistment covered the period from 25 June 1931 to 24 June 1934, terminating with a character excellent discharge. His fifth enlistment ran from 25 June 1934 to 24 June 1937. He was discharged as a sergeant, Medical Department, with

character excellent. He was again enlisted but discharged to accept a commission as second lieutenant, Medical Administrative Corps Reserve, on 22 October 1938 and was ordered to active duty on 1 November 1940, promoted to first lieutenant on 15 September 1942 and to captain 26 May 1943. His educational background reveals that he attended a grade school for eight years and a high school for two years in Brookly, New York. He is married and has two minor daughters, aged about 13 and 11 years respectively.

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

William A. Pound, Judge Advocate.

Carl McPlum, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 APR 1944 - 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 Raymond P. Watterson (0-372297), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

3 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 300, 17 Jun 1944)

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

(105)

SPJGV
CM 252626

16 MAY 1944

UNITED STATES v. First Lieutenant JOHN R. SCANLON (O-1283845), Infantry.	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Blanding, Florida, 10 March 1944. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant John R. Scanlon, Company "D", 201st Infantry Training Battalion, then of Company "D", 198th Infantry Training Battalion, Camp Blanding, Florida, with intent to deceive the Commanding Officer, 62d Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 1 December 1943, officially report that he, the said First Lieutenant John R. Scanlon, was married and would maintain a residence at 2770 Forbes, Jacksonville, Florida, which report was known by the said First Lieutenant John R. Scanlon to be untrue in that the wife of the said First Lieutenant John R. Scanlon did not on or about 1 December 1943, and has not since said date, resided at 2770 Forbes, Jacksonville, Florida.

Specification 2: In that First Lieutenant John R. Scanlon, * * *, did, at Jacksonville, Florida, on or about 19 February 1944, wrongfully and dishonorably introduce

as his wife, to First Lieutenant Meredith A. Lunn, Headquarters, 201st Infantry Training Battalion a woman who was not the wife of the said First Lieutenant John R. Scanlon.

Specification 3: In that First Lieutenant John R. Scanlon, * * *, did, at Jacksonville, Florida, between on or about 1 December 1943 and on or about 22 February 1944, wrongfully, dishonorably and unlawfully live and cohabit with a woman not his wife.

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

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

Paragraph 9 of Administrative Memorandum No. 2, dated 6 September 1943, Infantry Replacement Training Center, Camp Blanding, Florida, provided that regimental and company commanders might "grant permission to officers under their control to live off the post, provided the persons desiring such permission are married or live with dependents and will maintain a residence"(R. 6; Ex. A). Pursuant to such memorandum, accused on 1 December 1943 requested permission in writing to live off the post, and gave his contemplated home address as 2770 Forbes, Jacksonville, Florida (R. 7; Ex. B). This application was approved by the regimental commander and left headquarters through the message center (R. 6).

It was stipulated that if Georgia D. Scanlon were present she would testify that on 26 December 1942, while she was a member of the U. S. Army Nurse Corps, stationed at Camp Rucker, Alabama, she was married to the accused; that she and accused cohabited as man and wife from 15 to 17 January 1943 at Tuscaloosa, Alabama, from 7 to 8 February 1943 at Montgomery, Alabama, from 12 to 15 February 1943 at Camp Rucker, Alabama, on 18 April, 24 to 27 June, and on 2, 7, 9 and 10 to 12 of July 1943 at San Antonio, Texas; that she has not seen or resided with the accused since 13 July 1943, and has never since 13 July 1943 resided in Jacksonville, Florida, but has continuously since that date resided in Chicago, Illinois; that she has never instituted divorce proceedings of any character against the accused, and has never been served with notice of any divorce proceedings instituted by the accused (R. 13; Ex. C). A marriage certificate evidencing the marriage of accused and this witness on 26 December 1942 at Ozark, Alabama, was received in evidence (R. 14; Ex. G).

By stipulated testimony it was shown that accused in the latter part of November 1943 rented a room from Mrs. Robert Herman in her residence at 2770 Forbes Street, Jacksonville, Florida, and lived

therein over a period of two weeks with a woman accused introduced as his wife, Elizabeth Scanlon. On 4 December accused rented a room in the home of Mrs. Frances Devlin, 2228 Hershell Street, Jacksonville, Florida, and lived therein with a woman he held out to Mrs. Devlin and her family as being his wife. Accused and this woman lived in the Devlin home until 22 January 1944. On 23 January 1944 accused rented an apartment in the home of Mrs. Elizabeth R. Parker, 1526 Copeland Street, Jacksonville, Florida, and has lived there continuously since with a woman he introduced to Mrs. Parker as his wife Elizabeth (R. 14; Exs. D, E, F).

First Lieutenant Meredith A. Lunn testified that he had known accused for about three months, and had ridden with him between camp and home some fifteen or twenty times. On or about 19 February 1944, after prearrangement by telephone, Lieutenant Lunn and his wife met accused and a woman companion in a store in Jacksonville. Accused introduced his woman companion to Lieutenant Lunn as his wife "Lil". In response to an inquiry by Mrs. Lunn this woman stated she and accused had been married for about a year. The two couples then attended a picture show, and afterwards were driven to their home which Lieutenant Lunn believes was 1525 Copeland Street. Here the accused and his woman companion left the car.

4. For the defense:

Major George Wilson and Captain Wade C. Harrison testified that accused's performance of military duties was excellent, and Captain Harrison said that to the best of his knowledge the accused's reputation for truth and veracity was excellent (R. 15-18).

After having his rights as a witness explained accused elected to testify under oath. Accused was allowed wide latitude by the court in relating his personal history from childhood up. Concerning the offenses with which he was charged, the accused admitted he had married on 26 December 1942 (R. 22), and that he had lived with his wife for one or two days at a time on several occasions thereafter. When he went to Ellington Field he realized their marriage was a mistake and wrote his wife asking her to consider a divorce. She did not reply, but on 13 April 1943 he saw her in San Antonio and discussed the matter but did not get a definite answer. Later she wrote she would give him a divorce after her child was born. He himself had contacted a lawyer the Saturday preceding the trial concerning a divorce (R. 22). He met the woman referred to in the testimony as "Lil" at Hondo, Texas, and they started going together. When he was transferred she decided to go with him and stay with him until he could get a divorce and they could be married.

Accused admitted that on 1 December 1943 he forwarded to Headquarters, 62nd Regiment the application to live off the post; that at the time he was living with "Lil" at 2770 Forbes Street (R. 23), and that he had lived with her as husband and wife at the other addresses covered in the stipulated testimony(R. 24). On 19 February 1944 he introduced "Lil" to Lieutenant Lunn as his wife, for at the time he considered her "as my wife mentally and as soon as it was possible she was going to be my wife in fact" (R. 24). On redirect examination the accused testified that he did not know about the rules as to officers living off the post, and had no intention of deceiving anyone when he signed the application to live off the post.

5. The evidence conclusively shows that accused, a married man, while stationed at Camp Blanding, Florida, was living with another woman not his wife in Jacksonville, Florida, from the latter part of November to the date of trial, introducing this woman as his wife to the three persons from whom he rented rooms during this period. He also introduced this woman to Lieutenant Meredith Lunn as his wife when Lieutenant and Mrs. Lunn met accused and this woman for a social engagement on or about 19 February 1944. Accused's explanation of his reason for introducing this woman to Lieutenant Lunn as his wife was that he considered her "as mentally his wife". On 1 December 1943 accused, while living in Jacksonville, Florida, with this woman not his wife, and while his lawful wife was residing in Chicago, Illinois, filed an application in writing for permission to live off the post, such request being granted. The accused filed this application pursuant to paragraph 6 of Administrative Memorandum No. 2 dated 6 September 1943, Infantry Replacement Training Center, Camp Blanding, Florida. The pertinent paragraph of this administrative memorandum is ineptly phrased, in that it provides that commanders "may grant permission to officers * * * under their control to live off the Post, provided the persons desiring such permission are married or will live with dependents and maintain a residence". The accused being married, a strict and analytical construction of this provision would lead to the conclusion that accused had not violated its provisions. However, the Board is of the opinion that the reasonable interpretation of such memorandum is that it was intended to permit officers to live off the post provided they maintained a residence with their lawful wife or dependents.

6. War Department records show the accused to be 26 years of age. He graduated from the De La Salle Institute (preparatory school) and attended Manhattan College for one half year. He was inducted into military service 20 February 1941. Accused attended the Infantry School,

Fort Benning, Georgia, and was appointed second lieutenant 15 May 1942, promoted to first lieutenant 31 October 1942. He attended Army Air Forces Navigation School, Hondo, Texas, but was eliminated from that school and assigned to Infantry Replacement Training Center, 21 July 1943.

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

Thomas N. Tappy, Judge Advocate.

Herbert M. Kelleher, Judge Advocate.

Robert H. Harwood, Judge Advocate.

SPJGV
CM 252626

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 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 John R. Scanlon (0-1283845), 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. 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 371, 17 Jul 1944)

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

(111)

12 JUN 1944

SPJGH
CM 252628

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Army Air Base, Richmond, Virginia, 13 March 1944. Dismissal, total forfeitures and confinement for five (5) years.
	)	
First Lieutenant GEORGE M. EARLE (0-1047953), Coast Artillery Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant George M. Earle, 391st Antiaircraft Artillery Automatic Weapons Battalion (Semimobile), did, at Army Air Base, Richmond, Virginia, on or about 3 January 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with a human being, to wit: Sergeant Kenneth S. Waters.

Specification 2: In that First Lieutenant George M. Earle, 391st Antiaircraft Artillery Automatic Weapons Battalion (Semimobile), did, at Army Air Base, Richmond, Virginia, on or about 3 January 1944, with intent to do him bodily harm, commit an assault upon Sergeant Kenneth S. Waters, by cutting him on the arms, foot and in the groin, with a dangerous weapon, to wit: a jungle knife.

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

Specification: In that First Lieutenant George M. Earle, 391st Antiaircraft Artillery Automatic Weapons Battalion (Semimobile), did, at Army Air Base, Richmond, Virginia, on or about 3 January 1944, attempt to take his own life by stabbing himself in the abdomen and by slashing his neck with a sharp instrument.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances

due or to become due and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specifications 1 and 2, Charge I: On the evening of 2 January 1944, accused, who was assistant S-3 of the 391st Antiaircraft Artillery Automatic Weapons Battalion, at Army Air Base, Richmond, Virginia, engaged in a poker game with First Lieutenant Jake Humble, Jr., and other officers. Accused was drinking, and Lieutenant Humble was of the opinion that he was intoxicated. When the game broke up at about 2:30 a.m. on 3 January, accused returned to his room, which was on the second floor of battalion headquarters. At about three o'clock Captain Francis M. Vaughn, who occupied the same room, saw accused enter. Captain Vaughn stated that accused turned on the light and then turned it off. Accused had on a long overcoat. Captain Vaughn heard accused sit down, was "dozing", and stated that accused left the room in about 15 minutes and that he was still wearing the overcoat. He observed no evidence of intoxication (R. 7-8, 24-27; Exs. 4, 6).

Technician Fourth Grade Kenneth S. Waters, who was in charge of quarters on the night of 2-3 January, had gone to sleep at about 11:00 p.m. on a cot in the S-1 room on the ground floor of battalion headquarters. He was clothed in his underwear only, and was under a blanket. He had been acquainted with accused for about a year. At about 4:00 a.m. Sergeant Waters was awakened by the sound of accused moving around in the room. Accused was clothed in underwear, robe and slippers. When Waters awakened, accused said it was "mighty chilly" upstairs and that he came down to warm up. He walked over to the stove and Waters turned over to go back to sleep. Shortly thereafter accused sat on the edge of the cot, and Waters was again awakened, this time by the accused "feeling around" his penis. He "found" the hand of accused, who drew a hunting knife, said "This knife is mighty sharp; you better lay back", and told Waters to put his hand behind his head and "lay back". The knife (Ex. 3) had a blade about six inches long that tapered off to a sharp point. Accused put the knife against Waters' side, "took hold" of Waters' penis and "started monkeying around with that". He then "forced" Waters to "take hold" of his penis. After a few seconds accused "got up", went around to the head of the cot, and put his penis in Waters' mouth. Waters asked if "I have to do this" and accused replied, "Yes, you have to". The accused leaned over and put his penis in Waters' mouth. He then leaned over and took Waters' penis in his mouth. When he did that his penis came out of Waters' mouth and remained out. He kept the knife pressed against the side of Waters. Accused "sucked" Waters off and Waters "discharged". After the act was completed accused went around the bed, asked "Wasn't that fun?", and then "shoved the knife". Waters pushed the knife away and accused "came after" him, struck at him several times with the knife, and cut him in the groin, right arm, left arm, left foot and left thigh. During the attack Waters kicked back at accused and

"yelled" for help. He rolled off the cot and ran out the door to the hallway leading upstairs. The accused ran out the front door of the building. Waters was met at the stairway by officers who lived upstairs, was given first aid treatment, and taken to the hospital where he remained until 13 March 1944 (R. 7-15).

On cross-examination Sergeant Waters testified that there was sufficient light from the stove and the light in the hallway for him to be certain that accused was dressed in underwear and bathrobe, and to enable him to identify accused and the knife. He resisted accused until the knife was placed against his side and then knew that further resistance was useless as accused would "stab" him before he could move (R. 15-23).

Captain Vaughn heard the "sounds of a struggle" and screams coming from below, ran downstairs and saw Waters standing in the hallway. He also heard someone leave the house by the front door "as if they were going very quickly". When he observed Waters' condition Captain Vaughn called Captain Edward F. Olchowski and Lieutenant Humble from their room on the second floor. Waters was "covered with blood from head to foot". He talked "incoherently" and said, "I didn't think Lieutenant Earle would do that". He also stated, "He put his in my mouth and he had mine in his mouth". Waters had a "slashing" wound on his left biceps, a "penetrating" wound in the right inguinal region, and a "slashing" wound across the sole of his left foot. While Captain Olchowski was administering first aid, Waters said, "Lieutenant Earle, I can't believe it. He sucked me off and I sucked him off and then he stabbed me". The cot on which Waters had been sleeping was broken and there was blood on the floor. After the ambulance took Waters to the hospital Captain Vaughn made a search of the battalion area for accused but could not locate him (R. 26-27; Exs. 4, 5, 6).

b. Charge II: The search for accused was continued on the morning of 3 January 1944. First Lieutenant John J. McMannis made an unsuccessful search of the tents in the battery area. At about 9:30 a.m. Major Meyer Katzman, executive officer of the 443rd Fighter Squadron, entered the bachelor officers' quarters of the 443rd Fighter Squadron, and learned that a "strange Lieutenant" was in one of the rooms and did not "seem" very well. When Major Katzman found that the door to this room was locked, he knocked. The door was opened "slightly" by accused, who said that "everything was all right, that his doctor was coming" and asked to be left alone. Major Katzman forced the door open and noticed that accused had a large wound in his chest. He ordered accused to bed as he thought he would collapse any minute. There was a pool of blood on the floor and bloody clothing was strewn around the room. Photographs of the clothing (Exs. 11, 12, 13, 14 and 15) showed an overcoat, blouse, pants,

tie, pair of shoes and a shirt. The shirt bore the last four numbers of the serial number of accused and had a hole on the left side. The accused was in his underwear, which was covered with blood. Captain Olchowski arrived and observed that accused was in a state of shock because of loss of blood. He had a "slashing" wound across the upper part of his abdomen and two "slashing" wounds across his neck. The accused was placed in an ambulance and taken to the base hospital (R. 26-28, 30-37; Exs. 5, 7, 8).

Lieutenant Colonel John A. Schindler, Medical Corps, testified by deposition (Ex. 10) that he examined accused at the hospital between 9:00 and 10:00 a.m. on 3 January 1944. Accused "was suffering from a penetrating wound of the anterior abdominal wall in the upper left quadrant, measuring about one inch in length and further penetrating the left lobe of the liver and lesser curvature of the stomach". After advising accused of his rights Colonel Schindler asked him if the wound was self-inflicted or caused by an assailant. Accused replied that "he did it himself". Accused was sober at the time of the examination and not under the influence of drugs. He was not in a "stupor" but was in a state of shock. Colonel Schindler was of the opinion that accused understood what was asked him and what he stated. The wounds were of a nature that could have resulted in the death of accused (R. 28-29; Ex. 10).

The knife (Ex. 3) belonging to accused was found on the afternoon of 3 January after a search of the woods between battalion headquarters and the bachelor officers' quarters. Photographs (Exs. 1 and 2) of the knife show the name and serial number of accused on the handle (R. 25-28; Exs. 4, 5, 6, 7, 9).

Captains Vaughn and Olchowski and Lieutenants Humble and McMannis testified on cross-examination that they had been acquainted with accused for over a year. They had no reason to question the moral character of accused and stated that his reputation was "very good". Accused was thought of "very highly" by everyone in the battalion and Captain Olchowski had considered him the "finest type of friend" (R. 26-28; Exs. 4, 5, 6, 7).

4. For the defense:

Major William A. Oates testified that accused had been under his command or supervision from about January 1943 until Major Oates was transferred. The accused had been battalion adjutant, a battery commander, assistant S-3, and also battery officer when he first joined the battalion. Major Oates stated that he had observed accused throughout his association with the 391st Battalion. The accused had accompanied Major Louis A. Bonifay and Major Oates on weekend trips to neighboring towns and they would "share and share alike". At all times accused had behaved in a "soldierly fashion". His reputation in all respects and his character had been "beyond reproach". Major Oates played cards with accused, Lieutenant Humble and other officers until about 2:00 a.m. on 3 January 1944. Accused

had been drinking that evening but Major Oates could not say that he was drinking to excess, although he was a "little more " excitable than usual (R. 37-42).

Mr. George M. Earle, the grandfather of accused, testified that he had been very closely associated with accused during his lifetime except for the time he was in college and in the Army. Accused had a "Christian bringing up", attended Sunday School, and joined a church as soon as he was old enough. He was very active in boys' organizations in his community, and was one of three young men in his county to attain the rank of Eagle Scout. Accused attended Mount Union College in Alliance, Ohio, for a year and then became associated with his grandfather in the furniture business. Mr. Earle stated that after working about six months in the furniture store the accused asked his approval of joining the Army. He gave his permission and the accused enlisted. Accused had always been a normal boy, but when Mr. Earle visited him in the hospital about two weeks before the trial he thought accused was "anything but normal". The accused recognized him but instead of greeting him in his usual affectionate manner he turned away. All accused would say was "Why did you come? Why don't you leave me here?" According to Mr. Earle the accused had never been in any prior trouble, and his reputation was "always of the very best". Mr. Earle further testified that Mr. Harry Kraum, an uncle of accused, had been an inmate of the Massillon State Hospital in Ohio and that Mrs. Helen R. Rippel, an aunt of accused, had committed suicide. They were brother and sister of the mother of accused (R. 42-56).

A photostat (Def. Ex. G) of part of the clinical records of Massillon State Hospital shows that Harry Kraum's condition was diagnosed as "manic depressive psychosis (depressed type)", that his "attack" began about October 1933, that he was in another institution from about March 1934; that he came to Massillon about March 1935 and was released as "fit to be out" about August 1943. A photostat (Def. Ex. H) of a coroner's death certificate from the records of the Chicago Board of Health shows that on 2 November 1939 Mrs. Helen R. Rippel committed suicide by shooting herself with a rifle (R. 51-52).

The defense also introduced in evidence a number of pictures, certificates and newspaper clippings concerning accused for the purpose of showing his background, character, boy scout work and activities before entering the Army (R. 45-49; Def. Exs. A to F).

The accused remained silent (R. 56).

5. On rebuttal it was stipulated that if Major David B. Davis, Medical Corps, were present he would testify that on 25 January 1944 Lieutenant Colonel John A. Schindler, Captain Robert J. Irwin and he were members of a medical board convened to conduct an examination of accused; and that the board found that accused was sane at the time of the examination,

at the time of the alleged attack on Sergeant Waters, and at the time of the alleged attempted suicide (R. 56-57).

6. a. Specifications 1 and 2, Charge I: It is shown by the evidence that at about 4:00 a.m. on 3 January 1944, at battalion headquarters of the 391st Antiaircraft Artillery Automatic Weapons Battalion, Army Air Base, Richmond, Virginia, the accused entered the room where Technician Fourth Grade Kenneth S. Waters was sleeping. Waters was awakened by the accused "feeling around" his penis. When Sergeant Waters resisted him the accused displayed a sharp hunting knife and forced Waters to lie back. Placing the knife against Waters' side he forced Waters to take the penis of accused in his mouth. He then leaned over and took Waters' penis in his own mouth. His penis came out of Waters' mouth and remained out. Accused "sucked" Waters off. The evidence sustains the finding of guilty of Specification 1. After the act of sodomy had been completed the accused attacked Sergeant Waters with the knife and cut him in the groin, right arm, left arm, left foot and left thigh. When Waters broke away from accused and screamed for help the accused fled from the building. The evidence is clear that accused committed an assault with intent to do bodily harm on Sergeant Waters as alleged in Specification 2.

b. Charge II: The evidence shows that at about 9:30 a.m. on 3 January 1944, the accused was found in a room in the bachelor officers' quarters of the 443rd Fighter Squadron, Army Air Base, Richmond, Virginia. He was in a state of shock and was suffering from a penetrating wound in the abdomen and two cuts across his throat. He had been bleeding badly, and bloody clothes were scattered about the room. After he had been taken to the hospital the accused voluntarily admitted to the examining physician, after being warned of his rights, that the wounds were self inflicted. The wounds were sufficient to cause death in the absence of medical attention. The evidence is clear that accused attempted to commit suicide as alleged. An attempt by an Army officer to commit suicide is recognized as an offense in violation of the 95th Article of War (CM 173299, Dig. Op. JAG, 1912-40, sec. 453 (4)).

7. At the beginning of the trial the defense counsel stated he would like to enter a plea of insanity on behalf of accused. The trial judge advocate informed defense counsel he could raise the issue of insanity at any time he desired but asked "for the purpose of the arraignment" that the accused plead "in the absence of any special pleas or motions". Defense counsel then announced that the accused was ready to plead to the Charges and Specifications, and would enter the insanity plea later. No insanity plea was made during the course of the trial. Evidence was introduced by the defense, however, that an uncle of accused had been a mental patient in an institution and that his aunt had committed suicide. The grandfather of

accused testified that when he visited the accused in the hospital about two weeks before the trial the accused did not appear to him to be normal. On rebuttal it was stipulated that on 25 January 1944 the accused was examined by a board consisting of three medical officers and that they found him sane at the time of the examination and at the time of the commission of the offenses.

A similar situation was presented in CM 205621, Curtis, 8 B.R. 207, where the court refused to allow a special plea of insanity to be entered at the beginning of the trial, proceeded to hear all evidence offered by both the defense and the prosecution on the question of insanity, and found the accused guilty as charged without, insofar as the record of trial showed, balloting separately on the issue of insanity. The Board of Review there observed that it would have been better procedure for the court to have accepted the plea, received evidence at once on the issue of insanity and then determined the issue as an interlocutory question by separate ballot. The Board held, however, that, inasmuch as the court heard all of the evidence offered on the question of insanity and because the evidence warranted the court in finding the accused sane at all material times, as it must necessarily have done in finding him guilty as charged, there was no substantial prejudice to the rights of the accused. The Board cited CM 157854, Ireland, holding that failure to ballot separately on the issue of insanity was not substantial error.

In the instant case the court received all the evidence offered on the issue of the insanity of the accused, and the holding of the court that accused was sane at all material times, necessarily included in its findings of guilty, is fully sustained and justified by the evidence. The Board of Review concludes that no substantial prejudice to the rights of the accused resulted.

8. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 15 October 1940 to 1 February 1942 and from 1 May 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 10 December 1942; temporarily promoted to first lieutenant, Army of the United States, 12 April 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and 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 93rd Article of War.

Samuel W. Driver, Judge Advocate

Robert Lemon, Judge Advocate

F. Fletcher, Judge Advocate

1st Ind.

War Department, J.A.G.O., 14 AUG 1944 - 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 George M. Earle (0-1047953), 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 of guilty and the sentence and to warrant confirmation of the sentence. The accused committed sodomy per os on a sergeant (Spec. 1, Chg. I), with intent to do bodily harm, assaulted and severely wounded him with a jungle knife (Spec. 2, Chg. I), and attempted to commit suicide (Spec., Chg. II). Upon my recommendation accused was sent to Walter Reed General Hospital where he was under observation from 29 June 1944. He was finally examined on 21 July 1944 at Walter Reed General Hospital, Army Medical Center, Washington, D.C., by a board of medical officers composed of three psychiatrists and, in a report dated 21 July 1944, the board found that the accused was sane at the time of the commission of the offenses of which he was found guilty and sane at all subsequent times. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for five years be confirmed and carried into execution.

3. In conformity with paragraph 5(d), AR 600-375, 17 May 1943, the Federal Reformatory, Chillicothe, Ohio, should be designated as the place of confinement.

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

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

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Rept. of Medical Board, 21 July 1944.

(Sentence confirmed. G.C.M.O. 497, 13 Sep 1944)

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

SPJGN
CM 252646

UNITED STATES	)	19 APR 1944 98TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, 15 March 1944. To be shot to death with musketry.
Private GEORGE E. MILLER (35046481), Battery A, 369th Field Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

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

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

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

Specification: In that Private George E. Miller, Battery "A" 369th Field Artillery Battalion, did, without proper leave, absent himself from his organization at Tennessee Maneuver Area, from about 6 November 1943 to about 2 December 1943.

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

Specification 1: In that Private George A. Miller, Battery "A" 369th Field Artillery Battalion,

did, at or near Gallatin, Tennessee, on or about 12 December 1943, desert the service of the United States and did remain in desertion until he was apprehended at or near Akron, Ohio, on or about 31 December 1943.

Specification 2: In that Private George E. Miller, Battery "A" 369th Field Artillery Battalion, did, at Camp Rucker, Alabama, on or about 24 January 1944, desert the service of the United States and did remain in desertion until he was apprehended at or near Cleveland Heights, Ohio, on or about 31 January 1944.

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

Specification 1: In that Private George E. Miller, Battery "A" 369th Field Artillery Battalion, having been duly placed under armed guard at Fort Hayes, Columbus, Ohio, on or about 11 December 1943, did, on route between Fort Hayes, Ohio, and Camp Rucker, Alabama, at or near Gallatin, Tennessee, on or about 12 December 1943, escape before he was set at liberty by proper authority.

Specification 2: In that Private George E. Miller, Battery "A" 369th Field Artillery Battalion, having been placed under armed guard at Camp Perry, Ohio, on or about 7 February 1944, did, on route between Camp Perry, Ohio, and Camp Rucker, Alabama, at or near Montgomery, Alabama, on or about 10 February 1944, escape before he was set at liberty by proper authority.

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

Specification: In that Private George E. Miller, Battery "A" 369th Field Artillery Battalion, having been duly placed in confinement in the Camp Stockade, Camp Rucker, Alabama, on or about 7 January 1944, did, at Camp Rucker, Alabama, on or about 24 January 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Specifications 1 and 2 of Charge II and to Charge II, and guilty to all other Specifications and Charges. He was found guilty of all Specifications and Charges. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, adding the following note:

> "In view of attending circumstances, it is recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of fifteen years."

3. The evidence for the prosecution shows that the accused was assigned to and joined Battery A, 369th Field Artillery Battalion, on 6 November 1943, while the organization was away from its regular station at Camp Rucker, Alabama, and was on maneuvers in the State of Tennessee. Upon joining the organization, the accused told an enlisted man, in substance, that he would look the place over and that if he did not like it he would leave. On the morning report for the next day, 7 November, he was reported as being absent without leave. A search was made for him in the organization area but he could not be found. A bundle of his personal equipment was found, however, in some bushes beside a road near the bivouac of the organization. Accused had no authority to be absent, and he was away from his organization continuously until he was returned to it by an armed guard on or about 7 January 1944, as hereinafter recited (R. 6, 9, 10, 11; Pros. Ex. 1).

On or about 8 December 1943, an armed guard, Sergeant Clarence E. Fanning, was sent to Fort Hayes, Ohio, to return the accused to his organization. The record does not disclose whether the accused voluntarily surrendered himself to the military authorities or was apprehended. Nor does it disclose the date he surrendered or was apprehended. The guard received custody of the accused on 11 December 1943. Accused was then in uniform. They commenced the return trip by train. Everything went all right until the train reached Gallatin, Tennessee. In the early hours of 12 December 1943, about ten minutes before the train reached Gallatin, the accused requested and was granted permission to go to the men's room. The train slowed down at Gallatin. The guard, becoming concerned about the accused, went to the door of the men's room but found it locked. The conductor was summoned and he unlocked the door. It was then discovered that the accused was missing and that the window in the men's room had been opened. A search for the accused in the vicinity of Gallatin was promptly made but no trace of him was found (R. 12, 13).

Subsequently, the accused was apprehended and turned over to the military authorities at Camp Perry, Ohio. Neither the date nor the circumstances of his apprehension are disclosed by the record. Another armed guard, First Sergeant John J. Cullen, was sent to Camp Perry to return the accused to his organization, which was then at Camp Rucker, and the return was effected 7 January 1944. The guard turned the accused over to the Officer of the Day "to take him up to the stockade" and the battery commander signed the commitment order. The accused was dressed in civilian clothes when the guard received custody of him at Camp Perry on or about 4 January 1944 (R. 8, 9).

On or about 6 February 1944, still another armed guard, Sergeant Jerry R. Hilton, was sent to Camp Perry, Ohio, to return the accused to his organization. The guard received custody of the accused at Camp Perry on or about 8 February and was returning him by train. The train reached Montgomery, Alabama, on or about 10 February, and while it was there the accused asked permission to go to the men's room on the train. The guard granted permission but took the precaution of going personally into the men's room with the accused. The room was small, and when the two of them turned to leave it the guard was in front. Just as the guard reached the door the accused shoved him forward and slammed the door behind him, locking it before the guard could recover himself. A crash of glass was heard and the accused was seen to jump from the men's room window. The train, which was in motion at the time the accused jumped, was brought to a stop and the guard telephoned a nearby military police station for assistance in searching for the accused. Recapture was effected and the accused was returned to Camp Rucker the same day, 10 February. The accused was dressed "in his fatigues and fatigue hat" when the guard received custody of him at Camp Perry (R. 13, 14).

4. The prosecution having rested, and no evidence having been introduced relative to the alleged escape from the stockade at Camp Rucker, the defense made a motion that Charge IV and the Specification of Charge IV be stricken from the record on the ground that the prosecution had failed to prove any of the allegations thereunder. The prosecution announced that it had no evidence to offer with respect to Charge IV at that time, due to the fact that the witness who had been expected to testify as to Charge IV was absent. The court thereupon recalled Captain Harold M. Simon, commanding officer of Battery A, who testified that he placed the accused in the stockade at Camp Rucker on 7 January, that, so far as he knew, no authority had been given for the release of the accused from the stockade, and that, as

battery commander, he would customarily be advised if one of the men of his organization were released from the post stockade by authority of anyone other than himself. The testimony of Captain Simon appearing on page 8 of the record, however, makes it clear that he did not have personal knowledge that the accused was actually placed in the stockade. The court then ruled that "The motion of counsel for defense for a finding of not guilty is denied" (R. 15, 16).

5. There were no witnesses for the defense. Defense counsel stated that the rights of the accused had been explained to him and that he elected to remain silent (R. 16).

6. The Specification of Charge I alleges that the accused absented himself without proper leave from his organization at Tennessee Maneuver Area from about 6 November 1943 to on or about 2 December 1943. The elements of the offense and the proof required for conviction thereof, according to applicable authority, are as follows:

> "(a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The evidence for the prosecution conclusively establishes the commission of the offense as alleged, thereby supporting the accused's plea of guilty thereto. The findings of guilty of Charge I and its Specification are, therefore, warranted beyond a reasonable doubt.

7. Specification 1 of Charge II alleges that the accused "did, at or near Gallatin, Tennessee, on or about 12 December 1943, desert the service of the United States and did remain in desertion until * * * on or about 31 December 1943". The elements of the offense and the proof required for conviction thereof, according to applicable authority, are as follows:

> "(a) That the accused absented himself without leave * * * from his place of service, organization or place of duty, as alleged; (b) that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place * * *; (c) that his absence was of a duration and was terminated as alleged; and (d) that the desertion

> was committed under the circumstances alleged * * *" (M.C.M., 1928, par. 130).

The evidence for the prosecution conclusively establishes the commission of the offense alleged in this Specification. The element of intent, which is usually the most difficult part of the prosecution's proof in desertion cases, is amply proved in the instant case. Not only did the accused break away from an armed guard, but he was apprehended almost a month later wearing civilian clothes. There can be no doubt of the accused's intention to absent himself permanently from his organization. The findings of guilty of Specification 1 of Charge II and of Charge II are, therefore, warranted beyond a reasonable doubt.

8. Specification 2 of Charge II alleges that the accused "did, at Camp Rucker, Alabama, on or about 24 January 1944, desert the service of the United States and did remain absent in desertion until * * * on or about 31 January 1944". This Specification should be considered in conjunction with a consideration of the Specification of Charge IV, which alleges that the accused "did, at Camp Rucker Alabama, on or about 24 January 1944, escape from * * * confinement before he was set at liberty by proper authority". At the trial, the prosecution announced, as stated in paragraph 4 of this opinion, that it had no evidence to offer with respect to Charge IV, due to the absence of a witness. The result is that the record of trial is not only barren of proof that the accused escaped from confinement as alleged, but is also barren of any competent evidence that he was in fact confined in the stockade at Camp Rucker prior to the date of his alleged escape. It follows, therefore, that the record of trial is not legally sufficient to support the findings of guilty either of Charge IV or of its Specification. It is to be noted in this connection, that defense counsel's motion to strike Charge IV and its Specification from the record, being inconsistent with the original pleas of not guilty to that Charge and Specification, had the effect of changing those pleas to not guilty (M.C.M., 1928, par. 70; A.W. 21). Furthermore, the record of trial is barren of competent evidence that the accused was absent from Camp Rucker without leave at any time between the time of his return to the camp on 7 January 1944, and the time he was picked up by Sergeant Hilton at Camp Perry on 8 February 1944. The testimony of the battery commander that he had not authorized a release of the accused from the stockade and that, so far as he knew, no release had been authorized by any other authority was not competent to show absence without leave, such testimony being, at best, hearsay. The contention of the prosecution is that the accused was confined in the stockade on the 7th of January, and was, therefore,

from that date off the rolls of the battery. Since absence without leave is an essential element of desertion, it follows that the desertion alleged in Specification 2 of Charge II is not proved.

9. Specifications 1 and 2 of Charge III allege that the accused, on two separate occasions, having been duly placed under an armed guard, did escape before he was set at liberty by proper authority. The evidence of guilt of each offense is conclusive, thereby supporting the accused's plea of guilty thereto. It is equally clear that such conduct on the part of the accused is prejudicial to good order and military discipline and of a nature to bring discredit upon the military service, and is therefore, violative of the 96th Article of War.

10. The accused is approximately 24 years old. The War Department records show that he was inducted into the service on 13 November 1941, with no prior service.

11. 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 insufficient to support the findings of guilty of Specification 2 of Charge II, the Specification of Charge IV and Charge IV, but is legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence, and to warrant confirmation thereof. A sentence of death is authorized upon conviction of a violation in time of war of Article of War 58.

Abner E. Lifecomb, Judge Advocate.

William H. Bamberger, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 252646

1st Ind.

War Department, J.A.G.O., 4 - MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private George E. Miller (35046481), Battery A, 369th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings that the accused escaped from confinement on 24 January 1944, in violation of Article of War 69 (Chg. IV and its Spec.), and not legally sufficient to support the finding that the accused deserted the service on the second occasion alleged, in violation of Article of War 58 (Spec. 2, Chg. II), legally sufficient to support the sentence and to warrant confirmation thereof. Although desertion is a serious offense, I am of the opinion that military necessity at the present time does not require execution of the death penalty therefor. I recommend, in accordance with the recommendation of the reviewing authority, 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 fifteen years; that the sentence as thus modified be ordered executed 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for 15 years. G.C.M.O. 269, 8 Jun 1944)

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

(127)

SPJGK
CM 252657

22 MAY 1944

UNITED STATES	)	XIII CORPS
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Pickett, Virginia, 25 and
Captain NORMAN G. CRUMPECKER	)	26 February, 1944. Dismissal,
(0-1100937), Corps of	)	total forfeitures and confine-
Engineers.	)	ment for 3-1/2 years.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Captain Norman G. Crumpecker, 233d Engineer Combat Battalion, did, at or near Petersburg, Virginia, and on U.S. Highway Number 1, commonly known as the Petersburg - Richmond Highway, at or near a point approximately three miles north of Petersburg, Virginia, on or about 29 January 1944, with the intent to commit a felony, viz., rape, commit an assault upon Mary Drue Anthony, by willfully and feloniously biting her on the shoulder, back, and arms with his teeth; slapping and striking her on the face and back with his hands; putting his hand in a forceful manner on her private parts; forcibly holding and pulling her hair and her arms with his hands; forcibly holding her hands and wrists with his hands; forcibly removing and tearing her panties, tearing the straps of her brassiere and breaking the band of her wrist watch with his hands; unbuttoning his trousers; threatening to "knock her block off", or words to that effect, if she did not have intercourse with him.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for seven years. The reviewing authority approved "only so much of the findings of guilty of the Specification of the Charge and of the Charge as involves a finding

of guilty of an assault with intent to commit a felony, viz, rape, in violation of Article of War 93 at the time and place alleged, upon Mary Drue Anthony, by willfully and feloniously biting her on the shoulder and back and arm with his teeth; slapping and striking her on the face with his hands; putting his hand in a forceful manner on her private parts; forcibly holding and pulling her arms with his hands; forcibly holding her hands and wrists with his hands; forcibly removing and tearing her panties, tearing the strap of her brassiere and breaking the band of her wrist watch with his hands; unbuttoning his trousers; threatening to 'knock her block off', or words to that effect, if she did not have intercourse with him". He approved only so much of the sentence as provided for dismissal, total forfeitures, and confinement at hard labor for 3-1/2 years and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Prosecution.

Accused was executive officer of the 233rd Engineer Combat Battalion (R. 115,118,138,139,140,142,143).

The complaining witness was Miss Mary Drue Anthony, 28 years old, employed as a beautician in a department store in Petersburg, Virginia (R. 8,22,53).

At about 7:30 p.m., 28 January 1944, First Lieutenant Murrey W. Fuller, 1260th Engineers, First Lieutenant Otto W. Mourek, 233rd Engineer Combat Battalion, and accused, drove in the latter's car from Camp Pickett to Petersburg, Virginia. Accused's car was a four-door Plymouth sedan, two-tone in color. Lieutenant Fuller described the color as light green and very light green on top. They had a few "shots of whiskey" en route. They went to Alford's, a dine and dance place near Petersburg (R. 9,69, 87,88,89,95).

Lieutenant Fuller telephoned Miss Charlotte Irene Spinner of Colonial Heights, Petersburg, who in turn phoned Miss Anthony. Lieutenant Fuller called for the two girls and brought them to Alford's, where they joined the party. They arrived at Alford's about 10:30 p.m. Miss Anthony was introduced to accused. Miss Spinner had met him before (R.9,68,69,74,75,89). Lieutenant Mourek was not with the party during most of the evening (R. 87). The others danced, talked, and had something to drink. There is nothing to suggest that any of them was intoxicated (R. 9,69,70,76,84,85,89,90). Miss Anthony claimed to have drunk nothing except part of a glass of beer, whereas Lieutenant Fuller testified that she drank a whiskey coke (R. 9,23,48,89,90). Miss Spinner

testified that Miss Anthony did not drink a mixed drink and that so far as witness knew, she did not drink anything (R. 70,75,76). About 11:30 p.m., at accused's suggestion that he would like some air, he and Miss Anthony went outside (R. 9,10,23,24,70,76,90,91). Miss Anthony left her pocketbook with Miss Spinner and said that "she would be right in" (R. 70).

Miss Anthony's account of the ensuing events is as follows: She and accused sat in the latter's car for "a second or two" (R. 10,24). The car was a blue Pontiac. Witness did not see the name written on it, and knew the make solely because of "the emblem of an Indian" (R. 52,53). They rode into town and had a cup of coffee (R. 10,24,25). At about 11:50, witness suggested that they go back to Alford's which closed at twelve (R. 10,23,25). Instead of driving there, accused drove into an alley or side street, stopped, and cut off the motor and lights (R. 10, 26,27,49). He unbuttoned his trousers and "was coming at" witness with his hands (R. 10,33). She tried to push him off (R. 10), and he struck her on the head (R. 33,34). He paid no attention to her remark that she "didn't come out for that" (R. 10). She continued to put up a fight. At one time, seeing someone passing along the road, she shouted for help, whereupon accused said, "if you yell again I will knock your block off" (R. 10,27,28). During the whole evening he kept telling her that he would kill her or knock her "block" off, "or words to that effect", if she refused to do what he wanted her to do (R. 50). Her earrings and bracelet were torn off (R. 11). At length he agreed to take her home, but when they reached her house, he drove on to the Richmond-Petersburg Pike and went north for about three miles (R. 11,28). When witness repeated that she "wasn't out for that" and again asked accused to take her home, he refused, saying that she could not get out of the car until she had been "fucked" (R. 11,31). He kept saying this during the drive (R. 11). When they reached "Appomattox Bridge", witness opened the right-hand door and attempted to jump out, but accused grabbed her by the coat collar and she could not move (R. 11,31,49). She "screamed all the way through Colonial Heights" and kept "begging" accused to take her home, but he kept "speeding through" (R. 11).

Arrived about three miles from Petersburg, accused turned off the road, parked, rolled up the glass, locked the door, and moved over to the right of Miss Anthony (R. 11,53). Thereafter, there "wasn't one still minute". Accused "was always coming at" witness. Both fought (R. 11). Witness tried unsuccessfully to blow the horn (R. 11,32). Accused took hold of her arms, wrists, and elbows, and "carried them back" behind her body, until they felt as though they were "breaking off" (R. 11,32). Witness tried to open the door in order to get out of the car, but was unable to do so (R. 12,39,40). When she shouted, accused told her that she could "yell" all she wanted to and that "the cars don't stop" (R. 12).

Accused bit witness on her left arm between the shoulder and elbow and on her right shoulder (R. 12,18,33,51,52). He slapped her across the mouth, cutting her lip (R. 12,18). He kept saying that she was going to "fuck" and that she had to do it. He told her that she was not a virgin (R. 12). He tried to take off her pants, but since she had her legs crossed, did not succeed in the attempt (R. 12,13). Thereupon he tore them off completely (R. 13,15,34). He put his hands on "the private parts" of her body (R. 14).

He kept on "fighting" (R.13), and said that he hoped "to God" he would kill her (R. 36). He said that either she must do what he wanted or "suck his cock" (R. 13). He gave her one minute to make up her mind. She begged and pleaded with him to wait a few minutes (R. 13). He was standing up against her head, and she turned her face because she did not know what he was going to do (R. 13,35). She was on the front seat next to the steering wheel, and accused was "on the other side". He "jumped on the back seat" and tried to pull her over to him. When she prevented this, he came back to the front seat and grabbed her legs. She got loose (R. 13). He grabbed her hands. His body "came over against" her (R. 13,36). He was "over on" her (R. 37), "very close" to her, and his body was "next to" hers (R. 38). She "didn't have any pants on" (R.13). His pants were opened (R. 13).

There was nothing she could do (R. 13). She did not know what accused did next, but it hurt (R. 13,14,36). She screamed and cried (R.14). From the force of his coming against her, she was pushed off the seat and "wound up under the steering wheel" (R. 14,38), on the floor (R.53). He told her that she was "not a virgin now"; that she was a whore; and that all girls were whores. At length he told her that she was no good and that she should get out, which she did (R. 14,40,41,53). He started back toward Petersburg, then offered her a ride, which she refused (R.14, 15).

Witness put on her coat (R. 15,41). Her clothes were "almost torn off" her. Her sleeves were dirty. Her sweater was "badly dirty" and "stretched all out of shape", and its sleeves were stained with blood. Her skirt was wrinkled and dirty (R. 15). A bow was torn off her shoe. Her skirt has since been cleaned; in fact all her clothes have been cleaned except the slip, brassiere, and hose (R. 15,16). During the struggle, the band of her wrist watch was broken. She held onto the watch as long as possible, but finally had to let it go (R. 17).

Miss Anthony identified as a garment worn by her on the night in question a brassiere with one shoulder strap broken. It was received in evidence, but withdrawn at the conclusion of the trial (R. 16; Pros. Ex. A). She also identified the "slip" which she wore, and which was received in evidence and later withdrawn (R. 16,17,19; Pros. Ex. B). Prosecution's

Exhibit B describes the slip as "showing around the bottom and the front and the dark brown stains; reddish brown stains". Miss Anthony testified that the slip was clean when she left home on the evening of 28 January and that the stains on it were bloodstains - her own blood (R. 19).

Miss Anthony continued her testimony as follows: She walked down the highway a little distance, then went back and searched for her watch. It was so dark that she could not see well. As a result, she did not hunt long. She did not find the watch (R. 17,41,42). She started to walk to Petersburg, and after she had gone "some distance", a policeman in a car picked her up. They went up the road to look for the watch, but did not find it. The policeman used his flashlight. They returned to Petersburg (R. 17,43). The policeman drove her to Miss Spinner's home on Piedmont Avenue in Colonial Heights (R. 18,43). They arrived there about 3 a.m., almost simultaneously with the arrival of Miss Spinner and Lieutenant Fuller. The policeman departed (R. 18,43,44).

Carlos Wesley Cunningham, a police officer of Chesterfield County, testified that at about 2:30 a.m., 29 January 1944, while patrolling south just north of Petersburg, he saw a girl walking south. He drove on to Colonial Heights, turned around, came back, and took the girl in his car (R. 62). He identified Miss Anthony as the girl (R. 63). Witness "took her up the road to look for a wrist watch" (R. 62), at a spot three or four hundred yards from the place where she entered the car (R. 64). They got out of the car and hunted around with the aid of a flashlight for about five minutes (R. 64,66). Then, at her request, he drove her to her "girl friend's" house on Piedmont Avenue, Colonial Heights (R. 62). From the place at which they hunted for the wrist watch to the "girl friend's" house took not over ten minutes, and approximately twenty minutes elapsed from the time witness first saw Miss Anthony until he "drove her off" (R. 63,64,65).

Witness described Miss Anthony's condition as follows: She was excited, and her coat was rumpled and her hair "mussed up" (R. 63,65,66). Although she was not hysterical and not "weeping", her voice was trembling (R. 67,68). Witness did not notice anything else about her condition. In fact, while she was in the car and while they were hunting for the watch, he paid no attention to her (R. 65,66).

Miss Spinner and Lieutenant Fuller corroborated Miss Anthony's testimony relative to the latter's arrival at Miss Spinner's house in a car (R. 71,78,92,97). Miss Spinner placed the time at about 3 a.m. (R. 71, 77,80), and Lieutenant Fuller at about 2:30 (R. 92,97). Lieutenant Fuller testified that there was a street light about 75 or 100 feet away (R. 92). Both Miss Spinner and Lieutenant Fuller testified that Miss Anthony was wearing her overcoat, and Miss Spinner added that it was buttoned (R. 72, 79,93).

Miss Spinner testified that Miss Anthony's hair, which had been "lovely" when they were at Alford's, was "all pulled over her face and messed up" (R. 72,78). Lieutenant Fuller testified as follows with reference to Miss Anthony's condition: Her hair was "a little mussed up". It appeared to be "wind blown, like she was driving in a car with the window opened". There seemed to be nothing else wrong with her physically (R. 92). Witness did not notice her make-up smeared "or anything like that". He did not see "tears running down her cheek", but admitted that she "might have been sobbing" (R. 98). When asked whether Miss Anthony talked as though she were weeping, witness replied, "It could be that manner" (R. 93). He testified further that she "acted a little strange, like she was pretty mad at somebody, nervous and upset"; that she "had a catch in her voice"; that she "seemed nervous when she talked, it didn't flow out", and that her voice sounded as though she were "angry, nervous" (R. 93,98).

According to Miss Spinner, Miss Anthony was nervous, hysterical, and crying. She was "trying to talk, and she was hoarse" and "couldn't talk very well" (R. 72,79,80). Her mouth and face were bruised, her face looked swollen, and her make-up was smeared (R. 72,80).

The two girls and Lieutenant Fuller took a cab to Miss Anthony's house (R. 18,72,94,98). According to Lieutenant Fuller, Miss Anthony did not appear to be weeping during the trip (R. 93,99). Miss Spinner described her during the ride as "quite nervous and trying to talk and tell us something what had happened" (R. 81). Both witnesses stated that Miss Anthony several times spoke about the loss of her watch and asked Lieutenant Fuller to look for the watch in accused's car (R. 81, 94,95,98).

Arrived at Miss Anthony's, Lieutenant Fuller left for camp (R. 18, 81,94). The ladies went upstairs, where Miss Spinner undressed Miss Anthony, gave her a bath, and put her to bed (R. 18,72,73,81). Miss Spinner's description of Miss Anthony's condition at this point was as follows: Her sweater "was all stretched out of shape". It had blood on the front and back and on the sleeves (R. 73,82). Her skirt, hose, and shoes were dirty. Her hose had runs in them, and there was blood on the hem of the skirt. The skirt was wrinkled. One bow from her shoes was gone. Her slip was dirty and bloody and her brassiere straps broken (R. 73,81,82). She had bites and bruises across her shoulder and "a terrible bite" on her upper left arm (R, 73,84). Witness could see teeth marks on Miss Anthony's arms and across her shoulders (R.83). Her face was bruised, she had a cut or bruise on her lip, and her legs were dirty, bruised, and bloody. With reference to the legs, witness specified bruises on the outside of the thighs (R. 73,85).

Describing her own condition at the time, Miss Anthony testified that her arms had "swollen up" already, and that there were marks, scratches, and bruises on them. Her hands were sore and had scratches all over them

(R. 18,44). She had two bites on her back, and bruises on her back, leg, and temple (R. 18,44,52). There was blood on her leg, hose, skirt, and sweater sleeves. She had blood "all over" her body. On cross-examination she said that it was on her body, rather than all over her body. She was not menstruating at the time (R. 19,45).

Miss Anthony testified that she "complained" to Miss Spinner about accused's actions (R. 51). Miss Anthony's testimony continued in substance as follows: She went to bed around 4:30 a.m., did not sleep, and arose early (R. 19,20,45). It took her over an hour to dress. She could not raise her hands higher than her ears (R. 20,45). She went to her place of employment and stayed all day (R. 20,45). She told the manager that she did not think she would be able to work, and, although she gave a couple of shampoos, it was an effort (R. 20,45,46). She "complained" to the operators of the shop about accused's conduct, and also told her landlady and another roomer (R. 51).

Lieutenant Fuller testified that on Saturday afternoon, 29 January, Miss Anthony telephoned him and asked whether her watch had been found (R. 95).

Continuing her testimony, Miss Anthony stated that she spent Sunday, 30 January, in bed. On Monday she tried to work but was unable to do so because her arms were sore and she could not raise them. Her whole body was sore (R. 20,21).

On Monday, apparently after working hours, she went to see Dr. Ruth S. Mason, who examined her shortly after 6 o'clock (R. 20,46). A summary of Dr. Mason's testimony follows: She is a practicing physician in Petersburg (R. 54,55). On Tuesday, 1 February 1944, witness saw Miss Anthony at some time between 9 and 11 p.m. in witness' office. At Miss Anthony's request, witness examined her. Miss Anthony was nervous. She showed several bruises and abrasions on her face; among them a bruise on her left cheek. There was an "abraded area" on her lip, between the mucous membrane of the lip and the nose. It looked like fingernail scratches. There were several scratches on her face. Her left upper arm "showed a deep bruise on the outer outside". The bruise appeared to have been made with teeth and could not have been self-inflicted except by a contortionist (R. 55,56,57,58,60,61). Between her shoulders there were two bruises close together and several smaller bruises around her back and shoulders (R. 56).

Miss Anthony asked witness for an examination of the genitals. The examination revealed a bruise on the left side of the external vaginal orifice and a split or abrasion in the mid-line in front of the rectum and extending into the vagina. The split was "comparatively fresh" and

was raw, and the internal examination caused it to bleed (R. 56,60). Bleeding would not have occurred in the absence of the abrasion, and indicated that "it was not a healed abrasion"(R. 56,59). The injury to the genital organ was "from bruising; it was some forceful contact with something". Miss Anthony was not menstruating (R. 56).

Referring to the injuries as a whole, witness believed that they had occurred between 48 hours and a week prior to the examination. The bruises were fading (R. 57).

Miss Anthony testified that she wrote to her family, who did not live in Petersburg, telling them what had happened. Apparently as a result of their reply, she went to Camp Pickett on Sunday, 6 February, and made a complaint against accused for assault with intent to rape (R. 21,22, 46,47,48,51). On Tuesday, 8 February, she swore out a warrant at the Chesterfield County Court House against accused for attempted rape (R. 21,47).

Miss Anthony testified that at no time did she voluntarily kiss accused or permit him to kiss her, but that he attempted to kiss her and have intercourse with her (R. 22,30,48,51,52).

b. Defense.

Accused testified that he was single (R. 134). He corroborated the testimony about driving from Camp Pickett to Petersburg in his car and going to Alford's, where they arrived about 9:30 p.m. (R. 100,101). He stated that Petersburg is about 40 miles from Camp Pickett (R. 135). His car was a four-door Plymouth sedan, with a dark green body and a light green top (R. 101,113). On the dashboard was an emblem consisting of a picture of a ship. A person sitting in the car would have a very indistinct view of the emblem (R. 114). The front doors are unlocked by pushing down on the handle. The rear doors are locked by pushing down a button (R. 113,114). Three photographs of the car were admitted in evidence (R. 112; Def. Exs. A,B,C).

Accused continued as follows: He drank some liquor during the ride to Petersburg. He and his companions took a bottle into Alford's and had some coke and whiskey and some beer. Accused corroborated the testimony concerning Lieutenant Fuller's activities in getting Miss Anthony and Miss Spinner (R. 101). They all had a round of Coca-Cola and whiskey, drank part of it, and danced. After they were seated again, accused "felt slightly ill", and asked Miss Anthony if she would like to go outside with him, which she did (R. 102). They left Alford's about 11:50 (R.108). They sat in the car and talked, then went to a restaurant for coffee, after which they entered the car again. Accused put his right

arm around Miss Anthony, pulled her over toward him, and kissed her. He put his left arm around her and kissed her again. He told her she was "kind of cold" because she "didn't put her arms around" him, whereupon she put her arms around him and he kissed her two or three times. He placed his hand on her breast twice and each time she removed it. He "slipped" his left hand "up the side of her leg under her skirt", kissing her at the same time. She removed his hand, saying that if he "was going to be that way", he "could take her home". As directed by her, he drove her to the place where she said she lived. Accused asked Miss Anthony not to go in, and she made no attempt to leave the car. He put his right arm around her, his left hand on her hip, and placed her right arm around his neck. They rolled back toward the right corner of the car, he "about half on top of her". She opened the door, remarking that she knew he "was going to be that way". Thereupon he let her out and drove back to Camp Pickett (R. 102,103). It was about 12:30 or 12:45 when he left her, and he arrived at Camp Pickett at 2:15 a.m. He heard the time over the radio while he was listening to a news broadcast in the car, but did not recall the station or any of the news events (R. 103,106). He was not drunk (R. 106). He went upstairs, took off his coat, and went to the latrine, where he saw and talked with "Captain Angel", who remarked that it was "a hell of a time to get in a day before inspection" (R. 103,104). Then he went to "Captain Skogerson's room, turned on the light, and told Captain Skogerson that it was time to get up for reveille, to which the latter replied that it was only 2:30 and "to get the hell out of there". Accused then went to his room (R. 104,107).

Accused testified further that he did not find Miss Anthony's watch (R. 105). He denied that he had driven Miss Anthony north of Petersburg and that she had tried to jump out of the car on a bridge. He denied having committed the acts ascribed to him by Miss Anthony while she was in his car (R. 106).

Captain Nicholas C. Angel, Headquarters and Service Company, 233rd Engineers, corroborated accused's story about their meeting and talking in the latrine. Witness gave the time as 2:25 (R. 115). Witness had known accused since July or August 1942 and they were friends (R. 118).

Captain E. E. Skogerson, 233rd Engineer Combat Battalion, corroborated accused's statement that he came into Captain Skogerson's room and told him to get up for reveille. Witness said that it was 2:30 a.m. Witness and accused had been friends for two years (R. 122,123,129).

On cross-examination accused testified that he talked to Captains Angel and Skogerson on 16 February to find out whether they recalled the incident of his "coming in" (R. 135,136).

Captain Theodore Cohen, Medical Corps, 1318th Service Unit, Station

Hospital, Camp Pickett, Virginia, testified that it is possible for the dark area at the entrance to the vagina to be extended and irregular. A dark area might be normal or might be caused by a bruise (R. 136,137).

A number of officers who had known accused for substantial periods of time testified that his reputation for sobriety, integrity, honesty, truth, and veracity was good (R. 99,125,138-146). Captains Angel and Skogerson testified that they would believe accused under oath (R. 120, 125). The former stated that he could think of no time when accused had acted in an ungentlemanly fashion (R. 122). The latter stated that the accused had the reputation of going out for intercourse with women at times (R. 126).

Lieutenant Colonel Clayton S. Gates, 233rd Engineers, testified that he had known accused since 6 July 1942 and that accused had served as company commander and executive officer. Witness stated that accused was a "superior soldier" and "superior" as a company commander. He had the confidence of his officers and men and was a true leader. The morale of the company was high. Because of his success as a company commander, he was selected by witness as executive officer (R. 138).

c. View.

At the conclusion of the closing arguments, the court left the courtroom and inspected accused's automobile. Accused and counsel for both sides were present (R. 166, as corrected by Certificate of Correction).

4. From the foregoing summary, it is apparent even from accused's testimony that he made love to Miss Anthony and indulged in the customary preliminaries to sexual intercourse. However, according to his version, he desisted and released Miss Anthony when she objected to his course of conduct. He claims to have arrived at camp about 2:15, and two of his friends and fellow officers support his testimony in that respect. On the other hand, Miss Anthony tells a story involving an unwanted ride to a remote spot three miles from town and a subsequent brutal attack on her with the evident purpose of carnally knowing her by force and violence and without her consent.

In choosing between these conflicting stories, it must be borne in mind that the court had the opportunity of observing the witnesses and judging their credibility. In view of that fact, the court's findings should not be lightly brushed aside.

Obviously, accused had more reason to pervert the truth than did Miss Anthony, and it is not unreasonable to believe that his two fellow officers and friends either malevolently or inadvertently erred concerning the time of his presence in camp. For that matter it is possible that

accused, by fast driving, may have left Miss Anthony at the spot described by her and still have traversed the 40-odd miles to camp in time to arrive close to 2:15. The policeman found Miss Anthony about 2:30, prior to which she claims to have walked toward town, returned, searched for her watch, and again walked part way to town. These activities may have consumed sufficient time for accused's return to camp.

That Miss Anthony was in the locality where she claims to have been admits of no doubt. Neither does the fact that she was nervous, upset, and badly bruised. Her condition was serious enough to induce Miss Spinner to go upstairs with her, help her undress, give her a bath, and put her to bed. Since she had her coat buttoned when Lieutenant Fuller saw her, it is not surprising that he failed to observe anything awry with her clothing. Most of the injuries, too, would have been hidden from his view. Furthermore, he, too, was a good friend of the accused's.

Although Miss Anthony and Miss Spinner may have exaggerated the injuries, Dr. Mason, a completely unbiased witness, found injuries consistent with Miss Anthony's story and with the allegations, and entirely inconsistent with the contention of accused. One cannot study the record without becoming convinced that Miss Anthony was maltreated by someone as alleged. The possibility that after accused had left for camp Miss Anthony became entangled with another man and that it was this mysterious stranger who attacked her, is too remote for serious consideration. By accused's own testimony, Miss Anthony does not appear to have been in a receptive mood for sexual intercourse, and it is inconceivable that at such a late hour she would have set forth on a second adventure. If, nevertheless, she did, and this second man attacked her, why would she accuse Captain Crumpecker rather than the true culprit?

In addition to possible exaggeration concerning the extent of her injuries, there were certain inconsistencies in the testimony, as pointed out in a brief filed by the defense counsel and attached to the record of trial, and in a brief filed with the Board of Review by civilian counsel. Without commenting in detail on these inconsistencies, it is sufficient to state that they do not refute or render unconvincing the main features of Miss Anthony's story, as corroborated by other witnesses and by the circumstantial evidence, whereas the attempted alibi proclaimed by accused varies too widely from the established facts to be tenable.

In the opinion of the Board of Review, the record supports a conviction of assault with intent to commit rape in the manner found by the court, as modified by the reviewing authority.

5. Consideration has been given to the request for clemency signed by the defense counsel and attached to the record, and to a request for clemency filed by civilian counsel, three copies of which accompany the record. These are in the nature of briefs and have been so designated

supra. Consideration has also been given to the oral argument presented before the Board of Review by Mr. L. D. Joslyn, Charleston, Missouri, and Mr. S. P. Haines, Washington, D.C., attorneys for the accused.

6. War Department records show that accused is 28 years of age. He attended college for two and one-half years but did not graduate. He served as an enlisted man from 6 July 1941 until 24 June 1942, when, upon graduation from The Engineer School, Fort Belvoir, Virginia, he was appointed second lieutenant, Army of the United States. He was promoted to first lieutenant on 26 December 1942 and to captain on 23 July 1943.

7. The court was legally constituted and had jurisdiction of the person and of the offense. 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, as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized for violation of Article of War 93.

Percy A. Eyer, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.
29 MAY 1944

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Norman G. Crumpecker (0-1100937), 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, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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.

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 Ex. action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 320, 22 Jun 1944)

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

SPJGK
CM 252683

28 APR 1944

UNITED STATES	)	10TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Hale, Colorado, 22 March 1944. Dishonorable discharge (suspended) and confinement for ten (10) years. Rehabilitation Center, Seventh Service Command, Camp Phillips, Kansas.
Private LESLIE E. THOMAS (37473375), Headquarters and Headquarters and Service Company, 87th Infantry.	)	

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

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally sufficient to support only so much of the findings as involves absence without leave from 2 July 1943 to 21 January 1944, in violation of Article of War 61. 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leslie E. Thomas, Headquarters and Headquarters and Service Company, 87th Infantry, then of Service Company, 87th Mountain Infantry, did, at Fort Ord, California, on or about 2 July 1943, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty beyond the continental limits of the United States, and did remain absent in desertion until he was apprehended and returned to military control at Fort Des Moines, Iowa, on or about 21 January 1944.

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 15 years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures, and confinement at hard labor for ten years, suspended execution of the dishonorable discharge until release from confinement, and designated the Rehabilitation Center, Seventh Service Command,

Camp Phillips, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 29, 25 March 1944, 10th Infantry Division, APO No. 345, Camp Hale, Colorado.

3. The prosecution showed that from the first part of June until 4 July 1943, accused was a private, 87th Infantry, stationed at Fort Ord (R. 6,7,11; Ex. 1). Private Orville Jensen, 87th Infantry, testified that he knew accused. "One day", at Fort Ord, "about a week before he left", accused asked Jensen if the latter "wanted to go over the hill with him". Accused said he had "a job waiting for him" (accused). During their period of basic training, which started in February 1943, accused had told Jensen several times "that he would never go overseas" (R. 7,8,10). Private Jensen was asked by the court: "On or about the middle of June did you men of the 87th have any idea you were going abroad?". Jensen's answer was: "Yes, sir". He was then asked: "Was Private Thomas (accused) present at that time?". Jensen answered: "Yes, sir. He was there when Lieutenant Smith was telling us about it" (R. 11). Witness was then asked: "* * * did you have any idea how soon you would be going overseas, or have any indefinite date in the future?", to which he replied: "Well, we didn't know for sure, that is true" (R. 11). Accused absented himself from his organization without proper leave on 2 July 1943 and remained absent from military control until 21 January 1944 (R. 11; Exs. 1,2). The 87th Infantry sailed "for overseas" 28 July 1943 (R. 7).

The rights of accused were explained to him and he elected to remain silent. No evidence was introduced in his behalf.

4. Accused is charged with absenting himself without proper leave from his organization with intent to shirk important service, to-wit: embarkation for duty beyond the continental limits of the United States. This is desertion, under Article of War 28, and is punishable as such under Article of War 58. To sustain this charge it was necessary to prove that accused knew that his command was about to embark for overseas, and that he absented himself with the specific intent of shirking this important service (CM 230827, Sheffler). Without such knowledge accused could not have entertained the specific intent which is charged. The record is barren of any competent proof of such knowledge. The only evidence on this point is found in the affirmative answer of Private Jensen to the question: "On or about the middle of June did you men of the 87th have any idea you were going overseas?". This question was improper. It expressly called for an opinion or conclusion of an inadmissible character. The answer was incompetent and was not binding on accused. This witness also testified in this same connection that accused "was there when Lieutenant Smith was telling us about it" (evidently going overseas). Here, again, we have a conclusion from this witness that Lieutenant Smith notified accused of this "important service". This too was incompetent. The witness usurped the function of the court. He should have testified as to what the lieutenant told accused in order that the court could decide whether

accused had been duly put on notice.

The Manual for Courts-Martial, 1921, paragraph 409, says, at page 345:

> "In proving a specification alleging that accused quit his organization * * * with the intent to avoid hazardous duty, * * * the trial judge advocate should offer in evidence proof of facts tending to show that the accused knew with reasonable certainty that he would be required for such hazardous duty * * *" (underscoring supplied).

At best, the only evidence in this case on this important element of notice is that a lieutenant named Smith, at some time, told accused that he was going abroad at a time not specified.

The competent evidence does, however, show an unauthorized absence by accused from his organization and from military control from 2 July 1943 until 21 January 1944 as alleged in the Specification, in violation of Article of War 61, a lesser included offense of that charged (Bull. JAG, Nov. 1942, p. 323, CM 224932, CM 226374). The sentence as approved by the reviewing authority is legal. The maximum penalty for violation of Article of War 61 is dishonorable discharge, total forfeitures, and confinement for life.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave for the period alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Jerry A. Gore, Judge Advocate.

Thos Wannamtell, Judge Advocate.

(See concurring opinion), Judge Advocate.

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

(144)

SPJGK
CM 252683

UNITED STATES	)	10TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Hale, Colorado, 22 March 1944. Dishonorable discharge (suspended) and confinement for ten (10) years. Rehabilitation Center, Seventh Service Command, Camp Phillips, Kansas.
Private LESLIE E. THOMAS (37473375), Headquarters and Headquarters and Service Company, 87th Infantry.	)	

CONCURRING OPINION

of

FLETCHER R. ANDREWS, Judge Advocate.

I concur in the result reached by the majority of the Board of Review, but not in everything stated in the opinion. I am not at all certain that the questions and answers discussed therein were incompetent when taken as a whole. If they were competent, they tended to show that "on or about the middle of June", a Lieutenant Smith told the "men of the 87th" something about going overseas; that accused was present at the time; and that they "didn't know for sure" when they were going. In my opinion, the evidence was too flimsy to justify a finding that accused intended to shirk the "important service" of embarking for overseas. For aught that appears from the evidence, Lieutenant Smith may have said merely, "Well, men, work hard. Some day we'll be going over". For that matter, Lieutenant Smith's identity does not even appear in the record. He is not shown to have borne any official relationship to the "men of the 87th".

Desertion is a serious offense and a conviction thereof may stigmatize its victim for life. Conviction of desertion should not be based upon guesswork. As the British Manual of Military Law (1914) states at page 19:

> "A soldier charged with desertion may be found guilty * * * of being absent without leave * * *. In any case of doubt * * *, the court should find the accused guilty of the less offence."

In my opinion a reasonable doubt exists in the present case.

Whether the record would support a finding that accused intended to remain absent permanently is not before us, for where the specific intent

to shirk important service is charged, it must be proved (Bull, JAG, April 1943, sec. 385, p. 139; Bull. JAG, Nov. 1942, sec. 385, p. 322).

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Leslie E. Thomas (37473375), Headquarters and Headquarters and Service Company, 87th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the Charge and Specification be approved as involves findings of guilty of absence without leave in violation of Article of War 61. The sentence is approved. I recommend that all rights, privileges, and property of which accused may have been deprived by virtue of such findings so vacated be restored.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence approved. By order of the Under Secretary of War. G.C.M.O. 233, 29 May 1944)

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

SPJGN
CM 252710

21 APR 1944

UNITED STATES	)	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 6, 7 and 8 March 1944. Dismissal.
Captain CHARLES R. BATES (0-382048), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

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

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

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

Specification: In that Captain Charles R. Bates, Field Artillery Officers Replacement Pool, Field Artillery Replacement Training Center, Fort Bragg, North Carolina, was, at Fort Bragg, North Carolina, on or about 1 February 1944, found drunk while on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, Fort Bragg, North Carolina.

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

Specification 1: In that Captain Charles R. Bates, Field Artillery Officers Replacement Pool, Field Artillery Replacement Training Center, Fort Bragg, North Carolina, did, at Fort Bragg, North Carolina, on or about 1 February 1944, while on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, drink intoxicating liquor in the presence of guards and prisoners under his charge, in the day room of the Field Artillery Replacement Training Center Stockade barracks, a place set aside for the use of Enlisted Men for recreational purposes.

Specification 2: In that Captain Charles R. Bates, * * *, did, at Fort Bragg, North Carolina, on or about 1 February 1944, while on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, give a drink of intoxicating liquor to Private James B. Landers, a prisoner under his charge, in the presence of guards and prisoners, in the day room of the Field Artillery Replacement Training Center Stockade barracks, a place set aside for the use of Enlisted Men for recreational purposes.

Specification 3: In that Captain Charles R. Bates, * * *, did, at Fort Bragg, North Carolina, on or about 1 February 1944, while on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, Fort Bragg, North Carolina, gamble with Enlisted Men in the day-room of the Field Artillery Replacement Training Center Stockade barracks, a place set aside for the use of Enlisted Men for recreational purposes.

Specification 4: (Motion of defense for finding of not guilty sustained).

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Captain Charles R. Bates, * * *, did, at Fort Bragg, North Carolina, on or about 1 February 1944, while on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, wrongfully permit intoxicating liquor to be introduced into the enlisted men's barracks of the Field Artillery Replacement Training Center Stockade, in violation of paragraph 5, Section XVII of Post Regulations, Fort Bragg, North Carolina, dated 9 October 1943, which regulation is in words and figures as follows, to wit:

"SECTION XVII - MISCELLANEOUS"

"5. Intoxicating Liquor. - The introduction of intoxicating liquor into, or its possession in barracks or any other building, camp, or bivouac

area in which enlisted men are quartered collectively, or the Post Restaurants, the theaters, the Service Clubs, the Post Exchange or any of its branches, is prohibited."

Specification 3: (Stricken by court).

Before the accused pleaded to the general issues, Specification 4 of Charge II was amended by the insertion of the word "wrongfully" immediately before the word "scuffle", and Specification 3 of Charge III was withdrawn. The accused then pleaded not guilty to all Charges and Specifications. After the prosecution had presented its case and had rested, the court sustained a motion by defense counsel for a finding of not guilty of Specification 4 of Charge II. At the conclusion of the trial the accused was found guilty of all of the remaining Charges and Specifications with the exception of Specification 1 of Charge III of which he was found not guilty. 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 from 0800 on 1 February 1944 to 0800 on 2 February 1944 the accused was on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, Field Artillery Replacement Training Center, Fort Bragg, North Carolina. As of the first date there were one hundred and ten prisoners in the Stockade of whom two were "Class A". The men in this last category enjoyed numerous special privileges. In the words of one witness,

> "they are not confined inside the stockade at night; they have separate quarters down near the guardhouse area. They live in tents; they are not under guard; they are allowed to go out and work without guards with them; they are just told where to go and in some cases report there themselves; they are allowed the privilege of smoking; they do not wear uniforms with 'P' on them".

They were also allowed packages and "extras", such as candy, which were denied the other prisoners (R. 10, 69, 177).

"Around ten to twelve" armed guards were available as prison chasers. Ordinarily each of these had not "more than three" prisoners allotted to him so that the maximum number of prisoners "out on detail" at any one time did not exceed thirty-six. When the prisoners were drilled outside of the Stockade, they were accompanied and supervised by all of the guards (R. 177-179).

After "lights out" at nine o'clock p.m. on 1 February 1944 the sound of laughter, boisterous conversation, music, and "merriment" emanated from the day room of the guards' barracks. Some of the prisoners were awakened by the noise and came out of their tents to ascertain its cause. They saw the accused and several enlisted men drinking together. A "couple bottles [were] being passed around . . . among the fellows". There was "some sort of a celebration", a "regular wild party going on". The sound of revelry was sufficiently loud to be heard by an enlisted man on duty in a warehouse located approximately fifty yards from the guards' barracks (R. 16, 19, 26-27, 31, 49-50, 54-55, 132, 143).

Private Glen L. Witham, a prisoner who had been ordered to report that evening to the accused "from 7 o'clock to 10 o'clock every hour that the Class A prisoners were present and accounted for", entered the day room in compliance with his instructions at 8 o'clock p.m. He "observed a bottle being passed around amongst the men". It contained whiskey and was "approximately half full". The accused, who was the only commissioned officer present, took a drink from it and passed "it on to one of the other men" (R. 94-96, 99).

About a half an hour earlier a Private Hall and Privates James B. Landers, Jr. and Arthur Balling who were working as "KPs" in the mess hall were sent for by the accused. Upon reporting to him, they were all given cigarettes and were informed that they were henceforward Class A prisoners. According to Private Balling, "he wanted us to move out of the Stockade that night and check our clothes and see Private Witham, [who] would tell us which tent to sleep in". They left the accused and were shown to their new quarters (R. 104-105, 109, 137).

Between 8:30 and 9:00 o'clock p.m., after having "swept the tent out, started making [their] bunks, [and] put a few things away," Hall and Balling went to the day room to get a drink at the fountain. The accused saw them enter and "said that he wanted to talk to" them. Landers, who had just "started washing up" in the adjacent latrine, was summoned into the day room to join them. He has described what then occurred as follows:

> "We were all standing against the wall there; [the accused] has a bottle of whiskey in his hand three-quarter full of whiskey, so he offers Balling and Hall a drink of whiskey; they refuses; he offers me a drink so I took a drink . . . He says, 'you boys know I am not supposed to give a prisoner whiskey,' so at the time he said that he reached me the bottle."

On the floor near the accused's feet sat an enlisted man named Young holding another bottle. Several other enlisted men in the room were drinking liquor. Under the fountain was a small card-

board box containing a number of empty bottles (R. 94, 106-107, 111, 137-141).

In accordance with his schedule Private Witham came to the day room at nine o'clock p.m. He found the accused at the pool table "playing dice". About eight persons were participating in the game. The accused did not hold any money in his hands but he did roll the dice and make bets, and there was money on the table in front of him. Private First Class Glen E. Kuszmaul who went in and out of the day room several times during the evening also witnessed the rolling of the dice. At ten o'clock p.m. Private Witham again returned to the day room. He found the accused engaged in conversation with the guards and saw him take one or two drinks. No prisoners were present (R. 90-92, 96-102).

Shortly before eleven o'clock p.m. one or two shots rang out. Several of the prisoners were awakened and left their tents to investigate. They saw Private Carl W. Douglas on the steps of the guards' barracks hand a pistol to the accused who thereupon fired it three times in the general direction of a warehouse. Two of the shots passed over the head of Private Russell E. Wiswell who was on guard at one of the posts. Private First Class Kenneth Smith observed two holes in the warehouse building the following morning and found two "deformed" .45 caliber bullets on the floor. A slightly different version of the shooting was given by Private George H. Mize. He testified that Douglas fired four shots and the accused only one (R. 12-13, 15-25, 27-30, 38-40, 51, 56-59, 65-66, 72-73, 77, 87-88, 98, 108, 113, 117, 143).

After the last shot the accused "blew in" the pistol and put it in his holster. At this point some whiskey bottles came into view. Douglas congratulated the accused on his "good shooting" and said "Come on, Skipper, have a drink with me". The invitation was forthwith accepted. Douglas also partook, and both reentered the day room (R. 29, 41, 51, 66-67, 73).

Private Joseph M. Duffy, a tower guard, had seen them standing outside the guards' barracks immediately after the firing of the shots. When he and Private Raymond E. Haviland, another tower guard, were relieved from duty a little later in the evening and were passing through the day room on the way to the latrine, they observed the accused engaged in a card game with several enlisted men. No money was visible. The empty liquor bottles in the cardboard box were still under the fountain (R. 77-85, 322).

About 3:30 a.m. in the morning on 2 February 1944 the accused entered the tent into which Privates Hall, Balling, and Landers had moved only a few hours before and awakened all three. He

said, "Landers, I am freezing; build me a fire". This request was complied with immediately. According to Landers, the accused then "turned around to Balling and remarked 'you boys aren't going to mess me up'. He turned around and said the same thing to me, which he said to Hall. He said, 'Balling, you are a good boy. I know you got plenty of money; you got plenty of money in the office.' He turned around to me and he said 'Landers you are a good boy too'". After a brief stay, the accused announced that "I am going to wake up these goddam prisoners" and took his departure. As he walked out of the tent, Landers saw him stagger. Although the usual time for morning roll-call was 4:30 o'clock a.m., the bell summoning the prisoners to their reveille formation sounded a few minutes later. "It was still dark" (R. 47, 51, 61, 67, 75, 108-109, 117, 123, 133, 139-141, 146, 153).

There were 108 men present that morning. When they had lined up, the accused demanded the roll call sheet and commenced calling their names, but after he had read off only a few he remarked that his copy "was blurry" and requested another. The one which was immediately obtained for him proved just as difficult for him to bring to a focus. His "voice was sort of thick, loud, louder than usual, and he seemed to wobble a little". Corporal Birch E. Pack, who was standing nearby, offered to finish calling the roll sheet, and it was handed to him. As the names were read, certain of the prisoners to the number of about twenty were ordered by the accused "to step forward to another formation" and were told by him that they were now Class A. He was about to include a newcomer to the Stockade named Rice in this group, but, when Corporal Pack protested, he said, "I don't like your looks, Rice, take ten laps around the fence". Having completed his selection of Class A prisoners, the accused brought the others to attention and proceeded to drill them. He gave his commands on the wrong foot, staggered about, and, while following the formation, fell over a step leading into a tent. After about ten minutes, he shouted to Corporal Lloyd B. Dillard who was on guard, "Open the gate, we are coming out". Corporal Pack objected that there were no other guards outside, but the accused, after asking whether Dillard had his riot gun and after receiving a reply in the affirmative, patted his pistol holster and said, "My .45 is cocked; let them take off, anyone that wants to". Corporal Pack pointed out that it was customary to double-time the prisoners around the fence within the stockade and pleaded that the prisoners not be marched outside with so insufficient an escort. The accused was adamant and repeated his order to open the gate. The prisoners were led out accompanied only by the accused and the two corporals. There a Class A prisoner named Connell or Cornell began to drill them, but the accused soon stated that he would "take over." One of the men in the formation was Private Anderson M. Purcell, Jr. According to him, the accused "would give us about face on the wrong foot; marched us all back . . . where there was clay stuff on the side of the road, half of us ran up on

the piles, and we couldn't keep up with his cadence. He was counting his cadence fast part of the time and slow part of the time and we couldn't keep up with it at all . . ." He "staggered", "stumbled", and "weaved", and once, while marching backward after commanding "To The Rear March", he backed into a wall and "near fell down". The evidence is contradictory as to whether he held his pistol in his hand or retained it in his holster. Shortly after his unfortunate contact with the wall, he marched the prisoners back into the Stockade and dismissed them. He had had the Class A prisoners sign in and had given them leave to return to bed. When some three hours later he was relieved at 8:00 o'clock a.m., he was not, in the opinion of his successor as Officer of the Day, under the influence of liquor (R. 32-35, 52,53, 62, 67-70, 75, 114-115, 117-118, 123, 133-134, 143-144, 146-147, 151-156, 167-170).

That same morning a detail was appointed to dispose of all of the whiskey and beer bottles in the Stockade area. They were placed in a large wooden box, which they entirely filled, and were taken to an ash dump where they were buried. Most of them were removed from a trash barrel which was emptied "every few days" (R. 118-121).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand solely on the issues raised by the Specification of Charge I and by Specification 1 of Charge III. He categorically denied that he was either drunk on duty or that he wrongfully discharged his pistol (R. 313-328).

He stated that he went to bed at 9:45 o'clock p.m. and he did not fire any weapon nor hear any shots on the night of 1 February 1944. No rounds were discharged from his pistol. If any were missing from his clip, they were removed without his knowledge (R. 313, 317-318, 323).

Almost all of the numerous witnesses for the prosecution had testified that they believed him to have been drunk on the morning of 2 February 1944. When one of them was asked the reasons for this opinion he had answered in part that the accused

> "couldn't read the roll call, and he made 20 Class A prisoners. I don't think he would have otherwise, especially so early in the morning. . ."

By way of refutation the accused testified that he roused Corporal Pack at 3:15 o'clock a.m. and informed him that some Class A prisoners would be made that morning; that he went to the parolee tent of Balling, Hall, and Landers to awaken Hall who was the room orderly of the barracks; that Corporal Dillard was ordered to ring

the bell; that the prisoners were lined up and brought to attention; that the accused commenced calling the roll; that as each man responded to his name he was "supposed to do About Face"; that the accused had a carbon copy of the original roll, "which in the light there was very hard to see"; that he accordingly asked for the original; that while waiting for it he drilled the prisoners; that when it was handed to him by Corporal Pack, he proceeded to call eight to twelve names more; that Corporal Pack offered to complete the reading of the roll so that the accused might "pull" certain prisoners out for the purpose of putting them in Class A; that eighteen men were selected and were told "that they could go back to bed"; that what then occurred was related by the accused as follows:

> "I gave the prisoners Right Face and marched them out of the Stockade to the drill field, at which time Corporal Pack said to me, 'Sir, the guard isn't out here yet.' I says, 'Never mind the guard; I can take care of them,' and marched the prisoners out to the drill field, gave them a Column Left toward the drill field and halted the prisoners. As the prisoners passed out I stood by the gate, and as they passed out I fell in behind them, and as I fell in behind the prisoners about the same time I gave them Column Left to go onto the drill field Private Connell came walking up the walk from his tent. I says, 'Private Connell, wait a minute'. I halted the prisoners. I says, 'Connell, you go ahead and drill the prioners and Dillard, you guard them; take your riot gun and guard them.' I called the men who I had made Class A out and I got them into the gatehouse, had them come into the gatehouse and while I stood there I had them sign their names on a piece of paper with their full name so that I could give the list to the clerk for the purpose of making out the Class A passes which they have to have to show to go in and out of the gate. After that job was completed of signing up the Class A's, I turned those men as they signed back into the Stockade and they had the privilege of going back to bed if they wanted to. After I got that job completed I went out to the drill field, I says, 'All right, Connell, you can go ahead; I will take over.' I drilled the prisoners out on the drill field for a period of approximately 15 minutes. I then turned the prisoners back into the Stockade and closed the gate and went back down to my office";

that the accused had awakened the prisoners "exactly 45 minutes early" as "a disciplinary measure;" that, to quote the accused again:

> "The day before on the 1st around noon when the prisoners were turned in at noon, every prisoner that was in the Stockade went through the gatehouse and was stripped as he turned in. He had to strip to the hide, and at that formation the condition of their personal bodies was, as I might state, one hell of a mess. The odor of their person was terrible. I asked several of them being present in the gatehouse when the inspection was made if they ever took a bath. The answer I got to most of those questions was, We didn't have enough time, sir; we don't have enough time, sir. So I said, 'Well, we will have plenty of time tomorrow; we will get up an hour earlier which will give you time to clean up before you fall out; and then I had a bath formation myself up there later that evening";

that another disciplinary consideration was the absence of two or three prisoners the night before and the slowness of others in double-timing at roll-calls; that it was necessary to designate a large number of Class A prisoners because of the shortage of guards; that there were only twenty-two chasers available for over a hundred prisoners; that only eleven chasers were on duty at any one time; that taking the five or six noncommissioned officers into account, "approximately 52" prisoners could be sent out to work each day; that "as a result" "around fifty to sixty prisoners" had to remain "in the Stockade with just general police work to do there, which wasn't enough to keep them busy . . ."; that the problem had been solved in the past by the appointment of a large group of Class A prisoners; that so large a number had never previously been designated because "we had a detail of 50 prison guards from the 72d Replacement Battalion;" that, however, although only the usual number of chasers were present from 29 November 1943 to 1 February 1944 and although as many as one hundred fifteen prisoners were confined in the Stockade, the largest number of Class A prisoners during that period was eleven (R. 312-328).

Several witnesses for the defense testified that on the morning of 2 February 1944 the accused was not drunk and did not stagger. Upon cross-examination, however, as to other relevant events occurring at that time their recollection was vague or unformed. They had been "sleepy", "so sleepy", or "half asleep"; they hadn't paid "any attention"; they "couldn't see"; they "didn't notice"; they "didn't remember"; or they were "pretty hazy" (R. 221, 226, 252-255, 257-259, 263-264, 287, 273-274, 278, 281, 286, 291, 294, 297, 300-303).

Much of the evidence adduced by the prosecution was corroborated by the defense. Thus Corporal Dillard while passing through the day room at 9:00 o'clock p.m. on 1 February 1944 had heard the accused say "seven come eleven". Private Robert L. Ross had heard the conversation in which Corporal Pack had objected to the drilling of the prisoners outside of the Stockade on the grounds that "They didn't have chasers . . ." and the accused had replied "to open [the gate] anyway, . . . he had his gun there"; and Private John Henry Edmunds had been instructed by Corporal Pack on the morning of 2 February 1944 "to do away with the bottles". At a pre-trial investigation Corporal Dillard had stated that "I wouldn't say that [the accused and Corporal Pack] were perfectly sober." The reasons for his opinion was that "they wakened the prisoners up that early, and that the accused called him "soldier" instead of by name as usual (R. 206, 223-224, 231, 292).

Testimony was offered by the defense for the purpose of discrediting certain of the witnesses for the prosecution. It was shown that Private Henry H. Jackson had remarked that he "would do anything possible to get [the accused] busted if he could", and "that he hated [the accused's] guts". An attempt was also made to prove that Privates Jackson, Reid, and Riccardi were lying when they stated that they had come out of their tents and looked into the day room after having been awakened on the night of 1 February 1944. Private Joseph J. Duffy, who was on guard duty in tower number 2, was positive that he had not seen any prisoners outside their tents, and Private Charles Hren, who was in tower number 1 remembered "calling several times, but [did not] know whether it was exactly that night or whether it was some other night, but there wasn't three [prisoners] there was always one or two." The possibility that prisoners could stand outside their tents without being noticed by the guards was conceded by Private Duffy. Hren recalled that the night had been "misty" (R. 212-220, 243-246).

The accused's previous excellent record and character were attested to by Colonel Alfred B. Devereaux, Major William J. McVey, Captain Adrian F. Sherman, Captain Darwin O. Fee and Captain Robert F. Fairbanks. The Colonel described him as "always a very cheerful and very loyal officer who performed his duties in an intelligent fashion. He was a very hard worker". Captain Sherman believed the accused to be "thoroughly reliable" and added that "never at any time when he was given anything to do did he fail to do his utmost to accomplish his duty. I would welcome the opportunity to serve with [him] again at any time." The War Department AGO Form 66-1 relating to the accused contains no ratings for certain periods of his service but the five entries which do appear under the heading "Manner of Performance" are all "E".

5. The Specification of Charge I alleges that the accused on or about 1 February 1944 was "found drunk while on duty as Officer of the Day of the Field Artillery Replacement Training Center Stockade, Fort Bragg, North Carolina". This offense is laid under Article of War 85. Specification 1 of Charge II alleges that the accused did "on or about 1 February 1944, while on duty as [such] Officer of the Day . . . drink intoxicating liquor in the presence of guards and prisoners under his charge, in the day room of the Field Artillery Replacement Training Center Stockade barracks..". Specification 2 of Charge II alleges that the accused did "on or about 1 February 1944 while on duty as [such] Officer of the Day. . ., give a drink of intoxicating liquor to Private James B. Landers, a prisoner under his charge, in the presence of guards and prisoners, in the day room" mentioned. Specification 3 of Charge II alleges that the accused did "on or about 1 February 1944, while on duty as [such] Officer of the Day . . ., gamble with enlisted men in the day room" mentioned. All three of these Specifications under Charge II are set forth as violations of Article of War 95. Specification 2 of Charge III alleges that the accused did "on or about 1 February 1944, while on duty as [such] Officer of the Day . . ., wrongfully permit intoxicating liquor to be introduced into the enlisted men's barracks of the Field Artillery Replacement Training Center Stockade, in violation of paragraph 5, Section XVII of Post Regulations, Fort Bragg, North Carolina, dated 9 October 1943. . .". This act is presented as an offense under Article of War 96.

Beyond a reasonable doubt the accused was drunk on duty during the early morning hours of 2 February 1944. Much of the testimony to the contrary adduced by the defense was demonstrated upon cross-examination to be unworthy of belief. In any event the opinions of the numerous witnesses pro and con are not controlling, for it is the conduct of the accused which condemns him. The explanations offered by the accused for his eccentric acts are not convincing. The proffering of whiskey to prisoners, the undignified fraternization with certain of the guards, the sounding of the morning bell forty-five minutes ahead of schedule, the inability to read the roll-call, the designation of eighteen new Class A prisoners, the insistence upon drilling the other prisoners outside of the Stockade despite the absence of an adequate guard detail, the bungling commands of execution, the stumbling, and the staggering are all striking details evidencing a condition far removed from sobriety. Singly and apart little significance need have been attached to them. Together they spell drunkenness.

That the accused drank intoxicating liquor in the presence of guards and prisoners, that he gave a drink of whiskey to Private Landers, and that he gambled at dice with several enlisted men, all

as represented in Specifications 1, 2 and 3 of Charge II, is also conclusively established. None of these offenses, however, are per se violations of Article of War 95. In CM 119492 (1918); Dig. Op. JAG, 1912-1940, sec. 453 (9), it was said that:

> "Drinking in the presence of several enlisted men and where other people would have no difficulty in viewing the conduct of the officer constitutes a violation of Article of War 95".

But a more recent decision of the Board of Review in CM 234558 (1943) has been summarized in II Bull, JAG, Sept. 1943, sec. 453 (9) as follows:

> "Accused was found guilty of drinking in a public place in violation of Article of War 95. The evidence showed that the accused drank with men of his platoon at a club. Held: The record is legally sufficient to support a finding of guilty under Article of War 96; drinking with enlisted men is not per se a violation of Article of War 95".

This is the better rule, for Article of War 95 was not intended to cover offenses untainted by some form of moral turpitude. Drinking with enlisted men is not inherently shocking to our standards of decency. The objection to it is that it is prejudicial to good order and military discipline. As such it properly falls within the ambit of Article of War 96. Only an aggravated case should be charged under Article of War 95.

What has been said with respect to an officer's drinking with enlisted men is equally true of his gambling with them or of his giving one of them a drink of intoxicating liquor. The fact that the enlisted man is also a garrison prisoner adds to the gravity of the offense but not sufficiently, in the absence of other aggravating circumstances, to require the invocation of Article of War 95. The conduct testified to in support of Specifications 1, 2 and 3 of Charge II is not of the particularly reprehensible character required for a conviction under Article of War 95. It reveals only violations of Article of War 96.

The fact that the accused and several enlisted men were drinking in the day room is of itself ample proof of the introduction of intoxicating liquor "into the enlisted men's barracks" as charged in Specification 2 of Charge III. No other evidence was required. Paragraph 5, Section XVII of the Post Regulations

expressly and in unambiguous language prohibited the "introduction of intoxicating liquor into, or its possession in barracks or any other building . . . in which enlisted men are quartered collectively . . .". The accused's disregard of this published order was an offense under Article of War 96.

6. The accused is about 32 years of age. The records of the War Department show that after ten years and eight months of enlisted service he was commissioned a second lieutenant on 5 January 1941; that he was promoted to first lieutenant and to captain on 18 June 1942 and on 12 January 1943, respectively; and that since the last date he has been on active duty as an officer.

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 only so much of the findings of guilty of Specifications 1, 2 and 3 of Charge II as involve findings of guilty in violation of Article of War 96 and is legally sufficient to support the other findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 85 in time of war and is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

William H. Crawford, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

(160)

SPJGN
CM 252710

1st Ind.

War Department, J.A.G.O., 5 MAY 1944 - 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 Charles R. Bates (0-382048), Field Artillery.

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, 2 and 3, Charge II, as involve findings of guilty of those Specifications, in violation of Article of War 96, legally sufficient to support the other findings and the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 358, 17 Jul 1944)

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

SPJGQ
CM 252725

8 APR 1944

UNITED STATES v. Private RICHARD R. THOMPSON (14103467), Company A, 482nd Port Battalion, Transportation Corps.	PERSIAN GULF COMMAND Trial by G.C.M., convened at Port of Bandar Shahpur, Iran, 19 January 1944. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

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

Specification: In that Technician Fourth Grade Richard R. Thompson, Company A, 482nd Port Battalion Transportation Corps, did, at Bandar Shapur, Iran, on or about 7 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private First Class Walter L. Simmons, a human being by stabbing him with a knife.

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

Specification: In that Technician Fourth Grade Richard R. Thompson, Company A, 482nd Port Battalion Transportation Corps, did, at Bandar Shapur, Iran, on or about 7 December 1943, with intent to do him bodily harm, commit an assault upon Private First Class Romless Lyles, by cutting him on the shoulder and back with a dangerous instrument, to-wit, a knife.

The accused pleaded not guilty to, and was found guilty of, all of the Charges and Specifications. There was no evidence of any previous convictions offered. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. Attached to the record is a recommendation by the reviewing authority to the President of the United States for commutation of the sentence imposed upon the

accused to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life.

3. The competent and pertinent evidence for the prosecution may be summarized as follows:

On the evening of 7 December 1943 the accused, T/4 Richard R. Thompson of Company A, 482nd Port Battalion (R. 6), stationed at Bandar Shahpur, Iran (R. 10), was in the line for mess in the well-lighted mess hall of his organization. As the front end of the mess line was passing the servers, accused twice reached around Pfc. Granger Massey, who stood in line in front of him, and stabbed Pvt. Romless Lyles, who stood in front of Massey, on the back at the right shoulder with a knife having a blade 2½ to 3 inches long (R. 7, 12, 14, 19). No argument or words of any kind preceded the blows (R. 16). The chow or mess line continued to move, and, as the accused reached Walter L. Simmons, who was standing on a 2½-foot high platform serving lemonade to the men, he stabbed Simmons in the chest with the same knife just as Simmons was leaning over about to pour lemonade into his cup (R. 7, 12, 14, 16, 17, 19).

Simmons placed one hand on his chest as the blood ran out and pointing at the accused said, "that man stabbed me" (R. 7).

Simmons and Lyles were taken to the hospital for treatment. Lyles fully recovered from his wounds. Simmons died within two hours after the stabbing and as a result thereof (R. 21).

The accused proceeded on through the chow line, procured his food and sat down to eat it. Sgt. J. W. Bradshaw heard accused drop his mess kit, saw him stagger as if he had been drinking, so assisted him from the mess hall to his bunk where he fell across it (R. 24-25). He did not detect the odor of liquor on accused's breath. When apprehended shortly thereafter accused was lying on his bunk in a stupor, having vomited on the floor (R. 14, 15, 16, 23, 24).

The actual stabbing was testified to by the witnesses Pvt. W. E. Lewis (R. 6), Pfc. Granger Massey (R. 12), and Pvt. H. J. Ledbetter.

After accused was seated at the mess table, Pvt. H. J. Ledbetter asked him if he had cut Simmons and accused said "You're damned right I did but it's none of your damned business—keep your mouth shut" (R. 17). Accused looked strange as if "he was out of his head". He had had no cross words but had always been the best of friends with the two soldiers whom he stabbed (R. 17).

Lyles could give no reason for accused stabbing him (R. 20).

Captain Ira Teicher, M.C., testified that Simmons was brought into the Dispensary "about 6:25 p.m. on 7 December 1943 with a history of having been stabbed in the chest. The patient was in deep shock and presented an incised wound of the 3rd intercostal space on the left side of the chest about two inches from the mid line. At that time there was a little oozing of blood from the wound. He was immediately given supporting treatment, started plasma injections and his general course seemed somewhat improved during the next three quarters of an hour and then, at about 7:15 P.M., he took a sudden turn for the worse. His blood pressure, which had been picked up by the treatment we gave him, again dropped so as to be imperceptible and, at about 7:27 P.M., there was a sudden gush, a large amount of blood through the wound and this was almost immediately followed by death of the patient."

The cause of death was the stab wound extending into the heart (R. 21). Simmons' body was identified by his commanding officer, Captain E. S. Dunn (R. 22).

Lyles was also admitted to the hospital at the same time as Simmons. He had two incised wounds, one on the back of the right shoulder, and the other in the right axillary region (R. 20). These wounds after treatment healed up with no evidence of permanent injury (R. 21).

4. The accused was advised of his rights as a witness and elected to testify under oath. In his testimony, among other things, he stated that,

> "Beginning about 4:30 (1630 hours) I sat down with James Hayes and John Smith and, as we talked about home and other things, I drank six (6) cans of beer which I had in my barracks bag and, at about 1700 hours, I went out to the latrine, when I returned from the latrine Taylor Anderson, Rufus Jenkins, James Hayes and one or two more men were gathered about Hayes' bed and my bed; I 'bunk' between Hayes and John Smith and occupy the second cot from the north end of the barracks on the west side; I sleep with my head toward the aisle between the lines of cots; when I returned from the latrine as I stated above, Anderson, Jenkins and Hayes had a bottle of Vodka in a regular clear Vodka bottle, and as it was passed around among us I took two drinks directly from the bottle and the other fellows also took drinks; the liquor was brownish in color; when we finished this bottle we heard a whistle and thinking it was our 'chow' whistle we went out to get in the line, but found the whistle was for another company and returned to my barracks; I came back to the barracks with Bradshaw, put my mess kit down, and went to the south end of the barracks where Hayes, Bradshaw and Marcel Trammel, and some other fellows were sitting down. As I got there Bradshaw handed me a bottle of

water white liquor and asked if I wanted a drink and I took two drinks from the bottle. The other men might have taken drinks but I cannot say positively one way or the other. The next thing I remember was getting in the mess line and on the road next to Thomas Garnett, who worked in the same section as I do on the jetty. I remember next that I knocked my mess gear and food out on the floor and Bradshaw was there shaking me; I remember then that Bradshaw was there and took me out of the mess hall and over to the barracks where I got into my own bunk; I remember nothing else until I awoke in the MP Headquarters on the next morning 8 December, 1943; I did not immediately know where I was, but got up and looked thru the opening in the door and saw an MP and then realized I was in the Guard House; I thought I was there for being drunk."

* * * *

"I saw Simmons in the afternoon of December 7th, 1943, when I was in my bunk reading as he came thru my barracks from the rear (or south end) where a 'crap' game was in progress behind the barracks; Simmons said 'how's your mommy, boy?' He went off and said nothing else and I didn't answer him; besides seeing Simmons in the 'chow' line I usually saw him every day somewhere in the area or on the jetty; he used to bring our chow out on the jetty pretty often and I would see him then too; he was always trying to 'put me in the dozens' by talking nasty about everyone in my family, including my grandmother, my mother and my sister; before Thanksgiving I received a letter with pictures of my mother and sister and showed them to Simmons and some of the other boys; he used to play 'in the dozens' talking about my mother and sister, and what he would do to them after seeing these pictures; he told me these nasty things just about everytime I saw him; I told him I didn't 'play in the dozens,' and he knew I didn't, and I used to get mad about it; he knew this made me mad and acted like he got fun out of making me mad and 'playing in the dozens'; when Simmons came by on the afternoon of December 7th, Hayes was not present and Smith was asleep.

"Lyles and Granger Massey also used to use nasty language about my family trying to make 'play in the dozens' but Simmons was the worst of all; Simmons and these two men knew I didn't want to 'Play in the dozens' and knew I never said anything about their families; I have known Simmons and Lyles pretty well since I met them on the transport coming overseas.

"I drank the beer and Vodka, or whatever it was, on the afternoon of December 7, 1943 because I thought I could 'drown' my sorrows and my troubles about my family and forget my worries for the time being; the only other drinking, other than the beer, I have done while over here, was when I drank Cherry Brandy at the rest camp.

"About a month ago Charlie Eddings was on the jetty with me and had two knives so he loaned me the 'Scout' knife found on me and shown me here today; the knife was sharpened before I got it and I've not sharpened or done anything to the blade since I've had it; I've carried this knife on my person since I got it from Eddings; I have no recollection of having the knife in my hand at any time on December 7th, 1943, after about 1730 hours, but do remember opening the cans of beer I drank with it between 1630 and 1700 hours that afternoon; I cannot either admit or deny that I was carrying it in my hand, with the large blade open, while I was in the mess line, or mess hall, or in my barracks after Bradshaw brought me from the mess hall.

"One thing I never did was 'play in the dozens' and if anybody plays in the dozens, I try never to stay around them for the simple reason I couldn't stand for anybody to talk about my people in that manner. People who 'play in the dozens' talk vulgar language about the women folks in other peoples' families."

Captain Edward S. Dunn testified that on the evening of 7 December 1943 he found the accused on his bunk in a stupor. He could not state whether he was drunk or had collapsed. He was certain that there was something wrong with him. He was mumbling to himself and never seemed to realize what was going on. He was carried from there to the guardhouse (R. 30).

Lieutenant Finley S. Bender observed three soldiers carry the accused into the stockade about 6:45 p.m. on 7 December 1943. The accused was placed in a solitary cell. About 9:30 p.m. he observed that the accused had vomited and that there was a strong odor of alcohol. Upon both occasions the accused was unconscious, having "passed out".

Sergeant Edward Tomkins, Jr. was in the same barracks with accused between 5 and 6 o'clock of 7 December 1943, and observed that the accused was "pretty high" and unsteady on his feet. He offered the witness a drink of whiskey which he refused. The accused talked "kinda scattered" and had trouble pronouncing his words. When accused got into the mess line he pushed the witness and the witness pushed him back. As a result accused was ordered to the tail end of the line (R. 33).

5. In rebuttal the prosecution called as a witness First Lieutenant Charles G. Brown who testified that shortly after the stabbings in question he observed the accused lying on his bunk in his barracks in a stupefied condition. Accused had vomited and vomited again while the witness was present. He could not detect any odor of alcohol. He could not tell whether the accused had been drinking or not. There were no facilities in the camp available for giving a blood alcohol test (R. 35-36).

Private James Hayes testified that he saw the accused about 4 o'clock on the afternoon of 7 December 1943 at which time they each drank a can of beer. Accused only had one can of beer while witness was with him (R. 37). He left accused at 5:30. During the time he was with accused the accused did not walk like or act like a drunken man nor did he during that time drink any vodka (R. 38).

Private First Class John Smith observed the accused at the head of the chow line outside of the barracks while he himself was at the tail end. During the afternoon and until chow time he did not see accused drink anything but he himself was asleep most of the time. The bunk upon which he was asleep was immediately next to that of accused (R. 39-40).

T/4 James W. Bradshaw testified that he lived in the same barracks with accused and saw the accused there on the afternoon of 7 December 1943 about a half hour before evening chow, sitting on his bed which was at one end of the barracks. Witness' bunk was at the other end. The witness had with him a bottle of vodka and Trammel and Hayes joined him at his bunk where they drank beer. He was not positive whether any vodka was given to the accused or not. So far as he knew his bottle of vodka was the only one in the barracks that afternoon. He observed Thompson, the accused, when they went outside to line up for chow upon hearing the first whistle. At that time everyone was laughing and talking about different things that had happened during the day and when they found that it was not their chow whistle they returned to the barracks. Shortly thereafter their own whistle was sounded and they again went outside to form a chow line. He did not observe anything wrong with the accused—he was laughing and talking. He did not stagger or stumble nor do anything that would indicate that he was drunk. (R. 45)

Private Marcel B. Trammel testified that he saw the accused before evening chow and spoke to him but did not have anything to drink with him nor did he observe accused drinking. At the time he talked with accused Bradshaw, Hayes and Tomkins were present but he did not see any of these men taking a drink. He could not recall exactly what he said to accused nor what accused said to him—it was only two or three words. At the time accused was on his bed. He did not see any bottle of vodka in the barracks nor did he see anyone hand anything that might have looked like a bottle to the accused (R. 46-47).

Private First Class Thomas Garnett testified that he observed the accused all during the day of 7 December 1943 and did not see him drinking anything. He himself was second man from the accused in the chow line at the evening meal. He did not observe the accused strike Simmons but he did see the accused after the alleged blow was struck, go to the third table in the mess hall and either drop or knock his mess kit on the floor. While they were in the chow line he did not notice anything unusual about accused. He had no conversation with him during that time. There was nothing unusual about his manner of walking nor did he smell any liquor on accused when he stood next to him in the company formation prior to mess (R. 48).

Private H. J. Ledbetter was recalled and testified further that at the time Thompson, the accused, came over to his table in the mess hall, when Ledbetter asked him if he had cut Simmons, he did not smell any liquor coming from him. As Thompson approached him from a distance of 6 feet he did not walk normally but walked "rather shadowy like a ghost or something". His speech, however, was clear and easily understood (R. 49-50).

Private First Class Granger Massey was recalled and testified that as accused was moving along in the chow line immediately behind him, the accused's manner of walking was not unusual nor was there anything about his conduct during that time to indicate that he was drunk. He did not smell any liquor on Thompson (R. 50-51).

Private First Class Isaac Cotledge testified that he knew the accused and about 4:30 p.m. on 7 December 1943 he entered the barracks and saw a group of men near the accused's bunk. One had a bottle from which the witness took a drink. It contained a brown liquid which he described as cognac. He also observed Hayes taking a drink from the same bottle.

Sergeant Jessie Butler testified that he saw Thompson, the accused, in the chow line on the evening of 7 December 1943 in the second or third file. The witness ordered the first file to move off to the mess hall, and, as that file started moving off, Thompson started to move also. The witness called Thompson back to his original position. Thompson returned and stood in the file "prancing--just as we usually do sometimes as playing". He did not observe anything unusual in accused's manner of speech. He could not give an opinion as to Thompson's sobriety and could not say whether he had been drinking or not. Thompson, however, was not in such a condition as to warrant making a report (R. 53-54).

It was also stipulated that if Captain Robert C. Fisher, Medical Corps, were present in court he would testify that on 7 December 1943 about 6:45 p.m. he examined the accused in the presence

of Captain Young and Lieutenant Brown and others. At that time, Thompson had vomited and appeared to be in a daze. His actions were not those of a drunken man. The witness could not smell the odor of liquor on his breath nor from the vomitus. He examined accused again at 9:30 p.m. in the stockade. At that time the accused did not act like a man under the influence of alcohol but there was a faint odor of liquor on his breath (R. 54).

6. The accused is charged with murdering Private First Class Walter L. Simmons by stabbing him with a knife and with assaulting Private First Class Romless Lyles with intent to do him bodily harm by cutting him on the shoulder with a dangerous weapon, to wit, a knife.

The evidence clearly established, through the testimony of numerous eye-witnesses and not denied by the accused, that the accused did, at the time and place alleged, cut Private First Class Romless Lyles with a knife, and did kill Private First Class Walter L. Simmons by stabbing him in the heart with the same knife. The evidence is legally sufficient to support the findings of guilty of Charge II and its Specification regarding the assault on Lyles. A knife when used to cut a human being is per se a dangerous instrument. To strike a human being with a knife in the manner described constitutes an assault. The intent to do bodily harm may properly be inferred by the court from such circumstances. No further discussion of this Charge is deemed necessary.

With reference, however, to Charge I and its Specification, while it was shown, beyond all doubt, that the accused killed Simmons at the time and place and in the manner described in the Specification, it was strongly urged by defense counsel that the killing was without malice aforethought and therefore did not constitute murder.

Murder is the unlawful killing of a human being with malice aforethought. It was not claimed, nor was there any evidence adduced to show that the killing of Simmons was in self defense, or with legal excuse or authority. Therefore the only issue warranting discussion is that of the presence or absence of malice aforethought.

Was there malice aforethought? The term malice is not confined in its legal meaning to hatred or personal ill will toward the person killed, nor to an actual intent to take his life. The term "malice" is a technical one. Chief Justice Shaw in Com. v. Webster, 5 Cush 296; 52 Am. Dec. 711, explains it as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances

as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * * * * * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: It is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

What a person intends is best shown by his acts. When the accused deliberately, and without justification or provocation, stabbed Simmons in the chest over the heart with a knife, he must have intended to kill him. Such is a reasonable deduction from the nature of the act, the weapon used and the vulnerable spot where the blow was struck. Malice may be implied from this deliberate and cruel act. Assuming then that the accused was mentally able at the time to formulate the intent to kill the court was justified in finding him guilty of committing murder as charged.

The defense endeavored to show that the accused was not capable mentally of formulating an intent to kill because of his drunken condition. The accused, as a witness in his own behalf, admitted drinking six cans of beer with James Hayes and John Smith, and drinking from a bottle of Vodka with Hayes, Taylor Anderson and Rufus Jenkins. He also admitted drinking from a bottle of white liquor handed to him by James W. Bradshaw. As a result he claims that he lost his memory from the time he got into the mess line until the time he dropped his mess kit in the mess hall and Bradshaw led him away to his bunk in the barracks. There he again lost all memory of events until he regained it again in the guard house.

It has been held that one who has imbibed of intoxicating liquor to the point that his mind is incapable of formulating an intent to kill may not properly be convicted of murder. C.M. 234838 (1943). Whether the accused's mind was in such a condition was a question of fact for the court to determine. The accused was not corroborated in his testimony as to the quantity and extent of his drinking. In order that the court might determine the truth of

accused's theory of defense the prosecution called as a witness everyone of the soldiers named by the accused as present when he was doing the intensive drinking of beer, vodka and cognac. Hayes related that they drank only one can of beer each. Anderson, Smith, Jenkins and Bradshaw denied seeing the accused drinking any liquor at any time during the afternoon or early evening on the day of the killing. In view of the overwhelming evidence to the contrary the court properly disbelieved the accused's story regarding his drinking and consequently his pretense of loss of memory and the implied inability to formulate the legally required intent. The accused's physical condition subsequent to the commission of the homicide is satisfactorily established. At that time he was violently ill and for several hours thereafter was in a stupor. Just what causes brought about this condition unless it was the excessive drinking related by the accused does not affirmatively appear in the record. His vomiting may have been induced by the realization of the seriousness of his act and its consequences. His stupor could have been feigned. In any event all of the facts available were shown and the Board of Review can perceive no legal or valid reason to disturb the findings of the trial court.

As the defense has failed to establish a lack of mental ability because of drunkenness to formulate a specific intent on the part of the accused, the evidence as a whole is deemed legally sufficient to support the findings of guilty of Charge I and its Specification.

True it is that the accused's act was abnormal and without apparent reason, justification or motive. In his own testimony he admitted to a dislike for Simmons for what he termed "playing in the dozens"—that is, talking vulgarly about accused's family. It may have been this dislike that motivated him to kill Simmons. To a normal person such a motive would appear absurd, but this colored soldier's mind may have been brooding on Simmons' actual or fancied conduct and led him to the point of wrecking his vengeance upon Simmons in the manner that he did without regard to the consequences. Simmons is dead. Thompson should suffer the consequences of his own act.

7. Records of the War Department disclose that the accused was born 4 July 1922 in Lumberton, North Carolina. He completed the 7th grade of grammar school and was employed as a laborer for one year. He is single. On 18 August 1942 he enlisted in the service at Fort Bragg, North Carolina, for the duration plus six months.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence of death by hanging is authorized upon conviction of murder in violation of Article of War 92.

William A. Lounds, Judge Advocate.

Earle Stephen, Judge Advocate.

(on leave) Judge Advocate.

1st Ind.

War Department, J.A.G.O., 21 APR 1944 - 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 Richard R. Thompson (14103467), Company A, 482nd Port Battalion, Transportation 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 the sentence and to warrant confirmation thereof. Attached to the record of trial is a recommendation by the reviewing authority to the President of the United States for commutation of the sentence imposed upon the accused 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. I concur in the recommendation of the reviewing authority and recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the accused's natural life, and that as thus commuted the sentence be carried into execution. I further recommend that the United States Penitentiary, Atlanta, Georgia, 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.

Myron C. Cramer

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

3 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 432, 8 Aug 1944)

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

(173)

SPJGV
CM 252768

12 MAY 1944

UNITED STATES	CAMP HAAN, CALIFORNIA
v.	Trial by G.C.M., convened at
Private JAMES B. HOLIBAUGH (39152274), Unassigned, Attached Company E, Service Command Unit 1930.	Camp Haan, California, 20 March 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 B. Holibaugh, Unassigned, attached to Company E, SCU 1930, Presidio of Monterey, California, did, at or near the vicinity of Tustin, Orange County, California, on or about 13 February 1944, forcibly and feloniously against her will have carnal knowledge of Lela Lane, a female human being.

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

Specification 1: In that Private James B. Holibaugh * * *, did, without proper leave, absent himself from his organization at Presidio of Monterey, California, from about 23 November 1943 to about 8 February 1944.

Specification 2: In that Private James B. Holibaugh * * *, did, at or near Long Beach, California, while en route from Ninth Service Command Military Police Station, Los Angeles, California, to his organization at Presidio of Monterey, California, absent himself, without proper leave, from his station at Presidio of Monterey, California, from about 12 February 1944 to about 23 February 1944.

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

Specification: In that Private James B. Holibaugh * * *, having been duly placed in confinement at Ninth Service Command Military Police Station, Los Angeles, California, on or about 8 February 1944, and having been duly placed in the custody of an armed guard on or about 12 February 1944, to be returned to his organization at Presidio of Monterey, California, did, at or near Long Beach, California, on or about 12 February 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private James B. Holibaugh * * *, did, without authority, at or near Long Beach, California, on or about 12 February 1944, wrongfully take and carry away one .45 Calibre Smith and Wesson Revolver, Serial No. 98364, and one pair Peerless Handcuffs, Serial No. 171907, one web belt, one leather holster and five rounds of .45 Calibre Ammunition, of the value of about Twenty-five Dollars ($25.00) property of the United States furnished and intended for the Military Service thereof.

CHARGE V: Violation of the 84th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Private James B. Holibaugh * * *, did, at or near Moneta, Los Angeles County, California, on or about 21 December 1943, with intent to defraud, wrongfully and unlawfully make and utter a certain check, in words and figures as follows, to-wit:

90-120 Allen & Colorado St. 90-120
BANK OF AMERICA
National Trust and Savings Association No. 1283

Pay to the Pasadena, Calif. Dec 21, 1943
Order of Cash - $10.00
- - - Ten no/100 - - - - - - - - - - - - - - - - - - Dollars
James B. Holibaugh
39152274 - A.S.N.

On reverse side of above check:

88th AB & HQ. Sqdn)
Lemoore, Calf. ok
(C.O.by Wm.S.Penrod) Kenny

and by means thereof did fraudulently obtain from Harrison's Complete Food Market the sum of Ten Dollars ($10.00), lawful money of the United States, the said Private James B. Holibaugh then well knowing that he did not have and not intending that he should have any account at the Bank of America National Trust and Savings Association at Pasadena, California, for payment of said check.

Specification 2: Same form as Specification 1, but alleging check 17 January 1944, payable to the order of cash, made and uttered to Nelson's Drug Store, Gardena, California, and fraudulently obtaining thereby $10.

He pleaded not guilty to and was found guilty of all the Charges and Specifications except Charge V and its Specification upon which a finding of not guilty was made by the court on motion of the defense. He had one previous conviction by general court-martial for absence without leave, in violation of Article of War 61 and uttering worthless checks, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the findings except the words "one leather holster" in the Specification of Charge IV, 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.

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

On 23 November 1943 the accused was a member of Company E, Service Command Unit 1930, Presidio of Monterey, California. On this date he absented himself without leave from his station and remained absent until 8 February 1944 when he was apprehended at the Deluxe Hotel, Long Beach, California (R. 22; Pros. Ex. 5). On 12 February 1944 accused was placed in the custody of Private First Class James P. Lavin, M.P., who was to take him under guard to the Presidio of Monterey (R. 15, 16). Accused persuaded Lavin to accompany him on a visit to a girl friend and during this visit escaped, taking with him the military policeman's small bag containing a .45 caliber Smith and Wesson revolver, serial number 98364, one pair of Peerless handcuffs, serial number 171907, one web belt, and five rounds of .45 caliber ammunition, shown to have a total value of more than $25, and all property of the United States (R. 16, 27).

During accused's absence without leave he made and uttered at Moneta, California, and Gardena, California respectively, two worthless checks for $10 each dated 21 December 1943 and 17 January 1944, drawn on the Bank of America National Trust and Savings Association, Pasadena, California. Two civilian witnesses identified the accused as the person who made and cashed the above two checks and received the money therefor. The chief clerk of the Bank of America National Trust and Savings Association, Pasadena, California, identified the checks and stated that payment was refused thereon because the accused had no account with the bank (R. 8-15; Pros. Exs. 1, 2).

On 13 February 1944 accused was at Newport Beach, California, where he met Mrs. Lela Lane who offered to drive him and two other soldiers back to Santa Ana Air Base on her way to Tustin, California (R. 29). On the way to camp the party stopped at Barbara's Tavern between Newport, California, and Costa Mesa, California, where they had a few drinks. After this stop the accused, a Sergeant Sumpter, and Mrs. Lane continued on their way to camp. Sergeant Sumpter left the car at the camp about 2100 hours. Mrs. Lane and the accused continued on. After Mrs. Lane had driven the car a short distance from camp accused slipped a handcuff over her left wrist and then forced her to stop the car (R. 31, 32, 39). Accused forced Mrs. Lane from the car by pulling her by the handcuff attached to her wrist, proceeded with her some distance into an orange grove "about 8 tree rows in from the road", and disrobed her. He then overpowered her, attacked her and had sexual intercourse with her. Mrs. Lane testified that she resisted to the best of her ability and that accused "forcibly" attacked her, hit her several times and knocked her down (R. 33-37). Following this act accused permitted Mrs. Lane to dress herself, handcuffed her hands together and both of them entered Mrs. Lane's car. Accused drove her back to the air base, alighted from the car and said that he would come back the next day. Mrs. Lane, handcuffed, went to the number 3 gate at the Army Air Base and reported to the guard at the gate. The handcuffs were removed and she was taken to the dispensary where the doctor took two stitches in her face, treated her wrists which the handcuffs had scraped, and made a medical examination (R. 29, 30, 45).

On cross-examination Mrs. Lane was asked whether she had not made a statement that "he [accused] might have had it anyway, without so much force" (R. 35). The witness replied that she might have said something that sounded like that but had never consented to sexual intercourse with the accused or cooperated in any way with him (R. 36). Mrs. Lane testified that her age was 44 years; she was employed as an orange packer; that at the time of the attack she was recovering from a major operation, had a cold and was in a bad way physically; that she doesn't remember whether she screamed or cried out but that she was in a fainting condition from the pain caused by the twisting of the handcuff; and that

accused acted like an insane person (R. 28, 36-38). On 23 February 1944 accused was returned to military control and confined at the Santa Ana Air Base, Santa Ana, California (Pros. Ex. 6).

During an investigation conducted by Major Carl E. Myers, Provost Marshal, Santa Ana Air Base on 23 February 1944 of the complaint against accused by Mrs. Lane, accused admitted that he had intercourse with Mrs. Lane on the night of 13 February but stated that she had consented thereto. He admitted he had one handcuff on her at the time he had intercourse with her. After the act of intercourse he drove her car to Costa Mesa, California, "turned it around for her, and told her he would be back the next day and take the handcuffs off her" (R. 23, 25).

4. The defense showed by the testimony of George Alexander that the orange grove where the alleged rape occurred adjoined Alexander's home at the intersection of the Newport Road and the Santa Fe Railroad tracks near Tustin, California, that at the time of the occurrence there were people in the house, that the lights were probably on, that the windows were open and that any "unusual noise" from the place of the alleged attack could be heard in the house but an ordinary conversational tone of voice would probably be muffled by the noise of highway traffic (R. 51, 52).

Sergeant Frank Boccignone, defense witness, corroborated the testimony of Mr. Alexander relative to the location of the orange grove and Mr. Alexander's home. On the day following the alleged attack he had accompanied Mrs. Lane to the orange grove and she had shown him the place of said attack (R. 53-57). This witness stated that during this trip Mrs. Lane told him that she didn't understand why accused had treated her so roughly, that she "thought the least resistance she offered, the least harm would come to her * * * that if she were a younger woman, she would have had more to lose, but at her age she didn't have much to lose, and she thought the best thing to do was to get it over with and get out of there with the least harm done to her" (R. 57).

First Lieutenant E. C. Curtis, M.C., defense witness, stated that he examined Mrs. Lane at the Santa Ana Army Air Base on 13 February 1944 at 2245 hours about 35 to 40 minutes after the alleged attack; that she had a small laceration of the upper lip, surface bruises on her forehead and chin, that her external genitalia showed no evidence of trauma, the vulva was not moist and showed no evidence of male ejaculate, that a smear taken with a cotton swab from the vaginal vault showed many spermatozoa, that "there was no evidence that she had been attacked" (R. 60, 62).

On cross-examination the witness stated Mrs. Lane had engaged in "sexual intercourse with some man some time previous to this [examination]", that the fact that she had given birth to a child made it possible that she could have sexual intercourse without outer evidence; that medical authorities differ as to the length of life of spermatozoa, some saying they live as long as three days outside the male body and others that they die within 12 hours (R. 61, 62).

Accused, after a full explanation of his rights, elected to remain silent (R. 62, 63).

5. Accused's absence without leave from 23 November 1943 to 8 February 1944 was proven by an extract copy of the morning report showing his initial absence and by a witness who apprehended him on 8 February at the Deluxe Hotel, Long Beach, California. During this unauthorized absence accused made and uttered two worthless checks in the sums of $10 each on a bank in which he had no account. The persons who cashed these checks identified accused as the one who made and uttered the checks receiving cash therefor. It was shown by a bank employee that accused had no account in the bank upon which the checks were drawn. The guard sent to bring him back from the Ninth Service Command Military Police Station to the Presidio of Monterey after his unauthorized absence testified that on 12 February accused snatched a handbag forcibly from him and escaped from his custody. The bag contained a .45 caliber Smith and Wesson revolver, a pair of handcuffs, a web belt and ammunition of a proven value exceeding $25.

Following his escape on 12 February 1944, the record discloses that accused remained absent without leave until returned to military control on 23 February 1944. It was during this unauthorized absence that he raped Mrs. Lela Lane, the act occurring in an orange grove near Tustin, California. Accused admitted to the Provost Marshal of Santa Ana Air Base that he "had" Mrs. Lane (R. 25), but denied the raping and stated that she was willing to have intercourse. There is ample evidence in the record to justify the court's finding that accused did commit rape. This finding is fortified by the evidence as to Mrs. Lane's condition after the attack and the fact that she was admittedly handcuffed when accused had intercourse with her. The fact that the medical officer stated that his examination of Mrs. Lane soon after the attack revealed no evidence that she had been attacked is of little significance since the medical officer also testified that since Mrs. Lane had been through childbirth it was possible that she could

have had intercourse without outer evidence. Also, this officer's testimony did indicate that Mrs. Lane had intercourse with someone preceding his examination. He was unable to fix the exact time. While there is testimony in the record by one witness to indicate Mrs. Lane may not have tried her utmost to prevent the offense of rape, the weight of the evidence impels the belief that accused made a wanton, vicious attack upon Mrs. Lela Lane while she was in a weakened condition, tearing her clothes from her body, striking her and forcing her to his will by twisting her wrist with a steel handcuff. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 149b). The proof is ample that accused had carnal knowledge of Lela Lane and that the act was done by force and without her consent. The record contains no evidence to indicate that he is now or was at the time of the offense mentally unsound or not in possession of his normal faculties.

6. The accused is about 23 years of age. He has served during his current enlistment from 6 May 1941 to the present date. The data on the charge sheet indicates he had previous service from 19 February 1941 to May 1941.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and to support the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 278, Criminal Code of the United States (18 U.S.C. 457).

Thomas M. Tappy, Judge Advocate.

Arthur W. Kudner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

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

20 MAY 1944

SPJGH
CM 252772

UNITED STATES v. Corporal NEWTON GENTRY, JR. (18156694), 28th Aviation Squadron, San Antonio Aviation Cadet Center, San Antonio, Texas.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at San Antonio Aviation Cadet Center, San Antonio, Texas, 7 March 1944. Dishonorable discharge and confinement for life. Penitentiary.

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REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Newton Gentry, Jr., 28th Aviation Squadron, did, at San Antonio, Texas, on or about 14 February 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Isabella Ray, a human being by shooting her with a rifle.

He pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that Isabella Ray resided at 629 Kentucky Avenue, San Antonio, Texas, with her two daughters, Dovie Green and Gladys Curtis, and the husband of the latter, Sam Curtis, in a small, one-story frame dwelling, facing south. The house was about 30 feet in depth from front to back. There were two windows on the west side. The one toward the back was in the kitchen, where Isabella Ray

slept. There was a thick bush near this window, about three or four feet south of it. Photographs (Exs. F and G) were placed in evidence. Ardelia Sanders lived in a similar house, 631 Kentucky Avenue, immediately west of the Ray dwelling. The distance between the two houses was 25 or 30 feet. Although there was not a regular driveway between the two houses, cars could go between them to a garage in the rear. A picture of both houses (Ex. E) was introduced in evidence (R. 7, 11, 27, 46, 130-134).

On the evening of 13 February 1944 Gladys Curtis, accompanied by her cousin, Kail Green, went to "Dee's Place" and while there met Jerry F. Cunningham at about 11:00 p.m. She accused Cunningham of telephoning her sometime before and "cussing" her out, but they agreed to be friends. Cunningham testified that she had been accusing him of telling "some things" to her about her husband and Ardelia Sanders, and he had previously talked to her husband, Sam Curtis, about the report. She brought the subject up at Dee's Place, but Cunningham did not want to discuss it. At about 11:30 p.m. Cunningham left Dee's Place and shortly afterward went to Ardelia Sanders' house. At about midnight or 1:00 a.m., Kail Green took Gladys Curtis to her home. Isabella Ray, Sam Curtis and Dovie Green were already there. Gladys Curtis told her husband about her conversation with Cunningham (R. 7-9, 27-28, 46-47, 55-56, 63-65).

Sam Curtis dressed, went next door, knocked, called Cunningham, walked back to the driveway and stood there. Cunningham came to the door but would not come outside when Curtis wanted to talk to him. Curtis went back inside his house. While Curtis was outside, Dovie Green heard a conversation over the party-line telephone in which Ardelia Sanders called accused (a brother of Ardelia) and told him she was in "some trouble" and to come "over here". A few minutes later the car of accused was driven between the two houses, and stopped about 10 feet from the kitchen window, which was "at a triangle, cater-cornered" fromthe hood of the car. It was light enough to see, as there was a street light at the next corner and the lights were on in both houses. The car headlights were on when it drove in, but not afterward. About this time Cunningham, who was on the porch of Ardelia's house, called for Curtis, who came out of his house. Cunningham and Curtis had an argument. Then a shot was heard, and the bullet struck Isabella Ray in the head and killed her. At the time of the shot, Isabella was at the kitchen window (R. 8-10, 14, 28-33, 41-42, 44, 47-50, 56-57, 65-67, 97-98).

Gladys Curtis testified that she was inside the house at the telephone when the shot was fired. Just before the shot, she heard her mother raise the window and shade and say: "Cunningham, you called Sam. Whatever you do, you don't hurt my baby". She did not see accused, and did not hear him say anything. Sam Curtis testified that after the car drove up, and while he was arguing with Cunningham, he heard a shot. Up to that time he had not seen accused. He looked in the direction "where the gun fired" and saw accused on the right running board of his car aiming a gun over the car door, which was open, toward the kitchen window. Curtis was standing "right off from" the car and Cunningham was at the

rear of the car with his foot on the bumper. Curtis did not see the rifle until the shot was fired. After the shot he heard accused say something to the effect that "Is anybody else looking for trouble -- I will shoot them, too". Dovie Green testified that she was inside the house when the shot was fired. She did not see accused, but saw his car. Kail Green testified that he was inside nearly to the door when he heard the shot. When he looked out he saw accused. Shortly afterward the car of accused was backed out of the driveway. Green did not see a rifle. Cunningham testified that he saw the car of accused there, but "couldn't swear" that it was accused in the car because he "never even talked to him" and "never got up close enough to see that it was him". He did not see the rifle "at all". Cunningham heard a voice at the window, which he could not recognize, say "Whoever says that you didn't call my daughter up over the telephone and cuss her out is a damn liar". After the shot he heard someone say "Cunningham, let's get away from here". He "couldn't swear" it was accused (R. 9-11, 30-33, 43, 49-53, 57-58, 66-68).

Gladys Curtis had never heard of any arguments between accused and her mother or other members of her family. They were friendly with Ardelia Sanders, and her husband was friendly with Cunningham. Sam Curtis had never had an argument with accused and they were "pretty good friends". No member of his family had ever had any difficulty with accused. He knew of no reason why accused would want to shoot Isabella Ray. Cunningham testified that he was with accused about 12:30 p.m. until about 5:30 p.m. on 13 February, and each had two or three bottles of beer. When Cunningham returned to town from his home at about 8:00 p.m. he joined accused again. Each had a bottle or two of beer and they went to the home of accused. About 9:00 p.m. Cunningham brought accused, the wife of accused and her friend, Dorothy Hill, to town, and left them. Accused was not drunk, but was feeling "pretty good" (R. 19-21, 41, 43, 71-76).

At about 1:37 a.m. on 14 February, Bruce Weatherby, a city detective, San Antonio, Texas, proceeded to 629 Kentucky Avenue in response to a call. After gathering some information he went to the home of accused at 131 Albert Walk, but found neither accused nor any firearms there. He then went to the home of a sister of accused at 123 Cometa Street with another policeman, and there arrested accused as he came down the back steps. Weatherby asked accused where the gun was and accused stated it was at his house. They returned to the home of accused and found the gun, a Stevens .22 calibre rifle (Ex. A), behind a radio. Accused admitted it was the gun that he fired. They did not find the magazine of the gun (R. 91-94, 99).

At about 3:30 a.m. on 14 February, W. R. Lambkin, San Antonio police department, advised accused that he need not make a statement, and that if he did it would be used against him. Accused made and signed a statement (Ex. B) substantially as follows: At about 10:30 a.m. on 13 February he placed his .22 rifle in his car and went rabbit hunting. He returned home about 1:30 p.m. and went to the "Squeeze Inn", where he joined some friends and drank beer. He returned home at about 8:00

p.m. and went to bed about 10:00 p.m. When his sister called him at about 2:00 a.m. she stated that Curtis and Cunningham were having an argument. As they were both good friends of accused, he went to his sister's house in his car to see if he could stop the argument. His rifle was still behind the seat of his car (a coupe). There were several cartridges in the magazine but none in the barrel. When he arrived, he drove into the driveway and told them to "cut out that nonsense". Cunningham came to the car, saw the gun and grabbed it. Accused took it away from him, and the bolt must have been pulled back when they were "scuffling" over it. Accused tried to unload the gun as it was resting on the door of the car, and it went off accidentally. Accused heard some woman say she was shot, Curtis ran in the house and got a rifle, and as accused backed out of the driveway he saw Curtis shoot in the direction of Cunningham's car. Accused returned home, placed the gun behind the radio in its usual place, and started back to see what had happened. He stopped at 123 Cometa Street where a sister lived. She asked him to go out and latch the chicken coop, and as he started out for that purpose a policeman arrested him (R. 101-104).

Second Lieutenant Frode Anderson received accused from the city police at about noon or 1:30 p.m. on 14 February and delivered him to the provost marshal. He "spoke with" accused twice that day. Accused did not sleep any that day until he went to bed that night at the guardhouse. Lieutenant Anderson had him waked up at about 11:00 p.m., and "cross examined" him from "a little before" midnight until about 2:00 a.m. on 15 February. Lieutenant Anderson did not use any force nor make any threats or promises, but did ask accused whether he had slept any and say "I am not going to go to bed before I know the truth". At a little before 3:00 a.m. accused signed a statement (Ex. C) in substance as follows: At about 1:30 a.m. on 14 February he shot and killed Isabella Ray. The circumstances were as related in his statement to Lambkin except that "I at that time did not admit that I actually aimed and fired the gun at the woman, Isabella Ray, when she opened the window, but I did, and I am full aware of having done so" (R. 105-109).

Major Charles S. Gilbert, the trial judge advocate, who was also the investigating officer, testified that on 19 February he stated to accused that he need not make a statement and that if he did it could be used at his trial. Accused made a voluntary statement (Ex. D) and after it was typed he signed it. According to this statement, accused parked his car between 629 and 631 Kentucky Avenue after his sister called him and asked him to come over. Cunningham was on the porch of one house and Curtis on the porch of the other. They were arguing. Cunningham came to the car and tried to "grab" the rifle which was back of the seat. Accused took it away from him. About that time Isabella Ray opened the window and said something which accused "could not distinguish". Accused aimed the rifle at her and shot her in the head. He did not know how the rifle became loaded, unless in the struggle with Cunningham (R. 110-111).

4. Lucille Gentry, wife of accused, testified for the defense that at about 6:00 a.m. on Sunday, 13 February, accused left their house with his gun to go hunting. She was not at home all day, and next saw him at about 6:00 p.m. when he returned home in Cunningham's car with Cunningham and a man whose first name was Albert. At the time, Dorothy Hill was with Lucille Gentry. The men had been drinking. Lucille gave accused some fish to eat. Cunningham was "lit up" when all of them returned to town in his car. Accused and Cunningham drank something from a quart bottle. They went to the Squeeze Inn and then accused and his wife returned home in the car of accused. She drove because accused was "too full" to drive. They first took Dorothy to her home. When they returned home, accused ate some more fish, and then went to bed about 9:45 p.m. His sister called accused about 1:00 a.m. and he dressed and left. The rifle was still in the car, and had been there when they drove home. Accused was "still lit up". He returned home about 1:20 a.m., said "The gun went off, and I am going back to see what happened", and walked out. His wife did not see the rifle when he returned from his sister's house at about 1:20 a.m. Dorothy Hill testified that accused was "pretty tight" when she saw him and that the quart bottle from which they drank contained a sweet, strong substance like orange gin (R. 135-146).

Aredlia Sanders testified that when Curtis called Cunningham to the door and they "had some words", she telephoned accused, her brother, and asked him to "come down" as they were "fixing to start something". When the car came, she heard the horn blow, and Cunningham went outside. When she got to the door, she saw Cunningham "coming back away from" the car, and he stood with his foot on the car bumper. Curtis came out and stood in his yard opposite the driveway. She could not see accused but saw three persons on the Curtis porch during the entire argument, which, according to her "guess", lasted 15 or 20 minutes. She heard a shot fired, and "practically" everybody ran. She heard accused tell her to get in the house. After the shot was fired, accused got out of the car but she did not see a rifle (R. 118-128).

Accused testified that he had gone through the eighth grade, and had never had any difficulty with the police before (R. 147).

On the morning of 13 February he left home early to go hunting, but as it was a "little too cool" he returned home and slept until about 11:00 a.m. He then went hunting and came back to the Squeeze Inn about 1:00 or 1:15 p.m. He drank beer and whiskey until 2:30 or 3:00 p.m., and estimated that he had 10 or 12 beers and about three-fourths of a pint of whiskey. He then went to Garcia's Cafe with Cunningham and had more beer, he thought about six or eight beers. Later he returned to the Squeeze Inn and had more beer. Cunningham went home about 5:30 p.m., and accused next saw him at 7:30 or 8:00 p.m. They went to the home of accused, where he was told he ate fish, but he did not remember doing so. They were in Cunningham's car, as the car of accused had remained parked at the Squeeze Inn since 1:00 p.m. When the party returned to town later, accused had a drink of some "strong" liquor from Cunningham's bottle. After drinking some more at the Squeeze Inn, he returned home with his wife, ate some more fish, listened to a radio program about 10:00 or 10:15 p.m., and went to sleep (R. 147-151).

When his sister called a little after 1:00 a.m., he went to her house in his 1938 Chevrolet coupe. His gun was still back of the seat, right behind his head. When he drove into the driveway he asked Cunningham what was the matter. Cunningham was on the porch of Ardelia's house. Cunningham came up to the left side of the car, saw the rifle and "grabs at" it. Accused "snatched" the rifle and moved to the right side of the car. Cunningham had called Curtis, who came out of the house, and Cunningham went behind the car and stood with his foot on the bumper. Curtis stood in his yard. After taking the rifle, accused removed the magazine, and rested the rifle on the edge of the window, to "make it lighter". He removed the magazine so there would be no danger from the gun. Curtis and Cunningham were arguing. Accused did not hear Isabella say anything. There was a bush between him and "that window" and he could see something moving "back there", but who it was he could not say. While the gun was "laying in the window" Curtis and Cunningham were getting louder and louder, and beginning to "cuss" each other. "So" accused "leaned out" with the gun, which he was sure was not loaded. The gun was pointed through the "end of this bush". He heard a "big commotion", thought he was going to break up their arguing and was going to "bring the gun around that way" so Curtis and Cunningham could see it, to scare them into breaking up the argument. Then the gun "went off". He had his hand on the trigger when the gun was fired, but did not know there was a shell in it, as he had removed the magazine. He "wasn't aiming on the lady" and could not see "in that window". Accused told his sister to get in the house, heard a "great commotion", and left (R. 152-157).

He returned home, put the rifle behind the radio in its regular place, and told his wife he was going back to see whether the bullet hit anybody. He started walking back, stopped at his sister's house (123 Cometa Street), went outside to fasten the chicken coop, and was arrested. He made a statement at the jail about a half hour later, but remembered little about it, as he was "feeling drowsy", although he "began to sort of sober up a little bit" after the shot, which "scared" him. He was turned over to the military police some time after noon. That night after taking a bath he "fooled around" until about 10:30 p.m. "talking to the boys", and then went to bed. He was awakened about 11:35 p.m., and a little later Lieutenant Anderson talked to him. Finally, at about 2:00 a.m., after Lieutenant Anderson had told him he would not get any sleep unless he would "go on" and let him "make this statement" and that Sam and Gladys Curtis had said accused "up and aimed the gun and fired it", accused stated he "would be glad to do it". He signed the statement. As to the statement made to Major Gilbert, he testified that Major Gilbert said he "had to have a copy of that other one that Lieutenant Anderson took, he didn't have mo copyof it". Major Gilbert "just read from one statement off on another" and "let" accused sign it. Accused testified that he had never had any arguments with Sam or Gladys Curtis, Dovie Green, nor Isabella Ray. He had nothing against any of them (R. 157-161).

When asked on cross-examination where he thought the gun was pointed when it went off, he stated: "I wasn't for sure. I just knew I aimed the gun back, but I didn't know whether I hit anybody or not". He was"turning the gun back and aiming back here toward Cunningham, around

beside the car". He "aimed right through the bush". On examination by the court he stated that he sat with the gun through the window a "couple of minutes" before the gun "went off". He was not going to shoot the gun but point it to stop the argument. He had removed the magazine. He did not ordinarily keep a cartridge in the barrel. When his sister telephoned him and he started over there, he was "just feeling bad, still sleepy and everything" (R. 164-172).

5. The evidence shows that at about 1:00 a.m. on 14 February 1944, Ardelia Sanders, a sister of accused, telephoned him and asked him to come to her house as there was some trouble developing between Sam Curtis and Jerry Cunningham, both friends of accused. Accused drove to his sister's house and parked in a driveway between it and the home of Curtis. Accused sat on the right side of his car with a .22 rifle, which he claimed he had used during the day in hunting, resting on the car window. Curtis was in his yard and Cunningham was behind the car of accused as they engaged in an argument. Isabella Ray, mother-in-law of Curtis, came to the kitchen window of the Curtis house, to the right of the car and slightly in front of it. She raised the window and called to Cunningham not to hurt her "baby". There was a bush between accused and the window. Accused fired the rifle and the bullet struck and killed Isabella Ray. Immediately after the shot accused was seen standing on the running board of the car, aiming his rifle toward the kitchen window. Accused asked whether anyone else was looking for trouble and stated he would "shoot them, too". Accused then drove back to his home.

Accused testified that he had consumed a large amount of beer and whiskey on the afternoon and evening before the homicide. However, the evidence does not indicate that he was drunk, and about two hours after the shooting he made a full and detailed statement (Ex. B) of his activities during the day and up to the time of the statement. This statement was clear and logical. The Board of Review is satisfied from the evidence that accused was not under the influence of intoxicating liquor to such an extent as to negative intent, and that he was fully aware of what he was doing.

It appears that accused had been a friend of Sam Curtis and his family and had never had any difficulty with them. He testified that when he first arrived at the scene of the argument Cunningham tried to take the rifle from behind the seat of the car, but accused kept it away from him, and then removed the magazine. He stated that he did not know the rifle was loaded, and was attempting to point it at Cunningham and Curtis to frighten them into stopping the argument when it was fired. This contention, that the shooting of Isabella Ray was accidental, is negatived by the evidence. Cunningham testified that he did not get close to accused and did not see the rifle. Accused admitted that his hand was on the trigger, that he aimed "right through the bush", and that he saw something moving "back there". In a statement (Ex. D) made after proper warning, he admitted that he aimed the rifle at Isabella Ray and shot her in the head. In his voluntary statement (Ex. B) made about two hours after the homicide and in his testimony at the trial, he gave two distinctly different versions of how the rifle was fired, both tending to show that the shot was accidently fired. Notwithstanding the apparent lack of motive, the Board of Review is satisfied from

the evidence that accused intentionally fired his rifle in the direction of the kitchen window, where he knew some person was standing.

Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word, aforethought, does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (MCM, 1928, par. 148a). The Board of Review is of the opinion that the record of trial sustains every element of the offense of murder as alleged.

6. There was introduced in evidence a statement (Ex. C) made by accused on 15 February 1944 to Second Lieutenant Frode Anderson. In this statement accused admitted that he "actually aimed and fired the gun at the woman, Isabella Ray", and in effect made a confession of his guilt. The record shows that Lieutenant Anderson "cross-examined" accused for about two hours before the confession was made, and does not show that accused was advised of his right not to incriminate himself. The statement was made to a military superior, an officer. When accused was advised of his rights the night before, shortly after the homicide, he was being interrogated by civilian policemen. In the opinion of the Board this confession was not admissible, as it does not sufficiently appear that it was voluntarily made. However, the other evidence of the guilt of accused is clear and convincing, and accused subsequently, on 19 February, made another statement (Ex. D) after proper warning in which he made substantially the same admissions. The Board of Review is of the opinion that the erroneous admission of the statement (Ex. C), did not injuriously affect the substantial rights of accused.

7. The Charge Sheet shows that accused is 23 years of age, and that he enlisted 18 September 1942, with no prior service.

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. Confinement in a penitentiary is authorized under the 42nd Article of War for the offense of murder, by section 22-2404, District of Columbia Code.

/Sgd/ SAMUEL M. DRIVER, Judge Advocate.

/Sgd/ ROBERT J. O'CONNOR, Judge Advocate.

/Sgd/ F. J. LOTTERHOS, Judge Advocate.

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

SPJGQ
CM 252773

12 APR 1944

UNITED STATES v. Second Lieutenant JAMES P. JONAS (0-1640602), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Tuskegee Army Air Field, 10 March 1944. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 Second Lieutenant James Phillip Jonas, Air Corps, 318th Base Headquarters and Air Base Squadron, Tuskegee Army Air Field, Tuskegee, Alabama, did, at Tuskegee Army Air Field, Tuskegee, Alabama, on or about 16 February 1944, wrongfully strike Private Hozzie Howard about the head, face and body with his hands.

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

Specification: In that Second Lieutenant James Phillip Jonas, Air Corps, 318th Base Headquarters and Air Base Squadron, Tuskegee Army Air Field, Tuskegee, Alabama, was, at Tuskegee Army Air Field, Tuskegee, Alabama, on or about 16 February 1944, in a public place, to wit: Civilian War Housing Area, Tuskegee Army Air Field, Tuskegee, Alabama, disorderly while in uniform.

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

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

At all times pertinent to the issues involved, accused was a second lieutenant, Army of the United States, stationed at the Tuskegee Army Air Field. He was assistant Post Exchange Officer, in charge of the post restaurant (R. 7, 15). On or about 10 July 1943 Mattie Reed was employed as cashier at the restaurant. She and accused met at that time. During the latter part of July or the first part of August 1943, she and accused began going together, and continued their social relationship until some time in January 1944 (R. 8). After accused and Mattie Reed ceased going together in January, the latter began going with Private Hozzie Howard (R. 8). On 16 February 1944 she and Private Howard had a date and, because of inclement weather, decided to spend the evening in her apartment, which was located in the Civilian War Housing area, Tuskegee Army Air Field (R. 8, 16). Miss Pauline Thompson, one of Mattie Reed's two roommates, and Private Percy Rhodes were there present, and they were later joined by her other roommate, Elizabeth Taylor (R. 16). At approximately 11:00 o'clock p.m. accused knocked at the door of Mattie Reed's apartment. Private Rhodes answered his knock, and informed Miss Reed that accused desired to see her, accused, mean while, waiting outside (R. 21). She went to the door and talked to accused, and he asked her to come and go with him (R. 9). After talking with Private Howard, Mattie Reed returned to the door and told accused she could not go with him (R. 9). Within a few minutes accused knocked again, and Private Howard went to the door and said to him, "Lieutenant, the girl said she is not going any place. Why don't you go and see her tomorrow?" Thereupon accused pushed past Private Howard, went to where Mattie Reed was, and said to her in a loud voice, "Get your coat and hat and come with me" (R. 17, 21). Private Howard then stepped up and said, "Lieutenant, there is no use raising a lot of disturbance. You work with the girl every day. You can see her tomorrow". (R. 31, 36) Immediately afterwards accused struck Private Howard about the head with his fist twice (R. 17, 21). A fight ensued between the two in Mattie Reed's room. They were separated by Private Rhodes, but went outside and resumed the fight. Private Howard tumbled down the steps and landed outside the building (R. 17, 18, 22). During part of the fight on the outside, accused was on top of Private Howard, striking him (R. 18, 23). Private Rhodes twice separated the two, on the outside, before the fight was finally terminated (R. 23, 26, 27). During the progress of the fight outside a considerable crowd of civilians and soldiers congregated near the spot, or came out on nearby porches, where they could see it (R. 22, 25). Just after accused and Private Howard had been finally separated, the latter stepped up on the porch, whereupon accused, in a loud voice and in the presence of those assembled, said to him, "Bring your God damn black ass on over in the field and let's fight it out" (R. 18, 22, 32). Accused had a coca cola bottle in his hand at the time he made this remark (R. 25). Private Howard did not answer him, and accused left (R. 18).

Someone, whom Mattie Reed testified she recognized as a soldier (R. 10) and whom Elizabeth Taylor (R. 30, 32, 34) and Pauline Thompson (R. 35, 38) each testified positively she saw and recognized as accused, commenced knocking on the front window of the apartment occupied by these three women at approximately two o'clock the following morning (February 17, 1944) (R. 32). This window knocking was then alternated between windows at the front and rear of the apartment, and was kept up, more or less continuously, from about two until four or five o'clock on the morning of 17 February 1944 (R. 32, 41). It was loud enough to disturb not only the occupants of the particular apartment but also to annoy some of the occupants in nearby apartments in the same building (R. 29, 40). There was no specific testimony as to the kind of uniform, the person doing the knocking was wearing, except that of Elizabeth Taylor. She testified that she did not know what kind of uniform he had on but that he had on a dark coat (R. 35). Accused visited Mattie Reed that same morning (February 17th) at approximately 8:00 o'clock. He apologized for what had happened the previous night, and told her he was "liable to blow his brains out" (R. 12-13). If Mattie Reed mentioned the knocking to accused at that time, she was unable to recall it or any conversation pertaining to it (R. 13).

4. Evidence for the defense:

Having been first advised of his rights, accused elected to be sworn as a witness, and testified substantially as follows:

On 15 February 1944 accused received a letter in his basket at the Post Exchange from Mattie Reed, stating that she desired to see him (R. 56). A Private Ruffin also brought him word about the same time that Mattie wanted to see him (R. 56, 67). Accused left the Officers' Club at approximately 10:45 on the night of 16 February 1944, after having drunk three or four beers, which did not affect him (R. 55, 73), and decided to go to Mattie Reed's apartment and find out what she wanted. Upon arriving there he knocked, and was answered by Private Rhodes. Accused asked to speak to Miss Reed, and when she came to the door he remarked that he had received her messages, and suggested that they go to the club and talk (R. 56). He returned to the street to await her, but she returned to the door and asked if it was important that he see her. He replied that it was up to her as she had sent the messages. At this point Private Howard came out on the porch and said, "Lieutenant, she can't go", caught Miss Reed by the arm and drew her back inside the house, and slammed the door (R. 56). Accused testified that this "kind of burned me up". Accused knocked again, and Private Howard came to the door and said "G-d d--n it, Lieutenant, I said she can't go". The previous door slamming by Howard plus this remark offended accused and made him angry, partly, he said, for the reason that Howard was a private, but it did not make him angry enough to fight (R. 57). Accused then walked into the house where Mattie Reed was and said to her, "you make up your mind. If you want to go, O.K., and if not, say so". Private Howard then remarked, "Lieutenant

that threatening talk you make does not frighten me". Accused "saw red that time" and hit Private Howard (R. 57). The fight ensued and progressed substantially as detailed by the witnesses for the prosecution, except that accused did not at any time say to Private Howard, "Bring your G-d d--n black ass over in the field and let's fight it out" (R. 70).

Immediately after the fight accused went to his barracks and took a shower. This was around mid-night (R. 58). He then went to Lieutenant Allen's room, where some other officers were gathered. Lieutenant Freeman remarked that he was expecting his wife to give birth to a baby that morning. The baby was born at 3:05 o'clock a.m. and the group was more or less joining Lieutenant Freeman in celebrating the event. Accused remained in Lieutenant Allen's room until approximately four o'clock and then went to his own room and went to bed (R. 59). He did not return to Mattie Reed's apartment and knock on the windows (R. 72). He did go there at approximately 8:00 o'clock in the morning and did apologize to her (R. 60).

It was stipulated that if Second Lieutenant Richard C. Allen were present in court he would testify that accused came to his room at or about 0015 on 17 February 1944, and that to the best of his (Allen's) knowledge, belief, and recollection did not leave there until approximately 0350 (Ex. 1, R. 50). Second Lieutenant Jones testified that he saw accused in Lieutenant Allen's room from approximately 3:30 until about 4:00 o'clock, and that accused then went to his (accused's) room (R. 52, 53). This witness admitted on cross examination that it could have been as late as 5:00 o'clock before he was awakened by Lieutenant Freeman and went to Lieutenant Allen's room (R. 55). Lieutenant Freeman testified that he was in Lieutenant Allen's room around mid-night of 16 February and that accused came in about 12:15 o'clock and told them "of an incident that happened on the hill" (R. 45). Accused was still in the room when witness left at approximately 1:45 o'clock and was there when he returned at approximately 3:50 o'clock.

It was developed during cross-examination of accused that he was a married man, a fact of which he had apprised Mattie Reed (R. 65).

Accused also testified at length as to the various capacities in which he has served since coming into the army on 2 June 1941, and to the manner in which he had discharged his duties as Assistant Post Exchange Officer (R. 60-63).

5. Accused pleaded guilty to Charge I and its Specification, and freely admitted under oath, while testifying as a witness in his own behalf, that he struck Private Hozzie Howard, upon the occasion and in the manner alleged in the Specification, just because he became angry at the latter's attitude, conduct, and statements. An abundance

of other evidence was adduced, sufficient to conclusively prove all elements of the offense charged. The rule of law that mere words, even though provoking or even insulting, do not justify or excuse a battery, is applicable here. Accused's conduct was clearly a disorder to the prejudice of good order and military discipline, and was of a nature, under the circumstances, to bring discredit upon the military service, and therefore a violation of Article of War 96.

The Specification of Charge II merely alleges that accused was disorderly in a public place while in uniform, without setting out the nature of his disorderly conduct. It is therefore impossible to determine from this allegation alone whether it has reference to the fight and accused's conduct at that time, or to the knocking on Mattie Reed's apartment windows between two and four o'clock in the morning, or to both of these occurrences. The fact that accused pleaded guilty to Charge I and its Specification and freely admitted the fight in a public place, but pleaded not guilty to Charge II and its Specification, and that both he and the prosecution introduced considerable evidence in their respective efforts to prove or disprove that accused was the person doing the knocking, may well indicate that both accused and the prosecution were under the impression that the knocking on the windows constituted the gist of the offense set forth in Charge II and its Specification. Weight is added to this theory by the staff judge advocate's review. However, there does not appear to have been any action taken at any stage of the trial, from the time charges were preferred until its completion, which restricts the Board of Review to a consideration of any less than the whole of the evidence of record in passing upon its sufficiency to support the findings on this charge and specification.

The Specification is sufficient to state an offense. Paragraph 27, MCM 1928, cites as one of the examples of an unreasonable multiplication of Charges, based upon one transaction, that of charging disorderly conduct together with a separate charge of assault, when the disorderly conduct consisted in making the assault. Paragraph 151, MCM, 1928, p. 186, wherein Article of War 95 is under discussion, provides, however, that, "This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this (AW 95) and the preceding article (AW 94)". It has been repeatedly held that it is not legally objectionable to charge the identical acts as both a violation of Article of War 95 and of some other applicable Article of War (CM 246125 - Kangiser).

It follows that the Board of Review may, with perfect propriety, consider the fight between accused and Private Howard together with its subsequent attendant circumstances in determining whether accused was guilty of disorderly conduct in a public place on 16 February 1944,

of such a nature as to constitute a violation of Article of War 95. This fight had its origin in the fact that accused, a married officer, was wrongfully vieing with Private Howard for the company of Mattie Reed. It was immediately precipitated by accused's wrongfully striking Private Howard. A goodly portion of the fight took place on the street in front of Mattie Reed's apartment, a public place, in the presence of a considerable group of spectators, consisting of both civilians and army personnel. Accused was the aggressor in renewing the fight upon the two occasions when Private Rhodes separated him and Private Howard. Furthermore, there was ample evidence to prove that accused used vulgar and obscene language in the presence and hearing of those assembled, several of whom were women. Under the circumstances, accused's conduct in these respects was conduct unbecoming an officer and a gentleman, sufficient of itself to support the findings on Charge II and its Specification.

In addition to the foregoing, there is to be considered the matter of the knocking at Mattie Reed's apartment during the early hours of the following morning. The evidence leaves no reasonable doubt that accused was identified as the person involved. Two occupants of the apartment who knew accused well, testified positively that, at the time and place alleged, they saw his face and definitely recognized him. Accused sought to defend against this accusation by establishing an alibi. However, two of the three witnesses offered by him for this purpose, were not, according to their own testimony, in position to know of accused's whereabouts or his acts and conduct between 1:45 and approximately 4:00 o'clock of the morning of 17 February. Lieutenant Freeman was absent from the place accused claimed to be, from 1:45 until 3:50 o'clock. Lieutenant Jones did not even appear on the scene until sometime from 3:30 to 5:00 o'clock, which occurred after Lieutenant Freeman returned from the hospital and awakened him. The stipulated testimony of Lieutenant Allen says no more than that to the best of his knowledge, belief, and recollection accused did not leave his room from a few minutes after twelve midnight until approximately four o'clock of the morning in question. When weighed against the positive testimony of prosecution witnesses, to the contrary, it is obvious that this alibi testimony is not convincing.

Mattie Reed testified that while she was unable to recognize the person who was doing the knocking, she did recognize him to be a soldier. The only thing readily conceived that would enable her to recognize the man at a distance and at night as a soldier would be that he was wearing the uniform of a soldier. Elizabeth Taylor, while unable to identify the kind of uniform accused was wearing, inferred by her testimony that he was in uniform. Taken in conjunction with the presumption that accused, while in public, was dressed in uniform as required by regulations, the evidence is sufficient on this point. He was on the outside and in a public place while knocking on the windows.

Accused's conduct in going to the apartment occupied by three women, at approximately two o'clock in the morning, and his persistent efforts over a very protracted period of time to either gain entry thereto or to persuade some one of the occupants to join him on the outside, attended, as it was, by sufficient noise and commotion to awaken, and prevent sleep on the part of occupants of adjoining and nearby apartments (all of which were apparently situated in an area restricted to occupancy by female personnel of the post), was, in the absence of any explanation and in the absence of circumstances which would justify or excuse his actions, conduct unbecoming an officer and a gentleman, and a violation of Article of War 95.

6. War Department records disclose that this officer is 31 years of age, is married, and has two step-children. He attended high school for only two years, without graduating. He took a two year correspondence course in Radio at National Radio Institute. He worked for a produce company as truck dispatcher before being inducted into the service, on 2 June 1941. He worked for, and with, Japanese and states that he can speak and translate the language fairly well. He was commissioned a temporary second lieutenant, Army of the United States, on 18 December 1942, after having completed the prescribed course at Officers Candidate School, Eastern Signal Corps Schools, Fort Monmouth, New Jersey. He entered on active duty 18 December 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 and sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of Article of War 95 and is authorized upon conviction of Article of War 96.

William A. Pounds, Judge Advocate

Earle Stephens, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James P. Jonas (0-1640602), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. ~~I~~ recommend that the sentence be confirmed and carried into execution.

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

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

3 Incls
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 309, 17 Jun 1944)

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

SPJGK
CM 252812

28 APR 1944

UNITED STATES v. General Prisoner EARL R. SCOTT.	SECOND SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Jay, Governors Island, New York, 17 March 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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

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

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

Specification: In that General Prisoner Earl R. Scott now lawfully in confinement at Eastern Branch, United States Disciplinary Barracks, Green Haven, N. Y., did at Green Haven, N.Y., on or about 9 March 1944, offer violence against Major Henry J. Noble, his superior officer, who was then in the execution of his office, in that the said General Prisoner Earl R. Scott did strike said officer and threw him to the floor and attempt to slash said officer with a razor blade which he had concealed in his right hand.

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

Specification: In that General Prisoner Earl R. Scott now lawfully in confinement at Eastern Branch, United States Disciplinary Barracks, Green Haven, N. Y., did at Green Haven, N. Y., on or about 9 March 1944, with intent to do bodily harm commit an assault upon Private Thurlow J. Housel by wilfully and feloniously striking the said Private Thurlow J. Housel on the left shoulder with a dangerous instrument, to-wit: a razor blade.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specification of Charge I, except the words, "and attempt

to slash said officer with a razor blade which he had concealed in his right hand", of which excepted words he was found not guilty; guilty of Charge I, and guilty of Charge II and the Specification thereof. 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 life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Summary of evidence.

enter the corridor and search the prisoners for weapons. The corridor door was unlocked, and they entered. The thirteen or fourteen recalcitrant inmates, including accused, were strung out along the window side of the corridor. Accused was the third one from the corridor door, standing about two feet away from and with his back to the wall (R. 9,15,26,35,39, 40,47). Major Noble ordered the prisoners to line up in a column of twos. Two stepped forward, followed by accused, who apparently started to take the third position in such a column. The rest of the prisoners hung back, in a group, and the guards moved forward to break them up, while Major Noble and Private Housel stopped within three or four feet of accused (R. 9,10,13,26,50,54,56,58,59,65,98).

It was noticed by several of the witnesses that accused had a handkerchief wrapped about his right hand, and someone called attention to it (R.15,26,37,59,100). Seeing this, Major Noble ordered accused to remove it. Accused did not do so, but instead put his left hand up to his right and began to shove what appeared to at least one witness to be a razor blade out of the handkerchief and into his left hand. He raised his hands a little above his waist and took a short diagonal step away from Major Noble and Housel. Major Noble repeated the order to drop the handkerchief, but accused did not comply, and,according to the Major's testimony, began to move towards witness, raising his hand about eight inches (R. 12,15,16,22,26,36,37,40,43,50,55,59,63,65,101).

Major Noble reached out and gave accused a sharp rap on the hand or wrist with his club. The handkerchief and a razor blade fell to the floor. As guards Housel and Burns moved to seize accused, Housel jabbed accused in the ribs with his club (R. 12,15,16,22,27,30-32,40,51,60-63,67,103). Accused made a circular, overhanded motion at Housel with his right hand and arm. The blow landed on Housel's left shoulder, and though it had sufficient force to be felt by him, the only result was that the left shoulder strap of his field jacket was later found to have been cut, apparently by a sharp instrument. Accused immediately made a half turn and lunged at Major Noble. He grabbed the major with his arms, and both went down, despite the efforts of Burns, Housel and another guard to seize accused. The two landed on the floor, with accused on top of Major Noble. Accused was face down, and although witnesses differed in their views as to Noble's position, it appears from the latter's testimony that he landed on his face (R. 9,12,13,15,16,20,22,25,27,29-32,33,34,36,40,43,51-55,60, 62,66,67,102).

Accused got his left arm about Major Noble's neck, and with his right arm and fist made a digging or slashing motion at the major. The latter managed to get one arm around accused's head, and with the other he warded off accused's blows, protecting his face and neck. With their clubs, the sentries rained blows upon accused's head, back, shoulders, and legs, at the same time trying to pull him away from Major Noble. After considerable

effort they separated accused from the major, who got up. Accused again came towards Major Noble, saying, "I will kill you yet", or something similar. Major Noble struck him with his fist and kicked him, whereupon accused went into line with the rest of the prisoners, who were by that time under control (R. 15,16,22-24,27,28,37,38,41,42,44,45,47,49,60-64, 68,69,97,98).

After the struggle, Sergeant Burns picked up two razor blades and a handkerchief from the floor about two feet away from where accused's right hand had been (R. 41,42,47,48,51,56,57,60). Major Noble told Sergeant Burns and Private Morawski to take accused to the doctor, for he was bleeding from cuts on the head and hands. On the way to the hospital accused told Burns "that he didn't want to get the sentry at all * * * he wanted to get Major Noble", and later that "I will get him yet" (R. 42,49, 60,61).

b. Evidence for the defense.

Defense counsel requested the president of the court to explain to accused his rights as a witness, after which accused was sworn and took the stand (R. 70). His testimony was in most respects similar to that given by the prosecution's witnesses. The prisoners were denied their noon meal for their misbehavior in ranks, and accused and some others refused to reenter their cells (R. 71,77,85). Accused had a habit of wearing a handkerchief on his hand, and had had one on his left hand all morning, but there was no razor blade in it (R. 72,73,76,78,84,86). He was slow in obeying Major Noble's order to remove it, and the major hit him on the knuckles with a stick. A "lot of guards" were also hitting him on the head and "jigging" him in the sides and back (R. 72,76,78,80, 82,87). He turned around to his right, happened to notice a razor blade on the sill of the window, and tried to pick it up in his left hand (R. 72,73,75,78,79,89). He cut his finger, however, and consequently switched the blade to his left hand, and turned completely around to his right, so that he again faced Major Noble and the guards, who were still beating him. He was excited, and thought only of getting away, so swung and hit someone (he did not know whom) with the razor (R. 72,78,81,82,92,94). He did not intend to strike anyone, but merely to stop the beating and to defend himself as best he could. Major Noble hit his hand again, and he dropped the razor blade (R. 72,75,76,79,94). He covered his head with his hands, doubled up, and ran through the crowd for the cell door, but bumped into someone and fell. He had no intention of attacking Major Noble, did not lunge for or trip anyone, and did not see who he knocked down. He had no razor blade in his hand when he fell (R. 72,73,75,80,81, 91,92). He did not wrestle with anyone while on the floor, or lay hands on the major. The guards continued to beat him all over his body while he was on the floor. When they stopped, he got up, weak and dizzy (R. 73, 74,80-82,93). The major came towards him and hit him in the face with his

fist, and attempted to kick him, but he did not say anything to the major, nor threaten to "get him yet". Neither did he tell Burns, while on the way to the hospital, that he had not meant to hit the sentry, but only Major Noble (R. 74,83).

Accused admitted that he knew Major Noble to be an Army officer, his superior, and in charge of the prison (R. 94,95).

4. The record contains ample evidence from which the court could properly have found that accused struck at and slashed the clothing of Private Housel with a razor blade, and that he tripped, fell upon, and pummeled Major Noble, his superior officer. Accused admitted the former offense in his testimony, his only excuse being the untenable one of self-defense, for he was at that time in open defiance of two lawful orders. "* * * to strike the dress of the person assailed * * * may be as much a battery as to strike his face" (MCM, 1928, par. 148l, p. 178). It is also immaterial whether the object of that blow was Housel or Major Noble. "* * * Where a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group" (op. cit., supra.). A fortiori, he is guilty of an assault and battery where he feloniously strikes at one and injures another.

While accused denied intending to knock down Major Noble, the evidence is clear that he intentionally did so, and equally clear that he attempted while on top of the major to inflict serious bodily harm upon him. Accused claimed to be attempting only to avoid the sentries' blows, but the evidence is overwhelming that it was necessary to beat him severely and to pull him away by main force in order to make him desist. Without doubt, a razor blade, used in the manner revealed by the evidence, is a dangerous instrument within the meaning of Article of War 93 and paragraph 149m, Manual for Courts-Martial (1928). The court's findings of guilty of the Specifications and Charges are lawful.

5. The Board of Review is of the opinion that accused's status as a dishonorably discharged general prisoner did not preclude his conviction of violation of Article of War 64. Major Noble was the officer in charge of the housing, feeding, and discipline of the prison inmates. As such, he was accused's "superior officer" within the meaning of the words as used in the Article. Extensive research has disclosed an opinion cited at page 489 of Digest of Opinions of The Judge Advocate General, 1912, to the effect that a discharged general prisoner is a civilian, and may not be convicted of violation of Article of War 21, which is now Article of War 64. The citation given, however, is incorrect, and further search has failed to locate the opinion itself. It is the opinion of the Board of Review that this is no longer the established law of this office. The old article, which was in existence at the time of the above decision, prescribed punishment for "Any officer or soldier who, etc. * * *".

Article of War 64 by its terms is of much broader applicability, for it begins, "Any person subject to military law who, etc. * * *". The change was not without intent and effect. It has been held since the change that a civilian serving with the Army of the United States in the field as an oiler on an Army transport may be convicted under the Article (JAG 250.413, Sept. 25, 1924). The analogy is complete for the purposes of amenability to the provisions of this particular Article of War.

6. One minor error requires comment. The court sentenced accused to dishonorable discharge, total forfeitures, and confinement at hard labor for life. Inasmuch as it appears from the Charge Sheet and papers accompanying the record of trial that he was already undergoing a sentence of five years' imprisonment, and had been dishonorably discharged on 23 August 1943, that part of the sentence adjudging discharge and forfeitures is without practical effect. However, it is not illegal (MCM,1928, par. 103d).

7. The Charge Sheet shows that accused is 23-6/12 years of age. He was inducted into the Army of the United States on 18 September 1942 at Washington, D.C., and sentenced by a general court-martial to dishonorable discharge and imprisonment for five years from 30 July 1943. The staff judge advocate states in his review that the offense of which accused was convicted previously was that of assaulting enlisted men by shooting at them with a .30 calibre Browning Automatic Rifle.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Imprisonment for life is authorized for conviction of violation of Article of War 64. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to do bodily harm with a dangerous weapon, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 455, Title 18, United States Code.

Terry G. Eom, Judge Advocate.

John Bunnell, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

(203)

SPJGV
CM 252835

22 APR 1944

UNITED STATES	HAMPTON ROADS PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Newport News, Virginia, 17 March 1944. Dismissal and total forfeitures.
First Lieutenant ALFRED W. MILLEISEN (0-475236), Corps of Military Police.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Alfred W. Milleisen, CMP, did, without proper leave, absent himself from his post and station at Hampton Roads Port of Embarkation, Newport News, Virginia from about January 1, 1944 to about March 16, 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for a period of six months. The reviewing authority approved only so much of the sentence as involves dismissal and total forfeitures, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that accused absented himself from his organization and station at Hampton Roads, Virginia, 1 January 1944 (R. 4-5; Ex. 1), and was returned to military control 15 February 1944 and confined (R. 6-7; Ex. 2).

4. After having his rights as a witness explained, accused elected to remain silent. No witnesses or evidence was presented in defense of

accused.

5. For the reasons hereinafter stated it is not deemed necessary to decide the admissibility in evidence of the morning report (Ex. 1), but it appears that the entry therein for 1 January 1944 submitted 8 January 1944, was made from hearsay. "It was prepared from information received from orders, memos, officer's register, and telephone instructions from the officer sections, H.R.P.E., particularly, Lieutenant Schwartz" (R. 5).

6. Following the arraignment of accused, his counsel moved for a continuance on the ground that "the defense counsel has not been allowed sufficient time to prepare its defense. Charges were served on the accused at 1700, 16 March 1944, and on the counsel for the accused on March 17 at 0800" (R. 3).

In opposing the motion of defense for a continuance the trial judge advocate made the following statement:

> "This case has been handled expeditiously, but there are I think, two reasons for it. The charge sheet shows that the defendant was confined in the officer detention room, which is here in the Post Office. There are no adequate facilities provided for keeping an officer under confinement. Second, this is a very simple matter, and it was felt that the time allotted to the defense counsel, while not overly generous, was sufficient to allow for preparation of the case. Furthermore, with reference to the defense, it is true charges were served on the defense counsel at eight this morning, but that was done at request of the defense counsel, who did not desire to wait in his office until I should have time to serve the charges on him last night."

The motion for a continuance was thereupon denied, and the trial of accused proceeded.

7. It appears that accused was returned to military control 15 March 1944 and confined about six o'clock in the evening in the officer detention room at Hampton Roads Port of Embarkation. The following day the Charge was preferred; an officer was appointed to investigate the Charge; the investigation was completed; the case referred to a general court for trial; and, the Charge served on accused at about five o'clock in the afternoon of that same day while he was still in confinement. The Charge was served on accused's counsel the following morning at about eight o'clock. The court convened that same day, 17 March, at three o'clock in the afternoon. Thus, accused's trial commenced within 48 hours of the time he was returned to military control, and within seven hours after his counsel had received a copy of the Charge.

"The right to prepare for trial is fundamental. To deny this right is to deny a trial. Article of War 70 provides 'In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him'. This does not mean that during war an accused may be deprived of the right to prepare his defense. Nor does it mean that in time of war such preparation shall be limited arbitrarily to five days. The limitation by implication contained in this Article should be applied with great care and only when the rights of the accused are not prejudiced thereby" (CM 231119, Lockwood).

"* * * the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel can not be satisfied by mere formal appointment" (Avery v. Alabama, 308 U.S. 446).

This same principle is applicable in general court-martial cases where counsel is appointed to defend an accused, but in effect denied the opportunity to properly consider or prepare accused's defense. The question of a continuance is one for the sound discretion of the court, but when it is apparent upon the record that the court has abused its discretion or acted in an arbitrary way, the conviction should be held illegal.

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

Thomas N. Jaffy, Judge Advocate.

Thorbert Wikeduer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 252835

1st Ind.

War Department, J.A.G.O., - To the Commanding General, Hampton Roads Port of Embarkation, Newport News, Virginia.

1. In the case of First Lieutenant Alfred W. Milleisen (0-475236), Corps of Military Police, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 252835).

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

1 Incl.
Record of trial.

(Resigned)

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

SPJGV
CM 252929

26 MAY 1944

UNITED STATES	)	XXI CORPS
v.	)	Trial by G.C.M., convened at Camp Claiborne, Louisiana, 10 March 1944. Dismissal, total forfeitures and confinement for one (1) year.
Captain SWAIN N. THOMPSON (0-362677), Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 93d Article of War.

Specification: In that Captain Swain N. Thompson, 334th Infantry, did, at or near Alexandria, Louisiana, on or about 22 February 1944, with intent to commit a felony, viz, rape, commit an assault upon Irene Dupree, by willfully and feloniously striking the said Irene Dupree with his fist and his open hand, and by forcing her to the ground.

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

Specification: In that Captain Swain N. Thompson, 334th Infantry, did, at or near Alexandria, Louisiana, on or about 22 February 1944, with intent to commit a felony, viz, rape, commit an assault upon Irene Dupree, by willfully and feloniously striking the said Irene Dupree with his fist and his open hand, and by forcing her to the ground.

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

Specification: In that Captain Swain N. Thompson, 334th Infantry, having been restricted to the limits of the area of Headquarters, 84th Infantry Division, Camp Claiborne, Louisiana, on or about 24 February 1944, did, at Camp Claiborne, Louisiana, on or about 28 February, break said restriction by going to Alexandria, Louisiana.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to one year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. In support of the Specifications of Charges I and II, competent evidence was introduced by the prosecution to show that Miss Irene Dupree, a woman about 29 years of age, employed as cashier at the Joy Theatre in Alexandria, Louisiana, first met the accused on a Saturday night about three days prior to 22 February 1944 through a friend of hers, Margaret Stowe, whom accused had been dating (R. 14, 35). Thereafter, on Tuesday, 22 February, the accused phoned Miss Dupree informing her that a misunderstanding had arisen between him and Miss Stowe and requested Miss Dupree to contact her and arrange to have her meet him at a place called Lazarone's. Miss Stowe refused to meet the accused and, when accused was so informed about 10:30 that evening, he requested Miss Dupree to accompany him to Miss Stowe's home to which she agreed (R. 15). They drove to the house, but finding all lights extinguished, they did not stop. At accused's invitation, Miss Dupree then accompanied him to Lazarone's for a sandwich and a drink where they remained about an hour, Miss Dupree having two highballs (R. 16). The accused then insisted that she accompany him to a place called Cap's Barbecue for something to eat before he drove her home although she expressed the desire to be taken home immediately. At Cap's Barbecue Miss Dupree wished nothing to eat but had another drink of whiskey. The accused proceeded to order more drinks although she again repeated her request to be taken home. During their stay at this spot, the accused attempted to kiss Miss Dupree but received a slap for his efforts. After spending a while there, accused drove off, eventually proceeded through a city park and then turned down a

gravel road notwithstanding Miss Dupree's insistence that she be taken home (R. 17, 18, 28, 32).

The accused halted his car at a spot identified by Miss Dupree on a sketch of this locality and marked "No. 1" thereon (R. 18; Ex. A). Miss Dupree estimated it was then about 1:30 or 1:45 a.m., 23 February (R. 34). Accused grasped Miss Dupree, attempted to kiss her but was pushed away. Next he proceeded "to pull off his pants" and again commenced "trying to kiss me and everything" (R. 18). Although she kept pushing him away and asking him to desist, accused continued his advances and eventually pulled up her dress, got on top of her and tried to penetrate her privates through her underclothing. Miss Dupree fought, struggled and screamed in her attempts to resist these advances (R. 18, 19). She finally managed to open the car door and, sliding from underneath accused, escaped from the car (R. 19, 20). The accused followed her, threw her to the ground and the two rolled into a ditch where the accused again got on top of her and demanded "are you going to take it in the ditch or are you going to take it in the car" (R. 20). Hoping to escape, Miss Dupree told him she "would in the car" (R. 20). As soon as accused permitted her to rise, she sought to escape and commenced running down the gravel road with accused in hot pursuit clad in nothing but his shirt (R. 20). He caught her, tore the back of her dress and in a fury struck her in the eye knocking her to the ground, saying, "now god-damn you, I know you will or I will kill you" (R. 20, 21). While she fought, screamed, and begged accused to desist he attempted to remove her underpants by pulling them "on the side", placing one hand over her mouth to still her screams. Although he did not succeed in removing her underpants, he used his legs to force hers apart, opened her vagina and touched it with his penis but did not effect a penetration (R. 21, 23). During this struggle, Miss Dupree's back was cut, her arm was skinned from the gravel, and her feet, legs and thighs were bruised (R. 22, 23). Eventually the accused ceased his efforts, arose and, stating he was going to take her to a tourist cabin, said, "I know you will then" (R. 23).

The two got back in the auto, the accused discovered his leg was cut, wiped the blood off with his shorts, slapped Miss Dupree and then put on his trousers. He noticed the condition of Miss Dupree's eye caused by his blow and stated he was sorry. She replied, "It's too late to be sorry now" (R. 24). The accused then turned the car around and drove back to highway #71, crossed it and stopped at Maxie's Tourist Court. It was then about 4:30 a.m. (R. 34). He engaged a cabin from the negro attendant at the office. Miss Dupree

asked the negro to help her and call a cab so she could be taken home. The accused told the negro to pay no attention to her and drove off in search of the assigned cabin while Miss Dupree continued to entreat him to take her home. Being unable to find the cabin he returned to the office (R. 25). He cursed the negro attendant and, as he started off in his car, Miss Dupree jumped from it, fell to the ground on her stomach, "got up and hurried into the office to see if I could use a phone" (R. 26, 29). She locked the office door and managed to call one cab company, finding the line busy, before the negro apparently unlocked the door and he and accused entered the office (R. 26, 29, 30). The accused forestalled her further efforts to use the phone and the negro attendant refused to be of any assistance. Apparently a loud argument ensued which was interrupted when an unidentified woman shouted at them to be quiet and go to bed. Miss Dupree then called, "Lady will you please help me." Thereupon the woman entered the office, exclaiming, "My God, what's the matter" (R. 26). She attempted to use the phone to call a cab for Miss Dupree but accused interfered, saying that Miss Dupree could use his car to drive home and that he would follow in a cab. At Miss Dupree's request the woman accompanied her to accused's automobile where Miss Dupree stated she could not drive because of her upset condition. The woman then hailed a negro soldier who was walking along the highway and asked him to drive Miss Dupree to her home. He consented and, after about a fifteen minute drive, Miss Dupree was delivered to her home, arriving there about 5:30 a.m., 23 February. Her mother was awaiting her at the front door (R. 27, 39). She paid no more attention to the car and did not know where the negro took it (R. 33).

Her mother immediately asked her what had happened and Miss Dupree replied, "that's what Marguerite's boy friend did to me" (R. 44). She was crying, the right side of her face was black and swollen, one arm was bruised and bleeding, she was holding onto her back which was cut and "her clothes were tore up to pieces. She didn't hardly have any clothes on" (R. 45). Her mother gave her aspirin, bathed her face with cold water and phoned a doctor who was unable to call until that evening (R. 46, 47). The doctor's examination revealed general contusions and deep bruises about her body, swollen and somewhat discolored eyes, abrasions of the skin on different parts of her body and a puncture wound on the right side of her chest. The doctor opined that no fall from an auto could have caused such "general bruises of the entire body" (R. 50).

G. Frank Noone, a city detective of Alexandria, and Walter Hunter, Assistant District Attorney of Rapides Parish, visited Miss Dupree

about 8:30 on the evening of 23 February and observed that both her eyes were black, her lips swollen and gashed, her face puffy and bruised and her arms skinned and bruised (R. 52, 56). Miss Dupree gave Hunter a full statement of the events of the night of 22 February as recited above (R. 59, 60). On 25 February Lieutenant Colonel W. Kelso, I.G.D., 84th Infantry Division, visited Miss Dupree and found she was suffering from a badly bruised left elbow, discoloration and swelling on her left cheek, discoloration along her jaw and neck, bruises on her right upper arm and a bruised mouth (R. 61).

Sometime after 22 February Lieutenant Colonel Kelso and Detective Noone visited the gravel road where these events were stated to have occurred and on that road about four-tenths of a mile from highway #71 they found a heel from a woman's shoe (R. 54, 55, 63, 64). Miss Dupree identified it as one from the shoes she was wearing on the night of 22 February which she thought had been lost in the ditch alongside of the gravel road or, more probably, when she jumped from accused's auto at the tourist camp (R. 31, 38, 39).

Miss Dupree had been divorced about a year and a half prior to these events (R. 34). She testified she did not have dates with members of the opposite sex although she admitted she had been out with one Frank Demico in the company of other friends and, since her divorce, had become engaged to a second lieutenant in the Army eventually, however, breaking the engagement (R. 35, 36).

In support of the Specification of Charge III, the prosecution introduced competent evidence to show that on the morning of 24 February, two days after the assault upon Miss Dupree, the accused was restricted to the limits of the area of Division Headquarters, 84th Division, Camp Claiborne, by Brigadier General A. R. Bolling of the 84th Division, being permitted however to visit the latrine and to go to officers' mess for meals (R. 7). He was told in person of his restriction (R. 8). It was imposed in the absence of the division commander but approved by him upon his return. During his restriction the accused was given permission to leave the area on 26 February to take a mapping examination (R. 8). Between 6:30 and 7:00 p.m. on 28 February the accused asked Chief Warrant Officer B. R. Delle for a ride in his auto to Alexandria, Louisiana, and did ride into Alexandria with him and Warrant Officer D. G. David, leaving them at Lee Street in Alexandria (R. 11-13).

4. In denial of the Specifications of Charges I and II, the defense offered evidence to show that accused and Miss Dupree drove up to Cap's

Barbecue about 2 a.m. on 23 February 1944. The accused ordered two "cokes" and two glasses of ice. Miss Dupree asked for a sandwich but never did decide what kind she wished. The accused eventually ordered a second round of drinks (R. 66, 67). As they sat in the auto drinking, Miss Dupree had her legs folded under her and was turned toward the accused with her arms about his neck, her head upon his shoulder, the upper part of her body against his chest and she was observed kissing him (R. 67, 68).

A farmer and his wife who lived about 280 yards from where the alleged assault occurred on the gravel side road testified they generally were awake on and off each morning from 4 to 5 a.m. They also had two dogs which they allowed to roam at large outdoors during the night. On the early morning of 23 February they did not hear the dogs bark nor did they hear any woman scream (R. 71-76; Ex. A).

When accused and Miss Dupree arrived at Maxie's Tourist Court between 4 and 5 a.m. on 23 February, he requested a cabin "for me and my wife" (R. 78, 81, 82). Within ten minutes after accused had driven off to the assigned cabin he returned to the tourist camp office and told the negro attendant, one Sam Williams who was about 82 years old, that he would not take the cabin because the woman with him wouldn't stay (R. 78, 81). The woman "looked like she was uneasy to get out of the car" (R. 78). She asked Williams to call the police (R. 85). The accused put his right arm around her, held her in the car and started off (R. 78). She wanted to get out of the car and began to scream (R. 85). Before the car had proceeded more than twenty feet "she got loose from him", jumped out of the car, somersaulted on the road and regaining her feet she ran into the office, closing and locking the door behind her (R. 78). Williams, followed by the accused, entered the office through the back door and Miss Dupree again asked him to phone the police which he refused to do telling her to do it (R. 79). Miss Dupree looked like a "woman frightened", her dress was torn at the belt and her clothes appeared as if they "had been ripped some way or another" (R. 80). Williams thought she was drunk (R. 80). She refused to leave the office with accused and apparently a loud argument ensued (R. 79). An unidentified woman who lived at the camp with a soldier then came into the office and Miss Dupree exclaimed, "Oh, lady, come in here and help me. This damn nigger won't help me" (R. 80, 82). The accused then told Miss Dupree to drive his car to her home but she refused at first and "looked like she was afraid" (R. 79). However, thereafter she requested the woman to walk to the car with her and the two of them left the office (R. 79).

In so far as the Specification of Charge III is concerned the defense offered evidence to prove that, after Lieutenant Colonel Kelso

had talked to the district attorney in Alexandria about this case on 24 February, he returned to Camp Claiborne and suggested to General Bolling that the accused be placed in restraint. General Bolling then summoned the accused and told him personally that, acting in the absence of the division commander, he was restricting accused to the area of division headquarters (R. 86, 87). The instructions to the accused were clear and Lieutenant Colonel Kelso who was present at the time had the definite impression that accused was being restricted twenty-four hours a day (R. 87).

The accused, after his rights had been fully explained to him, elected to take the stand and make an unsworn statement. He stated that General Bolling, acting in the absence of the division commander, told him he was to stay within the division area (R. 88). The accused went into Alexandria on the evening of 28 February to get some keys he was having made for his car. He stated:

> "I left about 1830 or 1845 to go in town. I returned after finding that the keys weren't ready. I returned about 2315. I left in broad open daylight. Had I been trying to break restriction I wouldn't have left where a number of friends were at that time and walked down to the hutment where I saw the two Warrant Officers who have already testified and asked if they were going to town and I asked to go along. They knew me and possibly knew that I was under restriction. Had I been under restriction I wouldn't have gone. I had nothing planned in town and had nothing to do that someone else couldn't do for me. The whole thing was based on a misunderstanding."

The accused worked under Brigadier General A. R. Bolling as chief inspector of training. General Bolling considered that accused's performance of his duties was superior in every respect (R. 83).

5. The evidence conclusively shows, with respect to the Specifications of Charges I and II, that on the early morning of 23 February 1944 the accused made a vicious assault upon Miss Irene Dupree for the avowed purpose of obtaining carnal knowledge of her person against her will. The evidence introduced by the defense that Miss Dupree had displayed affection for the accused by kissing and hugging him while they were at Cap's Barbecue about an hour before the assault is of little weight in view of the proof that Miss Dupree did not subsequently

consent to carnal knowledge of her person. Had she consented the accused would have accomplished his purpose and the act of sexual intercourse would have been completed. His failure to accomplish his purpose, the evidence of Miss Dupree's injured condition immediately upon her return to her home and the evidence offered by the defense itself as to her condition and actions while at the tourist camp all support her testimony that, however companionable she may have found the accused earlier in the evening, she did not consent that he have carnal knowledge of her person. The evidence conclusively shows that her resistance to the objectionable overtures of the accused brought upon her a brutal and vicious assault. The findings of guilty of the Specifications of Charges I and II are fully sustained by the evidence. There is no duplication of offenses in alleging the same facts to constitute offenses under both Article of War 93 and Article of War 95 (CM 218924, Foster, 12 B.R. 173).

The evidence conclusively shows, with respect to the Specification of Charge III, that the accused was restricted to the area of his division headquarters at Camp Claiborne on 24 February 1944 and that he broke restriction on 28 February 1944 by going to the City of Alexandria, Louisiana. The accused's unsworn statement indicating that he misunderstood the temporal extent of his restriction has little weight in the face of the evidence adduced by the defense itself that the oral order restricting the accused left a clear impression with Lieutenant Colonel Kelso, present at the time, that the restriction was of twenty-four hour duration each day. Further, willful or wrongful intent is not an essential element in this offense. Proof of bona fide mistake is admissible only in extenuation (2 Bull. JAG 342). The findings of guilty of this offense are sustained by the evidence.

6. The accused is about 29 years of age. War Department records show that on 21 May 1938, accused was appointed a second lieutenant, Officers' Reserve Corps. On 12 June 1941 he was promoted to first lieutenant and, on 1 October 1941, he was called to active duty in that grade. On 10 March 1943 he was promoted to the grade of captain.

7. Recommendations for clemency were made by four of the ten members of the court. One member recommended that three years of accused's confinement be suspended. The other three recommended that the sentence be commuted to a forfeiture of all pay and allowances for a period of two months.

8. Mr. R. K. Wise, an attorney of Columbia, South Carolina, advised the Board of Review that he had been engaged to represent the accused and requested the opportunity personnally to appear before the Board of Review on his behalf. This request was granted and Mr. Wise was accorded a full hearing on 16 May 1944.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas H. Taffy, Judge Advocate.

Herbert M. Kiduer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

(216)
SPJGV
CM 252929

1st Ind.

War Department, J.A.G.O., 21 JUN 1944 - 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 Swain N. Thompson (0-362677), 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, to support the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. Accused made a vicious assault upon Miss Irene Dupree for the purpose of obtaining carnal knowledge of her person forcibly against her will, in the early morning of 23 February 1944, near Alexandria, Louisiana, and having been duly restricted to the area of his division headquarters on 24 February 1944 breached his restriction by going to Alexandria, Louisiana, 28 February 1944. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution. I also recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to the matters presented in person by the Honorable Butler B. Hare, Member of Congress, as well as to the attached letters from U. S. Senator Burnet R. Maybank from South Carolina, Honorable Olin D. Johnston, Governor of South Carolina, Honorable James B. Pruitt, State Senate, Anderson, South Carolina, Mr. R. F. Poole, President of Clemson Agricultural College, Clemson, South Carolina, Reverend J. O. Gillian, Starr, South Carolina, Mr. E. H. Agnew, Anderson, South Carolina, Mr. W. L. Mouchet, Starr, South Carolina, Mr. C. B. Marcom, Columbia, South Car., Mr. Willie Wyatt, Alexandria, Louisiana, and to a letter and sworn statement of the accused.

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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

13 Incls.
Incl.1-Record of trial.
Incl.2-Ltr & s/statement of acc, 27 May 44.
Incl.3-Ltr fr Hon Burnet R Maybank, 13 May 44.
Incl.4-Ltr fr Hon Olin D Johnston, 15 May 44.
Incl.5-Ltr fr Hon James B Pruitt, 1 May 44.
Incl.6-Ltr fr Mr R F Poole, 8 May 44.
Incl.7-Ltr fr Rev J O Gillian, 1 May 44.
Incl.8-Ltrs fr Mr E H Agnew, 1 & 30 May 44.
Incl.9-Ltr fr Mr W L Mouchet, 2 May 44.
Incl.10-Ltr fr Mr C B Marcom, 2 May 44.
Incl.11-Ltr fr Mr Willie Wyatt, 13 May 44
Incl.12-Dft ltr for sig S/W.
Incl.13-Form of action.

(Sentence as approved by the reviewing authority confirmed. G.C.M.O. 405, 27 Jul 1944)

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

SPJGN
CM 252937

21 APR 1944

U N I T E D S T A T E S	)	17TH AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 28 January 1944. Dishonorable discharge and confinement for the term of his natural life. Penitentiary.
Private AMON R. SUTTON, (36575159), Headquarters Company, Second Battalion, 517th Parachute Infantry.	)	

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REVIEW by the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private, then Private First Class, Amon R. Sutton, Headquarters Company Second Battalion, 517th Parachute Infantry, did, at Camp Mackall, North Carolina, on or about 9 January 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Robert L. Massey, Headquarters Company Second Battalion, 517th Parachute Infantry, a human being, by shooting him with a rifle.

The accused pleaded not guilty to the Specification and the Charge but guilty of the offense of manslaughter in violation of Article of War 93. He was found guilty of the Charge and Specification. The offense was committed in time of war. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, 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 50½.

(218)

3. The evidence for the prosecution shows that on the night of 8 - 9 January 1944 the accused had become quite intoxicated and from about 2100 o'clock until about midnight had been in his barracks making threats to the effect that he was going to "stomp" the deceased because the deceased had "walked" the accused's wife home and because the deceased on prior occasions had talked about the accused's wife, saying that he, the deceased, had had intimate relations with her. The deceased had commenced making such statements as early as June, 1943, at Toccoa, Georgia, where the organization had formerly been stationed and had continued to make them at various subsequent times which almost resulted in prior trouble between him and the accused. The deceased was not well liked because he made a practice of making degrading remarks about women, particularly the accused's wife. The accused while in the barracks continued to drink beer which he had brought with him and, although he appeared to be under the influence of intoxicants, he was still able to move normally and talk coherently. Prior to midnight other occupants of the barracks had induced him to give up a pocket knife, a pair of wire cutters and a machete or "bolo" which he had secured. Also during this period he had written upon one of the sheets in his leather portfolio after his name and address the words "To my best friend" and "Tonight I am going to stomp Massey" and had delivered it to one of his friends who returned it the next morning when the accused destroyed the sheet bearing the writing. The accused left the barracks shortly after midnight (R. 20-22, 23-27, 35-39, 40-47; Ex. F).

Four men, including the deceased, were in the lighted mess hall about 0100 o'clock on 9 January 1944. The deceased was sitting on a table near a window. A shot was fired from the outside through the window and struck the deceased in the head, mortally wounding him. The alarm was given by the remaining men in the mess hall and men were assembling. The accused was observed at this time approaching the mess hall with a cooking utensil and upon entering the mess hall he asked for some flour. He then identified the deceased by looking at him and by examining his identification papers and even assisted in placing the dead body of the deceased in the ambulance which had arrived in the meantime and which carried the deceased to the hospital and from there to the morgue where an autopsy was performed the next day which showed that instantaneous death had resulted from the gun shot wound. The accused then departed but shortly returned and picked up a rifle lying about ten feet from the window, in the dark and on the outside. The rifle was taken into custody by an officer and the accused returned to his barracks where he went to bed (R. 7-9, 10-11, 12-17, 20-22, 35-39).

The rifle was identified as one that had been taken the same night by forcing an entrance into the supply room and was submitted into evidence along with an empty shell therefor which had been found after dawn near the place where the accused had called attention to the rifle. Appropriate pictures of the portions of the mess hall involved and the portfolio, above mentioned, were also admitted into evidence. At about 0900 o'clock, 9 January 1944, an investigating officer interviewed the accused and found some live ammunition hidden in one of the accused's shoes (R. 18-19, 20-28, 30-31, 32-34; Exs. "A-1", "A-4").

The prosecution, relying upon the accused's plea of guilty of manslaughter to establish the accused's guilt of the homicide and upon the foregoing evidence to establish the corpus delicti and malice aforethought, rested its case.

4. The evidence for the defense included the testimony of the accused who, after explanation of his rights as a witness, testified that his early homelife had been unhappy, his schooling meager and his thirst for intoxicants, engendered at the age of fifteen, had grown continually more powerful and had resulted in its use obliterating his personal control; that he had met his wife the preceding April and married her in December, 1943; that the deceased on repeated occasions, both before and after the accused's marriage, had made insulting remarks about his wife, even saying that he - the deceased - had been intimate with her; that such insulting remarks preyed on his mind causing him to threaten to "beat up" the deceased on several occasions; that such insulting remarks did not incense him to hatred while he was sober but greatly incensed him while he was drinking so that he desired to "stomp hell" out of the deceased although the thought of killing him never entered his mind; that on the night in question he had drunk 12 or 16 bottles of beer and, after leaving his barracks about midnight, he broke into the supply room, secured the rifle exhibited at the trial, returned to his barracks and, leaving the rifle outside, secured some ammunition which he had long before acquired and had kept hidden in his foot locker; that he then picked up the gun, went to the mess hall, recognized the deceased, for whom he was and had been looking, through the window, fired the shot and dropped the gun on the spot; that he then went to the barracks and next recalled returning to the mess hall with the two quart dipper in his hand after hiding the unused ammunition in his shoe; that he identified the deceased and assisted in placing him in the ambulance before returning to his barracks and going to sleep; and that the deceased had not made any insulting remarks to him about his wife that night or since they had been on bivouac in early January, 1944 (R. 47-61).

The division neuro-psychiatrist testified that he had examined the accused on 11 January 1944. In response to a hypothetical question based upon the accused's testimony he stated that such an individual as was described in the question "could be suffering from a transient period of alcoholic psychosis, namely pathological intoxication" and that for such transient period would be mentally irresponsible. However, the witness upon cross-examination stated that the accused's condition was not similar to any observed case of pathological intoxication, that at the time of his examination of the accused and at the time of the trial, the accused knew the difference between right and wrong and that he had diagnosed the accused as a constitutional psychopath without psychosis. The accused's company commander testified that the accused became intoxicated quickly and easily on beer and that the deceased drove the men under him rather hard. A sergeant had been awakened in the early morning of 9 January 1944 by the accused who was drunk and who told him that the deceased had been killed, that the accused had found the rifle and that the accused had assisted in placing the deceased in the ambulance. Another sergeant and a private had heard the deceased make insulting remarks about the accused's wife and

were of the opinion that the deceased never over-looked an opportunity to tantalize the accused by such remarks. The sergeant's own wife had been the subject of insulting remarks by the deceased resulting in a fight between them (R. 62-66, 67-68, 69-76).

5. The accused is charged with murder. The Specification alleges that the accused did "* * * with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill * * *" the deceased by shooting him with a rifle. If the evidence is legally sufficient to support the finding of guilty under this Specification, it must support the conclusion that the accused unlawfully killed the deceased with malice aforethought. Subjected to such test and viewed in the light of pertinent authorities, the legal sufficiency of the evidence cannot be successfully challenged.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful as used in such definition means * * * without legal justification or excuse". "A homicide done in the proper performance of a legal duty is justifiable". Consequently, a homicide without legal justification is one not done in the performance of a legal duty. Also, an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder requires that "the death must take place within a year and a day of the act or omission that caused it, * * *" (M.C.M., 1928, par. 148a). The most distinguishing characteristic of murder is the element of "malice aforethought". This term, according to the authorities, is technical and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

> "Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit a felony.* * *"(M.C.M., 1928, par. 148a, underscoring supplied).

Indicative of authorities supporting the principles set forth in the Manual for Courts-Martial are the words of Chief Justice Shaw, who in the leading case of Commonwealth v. Webster (5 Cush. 296; 52 Am. Dec. 711) explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden". (Underscoring supplied).

The authorities to the same effect are manifold and further citation thereof would be superflous.

The accused by pleading guilty to manslaughter admitted his commission of the homicide and by his testimony and that of other witnesses sought to show that it was without malice aforethought and therefore that he was not guilty of murder. Voluntary manslaughter, which alone is here urged by the defense, is an unlawful homicide without malice aforethought where the act causing death is committed in the heat of sudden passion caused by provocation. (M.C.M., 1928, par. 149a). From the same authority the following excerpts are controlling:

> "In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark).
>
> "The killing may be manslaughter only, even if intentional, but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. * * *
>
> * * * * *
>
> "Instances of inadequate provocation are: Insulting or abusive words or gestures, trespass or other injuries to property, and breaches of contract."

Viewed in the light of controlling legal principles, all of the evidence establishes, beyond a reasonable doubt, every element of the crime charged. The evidence conclusively demonstrates that the deceased over a protracted period of several months had made insulting remarks about the accused's wife, both before and after their marriage. These remarks appear to have been made with the intention of tantalizing the accused which they unquestionably did. However, conceding such purpose and effect and even

that they were calculated to and did excite the accused's passion, such remarks and such result thereof do not reduce the crime here shown from murder to manslaughter because mere words are inadequate provocation and under the undisputed evidence, including the testimony of the accused himself, the deceased had not made any of such remarks either on the night of the killing or for several days prior thereto. A sufficient cooling time had, therefore, elapsed between the provocation and the killing which, consequently, was murder, even if the accused's passion still persisted. The evidence discloses that the accused brooded over the insulting remarks, and that, while his control over his acts was weakened through partial intoxication, he deliberately made threats against the deceased which he executed in accordance with a conceived and calculated plan which included the acquisition of a weapon, search for the deceased, shooting of the deceased in cold blood and some effort to divert suspicion. Such a killing is murder.

The testimony of the neuro-psychiatrist does no more than merely inject a possibility that the accused could have been in a "transient period of alcoholic psychosis, namely pathological intoxication" because the testimony of the witness in total effect is that the accused was not insane but a constitutional psychopath without psychosis. This testimony, even if sufficient to raise the issue of the accused's sanity was considered by the court which by its findings, based upon abundant evidence to the contrary, resolved it against the accused. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply supports the court's findings of guilty of the Charge and its Specification.

6. The accused is about 21 years of age. He was inducted at Detroit, Michigan, 22 February 1943. His record shows no prior service.

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. A sentence either of death or of imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Abner E. Lipscomb, Judge Advocate.

William H. Trumbell, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

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

(223)

11 MAY 1944

SPJGH
CM 252961

UNITED STATES	)	86TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, 24 March 1944. Dismissal.
	)	
First Lieutenant EDWARD D. MARTIN (O-1030267), Cavalry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Edward D. Martin, Cavalry, 86th Reconnaissance Troop, Mechanized, now on Special Duty, Headquarters 86th Infantry Division, Camp Livingston, Louisiana, did, on or about 5 August 1943, in the vicinity of Denison Dam, Texas, gamble, with the following enlisted men, to wit: First Sergeant Robert C. Norman, Staff Sergeant Clyde Holdiness, and Private (then Sergeant) James M. Sisk.

Specification 2: (Nolle prosequi entered).

Specification 3: In that First Lieutenant Edward D. Martin, Cavalry, 86th Reconnaissance Troop, Mechanized, now on Special Duty, Headquarters 86th Infantry Division, Camp Livingston, Louisiana, did, on or about 10 November 1943, at Camp Howze, Texas, wrongfully drink intoxicating liquor and gamble with Technician Fourth Grade Dallas D. Dickson and other enlisted men.

Specification 4: In that First Lieutenant Edward D. Martin, Cavalry, 86th Reconnaissance Troop, Mechanized, now on Special Duty, Headquarters 86th Infantry Division, Camp Livingston, Louisiana, did, on or about 25 January 1944, at Camp Livingston, Louisiana, gamble with the following enlisted men, to wit: Corporal James C. Chastant, Sergeant Walter Roberts, Private First Class Tommy B. Buford, Private First Class Albert F. Bishop, Private Carl L. McMellon.

Specification 5: In that First Lieutenant Edward D. Martin, Cavalry, 86th Reconnaissance Troop, Mechanized, now on Special Duty, Headquarters 86th Infantry Division, Camp Livingston, Louisiana, did, on or about 3 February 1944, at Camp Livingston, Louisiana, gamble with Technician Fourth Grade Sam F. Flynn and other enlisted men, including Corporal Carl H. Balke, Private Carl L. MacMellon, Private John O. Fischer, and Private Earl E. Spratt.

He pleaded guilty to Specifications 1, 4 and 5, and to Specification 3, except the words "wrongfully drink intoxicating liquor"; not guilty to the Charge, but guilty of a violation of the 96th Article of War. He was found guilty of all Specifications and of the Charge, and was sentenced to dismissal. 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:

a. Specification 1: It was stipulated (Ex. 1-A) that First Sergeant Robert C. Norman would testify that in the vicinity of Dennison Dam, Texas, on a date between 1 August and 15 August 1943 which he believed was 8 August, he played stud poker for about two hours behind the mess tent with accused, Sergeant Clyde Holdiness and Private (then Sergeant) James M. Sisk. It was a "table stakes" game. Staff Sergeant Clyde Holdiness (Ex. 1-B) entered a "no limit" stud poker game behind the mess tent near Dennison Dam on a date which he believed was 5 August 1943 at about 8:00 p.m. and played for about an hour. The other players were accused, Norman and Sisk. Private Sisk (Ex. 1-C) joined in a "table stakes" stud poker game behind the mess tent near Dennison Dam about 5 August "in the afternoon". The other players were accused, Norman and Holdiness. Sisk won about $173. The three witnesses belonged to 86th Reconnaissance Troop Mechanized, 86th Infantry Division, Camp Livingston, Louisiana (R. 8-9).

b. Specification 3: It was stipulated (Ex. 1-C) that Private Sisk would testify that about 10 November 1943 before 7:00 p.m. he saw accused and two enlisted men playing showdown poker for 50 cents a hand in the troop orderly room at Camp Howze, Texas. A "little later" Sisk returned to the orderly room and engaged in a "table stakes" stud poker game. To the best of his knowledge the other players were "Corporal Graves, Sgt. Alexander, Private Pequeen" and accused. He believed that Technician Fourth Grade Dallas Dickson came into the game later. One of the men had a bottle of whiskey and when it was finished someone sent out for another quart. He did not remember whether accused drank any. The game broke up at about 2:00 a.m. Sisk lost $175. Sergeant Dickson, 86th Reconnaissance Troop, testified that about 10 November accused came into the kitchen and "something was said about shooting dice". They had a "little dice game" in the store room. Four or five others, "some enlisted men", entered the game.

The game lasted 20 or 30 minutes. About 8:00 p.m. Dickson went to the orderly room and entered a "no limit" poker game that was in progress. Among the players besides himself Dickson recalled accused, "Corporal Graves, Sergeant Sisk, Sergeant Alexander, Private Pequeen". The game lasted until about 2:00 a.m. Dickson lost $148. Some of the men had a drink or two from a Coca-Cola bottle containing half whiskey and half Coca-Cola. Dickson poured the whiskey into the bottle, he and Corporal Graves drank from it, and he saw accused take one drink. He did not know whether any others took a drink. On cross-examination he stated that he considered accused a "good officer", the "best one we have had" (R. 9, 13-26).

c. Specification 4: It was stipulated (Ex. 1-B) that Sergeant Holdiness would testify that about 25 January 1944, just after the organization had moved to Camp Livingston, he entered a dice game in the rear of the enlisted men's latrine at about 10:00 p.m. and remained about 15 minutes. Accused and 10 or 12 enlisted men were in the game. Technician Fourth Grade Claude F. Bates (Ex. 1-D), sergeant of the guard on the night of 25 January, saw accused in a dice game with Private First Class Tommy Buford and other enlisted men in a hutment at about 9:45 p.m., and in a dice game with enlisted men in the latrine at about 11:00 p.m. and about 1:00 a.m. Staff Sergeant Walter Roberts (Ex. 1-E) was in a dice game with accused and several enlisted men in one of the hutments for about 15 minutes about 25 January. Private First Class Albert F. Bishop (Ex. 1-F) entered a small dice game in "hutment number 12" at about 7:00 p.m. on 25 January. The game grew larger and accused entered it. About 10:00 p.m. when the lights went out, the game was moved to the rear part of the enlisted men's latrine. Accused was still in the game when Bishop left about midnight. Private Carl L. McMellon (Ex. 1-H) and Corporal James C. Chastant (Ex. 1-R) were also in the game, and shot dice with accused. All the witnesses belonged to the 86th Reconnaissance Troop Mechanized (R. 9, 11).

d. Specification 5: It was also stipulated (Ex. 1-H) that Private McMellon would testify that early in February 1944, a few days after pay day, he entered a dice game in the enlisted men's latrine in the troop area at about 9:00 p.m. Accused and enlisted men were in the game. Privates Tommy B. Buford (Ex. 1-G), Earl E. Spratt (Ex. 1-J) and Muriel E. Tinker (Ex. 1-Q) participated in the game with accused and other enlisted men. Private John O. Fischer (Ex. 1-I), Technician Fourth Grade Glen E. Shaulis (Ex. 1-K), Sergeant Carl W. Hall (Ex. 1-L), Sergeant Howard W. Fertig (Ex. 1-M), Private Alvin A. Dobbins (Ex. 1-N) and Technician Fourth Grade Eugene Lefkowitz (Ex. 1-O) observed the dice game, about 3 February, and saw accused there. Some saw him shooting dice and some did not. Among those seen in the game was Fischer. The witnesses belonged to the 86th Reconnaissance Troop Mechanized. When accused dropped out of the game at about 1:00 a.m. he told Private Fischer that he had lost about $400 (R. 9-11).

4. Lieutenant Colonel Ferris C. Standiford testified for the defense that while he was G-2 of the division accused joined it about March or April 1943, and he had known accused since that time. Accused was commander of the reconnaissance troop. He had occasion to observe accused "very closely", as the training of the reconnaissance troop was under G-2. Colonel Standiford expressed the view that accused was a "very forceful and energetic" officer and did a "very good" or "excellent" job in the basic training period and in training the individual soldier, but when it came to field exercises it was felt that the troop needed someone with more field experience. His observations of accused were as an officer, and he knew nothing of the personal habits of accused (R. 28-29).

First Sergeant Robert C. Norman had known accused for about nine years, first as an enlisted man, and later as an officer when accused joined the 86th Reconnaissance Troop in March 1943 as a first lieutenant and troop commander. He stated that accused was a "qualified officer" and a "good soldier", was well liked in the troop and got along fine with the men, gained the confidence of the men because he was "with the troops at all times", and enforced discipline but was "fair and square with it". Staff Sergeant Walter Roberts, who had known accused since March 1943, considered him one of the best troop commanders he had "ever soldiered under". He stated that accused was a "good man", did his duty, and the men liked him. Sergeant Roberts had been in the service about fifteen and a half years. Technician Fourth Grade Eugene Lefkowitz stated that the reputation of accused was "about the best", he handled the men "squarely" and had no favorites, and he based their training on physical fitness, which they needed. Private Alvin A. Dobbins considered accused one of the best officers they had ever had, because he knew how to handle his men and was always fair with them. He stated that accused knew how to talk to the men and get work out of them (R. 39-40).

It was stipulated that 10 other enlisted men, named in the stipulation, would testify substantially the same as the foregoing witnesses (R. 41).

Private James M. Sisk stated that the reputation of accused with his men was good, and that he was a good leader and fair to his men. Second Lieutenant Lewis T. Pratt, who served in the 86th Reconnaissance Troop with accused, stated that accused was "hard working", maintained good discipline, was fair, and bore a good reputation. Second Lieutenant Delos L. Romer, who had known accused since 24 August 1943, testified that accused had "conducted his job" in a thorough manner, had a good reputation, and was a leader of his men, a good officer (R. 42, 45, 50-53).

Private Sisk testified that when he was in a poker game with accused, Graves, Alexander, Pequeen and Dickson, near Dennison Dam, about the first or middle of November 1943, they had some whiskey, but he did not see

accused drink any. They also had "a batch" of bottles of Coca-Cola there (R. 42-49).

The accused elected to remain silent (R. 53).

5. The evidence shows that about 5 August 1943 accused engaged in a game of stud poker with three enlisted men, near Dennison Dam, Texas (Spec. 1); that about 10 November 1943 he played poker with enlisted men at Camp Howze, Texas, and that during the game accused took a drink of whiskey, as did some of the enlisted men (Spec. 3); that about 25 January 1944 accused engaged in a dice game with enlisted men at Camp Livingston, Louisiana (Spec. 4); and that about 3 February 1944 accused played in a dice game with enlisted men at Camp Livingston (Spec. 5). A number of witnesses testified for the defense as to the good reputation of accused and as to his ability as an officer.

Accused pleaded guilty to the four Specifications, except as to the drinking of intoxicating liquor with enlisted men as alleged in Specification 3, but only in violation of the 96th Article of War. Although the conduct of accused was to the prejudice of good order and military discipline, it was not of such character as to compromise his character and standing as a gentleman. The Board of Review is of the opinion that the offenses of which accused was found guilty are in violation of the 96th Article of War, and not of the 95th Article of War. (See CM 234558, Field, 2 Bull. JAG 342; CM 241176, Petty).

6. The accused is 31 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 1 August 1930; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 18 July 1942; temporarily promoted to first lieutenant, Army of the United States, 26 November 1942.

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 only so much of the findings of guilty as involves a violation of the 96th Article of War, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate

_____, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 20 MAY 1944 - 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 Edward D. Martin (O-1030267), Cavalry.

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 as involves a violation of the 96th Article of War, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused gambled with enlisted men on three occasions (Specs. 1, 4 and 5), and gambled and took a drink of intoxicating liquor with enlisted men on another (Spec. 3). A nolle prosequi was entered as to Specification 2.

The record shows that accused, with approximately 12 years of enlisted service prior to his appointment as an officer, bore the respect and confidence of the enlisted men of his organization, and that three officers who observed him testified to his ability as an officer. I recommend that the sentence to dismissal be confirmed but, in view of all of the circumstances, that the execution thereof be suspended during good behavior.

3. Attention is invited to a letter in behalf of accused from his wife to the President.

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 carrying into effect the recommendation made above.

Myron C. Cramer

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

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Mrs. Martin.

(Only so much of findings of guilty as involves violation of 96th Article of War approved. Sentence confirmed but execution suspended. G.C.M.O. 266, 6 Jun 1944)

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

SPJGK
CM 252981

6 APR 1944

UNITED STATES v. Chaplain (Captain) OWEN W. EAMES (O-418287), Chaplain Corps.	FIRST SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Devens, Massachusetts, 28 March 1944. Dismissal.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Chaplain (Captain) Owen W. Eames, Service Command Unit No. 1129, did, at Cambridge, Massachusetts, on or about 1 February 1944, feloniously take, steal and carry away about $281.00, United States currency, the property of Chaplain (1st Lt) Martin B. McMahon and about $50.00, United States currency the property of Chaplain (1st Lt) Christopher Fagan.

Specification 2: In that Chaplain (Captain) Owen W. Eames, Service Command Unit No. 1129, did, at Cambridge, Massachusetts, on or about 20 December 1943, feloniously take, steal and carry away $10.00 in United States currency, the property of Captain Lawrence V. Curran.

Specification 3: In that Chaplain (Captain) Owen W. Eames, Service Command Unit No. 1129, did, at Cambridge, Massachusetts, on or about 14 May 1943, feloniously take, steal and carry away one radio, value about $22.00, the property of Captain John K. Darling.

He pleaded guilty to and was found guilty of the Specifications and Charge. There was no evidence of any previous conviction. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. Specification 3.

On or about 14 May 1943, Captain John K. Darling, Corps of Engineers, Chaplain School, Harvard University, Cambridge, Massachusetts, was serving as an instructor at the school (R. 17). He owned a small portable General Electric radio, which, at the time, he had placed on his desk. About noon he left the room. When he returned at 1 p.m. the radio was missing. Later, some "civilian investigators" brought back the radio to him. A radio, which Captain Darling identified by various characteristics as the one in question, was admitted in evidence (R. 18-20; Ex. 1).

On 21 March 1944, Captain George H. Schwartz, Judge Advocate General's Department, Headquarters, Chaplain School, Harvard University, Cambridge, Massachusetts, interviewed accused. Captain Schwartz was the investigating officer. He read Article of War 24 to accused, and explained to him that he need not make a statement; that if he declined to make a statement, his declination would not be held against him; and that if he did make a statement, it could be used against him (R. 21,22). Thereupon, accused expressed the desire to make a statement. The statement was dictated to a stenographer, transcribed, read by accused, and then signed and sworn to by him (R. 23,24). Without objection by the defense, the statement was introduced in evidence (R. 24; Ex. 2). In it, accused stated that from November 1942 he had been stationed at the Chaplain School at Harvard as a member of the faculty. He admitted having taken Captain Darling's radio from the latter's desk, on or about 14 May 1943, intending to keep it. He knew that the radio belonged to Captain Darling. Soon after taking the radio, accused gave it away (Ex. 2). It was stipulated that on 14 May 1943 the radio was valued at $22 (R. 20).

b. Specification 2.

On 20 December 1943, Captain Lawrence V. Curran, Corps of Engineers, Army Chaplain School, Harvard University, was stationed at the school (R.14). His "office" (apparently referring to a "study") adjoined that of accused (R.15). Captain Curran had in his possession $35, representing contributions for Christmas gifts from officers stationed at the school. Although the money did not belong to Captain Curran, he was accountable for it. At some time during the day, accused, who was "visiting" in Captain Curran's room, saw Captain Curran sitting at his desk counting the money. Before retiring, Captain Curran put the money in his desk drawer. The door to his room was not locked. On the following day Captain Curran discovered that $10 of the $35 were missing (R. 14-16).

In the written statement already referred to, accused admitted that around 20 December he took $10 from the drawer of Captain Curran's desk, intending to keep the money for his own use (Ex. 2).

c. Specification 1.

On 1 February 1944, Chaplain (First Lieutenant) Martin B. McMahon, Chaplain Corps, Childress Army Air Field, Texas, was stationed at the Chaplain School at Harvard. At 11 p.m. he prepared for bed. He placed his clothes in his study room. His wallet was in the rear pocket of his trousers and contained $281. He turned out the lights and went to the latrine. His roommates were asleep.

When he left the room, the door between the bedroom and study was open, and the door leading from the study to the hallway was closed. Upon his return from the latrine about 11:30 p.m., he noticed that the door to the hallway was open and the door to the bedroom closed. About 6 a.m. the next day, Chaplain McMahon discovered that his wallet and the money were gone. About 8 a.m. one of his roommates handed him the wallet, from which the money was missing (R. 9-11).

In his confession, accused stated that on the night of 1 February 1944 he was Officer of the Day in one of the dormitories. He admitted entering the room occupied by Chaplain McMahon, a student at the school, and taking from Chaplain McMahon's trousers a wallet containing $281, belonging to Chaplain McMahon. He removed the money from the wallet and replaced the wallet in "a pair of trousers". He intended to keep the money (Ex. 2).

On 1 February 1944, Chaplain (First Lieutenant) Christopher Fagan, 359th Base Headquarters and Air Base Squadron, Army Air Base, Alamogordo, New Mexico, was stationed at the Chaplain School as a student (R. 12). Accused was Officer of the Day. When Chaplain Fagan retired for the night, he left his wallet, containing about $50, on the desk in his living room. Next morning the wallet was missing. The wallet (minus the money) was recovered by him next day (R. 12-13).

In his confession, accused admitted taking Chaplain Fagan's wallet containing about $50. He removed the money, intending to keep it. He placed the empty wallet in the latrine on the floor below (Ex. 2).

d. Accused made an unsworn statement to the following effect: He is married and has three children. He has been a minister since 1924 and held the same parish for the 14 years immediately preceding his entrance into the Army in January 1941 (R. 25). From January 1941 until 1 November 1942, he served as a chaplain with an infantry regiment, in which assignment he was very happy and believes he did good work. When he left, his regiment gave him a "review" (R. 26).

However, within several months after accused's entrance into the Army, a domestic difficulty developed, which caused him deep distress, disillusionment, and unhappiness, and resulted in the breaking up of his home and

the departure of his wife (R. 26).

On 1 November 1942 he was assigned to the Chaplain School as an instructor (R. 26). He found the work monotonous and he was not happy. In the spring of 1943, he "began to be aware of impulses to take things that didn't belong to" him. He admitted taking the radio and money, as alleged in the Specifications. Taking the radio and money did not make him happy, and he did not take "through any desire to gain, at the expense of others". He had difficulty in understanding himself. He made no attempt to spend or dispose of the money, and merely kept it in his foot locker (R. 27).

In January, accused went to his commanding officer, intending to tell him the whole story and to make what restitution he could, but he could not "find it in" his heart to make the disclosure (R. 28).

Accused believed that his conduct did not result from "any fundamental dishonesty" in his nature, but rather from "inner turmoil or tension". His chief concern is for his children. There is no one to support them and no one except accused to whom they can turn. Accused wants the opportunity of making a home and caring for them (R. 29).

e. It was stipulated that accused has made restitution of the money and that the radio has been or will be returned (R. 30).

4. The plea of guilty and the evidence establish accused's guilt.

5. Specification 2 alleges that the money was the property of Captain Curran. The evidence shows that the money had been turned over to him by various officers, and was to be used by him in purchasing joint Christmas gifts. It was in his possession. Larceny is a crime against the possession, and it is proper to allege ownership in either the real owner or the person in possession (MCM, 1928, p. 173). Consequently, there is no variance between the allegation and the proof.

6. War Department records show that accused will be 44 years old on 16 April 1944. He graduated from Tufts College and Tufts School of Religion. He has been a minister since 1925. On 12 December 1940 he was appointed chaplain (first lieutenant), National Guard of the United States, and entered upon extended active duty. On 7 December 1942 he was promoted to captain, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and subject matter. 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 of the sentence. Dismissal is authorized

upon conviction of a violation of Article of War 93.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 APR 1944 - 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 Chaplain (Captain) Owen W. Eames (0-418287), Chaplain 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 of the sentence. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 265, 6 Jun 1944)

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

SPJGN
CM 253054

8 MAY 1944

UNITED STATES	)	SIXTH AIR FORCE
v.	)	Trial by G.C.M., convened at U.S. Army Air Base, Guatemala City, Guatemala, Central America, 7 February 1944. Dismissal and confinement for two (2) years.
Major RUSSELL B. HOWARD (0-279449), Medical Corps.	)	

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OPINION of the BOARD OF REVIEW
LIPSCOMB, CAMPBELL and GOLDEN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer above named 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 1: In that Major Russell B. Howard, Medical Corps, did, at Guatemala City, Guatemala, Central America, on or about 4 April 1943, feloniously embezzle by fraudulently converting to his own use money of the value of Two-hundred and Ninety-five Dollars ($295.00), the property of Sergeant JAMES ABESHAUS, entrusted to him by the said Sergeant JAMES ABESHAUS.

Specification 2: In that Major Russell B. Howard, Medical Corps, did, at Army Air Base Guatemala City, Guatemala, Central America, on or about 27 July 1943, feloniously embezzle by fraudulently converting to his own use money of the value of Three-hundred and Thirty-seven Dollars and Eighteen Cents ($337.18), the property of the "Hospital Fund" United States Army Air Base, Guatemala City, Guatemala, Central America, entrusted to him under the provisions of Paragraph 1 a, and Paragraph 5 a (1) of Army Regulations 210-50.

Specification 3: In that Major Russell B. Howard, Medical Corps, did, at Army Air Base Guatemala City, Guatemala, Central America, on or about 9 January 1943 feloniously embezzle by

fraudulently converting to his own use money of the value of Seventeen Dollars ($17.00), the property of Captain Richard H. Shug, entrusted to him by the said Captain Richard H. Shug.

Specification 4: In that Major Russell B. Howard, Medical Corps, did, at Army Air Base Guatemala City, Guatemala, Central America, on or about 2 April 1943, feloniously embezzle by fraudulently converting to his own use money of the value of Thirty-six Dollars ($36.00), the property of Major Sylvester E. Pawol, entrusted to him by the said Major Sylvester E. Pawol.

Specification 5: In that Major Russell B. Howard, Medical Corps, did, at Army Air Base Guatemala City, Guatemala, Central America, on or about 11 July 1943, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to wit:

SAN ANTONIO, TEXAS July 11, 1943
FORT SAM HUSTON BANK

Pay to the Order of MAJOR RUSSELL.B. HOWARD $ 100.00
ONE-HUNDRED and no/100- - - - - - - - - - - - - - - - Dollars

(Signed) CHAS. I. WEBB

which check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification: In that Major Russell B. Howard, Medical Corps, did, at Guatemala City, Guatemala, Central America, on or about 11 May 1943, wrongfully and knowingly dispose of by gift to Senor Eugenio Silva Pena two (2) automobile tire casings and tubes of the value of about Thirty Dollars ($30.00), property of the United States furnished and intended for the Military Service thereof.

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

Specification 1: In that Major Russell B. Howard, Medical Corps, did, at Army Air Base, Guatemala City, Guatemala, Central America, on or about 19 July 1943, with intent to deceive, wrongfully and unlawfully make and utter to Sergeant James Abeshaus, a certain check, in words and figures as follows, to wit:

THE CHASE NATIONAL BANK
Balboa Branch July 19, 1943

Pay to the Order of JAMES ABESHAUS $ 295.00
TWO HUNDRED AND NINETY FIVE oo/100 - - - - - - - Dollars

(Signed) RUSSELL B. HOWARD
0-279449

in payment of a debt in the sum of Two-hundred and Ninety-five Dollars (295.00) owed to the said Sergeant James Abeshaus, he the said Major Russell B. Howard, then well knowing that he did not have and not intending that he should have sufficient funds in the Balboa Branch Chase National Bank for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on Fort Sam Houston Bank, dated 27 July 1943, payable to order of and made and uttered to Captain Charles A. Hulse, in amount of $100 at same place, in payment of a debt in amount of $100.

Specification 3: Same form as Specification 1, but alleging check drawn on The Fourth Street Bank, Louisville, Kentucky, dated 31 July 1943, payable to order of and made and uttered to Major William H. Agenbroad, in amount of $100 at same place, in payment of a debt in amount of $100.

Specification 4: In that Major Russell B. Howard, Medical Corps, did, at Army Air Base, Guatemala City, Guatemala, on or about 27 July 1943, with intent to defraud, wrongfully and unlawfully make and utter to Captain Mack M. Rabinowitz, a certain check, in words and figures as follows, to wit:

WHITESBURG NATIONAL BANK
Whitesburg, Kentucky

July 27, 1943

Pay to the order of MACK R. RABINOWITZ $ 100.00
ONE HUNDRED and oo/100 - - - - - - - - - - - - - - - - - Dollars

(Signed) RUSSELL B. HOWARD

and by means thereof, and as partial consideration for, did fraudulently obtain a check in the value of Two Hundred ($200.00), from Captain Mack M. Rabinowitz, he, the said Major Russell B. Howard, then well knowing that he did not have and not intending that he should have any account with the said WHITESBURG NATIONAL BANK for the payment of said check.

Specification 5: Same form as Specification 4, but alleging check drawn on same bank, dated 30 August 1943, payable to order of and made and uttered to same officer, at same place, in same amount and fraudulently obtaining thereby check in the value of $200.

Specification 6: In that Major Russell B. Howard, Medical Corps, being indebted to Captain Richard H. Shug in the sum of Twenty

Dollars ($20.00) for money received which amount became due and payable on or about 1 March 1943, did, at Guatemala City, Guatemala, Central America, from about 1 March 1943 to about 2 October 1943, dishonorably fail and neglect to pay said debt.

Specification 7: Same form as Specification 1, but alleging check drawn on The Chase National Bank, Balboa Branch, dated 10 December 1942, in amount of $99, made and uttered to Thomas Woodward, at same place, in payment of debt in amount of $99.

Specification 8: In that Major Russell B. Howard, Medical Corps, being indebted to Thomas Woodward in the sum of Ninety Nine Dollars ($99.00) for money had and received, which amount became due and payable on or about 9 December 1942, did, at Army Air Base Guatemala City, Guatemala, Central America, from about 9 December 1942 to about 2 October 1943, dishonorably fail and neglect to pay said debt.

Specification 9: In that Major Russell B. Howard, Medical Corps, being indebted to Major Maurice C. Tobin, in the sum of Twenty Two Dollars ($22.00) for merchandise received, which amount became due and payable on or about July 19, 1943, did, at Guatemala City, Guatemala, Central America, from about 19 July 1943, to about 2 October 1943, dishonorably fail and neglect to pay said debt.

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

Specification 1: In that Major Russell B. Howard, Medical Corps, being indebted to Maximo Kosak, doing business under the trade name and style of "Maximo Kosak & Co"., Guatemala City, Guatemala, Central America, in the sum of Eighty Three Dollars and Twenty Cents ($83.20) for merchandise purchased, which amount became due and payable on or about 17 July 1943, did, at Guatemala City, Guatemala, from about 17 July 1943 to about 1 October 1943, dishonorably fail and neglect to pay said debt.

Specification 2: Finding of not guilty.

Specification 3: In that Major Russell B. Howard, Medical Corps, being indebted to Alberto F. Walden and Rafael Piccioto, copartners, doing business under the trade name and style of "Lavanderia San Antonio", Guatemala City, Guatemala, Central America, in the sum of Fourteen Dollars and Ninety-Nine Cents ($14.99), for services received, which amount became due and payable on or about 22 July 1943, did, at Guatemala City, Guatemala, Central America, from about 22 July 1943 to about 2 October 1943 dishonorably fail and neglect to pay said debt.

Specification 4: Finding of not guilty.

The accused pleaded not guilty to each of the Charges and Specifications and was found guilty of all of them with the exception of Specifications 2 and 4 of Charge IV of which he was found not guilty and with the further exceptions of Specifications 6 and 9 of Charge III of which he was found not guilty as charged under Article of War 95 but guilty of the same Specifications under Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for a period of two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that in April of 1943 the accused was the Base Surgeon and senior medical officer at Guatemala Air Base, Guatemala City, Central America. He had formerly been the Commanding Officer at APO 662 and had there accepted deposits of money from various individuals for safekeeping. Upon leaving for the Guatemala Air Base, he had repaid all of the sums entrusted to him (R. 14, 16, 37, 42).

Among those who had availed themselves of this depositary service was Staff Sergeant James Abeshaus. Late in March of 1943, while attached to Albrook Field, Canal Zone, he received shipping orders transferring him to Guatemala Air Base. Preparatory to his departure, he closed his personal savings account with the Balboa Branch of the Chase National Bank of New York and purchased a cashier's check in the sum of $295.00 with the proceeds. Upon arriving at his new station he on or about 4 April 1943 requested the accused to cash the instrument. The accused represented that "he would probably have [the money] the same afternoon". Despite repeated demands by the Sergeant, no effort to repay him was made until 19 July 1943. On that day the accused gave him a personal check for $295.00 drawn on the Balboa Branch of the Chase National Bank of New York and expressed regret at the long delay. According to the Sergeant,

> "I asked him if I could cash it without any trouble and he said that I could. I then took the check to the Banco Central in Guatemala and they would not honor it, but would take it for collection. * * * [They] said to try the Bank of London and South America, Limited; and they would not honor it either. They said the only way they could cash it for me was to take it for collection, and they would send it to the Chase National Bank in the Canal Zone, and I left the check with them for collection".

In the meantime Colonel Edwin H. Lauth, the Commanding Officer of the Base, had learned of the indebtedness. He promptly instructed the accused, who had shortly before been given shipping orders, to satisfy the obligation. In compliance with this order the Sergeant on 25 or 26 July was paid the entire $295.00 in cash at the Colonel's office. Four

or five days later the check dated 19 July 1943 was returned marked "Insufficient Funds". As of 19 July 1943 the accused had $3.07 on deposit with the Balboa Branch (R. 13-22, 36-37; Pros. 1, 20, 21, A).

During June and July of 1943 the accused was the Custodian of the "Hospital Fund, Guatemala Air Base" in the name of which an account was maintained at the Bank of London and South America Limited. In that capacity he received Ration Savings for the month of June, consisting of $1157.18 in cash, from Captain (then First Lieutenant) Mack M. Rabinowitz, the Agent Finance Officer. A bank deposit in that sum to the credit of the Hospital Fund was made by the accused on 27 July 1943, but only $620.00 of it was in cash. The rest was comprised of two checks, one for $337.18 executed by him and drawn against the joint account of himself and his wife with The Fourth Street Bank of Louisville, Kentucky, and the other a draft for $200.00 signed by Captain Rabinowitz and directed to the Pilgrims Trust Company of Boston, Massachusetts. The amount represented by the two instruments had been withdrawn in cash from the Ration Savings for June and applied by the accused to his personal purposes and uses. His exact balance on 27 July 1943 with The Fourth Street Bank was $27.13, and in "August his only balance was $17.13". A "Stop Payment" order from the accused was received by the bank on 4 August 1943, and the check of 27 July 1943 was returned on 6 August 1943 marked "Payment Stopped". The background of the check for $200.00 was related by Captain Rabinowitz as follows:

> "On 27th of July 1943, Major Howard and I had a conversation in which he told me he was leaving, that he had received his orders, and he asked me if I would loan him some money, and I said that I would, and we didn't discuss the amount, but he said he would give me a post-dated check for the money and I suggested that we go to my office and I would write him a check. As he started to write out the check, he said that he was going to give me two (2) checks in the amount of One hundred dollars ($100.00) each and asked me if that would be all right, and I said 'Yes'. He said that he would like to make one check for August 15th and one for August 30th. He did date one of the checks July 27th, which was the current date, but I agreed to hold it until August 30th. He gave me two (2) checks; one dated July 27th for One hundred dollars ($100.00), and one dated August 30th for One hundred dollars ($100.00), drawn on the Whitesburg National Bank, Whitesburg, Kentucky, and I gave him my check for Two hundred dollars ($200.00) drawn on the Pilgrim Trust Company, Boston, Mass."

The checks drawn on the "Whitesburg National Bank" were deposited shortly after the dates agreed upon. Both were returned unpaid. Subsequent inquiry disclosed that there was no "Whitesburg National Bank" and that the accused had no account in the Bank of Whitesburg, which was the only bank in Whitesburg, Kentucky. As a consequence of the accused's "Stop Payment" order to the Fourth Street Bank, the Hospital Fund account was overdrawn as of 27 September to the extent of $261.32. In lieu of the rejected instrument addressed to the "Fourth Street Bank",

the Bank of London and South America Limited received the following day another check in the sum of $337.18 dated 6 September 1943 and drawn on The Seymour National Bank of Seymour, Indiana. This last check was sent to New York for collection, but it was recalled at the request of the accused without presentation, and its amount was "eventually covered" by him with the proceeds of travelers checks on the Mellon National Bank (R. 24-37; Pros. Exs. 2-5, 24-25, B, I, J).

Early in July of 1943 the accused had borrowed $100 from Major (then Captain) Charles A. Hulse, the "General Medical officer" at Guatemala Air Base. A check in that sum drawn against Fort Sam Houston Bank, San Antonio, Texas, was executed by the accused and sent to Major Hulse on 27 July 1943. It was not honored because of "signature illegible". Some three weeks after its return the original loan was repaid in full by the accused. A search of the Bank's records failed to disclose any account in his name (R. 42-44; Pros. Ex. 22, E, G).

Another check for $100.00 drawn on the Fort Sam "Huston" Bank of San Antonio, Texas, bearing the signature "Chas. I. Webb", and made payable to the accused was indorsed by him and cashed at the Guatemala Post Exchange on 11 July 1943. It, too, was returned because of "Signature illegible". Upon interrogation, prior to the trial, the accused admitted that "I wrote that check at the Post Exchange one afternoon when I was a little drunk". Expert testimony clearly established the signature to be in his handwriting. "Chas. I. Webb" was not a fictitious character. He was an Infantry major and a brother of the accused's wife. He did not maintain an account at the National Bank of Fort Sam Houston and had never authorized anyone to use his name and signature. In his deposition, however, he did state that, if he had known about it, he would have ratified the accused's check. "The reasons are quite obvious because of the relationship with my sister and her family". The Post Exchange was reimbursed by the accused in cash for the amount of the check on 1 or 2 October 1943. In pursuance to the instructions of Colonel Cole, the Inspector General of the Sixth Air Force, no attempt to obtain payment had been made (R. 59-69; Pros. Exs. 10, E, F, G).

In the last week of July "on a Tuesday", the accused solicited Major William H. Agenbroad for a loan of $100 "until Saturday, Saturday being payday". The Major advanced the sum. When Saturday arrived, the accused was unable to make repayment but in lieu thereof delivered a promissory note and a personal check, each for $100. The additional security of the promissory note was provided at the request of Colonel Lauth. "About three weeks to one month later" the check which was directed to the Fourth Street Bank of Louisville, Kentucky, was returned with the notation "no account". Upon the accused's return from the United States some time thereafter he paid $100 in cash to Major Agenbroad with monies borrowed from Colonel Lauth. The accused's balance with the Fourth Street Bank on 31 July 1943 was $17.13, and on 9 August 1943 he closed the account. The check to Major Agenbroad was returned on 13 August 1943 (R. 70-74; Pros. Ex. I).

More than a year before, while serving at APO 662, located on the Galapagos Islands in the Pacific, the accused had made the acquaintance of Mr. Tom R. Woodward a general construction superintendent. On or about December of 1942 Mr. Woodward was a patient in the Station Hospital. In his deposition he has stated that:

> "I laid $99.00 in currency on the table alongside my bed . . . and when [the accused] saw the money there he told me he would put it in the hospital safe for safe keeping, if I so desired. I told him to take the $99.00 and place it in the safe. I handed the money to him."

Upon his release from the Hospital on or about 8 December 1942 he asked the officer in charge of the safe for his funds. They were not there. Four or five days thereafter Mr. Woodward received in the mails a check for $99.00 signed by the accused and drawn on the Balboa Branch of The Chase National Bank of New York. It was cashed by Major Leroy Bitcon, the local Post Exchange Officer, and deposited in the Post Exchange bank account. "In due course it was returned N.S.F." Major Bitcon immediately wrote to the accused, who had in the meantime been transferred to the Guatemala Air Base, requesting "a postal money order" "in order to make said check good with least possible delay." No reply was ever received. Mr. Woodward reimbursed the Post Exchange and wrote to the accused twice. No answer was forthcoming on either occasion. The obligation is still unpaid. As of 10 December 1942 the accused's account with the Balboa Branch was "$10.59 overdrawn" (R. 74; Pros. Exs. A, K, L, M).

According to Major Richard H. Schug,

> "Shortly after [the accused] arrived at Guatemala Air Base he was telling Captain Huffman and myself about purchasing some Peruvian blankets and carved bone chess set through a friend of his at Galapagos Islands. I requested [the accused] to secure for me two (2) Peruvian blankets and one carved bone chess set, the price of which was Seventeen Dollars ($17.00), and we were to have obtained them in time for transmittal to the States before Christmas. Both of us, Captain Huffman and myself, gave him that amount of money, Seventeen Dollars ($17.00)."

Neither of these items was delivered. Whenever Major Schug inquired about them, the accused told him that "the person he was working through at the 'Rock' (Galapagos Islands) had either gone or was having difficulty in securing the merchandise". In the early part of March of 1943 the Major was "accosted" by the accused and asked for a loan of $20.00 "to enable him to go to town that evening". The money was advanced upon the express understanding that it would be repaid the following morning. Despite several demands by Major Schug both orally and in writing, the total indebtedness of $37.00 was not satisfied by the accused until November of 1943. On one occasion, just prior to departing for Albrook Field, Major Schug had asked for payment and had been assured that the accused "would go into town that night and cash a check". The Major testified that on "the morning of April 28th, at about 5:30, I woke him up, as he

had asked me to do, and he told me at that time that he had forgotten to cash a check, but that he would cash a check that day and send the money to me". After the Charges were preferred, the accused admitted the indebtedness to the Investigating Officer, and it was then that arrangements for payment were made (R. 37-40, 50).

During the month of February and March respectively, Private Walter R. Harrison and Corporal Adolph A. Bambic were transferred from Guatemala Air Base to the Galapagos Islands. Before leaving they had contracted debts aggregating $36.00 at an establishment entitled "El Rinconcito". Upon having the matter called to their attention at their new post, Corporal Bambic paid $3.00 and Private Harrison $33.00 to Major Sylvester E. Pawol of the Medical Corps. He pocketed the money and on 2 April 1943 mailed his personal check for the total to the accused, who cashed it and applied the proceeds to his own purposes. The obligation not having been satisfied, the owner of "El Rinconcito" addressed a letter to the Commanding Officer of Guatemala Air Base. The Public Relations Office sent an inquiry to the Galapagos and was in due course informed that the amount in question had been turned over to the accused. Having been confronted with the correspondence, he made full restitution in November of 1943 (R. 40-41, 51-52; Pros. Exs. 6, 7, 8, 9, C, D).

The accused visited Major Maurice Costello Tobin, of the Corps of Engineers, on 11 May 1943 and asked "about getting some tires". The Major was the resident engineer for Pan American Highway in Guatemala City and was in "complete charge of everything connected to the Highway", including the "Bodego" or warehouse of the United States Engineers Department. To quote from his deposition 22 January 1944,

> "When the [accused] saw me on this date, he told me that he had a car which he was using in his own organization and that he had a lot or [sic] running around to do from the Base to the butcher shop, etc., in Guatemala City, and also stated that he sometimes took trips to San Jose, Guatemala. I asked him how he got by the Colonel in using the car for his use. He said that the Colonel knew he was using the car and so he went on using it. He then volunteered the information that the Base Finance Officer was paying rental on this car. I then called up the Bodego and gave instructions to give [the accused] two (2) 650x16 tires and two (2) 650x16 innertubes and to make Memorandum Receipts for same."

This order was promptly executed. Upon receiving the tires and innertubes the accused turned them over as a gift to Senor Eugenio Silva Pena "for the kind way in which [he] had treated the [accused] as a lawyer". The transfer was not in payment of any "financial indebtedness" but the Senor did state that "I had served him as a lawyer and had not as yet charged him anything". Some time later, upon learning of the accused's impending trip to the United States, Major Tobin "began to get

worried about the tires and started an investigation . . . to determine where" they were. It was not, however, until the accused's return to Guatemala that the details of the transaction were ascertained. On 17 October 1943 he informed the Major of his "present" to Senor Pena. The tires were retrieved on 22 October 1943 and the tubes on 12 November 1943. The tires were "in perfect condition". They were property of the United States Government, and their stipulated value was $30.00 (R. 53-58; Pros. Exs. 18, 19, H).

Major Tobin and the accused had exchanged numerous courtesies in the purchase of small supplies for one another. Many of the transactions were unusual but were necessitated by the lack of adequate facilities in Guatemala. Thus the accused had supplied several of the Major's Pan American Highway stations with groceries. The Major had attempted to make payment, but the accused "just put it off". "Around the latter part of June 1943" the Major, in the presence of the accused and a Major Burleigh of the Quartermaster Corps, had remarked that he was about to go to Managua. Major Burleigh thereupon requested that two alligator purses be purchased for him and handed Major Tobin $20 to cover the cost. The accused then also asked that the same service be performed for him and said, "I'll pay you for them when you get back". In Managua Major Tobin discovered that the price had been increased from $10 to $11 per purse. He paid for four and brought them to Guatemala City. In the meantime Major Burleigh had been transferred to Galapagos Islands. When told around 19 July 1943 that the purses were available, the accused came to Major Tobin's office and stated that "I will take all four . . . and send two . . . to the Major . . . I will pay you for these in the next day or two". Payment was not actually made until 25 October 1943 which was only four days before the formal charges here under consideration were preferred (R. 11, 76; Pros. Ex. H).

Contemporaneously with most of the transactions described above, the accused had contracted a number of obligations for merchandise and laundry and cleaning service which also remained unsatisfied until shortly before or after the preferment of charges. Thus, on 17 July 1943 he became indebted in the sum of $83.20 to Maximo Kosak & Company. It was due within thirty days, and several bills for it were submitted. It was paid in full on 1 October 1943. The accused had had certain dry cleaning and laundry done by the Lavenderia San Antonio of Guatemala City. As of 22 July 1943 he owed them $14.99, which was payable "when the customer is presented the bill and if he cannot pay at that time the bill is pending until such time as the customer can pay". A detailed bill was delivered to the accused in August. It was ultimately satisfied between 20 and 30 October 1943 (R. 77-81, 83-85).

To extricate the accused from his financial entanglement, Colonel Lauth, "sometime subsequent to July 1943" arranged a general settlement. He testified that:

"There was no information given to me as to the exact indebtedness, with amounts due people or firms that made up the total that Major Howard advised me he owed at that time. I had asked him to ascertain exactly what bills he may have outstanding in town to firms or people and to let me know what that total was and that I might possibly assist him to clear all those prior to his departure, that I would not want to have any correspondence with regard to unpaid bills when any officer cleared the Post. The following day he brought in a list with some names and amounts opposite them and a total. He did tell me it included One hundred dollars ($100.00) to Major Agenbroad and Two hundred dollars ($200.00) to Captain Rabinowitz and the sum total was slightly over Eleven Hundred Dollars ($1100.00). I advised him if the two officers would be willing to wait until he could pay them, I would offer to lend him the money to settle all other debts he had listed, and deducting the amounts due the two officers left something over Eight Hundred Dollars ($800.00), and with sufficient money for his trip to the states he estimated it would take Eight Hundred and Seventy Dollars ($870.00). I gave him this much in cash and I do not know whether Captain Hulse's indebtedness was included in the total."

As evidence of the loan two notes, each in the sum of $435.00, were executed by the accused. The Colonel in advancing the necessary funds acted in both a personal and official capacity. Whether he has since been reimbursed does not appear (R. 46-48).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand in his own defense. Two other witnesses were called on his behalf. Staff Sergeant Abeshaus, who had also testified for the prosecution, merely elaborated upon his previous testimony concerning the manner in which the accused, while stationed on the Galapagos Islands, had discharged his duties as the custodian of sums of money entrusted to him for safekeeping by enlisted personnel. Each man's deposit had been placed in "an envelope, with his name and the amount written on it, and it was placed in the strong box in the office". When the accused was about to leave the Galapagos Islands, he requested all enlisted men who had money "in the bank" to withdraw it. All cash entrusted to him was returned to its owners.

Colonel Edwin H. Lauth, the other witness, had also testified for the prosecution. He now added that he believed that the accused

"did a superior job here and I so rated him on his Form 66-1. He displayed an interest in not only the activities here on the Base, but at that time we had no Veterinary Officer and he made inspections of the various firms and business houses and was constantly striving to improve our sanitary conditions. He was quite interested and developed a system of inspecting the latrines

and checking their condition, using the same system here as he had used at Galapagos Islands, which resulted in changing our sanitary condition from quite good to such condition that we were no longer criticized due to the condition of the latrines, and the hospital was rated such that I never had any reports from the Sixth Air Force Surgeon indicating any action was necessary."

In the light of subsequent revelations, the Colonel would change the accused's personal character rating to "satisfactory" but would retain the same rating for "his official acts as Base Surgeon". The character and discipline mark of "superior" had been given with full knowledge that the accused was indebted to enlisted men (R. 91-98).

Neither Staff Sergeant Abeshaus nor Colonel Lauth appreciably strengthened the defense's case. What was true of their testimony was even more true of that of the accused. He did not in the main deny or attempt to disprove but merely added, explained, and pleaded in mitigation.

Most of his financial troubles were attributable to "just drinking too much and running around too much". A girl named Lola Luna had been an object of his attentions. Having once involved himself in debt, he had found it necessary to "Rob Peter to pay Paul" (R. 107, 112).

He was married and the father of two boys. While a Captain he had allotted $250 of his pay to his wife from whom he was estranged. Upon his promotion to Major he had increased this sum to $350. His total Army income was $465 per month. The only other source of funds available to him was his father's estate which consisted of real estate and cash having an aggregate approximate value of $30,000. Although this property was subject to a life interest in his mother, he had an agreement with her "whereby she would have a bank account and [he] could get the money". Whenever he had "wanted anything" she had granted his requests. About 1 July 1943, prior to his leaving Guatemala for the United States, he had written her asking her to send him $1000, but the letter had not reached her because she was then vacationing at a "tourist place" to which "mail was not delivered directly" (R. 101-103, 113-115, 123).

He had a joint account with his wife at The Fourth Street Bank of Louisville, Kentucky. It had been opened by her sometime after 28 May 1942 when she sailed from Panama for the States. When he executed the check for $337.18 payable to the "Hospital Fund", he had no knowledge that the monies on deposit were insufficient to warrant payment. He left Guatemala to return to this country on 31 July 1943 and after his arrival here

"on or about 3rd or 4th of August, I went to the Fourth Street Bank and inquired as to my balance in the bank, which was joint with my wife, and I discovered my funds were depleted,

and I decided that it was unsatisfactory for two people to draw on the account, and I closed the account, that is the joint account with my wife, and asked my wife to deposit her check to her account only so there would be no discrepancy thereafter, and I would write to her for it. Knowing the check for $337.18 was coming in, and rather than have it returned for insufficient funds, I stopped payment until I could get in touch with my wife. I also notified them to stop payment on the check for One Hundred dollars to Major Agenbroad."

On the respective dates of the checks to the Hospital Fund and to Major Agenbroad he believed "that there were sufficient funds there for both" (R. 100-101, 103, 120).

Between the 15th and 20th of August 1943 he succeeded in contacting his mother and obtained another $1000 from her. With this sum he purchased travelers' checks in denominations of $20.00 each. He intended to use some of these to pay the second check to the Hospital Fund dated 6 September 1943 upon presentation and consequently did not make a deposit to cover that amount in a newly established account with the Seymour National Bank of Seymour, Indiana.

He did not follow this plan of action because of his recall to Guatemala. Colonel Lauth granted him permission to pay the $337.18 in travelers' checks directly without waiting for the check on the Seymour National Bank to clear (R. 103-105, 115).

It was not his purpose to deceive Staff Sergeant Abeshaus. Repayment was demanded on three occasions between April and the end of July, 1943. The "first time" the accused did not know whether the Sergeant's check had been honored, "the second and third times [the accused] did not have the money." The check of 19 July 1943 was delivered with the warning that it might not be honored. In that event the accused promised satisfaction in cash. Payment of the obligation was eventually made "before the check had a chance to clear" with funds advanced by Colonel Lauth, Major Agenbroad, Major Hulse, and Captain Rabinowitz. This was an instance in which he had "borrowed from 'Peter' to pay 'Paul'" (R. 107-109, 111-113).

With reference to the blankets and chess set for which Major Schug had advanced $17.00, the accused stated that:

> "I told him that I knew the priest on the 'Rock' [Galapagos Islands] who served Salinas and Talara, so I wrote to the Father and asked if he could obtain same to let me know and I would send him the money, but I never heard from him."

No money accompanied this correspondence. Although Major Schug never requested the return of the money, he did demand "the merchandise". The accused had no "definite date in mind" as to the repayment of the $17.00, but he "did not intend to keep it". He admitted borrowing $20.00 from Major Schug in March of 1943, but did not remember ever having been asked for payment. (R. 105-106, 116).

He had not turned over the $36.00 received from Major Pawol, because "We were not authorized to go down to the 'El Rinconcito', we were authorized to turn the money in to the S-2". The accused cashed the check and retained the proceeds. He "intended to take care of that indebtedness upon [his] return" to the United States (R. 106, 117).

He admitted signing Major Charles I. Webb's name,

> "because I knew if it came to his attention it would be honored. I needed money at that time and I had reason to believe he had a checking account in that bank because he had been on duty in Caledonia and had an account in that bank. I knew if it came to his attention he would honor it."

Despite the accused's estrangement from his wife, he was on "excellent" terms with his wife's brother, Major Webb. When the accused executed the check, he "had been drinking quite a lot". He had no definite information but "understood" that his brother-in-law had opened an account at the Fort Sam Houston Bank before leaving for New Caledonia (R. 106-107, 117-118).

The tires and tubes turned over to Senor Eugenio Silva Pena were merely loaned to him. No gift was contemplated. When the accused left Guatemala on 31 July 1943 for the United States, he did not instruct anyone to retrieve the tires because he "assumed [they] were not going to be needed" by the "Government" (R. 107-108, 118-119).

He received four purses from Major Tolin and had two of them sent to Major Burleigh on the Galapagos Islands. As to the two of which the accused retained possession "I was going to pay him when I got the money" (R. 108, 123-124).

The debt to Mr. Woodward had not been paid even at the time of the trial

> "Because I had the hazy idea that I had sent him the money. I was in town one night drinking with some of the Contractor employees at the Le Grande, who came up here and who worked for Mr. Woodward, and I recall I requested one of the individuals to give the money back to Mr. Woodward. I remember going to Ciro's and the Palace Hotel to get American money to send back to him, and I don't recall whether the individual received the money or not. I know that the next day I was approximately One hundred and twenty-five dollars ($125.00) poorer. However, I am perfectly willing to take the word of Mr. Woodward that he has not received the money and that he will receive restitution."

The check which the accused delivered in payment of the obligation of $99.00 was drawn against a joint account with his wife. She no longer made any withdrawals from it, but, since he expected certain remittances from the Consolidated Coal Company by whom he had been employed before

entering the Army, he did not know what his balance was (R. 109-110, 121-123, 126).

He admitted that he had no account with the Fort Sam Houston Bank at the time he executed the check to Major Hulse. The accused maintained, however, that he informed the Major that "when I was returned to San Antonio I would open an account, but I was not sent to San Antonio" (R. 119).

Although he had no account with the bank in Whitesburg, Kentucky, during 1943, he might have opened one in 1940 when "he lived in that community". He had then practiced medicine in the mining camps at Roberts, Kentucky, as an employee of the Consolidated Coal Company. Compensation for his services was "collected on the payroll . . . and I had instructed them when I left the states, to send these checks to me in the Canal Zone at Fort Kobbe, according to any collections they owed me, which was around Nine hundred dollars ($900.00), this I never received, and when I went back I expected to go back to the Coal Company and renew that proposition that was owed me, to be deposited in the Whitesburg Bank". These funds would have assured the payment of the checks to Captain Rabinowitz. A number of remittances from the Coal Company had been deposited to the credit of the accused at the Balboa Branch of the Chase National Bank (R. 120-121, 125).

When he had departed from Guatemala on 31 July 1943, he had expected to satisfy his "debts in town" to various purveyors of goods and services "as soon as I got the money". Upon his return from the United States he paid all his bills. His only outstanding obligations at the time of his trial were those to Colonel Lauth and to Mr. Woodward (R. 109, 124-126).

5. Specification 1 of Charge I alleges that the accused did, "on or about 4 April 1943, feloniously embezzle by fraudulently converting to his own use money of the value of" $295.00, "the property of Sergeant JAMES ABESHAUS, entrusted to him by the said Sergeant JAMES ABESHAUS." Specification 2 of Charge I alleges that the accused did, "on or about 27 July 1943, feloniously embezzle by fraudulently converting to his own use money of the value of" $337.18, "the property of the Hospital Fund, United States Army Air Base, Guatemala City, . . . entrusted to him under the provisions of Paragraph 1a and Paragraph 5a (1) of Army Regulations 210-30". Specification 3 of Charge I alleges that the accused did "on or about 9 January 1943 feloniously embezzle by fraudulently converting to his own use money of the value of" $17.00, "the property of Captain Richard H. Shug, entrusted to him by the said Captain Richard H. Shug." Specification 4 of Charge I alleges that the accused did "on or about 2 April 1943, feloniously embezzle by fraudulently converting to his own use money of the value of" $36.00, "the property of Major Sylvester E. Pawol, entrusted to him by the said Major Sylvester E. Pawol." These acts were set forth as violations of Article of War 93.

Embezzlement is defined by paragraph 149h of the Manual for Courts-Martial, 1928, as "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come." This language is susceptible of application to varying factual situations which superficially differ from one another but which actually have a common denominator in that they all involve a breach of trust by one occupying a fiduciary position. The rule pertinent to all such cases, stated in its broadest form, is that any person who lawfully accepts or assumes possession for an indeterminate period of the money or property of another as a trustee, agent, or bailee, must, unless prevented by some supervening cause beyond his control, repay or redeliver upon demand of the owner. This principle, read in conjunction with the facts herein related, clearly shows the accused to be guilty of embezzlement as alleged in the first four Specifications of Charge I. The check for $295.00 was placed in his hands for the sole purpose of cashing. Its proceeds were to be paid to Sergeant Abeshaus later that very day. They were not lent to the accused nor did he acquire any property interest in them. Yet when demand was made upon him, he procrastinated, gave a check drawn upon insufficient funds in payment, and finally made restitution only after the intervention of superior military authority. As was said in CM 130989 (1919), Dig. Op. JAG, 1912-1940, sec. 451 (17), "In the absence of any explanation by the accused as to why he was not able to pay the money on demand, sufficient facts are shown to establish a prima facie case of embezzlement." No satisfactory rebuttal evidence having been adduced by the defense, the prima facie case has become conclusive.

The accused's appropriation of the $337.18 comprising a portion of the Hospital Fund was a flagrant dereliction of an express fiduciary duty. As custodian, he was required to be prepared to account and turn over upon demand at any time. The fact that he may have honestly and sincerely intended to return the sum taken does not mitigate or extenuate his conduct. To quote from CM 192530 (1930); Dig. Op. JAG, 1912-1940, sec. 451 (18),

> "The act of a custodian of company funds in borrowing them for even temporary personal use constitutes the offense of embezzlement. The fraudulent conversion, which is the essence of the offense of embezzlement, exists in such case despite the fact that accused may have intended to return the money".

The accused purported and assumed to act as an agent for both Major Richard H. Schug and Major Sylvester E. Pawol. As such, he was obviously a fiduciary and strictly accountable for all funds received from them. His legal and moral obligation was to apply the $17.00 from Major Schug and the $36.00 from Major Pawol to the purposes for which those sums had been intrusted to him or, in the alternative, to return them promptly. Under no circumstances was it proper for him to use them for his own benefit. That Major Pawol was himself an agent for others is immaterial. He was the accused's principal and the accused was required to render him the faithful and honest service expected of an agent-fiduciary.

In all four instances of embezzlement the restitution of the monies converted does not diminish the offense, particularly when it is considered that payment was made under pressure from superior military authority or after the preferment of court-martial charges "* * The return of the amount of the fund post litem motam is of no probative value, except as an admission that he was responsible for it. It does not tend either to negative or to excuse the offense charged" CM 123492 (1918); Dig. Op. JAG, 1912-1940, sec. 451 (17).

6. Specification 5 of Charge I alleges that the accused did, "on or about 11 July 1943, with intent to defraud, falsely make in its entirety a certain check" in the sum of $100.00 drawn on the Fort Sam Houston Bank of San Antonio, Texas, payable to the order of Major Russell B. Howard, and signed "CHAS. I. WEBB", "which check was a writing of a private nature, which might operate to the prejudice of another". This was also stated to be a violation of Article of War 93.

In signing the name of Major Charles I. Webb to the check dated 11 July 1943 the accused clearly committed forgery. It is argued on his behalf that a conviction of this crime cannot be sustained in the absence of proof of his lack of authority to execute the instrument, and that in this case Major Webb has stated under oath that:

> "I would determine whether he had written the check or not before I would make payment and had he made it, I would have ratified it. The reasons are quite obvious because of the relationship with my sister and her family".

This contention is based in large part upon the following holdings in CM 123118 (1918) and CM 155772 (1923); Dig. Op. JAG, 1912-1940, sec. 451 (29).

> "On a prosecution for forging and uttering checks, it appeared from the evidence that there was such a person as the purported signer, capable of authorizing the use of his name in this way. In establishing a case of forgery, want of authorization to sign or utter must be shown; and where there was nothing to show that the accused had not been authorized to sign the name to the checks, conviction must be disapproved.
>
> "To support a conviction of forgery accused's lack of authority to make the instrument alleged to have been forged must be shown by direct evidence or by evidence of circumstances from which such lack of authority may reasonably be inferred."

In the very same paragraph of Dig. Op. JAG, 1912-1940, however, appears a summary of the opinion in CM 122215 (1918) in which it was said that the "rule that the prosecution must prove that the signature was without authority of the purported signer does not obtain where the circumstances show guilty knowledge on the part of the accused in uttering the forged check". In this case Major Webb has expressly denied that he ever au-

thorized anyone to use his signature. His statement that he would have ratified the check had it come to his knowledge must be attributed to a readily understandable desire to help his sister's husband. At best the ratification could not relate back to the date of execution for the purpose of converting a crime into an innocent and legal act. The accused had no reasonable certainty that the instrument would be honored; he "knew" that it would be only if it came to Major Webb's attention. But, by his own admission, he had no definite information that Major Webb had an account with the Fort Sam Houston Bank, and subsequent events showed that his "understanding" that such an account existed was not based upon fact. His execution and cashing of a check whose validity was subject to the two contingencies that Major Webb had money in the Fort Sam Houston Bank and that he would ratify revealed a reckless disregard for the property rights of others and a criminal intent.

7. The Specification of Charge II alleges that the accused did "on or about 11 May 1943, wrongfully and knowingly dispose of by gift to Senor Eugenio Silva Pena two (2) automobile tire casings and tubes of the value of about" $30.00, "property of the United States furnished and intended for the Military Service thereof". This offense was laid under Article of War 94.

The gift to Senor Pena of two tires belonging to the United States has been established beyond a reasonable doubt. The accused's contention that the transaction was a loan is contradicted by all of the other evidence in the record. He has wrongfully disposed of property of the United States within the meaning of Article of War 94.

8. Specifications 1, 2, 3, 4, 5, and 7 of Charge III allege that the accused on 19 July, 27 July, and 31 July 1943 and on 10 December 1942 did, "with intent to deceive, wrongfully and unlawfully make and utter" certain described checks one in the sum of $295.00, four in the sum of $100.00 each, and one in the sum of $99.00, in payment of various debts owed to Sergeant James Abeshaus, Captain Charles A. Hulse, Major William H. Agenbroad, Captain Mack M. Rabinowitz and Mr. Thomas Woodward, "then well knowing that he did not have and not intending that he should have sufficient funds in the Balboa Branch Chase National Bank", and in the Fourth Street Bank of Louisville, Kentucky, two of the drawee banks, for the payment of the checks to Sergeant James Abeshaus, Major Agenbroad, and Mr. Thomas Woodward, and "then well knowing that he did not have and not intending that he should have any account" with the other two drawee banks for the payment of the checks to Captain Charles A. Hulse and Captain Mack M. Rabinowitz. This uttering of worthless checks was charged under Article of War 95.

The instruments issued by the accused to Major Charles A. Hulse, Major William H. Agenbroad, Captain Mack M. Rabinowitz, Staff Sergeant James Abeshaus, and Mr. Thomas Woodward were drawn against either depleted or non-existent bank accounts. His protestations of good faith ring hollow. Paragraph 151 of the Manual for Courts-Martial, 1928, lists among other violations of Article of War 95 "giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be". The accused knew that he had no accounts with the Fort Sam Houston Bank or the "Whitesburg National Bank". He knew, too, that his balance at the Balboa Branch of the Chase National

Bank was trivial. His willingness, nevertheless, to draw checks against these institutions casts grave doubt upon his alleged ignorance of the state of his joint account with the Fourth Street Bank. The possibility that remittances might have been forthcoming from the Consoldiated Coal Company for past medical services presents a contingency too remote to deserve serious consideration.

9. Specifications 6, 8, and 9 of Charge III allege that the accused "being indebted" to Captain Richard H. Shug, Mr. Thomas Woodward, and Major Maurice C. Tobin in the respective sums of $20.00, $99.00, and $22.00, did, for certain specified periods extending over several months, "dishonorably fail and neglect to pay said" debts. This was stated as an offense under Article of War 95. Specifications 1 and 3 of Charge IV allege that the accused, "being indebted" to "Maximo Kosak & Co." and Alberto F. Walden and Rafael Piccioto, co-partners, doing business as "Lavenderia San Antonio", in the respective sums of $83.20 and $14.99 did, for certain specified periods extending over several months, "dishonorably fail and neglect to pay said" debts. This procrastination by the accused in satisfying his obligations to the trades people mentioned was charged as violative of Article of War 96.

The court's finding that the accused had dishonorably failed and neglected to pay certain of his debts is amply supported by the evidence. His conduct toward Mr. Thomas Woodward was particularly reprehensible. It has been held that the "mere failure by an officer to keep his promise to pay a debt is not a dishonorable act in violation of Article of War 95 unless the promise to pay is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment": CM 220760 (1942); I Bull. JAG, January-June 1942, sec. 453 (13), p. 22. These elements were all present in the accused's transaction with Mr. Thomas Woodward. After obtaining the $99.00 in the first instance by deceitful methods, after giving a bad check in payment, and after the lapse of more than a year, the accused has not yet satisfied the obligation. His omissions to pay his other debts were also dishonorable but, while discreditable to the military service, were not so tinged with moral turpitude as to constitute conduct unbecoming an officer and a gentleman. They were properly found to be offenses under Article of War 96.

10. The accused is about 41 years of age. The records of the War Department show that he was appointed a first lieutenant in the Medical Reserve, Officers Reserve Corps, on 19 December 1930; that he was reappointed a first lieutenant in the Medical Reserve, Officers Reserve Corps on 19 December 1935 and again on 2 February 1940; that on 4 December 1940 he was ordered to extended active duty, effective 15 December 1940; that he was promoted to captain on 4 March 1941 and to major on 1 February 1942; and that since 15 December 1940 he has been on active duty as an officer.

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 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Articles of War 93, 94, or 96 and is mandatory upon a conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

William H. Bamberger, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 15 MAY 1944 - 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 Russell B. Howard (0-279449), Medical 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 the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed, 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Dft. ltr. for sig. S/W.
Incl. 3 - Form of action.

(Sentence confirmed. G.C.M.O. 344, 11 Jul 1944)

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

SPJGQ
CM 253058

21 APR 1944

UNITED STATES	SAN FRANCISCO PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Fort McDowell, California, 15 February 1944. Dishonorable discharge, total forfeitures, and confinement for life. Penitentiary.
Technician 5th Grade CALVIN R. DANE (32981961), 321st Port Company, 512th Port Battalion, Transportation Corps.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 92nd Article of War.

Specification: In that Technician Fifth Grade Calvin R. Dane did, at Benicia California, on or about 15 January 1944 forcibly and feloniously, against her will, have carnal knowledge of Miss Colleen Murdock.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the remainder of his natural life. 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 pursuant to Article of War 50½.

3. For the prosecution:

To facilitate proceedings, a photographic map of a portion of the City of Benicia, California, where the offense occurred, was used and referred to throughout the trial and was, pursuant to stipulation (R. 322), introduced as prosecution's exhibit 4 (R. 322).

Colleen Murdock (R. 247), 18 years old and single, boarded the Martinez-Benicia Ferry, S.S. Van Damme, in Martinez, California, at about 10:30 p.m. (R. 249) on 15 January 1944 (R. 248), for the purpose of returning to her residence (R. 249) in Benicia, California (R. 247). She spent the entire trip of about 20 minutes duration (R. 251) in the brightly lighted restaurant where she was seated immediately around the corner of the lunch counter from a civilian, to whom her attention was attracted because of the difficulty he was having, due to his inability to speak English, in making the waitress understand his order, and a colored soldier (R. 250). The latter, whom she identified as accused, was looking at her when she noticed him, and she looked squarely into his face (R. 251). The boat docked at Benicia about 10:55 or 11:00 p.m. (R. 252), at the foot of East Fifth Street, point marked "A" on Exhibit 4 (R. 253). Miss Murdock proceeded on foot along Fifth Street to its intersection with "H" Street (R. 253), point "B" on Exhibit 4, at which point, or just before reaching which, she was accosted by the accused, who asked if she minded his walking with her. She did not respond (R. 254), but continued north to "I" Street, thence east toward her residence near Seventh Street (R. 256), point marked "D" on Exhibit 4. After accosting her at "H" Street, the accused, without invitation or encouragement, walked at her left side (R. 258), and continued his efforts at conversation (R. 255, 258). Twice during this walk, first at the intersection of Fifth and "H" Streets, and again at the intersection of Fifth and "I" Streets, they passed under street lights and she had a clear view of his face (R. 255), and was sure that accused was the soldier who was walking with her (R. 255, 256, 268).

As she turned to enter her residence she started running (R. 261) but was grabbed by her hair from behind, an arm was thrown around her throat, choking her, and she was dragged struggling across the street to vacant lot 12 or 16, Block 75, approximately point "E" on Exhibit 4 (R. 263). There a struggle took place between her and her assailant. She was thrown to the ground three times, but managed to regain her feet each time (R. 264), all the while being choked (R. 265). She was then thrown to the ground a fourth time, and that time was unable to rise. She was on her back and accused was on top of her, still choking her with both hands. Accused forced her legs apart with his knee, removed one hand from her throat temporarily, and inserted his penis in her vagina (R. 266, 270, 271). She lost consciousness momentarily, but revived and succeeded in screaming (R. 270), whereupon accused threatened to kill her with a knife (R. 271). Shortly after she screamed, a light flashed on in the vicinity and the accused raised his head so that she was able to see his face, and she dug the fingernails of her left hand into some portion of it (R. 272). At that time, she again recognized the accused (R. 268, 269). Both got up and ran, Miss Murdock to the apartment of Mrs. Rison, who lived in the same apartment building as Miss Murdock, at point "D" on Exhibit 4 (R. 274), and the last she saw of the accused, he was running in the direction of the lower arsenal gate (Gate 17) (R. 312).

Miss Murdock's scream awakened Robert Gaut and his wife (R. 34, 78), who lived on Seventh Street at point marked "F" on Exhibit 4 (R. 35).

Mr. Gaut turned on his porch light and went out about 30 feet in the direction from which the scream had seemed to come (R. 34), and saw the accused at point "E" on Exhibit 4 (R. 36, 43) arising from a prone position and adjusting his trousers in a confused manner. Mr. Gaut had an excellent view of the accused's face at the time; observed it closely, and was sure that he could not be mistaken in his identification of him (R. 43, 44). Accused ran from the scene of the crime toward the intersection of Seventh and "I" Streets, thence down Seventh Street toward "H" Street (direction of Arsenal Gate 17) (R. 44). Mr. Gaut watched him until he passed from view going down a hill between "I" and "H" Streets, and then returned to his home (R. 44). When he (Gaut) reentered his home, his wife looked at the clock and noted that it was 11:25 p.m. (R. 80). On 3 February 1944 (R. 31, 33) Mr. Gaut picked accused out of a line-up of 14 colored and white prisoners at Fort McDowell and identified him as the man whom he had seen at the time and place in question (R. 28, 34).

Miss Murdock stumbled into Mrs. Rison's apartment at about 11:20 p.m., according to Mrs. Rison's clock (R. 96), in a hysterical and disheveled condition, and informed Mrs. Rison that she had been raped (R. 94, 95). Her clothes, particularly her coat and stockings, were very dirty (R. 94). The police (R. 96) and Doctor Atwood (R. 138) were called, and Miss Murdock was removed to the Doctor's office for examination (R. 96). Mrs. Rison prepared Miss Murdock for this examination and discovered that her underclothing was quite bloody (R. 97). Dr. Atwood's examination of Miss Murdock disclosed that there had been a recent (R. 152) laceration and partial tearing away of the hymen and a penetration of approximately one and one-half inches, which had caused considerable bleeding (R. 144). He also discovered several bruised and scratched areas to the right of her right breast, which could have been caused by a blow (R. 142); bruises and scratches on both sides of her larynx and below her left ear (R. 142), which, in his judgment, had been caused by sufficient pressure to prevent breathing (R. 143), and a superficial laceration over her right instep and over each of her knees (R. 144). Mrs. Rison testified that the marks on Miss Murdock's throat were swelling into prominent welts at the time she observed them in Dr. Atwood's office (R. 97).

Dr. Atwood also examined the accused (R. 144) at about 1:30 o'clock the same morning (16 January 1944) (R. 149) and found dried mucus upon the head of his penis (R. 144) and recent scratches, still moist and exuding serum, upon the left side of his nose, cheek and jaw (R. 145). It was his opinion that the scratches, which had the appearance of small portions of the skin having been dug out (R. 164), had been incurred within probably two hours of the time the examination was made (R. 146). Lieutenant Gaddis, of the Army Medical Corps, examined the accused about 2:00 o'clock of the same morning (R. 214), discovered the scratches on his face, and expressed the opinion that they were from two to six hours old at the time he examined them (R. 215).

Major James G. Buchanan testified that the place where the rape was consummated was covered with grass, but that he was able to discern toe prints in a semi-circle of approximately three feet (R. 176, 177).

The accused entered the Benicia Arsenal at Gate No. 17, located at "H" and East Seventh Streets (R. 85) at 11:25 p.m. (R. 87) and surrendered his pass to Mr. McMaster, the guard there, who noted the time and signed his name on the reverse thereof (R. 86, 87; Ex. 3, 3A). Corporal Williamson saw the accused on the work bus on the way from the docks (inside arsenal) to their company area for midnight mess (R. 239) shortly before midnight, but had no physical contact with him (R. 240). He and accused had, however, wrestled strenuously earlier in the evening, sometime between 6:30 and 7:30 (R. 237, 238).

Eugene Barbeiro, Assistant Chief of Police in Benicia, after being told by Miss Murdock that her attacker was a negro soldier, last seen going toward Arsenal Gate No. 17, went to that gate and secured the pass which accused had surrendered as he entered (R. 118). He gave the pass to the officer of the day, who sent First Sergeant Mason to get accused (R. 119). Sergeant Mason found accused in his bunk, apparently asleep, at about 12:15 o'clock (16 January 1944) (R. 222). He aroused accused and at that time asked him where he got the scratches on his face. Accused replied that he did not know (R. 225). Accused was then taken to Captain Crosby (R. 186) who, with Lieutenant Rumberg and Sergeant Mason, took him to Doctor Atwood's office (R. 226), where, in the presence of Mrs. Rison (R. 98), Eugene Barbeiro (R. 120), Doctor Atwood (R. 146), and Captain Crosby (R. 189), Miss Murdock identified him as her attacker, after having been first confronted with Sergeant Mason (also colored), whom she stated was not the man (R. 98, 120, 146, 189, 226).

4. For the defense:

Called as a defense witness, Mr. McMaster testified that, though the light at the gate was good, he did not notice any scratches on the face of the accused when he passed the gate at 11:25 p.m. (R. 155). Lieutenant Rumberg, his company commander, testified that he had personally inspected accused's clothing (R. 327) at about 12:15 a.m. on 16 January 1944 (R. 339) and found very little mud on them and no grass stains (R. 327, 328). He also testified that accused had been an excellent soldier (R. 325); that no punishment had ever been administered to accused while in the company (R. 333), and that he would be glad to have him return to his organization (R. 329).

The accused having been first fully advised of his rights (R. 348), elected to take the stand and testify under oath (R. 349). In civilian life, he had been a chauffeur, was a high school graduate (R. 351), is married and has one child (R. 352). He had gone to Oakland on the afternoon of 15 January 1944 (R. 353) but had returned to the Arsenal (R. 354) and later about 7:00 p.m., again went to Oakland, leaving camp on the "G.I" bus (R. 355). He knew all the soldiers on it, including Private Williamson, with whom he frequently scuffled, and they wrestled all the way to the dock (R. 355), from which point, the accused proceeded on foot to the ferry (R. 357). On his return, he left Oakland about 9:00 p.m. (R. 358) and boarded the ferry at Martinez sometime before 11:00 p.m. (R. 359). On the boat, he went to the men's room and then upstairs (R. 359) but at no time did he enter the restaurant (R. 390, 391). He asked the

driver of one of the cars on the boat if he was going to the arsenal. The driver was not going there, but offered the accused a ride to the street leading to the arsenal, which offer was accepted (R. 392). The accused was in the second car to leave the ferry (R. 407), rode to the corner of Fifth and "H" Streets, point marked "B" on Exhibit 4 (R. 361), which he reached in less than 5 minutes (R. 411), and then walked directly to the arsenal gate (R. 407). He had no idea how long it took him to walk to the gate (R. 411) although he had walked at his ordinary speed (R. 416). After entering the gate, he recalled that the bus used to transport the men from the docks for mess (R. 416) usually left around 11:00 or 11:30 p.m. (R. 417) and proceeded to catch it along with the returning members of the dock crew. He did not eat, however, (R. 397) but went to his tent and retired and was awakened by Sergeant Mason (R. 365). He was then taken to a doctor's office where he saw a woman sitting down crying and Mrs. Rison standing at the door. Mrs. Rison said, "That's him. I know that's him" but that he did not see the girl sitting down and couldn't recall whether or not he had ever seen Miss Murdock before she appeared in court (R. 370). He had been dressed in OD pants, shirt, blouse, overcoat, and overseas cap, both when he returned from Oakland, and when taken to the doctor's office for identification (R. 376). He denied having indulged in sexual intercourse while in Oakland (R. 388).

5. The evidence is without conflict on the point, and leaves no room to doubt that Miss Murdock was viciously attacked and raped by someone on the night of 15 January 1944. This fact is attested, and Miss Murdock's testimony that she was seized, choked, and dragged into a vacant lot, where, in spite of her utmost resistance, her assailant overpowered her and had carnal knowledge of her against her will, is strongly corroborated, by the condition of the ground at the scene of the rape, by Miss Murdock's screams, by the welts, bruises, and abrasions appearing on her throat and body, by the condition of her clothing, by her hysterical condition, and by res gestae statements made by her after the attack, all as recounted and described by witnesses other than Miss Murdock; as well as by the findings of Dr. Atwood when he examined Miss Murdock a short time after the assault. It was clearly established that the attack was made quite close to, but slightly before, 11:25 p.m., and that the rape was consummated in either lot 12 or 16, Block 75, in Benicia, California (point E, Ex. 4).

The only issue made by the evidence was whether accused or some other person was Miss Murdock's assailant. Upon this point, the evidence for the prosecution and the defense is in direct and irreconcilable conflict. Miss Murdock definitely identified accused as her attacker, and Mr. Gaut definitely identified him as the man whom he had seen run from the scene of the attack. Accused, on the other hand, flatly denied that he made the attack; that he was at the place where the crime was committed on the night in question, or that he had ever seen Miss Murdock until a considerable time after she had been attacked.

The issue thus made by the evidence has been resolved against accused by the court-martial and the reviewing authority, in whom, exclusively, was vested the function of weighing the evidence, judging of

the credibility of the witnesses, and determining controverted questions of fact. Their findings as to the facts proved by the evidence are conclusive and binding upon the Board of Review and The Judge Advocate General so long as there is any evidence of record, which, if true, is legally sufficient to support those findings. CM 152797.

As above stated, Miss Murdock definitely identified accused as her attacker. She testified that she had plainly seen the face of her assailant three times immediately prior to the attack and once during the consummation thereof. She first saw accused in the brightly lighted restaurant of the ferry boat, where she sat near him at the counter for most of the twenty minutes consumed in crossing from Martinez to Benicia. Her attention was particularly attracted in accused's direction by the inability of the man sitting next to him to speak English. She noticed accused watching her at the time, and his clearly visible face and features became fixed in her mind. It is an uncontroverted fact that Miss Murdock and accused did travel from Martinez to Benicia on the same ferry boat, and arrived at the ferry landing at the south end of Fifth Street, in Benicia, California (point A, Ex. 4), at approximately 10:55 or 11:00 o'clock of the night in question. Miss Murdock testified further that at the intersections of Fifth and "H" Streets and Fifth and "I" Streets, she had the opportunity to see clearly under street lights the face of the man who was endeavoring to force his company upon her, and who subsequently attacked her. She recognized him as the same man she had seen on the boat, and identified him as accused. Also, according to her testimony, she was able to get one clear view of her attacker's face during the attack, and to rake at his face with her finger nails. When she last saw her assailant he was running toward entrance No. 17 to Benicia Arsenal. Miss Murdock saw accused within approximately two hours after the attack, and immediately and without hesitation identified him as the rapist.

The testimony of Miss Murdock is sufficient, standing alone, to sustain the findings of guilty, but, as above suggested, there is the added testimony of Mr. Gaut, and also an abundance of circumstances which tend to corroborate rather than to refute their testimony.

Mr. Gaut testified that upon emerging from his house, which was located quite near the scene of the crime, after having been awakened on the night in question by what sounded like a muffled scream, he saw a man, whose face he saw clearly and observed closely, arise from a prone position, adjust his trousers, and run from the spot where the rape was committed, in the direction of entrance No. 17 of Benicia Arsenal. When he reentered his house, after having watched the running man until he passed from view, it was 11:25 p.m. Approximately two weeks later, Mr. Gaut selected accused from among a mixed group of fourteen white and colored prisoners as the man he had seen upon that occasion, and at the trial he unqualifiedly identified him as that person.

Accused entered the Benicia Arsenal by entrance No. 17 at 11:25 o'clock on the night in question. He testified that he was given a ride from the ferry boat (in the second car off the boat) to "H" Street,

arriving there in less than five minutes, and that he then proceeded on foot at a normal pace along "H" Street directly to the arsenal gate. The distance from the intersection of Fifth and "H" Streets (point B, Ex. 4) to the arsenal gate is just slightly in excess of two city blocks. It scales .25 of a mile on the map (Ex. 4). If accused did in fact ride to "H" Street and arrive there as quickly as his testimony indicates, he must have arrived there considerably ahead of Miss Murdock, who was walking. Yet, Miss Murdock had traversed on foot the entire and still greater distance from the ferry landing at the south end of Fifth Street (point A, Ex. 4) travelling along Fifth Street past its intersection with "H" Street (point B, Ex. 4) to its intersection with "I" Street, thence along "I" Street, to her place of residence, Lot 5, Block 75 (point D, Ex. 4), and had been carried still further into a vacant lot (point E, Ex. 4) and there forcibly raped before accused entered the arsenal gate. This is sufficient to show, and common knowledge adds support to the conclusion, that accused did not legitimately require or make use of 20 to 25 minutes in traversing at a normal pace the comparatively short distance from the intersection of Fifth and "H" Streets (point B, Ex. 4 - the point at which Miss Murdock testified she was first accosted by accused after leaving the boat), to the arsenal gate. He offered no other explanation as to his whereabouts or actions during the time that Miss Murdock was concededly raped, within approximately 600 feet of where he, by his own testimony, placed himself. The abrasions which appeared on the face of accused when he was examined shortly after midnight, the existence of which he professed to be ignorant until he was questioned about them, were such as may well have been inflicted by Miss Murdock's finger nails, and their freshness was more compatible with the attack upon her and the resistance which she offered than with the friendly tussle accused engaged in with Corporal Williamson earlier in the evening. The mucus which Dr. Atwood discovered upon accused's penis was more compatible with the penetration described by Miss Murdock than with accused's denial of any act of intercourse on the day or night in question.

The competent evidence of record is legally sufficient to sustain the findings of guilty, and establishes beyond a reasonable doubt that such findings are based not only on the victim's testimony but also on the definite identification of accused by a disinterested witness who saw him at the scene of the crime.

Testimony of Major Buchanan and Captain Crosby as to results obtained by them in fitting certain shoes to tracks found at the point where Miss Murdock was first attacked was provisionally admitted into evidence, conditioned upon the prosecution's subsequently proving that the shoes were worn by accused on the night in question. When the prosecution failed to make this proof, all testimony relative to the foot prints and shoes was withdrawn by the Trial Judge Advocate and ordered stricken from the record by the law member. In view of the fact that the evidence of accused's guilt is otherwise legally sufficient, accused's substantial rights were not prejudiced by the temporary and conditional admission of this improper evidence within the purview of the provisions of Article of War 37.

6. The record shows the accused to be 20 years of age and married. He was inducted 10 July 1943 at Camp Upton, New York, to serve for the duration plus six months.

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. A sentence of imprisonment for life is authorized upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 2801, Title 22, Code of the District of Columbia.

William A. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert R. Friedman, Judge Advocate.

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

SPJGN
CM 253070

11 MAY 1944

UNITED STATES	83RD INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Breckinridge, Kentucky, 24 March 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Fifth Service Command Rehabilitation Center, Fort Knox, Kentucky.
Private JOHN MORAN (39077694), Headquarters Company, 2nd Battalion, 331st Infantry.	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, 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 sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings of guilty of absence without leave and legally sufficient to support the sentence. The record of trial 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John Moran, Headquarters Co., 2nd Battalion, 331st Infantry, did, at Camp Breckinridge, Kentucky, on or about March 13, 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: embarkation for overseas service.

The accused pleaded not guilty to the Charge and Specification, but guilty to absence without leave, in violation of the 61st Article of War. He was found guilty of the Charge and its Specification. Evidence of one previous conviction by summary court-martial for being drunk and disorderly in a public place and for behaving in an insubordinate and disrespectful manner toward a warrant officer and noncom-

missioned officer, in violation respectively of Articles of War 96 and 65, 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 but remitted five years of the confinement imposed, suspended the execution of the dishonorable discharge, directed the execution of the sentence as modified and designated the Fifth Service Command Rehabilitation Center, Fort Knox, Kentucky, as the place of confinement. The result of trial was published in General Court-Martial Order No. 46, Headquarters 83rd Infantry Division, 31 March 1944.

3. The evidence for the prosecution shows that the accused acknowledged in writing on 15 January 1944 that he had heard (along with the other members of Headquarters Company) the reading of Article of War 28 and the advice then given as to its meaning and the prescribed penalties for its violation. It was further explained to him personally on either 13 or 20 February 1944 by Second Lieutenant Alson E. Lancaster. Pursuant to a regimental order of 11 March 1944 that all men of the command be notified that Article of War 28 "was in effect" it was read to the members of the company by First Lieutenant James A. Patterson but the roster evidencing the hearing of such reading was not signed by the accused. Sergeant Frank L. Brown testified, however, that on 11 March 1944 he explained to his squad, including the accused, Article of War 28 and that it was "effective" at midnight that night. Defense counsel conceded that Article of War 28 had been read to the accused. The direct examination of Lieutenant Patterson concluded with the following question and answer:

> "Q. Was it clear to them [the men of each squad] that embarkation or entrainment was imminent or that ultimately they would be sent overseas?
>
> A. There is no doubt in my mind that the fact was brought out to each man that he would ultimately go somewhere. We gave the men all the information we possibly could" (R. 9-13; Ex. 2).

The evidence for the prosecution further shows, according to the extract copy of the morning report, that the accused absented himself without leave from his organization at Camp Breckinridge, Kentucky, 13 March 1944 at 0600 o'clock. He was apprehended by a civilian police officer, about 1600 o'clock in front of a theater in nearby Evansville, Indiana. The accused appeared to have been drinking but he was not drunk and was making no "disturbance" when he was taken from a surrounding crowd of people by the policeman who noticed that his arm looked as if it had been probed or cut. The accused volunteered the explanation that he had tried to cut his wrist with the lens from his

broken glasses "because he was tired of living". He was confined at "headquarters" and, because of his statement that he intended to "finish the job" the police inferred that the accused intended to end his life. As a precaution his belt and tie were taken from him. The accused was placed in the regimental guardhouse at Camp Breckinridge, Kentucky, on 15 March 1944 (R. 7, 8, Ex. 1).

4. The defense, after denial of its motion for a finding of not guilty because of insufficiency of the evidence, introduced no witness except the accused who, after his rights had been explained to him, testified under oath that on 12 March 1944 he drank beer until the PX closed at 2100 o'clock, that he became drunk and did not know what he did until he got on a bus bound for Evansville, Indiana, that in Evansville he drank whiskey and beer, that he did not know where he slept at night, that on Monday (13 March 1944) civilian police officers in a patrol car apprehended him in a cafe next to the theater (mentioned in the evidence for the prosecution) and finding him without a pass he was taken outside, that he did not cut himself, that he "was too drunk to do anything", and that he had had no cut but rather a scratch on his wrist "from a fall". On cross examination, however, he admitted that he had cut his wrist just before his apprehension. He testified that when drafted and inducted he had requested that he be permitted to go overseas right away, that this was still his wish, that he did not intend at any time not to come back nor to keep from embarking with his outfit and did not intend to shirk important service (R. 13-16).

The earlier motion for a finding of not guilty was resubmitted and likewise overruled.

5. The Specification alleges that the accused did, on or about 13 March 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: embarkation for overseas service. The Manual for Courts-Martial explains that "important service" within the purview of Article of War 28 includes, among other services,

> "*** embarkation for foreign duty or duty beyond the continental limits of the United States ***. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included." (M.C.M., 1928, par. 130).

In order to sustain the findings of guilty under the present allegation of desertion, the evidence must show that the accused absented himself from his organization with the specific intent of shirking important service with his organization. The proof shows no such intent. It even fails to show any intent to avoid duty in connection with the departure of his organization for an undisclosed destination. In fact, there is no evidence that he or his organization, the 331st Infantry, had been ordered overseas, that the organization had made any move preparatory even to change of station or that the organization did move from Camp Breckinridge. There is no evidence that the accused knew or had reason

to believe that his unit was about to depart for foreign service. No showing is made of an alert status of the organization nor of rumors or speculation of a prospective move. A series of acts or course of prescribed conduct, designed, by way of preparation and training, to perfect the personnel of the Army in its duties with a view to service overseas "ultimately" do not constitute "important service" within the purview of Article of War 28 (CM 224805; Oct. 1942 Bul., p. 269).

Evidence that the accused had been informed as to what would constitute the offense of deserting in order to avoid important service falls far short of showing that the accused had any intent to commit that offense. The instruction which was given to the accused including the statement that Article of War 28 was in effect for the accused's organization did not constitute notice to him that his organization was alerted with a view to embarkation for overseas service. In the absence of proof that the accused expected the early embarkation of his organization for overseas service, his attempted suicide affords no proof of an intent to avoid such service. The evidence is, therefore, legally sufficient to support only so much of the findings as involve findings of guilty of absence without leave from about 0600 o'clock, 13 March 1944, to about 0400 o'clock, 15 March 1944, in violation of Article of War 61.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings that the accused, at the place alleged, absented himself without leave from his organization on 13 March 1944 and remained absent therefrom until 15 March 1944, in violation of Article of War 61, and legally sufficient to support the sentence.

Abner E. L. Ipscomb, Judge Advocate

Walton Shepherd, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

SPJGN
CM 253070

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private John Moran (39077694), Headquarters Company, 2nd Battalion, 331st Infantry.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty as involve findings of guilty of an offense by the accused other than absence without leave from his organization at Camp Breckinridge, Kentucky, on or about 13 March 1944 until 15 March 1944 in violation of Article of War 61 be vacated; and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

Myron C. Cramer

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

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

(Findings of guilty vacated in part in accordance with recommendation of the Judge Advocate General, by order of the Under Secretary of War. G.C.M.O. 232, 29 May 1944)

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

SPJGV
CM 253104

22 MAY 1944

UNITED STATES	8TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Louisiana Maneuver Area, 17 March 1944. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant GORDON D. STRYKER, JR. (0-1641835), Signal Corps.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 Lt. Gordon D. Stryker, 148th Armored Signal Company, 8th Armored Division, did, without proper leave, absent himself from his post and duties with the 148th Armored Signal Company on maneuvers in the Louisiana area, from about 0001 16 February 1944 to 1230 9 March 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, but recommended that so much of the sentence as pertains to confinement be remitted.

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

Accused was graduated on 12 February 1944 from the Fourth Army Cryptographic School, Fort Sam Houston, Texas, and on the same day cleared that headquarters for return from detached service to duty with the 148th Armored Signal Company, 8th Armored Division (R. 6; Ex. A).

An extract copy of the morning report of accused's organization showing his unauthorized absence from 16 February to 9 March 1944 was introduced into evidence through Captain Robert R. Hiller, Company Commander, 148th Armored Signal Company, 8th Armored Division.

Captain Hiller, on cross-examination, testified that accused had been a member of his company since June 1943. He was Message Center Officer, and had served as S-3 for approximately three months. He rated accused's work as very satisfactory and said accused's reputation as to integrity, veracity and honesty was of the highest character. Accused had been selected to attend the Cryptographic School at Fort Sam Houston only after he had been especially investigated.

4. For the defense:

First Lieutenant John W. Hines and Second Lieutenant Charles T. Longbottom testified that accused's reputation was good, and that he performed his military duties with a high degree of efficiency. Both witnesses said they were familiar with the qualifications necessary for selection to attend the Cryptographic School, and that before a man is selected he must be checked and found to be of the highest character and intelligence.

After being advised as to his rights as a witness accused elected to make a sworn statement. He testified that during September, October and November 1943 he had been Message Center Officer and had served additionally as S-3. He was under great strain and pressure and developed stomach trouble and headaches. He then went to the Cryptographic School and there was able to relax and found the strain and pressure gone. As the school drew to a close he dreaded to return to the strain. In addition his company commander called upon his officers to do a great many things which "according to my experience just should not be". Also accused had been told he would be Assistant Division Signal Officer upon his return and he has labored under an unusual and unnatural fear of the colonel under whom this new assignment would apparently place him, ever since he has been in his division (R. 13).

On cross-examination and examination by the court accused testified he had not written his company commander or any of the

other officers during his absence. During his unauthorized absence he remained in San Antonio, Texas, with his wife until he voluntarily returned to his station (R. 14).

5. The evidence shows conclusively that accused failed to return to his post and duties after completing a course at the Cryptographic School, Fort Sam Houston, Texas, and was absent without leave from 16 February 1944 until he voluntarily returned to his station on 9 March 1944.

6. War Department records show that accused is 23 years of age. He graduated from the Washington High School, Portland, Oregon. As a member of the Oregon National Guard he entered the Army 16 September 1941 when the Guard was federalized. After serving in the Aleutians he attended the Eastern Signal Corps Officer Candidate School and was commissioned second lieutenant, Signal Corps, Army of the United States, 31 December 1942. As an officer he completed the Eastern Signal Corps Schools course in Field Wire Communication on 20 February 1943.

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

Thomas H. Dappy, Judge Advocate.

Herbert M. Kiedner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 253104

1st Ind.

War Department, J.A.G.O., 19 JUL 1944 - 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 Gordon D. Stryker, Jr. (0-1641835), 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, to support the sentence and to warrant confirmation of the sentence. The reviewing authority recommends that so much of the sentence as pertains to confinement be remitted. In view of this recommendation and of accused's age and prior good record I recommend that the sentence be confirmed but that the forfeitures and confinement adjudged be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft ltr for sig S/W.
Incl.3-Form of action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 479, 1 Sep 1944)

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

SPJGV
CM 253134

22 JUN 1944

UNITED STATES v. Private EUGENE FRIESON (35767208), Company C, 780th Military Police Battalion.	FIRST SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Devens, Massachusetts, 20 January, 23 February, 6-11 March 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Eugene (NMI) Frieson, Company C, 780th Military Police Battalion did, at Fort Devens, Massachusetts, on or about 15 January 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Clarence J. McWilliams, Company C, 780th Military Police Battalion, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Competent evidence introduced by the prosecution shows that on 14 January 1944, at approximately 6:30 p.m., accused accompanied by Private Harry Pillette, both colored soldiers, went on pass from Fort Devens, Massachusetts, to the nearby town of Ayer to spend the evening (R. 115, 137). On the way to Ayer accused casually remarked to Pillette that "McWilliams [the victim in this case] gave me a $1.25 on my cap", which accused apparently found acceptable (R. 115, 138, 140). As later evidence shows the remark had reference to a cap McWilliams had borrowed from accused and failed to return. When they arrived in Ayer accused, Pillette and a Private Chattmon each purchased a quart of rum and, proceeding to a spot behind the railroad station, each indulged in a drink (R. 141, 142). Thereafter they went to a shoe store where Pillette wished to obtain some shoes. In the shop accused and Chattmon saw some knives on display and each purchased one of them (R. 116, 117, 143, 144). They then proceeded to a cafe where they remained between 30 to 45 minutes. During that time accused had two hamburgers and, having been joined by some four or five other individuals, they all proceeded to consume one quart of rum (R. 145, 147, 175). Accused and Pillette next visited a basement bar at the Lincoln Hotel, known as the Dug Out, where accused consumed three drinks of whiskey prior to Pillette's departure (R. 147, 149). Pillette left the Dug Out between 8 and 8:20 p.m. to attend a USO dance (R. 150). Sometime between 10 and 11 p.m. accused arrived at this same dance (R. 150, 246). While there accused indulged in horseplay with Private Sterling Mapp in the basement of the building where the dance was being held, exhibiting a "long fish knife" with opened blade and "kind of stuck it at" Mapp (R. 247, 257). Accused stated he had just bought "this new knife" (R. 259). Mapp was of the opinion that accused had been "heavily drinking" although he acted normal and "was in his right mind" (R. 256). Pillette did not see the accused at the dance until approximately 11:05 or 11:10 p.m. and to him accused then appeared to have been "drinking right smart" although he was "walking straight" (R. 150, 151). He was of the opinion that accused was "high" and "feeling good", although he was not drunk (R. 152, 176). Pillette and accused left the dance about 11:30 p.m. to return to camp by bus arriving there sometime around midnight (R. 153). Private Mervin Sapp sat next to accused during the ride and believed him to be "feeling good" although he "didn't show any evidence of carrying on, or wrong, or anything" (R. 220, 221).

When they arrived at camp, accused, Pillette and Sapp walked about two blocks to their barracks and entered the latrine where they, plus some three or four other soldiers, soon commenced a dice game (R. 121, 122, 154, 155, 183, 184, 229, 230). The game began sometime

between midnight and 12:30 a.m. and broke up about 1:15 a.m. (R. 124, 155, 248). There was no drinking by any of the players during the dice game in the latrine although all of them had been drinking and were more boisterous than usual (R. 180, 237, 241). Private Clarence J. McWilliams, the victim in this case, was on duty as fireman and, clothed in fatigues, was present in the latrine during the dice game. Leaning against a washbowl he observed the game but did not enter into it (R. 129, 184, 230, 249). During the game, according to Pillette, accused was "feeling the same as when he left town"; he was "high", but he was sober and not drunk (R. 156, 164, 176, 178). Pillette believed a man to be drunk when "he don't know what he is doing"; when, in a crap game, "he can't make change money, and don't know when he is losing or winning" (R. 178, 179). Corporal C. D. Townsell, also a participant in the game, observed that accused "acted like he always acted" and he could not say that accused was drunk (R. 237, 243).

After the dice game had progressed awhile Pillette lost all of his money and from then on observed the game as a bystander (R. 125, 156, 159). The accused was losing heavily on his bets, having lost $8 to Corporal Townsell on one play (R. 125, 156, 232, 249, 264, 266, 267). The bets ranged generally from 55 cents up to $2.05, although at times the wagers totaled as much as $14 (R. 231, 253). At no time during the game did accused have any conversation or words with McWilliams or did they have any quarrel whatsoever (R. 171, 172, 185, 186, 223, 235, 252). Accused did not appear to become angry during the game and McWilliams, standing by the washbowls, did nothing to offend him (R. 226).

At one stage of the game the dice passed to accused and, with nine as his point, he rolled a seven. Immediately, without provocation and without uttering a word, the accused jumped from the floor where he had been kneeling and, in a split second, crossed the circle of dice throwers and stabbed McWilliams with a knife (R. 130, 131, 159, 160, 171, 172). Pillette saw the knife in accused's hand and, although other players in the game did not see the knife they did witness accused's sudden and unprovoked attack upon McWilliams (R. 185, 232, 233, 251). Private Mapp felt blood splatter on his coat and Corporal Townsell saw blood strike the latrine floor (R. 233, 250). McWilliams cried "Oh, Frieson" as Corporal Townsell sprang to his feet and separated the two (R. 172, 187, 234-236, 250). McWilliams then dashed from the latrine and out the side door of the barracks, pursued by accused who carried his right arm raised in the air (R. 131, 132, 172, 187, 194, 237, 250). Pillette immediately gave chase, following them from the barracks (R. 131, 187, 237, 254). He overtook the accused at the rear of the barracks and tripped him to the

ground. Accused rose to his feet immediately, again set off in pursuit of McWilliams, and again Pillette overtook him and tripped him (R. 132, 133, 161, 163). Pillette then urged accused to return to the barracks with him, saying, "Come on, let's go back to the barracks, I don't want you to get in any trouble" and accused returned with him (R. 133, 163).

Private Sapp followed the procession from the latrine, observing blood on the latrine door as he passed, and hastening through the barracks and out the front door he saw McWilliams flee down the company street, shouting for the guard, and then collapse upon the ground (R. 187, 188, 194, 198, 199). Sapp ran to him, asked him where he had been cut, instructed some individuals to lay him on a nearby porch and then hurried to the officers' barracks (R. 217, 218). After Pillette had seen accused to the barracks, he went to see about McWilliams and found him lying at the entrance of a barracks some five or six barracks away from where the assault had taken place (R. 165-167).

About 1:15 a.m. Second Lieutenant Edwin L. Booth, who was in his room at the officers' barracks, heard someone shout for the guard, saw men congregate directly across from the officers' barracks, hurried to the scene and found McWilliams lying on the barracks steps bleeding profusely from apparently severe lacerations on his body. He immediately summoned First Lieutenant Philip Grundfest, the battalion surgeon, who was in the officers' barracks, proceeded to an ambulance parked in the area nearby and drove it to where McWilliams was lying, McWilliams was placed in the ambulance and taken to the Station Hospital, arriving there about 2 a.m. (R. 313, 526, 559). Lieutenant Grundfest and four or five other individuals accompanied him to the hospital and during the ride Lieutenant Grundfest made a general examination of McWilliams and found he was unconscious and suffering from complete shock. His examination revealed a large incisional wound in the left upper chest about two and a half inches long. Although it was not bleeding, there was blood on McWilliams clothes, his pulse was "rapid and thready", and his body cool (R. 559). When they arrived at the hospital Captain Edwin E. Gottdiener, the hospital Officer of the Day, was summoned and McWilliams was removed to the operating room where both Lieutenant Grundfest and Captain Gottdiener began to administer to him (R. 313, 560).

Captain Gottdiener's examination of McWilliams revealed a deep wound in the chest just below the left collar bone, approximately three inches long, from which dark blood was oozing. He also had a laceration on his chin extending from the lower lip to about three inches under the chin. Another laceration extended diagonally across the palmar

surface of the last three fingers on his left hand. A pressure dressing was applied to the chest wound in an effort to stop the bleeding. He was given two and one quarter quarts of blood plasma and also a dose of morphine (R. 527). However, McWilliams died at 5:40 a.m., approximately four hours after he had been admitted to the Station Hospital (R. 533). The cause of death was severe shock and hemorrhage induced by the chest wound (R. 534).

About 1:30 a.m. on 15 January 1944 First Sergeant Hammie Donaldson, asleep in his barracks, was awakened by someone knocking on his door and, in response to his invitation to enter, accused stepped into the room. He asked the sergeant to take him to the guardhouse and the former, believing he was joking, told him to leave. Accused then stated he was not joking and that he had "cut" Private McWilliams because of some difficulty over a garrison cap accused had loaned to him (R. 268-271). Accused appeared to be normal and talked in a normal unexcited voice (R. 269, 275, 276). The Officer of the Day and the sergeant and the corporal of the guard then entered the room (R. 269).

A confession made by the accused to the investigating officer was admitted in evidence over strenuous objection by the defense and after exhaustive examination of the investigating officer to determine whether or not it was voluntarily made. In it the accused stated that McWilliams had owed him $5.50 for a long time and that during the dice game accused decided that he was going to obtain the money from McWilliams or "take it out of his hide". McWilliams said he did not intend to pay it "so I pulled out my 6 inch knife" and "I stabed him hard as I could in the Chest". Accused then stabbed McWilliams a second time in the chest and pursued his victim as he fled from the latrine. He admitted McWilliams put up no resistance. Thereafter he went to First Sergeant Hammie Donaldson and asked to be locked up. Accused had taken several drinks earlier that night and was feeling their effect (Pros. Ex. 6).

4. The defense offered evidence to show that accused had consumed a large quantity of liquor during the several hours spent in the town of Ayer. Accused, Private First Class Virgie Chattmon and Private Harry Pillette each bought a quart of rum when they first arrived in Ayer that evening (R. 655). All three of them had a drink from accused's bottle behind the railroad station and then they repaired to a local cafe where accused had a couple of hamburger sandwiches after which he and about six other individuals consumed the remainder of the quart of rum (R. 656, 657, 684-686). Their next stop was the Lincoln Hotel where, by 9 p.m. accused had consumed some four to six drinks of whiskey (R. 646, 649).

Second Lieutenant Austin D. Moran observed accused at the USO dance around 11 p.m. and was of the opinion that he was then in more or less of a drunken condition. When accused talked to the lieutenant "he was sort of swaying from side to side" and "his words came out sort of mumbled as though his tongue were thick" (R. 601). His blouse and collar were unbuttoned and his tie loosened but, when he was next observed some ten or fifteen minutes after the lieutenant had told him to put his dress in order, his clothing was properly arranged (R. 600, 602). He understood the directions issued to him by the lieutenant and complied without hesitation (R. 602). Lieutenant Moran saw accused again about 2 a.m. the next morning and he appeared to be sober at that time; at least the lieutenant knew that then he was not drunk (R. 605, 606).

During the dice game accused was not drunk although he had been drinking (R. 694). He made change during the game, "faded" for amounts that were specified and picked up the money whenever he won (R. 697). However, the net result of all his wagers was that accused lost money in the game (R. 696).

After accused had been fully advised of his rights by defense counsel and also the president of the court, he elected to make an unsworn statement. He reviewed his earlier life stating that his mother died when he was seven years of age and that he ceased attending school when he was in the seventh grade, thereafter laboring in iron and coal mines. He commenced drinking when he was 13 years old. One of his brothers had perished in the First World War and another died in an insane asylum in Alabama, his condition apparently induced from over indulgence in alcoholic liquors. Accused verified his purchase of a bottle of rum and a knife in the town of Ayer on the night of 14 January. He had several drinks from his bottle of rum and thereafter visited a restaurant where he had a meal of chop suey and "coke". After his meal he and several others sat around the table drinking until the bottle of rum had been consumed. Accused then visited the Dug Out Bar where he purchased a total of ten rounds of drinks and a round of beer while two rounds of drinks were purchased by other individuals. He had "some more drinks" at another table and then went to the USO dance. After the dance he returned to the bar and purchased eight rounds of drinks and visited other tables where he consumed more liquor. He remembered boarding the bus with Private Sapp for the return trip to camp but did not remember leaving the bus or seeing anyone on board that he knew. His statement continues as follows:

> "* * * The next thing that I remember I was in the latrine. I don't know if I was shooting dice or

fading. I don't know who was in the game. And, the mystery part, I remember striking, and, I never wanted to harm or hurt or kill anyone. I treat people better than I treat myself. That mystery part, I can't recall, and I don't remember.

"The next I remember I was standing in the First Sergeant's room and I remember Second Lieutenant Moran and two men standing in the door. Corporals or Sergeants, I don't know" (R. 700-702).

5. Prior to the trial of accused he was examined at the Station Hospital, Fort Devens, Massachusetts, by a Board of Officers duly appointed by the convening authority to inquire into his mental condition. The Board submitted its report dated 17 February 1944, wherein it set forth its conclusions that accused, at the time of commission of the offense charged, was so far free from mental defects, disease and derangement as to have been able to distinguish right from wrong and to adhere to the right; that he was then sufficiently sane to conduct or cooperate intelligently in his defense; that, at the time of commission of the offense charged, accused was under such influence of alcohol as to cause "some impairment of the exercise of proper judgment and of control over his emotions"; that he had a mental age of between eight and nine years and fell within the moron classification; and that he was responsible and accountable for his behavior. Accused had positive Kahn and Wasserman blood tests but his spinal fluid examination produced negative results (Pros. Ex. 1). The results of the Kahn and Wasserman tests indicated only that the accused had syphilis at one time and were not conclusive that the disease was active at the time the tests were conducted (R. 48). Any deterioration of the cell structure of a brain and the existence of complementary mental disorder can be determined by a spinal fluid examination (R. 27, 28, 39, 40). The results of such examination of the accused were negative demonstrating that no deterioration of the cellular structure of the brain had occurred (R. 39).

Two of the three officers on this Board testified at the trial and were subject to searching and detailed examination by the defense. However, nothing was produced to weaken or alter their conclusions that, although accused was limited in the exercise of his judgment and control of his emotions at the time of commission of the offense charged because of a substantial consumption of alcohol, nevertheless, he was then able to distinguish right from wrong and adhere to the right (R. 60, 61, 99, 100).

6. Counsel for the accused included, in addition to regularly appointed defense counsel, William H. Lewis, Jr., a practicing attorney in Boston, Massachusetts, and a former Assistant United States Attorney for the Southern District of New York and the District of Massachusetts, plus Major William J. White, Jr., I.G.D., First Service Command. They conducted a zealous defense of accused and the record is replete with numerous and vigorous objections made to the admission of evidence offered by the prosecution and with argument in support thereof. As has been noted above, defense counsel also subjected two of the three members of the Board of Officers, appointed to examine into accused's mental condition, to a long and searching examination testing the basis for the Board's conclusions. However, they remained unshaken in their opinions and the conclusions of the Board as detailed in their report were not impeached. The evidence fully justifies the conclusion that accused was sane at the time the offense charged was committed and also at the time of trial.

Strenuous objection was made to the admission in evidence of accused's confession and lengthy examination and legal argument ensued on this point. The facts surrounding the confession are that about 2 a.m. on 15 January 1944, Second Lieutenant Austin D. Moran, the Officer of the Day, questioned accused advising him that he "didn't have to say anything unless he wanted to help himself out" whereupon accused made a statement (R. 400, 402). At approximately 8:30 a.m. on 15 January accused appeared before First Lieutenant John C. Cox, the officer only verbally appointed at that time to investigate the case (R. 316). Besides accused and Lieutenant Cox, Lieutenant Moran was also present on this occasion (R. 318). Article of War 24 was read to accused and it was explained to him that he need make no statement (R. 319, 320, 323). Accused proceeded to make a confession and Lieutenant Cox wrote down the substance of it in longhand which accused signed (R. 331, 332). Lieutenant Cox had not received the charges at that time and, accordingly, accused's confession was made when he was not advised with what offense he was charged or who the witnesses against him were (R. 345, 347, 375, 376). Lieutenant Cox proceeded to type up the confession signed by accused and submitted this typed confession to accused for his signature. By then the charge sheet had been delivered to Lieutenant Cox and he informed accused of the offense with which he was charged although accused was not told who the accuser was or who the witnesses against him were, the names of the latter not appearing on the charge sheet at the time (R. 378, 388, 469). Accused also signed this typewritten confession (R. 332).

The following day, 16 January, Lieutenant Cox visited accused at the guardhouse sometime around 4 p.m. He informed accused of the

statements he had obtained from various witnesses and explained to him his right to question them (R. 436). He read the charge sheet to the accused which then contained the names of the witnesses, and informed accused he did not have to say anything if he did not want to, but that if he did make any statement it could be used against him (R. 437). Lieutenant Cox then showed accused the two statements he had previously signed and asked him if he wished to make any changes in them (R. 439-440). Accused stated he "didn't have any objections whatsoever" and that "there was no objection whatsoever to it" (R. 443). The lieutenant pointed out to accused certain discrepancies between his confession and the statements of other persons but accused clung firmly to his statement (R. 502-504).

At the conclusion of that part of Lieutenant Cox's testimony which related to the events occurring on 15 January when accused signed the handwritten and typed confessions, the prosecution offered the statements in evidence but they were denied admission (R. 425). The law member stated that the reason for their exclusion was that the accused had not been informed of the charges against him at the proper time during the investigation (R. 426). However, after the testimony had been introduced relative to the events that transpired on 16 January when Lieutenant Cox interviewed accused at the guardhouse, the prosecution again offered the typewritten statement in evidence and it was admitted (R. 476).

It is unnecessary here to express opinion as to whether the initial ruling of the law member denying admission to the statements was correct. It is clear, however, that on 16 January 1944, accused had been fully advised of his rights and no threats or promises were made to him or other coercion exercised upon him. At that time accused affirmed his previous statement without change. Such voluntary reaffirmance makes an accused's confession competent, admissible evidence even though it were originally open to the objection of having been involuntarily made. (Dig. Op. JAG, 1912-40, sec. 395 (10), p. 206-207). Parenthetically, it should be noted that the events occurring during the dice game are fully established by direct evidence independent of accused's confession.

Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. Malice aforethought does not mean hatred or personal ill will or even an actual intent to take life. An intention to inflict grievous bodily harm upon any person or knowledge that the act which causes death will probably cause grievous bodily harm establishes malice aforethought

(MCM, 1928, par. 148a). Voluntary drunkenness is no excuse for crime but it may be considered in determining whether accused possessed the mental capacity to entertain the requisite specific intent (MCM, 1928, par. 126a). Accused denied he intended to inflict grievous bodily harm upon the victim because he was so intoxicated he knew not what he did. However, there is abundant testimony that, although accused had partaken heavily of alcoholic liquors during the earlier hours of the night and although he may have been "high" and "feeling good" during the dice game, he was not drunk when he assailed McWilliams without provocation. He was in sufficient possession of his faculties during the game to make wagers, make change and collect the money when he won. Indeed, within a quarter of an hour after the attack he proceeded voluntarily to the quarters of his first sergeant, aroused him, stated in a normal unexcited voice that he had "cut" McWilliams and requested that he be removed to the guardhouse. Such conduct indicates accused was fully aware of what he had done. The report of the Board of Officers supports the conclusion that accused was legally responsible for his actions. It was the Board's opinion that, although accused's consumption of alcoholic liquors may have affected his exercise of judgment and control of emotions, it did not prevent him from knowing right from wrong and from adhering to the right within the tenets of the law. Accordingly, the evidence justifies the conclusion of the court that accused knew what he was doing when he assailed McWilliams with an opened knife. The evidence sustains the findings of guilty of the Specification and the Charge.

7. The accused is about 33 years of age. He was inducted into the military service on 27 May 1943.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification and to support the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable civilly by penitentiary confinement under Section 275, Criminal Code of the United States (18 U.S.C. 454).

Thomas N. Jappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

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

(285)

SPJGH
CM 253202

6 MAY 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER CAMP BLANDING, FLORIDA
v.	)	
Second Lieutenant KENDALL B. MC CLURE, JR. (0-1318738), Infantry.	)	Trial by G.C.M., convened at Camp Blanding, Florida, 27 March 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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 Lt. Kendall B. McClure, Jr., Company "A", 190th Infantry Training Battalion, 60th Infantry Training Regiment, did, without proper leave, absent himself from his station at Camp Blanding, Florida, from February 22, 1944, to about February 24, 1944.

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

Specification (Amended): In that 2nd Lt. Kendall B. McClure, Jr., Company "A", 190th Infantry Training Battalion, 60th Infantry Training Regiment, was, at St. Augustine, Florida, on or about February 24, 1944, in a public place, to wit, Glick's Bar, Cathedral Street, St. Augustine, Florida, drunk and disorderly while in uniform.

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

Specification: In that 2nd Lt. Kendall B. McClure, Jr., Company "A", 190th Infantry Training Battalion, 60th Infantry Training Regiment, failed to comply with standing orders of this command in that he failed to sign the Officers' Register of the 60th Infantry Training Regiment upon leaving his Post at Camp Blanding, Florida, on or about February 22, 1944.

He 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 the 48th Article of War.

3. The evidence for the prosecution:

a. Charge I: Extract copies (Ex. 1) of morning reports of Company A, 190th Infantry Training Battalion, Camp Blanding, Florida, show accused from duty to absent without leave 0001 on 23 February 1944, and from absent without leave to duty 1900 on 24 February 1944. Accused failed to report for duty on the morning of 23 February, and did not have permission from his company commander to be absent from camp. A search of the battalion area failed to reveal his whereabouts. The accused was apprehended at St. Augustine, Florida, on 24 February 1944, and stated to Major Max S. Edelstein, provost marshal of that area, at the time of his apprehension that he was not on leave but was "A.W.O.L." (R. 5-7, 31-32).

b. Charge III: An extract copy (Ex. 3) of Administrative Memorandum No. 9, Headquarters, Infantry Replacement Training Center, Camp Blanding, Florida, dated 30 September 1943, provides in pertinent part that officers must sign the officers' register at regimental headquarters before leaving the post under verbal orders of the commanding officer. An extract copy (Ex. 2) of the officers' register, 60th Infantry Training Regiment, shows that accused failed to sign the register in the period 22 February to 24 February 1944 (R. 7-9).

c. Charge II: On the afternoon of 24 February 1944, accused and a technical sergeant were sitting in a booth at "Glick's Famous Bar", in St. Augustine, Florida. After being served a round of drinks, the accused approached Mr. Jack Long, the bartender and asked him to cash a check. Mr. Long informed accused that he had no authority to cash checks and that accused would have to wait until the proprietor returned. The accused became angry and stated that he would "tear the fucking joint up"; he would "tear that clock off the wall"; and he would "whip any son-of-a-bitch in the house". Several customers were in the bar, including two ladies who were seated in a front booth. Boatswain's Mate Frank Galloway, a shore patrolman of the United States Coast Guard, seated at the bar, asked accused if "that" included him. Accused replied that the statement did not apply to him or to men in uniform. Accused made his statements in a voice loud enough to be heard by those seated at the bar, but the bartender did not know whether or not the remarks were overheard by the two ladies. The accused approached the bartender again a few minutes later and demanded that Mr. Long send for the manager. On being informed that the manager was out shopping or playing golf accused said: "It is a fine God-damned thing, him playing golf while we are fighting a war". Accused

was in uniform and neatly dressed, but in need of a shave. He talked a "mumbley language" and in the opinion of Galloway he was drunk. Mr. Long and Galloway did not consider accused dangerous or in any condition to fight (R. 9-14, 20-27).

When Mr. Max S. Glickstein, proprietor of "Glick's Bar" entered his place of business between 3:00 and 4:00 o'clock that afternoon, accused approached him and requested that he sell accused some whiskey and cash a check. Mr. Glickstein refused the requests as accused "appeared" to be drunk. His eyes were red and he "weaved a little" when he walked. As Mr. Glickstein walked away accused stated: "If you don't cash this check when I get through with you, you won't be worth thirty-dollars". Mr. Glickstein became angry and said accused was an officer and a gentleman but that if accused did not behave he would call the provost marshal. Accused "grabbed" Mr. Glickstein by the front of his sweater and said: "If you call the Provost Marshal I will cut your heart out" or "I will cut your God-damned heart out". Mr. Glickstein told accused to "start cutting" and telephoned for the provost marshal. The accused and the technical sergeant then left the bar (R. 14-20, 22).

Major Max S. Edelstein, provost marshal for the St. Augustine Area, went in search of accused after receiving the telephone call from "Glick's Bar". He saw accused in the act of cashing a check at the "Marine Bar". After Galloway identified accused as the person who caused the disturbance at "Glick's Bar", Major Edelstein asked accused to accompany him to headquarters. Accused was courteous and readily agreed. At headquarters accused displayed a substantial amount of money. With the consent of accused Major Edelstein took $10 of the money, and exchanged it at the "Marine Bar" for the check accused had written for that amount. Accused looked "haggard", his eyes were "glassy, bloodshot and half closed", his movements were of an "exaggerated nature" and in the opinion of Major Edelstein and First Lieutenant William S. Myers, accused was drunk. He was not "boisterous" but was inclined to be "argumentative". He further emphasized the fact that he was intoxicated by persisting in passing uncomplimentary remarks about his organization, the Infantry Replacement Training Center. He stated to Major Edelstein and Lieutenant Myers that he had been in the "I.R.T.C.", for a considerable period of time, was "fed up" with training and wanted to get into actual combat; and that he was drunk and was going to stay drunk until he got overseas. While at headquarters the accused wanted to "throw up". He was taken to the latrine where he vomited twice. He then went to sleep on a bed for the remainder of the afternoon. Lieutenant Myers returned accused to Camp Blanding that evening and turned him over to the duty officer of the 60th Regiment (R. 23, 27-34).

4. For the defense:

The accused testified that he attended Allen Military Academy for one year, Kemper Military Academy for two years and received three months military training at "Texas A. & M.". He left that institution in his freshman year to enlist in the Army, and on 19 January 1943, entered Officer Candidate School at Fort Benning, Georgia. After receiving his commission, his duties were confined exclusively to Infantry Replacement Training Centers and in a period of eleven months he had been through three training cycles. He further stated that he entered the Army with the desire to take part in actual combat, but his requests for a transfer to an active unit had been denied (R. 34-36).

With reference to being absent without leave (Chg. I), and drunk and disorderly (Chg. II) the accused testified that after leaving Camp Blanding he went to Starke, Florida, and drank seven bottles of India Ale, "sometimes" referred to as "Green Death". After drinking the ale he decided that if he stayed away from camp for a day or two and "didn't mess up too badly", he might have a better opportunity of being released for overseas service. Other officers had previously advised him that such a plan might prove successful. Accused stated that he then went to Jacksonville, Florida, and from there to St. Augustine, Florida, where he arrived at 2:00 o'clock in the morning (24 February 1944). He went directly to a hotel. At about 11:00 o'clock that morning he went to "Glick's Bar" where he had "two or three" drinks. He attempted to get a haircut but found the barber shop closed. After having more drinks at "Glick's Bar" he went to the Camp Blanding Bus Station, and ascertained that the next bus for camp left at 4:00 p.m. He returned to "Glick's Bar" for the third time and drank "some more". He later went to the "Marine Bar" where he met a technical sergeant of his acquaintance and asked if the sergeant knew where he could cash a check. Accused did not know why he wanted to cash a check as he had "plenty" of money at the time. At the sergeant's suggestion they went to "Glick's Bar" but the bartender would not cash the check in the absence of the manager. Accused stated that he and the sergeant were having a drink when Mr. Glickstein arrived and that he "got sore" when Mr. Glickstein refused to cash his check. He did not remember saying anything to Mr. Glickstein or the bartender, and when they refused to cash his check he went back to the "Marine Bar". When Major Edelstein arrived at the "Marine Bar" the accused accompanied him to the recreational area, where he was held until Lieutenant Myers returned him to camp. The accused further testified that he was willing to accept any punishment the court might give for his being absent without leave (Chg. I) and for his failure to sign the officers' register (Chg. III). He had never been in any previous trouble and was most interested in retaining his commission and being given the opportunity to fight abroad for his country (R. 36-38).

On cross-examination the accused testified that while stationed at Fort McClellan, Alabama, he requested overseas service from his company

commander and from the regimental adjutant. After arriving at Camp Blanding he made the same request of his company commander and the battalion adjutant. He was "sick and disgusted" in his work with the Infantry Replacement Training Center and desired to join a more "active outfit". He further testified that he first made up his mind to go absent without leave after drinking the ale in Starke, Florida. He did not think he was in "full possession" of himself at the time nor did he consider himself drunk. He drank "off and on" before arriving at St. Augustine on 24 February 1944. He ate breakfast that morning and during the day consumed approximately fifteen drinks. He did not "intentionally engage in misconduct" while at St. Augustine (R. 38-42).

Technical Sergeant William A. West testified that he and accused belonged to the same battalion. He met accused at a bar in St. Augustine, Florida, during the month of February 1944, and in the course of their conversation accused asked where he could cash a check. Sergeant West said he was acquainted at "Glick's Bar" and suggested that accused could cash a check there. They went to "Glick's Bar" where they sat in a booth and had some drinks. Neither of them purchased a drink for the other (R. 45-46).

The battalion commander of accused testified that accused had expressed to him a desire for overseas service. He rated the general performance of accused, his conduct, and instruction of "trainees" as excellent. His company commander gave accused a superior rating, never had occasion to discipline accused, and regarded him as the best instructor he ever had. According to Second Lieutenant Claude E. Carter who occupied the same hut with accused, the accused seldom left camp and was an excellent officer and instructor (R. 42-45).

5. a. Charge I: It is shown by the evidence and admitted in the testimony of accused at the trial that accused without proper leave absented himself from his organization from about 22 February to 24 February 1944.

b. Charge III: The Specification under this Charge alleges that accused failed to comply with standing orders of the command in that he failed to sign the officers' register at his regimental headquarters upon leaving the post on 22 February 1944. Examination of the standing orders discloses that officers leaving the post under verbal orders of the commanding officer are, under certain circumstances, required to sign the regimental register. Inasmuch as there is no evidence in the record that accused left the post under any such verbal orders the applicability of the standing orders to accused is not shown and the findings of guilty of this Specification and Charge are not sustained.

c. Charge II: The evidence shows that on 24 February 1944 the accused consumed a considerable amount of liquor. While in an intoxicated

condition he attempted to cash a check at "Glick's Famous Bar" in St. Augustine, Florida. When the bartender explained that he was not authorized to cash checks the accused became angry and stated in a loud voice that he would "tear the fucking joint up"; that he would "tear the clock off the wall"; and he would "whip any son-of-a-bitch in the house". Several customers, including two women seated in a front booth, were in the bar. A coast guardsman who inquired if he was included in the challenge was told that it did not apply to him or to men in uniform. When the proprietor of the bar arrived, accused asked him to cash the check. When he refused, accused stated "When I get through with you, you won't be worth thirty-dollars". The proprietor threatened to call the provost marshal and accused grabbed him by the front of his sweater and said "I will cut your heart out" or "I will cut your God-damned heart out". When the proprietor said "start cutting" and went to the phone accused left the place. Accused was in uniform, neatly dressed, but in need of a shave.

The evidence establishes that accused was drunk and disorderly in uniform in a public place. The question remains whether his behavior was of such aggravated character as to constitute "conduct unbecoming an officer and a gentleman" within the meaning of Article of War 95. Paragraph 151 of the Manual for Courts-Martial (1928) gives as an instance of a violation of this article, "being grossly drunk and conspicuously disorderly in a public place" and further states the Article contemplates conduct by an officer which, taking all the circumstances into consideration, shows that he is morally unfit to be an officer or considered a gentleman. It is doubtful that the drunkenness of accused could be characterized as "gross". His disorderly conduct was confined to seizing the sweater of the proprietor of the bar and using vulgar, threatening language. He made no attempt to carry out his threats and when invited to do so, left the bar, thereby demonstrating that his violence was purely vocal. Without attempting to condone his use of vulgar language, especially when two women were present and may have heard it, the Board makes note of the fact that the misconduct of accused occurred in a barroom, where his acts would not be as conspicuous as in many other public places. The conduct of accused was highly discreditable, but the Board of Review is of the opinion that it does not clearly demonstrate that moral unfitness which is involved in a violation of Article of War 95 (CM 238792, Kuennen; CM 228894, Peterson; CM 227651, Hess; CM 213442, Due; CM 202846, Shirley). The evidence is legally sufficient to support only so much of the findings of guilty with respect to the Specification as involves a finding of guilty of the Specification in violation of Article of War 96.

6. The accused is 19 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 14 September 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 24 April 1943.

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 insufficient to support the findings of guilty of the Specification, Charge III and of Charge III; legally sufficient to support only so much of the findings of guilty of the Specification, Charge II and of Charge II as involves a violation of Article of War 96; legally sufficient to support the findings of guilty of the Specification, Charge I and of Charge I; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War.

Samuel M. Bower, Judge Advocate

Robert O'Connor, Judge Advocate

T. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 MAY 1944 - 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 Kendall B. McClure, Jr. (0-1318738), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Specification, Charge III and of Charge III; legally sufficient to support only so much of the findings of guilty of the Specification, Charge II and of Charge II as involves a violation of Article of War 96; legally sufficient to support the findings of guilty of the Specification, Charge I and of Charge I; and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was absent without leave from his station for about two days (Spec., Chg. I) and was drunk and disorderly in a barroom (Spec., Chg. II). The prior record of accused (19 years of age) as an officer was excellent, according to his battalion commander, and his company commander testified that accused was the best instructor he had ever had and gave him a superior rating. Although the conduct of accused in the barroom was highly discreditable, he was neither grossly drunk nor conspicuously disorderly. I recommend that the sentence to dismissal and total forfeitures be confirmed but commuted to a reprimand, and that the sentence as thus commuted be carried into execution.

3. Attention is invited to a letter dated 22 April 1944 from Honorable Milton H. West, Member of Congress, with inclosures, in behalf of accused.

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 carrying into effect the recommendation made above.

Myron C. Cramer

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

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Hon. West, 22 Apr.44, w/incls.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to reprimand. G.C.M.O. 257, 3 Jun 1944)

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

SPJGK
CM 253207

14 APR 1944

UNITED STATES	)	ARMORED CENTER
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 16 March, 1944. Dismissal.
Second Lieutenant LEROY T. ELLIOTT (0-1012452), Infantry.	)	

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

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

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

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

Specification 1: In that 2nd Lt. Leroy T. Elliott, Tank Department, The Armored School did, at Fort Knox, Kentucky, on or about Dec. 16, 1943, with intent to deceive Major Marvin J. Hummel, officially state to the said Major Marvin J. Hummel that he had not borrowed money from any enlisted man in the Tank Department of the Armored School, which statement was known by the said 2nd Lt. Leroy T. Elliott to be untrue.

Specification 2: (Finding of not guilty).

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

Specification: In that 2nd Lieutenant Leroy T. Elliott, Tank Department, The Armored School, did, at Fort Knox, Kentucky, on or about Oct. 15, 1943, wrongfully and unlawfully borrow the sum of Three dollars ($3.00) United States currency, from Sergeant Fred W. Pittman, Tank Department, The Armored School, Fort Knox, Kentucky, to the prejudice of good order and military discipline.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 2, Charge I, guilty of Specification 1, Charge I, and of Charge I, and guilty of the Specification of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced

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

3. Summary of evidence.

a. Charge II (Specification, borrowing from an enlisted man, in violation of Article of War 96).

The only evidence concerning this offense was offered by the testimony of Sergeant Fred W. Pittman, Company B, The Armored School, Fort Knox, Kentucky. Accused was senior instructor in the Tank Department and witness' immediate superior. On 15 October 1944, accused asked witness if he could borrow $2. Witness loaned this amount to him. On 31 October or 1 November, accused offered to repay the loan, but witness was unable to change a $10 bill, and nothing more was said about it. Witness was absent on furlough from 17 November until 3 December, over accused's pay day. Upon his return accused "was working in a different phase of the Tank Department" and witness saw nothing of him until 31 December, when accused repaid him (R. 12).

b. Specification 1, Charge I (False official statement in violation of Article of War 95).

On the 13th or 14th of December 1944, Major Marvin J. Hummel, Field Artillery, the Executive Officer of the Tank Department at The Armored School, instructed Major Carl E. Bernhardt to question accused about borrowing money from enlisted men and others. Major Bernhardt went to the shed in which accused was working, and asked accused whether he had borrowed any money from enlisted men. Accused replied that he "didn't know of any - he didn't believe that he had borrowed any money from any enlisted men", and that he owed no money to enlisted men. Major Bernhardt then directed accused to report to Major Hummel. Accused walked into Major Hummel's office, and without the latter's questioning him directly concerning his borrowings, stated that Major Bernhardt had talked to him about the subject and that he (accused) wanted to tell Major Hummel that he had not borrowed any money from enlisted men. No specific times or persons were mentioned in the conversation between them, which apparently was quite brief (R. 6-8, 9-11).

Accused elected to remain silent, and offered no evidence (R. 18).

4. There is no evidence to dispute that introduced by the prosecution. The record is sufficient to show accused guilty beyond reasonable doubt of both Charges and their Specifications as found by the court.

5. The Specification of Charge II alleges that accused borrowed $3 from Sergeant Pittman, while the proof shows that he borrowed only $2.

The time, place, and person involved were as alleged, and the variance in amount is immaterial and a nonprejudicial error.

6. War Department records show that accused is 31 years of age and married. He attended Bradley College for two years, and graduated from the University of Iowa in 1935 with the degree of Bachelor of Arts. He enlisted in the United States Army on 16 July 1937, serving until 7 December 1939, from which time he was in the Regular Army Reserve until 2 February 1941. He attended The Armored Force School, Fort Knox, Kentucky, from which he was graduated on 12 September 1942, and commissioned a second lieutenant, Infantry, Army of the United States. In recommending him for attendance at Officer Candidate School, Captain Dee Small, Infantry, Camp Grant, Illinois, stated that accused was of excellent character and had demonstrated outstanding qualities of leadership. His performance in The Armored Force School's Tank Maintenance Officers' course from 8 February 1943 to 27 April 1943 was rated "satisfactory".

It also appears from the review of the Staff Judge Advocate that accused "possesses good general habits, and has aptitude for and an interest in mechanical work", that he has been rated "excellent" and "very satisfactory" in his performance of two unnamed Army assignments, and that he has had no punishments under Article of War 104.

The chronology sheet accompanying the record of trial indicates that accused submitted his resignation for the good of the service, but that it was not accepted.

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

Jerry A. Cox, Judge Advocate.

John Rosenfeld, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 MAY 1944 - 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 Leroy T. Elliott (0-1012452), 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 thereof. In view of accused's previous good record and under all the circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 331, 27 Jun 1944)

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

SPJGN
CM 253209

6 MAY 1944

U N I T E D S T A T E S	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Barksdale Field, Louisiana, 13 March 1944. Dismissal.
Second Lieutenant ALBERT A. DAVIS (0-680612), 480th Bombardment Squadron, 336th Bombardment Group (M).	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Albert A. Davis, 480th Bombardment Squadron, 336th Bombardment Group (M), did, on or about 8 December 1943, at or near Clearwater Beach, Florida, wrongfully violate Section II, paragraph 16 a, (1) (d), Army Air Forces Regulation 60-16, dated 9 September 1942, by flying a military airplane at an altitude of less than five hundred feet above the ground.

He pleaded not guilty to and was found guilty of the Charge 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. The evidence for the prosecution shows that on 8 December 1943 the accused took off at 1330 o'clock from the Army Air Field, Lake Charles, Louisiana, in a "B-26" bomber bearing the field number 1872, with MacDill Air Field in Florida as his assigned destination. Accompanying the accused in his plane were five officers and two enlisted men. The principal evidence for the prosecution is presented in the depositions of Majors Charles D. Warfield and William D. Ford of the Army Air Corps, stationed with Headquarters Third Air Force, Tampa, Florida. Major Warfield's deposition shows that at 1755 o'clock on the afternoon of 8 December 1943, he was at his home at Clearwater Beach when he heard the sound of low flying airplanes coming up the beach. He went out on the second floor balcony of his home and saw three airplanes making an extremely low pass to the north along Clearwater Beach. The leading plane bearing the field number 1872 "was between 50 and 75 feet above the ground, when it passed" his position. The plane to the left of the lead plane was slightly above the leader, possibly at an elevation of 100 feet, whereas the plane to the right of the leader was slightly higher at an altitude of about 150 feet. The leading plane bearing the field number 1872 passed by at about 150 feet from where Major Warfield was standing (R. 4, Exs. A,B,C).

The deposition of Major Ford, similar to that of Major Warfield, stated that he was at his home at Clearwater Beach at 1755 o'clock on 8 December 1943 and observed three "26's" at extreme low level over Clearwater Beach. The leading plane was "under 100 feet" during the time he was in a position to observe its flight. The plane to the right of the lead plane was below 200 feet whereas Major Ford could not observe the plane to the left of the lead plane. Major Ford stated in his deposition that he was positive of the altitude of the planes which he saw because he had had "three years of flying experience, most of it low level flying". He added that he "considered /himself/ well qualified to judge distances above the ground" (R. 4; Ex. D).

Both Major Warfield and Major Ford in response to an interrogatory asking if the planes in question were over the water and not over the beach itself, replied respectively, as follows:

> "Answer: The leader was following the shore line and may have been 50 feet off shore but no more than that."

> "Answer: The right wingman was definitely over the line, and the leader was just about on the shore line, and if at all, not any

appreciable distance beyond the beach line" (Exs. C, D).

4. The evidence for the defense, including the testimony of the accused and the four officers and two enlisted men who were with him on the flight from the Lake Charles Air Field to MacDill Field, was to the effect that the accused never flew his plane on the flight at an altitude lower than 500 to 700 feet. When the plane piloted by the accused approached the Florida coast, the accused lowered his plane rapidly, turned first to the right, then to the left and flew for a short distance parallel to the shore line at an altitude of from 500 to 700 feet above the water. The accused then, according to the testimony of the navigator of the plane, ascended to an altitude of about 1400 feet, turned inland and landed at MacDill Field (R. 5-22).

The accused testified in explanation that when he reached the coast of Florida after flying from Lake Charles at an altitude of about 7500 feet, he began "letting down" and called to the ships that were accompanying him, for a close formation but neither ship answered. His testimony continued, as follows:

> "I kept letting down and I turned left to see if my left wing man had followed instructions then I turned away from the coast so I would not be over land. I straightened out and flew a few seconds up the coast and then turned to the right and pulled up over the land and went into the field. Both of the other planes pulled into echelon on my right wing. I presumed that both planes knew what I was doing and I pealed off to land and made a normal landing. I thought the other ships knew what I was doing but they misunderstood me and tried to follow me in, and instead of making the runway both had to go around and contact the tower in Tampa with their own radio equipment and they came on in and made a landing on their own."

The accused testified unequivocally that after lowering his plane to an altitude of about 500 to 600 feet he flew around the coast over the water and avoided flying over the land. He also testified that he did not buzz or attempt to buzz the beach (R. 23-27).

By stipulation between the prosecution and the defense, it

was shown that, if the two pilots of the two ships accompanying the accused on the flight of 8 December 1943, were present at the trial, they would have testified that, upon nearing the shore line, the accused's plane made a "let down" which was quite rapid but that their lowest altitude, which was in the vicinity of Clearwater Beach, Florida, was at approximately 500 feet over the water (R. 22-23).

Technical Sergeant Irving W. Krause testified that on the flight in question the antenna of the plane was reeled out to a length of about 200 feet and that in his judgment it extended about 100 feet below the ship. The antenna was not reeled in until just before landing at MacDill Field and there was no indication that it had been injured by contact with anything on the ground (R. 16-18).

It was stipulated by and between the prosecution and the defense that if Major Gerald J. Crosson, Commanding Officer of the 480th Bombardment Squadron, Lake Charles Army Air Field, were present, he would have testified that the accused had been with his organization for the past five months and that during that time he had known the accused personally and had always found him to be beyond reproach. In his opinion, the accused was an outstanding pilot who had been serving both in the capacity of an instructor and as an assistant flight commander. In Major Crosson's opinion the character and efficiency of the accused should not be overlooked in the present case (R. 27).

5. The Specification alleges that the accused did on or about 8 December 1943, at or near Clearwater Beach, Florida, wrongfully violate Section II, paragraph 16 a (1) (d), Army Air Forces Regulation 60-16, dated 9 September 1942, by flying a military airplane at an altitude of less than 500 feet above the ground.

Although the record of trial raises certain questions involving the proof of the offense charged, their discussion is rendered unnecessary by the determination herein made of an issue of paramount and overshadowing importance. Upon the completion of the case and the announcement of the sentence, the court, by unanimous action, executed the following instrument:

> "1. Each and every member of the General Court-Martial, which today tried and convicted 2nd Lt. Albert A. Davis, 0-6806812, 480th Bombardment Squadron, 336th Bombardment Group (M), Lake Charles Army Air Field, Lake Charles, Louisiana, of the violation of the 96th Article of War, and the specification thereunder alleging a violation of flying regulations, to wit: Army Air Forces Regulations

60-16 recommends that clemency be extended to the aforesaid officer. The court in accordance and pursuant to the policy set forth by the Commanding General, Army Air Forces, and the Commanding General, Third Air Force that dismissal is the appropriate sentence for an intentional violation of flying regulation, today sentenced the accused to be dismissed from the service. It is felt that this is a case which justifies a recommendation from the court that the sentence given be commuted to forfeiture of pay and restriction at whatever base the officer may be serving. The following facts justify a reconsideration of this officer's case:

a. This officer's previous record prior to the offense committed herein shows that his entire service and character have either been excellent or superior.

b. The salvage value of this officer.

c. The necessity for preserving manpower in the present emergency.

d. A lesser sentence will suffice to proper discipline this officer."

A careful consideration of the above instrument leads to the inescapable conclusion that the court was of the fixed opinion that the accused should receive no greater punishment than that involved in a sentence providing for an undesignated forfeiture of pay and restrictions. The court carefully outlined, in support of its opinion on the sentence, four reasons which it presented in paragraphs a, b, c, and d above. At the same time it, with no less clarity, indicated that it had disregarded the four reasons which appealed to its sense of justice and had abdicated its responsibility for what it regarded as the wishes or policy of the Commanding General, Army Air Forces and the Commanding General, Third Air Force, that officers who had intentionally violated flying regulations should be dismissed the service. The court frankly states that the sentence imposed was "in accordance and pursuant to the policy" just mentioned.

In considering the present problem it must be remembered that each member of the court at the beginning of the trial took the oath prescribed by Article of War 9, providing that he would,

> "* * * duly administer justice without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to /his/ conscience, the best of /his/ understanding, and the custom of war in like cases; * * *".

This oath clearly placed each member of the court under a sworn duty to administer justice according to his conscience and the best of his understanding. Furthermore, the Manual for Courts-Martial presents the following explanation concerning the duty of the court in determining the punishment to be imposed,

> "Basis for Determining.— To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. See 102-104 (Punishments). In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline" (M.C.M., 1928, par. 80a).

Since the accused was being tried for an offense alleged to be a violation of Article of War 96, and since no maximum or minimum punishment therefor had been prescribed by law, the court had, under the wording of that Article, a wide discretionary power to impose upon the accused any punishment, except death (A.W. 43). The controlling principle in the exercise of such discretionary power lies in the court's sworn obligation to administer justice according to its conscience and the best of its understanding. The punishment which it imposes must be "justified by the necessities of justice and discipline". On the other hand, when a court surrenders its responsibility to assess punishment according to its own understanding of the law and the facts of the particular case, and like Pontius Pilate seeks to wash its hands of such responsibility, and in unmistakable terms spreads upon the record evidence of the abdicating of its sworn duty, the sentence which it renders is a legal nullity. Obviously, such a procedure runs "* * * afoul of the basic standard of fairness which is involved in the

constitutional concept of due process of law * * *" (U.S. ex rel. Innes v. Hiatt, C.C.A. 3, 15 March 1944, Nos. 8455, 8536).

This principle is well recognized in military law. In CM 156620, German, the court was closed during the trial of the case and before final argument. Upon reopening without having made any findings, it adjourned for the stated purpose of consulting higher authority on certain questions. The record fails to disclose the nature of these questions. Upon reconvening, the court, without disclosing what advice it had received, immediately proceeded to find the accused guilty. It was held that the procedure was unauthorized. A court-martial is not permitted in closed session to consult any outside authority. Under such circumstances the error was fatal to the conviction.

In CM 216707, Hester, during the trial, a circular letter announcing a mandatory policy of dishonorably discharging enlisted men in cases referred to general courts-martial was distributed to the members of the court after they had deliberated without result one hour and twenty minutes. Although the cited case involved an officer and not an enlisted man, it was held that the presentation of the letter to the court constituted an error injuriously affecting the substantial rights of the accused and vitiated both the findings and the sentence.

In condemning the court's action in substituting for its own judgment what it referred to as the "policy set forth by the Commanding General, Army Air Forces, and the Commanding General, Third Air Force", the Board of Review does not intend to criticize the practice of military commanders in disseminating among courts-martial information revealing the need for the imposition of stern punishment for certain offenses. Such action may at times be essential to the proper performance by courts-martial of their function. It does not follow, however, that military commanders may prescribe minimum sentences and require, by policy pronouncement or otherwise, their imposition for certain offenses. Such action would constitute unlawful usurpation of the court's authority in contravention both of the spirit and of the language of the Articles of War. Congress alone has the power to prescribe minimum penalties. Whatever may have been the practice prior to 1920 when the present Articles of War were enacted, it is now clearly contemplated that our courts-martial should freely exercise certain distinctively judicial functions in a manner which will guarantee independence of judgment in determining the guilt or innocence of an accused and in the imposition of his sentence. That Congress intended to protect our courts-martial in the performance of their judicial duties against the

possibility of coercion and undue influence by superior military authority is clearly shown by the Articles themselves. Article of War 40 states that,

> "No authority shall return a record of trial to any courts-martial for reconsideration of—
> (a) An acquittal; or * * *
> (d) The sentence originally imposed, with a view to increasing its severity, * * *".

Article of War 45 provides that the President may prescribe maximum punishments, but significantly fails to authorize the President to establish any minimum punishment whatsoever. Finally, in Article of War 50½, Congress has sought to insure that the administration of justice in our Army will be in accordance with law by providing for a system of automatic appellate review.

In CM 250472, Hoffman, a letter on the subject of hazardous flying which had been issued for the guidance of commanding officers and others of the Air Corps was read to the court prior to its action in making findings and imposing a sentence. The Board of Review, in passing on the issue which this action raised, stated that,

> "While the introduction into trial of letters setting forth views of reviewing authorities might, under certain circumstances, constitute an error or irregularity injuriously prejudicing the substantial rights of the accused, there is nothing in this record to cause the Board to believe that the introduction of General Hunter's letter overcame the volition and independent judgment of the members of the court."

The Board of Review made the further explanation, as follows:

> "While the functions of a court-martial and the reviewing authority should remain separate and distinct, it is equally essential to the enforcement of military discipline that members of courts-martial be made aware of the gravity of certain offenses and the need of drastic punishments to deter commission thereof. For a commanding officer to inform his courts-martial of offenses that are impairing the efficiency and discipline of his command and

to suggest to them his opinion of appropriate sentences, the ultimate decision in each specific case being left, of course, to the wisdom and judgment of the court is consistent with all our principles of military justice."

With this opinion there can be no quarrel for it clearly recognizes the principle herein stated. The record in that case is devoid of any indication that the court's volition and independent judgment were overcome. Although it considered the content of General Hunter's letter, its findings and sentence appears to have been the expression of its own free will and judgment. The instant case is clearly distinguishable. Here the court has spread upon the record in the form of a recommendation for clemency an impeachment of its own judicial act. It has, to all intents and purposes, said that it has bowed to the wishes and announced policy of the Commanding General, Army Air Forces and the Commanding General, Third Air Force, and has imposed a sentence which exceeds in its own judgment "the necessities of justice and discipline". In so doing, it has failed to realize the significance of its oath and its judicial obligation. It has in effect proclaimed to the world that it has regarded itself as a mere automaton. Obviously, the accused has not received the fair trial guaranteed to him by our system of law. The findings and sentence must be disapproved.

6. The records of the office of The Adjutant General show that the accused is approximately 28 years of age. He entered upon active service as an enlisted man on 11 September 1942 and was commissioned and entered upon active duty as an officer as Second Lieutenant on 24 May 1943.

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

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Fabian H. Goldman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 OCT 1944 - 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 A. Davis (0-680612), Air Corps.

2. I do not concur in the opinion of the Board of Review and, for the reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence shows that at about 5:55 p.m. on 8 December 1943, Major Charles D. Warfield, Air Corps, Headquarters Third Air Force, was in his house at Clearwater Beach, Florida, when he heard the sound of low flying airplanes. He went out on the second floor balcony and saw three airplanes approaching at extremely low altitudes. They were either B-26 or AT-23 type. The AT-23 is a B-26 modified to adapt it to training purposes. Major Warfield watched the planes for about a minute before they passed his house and for about a minute afterward and during that time the lead plane was between 50 and 75 feet above the ground and the wing planes slightly higher. He was "positive" about the altitude because the lead plane passed within about one hundred and fifty feet of where he was standing, and was directly opposite the second floor of his house which he knew to be no higher than sixty feet above the ground. He read and immediately wrote down the field number (1872) of the lead plane. On cross-examination he stated that the leader was following the shore line and may have been fifty feet off shore "but no more than that" (Ex. C).

Major William D. Ford, Headquarters Third Air Force, an Air Corps officer with several years of low level flying experience also was in his house at Clearwater Beach at about 5:55 p.m. on 8 December and saw three planes pass along the beach. He first described them as B-26s but later in his deposition stated that they may have been of the AT-23 type. Major Ford observed the flight of the lead plane which passed about 200 yards from him, through a distance of one and one-half miles and during all of that time its altitude was lower than 100 feet. On cross-examination he stated that the leader was just about on the shore line and "if at all, not any appreciable distance beyond the beach line" (Ex. D).

Accused testified that on the afternoon of 8 December he piloted a B-26 leading a three plane formation with two AT-23s in the wing positions. As he approached Clearwater Beach, he made a sharp and considerable descent and flew for several seconds in a northerly direction parallel to the beach. The field number of his plane was 1872. He stated, however, that he was about a half mile off shore and that his altitude was never lower than between 500 feet and 650 feet. The co-pilot and several other members of his crew

testified to substantially the same effect. The stipulated testimony of the pilots of the two wing planes also tended to corroborate him.

The record thus presents a direct and irreconcilable conflict between the testimony of the witnesses for the prosecution and the testimony of the witnesses for the defense. The former, Majors Warfield and Ford, were not casual observers. Their attention was attracted by the sound of low flying planes and they both took particular note of the position and altitude of the lead plane as it passed along the beach. The weather was clear, they had ample time and opportunity to make accurate observations, and at least one of them was an experienced low flight observer. They were wholly disinterested and unbiased so far as the record shows. Under the circumstances they could not have been honestly mistaken as to whether or not accused flew his plane at an altitude lower than 500 feet and it is inconceivable that they would have willfully testified falsely against him. The members of the court who were in a position to hear and observe the witnesses obviously accepted the testimony of the witnesses for the prosecution and rejected the conflicting testimony of the accused and his flight companions. While in a Presidential case such as this the findings of the trial court on a question involving the credibility of witnesses are not conclusive, they are entitled to considerable weight (CM 243466, Calder; CM 243674, Bever). In my opinion the evidence shows beyond a reasonable doubt that the accused piloted his plane along Clearwater Beach in substantially the location and at approximately the altitude as stated by Majors Warfield and Ford.

The Army Air Forces regulation which accused was charged with violating provides that, with certain exceptions not applicable here, aircraft will not be operated below the altitude of 500 feet above the ground. It seems to me that whether or not the regulation governs sustained overwater flights it clearly applies to settled shorelands and covers the areas immediately adjacent to the water line. Therefore, even though accused during his low altitude flight may have been over water at all times, nevertheless, he followed the approximate beach line and was so close to the shore that his plane was less than 500 feet above the ground within the meaning of the regulation.

4. The Board of Review has concluded that the sentence to dismissal is invalidated by certain statements which appear in a recommendation of clemency signed by all of the members of the court and attached to the record of trial. The recommendation, which is quoted in full in the Board's opinion, states that the court sentenced the accused to dismissal "in accordance and pursuant to the policy set forth by the Commanding General, Army Air Forces, and the Commanding General, Third Air Force that dismissal is the appropriate sentence for intentional violation of flying regulations——". Since the members of the court recommended that the sentence be commuted to forfeiture of pay the Board of Review has concluded that they abdicated their responsibility and instead of using their own best judgment and discretion imposed a sentence in conformance with the policy of the commanding generals

and not in accordance with their own convictions.

The record shows that no statement of policy, either oral or in writing was announced or read to the court during the trial and it must be assumed that the members of the court became acquainted with the policy at some prior time.

In CM 250472, Hoffman, the accused was charged with piloting a military plane at a lower altitude than the minimum prescribed by Army Air Forces regulations. In his final argument to the court the trial judge advocate over objection by the defense read a letter from the reviewing authority containing a quotation from a letter by the commanding general of the Army Air Forces on the subject of hazardous flying. The letter stated that there was a vast amount of hazardous flying in the Army Air Forces which appeared to be on the increase, that it caused fatal accidents, endangered the lives of pilots, menaced Government and private property, tended to create resentment among the civilian population against the Air Forces and "must be stopped and stopped now". The reviewing authority's letter also contained a statement to the effect that dismissal from the service was considered an "appropriate punishment" for violation of flying regulations. The court found accused guilty and sentenced him to be dismissed the service. Eight of the ten members of the court then signed a recommendation of clemency recommending that the sentence be commuted to forfeiture of $50 per month for six months. The Board of Review held that the sentence was legal and that no error prejudicial to any substantial right of the accused was committed by the court. In its opinion the Board stated:

> "The instant letter on the subject of hazardous flying contained proper information for commanding officers and others of the Air Corps. Certainly, the perusal of such a letter by a member of the court immediately prior to this trial would not be considered per se a sufficient ground for challenge nor would it be a reasonable inference that the reading of this letter by a member overcame that member's volition and independent judgment on a specific case. It is fundamental that courts-martial have the right and duty to take into consideration, in arriving at proper sentences, general policies announced by the War Department and commanding officers relative to enforcement of discipline and uniform sentences. An important consideration in determining the punishment to be imposed in a given case is its effect upon military discipline (Winthrop's Military Law and Precedents (Reprint) p. 397). Indeed, it is fundamental that courts-martial are instrumentalities of the executive power to aid him in properly commanding the Army and enforcing discipline therein (Winthrop's Military Law and Precedents (Reprint), p. 49). While the functions of a court-martial and the reviewing authority should remain separate and distinct, it is equally essential to the enforcement of military discipline that members of courts-martial be made aware of the gravity of certain offenses and the need of drastic punishments to deter commission thereof. For a commanding officer to inform his courts-martial of offenses that are impairing

the efficiency and discipline of his command and to suggest to them his opinion of appropriate sentences, the ultimate decision in each specific case being left, of course, to the wisdom and judgment of the court is consistent with all our principles of military justice. * * *"

The principles stated in the foregoing quotation are sound and well settled. As the Board of Review in the instant case in its opinion concedes, it is proper for a military commander to inform courts-martial of the need for the imposition of severe punishment for certain offenses. The Commanding Generals of the Army Air Forces and the Third Air Force as it was their right and duty to do, informed the personnel of their commands, including the officers who subsequently sat as members of the court, that the welfare of the air forces was being seriously threatened by the increasing prevalence of hazardous flying and urged that stern measures be taken to stop the practice. Manifestly, their proper purpose in so doing so far as courts-martial proceedings were concerned was to persuade and influence such courts to impose more severe punishment for hazardous flying. Why then should the sentence in the present case be invalidated merely because the desired and contemplated result of a proper and legitimate expression of policy appears to have been accomplished? There is no evidence that the members of the court were in any manner coerced or intimidated. If they deferred to the wishes of the commanding generals in imposing the sentence of dismissal, so far as the record shows, they did so freely and voluntarily.

The effect which a sentence may have in deterring others from committing similar offenses is one of the factors which a court-martial properly may consider in fixing the punishment. In the present case the recommendation for clemency sets out four reasons in support of the suggested commutation of the sentence, namely, the previous good record of the accused, his "salvage value", the necessity for preserving manpower and the fact that the "lesser sentence" would be sufficient to "discipline this officer". It is significant that the recommendation does not state that the "lesser sentence" was believed to be sufficient to deter others from committing like offenses. This deterrent factor may well have been the consideration which influenced the members of the court to adjudge dismissal even though they otherwise would have been inclined to impose a punishment less severe for the reasons specifically stated in their recommendation for clemency.

I do not agree with the conclusion of the Board of Review that by reason of fundamental unfairness of his trial the accused has been deprived of his constitutional right to due process of law. The court was legally constituted and had jurisdiction of the offense and of the person of the accused, the findings of guilty are supported by the evidence and the sentence is within the power of the court to impose for the offense involved. I cannot subscribe to the doctrine that under such circumstances the sentence

becomes a legal nullity merely because it appears that the court in fixing the punishment took into consideration and voluntarily deferred to a general declaration of policy of a military commander as to what he considered an "appropriate" sentence upon conviction of an offense the prevalence of which he regarded as a serious threat to the discipline and welfare of his command.

5. In a memorandum to me dated 7 October 1944, Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, states that:

> "1. I have considered the evidence in the case of the above named officer who was convicted of buzzing Clearwater Beach, Florida.
>
> "2. In my opinion this officer was guilty of serious and wilful violation of flying regulations for which he deserves severe punishment. I do not, however, believe that his misconduct was aggravated to the extent that the best interests of the service require his dismissal.
>
> "3. I, therefore, recommend that the sentence be commuted to forfeiture of pay in the amount of $75 per month for six months."

I concur in the recommendation of the Deputy Commander, Army Air Forces, and also recommend that the sentence be confirmed but commuted to a forfeiture of pay of $75 per month for six months, and that the sentence as thus modified be ordered executed.

6. Attention is invited to the recommendations for clemency attached to the record of trial, one, mentioned above, by all of the members of the court-martial and the other by the commanding officers of the squadron and bombardment group of the accused. Consideration has also been given to the following letters requesting clemency: From Mrs. A. A. Davis, the wife of accused, directed to the President, dated 9 May 1944; from Mary L. Eads and Charles J. Eads, Sr., directed to the President, dated 17 May 1944; from Honorable Lee O'Daniel, United States Senator, dated 25 May 1944, inclosing copy of a letter from Mr. R. L. Morrison of Graham, Texas, dated 23 May 1944; from Honorable Ed Cossett, Member of Congress, directed to me, dated 25 May 1944 and inclosing a letter from Mr. R. L. Morrison of Graham, Texas, dated 23 May 1944; from Honorable Tom Connally, United States Senator, dated 19 June 1944, referring to me a letter from Miss Hortense Gregory of Dallas, Texas, dated 12 June 1944; from Mr. C. A. Heiser, directed to me dated 19 June 1944, and from Honorable Hatton W. Sumners, Member of Congress, directed to me, dated 21 June 1944 and inclosing a letter from Mr. Luis V. Nogueira of Dallas, Texas, dated 14 June 1944.

7. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and two forms of Executive action marked A and B. Draft A is designed to accomplish the confirmation and commutation of the sentence in accordance with my recommendation and Draft B is designed to accomplish the disapproval of the findings and sentence in accordance with the opinion of the Board of Review.

Myron C. Cramer

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

11 Incls.
Incl 1 - Record of trial.
2 - Dft. ltr for sig. S/W.
3 - Form of Action (Draft A).
4 - Form of Action (Draft B).
5 - Ltr. fr. Mrs. Davis, 9 May/44.
6 - Ltr. fr. Mary Eads and Charles Eads, Sr., 17 May/44.
7 - Ltr. fr. Sen. O'Daniel, 25 May/44, w/incl.
8 - Ltr. fr. Hon. Gossett, 25 May/44, w/incl.
9 - Ltr. fr. Sen. Connally, 19 June/44.
10 - Ltr. fr. Mr. Heiser, 19 June/44.
11 - Ltr. fr. Hon. Sumners, 21 June/44, w/incl.

(Sentence confirmed but commuted to forfeiture of pay of $75 per month for six months. G.C.M.O. 584, 25 Oct 1944)

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

SPJGQ
CM 253252

21 APR 1944

UNITED STATES v. First Lieutenant JOHN A. STEELE (01551526), 3464th Ordnance Medium Maintenance Company.	76TH INFANTRY DIVISION Trial by G.C.M., convened at Camp McCoy, Wisconsin, 14 January 1944. Dismissal.

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OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

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

Specification: In that First Lieutenant John A. Steele, 3464th Ordnance Medium Maintenance Company, did, without proper leave, absent himself from his organization at Camp McCoy, Wisconsin, from about 7 December 1943 to about 11 DECEMBER 1943.

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

Specification: In that First Lieutenant John A. Steele, 3464th Ordnance Medium Maintenance Company, was, at Milwaukee, Wisconsin, on or about 10 December 1943, in a public place, to wit: U.S.O., 740 North 4th Street, Milwaukee, Wisconsin, drunk while in uniform.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge II and of Charge II as involves a finding of guilty of that Specification in violation of Article of War 96, approved the sentence and forwarded the record of trial for action under Article of War 48.

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

For a period of approximately two weeks prior to, and on, 7 December 1943, the accused was a member of 3464th Ordnance Medium Maintenance Company. On 4 December 1943 accused requested and was granted a two-day leave of absence. He left his station on 4 December and his leave expired at midnight on 6 December. On the morning of 7 December 1943 at 7:50 it was discovered that accused was still absent. About 8 a.m. that same date a search for him was made in the barracks, shops and other company buildings, but he was not found (R. 67). An appropriate entry, recording his absence, was made in the morning report of accused's organization on 7 December 1943 and a certified extract copy of the same was admitted in evidence (R. 8; Pros. Ex. A). On 13 December 1943 he voluntarily returned to his organization and station (R. 8).

Meanwhile, however, the accused had been in Milwaukee, Wisconsin, and there visited the rooms of the U.S.O. on the night of 10 December 1943 at about 7:30 o'clock in company with Canadian Flight Officer Sherwood (R. 14). His appearance and conduct at that time was such, however, as to cause Sergeant Chester R. Pelczysnki, who was then on duty as a military policeman, to call the Assistant Provost Marshal, Lieutenant Norbert O. Berner, and report that accused was in the U.S.O. rooms while under the influence of liquor (R. 16). Sergeant Pelczysnki testified that at about 7:15 p.m. on that date the accused, accompanied by the Canadian officer, came into the main or reception room of the U.S.O. talking loudly. The accused's cap was set awry on his head at an angle of 45 degrees, and although he was clothed in the full uniform of an officer his blouse needed pressing and there were dark, stained spots on his trousers. His tie was loosened and away from his collar. His eyes were bloodshot and he weaved back and forth instead of standing straight and touched the building from time to time to support himself as he moved along (R. 18). The Sergeant smelled liquor on the breath of both the accused and the Canadian officer (R. 16, 19). In the opinion of Sergeant Pelczysnki the accused was drunk (R. 17). There were enlisted men present during the time the accused and his companion were in the building and, at one time, the Canadian officer was heard to say that "he didn't want anything to do with enlisted men there" (R. 17) and he wanted to leave "because there might be trouble" (R. 16).

Lieutenant Berner, upon receiving Sergeant Pelczysnki's report, accompanied by Sergeant Wayne F. Ziegler, Military Police, who acted as his chauffeur, went to the U.S.O. building (R. 10) where, as they approached the front entrance, they saw accused coming out preceded by the Canadian officer. Accused walked down the steps and then turned and proceeded toward Lieutenant Berner. He had an unkempt appearance and his cap was still twisted toward the right at an angle of 45 degrees and his short mackinaw overcoat was unbuttoned (R. 11)

By stipulation it was agreed that Lieutenant Norbert O. Berner, Corps of Military Police, would testify that the accused was, at that time, "unsteady on his feet; his clothes consisting of a United States Army officer's uniform were disarrayed; his pinks were spotted from stains and his officers' cap was placed crooked on his head". In the opinion of Lieutenant Berner, the accused "was drunk when escorted from the U.S.O. * * *". "In walking from the U.S.O. to my (Lieutenant Berner's) office, Lieutenant Steele could not walk straight. He was continually going off to one side and had to be helped along by (his companion), the Canadian officer. When questioned his answers were not logical or responsive * * * I saw him reel against the building several times and put his hand there to help himself along."

During the examination at Military Police Headquarters the accused, when asked regarding his status, "said that he was away on leave but that he did not have his leave papers with him". After cautioning both officers, Lieutenant Berner dismissed them but told accused to get himself cleaned up and report back immediately to his commanding officer at Camp McCoy (R. 20; Pros. Ex. B).

At 9:15 p.m. on the following day (11 December 1943) Staff Sergeant Roy A. Numme, of Camp McCoy, Wisconsin, went to Military police Headquarters in Milwaukee, Wisconsin and reported to Lieutenant Berner that accused's commanding officer requested the military police to be on the lookout for the accused who was absent without leave. Lieutenant Berner thereupon immediately notified all the military police to find accused (Pros. Ex. B). He was eventually discovered in the bar room of the Miller Hotel at about 10:00 p.m. and taken to Military Police Headquarters (R. 9, 10, 13) where Lieutenant Berner again questioned him about his status. Accused reiterated that he was on leave but that he did not know where his leave papers were. He finally admitted, however, that he was lying and that he had been on a leave status which had expired at midnight 6/7 December 1944. (Pros. Ex. B, but see stipulation on R. 20 regarding erroneous date).

Sergeant Pelczysnki testified on cross-examination that accused's conduct in the U.S.O. was neither disorderly in any way nor an annoyance to anyone, except for the loud talking between the accused and the Canadian officer (R. 20).

By stipulated testimony of Lieutenant Berner it appears that accused was not boisterous or abusive while in his presence on the occasion when the sergeant brought him from the U.S.O. to Military Police Headquarters. At that time accused was soft spoken and, other than Sergeant Pelczysnki, no one at either the Miller Hotel or the U.S.O. had made any complaint against the accused (Pros. Ex. B).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified substantially as follows:

He had met a Canadian Flight Officer by the name of Lieutenant Sherwood (R. 24), who had served in the same theater of operations with him and, at about 3:00 or 3:30 p.m. on the afternoon of 7 (11) December 1944, they had gone to the Officers' Lounge (Milwaukee, Wisconsin), where the accused had five drinks of scotch whiskey and coca cola during a period of about two and one-half or three hours. From the lounge they went to the U.S.O. rooms. On the way they stopped at a hotel where accused had another drink. The Canadian Flight officer was trying to find some Canadian soldiers and it was upon this quest that he and accused went into the hotel and later into the U.S.O. (R. 23, 27).

At the U.S.O. they looked around, both downstairs and upstairs, seeking enlisted men with Canadian insignia on their uniforms (R. 24-26). The Canadian officer, meanwhile, feared there would be trouble and wanted to get away as soon as possible (R. 24) but accused "wanted to stay and see what the trouble was" (R. 25). After about ten minutes Sergeant Perrigo spoke to the accused. Immediately thereafter accused and his Canadian companion were taken by Lieutenant Berner to Military Police Headquarters where, after interrogation respecting their status, they were released (R. 23, 28). When Lieutenant Berner asked him whether he was on leave, accused had replied in the affirmative, but did not consider that he was telling a falsehood because he had not been asked whether he was absent without leave at the time (R. 29). He admitted that Lieutenant Berner, on the night of 11 December 1943 had ordered him to "clean up and get back to your organization" (R. 29), and further stated he did not know why he failed to obey this order because he knew, when he awoke the next day, that he was absent without leave (R. 30).

Theodore H. Zenz, Civilian Automotive Adviser with the Second Army, at Camp McCoy, Wisconsin, testified that he has known accused since April 1943 and had seen him since then about three or four days a week. He has never observed the accused conducting himself in a manner unbecoming an officer and a gentleman and, in his opinion, the accused "does his work well" (R. 21-23).

A certificate of the accused's honorable discharge from enlistment in order to accept a commission as an officer was admitted in evidence (R. 24; Def. Ex. A).

5. By competent evidence it was shown that the accused was absent without leave from his organization from 7 December 1943 to 11 December 1943, as charged in the Specification of Charge I. The extract copy of the morning report of accused's organization shows his initial absence, and the testimony of the members of the Military Police organization in Milwaukee, Wisconsin, evidence the time of his return to military control on 11 December 1943 after which, under verbal orders so to do, he returned to his organization on 13 December 1943.

Nor is there any doubt that the accused, while so absent, was drunk in a public place while in uniform as alleged in the Speci-

fication of Charge II. The evidence discloses that he went in company with a Canadian Flight Officer into the rooms of the United Service Organization in Milwaukee, Wisconsin on 10 December 1943. Accused admitted, that before going there, he had taken five drinks of scotch whiskey and coca cola within a period of approximately three hours. Whether his conduct while in these rooms was disorderly is doubtful, for no one, except a Sergeant of Military Police, found any cause to complain about it and the sergeant testified that the accused was not disorderly and caused no annoyance except by his loud talking. The Assistant Provost Marshal, who later examined the accused after he had voluntarily accompanied the police officer to Military Police Headquarters for examination, stated that the accused was "soft-spoken" and neither boisterous nor abusive at any time while in his presence. Accordingly, there is nothing in the record of trial which would justify a finding that the accused's conduct was disorderly either during the time or at the place alleged in the Specification of Charge II. That he was drunk is conclusively established by the testimony of both the Sergeant of Military Police and the Assistant Provost Marshal. The former smelled liquor on the breath of both accused and his companion, and testified that accused's eyes were bloodshot, his clothes were in a slovenly condition, he wore his cap in a rakish manner, wavered back and forth when standing still, and was obliged to brace himself against the wall of the building for support as he weaved down the street, between the entrance of the U.S.O. and the car, where the Assistant Provost Marshal awaited him. The latter corroborated the sergeant's testimony as to the disarray of the accused's clothing and his unsteady gait, and added that accused was neither logical nor responsive in answering questions. Both the sergeant and the Assistant Provost Marshal were of the opinion that the accused was drunk during the time he was in the U.S.O. building, and later when he left it to proceed to Military Police Headquarters. This evidence abundantly and clearly sustains this conclusion. Although accused's drunkenness was not of such gross character, nor accompanied by such conspicuous disorder as to justify a finding of guilt under Article of War 95, it was legally sufficient to constitute a violation of Article of War 96.

6. Records of the War Department disclose that accused was born in Houston County, Georgia and is now 32 years and 4 months of age. He graduated from high school in 1930. During 1932-34 he was employed as a salesman and used car manager by the Shackelford Chevrolet Company; in 1934-39 he was a foreman employed by D. R. Pierce in timber operations; and in 1940 he was a rigbuilder for the Texas Oil Company. He was inducted on 5 December 1940. From 2 September to 1 December 1941 he attended the Artillery School at Aberdeen, Maryland. While in the grade of Technical Sergeant he made application to attend Officers Candidate School, Aberdeen Proving Ground, Maryland. On 28 November 1942 he was commissioned a second lieutenant, Army of the United States, and assigned to the 591st Ordnance Company. On 24 September 1943 he was promoted to first lieutenant, A.U.S. He is not married.

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 either Article of War 61 or Article of War 96.

William A. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Fredriksen, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 APR 1944 - 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 John A. Steele (01551526), 3464th Ordnance Medium Maintenance Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

Myron C. Cramer

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

3 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed but execution suspended. G.C.M.O. 299, 17 Jun 1944)

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

SPJGV
CM 253254

26 MAY 1944

UNITED STATES	100TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Bragg, North Carolina, 15 March 1944. Dismissal.
Second Lieutenant JOHN L. ROBERTSON (0-1322710), Infantry.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant John L. Robertson, 399th Infantry, did, in the Tennessee Maneuver Area, on or about 22 November 1943, borrow the sum of Five ($5.00) Dollars from 1st Lieutenant Stephen F. Gancar, Company G, 399th Infantry, which amount became due and payable within a reasonable time after 22 November 1943, and did, in the Tennessee Maneuver Area and at Fort Bragg, North Carolina, from about 22 November 1943 to about 11 February 1944, on which last named date he was transferred to Fort George G. Meade Replacement Depot No. 1, dishonorably fail and neglect to pay said debt.

Specification 2: In that 2nd Lieutenant John L. Robertson * * *, did, in the Tennessee Maneuver Area, on or about 15 January 1944, borrow the sum of Ten ($10.00) Dollars from Private Charles Madonia, Company E, 399th Infantry, which amount

became due and payable 31 January 1944; and further in that from 31 January 1944 to about 11 February 1944, when he was transferred to Fort George G. Meade Replacement Depot No.1, the said 2nd Lieutenant Robertson did dishonorably fail and neglect to pay said debt.

Specification 3: In that 2nd Lieutenant John L. Robertson, * * *, did, at Fort Bragg, North Carolina, on or about 26 January 1944, borrow the sum of Thirty-Three ($33.00) Dollars from Sergeant Charles W. Blanchard, Company E, 399th Infantry, which amount became due and payable 31 January 1944; and further in that from 31 January 1944 to about 11 February 1944, when he was transferred to Fort George G. Meade Replacement Depot No. 1, the said 2nd Lieutenant Robertson did dishonorably fail and neglect to pay said debt.

Specification 4: In that 2nd Lieutenant John L. Robertson, * * *, did, at Fort Bragg, North Carolina, on or about 25 January 1944, borrow the sum of Ten ($10.00) Dollars from Private First Class Joseph P. Casella, Company E, 399th Infantry, which amount became due and payable 31 January 1944; and further in that from 31 January 1944 to about 11 February 1944, when he was transferred to Fort George G. Meade Replacement Depot No. 1, the said 2nd Lieutenant Robertson did dishonorably fail and neglect to pay said debt.

Specification 5: (Withdrawn by the prosecution at the direction of the convening authority).

Specification 6: In that 2nd Lieutenant John L. Robertson, * * *, did, at Fort Bragg, North Carolina, on or about. 25 January 1944, borrow the sum of Twenty ($20.00) Dollars from Private Andrew B. Paul, Company E, 399th Infantry, which amount became due and payable 31 January 1944; and further in that from 31 January 1944 to about 11 February 1944, when he was transferred to Fort George G. Meade Replacement Depot No. 1, the said 2nd Lieutenant Robertson did dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lieutenant John L. Robertson, * * *, did, at Fort Jackson, South Carolina, on or about 6 November 1943, borrow a Gruen wrist watch of the value of about Fifty ($50.00) Dollars from Private Charles Madonia,

Company E, 399th Infantry, which watch 2nd Lieutenant Robertson was obligated to return to Private Madonia within a reasonable time after 6 November 1943; and further in that from 6 November 1943 to about 11 February 1944, when he was transferred to Fort George G. Meade Replacement Depot No. 1, did, and does still, dishonorably fail and neglect to return said watch to Private Madonia.

Specification 8: In that 2nd Lieutenant John L. Robertson, * * *, in the Tennessee Maneuver Area, on or about 1 January 1944, did retain Fifteen ($15.00) Dollars out of the proceeds of a pay check for Eighteen Dollars and nine cents ($18.09) which he cashed for Private Charles Madonia, Company E, 399th Infantry, with the understanding that he, the said 2nd Lieutenant Robertson, would deliver, or pay, Fifteen ($15.00) Dollars to Captain JO B. Sedberry, III, 399th Infantry, in payment of a debt of Fifteen ($15.00) Dollars owed by Private Madonia to Captain Sedberry; and further in that from about 1 January 1944 to about 11 February 1944, when he was transferred to Fort George G. Meade Replacement Depot No. 1, the said 2nd Lieutenant Robertson did dishonorably fail and neglect to pay Captain Sedberry Fifteen ($15.00) Dollars in keeping with his promise.

Specification 9: In that 2nd Lieutenant John L. Robertson, * * *, did, in the Tennessee Maneuver Area, on or about 26 January 1944, borrow the sum of Forty-Two ($42.00) Dollars from Private First Class James C. Lombardi, Company E, 399th Infantry, which amount became due and payable within a reasonable time after 1 January 1944, and did, at Fort Bragg, North Carolina, from about 26 January 1944 to about 11 February 1944, on which last named date he was transferred to Fort George C. Meade Replacement Depot No. 1, dishonorably fail and neglect to pay said debt.

Specification 10: In that 2nd Lieutenant John L. Robertson, * * *, did, in the Tennessee Maneuver Area, on or about 26 January 1944, borrow the sum of Ten ($10.00) Dollars from Private First Class Joseph Gribas, Company E, 399th Infantry, which amount became due and payable within a reasonable time after 1 January 1944, and did,

at Fort Bragg, North Carolina, from about 26 January 1944 to about 11 February 1944, on which last named date he was transferred to Fort George G. Meade Replacement Depot No. 1, dishonorably fail and neglect to pay said debt.

After presentation of its case, the prosecution requested permission to amend Specifications 9 and 10 and, the defense having no objection, these Specifications were each amended as follows:

By striking the words "on or about 1 January 1944" and substituting therefor the words "on or about 26 January 1944", and by striking the words "Tennessee Maneuver Area" and substituting therefor the words "Fort Bragg, North Carolina".

The accused pleaded not guilty to, and was found guilty of, all Specifications (Specification 5 withdrawn) and the Charge. 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 for action under Article of War 48.

3. In support of Specification 1 of the Charge, the evidence shows that on 22 November 1943, while accused was on maneuvers with his organization, he borrowed $5 from First Lieutenant S. F. Gancar of Company G, 399th Infantry (R. 5). Sometime thereafter during maneuvers "at the completion of problem 06 or 07", Lieutenant Gancar asked accused "if he remembered that he owed" the money to which accused replied that he was mindful of the debt and would pay it (R. 5, 6). During maneuvers Lieutenant Gancar encountered accused at least once a week, sometimes more often, inasmuch as they were in the same battalion (R. 6, 7). They returned from maneuvers to Fort Bragg on or about 14 January 1944 and in the early part of February the accused was transferred from the 100th Infantry Division to Fort Meade, Maryland. The loan of $5 was repaid to Lieutenant Gancar on 6 March after the accused had been transferred back to the 100th Infantry Division (R. 6). The Charge against the accused was preferred on that same day.

In support of Specification 2 of the Charge, the evidence shows that on 15 January 1944, just after leaving the maneuver area, the accused borrowed $10 from Private First Class Charles Madonia, a soldier in accused's organization, Company E, 399th Infantry Regiment (R. 7, 8). The loan was to be repaid on pay day, 1 February (R. 8, 10).

On 1 February Madonia was on a nine-day furlough from which he returned on or about the 7th or 8th of February. When he returned accused had left the organization, having gone to a port of embarkation. Madonia heard that the accused had left $200 at the company orderly room "to pay the men" but investigation proved this rumor to be completely false (R. 8). The loan was repaid sometime around 8 March, about a week before the trial of accused and two days after the Charge had been preferred (R. 14).

In support of Specification 3 of the Charge, the evidence shows that on or about 26 January 1944, accused borrowed the sum of $33 from Sergeant Charles W. Blanchard, also of Company E, 399th Infantry. Sergeant Blanchard was leaving on furlough that same day and accused told him he would wire him the amount of the loan on pay day. The sergeant gave accused the address to which the telegram was to be sent but the accused did not keep his promise (R. 20). When the sergeant returned from furlough on 7 February he discovered the accused had been transferred to Fort Meade, Maryland, a port of embarkation, and had not made any arrangement to repay the loan. The loan was eventually repaid to the sergeant on 6 March by a Lieutenant Miller, apparently the special defense counsel originally selected by accused (R. 20-22, 37, 38). The sergeant had previously made other loans to the accused which had been repaid as agreed (R. 21).

In support of Specification 4, the evidence shows that, sometime between 17 January and 30 January 1944, Private First Class Joseph Casella, also of Company E, 399th Infantry, loaned the accused $10 at Fort Bragg. Accused stated to Casella that he would repay it "when he got paid" (R. 22, 23). Casella went on furlough on 30 January and returned about 13 February (R. 23). When Casella returned he found that the accused had been transferred and had left Fort Bragg (R. 23). Casella had not given accused his address when he went on furlough and when he returned he found that no arrangements had been made for repayment of the loan (R. 24). Accused repaid this loan about a week or two prior to the date of the trial, i.e., a week or two prior to 15 March (R. 24).

In support of Specification 6, the evidence shows that about six days before pay day, which would have been approximately 25 January 1944, Private Andrew B. Paul, also of Company E, 399th Infantry, was in his organization's mess hall when accused entered and stated that "he had a date in town and that he was broke and that he wanted to borrow Twenty Dollars from anyone and that he would pay back Twenty-Five dollars" (R. 24, 25). Paul loaned accused $20 which the latter agreed to repay on

pay day. Sometime between the date of the loan and the 6th or 7th of February, accused asked Paul if he was worried about his money and informed him that he had not as yet received his pay (R. 25). On the day accused left the organization on his transfer to Camp Meade, apparently around the 6th of February, Paul saw the accused and was going to inquire about repayment of the loan but refrained from doing so inasmuch as there was another officer present (R. 25). Prior to accused's transfer to Camp Meade he said nothing to Paul about repaying the loan and made no arrangement for its repayment (R. 25). Subsequently Paul went on an eleven-day furlough from which he returned on the day of trial, 15 March. That morning he was repaid by Sergeant Rogers, First Sergeant of Company E (R. 26).

In support of Specification 7, the evidence shows that in the early part of November 1943, when accused's organization was going on maneuvers, he borrowed a watch from Private Madonia for the duration of the maneuvers (R. 9, 11). The accused had been assigned to the umpire detail during maneuvers and Madonia had been detailed as his flag orderly (R. 11). Madonia told accused the watch belonged to him although in fact he had borrowed it from another soldier, one Private Balchumas (R. 9, 11). Just before leaving the maneuver area, sometime around the middle of January, not seeing the watch on accused's wrist, Madonia asked him what had happened to it, informing him that it was worth about $25. Accused told Madonia that he had loaned it to a Lieutenant Sheesley and that he need not worry about it because accused would either return the watch or pay for it on pay day (R. 9, 11, 12). About a week before the date of trial of the accused, the watch was returned to Madonia by a Lieutenant Miller (R. 9). Madonia had been on a nine-day furlough returning to his organization about the 7th or 8th of February and thus was not present on the January pay day (R. 9).

In support of Specification 8, the evidence shows that during the latter part of November 1943, while on maneuvers, Private Madonia borrowed $15 from Captain J. B. Sedberry, 2nd Battalion, 399th Infantry, who was battalion supervisor of the team on which Madonia was flag orderly (R. 12, 15). The loan was to be repaid by next pay day(R.13). It was agreed between Madonia, Captain Sedberry and accused that when the captain should give Madonia his next pay check, he would endorse it to the accused to cash and to withhold $15 from it to repay the captain. This was to occur at the Andrew Jackson Hotel in Nashville on a particular Saturday night at 6 p.m. (R. 15, 16, 17). Madonia received a pay check for $18.09 which he endorsed and gave to the

accused, receiving therefor $3.09, and accused's promise that he would pay Captain Sedberry (R. 10, 12, 13, 15, 16). Captain Sedberry saw the accused at about the stipulated time but apparently he had not as yet received the check from Madonia. Although the captain told accused he would return later that night he did not do so (R. 16). He never asked the accused for the money nor did the accused offer to pay it until three or four days before the date of trial, i.e., on or about the 11th or 12th of March, when the captain received repayment thereof (R. 16, 18). The accused made no arrangement to pay this $15 before he transferred to Camp Meade in the early part of February (R. 16).

In support of Specification 9 the evidence shows that about a week before accused was transferred to Camp Meade he borrowed $42 from Private First Class James C. Lombardi, also of Company E, 399th Infantry (R. 27). The accused told Lombardi that he needed money, that he was going home on leave and that if he didn't return, he would mail repayment of the loan to Lombardi (R. 27). At the time the loan was made, Lombardi did not expect to be paid right away but expected "When he (accused) had it he would send it to me" (R. 29). On 5 February accused told Lombardi in the orderly room of Company E that he was going home before leaving for a port of embarkation but not to worry about repayment of the loan because accused would send the money to him. He told Lombardi "to tell the same thing to the other men" (R. 29, 30). The accused did not send the money to Lombardi (R. 27, 30). Lombardi went on furlough the latter part of February and after he returned on 1 March the accused repaid the loan (R. 27).

In support of Specification 10, the evidence shows that on 25 January 1944, the accused borrowed $10 from Private First Class Joseph Gribas also of Company E, 399th Infantry (R. 30). The accused did not state when he would repay it, did not talk to Gribas at any time between the date of the loan and the date he was transferred to Camp Meade, and made no arrangements to repay the loan before he was so transferred (R. 31). The loan was eventually repaid by an unidentified major on 6 March (R. 31).

4. After his rights had been fully explained to him the accused elected to take the stand and testify under oath in his own behalf. The substance of his testimony is as follows: He was employed as a fireman on the Pennsylvania Railroad and had been classified 3A by his draft board when, on 18 May 1942, he enlisted in the Army as a Volunteer Officer Candidate (R. 32). When interviewed for officers' candidate school he was found deficient in military experience and was rejected

whereupon he elected to remain in the Army, apparently waiving his discharge (R. 32, 33). He attended a noncommissioned officers school at Camp Wheeler, Georgia, graduating in April 1943 and was immediately sent to Fort Benning, Georgia, apparently for officer's training. He received his commission as second lieutenant on 24 July 1943 and on 9 September 1943, he was transferred to the 100th Infantry Division (R. 33). The accused admitted borrowing the money alleged in Specifications 1, 2, 3, 4, 6, 9 and 10 of the Charge (R. 33). The bulk of it was borrowed after 18 January 1944, and, at the time it was borrowed, accused agreed upon the 1st of February as the date of repayment; he left the impression with his creditors that they could expect repayment on that date (R. 34). The accused needed the sum total of these loans, approximately $140, because the "officer's club bill of eighty-two dollars had to be paid, housekeeping expenses and shortages of clothing, and I didn't have any money with me" (R. 34). In speaking of shortages of clothing the accused was referring to "an overcoat and OD's" which he had to replace (R. 41). He expected to repay these loans from his pay check due around the 1st of February. His monthly pay check amounted to about $169 of which he sent his wife $100 every month and he expected to make up the difference necessary for repayment of his debts from funds to be obtained from his father (R. 34). The accused had sold an automobile for $300 before entering the Army and he had given the money to his father with the understanding that he could draw upon him for it (R. 35). The accused received his pay check for $169 on 2 February but did not use it to apply on his debts (R. 35). He gave the following as his reason for not doing so:

> "I couldn't cash the check right then, and then I was told that I was going to POE, Fort Meade, Maryland. I hadn't received the money from my father as yet, I needed additional equipment to clear Post and therefore didn't want to do anything with the money as yet" (R. 35).

Thereafter he told Private Lombardi that he had been ordered to Camp Meade, Maryland, that he had a five-day leave before transferring and that the loan from Lombardi and the other men would be repaid. The accused went on leave the morning of 5 February (R. 35). He cashed his pay check on the night of 3 February but did not make any effort to repay any of his debts before leaving the post on 5 February (R. 39). Neither did he wire Sergeant Blanchard the money to repay his loan as he had promised (R. 40).

The accused went on a five-day leave on 5 February visiting his wife and father in Philadelphia. He gave his wife $100 from his

pay check funds of $169, discussed his financial affairs with his father and obtained his father's promise to have some money for him by the end of the month (R. 35, 36). He then reported at Camp Meade on 11 February and remained there until 24 February where he was given a seven-day leave which he used to visit his father again and discuss his indebtedness. Accused was also counting on another pay check about the 1st of March to help square his accounts. He intended to repay all his debts before he shipped out of the country (R. 36). When he returned to Camp Meade on 1 March he received orders to return to Fort Bragg. Accused thought he was being returned for further duty with troops (R. 36). He proceeded first to Philadelphia, obtained $158 from his father on 2 March and then continued on to Fort Bragg, arriving there about 3 March. Upon reporting he was ordered into arrest in quarters (R. 37). Accused then selected a Lieutenant Miller as his defense counsel, told him he had the money to pay his debts and Lieutenant Miller apparently took the money, paid some of the men on 6 March and left the rest of it with Sergeant Rogers to pay those men who were on furlough (R. 37-38).

Accused had returned from maneuvers on 18 January but had not sought to encounter Captain Sedberry because he was "ashamed to face him" (R. 38). However, sometime after that date he did see the captain and told him that he had "spent the money" which was due the captain in discharge of Madonia's indebtedness (R. 38). The accused intended to pay this indebtedness to Captain Sedberry sometime (R. 38).

Captain Guy S. Athearn, First Lieutenant George L. Bradbury and First Sergeant John J. Rogers, all of Company E, 399th Infantry, testified that the accused had been a good officer in their organization and that his work had been entirely satisfactory (R. 42-44). The defense also introduced a letter of commendation from Colonel Grant Layng, Commanding Officer, 137th Infantry, complimenting accused for his "excellent zealousness and conscientious devotion to the job on hand" while acting as a member of the umpire detail on maneuvers (R. 45; Def. Ex. 1).

5. The neglect or failure of an officer to pay a debt or to keep a promise to do so is not a military offense unless characterized by dishonorable conduct (1 Bull. JAG 106). Neglect to pay a debt promptly, accompanied by fraud or deceit, constitutes dishonorable neglect to pay in violation of Article of War 95 (Dig. Op. JAG, 1912-40, sec. 453 (14)). The failure of an officer to keep

his promise to pay a debt is dishonorable if the promise was made with a false or deceitful purpose or if the failure to pay is characterized by a fraudulent design to evade payment (1 Bull. JAG 22, 23).

The evidence offered under Specification 1 shows that accused borrowed $5 from a brother officer on 22 November 1943 and, when the lender inquired about repayment sometime prior to 14 January 1944, the accused acknowledged the indebtedness and stated it would be paid. The accused testified that he had agreed to repay this loan, and the other loans made to him in January, by the 1st of February. Although he left his organization about 5 February on a change of station, after receiving and cashing his January pay check for $169, eventually proceeding to Camp Meade, Maryland, preliminary to embarkation, he did not pay this indebtedness or any part thereof before leaving. It was finally repaid on 6 March, the day the instant court-martial charge was prepared. Of his January pay of $169 he gave $100 to his wife whom he visited while on leave just prior to reporting at Camp Meade. It is thus apparent that, at the time accused was being permanently separated from his organization and although he had funds available, he refrained from honoring his promise to pay this debt. He gave a vague and unsatisfactory explanation for his conduct (see par. 4, supra). Notwithstanding accused's protestations that he intended to pay this debt it was entirely reasonable for the court to conclude, from accused's failure to pay it at a time when he was in funds and was apparently severing his association with his organization, that he intended to evade payment of the debt. Neglect to pay, coupled with such an intention, constitutes dishonorable failure to pay a debt in violation of Article of War 95. The finding of guilty of Specification 1 is sustained.

The evidence offered under Specifications 2, 4 and 6 shows that between 15 January and 30 January the accused borrowed $10, $10 and $20 from three different enlisted men of his organization, promising to pay them on pay day, 1 February. He did not do so and made no arrangement for paying these debts before leaving his organization. The conduct of an officer in borrowing money from enlisted men of his organization is an offense under Article of War 96 (Dig. Op. JAG, 1912-40, sec. 453 (5); 1 Bull. JAG 106; 2 Bull. JAG 144). If such obligations are incurred under dishonorable circumstances or there is an inexcusable failure to repay them at the time agreed upon, such conduct constitutes a dishonorable failure to pay a debt in violation of Article of War 95 (Dig. Op. JAG, 1912-40, sec. 453 (5)). Two of these three enlisted men were on furlough when the due date arrived. The accused made no arrangements

for repaying them by depositing available funds with some responsible individual. He also made no attempt to repay the enlisted man who was present at the station. Failure so to do coupled with the fact that accused left shortly thereafter apparently on a permanent change of station constitutes a dishonorable failure to repay these borrowings from enlisted men in violation of Article of War 95. The evidence sustains the findings of guilty of Specifications 2, 4 and 6.

The proof offered in support of Specification 3 is substantially the same as that of Specifications 2, 4 and 6, except that the accused promised the enlisted man, who was to be on furlough over pay day, that he would telegraph money to him to repay the loan of $33. The accused did not telegraph him the money nor did he make any other arrangements to use available funds to repay the loan before transferring from his station. Such conduct likewise constitutes a dishonorable failure to pay the indebtedness in violation of Article of War 95. The evidence sustains the finding of guilty of Specification 3.

Under Specification 7 the evidence shows accused borrowed a watch from an enlisted man of his organization in early November 1943, subsequently loaned it to another officer and so informed the enlisted man when he inquired about the watch in January 1944, stating further that he would either return the watch or pay for it on pay day. The watch was eventually returned about a week before the trial of the accused on the instant charge. There was no apparent excuse for the failure to return this property as promised. The accused's conduct was dishonorable in violation of Article of War 95 and the evidence sustains the finding of guilty of this Specification.

Under Specification 8 the evidence shows accused agreed to cash a pay check of an enlisted man in his organization and retain $15 to be used promptly to pay the latter's indebtedness to an officer. The accused, however, failed to pay over the money and used it for his own purposes. The accused occupied a fiduciary capacity in this transaction and had assumed the duties of at least a quasi-trustee. His failure to discharge these duties is tantamount to a breach of trust. Such conduct is conduct unbecoming an officer and a gentleman (2 Bull. JAG 13). The evidence sustains the finding of guilty of this Specification.

Under Specification 9 the evidence shows accused borrowed $42 the latter part of January 1944 from an enlisted man in his organization and left the organization the early part of February without repaying the loan, stating only that he would mail payment

of it. When the loan was made the enlisted man expected the money would be repaid "when he (accused) had it" (R. 29). The accused testified that 1 February had been agreed upon as the date for repayment. The accused did not mail repayment during the month of February, the loan being repaid only after accused had been returned to Fort Bragg to answer the instant charges. The accused had received his January pay of $169 and had funds to discharge this debt or to apply in reduction of it before transferring from his organization. There was no valid excuse for his failure to do so and, thus, his neglect to respect his original promise of payment to this enlisted man of his organization was dishonorable. The finding of guilty of this Specification is sustained by the evidence.

Under Specification 10 the evidence shows accused borrowed $10 from an enlisted man of his organization about 25 January 1944. Although the lender testified that accused never did state when he would repay it, the accused, in his sworn testimony, stated it was another of the debts to be paid by 1 February. As in the case of the other loans, accused did not repay it on that date and transferred from his organization without making any arrangement for repayment, thus dishonorably neglecting to pay the debt on the due date. The evidence sustains the finding of guilty of this Specification.

6. The accused is about 24 years of age. War Department records reveal that he enlisted in the service on 18 May 1942. He attended Infantry Officers' Candidate School at Fort Benning, Georgia, and upon graduation therefrom was commissioned second lieutenant, Infantry, Army of the United States, 24 July 1943.

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

Thomas H. Tappy, Judge Advocate.

Kurtz M. Kidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 253254

1st Ind.

War Department, J.A.G.O., 9 June 1944 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 L. Robertson (0-1322710), 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 of the Specifications and the Charge that the accused, in violation of the 95th Article of War, dishonorably failed and neglected to repay seven loans made to him in the total amount of $130, to return or pay the value of a watch worth $25 loaned to him, and to pay to an officer $15 entrusted to him by an enlisted man for that purpose, legally sufficient to support the sentence and to warrant confirmation of the sentence.

3. The accused had a good military record during his service for more than a year as an enlisted man and for more than six months as an officer. His company officers declared him to be a good officer and found his military work entirely satisfactory. He received especial commendation from the commanding officer of the 137th Infantry for his performance of military duties while on maneuvers. All indebtedness has been paid and the watch has been returned. I recommend that the sentence be confirmed but, in view of the foregoing circumstances and mindful of the need of conserving to the utmost all personnel available and suitable for military duty, that the execution thereof be suspended during accused's good behavior.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 326, 27 Jun 1944)

In the Office of The Judge Advocate General
for the
China Burma India
Theater of Operations

C.M. 253311
(CBI 54)

5 Jan 1944

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

v.

Lowell E. Presley
(36046639)

(This opinion will be included in compilation of CBI cases)

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

(337)

15 JUN 1944

SPJGH
CM 253322

UNITED STATES v. Second Lieutenant STEVEN W. SMITH (0-809203), Air Corps.	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Newport Army Air Field, Newport, Arkansas, 7 and 24 March 1944. Dismissal, total forfeitures and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Steven W. Smith, Air Corps, AAF Pilot School (Basic), Newport Army Air Field, Newport, Arkansas, did, at Newport Army Air Field, Newport, Arkansas, on or about 10 February 1944, feloniously take, steal and carry away one wallet, value about $2.00, and its contents to wit, $183.00, lawful money of the United States, the property of First Lieutenant Harry A. Larsen.

Specification 2: In that Second Lieutenant Steven W. Smith, Air Corps, AAF Pilot School (Basic), Newport Army Air Field, Newport, Arkansas, did, at Newport Army Air Field, Newport, Arkansas, on or about 27 October 1943, feloniously take, steal and carry away one officer's topcoat with removable lining, value about $47.50, the property of Second Lieutenant Robert W. Johnston.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allewances due "and" to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of two (2) years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the Charge as involves a finding of guilty of the larceny of one officer's topcoat with removable lining, of some value, approved the sentence, but remitted one year of the confinement imposed, and forwarded

the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused and First Lieutenant Harry A. Larsen occupied adjoining rooms in Bachelor Officers' Quarters 501 at Newport Army Air Field, Newport, Arkansas. They drove to Jonesboro, Arkansas, together on the night of 9 February 1944, and went to a movie with the "girl friend" of accused. Lieutenant Larsen took out his wallet at the ticket window but as accused insisted on paying Lieutenant Larsen returned the wallet to his trouser back pocket. The wallet contained "about $180.00", his picture, and various papers bearing his name. They returned to the post about 0200 the following morning and Lieutenant Larsen went directly to his room, accused coming in after him. Lieutenant Larsen undressed, draped the trousers over the back of the chair with the legs on the seat and the pockets down "facing the floor", and retired. The light was still on at that time in the room of accused. Lieutenant Larsen arose about 0740 and went to the latrine to "wash up". Accused came in a few minutes later and proceeded to shave. When Lieutenant Larsen returned to his room to dress he noticed that his "AGO pass" which had been in his pocket with the wallet, was lying on the chair so he picked up his trousers and found that the wallet was gone. He called accused and told him that the wallet was missing. Accused made a phone call to his girl friend's house to see if it was there, and Lieutenant Larsen then called the picture theater, but without success. Accused said he was going to Memphis and would stop at Jonesboro to see if the wallet was there. Lieutenant Larsen decided to go himself, borrowed some money and gas tickets from accused, and went to Jonesboro but the trip was fruitless. When he returned to the field at about 1100 he found that "Captain Crescenzi" had the wallet. Lieutenant Larsen had not given accused nor anyone else permission to take it. The wallet, containing $183 in currency, gas ration books and other papers (Ex. 5), was identified by Lieutenant Larsen as his property (R. 6, 9, 14-20).

Captain Emil J. Crescenzi, provost marshal at the field, received a report concerning the loss of the wallet, on the morning of 10 February and went to interview Lieutenant Larsen and accused. He found that Lieutenant Larsen had gone to Jonesboro and that accused was not in his room. He left word "at the gate" to detain the car of accused. Accused came to the gate about 1000, and was taken to the provost marshal's quarters where Captain Crescenzi questioned him after warning him of his rights. Accused said he had gone to the theater at Jonesboro the preceding evening with Lieutenant Larsen and then returned to the field. He further said that he had gone to town that morning on business. Accused was searched and was then taken to his quarters which were searched. At the entrance to his quarters were two clothes closets, parallel to one another, and with the long side of the closets parallel to the entrance. The entrance was about two feet wide. Photographs of the entrance (Exs. 2 and 3) were received in evidence. During the search "Lt. Bailey" was inside the room, Captain Crescenzi near the clothes closets, Captain John E. Graham in the entrance, while accused

was in the hallway which extended in front of his room and the adjoining room of Lieutenant Larsen. In one of the clothes closets Captain Crescenzi found two topcoats and remarked about the number. Accused said he had received one coat from his father who was an officer and wore the same size clothing. One coat (Ex. 6) was removed by Captain Crescenzi from the closet, and later taken to his office and locked up. After searching the closets Captain Crescenzi noticed a gas mask (Ex. 4) on the top of the inner closet, took the mask down, opened the carrier flap, pulled out the face piece and felt around the cannister. He felt a wallet (Ex. 5) which he removed, examined, and found that it contained $183 in currency and papers bearing the name of Lieutenant Larsen. He dropped the wallet in the carrier, stepped toward the entrance and said, "Lt. Smith, you are under arrest". Accused said, "How did that get in there, Captain". Accused had not been in the room while Captain Crescenzi was inspecting the gas mask but Captain Crescenzi could not see where he was standing (R. 6-14, 20-23).

At the written request of accused, he was given an interview on 14 February 1944 by Colonel Robert W. C. Wimsatt, commanding officer of the Pilot School (Basic) at the field. After being warned of his rights accused made substantially the following statement: After he returned to camp with Lieutenant Larsen on the night of 9 February and had gone to his quarters he went back out to his car to get a razor he had left there. He got the razor and "brought Lt. Larsen's wallet back with him". The following morning he put the wallet under Lieutenant Larsen's pillow but as the bed had not been made up he took the wallet back to his own room. He (accused) had lost a wallet sometime previously and he wanted to make Lieutenant Larsen "sweat and teach him a lesson". Lieutenant Larsen told accused that he had lost his wallet, said he might have lost it at the movies in Jonesboro and borrowed money from accused to go there and search for it. When accused himself returned to the field and was taken to his room he did not remember at the moment that he had taken the wallet from Lieutenant Larsen's room and that he had hid it in his own room (R. 25-28).

Second Lieutenant Robert W. Johnston, Air Corps, testified that he lost his coat in the officers' mess at the field on 27 October 1943. He "got" to the officers' mess about 1000 and came back for his coat about 1020. He had purchased the coat in August 1943, at the George Field Post Exchange. "The night before it was taken" the wife of another officer had sewed the buckle on using a thread of a different color than was used in the rest of the coat. Lieutenant Johnston identified Exhibit 6 as the coat. He tried the coat on in court and counsel made the following comment: Defense: "Looks kind of big to me". Prosecution: "Looks fine to me". (R. 28-31).

First Lieutenant Francis Raphael, testified that he had been post exchange officer since November 1942, and in such capacity had purchased and sold, and was familiar with, the value of military clothing. Exhibit 6 would retail from $45 to $50 at the post exchange and from $50 to $60 in a commercial store. He had also purchased and sold, and was familiar with the value of wallets. Exhibit 5 was "worth from $3 to $4" (R. 31-32).

4. Evidence for the defense: It was stipulated that if Reverend Joseph H. Bond, Rector, St. Ann's Episcopal Church, Sayville, New York, were called as a witness he would testify under oath that he had known accused since he was a boy in the scouts and in the church choir; that he considered his present attempt at a "practical joke" unfortunate, misguided and silly; that accused was a "fine boy" and he had always found him honest and straightforward. It was further stipulated that if Mr. Leslie Weiss, President of Patchogue Electric Light Company, Patchogue, New York, were called as a witness he would testify under oath that the character and integrity of accused was of the highest degree during his several years employment by the Electric Light Company. Doctor P. W. Lutterloh, Jonesboro, Arkansas, had known accused since August 1943. Accused had frequently visited in his home and in other homes in Jonesboro and attended church there. His general reputation for truth and honesty was good. The Army Air Forces Officers' Qualification Record (Form 66-2) of accused was received in evidence (Exs. A, B, C; R. 33-36).

Mrs. Marguerite L. Smith, Patchogue, New York, mother of accused, testified that her husband had been an officer in the last war. They suffered serious reverses when accused was little and "sometimes we ate". Accused had St. Vitis dance when he was eight but he got back in school, was industrious and passed with the others. He worked after school on weekdays and on Saturday, bringing the money home. Accused was good but full of mischief, and did not drink or smoke. There were more reverses and with four children their "happiness had to be jokes on each other". Accused was like his father, jolly and foolhardy. When school was out accused went to work, started in "with a broom" and was assistant cashier before he left. In all honesty she could not tell a mean thing, a dishonest thing that "my boy" had done. He was honest, good and kind. She said this because it was "God's truth", not just because she was his mother. He was absolutely honest and trustworthy, and a good straightforward young man. He only went with "nice people". He had been sick all his life but he wanted to get into the service. When he got in he was really proud (R. 36-38)

Defense counsel made an unsworn statement in behalf of accused in pertinent part as follows: Accused had been in the service since 4 May 1942 and had about 642 flying hours to his credit. As Lieutenant Larsen testified, accused went with him to Jonesboro where they attended a movie. After returning to the field Lieutenant Larsen went in to their quarters while accused got in the back of the car to pick up his razor. He put on the lights to find the razor and then found the wallet of Lieutenant Larsen. He had no intention of keeping the wallet and intended to give it back to Lieutenant Larsen the following morning. However, he wanted to make the Lieutenant "sweat". The next morning he put the wallet in Lieutenant Larsen's pillow case still intending to make him "sweat". The reason accused called Jonesboro was not to find out if the wallet was there but to say goodbye to his girl friend who was going to North Carolina that day. Accused did not deny but admitted putting the wallet in the gas mask (R. 38-41).

At the close of all the testimony, when the defense was asked if it had anything further to offer, accused said: "Gentlemen, I know I have made an awful mistake, I do not know of anything I can say. Evidence has been presented to you just as I have done these things, God knows I didn't mean any harm" (R. 46).

5. a. Specification 1: The evidence for the prosecution shows that on the night of 9 February 1944, accused and Lieutenant Harry A. Larsen, who occupied adjoining rooms in the Bachelor Officers' Quarters at Newport Army Air Field, went to the movies in the nearby town of Jonesboro, Arkansas. Accused insisted on paying so Lieutenant Larsen put his wallet back in the back pocket of his trousers. The wallet, which had a value of $3 or $4, contained $183 in currency and a number of papers bearing Lieutenant Larsen's name. They returned to the field and Lieutenant Larsen retired after hanging his trousers over a chair, with the back pockets toward the floor. Accused came in to his quarters after Lieutenant Larsen, and his light was still burning when Lieutenant Larsen went to bed. The following morning Lieutenant Larsen arose about 0740 and was in the washroom when accused came in to shave. When Lieutenant Larsen returned a few minutes later he noticed that his "AGO pass" which he kept in the same pocket as the wallet, was lying on the chair and upon examining the trousers he found that his wallet was gone. He called to accused and told him that the wallet was missing. Accused phoned his girl friend in Jonesboro who had been with them the night before and asked if the wallet was left at her house. Lieutenant Larsen put in a call to the movie theater but could not locate the wallet. Accused said he was going to Memphis and would stop at Jonesboro on the way and see if he could find the wallet but Lieutenant Larsen decided to go in himself and after borrowing some money from accused, drove in to Jonesboro.

The loss was reported to the provost marshal who, after some delay in locating accused, due to his temporary absence from the field, questioned and searched him. A search was then made of the room of accused while accused stood in the hall outside. On top of a clothes closet inside his room the provost marshal found a gas mask, pulled out the face piece and discovered the missing wallet containing the money and papers. Accused asked, "How did that get in there". Four days after the discovery of the wallet in the room of accused, he made a voluntary statement to Colonel Robert W. C. Wimsatt, commanding officer of the basic pilot school at the field. Accused stated that after returning to camp with Lieutenant Larsen on the night of 9 February he went back out to the car to get his razor, which he had left in it, and "brought back Lt. Larsen's wallet with him"; that the following morning he placed the wallet under Lieutenant Larsen's pillow but as the bed was not made up took the wallet back to his own room; that he wanted to make Lieutenant Larsen "sweat and teach him a lesson"; and that later when accused was taken to his room and the search made he momentarily forgot that he had the wallet in his room.

The evidence for the defense consisted of testimony concerning the previous good character and reputation of accused and an unsworn statement, made by accused through his counsel, similar to the statement he had made to Colonel Wimsatt. He stated that he found the wallet in the car while looking for his razor on the night of 9 February and that he kept it to make Lieutenant Larsen "sweat". He admitted placing the wallet in the gas mask. At the close of all the testimony accused himself told the court that he had made an "awful mistake" and "God knows I didn't mean any harm".

The undisputed evidence accordingly shows that on or about 9 February 1944, the pocket book of Lieutenant Larsen, containing $183 in currency came into the possession of accused. The manner by which he obtained possession does not clearly appear. The wallet was in Lieutenant Larsen's pocket on the evening of 9 February. According to the statements of accused he found the wallet in the early morning of 10 February in his automobile in which he and Lieutenant Larsen had been riding. There is circumstantial evidence, however, indicating that the wallet may have been taken on the morning of 10 February from Lieutenant Larsen's trousers as they lay draped over a chair in his room. Whatever the manner in which possession was derived by accused it is not disputed that accused was immediately aware of the ownership of the wallet. On the morning of 10 February when Lieutenant Larsen told accused of his loss, accused pretended ignorance, made a phone call to a home and offered to drive to a nearby town where they had been the night before, to locate it, and then loaned Lieutenant Larsen sufficient money so he could go to town and make inquiry. Sometime after 1000 that morning the room of accused was searched by the provost marshal of the field and other officers in the presence of accused and the wallet was found concealed in a gas mask lying on top of a clothes closet. Accused admitted putting it there. He stated he always intended to return the wallet to Lieutenant Larsen but first he wanted to see him "sweat" over the loss. In the opinion of the Board of Review his explanation is wholly unsatisfactory. His actions do not indicate a "practical joker" but rather a thief. It is inconceivable that accused would allow events to go as far as they did in this case merely to further a joke. If accused were joking he would have called a halt as soon as the matter was brought to the official attention of his superiors and would never have persisted in his attitude of pretended ignorance during his questioning by the provost marshal and the search of his quarters. It is noteworthy that the first time accused made the claim that his actions were a joke, was four days after the wallet was discovered in his possession. Under the facts of the case the Board believes that the intent on the part of accused to deprive Lieutenant Larsen permanently of the property is clearly shown and that the allegations of the Specification are proven beyond any reasonable doubt.

b. Specification 2: In the course of the search of the clothes closets of accused by the provost marshal on 10 February, two topcoats were

found and a remark was made about the number. Accused said he had received one from his father, an officer who wore the same size clothing. One of the coats found in the closet had been "lost" by Second Lieutenant Robert W. Johnston in the officers' mess at the field on 27 October 1943. Lieutenant Johnston testified that he went to the mess about 1000 and returned for his coat at 1020. He identified the coat by the color of the thread used by the wife of another officer when she sewed on the buckle the night before the coat was, as Lieutenant Johnston stated, "taken". No explanation was made by accused of his possession of the coat, other than the statement made at the time of the search. The mother of accused testified that his father had been an officer in the first world war.

The Manual for Courts-Martial (par. 112a) provides, "Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it". This rule is given in Wharton's Criminal Evidence (Vol. I, p. 199) in the following language: "* * * possession by a party of stolen goods is a fact from which his complicity in the larceny may be inferred. But the possession must be personal, recent, and unexplained, and must involve a distinct and conscious assertion of property by the defendant. ***"

The necessity that the possession be recent is commented on in Ruling Case Law as follows:

> "The possession of stolen property must be recent after the theft in order to afford a just basis for an inference of guilt on the part of the possessor. The weight of such evidence will be stronger or weaker in proportion to the period intervening between the taking and finding in the possession of the defendant, and it may be rendered of no weight whatever by the lapse of sufficient time as to make it not improbable that the goods may have been stolen by another and passed to the accused. The length of time that must elapse after the larceny of goods before that possession should cease to be considered as tending with other facts to show guilt is, as a rule, purely a question of fact for the jury." (17 R.C.L. 73).

The Board is of the opinion that under the circumstances of the instant case, the discovery of the stolen coat in the closet of accused three and one-half months after its disappearance in the officers' mess is, in the absence of any other evidence connecting him with the taking, insufficient to establish that accused was guilty of its theft (cf. CM 154792, Grigsby, Dig. Ops. JAG 1912-40, sec. 451 (37)).

6. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 13 May 1942; aviation cadet from 20 October 1942; appointed temporary second lieutenant, Army of the United States and active duty, 28 July 1943.

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 insufficient to support the finding of guilty of Specification 2; legally sufficient to support the findings of guilty of Specification 1, and the Charge; 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.

Samuel H. Drew, Judge Advocate

_____, Judge Advocate

F. J. Fottuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 24 JUN 1944 - 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 Steven W. Smith (0-809203), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2, but legally sufficient to support the findings of guilty of Specification 1 and the Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused stole a wallet valued at $2, and containing $183, from a fellow officer occupying an adjoining room in the Bachelor Officers' Quarters at the air field where they were stationed. I recommend that the approved sentence to dismissal, total forfeiture and confinement at hard labor for one year be confirmed and carried into execution.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Finding of guilty of Specification 2 disapproved. Sentence confirmed. G.C.M.O. 421, 27 Jul 1944)

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

SPJGK
CM 253323

26 MAY 1944

UNITED STATES	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Greenville, Mississippi, 8 and 9 March 1944. Dismissal.
Captain CHARLES K. McCLURE, JR. (O-428440), Air Corps.	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, 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 94th Article of War.

Specification 1: In that Captain (then Second Lieutenant) Charles K. McClure, Jr., Air Corps, did, at Greenville Army Flying School, Greenville, Mississippi, on or about 31 May 1942, cause to be presented by Captain Samuel Sansweet, F.D., for payment, a claim against the United States by causing to be presented to Colonel R. K. LeBrou, F.D., finance officer at New Orleans, Louisiana, an officer of the United States duly authorized to pay such claims, a pay and allowance account in the net amount of $255.40, which claim was false in that it set forth no debit for a Class E allotment, although said Charles K. McClure, Jr., had theretofore, on or about 16 March 1942, authorized a Class E allotment of his pay in the amount of $100.00 per month, commencing 1 May 1942, and was then known by the said Charles K. McClure, Jr., to be false.

Note: and eighteen additional specifications identical in form with Specification 1, except as to date, rank of accused at the time of presentation, officers by whom and to whom presented, and amount of the claim, which excepted matters are as follows, respectively:

Spec.	Date Presented	Accused's Rank	By Whom Presented	To Whom Presented	Amount
2	30 June 1942	1st Lt.	1st Lt. S. J. Palmisano, F.D.	Lt.Col.F.F. Flagel,F.D.	$348.30
3	31 July 1942	1st Lt.	1st Lt. S.J. Palmisano,F.D.	Lt. Col.F.F. Flagel,F.D.	361.70
4	31 Aug. 1942	1st Lt.	1st Lt. S.J. Palmisano,F.D.	Lt. Col.F.F. Flagel,F.D.	361.70
5	30 Sept. 1942	1st Lt.	1st Lt. S.J. Palmisano,F.D.	Lt. Col.F.F. Flagel,F.D.	360.30
6	31 Oct. 1942	1st Lt.	1st Lt. S.J. Palmisano,F.D.	Lt.Col.F.F. Flagel,F.D.	361.70
7	30 Nov. 1942	1st Lt.	1st Lt.S.J. Palmisano,F.D.	Lt.Col.F.F. Flagel,F.D.	370.96
8	31 Dec. 1942	1st Lt.	1st Lt.S.J. Palmisano,F.D.	Lt.Col.F.F. Flagel,F.D.	361.70
9	31 Jan. 1943	1st Lt.	Capt. S.J. Palmisano,F.D.	Lt.Col.F.F. Flagel,F.D.	361.70
10	28 Feb. 1943	1st Lt.	Capt.S.J. Palmisano,F.D.	Lt.Col.F.F. Flagel,F.D.	357.50
11	31 Mar. 1943	Capt.	Capt. S.J. Palmisano,F.D.	Lt.Col.F.F. Flagel,F.D.	446.20
12	30 Apr. 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Lt.Col.F.F. Flagel,F.D.	425.30
13	31 May 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Lt.Col.F.F. Flagel,F.D.	426.70
14	30 June 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Lt.Col.F.F. Flagel,F.D.	425.30
15	31 July 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Lt. Col.F.F. Flagel,F.D.	426.70
16	31 Aug. 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Lt. Col.F.F. Flagel,F.D.	426.70
17	30 Sept. 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Lt.Col.F.F. Flagel,F.D.	425.30
18	31 Oct. 1943	Capt.	2nd Lt. Ben McEnteer,F.D.	Capt. L.R. Andrews,F.D.	426.70
19	30 Nov. 1943	Capt.	1st Lt. Ben McEnteer,F.D.	Capt. L.T. Andrews,F.D.	425.30

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

Specification: In that Captain Charles K. McClure, Jr., Air Corps (then Second Lieutenant), having, on or about 16 March 1942, authorized a Class "E" allotment of his pay in the amount of $100.00 per month for 15 months, commencing 1 May 1942 and expiring 31 July 1943, which allotment was subsequently continued for an indefinite period and was in effect during each month thereafter to and including the month of November 1943,

and which allotment was duly paid for each of the months commencing with the month of May 1942 to and including the month of November 1943, did, at Greenville Army Air Field, Greenville, Mississippi, from May 1942 to November 1943 in disregard of the fact that such allotment had been authorized and was being paid and in violation of his duty to ascertain the truth and correctness of the pay and allowances accounts made by him, wrongfully certify as true and correct his pay and allowances accounts for each of said months from May 1942 to and including November 1943, which said accounts were incorrect and his certifications thereof were false, in that the amount of said Class "E" Allotment of $100.00 per month had not been entered as a debit on said accounts.

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

3. Summary of evidence.

Accused was tried and found guilty of presenting to the duly authorized finance officer of the Army a total of 19 successive false claims for monthly pay, from 31 May 1942 to 30 November 1943. Accused's successive promotions to first lieutenant and captain during the period, the authority of the various finance officers to whom the claims were presented, and the respective amounts of the vouchers as alleged in the Specifications, were all proved by the prosecution without objection by defense (R. 19,20, Pros. Exs. 3,4; R. 30,31, Pros. Exs. 5,6,7; R. 13, Pros. Exs. 1a to 1s, incl.). They will not be discussed further except insofar as is necessary to explain other details of accused's conduct.

It appears from the testimony of Mr. W. L. Bailey, the Assistant Cashier of the National Bank of Fort Sam Houston, San Antonio, Texas, that accused opened an account with that bank on 2 June 1941, and that on the same date his account was credited with the proceeds of a $225 loan from the bank (R. 48,49,60). On 1 November 1941, he obtained a $600 loan from the bank, which credited his account with $555.32, the proceeds thereof (R. 50), and on 12 March 1942, accused wrote a letter to the bank asking to refinance his loan (R. 49,50; Pros. Ex.14). The bank wrote back to accused on 13 March stating that the unpaid balance on the loan of the previous November was $440, less unearned interest, setting forth the interest and other costs of the proposed new loan, and explaining the terms upon which it could be made (R. 50; Pros. Ex. 15). The principal requirement was that accused make a Class "E" allotment of $100 per month of his pay to his account with the bank and agree not to revoke the allotment until his indebtedness to the bank had been paid in full. The loan itself was to be paid in 15 monthly installments of $40 each, the first being due on 5 May 1942, and the others on the

5th of each succeeding month (Pros. Ex. 15). Accused thereupon executed War Department A. G.O. Form Number 29, authorizing such a deduction for the period of 15 months, commencing 1 May 1942 and expiring 31 July 1943, and sent to the bank a copy thereof, with his written certification that he would not revoke the allotment until the indebtedness was paid in full (R. 10,50,51,52,57; Pros. Exs. 1,16,17,18). The proceeds of this loan were credited to accused's account on 19 March 1942 (R. 50; Pros. Ex. 13c). From the time the account was opened, accused received monthly statements showing his balance, and acknowledgments of deposits made by mail (R. 56, 62).

Accused thereafter presented and received pay upon vouchers for the months of May 1942 through November 1943. On each of them he successively claimed and received the pay of a second lieutenant (May 1942), a first lieutenant (June 1942 through February 1943) and a captain (March 1943 through November 1943) on flying status having a dependent wife. On each of these vouchers appears a Class "N" deduction of $6.70 for National Service Life Insurance, but nowhere any deduction for the Class "E" allotment (R. 13,26; Pros. Exs. 1a-1s, incl).

Prosecution's Exhibit 8, a letter dated 6 November 1943, from the Office of the Fiscal Director to accused, shows that allotment checks were issued monthly during that period of time (R. 43). An examination of the ledger sheets of accused's account with the National Bank of Fort Sam Houston shows that in addition to receiving and depositing to accused's account a check in the amount of his respective monthly pay vouchers, the bank also received and credited to his account each month a check for $100 (R. 52,53; Pros. Exs. 1a-1s, 13c-13n).

The manner in which these claims were presented was described by Staff Sergeant Milnor L. Dunk, Finance Detachment, Master Sergeant John P. Small, Finance Detachment, and First Lieutenant Ben McEnteer, Finance Department, all of Greenville Army Air Field. Dunk had been chief clerk of the officers' pay section of the finance office during the entire period, while Small was chief clerk of the finance office (R. 11,30). It was the function of the office to assemble data and prepare officers' pay vouchers for signature, then to forward them to the accountable disbursing officer (successively stationed at New Orleans, Memphis, and Columbus, Mississippi) for payment (R. 11,30,41). There was no requirement that officers' vouchers be prepared for them, but rather, this was done as a helpful service (R. 11,35). The information from which the vouchers were prepared was obtained from the officers themselves (R. 11,12,41). When an officer reported at the station he was instructed to leave at the finance office whatever papers and data he had pertaining to his pay. Accused was already at the station in April or May of 1942 when officers' pay data cards were distributed through the message center "for each officer on the field at that time" (R. 11,12,18, 20,32,34,35,41). Sergeant Small was unable to state of his own knowledge that accused had actually received one (R. 38). Whenever any change occurred

in an officer's status affecting his pay, such as marriage or a promotion, the finance office made a new pay data card for him, attached it to his pay voucher and gave it to him the next time he came in to sign the voucher (R. 12,18,19,22,23,26,27,34,35,38,41).

Class "E" allotments were made through the officers' personnel section at the post headquarters, which usually sent a copy of the form to the finance office, but the latter did not depend upon receiving such notification, and it was up to the individual officer to inform the finance office personally of all allotments (R. 25,27,32,33,38,41,42,47). Army Regulations provide that the allotter is responsible that the allotment is immediately entered on all pertinent records as a charge against his pay (R. 28,29). The records pertaining to accused's pay, kept by the finance office, disclosed no deduction for a Class "E" allotment (R. 17, 42,43).

The practice at accused's station was for the officers' pay section of the finance office to make out the officers' pay and allowance vouchers in complete form, and to notify all officers through the post's daily information bulletin that they were ready for signature. The officers would then come in and sign, after which the vouchers were forwarded to the accountable disbursing officer (R. 11-13, 31,32,41). The latter would, in turn, notify the post finance office that payment had been made, by returning the triplicate of the original voucher with a notation of the number of the check and the amount paid (R. 13,32). During the period covered by accused's claims, there was one shorter period in which officers were required to sign incomplete pay vouchers. During the months from August 1942 through January 1943, inclusive, no credit figures were placed in the right-hand columns of the vouchers, because of instructions from the accountable disbursing officer at Memphis that they were to be omitted and would be filled in at that office. This, in turn, had been caused by uncertainties over the effects of the Pay Readjustment Act of 16 June 1942 (R. 12,14-16, 33,36,37, 40). The old practice of extending the credit figures was resumed in February 1943, and it is clear that even during the interval which preceded it, the duductions were meant to be and in fact were entered at accused's station before the vouchers were signed and forwarded. No deductions were added at Memphis, nor was Memphis even supposed to do so (R. 12,14,16, 21,24,27,34,36,37,40).

Sergeant Dunk testified that he had seen accused sign his pay vouchers "about ten times", and that accused had looked at them before doing so, but witness did not know whether accused had actually read them (R. 16,20). They all contained Class "N" insurance deductions (R. 26).

On 7 December 1942, accused had again written the bank, requesting refinancing of his loan, and inquiring particularly whether it would be necessary for him to make out another allotment (R. 53; Pros. Ex. 19). The bank

replied on 10 December that no new allotment would be necessary. Actually, Change 7, paragraph 8a, of Army Regulation 35-5520, dated 6 July 1943, had extended all then existing allotments for the duration of the war. The new loan was for $600, payable in twelve monthly installments of $50 each, and netted accused $553.50 (R. 28,54; Pros. Exs. 13g, 20).

When he received the letter from the Fiscal Director, pointing out that no Class E allotment deductions had been made, accused consulted with Sergeant Dunk and Lieutenant McEnteer, in the latter part of November 1943, telling the latter that he had the money to pay the amount due the Government (R. 17,18,43,44). Lieutenant McEnteer prepared a first indorsement to the original letter offering to pay by making an additional $100 deduction per month, in addition to the then current one allotted to the bank (R. 43,44; Pros. Exs.8,9). Other correspondence between accused and the Finance Office at Columbus, Mississippi; and a conference with the investigating officer, resulted in two monthly deductions of $150 each from accused's December and January vouchers. On 21 January 1944, accused brought to Lieutenant McEnteer a $1600 draft of the First National Bank of Greenville, Mississippi, payable to the Treasurer of the United States, which, together with the two $150 deductions, paid in full the $1900 he obtained as a result of the failure to deduct the allotment (R. 44-47; Pros. Exs. 10,11,22). Mr. W.F. Carnahan, Vice-President of the First National Bank of Greenville, testified that accused had purchased the draft with two $800 checks of prominent local citizens (R. 62-65). Mr. Bailey testified that with the National Bank of Fort Sam Houston's receipt of accused's $100 allotment in January of 1944, the last $600 loan had been paid in full (R. 57; Pros. Ex. 13o).

Accused made and signed a voluntary statement (apparently to the investigating officer) after duly being advised of his rights under Article of War 24, and it was introduced without objection by defense as Prosecution's Exhibit 12 (R. 48). In it after briefly narrating his history prior to May of 1942, he stated that he borrowed $600 from the National Bank of Fort Sam Houston in May (sic) of 1942 in order to get married. Of the $100 Class "E" allotment, $50 per month was to be used to retire the indebtedness and $50 was to remain in his checking account. He was already in the habit of having his entire monthly check sent directly to the bank each month. When he married he authorized his wife to draw upon his account. He did not keep a check book nor check stubs, and "due to negligence, * * * did not pay any attention to" the bank statements and deposit slips which he received each month. He thought that the deductions were being made and knew nothing about the accumulating overpayments to his bank account until he was notified by the Fiscal Director. He gave as further reasons for his failure to examine his bank statements the fact that he "knew" his indebtedness was being reduced, that he was living within his means, saving money, and was irregularly receiving sums of $50 to $150 from home every few months.

Evidence for defense.

Defense counsel stated that accused's rights as a witness had been explained to him. Accused was sworn and testified in his own behalf. He stated that he had worked at various jobs for the Tennessee Valley Authority while attending the University of Tennessee between the fall of 1935 and the winter of 1938-39, and that he continued in this work after leaving college, except for a short stay with a finance company in Charlotte, North Carolina (R. 77-79). He entered the Army for training as an aviation cadet on 16 March 1941, was commissioned on 1 November 1941, and at the time of the trial was flight commander of Flight 4, Group 1, at his field. At no time while he was a cadet or an officer had he ever received instructions on how to fill out pay vouchers, but merely ascertained when the vouchers were ready for signature and stopped at the Finance Office to sign them. He did not remember ever having received a pay data card (R. 79,86).

He recalled glancing over "a few of" the vouchers which he signed, but never read the paragraph of certification and did not notice whether there was a deduction for an allotment. He admitted, however, having seen the insurance deductions on most of the vouchers (R. 79,80,88). He remembered signing one "blank" (incomplete?) pay voucher, and admitted that he was familiar, at each step in his promotions, with the amount of pay and allowances he should have received, and both admitted and later denied having checked these figures when he signed the vouchers (R. 80,87,88,94). He believed that the $100 allotment was being deducted, but did not know how it was being accomplished (R. 88). He made the allotment on 16 March 1942. It was filled out for him by "a sergeant" at the officers' personnel section at the headquarters building. Accused received a copy, and the sergeant told him that he would make the distribution of the other copies. Accused sent the one he had received to the National Bank of Fort Sam Houston (R. 80,81, 83).

Accused received monthly statements from the bank, which he used to check when he first began receiving them, but finding that they all "tallied out", he "got in the habit of not opening them at all". Both he and his wife drew on the account, but instead of checking the statements, they set an arbitrary figure of how much they would draw during the month, and he thought that she was keeping a record in this manner, and believed that his account had never fallen below $100 (R. 81,82,91,92). After his attention was drawn to the overpayments, he searched his car, desk drawers, and "other places out at the field", and found unopened statements for April, May, June, October, November, and December of 1942, and for January, February, March, May, June, July, August, October, and December of 1943 (R. 82, 83,90). He had searched for, but could not find, the other statements (R. 83).

He had likewise seen the deposit slips mailed to him by the bank, after opening his account, but, as in the case of the statements, he had ceased to open them prior to the time he made the allotment. He produced at the trial still unopened envelopes, which were found to contain acknowledgments

of deposits of $100 on 6 October 1942, $425.30 on 3 July 1943, $100 on 10 September 1943, and $425.30 on 4 October 1943 (R. 81; Def. Exs. D^{1-4},incl.). He did not know where the rest of his deposit slips were (R. 82). He knew he was supposed to be receiving $100 monthly, but he never knew he was receiving the extra $100 on his pay check (R. 82,85). During part of this time he was also receiving varying amounts of money at irregular intervals from other sources (R. 97). When he did investigate the status of his account he found that both he and his wife had drawn more checks than he had first believed, and that his balance was not what he had thought it was (R. 83,88). He told Lieutenant McEnteer that he had the money to pay the indebtedness in full because "after they told me I had been overpaid that ($1900) I figured it should be there" (R. 92). He had actually not investigated his financial status or his statements (R. 92,93). He authorized a representative of the Judge Advocate General's Department to examine his records with the bank because he "didn't want to hold anything back from them" (R. 86; Def. Ex. B).

Captain William D. Smith, Air Corps, and Second Lieutenant Lewis E. Griffith, Air Corps, both of accused's station and organization, testified that while driving to the post in accused's car they had upon different occasions seen unopened bank statements (R. 68,69,71,72). Upon another occasion Captain Smith had cleaned out accused's desk at their office when accused expected to be transferred, and had found "five or six" bank statements, "some" of which had not been opened (R. 68-70). Both witnesses testified that accused had always been honest in his dealings with them, and that he had been able, hard-working, and efficient in his work as flight commander (R. 67,68,71).

Captain Louie C. Doerr, Air Corps, and Major John Grable, Jr., Air Corps, both of accused's station, testified that they had at one time been given incomplete pay vouchers to sign, and were told that the forms would be completed at Memphis. They both stated, however, that they had allotments only for life insurance, and that these deductions had been on the vouchers thus presented to them (R. 73,74,76,77).

Defense also introduced as its Exhibit "A" the letter from the Fiscal Director which instructed that vouchers be forwarded to Memphis without computations, and as its Exhibit C a list of checks drawn by accused and his wife on their account in the First National Bank of Greenville, which had not been included in that bank's January and February 1944 statements (R. 21, 66).

Stipulated testimony of Major Andrew V. Santangini, Air Corps, and Captain William H. Walker, Air Corps, was introduced by defense. Accused had served under their command as group and squadron commanders, respectively, for approximately a year. Each stated that accused had been an excellent flight commander and had been honest in his dealings with the witness (R. 70).

4. To recapitulate briefly, accused presented vouchers for, and received, the pay of an officer of his grade of second lieutenant, first lieutenant and captain, during the months of May 1942 through November 1943. During all of those months he had in effect a monthly Class "E" allotment of $100 to a bank whose debtor he was. This allotment was paid to the bank, but due to the failure of the officers' personnel section of the finance office at accused's post to be informed of its existence, he received his full pay and allowances each month. These overpayments totaled $1900, which he repaid after they were discovered. His defense was that he signed the vouchers prepared for him by the finance office, without more than cursory examination of them, and that he never bothered to open either his monthly bank statements or the monthly slips sent to him by the bank acknowledging receipt of the allotment and deposit checks.

5. The evidence that the claims were presented by accused, that they were false in that they made no deductions for the allotments, and that he received overpayments totaling $1900, is all so clear and undisputed that it requires no comment. It has repeatedly been stated and held that intent to defraud is not an essential element of proof in a charge of violation of Article of War 94, but only that accused knew that the claims were false (CM 241208, Russell; CM 243683, Bowling; Winthrop, Military Law and Precedents, 2nd ed. rev., p. 701). The evidence in this case is compelling that accused knew they were false. His admissions that he did observe the monthly deductions for his life insurance, his inconsistent statements in court concerning checking the figures on the vouchers at the time his rates of pay and allowances changed as the result of his promotions, and his testimony concerning the conversation between him and the sergeant who made out his allotment application, all point to a knowledge on his part that he was filing false pay vouchers.

6. Following his arraignment, accused entered a "special plea of estoppel" on the ground that the vouchers which were presented to him between the months of August 1942 and January 1943 were presented in incomplete form, "and had, therefore, barred prosecutions based on such incomplete vouchers and all subsequent vouchers". The plea, apparently based on the later developed evidence that during those months the credit figures were omitted from the vouchers, and were supplied later at Memphis, was overruled. The record shows that the court's ruling was correct. It clearly appears that the vouchers presented to accused and to the defense witnesses during that period contained the deductions then known to the personnel office for each officer, and further appears that no real or alleged error made at Memphis affected in any way the falsity of accused's vouchers. If, therefore, this was no defense to the charge as it pertained to vouchers submitted during the period, it was still less a defense to those submitted thereafter.

The Specification of Charge II alleges a violation of Article of War 95, in that accused wrongfully certified as true and correct his pay and allowances accounts for each of the months from May 1942 to and including November

1943, in disregard of his duty to ascertain the truth and correctness of the accounts. Winthrop, in his discussion of offenses which may properly be charged under Article of War 61 (now Article of War 95) includes that of "Duplication of pay accounts", and says further of this act, in a footnote:

> "This offence has already been referred to as not unfrequently charged under Article 60 [now Article of War 94], when involving the presenting * * * of a fraudulent claim for pay against the United States * * *" (Military Law and Precedents, 2nd ed., p. 714).

The Board of Review is of the opinion that repeated certification by an officer of his accounts as true when he obviously has made no bona fide effort to ascertain the truth and accuracy of the accounts is such as to compromise seriously his character and position as an officer of the Army, and as a gentleman, and that in so doing he violated Article of War 95.

7. War Department records show that accused is 28 years of age and married. He attended the University of Tennessee for 3-1/2 years, but did not graduate, working at various jobs for the Tennessee Valley Authority both during his attendance at college and thereafter. He served as an aviation cadet from 15 March 1941 until 31 October 1941, being honorably discharged from that status and commissioned a second lieutenant, Air Corps Reserve, on 1 November 1941. On 2 June 1942, he was promoted to the grade of first lieutenant, Army of the United States, on 22 February 1943 to captain, Army of the United States, Air Corps, and on 20 July 1943 to Captain, Army of the United States. At the time of recommending him for each promotion, his commanding officers stated that he had performed his duties as an instructor in an "excellent" manner.

8. Attached to the record of trial is a letter to the Commanding General, Army Air Forces, Eastern Flying Training Command, dated 15 March 1944, from First Lieutenant George M. Krisle, Jr., Air Corps, accused's individual defense counsel. In it Lieutenant Krisle requests clemency for accused because of his "excellent reputation with both his superiors and his subordinates", his "high professional attainments", and because he has repaid in full the excessive sums received by him. Also attached to the record is a letter to the same commanding general, signed by all ten members of the court, recommending that clemency be extended to accused "to the extent that execution of the sentence to dismissal be suspended".

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 94, and mandatory upon violation of Article of War 95.

Irving G. Gaw, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Samuel Sonnenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 - JUN 1944 - 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 Charles K. McClure, Jr. (0-428440), 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 of guilty and the sentence and to warrant confirmation thereof. Although the accused is guilty of serious neglect of duty, in view of his previous good character and excellent service, the unanimous recommendation of the court, and the fact that full restitution has been made, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 323, 27 Jun 1944)

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

SPJGN
CM 253339

26 APR 1944

UNITED STATES	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Fort Sheridan, Illinois, 9 March 1944. Dismissal.
First Lieutenant O'NEIL F. BRANDT (0-382505), Ordnance.	

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OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant O'NEIL F. BRANDT, Ordnance, student, Class 13, Officers' Basic Course, Provost Marshal General's School, Fort Custer, Michigan, was, at Fort Custer, Michigan, on or about 21 January 1944, in a public place, to wit, Dickman Road at Fort Custer, Michigan, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant O'NEIL F. BRANDT, Ordnance, student, Class 13, Officers' Basic Course, Provost Marshal General's School, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 21 January 1944, use the following threatening and insulting language toward Private Sam Rimar, Military Police Detachment, 1621st Service Unit, a Military Policeman in the execution of his duty, "No son-of-a-bitch of an MP is going to tell me what to do", "I'm going to get your gun and make you eat it", or words to that effect.

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

Specification 1: In that First Lieutenant O'NEIL F. BRANDT, Ordnance, student, Class 13, Officers' Basic Course, Provost

Marshal General's School, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 21 January 1944, while drunk, wrongfully and unlawfully drive a motor vehicle, to wit: a Packard Sedan, upon Dickman Road, Fort Custer, Michigan, a public highway.

Specification 2: In that First Lieutenant O'NEIL F. BRANDT, Ordnance, student, Class 13, Officers' Basic Course, Provost Marshal General's School, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 21 January 1944, wrongfully strike Private Sam Rimar, Military Police Detachment, 1621st Service Unit, a Military Policeman, in the face and on the body with his hands.

He pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications, except the words "I'm going to get your gun and make you eat it", in Specification 2, Charge I, and the words "in the face and", in Specification 2, Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at about 8 p.m. on 20 January 1944, the accused and First Lieutenant Elhanon Singleton met in their barracks at Fort Custer, Michigan, and proceeded in the accused's Packard sedan to Battle Creek, Michigan, a drive requiring fifteen minutes. At Battle Creek they went to a tavern known as LaFayette Gardens, remaining there four or five hours. Beer is the only beverage sold at the tavern. The accused and Lieutenant Singleton each drank four or five glasses of beer during the evening, and, according to Lieutenant Singleton, a witness for the prosecution, the two of them were together all evening and neither of them drank any other beverage. They left the tavern after 2 a.m. and returned to Fort Custer in the accused's car (R. 75-76, 79-80, 85-92).

As the car approached Outpost 7, which is the entrance to the camp from Battle Creek, the sentry on duty observed the car to be zigzagging from one side of the road to the other in a strange fashion. The car was brought to a stop a few paces from the gate and the accused, who was driving, spoke to the sentry and inquired "Where am I? Am I coming in from the south?". He then asked for directions to 23rd Street, where his barracks was located. His words seemed "to be chewed up". He looked "sleepy". The sentry could smell alcohol in the car. The officer who was seated beside the accused saluted, said "Thank you" and the car moved forward, driven by the accused. It zigzagged and appeared to be out of control (R. 8-10, 20-21).

Private Sam Rimar, the post M.P., observed the conversation between the sentry and the accused through the sentry box window, and

when the accused drove forward he (Private Rimar) followed closely in a jeep. After the accused had driven approximately one mile along Dickman Road, Private Rimar pulled alongside of him and the accused brought his car to a stop. Rimar inquired of the accused if there was anything wrong with his car, and the accused replied that there was not. Rimar then told the accused that his car was out of control and that he, Rimar, would take the accused to his barracks in the jeep. The accused refused to go. Thereupon, Rimar told the accused that he could not drive in his condition and that he, Rimar, would have to take the accused to the orderly room. At this point the officer riding with the accused stated that he desired to get out of the car and walk to his barracks since he did not want to get mixed up in an altercation. Accused then agreed to go to the orderly room. He drove about three blocks farther and let the other officer out, at a point about three blocks from the latter's barracks. Accused then followed Rimar in the direction of the orderly room. After driving a short distance, however, accused stopped and turned his car around. Rimar promptly turned the jeep around and overtook the accused. Then followed an altercation. The accused got out of his car and Rimar got out of the jeep. Rimar testified that the accused "started pushing me around, striking at me" and knocked Rimar's glasses off and broke them. He further testified that the accused told the witness that "there aint no son-of-a-bitch of an M.P. is going to tell him what to do". Rimar also testified that the accused was "staggering drunk" and that he could tell that the accused was "very drunk" by the language he used, the way he drove his car and the way he staggered. Finally, Rimar decided that he could not "do anything with the officer at that time" and so he went to the orderly room for assistance. When he returned a few minutes later to the scene of the altercation, with two additional men, the accused could not be found. A search was promptly made for the accused's car and it was found parked in its regular place near the accused's barracks (R. 27-32, 35, 76-77).

Private John L. Pointer, a witness for the prosecution, testified that he was a sentry on Post 3, Fort Custer, from 2 a.m. to 4 a.m., 21 January 1944; that at about 3:30 a.m. he heard an altercation on his post between a lieutenant and an M.P.; that the lieutenant said to the M.P. several times "I will kill you"; and that he could not positively identify either the lieutenant or the M.P., although he walked up to within six feet of where they were standing. He further testified that he could not say that the lieutenant was drunk (R. 55-57, 63).

Private Ned J. Zelko, a witness for the prosecution, testified that he was a sentry on Post 6, Fort Custer, from 2 a.m. to 4 a.m., 21 January 1944. At about 3:15 a Packard sedan and a jeep stopped near his post. An officer got out of the sedan and an M.P. got out of the jeep. They commenced "scuffling" and the M.P. seemed to be trying to get out of the way of the officer. The officer said to

the M.P., "I will kill you, you dirty bastard". When the officer tried to walk "he just wobbled around". Although the witness stood within 25 feet of the officer and the M.P. he stated that he could not definitely identify the officer. He did, however, identify the M.P. as Private Rimar. Private Zelko further testified that he did not see any "swinging or direct blows", as would take place in a boxing engagement; he simply saw "scuffling" (R. 64-65, 67-68).

First Lieutenant Elhanon Singleton, a witness for the prosecution, testified regarding the events of the night of 20-21 January 1944, leading up to the return of himself and the accused to the camp, as above narrated. He was asked specifically why he left the accused when the M.P. arrived on the scene, to which he replied, evasively, "Well, I just had a desire to get out, that is all". He also testified that the accused "had perfect control of the car" and that, in his opinion, the accused was not drunk (R. 76, 84, 86).

4. The accused, after having had his rights as a witness explained to him by the court, elected to be sworn as a witness and testified in his own behalf. He corroborated the testimony of Lieutenant Singleton that the two of them spent the evening of 20 January 1944 at the LaFayette Gardens in Battle Creek; that each of them had four or five glasses of beer during the evening and no other beverage of any kind; and that they returned to camp in the accused's car in the early hours of 21 January 1944, the exact hour being estimated as 2 a.m. The accused's version of his altercation with the M.P., particularly that portion of it which occurred after Lieutenant Singleton left the car, varies materially, however, from the version of the witnesses for the prosecution. According to the accused's version, he had entered the gate at Outpost 7 and had driven down Dickman Road about a mile and a half in the direction of 23rd Street when an M.P. drove alongside of his car. The accused brought his car to a stop on the right hand side of the road. Lieutenant Singleton at this point stated that he wished to relieve himself and that he would walk the balance of the way to his barracks, a distance of four or five blocks. So, while the M.P. was parking his jeep, Lieutenant Singleton got out of accused's car and left. The M.P., Private Rimar, then walked over to the accused's car and looked inside and said, "All right, get out of that car". Accused was incensed that the M.P. should speak to him so sharply when the accused "had not done anything".

> "I got out of the car and I gave him quite a bawling out and dissertation ***. I asked him what he meant by addressing an officer in such a manner, and I believe I also lectured him about enlisted men using language, and the means that he did, toward an officer".

Rimar just stood there and looked at the accused. The accused then got back in his car and drove to the motor park near 23rd Street, where he put the car away. He then went to his barracks and went to bed. Accused further testified that on 21 January 1944 he was not familiar

with the road leading to the gate at Outpost 7 and that he had not previously been on that road. He categorically denied that he struck Private Rimar or even touched him (R. 98-103, 107-108, 113-117, 123, 128-132).

No other witnesses were called for the defense.

5. Specification 1 of Charge I alleges that the accused "was, at Fort Custer, Michigan, on or about 21 January 1944, in a public place, to wit, Dickman Road at Fort Custer, Michigan, drunk and disorderly while in uniform". The evidence shows that Dickman Road is a main thoroughfare at Fort Custer, extending from one end of the camp to the other. It can hardly be denied therefore that Dickman Road is a public place. It is undisputed that the accused was in uniform and was on Dickman Road at or about the time alleged. On the question as to whether the accused was drunk, however, the testimony of the accused and of Lieutenant Singleton as to the sobriety of the accused at the time in question is squarely contradicted by the testimony of the other witnesses for the prosecution. If the court chose to believe the principal witnesses for the prosecution, as it had the right to do, the evidence supplied by them was ample to support a finding that the accused was both drunk and disorderly. It is to be noted, however, that Specification 1 is laid under the 95th Article of War. The test for drunkenness and disorderly conduct as a violation of the 95th Article of War is set out in paragraph 151 of the Manual for Courts-Martial as "being grossly drunk and conspicuously disorderly". The Board of Review is of the opinion that the evidence in the instant case is not sufficient to meet that test, but is sufficient to support a finding of guilty of the Specification in violation of the 96th Article of War.

6. That portion of Specification 2 of Charge I, of which the accused was found guilty, alleges that the accused did at Fort Custer, on or about 21 January 1944, use the following threatening and insulting language toward Private Sam Rimar, a military policeman in the execution of his duty, "No son-of-a-bitch of an MP is going to tell me what to do", or words to that effect. Here, again, the Specification is charged as a violation of the 95th Article of War. While the evidence is ample to support a finding that the accused did use the quoted language in his conversation with Private Rimar, it does not follow that such use was per se a violation of the 95th Article of War. The evidence discloses that the altercation between the accused and Private Rimar took place in the middle of the night, upon an unlighted road. No other person was present, unless it be said that the two sentries, who were walking their posts, were present, and there is no showing that the accused knew that they were nearby (See Field, CM 234558). The Board of Review is of the opinion that the offense of which the accused was found guilty under this Specification may, in view of the circumstances disclosed by the evidence, more appropriately be considered a violation of Article of War 96 than of Article of War 95.

7. Specification 1 of Charge II alleges that the accused "did, at Fort Custer, Michigan, on or about 21 January 1944, while drunk, wrongfully and unlawfully drive a motor vehicle, to wit: a Packard sedan, upon Dickman Road, Fort Custer, Michigan, a public highway", and that portion of Specification 2 of Charge II of which the accused was found guilty alleges that the accused "did, at Fort Custer, Michigan, on or about 21 January 1944, wrongfully strike Private Sam Rimar *** on the body with his hands". Both Specifications are laid under the 96th Article of War. In the case of each of the Specifications, the finding of guilty is fully supported by the evidence adduced for the prosecution. It is evident that the court, in reaching its conclusions, elected to disregard those portions of the accused's testimony which were in conflict with the testimony of the witnesses for the prosecution. This it was privileged to do.

There can be no doubt that the conduct alleged in Specifications 1 and 2, Charge II, of which the accused was found guilty, was strongly prejudicial to good order and military discipline and of a nature to bring discredit upon the military service. Such conduct, therefore, represented offenses properly chargeable under the 96th Article of War.

8. The accused is approximately 40 years old. The records of the War Department show that the accused has nine years of enlisted service; that he was commissioned a second lieutenant in the Quartermaster Corps on 14 October 1939; and that he was promoted to first lieutenant on 6 August 1942, which grade he has held since that date.

9. 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 Specifications 1 and 2 of Charge I as involves findings of guilty of the Specifications in violation of Article of War 96, legally sufficient to support all other findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lifscomb, Judge Advocate.

William H. Gambrell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 8 MAY 1944 - 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 O'Neil F. Brandt (0-382505), Ordnance.

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 Specifications 1 and 2, Charge I and Charge I, as approved by the reviewing authority, as involves findings of guilty of those Specifications in violation of Article of War 96, legally sufficient to support the other findings and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but suspended during good behavior.

3. Consideration has been given to two letters from the accused, both dated 21 March 1944, addressed to the President of the United States and to the Secretary of War, requesting clemency in his behalf.

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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

5 Incls.
Incl.1 - Record of trial.
Incl.2 - Dft. ltr. for sig. S/W.
Incl.3 - Form of action.
Incl.4 - Ltr. to S/W dated 21/3/44.
Incl.5 - Ltr. to Pres. dated 21/3/44.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 264, 6 Jun 1944)

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

SPJGQ
CM 253467

9 JUN 1944

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Common trial by G.C.M., convened at Army Air Base, Hammer Field, Fresno, California, 2 March 1944. Dismissal.
Second Lieutenant CHARLES E. VANDER MOLEN (O-754565), Second Lieutenant SAMUEL A. MADDALENA (O-753700), 349th Night Fighter Squadron, Air Corps.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, CAMPBELL and FREDERICK, Judge Advocates

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

2. The two accused were tried by a common trial upon the following Charge and Specifications:

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

Specification 1: In that 2nd Lt. Charles E. Vander Molen, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, at Rankin Aeronautical Academy, Tulare, California on or about 4 February 1944, violate paragraph 16, AAF Regulation No. 60-16, dated 9 September 1942, by operating an aircraft below 1,000 feet altitude and over an obstruction to flight.

Specification 2: In that 2nd Lt. Charles E. Vander Molen, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, along US Highway No. 99, between Fresno, California and Merced, California on or about 4 February 1944, violate paragraph 16, AAF Regulation No. 60-16, dated 9 September 1942, by operating an aircraft below 1,000 feet altitude and over an obstruction to flight.

Specification 3: In that 2nd Lt. Charles E. Vander Molen, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, at Rankin Aeronautical Academy, Tulare, California, on or about 4 February 1944, violate paragraph 1, AAF Regulation No. 60-16, dated 9 September 1942, by flying a military airplane in a reckless and careless manner.

Specification 4: In that 2nd Lt. Charles E. Vander Molen, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, along US Highway No. 99, between Fresno, California and Merced, California, on or about 4 February 1944, violate paragraph 1, AAF Regulation No. 60-16, dated 9 September 1942, by flying a military airplane in a reckless and careless manner.

Specification 5: In that 2nd Lt. Charles E. Vander Molen, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, on or about 4 February 1944, violate paragraph 24, AAF Regulation No. 60-16, dated 9 September 1942, by deviating from the approved flight plan and going to Tulare, California.

Specification 6: In that Second Lieutenant Charles E. Vander Molen, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, on or about 4 February 1944, did, above United States Highway 99 between Fresno, California and Merced, California, wrongfully fail to obey an order of the Commanding General, IV Fighter Command, that no aircraft of said command would at any time fly at an altitude of less than two hundred (200) feet above the terrain or water, except by express permission of the Commanding General, IV Fighter Command, which said order was given by said Commanding General while in the execution of his office.

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt. Samuel A. Maddalena, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, at Rankin Aeronautical Academy, Tulare, California, on or about 4 February 1944, violate paragraph 16, AAF Regulation No. 60-16, dated 9 September 1942, by operating an aircraft below 1,000 feet altitude and over an obstruction to flight.

Specification 2: In that 2nd Lt. Samuel A. Maddalena, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, along US Highway No. 99, between Fresno, California and Merced, California on or about 4 February 1944, violate paragraph 16, AAF Regulation No. 60-16, dated 9 September 1942, by operating an aircraft below 1,000 feet altitude and over an obstruction to flight.

Specification 3: In that 2nd Lt. Samuel A. Maddalena, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, at Rankin Aeronautical Academy, Tulare, California, on or about 4 February 1944, violate paragraph 1, AAF Regulation No. 60-16, dated 9 September 1942, by flying a military airplane in a reckless and careless manner.

Specification 4: In that 2nd Lt. Samuel A. Maddalena, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, along US Highway No. 99, between Fresno, California and Merced, California, on or about 4 February 1944, violate paragraph 1, AAF Regulation No. 60-16, dated 9 September 1942, by flying a military airplane in a reckless and careless manner.

Specification 5: In that 2nd Lt. Samuel A. Maddalena, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, did, on or about 4 February 1944, violate paragraph 24, AAF Regulation No. 60-16, dated 9 September 1942, by deviating from the approved flight plan and going to Tulare, California.

Specification 6: In that Second Lieutenant Samuel A. Maddalena, Air Corps, 349th Night Fighter Squadron, 481st Night Fighter Operational Training Group, on or about 4 February 1944, did, above United States Highway 99 between Fresno, California and Merced, California, wrongfully fail to obey an order of the Commanding General, IV Fighter Command, that no aircraft of said command would at any time fly at an altitude of less than two hundred (200) feet above the terrain or water, except by express permission of the Commanding General, IV Fighter Command, which said order was given by said Commanding General while in the execution of his office.

Each accused pleaded not guilty to, and was found guilty of, the Charge

and all the Specifications except Specification 4. Each was found not guilty of Specification 4. No evidence of previous convictions as to either was introduced. They were each sentenced to be dismissed the service. The reviewing authority approved of the sentence as to each and forwarded the record of trial for action under the 48th Article of War.

3. The competent and pertinent evidence presented by the prosecution may be summarized as follows:

The two accused, lieutenants Vander Molen and Maddalena, 22 and 21 years old respectively, were Night Fighter Student Pilots and were members of the 349th Night Fighter Squadron. About 1 February 1944 they reported at Hammer Field, Fresno, California for transition training in P-70s (Pros. Ex. 5). Because of the scarcity of planes they and other pilots of the same squadron were to be given only 4 hours of actual flight in P-70 planes as their quota of transition flying time for the month. They then would be "grounded" for two months (R. 8, 12). Neither had flown a P-70. On 2 February 1944 they flew P-70s for two hours. They were scheduled to fly the remaining 2 hours at 1200 (noon) on 4 February 1944. Due to adverse weather conditions prevailing at that time the flight time was postponed until 1400 (2 p.m.) (R. 8).

The Flight Commander, Captain R. A. Hamrick, briefed the pilots on a mission which contemplated flying from Hammer Field near Fresno, California, to Stockton, thence to Hanford and return to the starting field, (R. 8) and handed out the flight clearances to the pilots (R. 9). On the bulletin board appeared the number of the plane each student was to fly, the take off time, landing time, and where they were to go (R. 10). No pilot could take off in his plane without first turning over to his crew chief his flight clearance.

There was accepted in evidence, without objection by defense, a copy of Army Air Force Regulations No. 60-16 (Ex. 1), an aero-chart map of the locality (Ex. 2), the Operations Orders (Ex. 3, 4) and the weather forecast for that date from 1400 to 1800 (Ex. 5).

The Flight Commander explained that the proposed flight was a transition flight, viz. a flight for the purpose of familiarizing the pilot with this type of plane. Furthermore, it was to be a "contact" flight not an "instrument" flight, that is, the pilot was to "maintain visual contact with the ground" (R. 12). He further testified that when there is an overcast a pilot is required to fly at least 500 feet below it (R. 14).

According to the bulletin board and the Operations Orders, Maddalena was assigned to plane 066 listed to take off at 1415; Vander Molen at 1420 in plane 131. These identifying numbers appear on the fin of the plane (R. 14). Each flight was scheduled to terminate 2¼ hours later (4:30 p.m. and 4:35 p.m. respectively).

According to the map (Ex. 2) the first leg of the flight was N.W. from Hammer Field to, or around, Stockton. In direct line with this leg of the flight and about half way is a town named Merced. The second leg of the flight is S.E., but slightly to the south, so that in reaching its terminus, Hanford, the flight would pass west of Hammer Field and continue well beyond. The third leg of the flight was N by N.W. back to Hammer Field. S.E. of Hanford, by approximately 15 miles, is the Rankin Air Field near the town of Tulare. The flight was to be a non stop flight. Each accused was given copies of the weather forecast (Ex. 5). This forecast was issued at 1345 and indicated an "overcast at 1000 Merced becoming broken at 1430 and scattered at 1500" and an "overcast at 1200 feet Hammer Field becoming broken by 1430 and scattered by 1530. Visibility 5-8 miles in haze. Verification probably 85%."

Lieutenant J. V. McBride, weather officer at Hammer Field, testified that he pointed out to the pilots undertaking the proposed flight that the weather "to the south was not too good" (R. 15); that at Hanford and in that locality the ceiling was estimated to be 1000 feet but "it could have been 900 feet" (R. 16).

The pertinent parts of the Air Traffic Rules issued by the War Department 9 September 1942 as AAF Regulation No. 60-16 (Ex. 1) read as follows:

SECTION I. GENERAL FLIGHT RULES

1. Reckless Operation. An air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground.

SECTION II. CONTACT FLIGHT RULES

(Contact flight below 3,500 feet)

16. Minimum altitudes of flight.

a. Except during take-off and landing, aircraft will not be operated.

(1) below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(c) 1,000 feet above any open air assembly or persons.

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstruction to flight.

b. Any maneuver may be conducted at such altitude above the ground or water as is necessary for its proper execution in places other than specified above, when such maneuver is required to accomplish an ordered tactical flight, engineering or training mission.

17. Contact flight above 3,500 feet on civil airway. Military aircraft flying under contact conditions at an altitude of more than 3,500 feet above the ground or water and within the limits of a civil airway shall conform to the rules prescribed for flight under instrument conditions in the following respects:

a. (1) Compliance with paragraph 24, Flight plan, when flights touch airway traffic control areas.

18. Proximity to cloud formation. Aircraft shall not be flown closer than 500 feet vertically to an overcast or cloud formation nor closer than 2,000 feet horizontally to a cloud formation.

SECTION III. INSTRUMENT FLIGHT RULES

24. Flight Plan.

c. Approved flight plan. An approved flight plan is an authorization for an aircraft to proceed in accordance with the provisions of such flight plan only insofar as known air traffic conditions are concerned and does not constitute authority to violate any provisions of these regulations or any provisions of the Civil Air Regulations promulgated by the Civil Aeronautics Board. Traffic control instructions issued to and received by the pilot before departure or enroute shall be considered to be a part of the approved flight plan.

d. Notice of change in flight plan. No change in an approved flight plan shall be made without the prior approval of the airway traffic control center concerned unless an emergency situation arises which requires immediate decision and action or unless weather conditions make it necessary for the pilot to effect such change in order to continue flight in accordance with the contact flight rules; in either case, the proper airway traffic control center shall be notified as soon as possible.

38. Contact flight. Contact flight is flight conducted in such a manner that ground and water within gliding distance of the aircraft can at all times be used for visual reference.

SECTION V. NONAPPLICATION OF AIR TRAFFIC RULES

49. These air traffic rules or any particular air traffic rule shall not apply in the following cases:

d. When necessary to carry out training directives. When deviation from the provisions of these regulations is deemed necessary for flying training activities, commanding officers will be responsible for (1) the coordination of such training with all other activities concerned in the local area involved; and (2) for the notification of the appropriate airway traffic control center.

On 1 February 1944 Lieutenant Colonel W. R. Yancey, commanding officer of the 349th Night Fighter Squadron, called a meeting of all pilots of his squadron. This meeting was attended by the accused. At that meeting he read to them a draft of the orders issued by the Commanding General of the Fourth Fighter Command and pointed out that these regulations were from General Arnold himself and to pay particular attention to them. He then read the complete draft of the order which included Paragraph 7 relating to low flying. This paragraph "definitely states that no aircraft of this command will at no time fly at an altitude lower than 200 feet above ground, or over any obstruction on the ground" (R. 44).

By stipulation (R. 17) the two accused pilots cleared and signed the flight report on the two ships indicated.

Lieutenant Wayne E. Coyle of the same field but of a different organization testified that he was flying a P-70 plane on the afternoon of 4 February 1944 testing equipment. During the course of this flight he descended through a broken cloud and noticed the two planes flown by the accused "flying low". He "took after" them and took the numbers of the planes (R. 18). When he first observed them he was about 8 or 10 miles North of Hammer Field. He flew 15 to 20 miles in order to catch up to them. He caught up as he approached Merced. He stated that he saw "two aircraft flying low, fifty to one hundred feet jumping over trees". He himself had had four years of flying experience. High tension wires were to the right of the flight running parallel thereto (R. 19). When he caught up to the planes they were at 700 feet altitude. The time was 1425. When asked if there were any obstructions to flight, he stated that there were "scattered houses and trees" (R. 20).

On cross examination he testified that the ceiling when he came down through the cloud was 800 to 1000 feet and continued slightly better than 800 feet to the spot where he overtook the planes. The two planes were five to eight miles away from him when he first saw them. He could not state how long it took him to catch up to the planes but he stayed above them until he caught up to them then he "chandelled" underneath and between the two planes. He could not state exactly where it was that he saw them flying low during the 50 mile chase but it was somewhere between

Madera and Merced. At the time he himself was "within one mile - behind and below them" (R. 22-23). He could not tell how many times the planes descended but although he was several miles behind them he saw them descend "many times" and then raise to 700 feet (R. 24). He flew at a speed of 280 miles per hour in order to catch them. The planes piloted by the accused were going about 220 miles per hour (R. 25).

Mr. Howard C. Scheurer, Squadron Commander, Lieutenant H. C. Phillips, Army supervisor and Mr. Lynn F. Saunders, tower operator of the Rankin Aeronautical Academy, Tulare, California testified that the academy was being operated on 4 February 1944 under contract with the Government to train air cadets in primary training. These three witnesses were in the west control tower (30 feet above ground) and observed a P-70 coming from the West at an altitude of 150 to 250 feet. At the time the weather was not suitable for solo flights by the students so the students were being trained within the traffic pattern at a height of no more than 500 feet. The P-70 flew across the field and came within approximately 50 to 150 feet of one trainer in flight and 100 to 250 feet of another trainer (R. 27, 28, 31, 35). A second P-70 followed soon thereafter but at a greater altitude - 500 to 600 feet (R. 30). It approached the traffic pattern at traffic pattern altitude and immediately climbed above that altitude above the pattern to 1000 to 1200 feet (R. 28, 30, 31, 35, 37). The first plane (P-70) had a 6 on its vertical fin (R. 29, 31). Two of the witnesses were of the opinion that the P-70 with the numeral 6 on the fin was being operated in a reckless and careless manner (R. 28, 31), but "not so much" the second plane (R. 28), he "approached it very closely" (R. 31). One witness was of the opinion that the second P-70 was not operated in a careless or reckless manner (R. 37).

Mr. Gerald P. Nettleton, flight instructor at the Rankin Academy testified that he had taken off from Rankin Field for a supervised solo flight of a student on the afternoon of 4 February 1944 and had levelled off at 500 feet above ground when he observed a plane he believed to be a P-70 coming from the West in a long dive several thousand feet in front of him but at 100 or 150 feet lower altitude (R. 40). He could not tell what was its lowest point of altitude because he himself was at a higher altitude. He did not observe that it came close to any other ship, nor that it was flown in a careless or reckless manner other than its altitude and the fact that it crossed the field (R. 42). He also saw the second P-70 but it flew outside of the traffic pattern and was not below 500 feet, nor was it flown in a careless manner (R. 42).

Captain L. C. Bradley testified that, as flight commander, on 1 February 1944, he read the flight regulations (AAF No. 60-16, Ex. 1) to all members of his command including both accused (R. 47).

There was offered in evidence, without objection, a written acknowledgement signed by the accused that they had read the Flight Regulations (Ex. 10, 11). Separate written statements concerning the particular flight under discussion signed by the accused were also admitted in evidence without objection (Ex. 12, 13, 14, 15).

The accused, Maddelena, set forth in his statement that he was told to report at 1200 for briefing at the Pilots' Lounge, but because of the weather the pilots could not take off until 1400. He obtained permission from Captain Hamrick to leave for something to eat. Upon his return Captain Hamrick was talking "to the boys" so he went to his locker to put on his flight clothes. He heard the captain mention Stockton and Hanford and saw him diagram the course on the board. He received his clearance. The weather officer "briefed" them and the pilots left. He did not hear any instruction given regarding altitude. He knew his course was "Stockton to Hanford and back to Fresno".

The accused Vander Molen set forth in his statements that he did not hear the "briefing" as he was putting on his flying suit at the time. He was given his clearance and knew the route but did not know the altitude. He denied that he was flying at tree-top level or that he was hedge-hopping. Vander Molen took off in plane 131 at approximately 1420 and, observing Maddalena directly in front of him, caught up with him and flew abreast with him toward Merced about 500 or 600 feet apart. Around Madera another P-70 came between them and chandelled up in front of them. His own altitude at that time according to his altimeter set at 0 was 500 feet. He continued on to Stockton at an altitude between 1000 and 1500 feet, then to Hanford. Having taken his primary training at Rankin Field he flew in that direction, approached that field at about 800 feet altitude and dropped down when over the field to 500 to 600 feet then climbed up to avoid the traffic pattern avoiding all aircraft. He then headed for Fresno at 1000 feet and landed at 1620.

4. After the prosecution had closed its case the defense moved for finding of not guilty of Specification 5 in that the flight undertaken by accused was admittedly a contact flight less than 3500 feet and that therefore neither paragraph 24 nor paragraph 17-a of AAF Regulations 60-16 applied. The trial judge advocate conceded that neither paragraph applied but contended that it was a question for the court to determine (R. 52, 53). He thereupon moved to amend Specification 5 by omitting all reference to the Regulations and by changing the word "by deviating" to the word "deviate", so that the Specification would then read "In that Second Lieutenant Maddalena (Vander Molen), Air Corps, - - -, did, on or about 4 February 1944 deviate from the approved flight plan by going to Tulare, California". The defense counsel objected (R. 53). Defense counsel also moved the court to find Vander Molen not guilty of Specification 3 as none of the witnesses testified that the plane he was flying was flown in a reckless or careless manner (R. 54). The court refused the motion regarding Specification 3 and announced, regarding Specification 5, "the Specification, as amended, may be accepted" (R. 54-55).

5. The comptetent evidence produced by the defense may be summarized as follows:

Mr. Victor A. Kunz, a Squadron Commander, Mr. Fritz Van Briesen, a flight instructor, Mr. Charles E. Hahn, a Flight Commander, of the Rankin Aeronautical Academy testified that on the afternoon of 4 February 1944 they were at Rankin Field and observed the two planes operated by the accused. Kunz stated that he was in the East traffic tower; that neither plane came lower than the traffic pattern altitude - which was "800 feet indicated" (R. 56); (500 feet actual), that neither one came any closer than 500 feet to any other plane; and that neither plane was operated in a careless or reckless manner (R. 56). He maintained he was in a position to observe the entire episode and was positive of the altitudes (R. 57). The ceiling at that point and at that time was 900 feet (R. 57). Van Briesen was on the ground having just gotten out of a plane and testified that the first plane that approached was "about pattern altitude" (500 feet), the second one was "around 800 feet", neither one of them flew close to any other plane, and that the altitude of the lowest plane was not dangerous to the operations of the field (R. 59-60). Hahn was flying at 500 feet when he observed the planes and stated they were at the same altitude he was, that neither plane flew close to any other plane and neither was operated carelessly (R. 61).

The defense offered and there was accepted in evidence a document known as AAF Form No. 23 (Def. Ex. A) which contained a list of the pilots to participate in the flight of 4 February 1944, the Route, the Weather Data, and the Flight Plan. In the latter it appeared that the route was direct to Stockton, direct to Hanford, and direct to Hammer. The altitude shown during the entire flight was CFR (Contact Flight Rules). (R. 66).

Lieutenant William Elbracht a student officer in the same squadron with the accused testified that he participated in the two flights, of the 2nd and 4th of February 1944, and that when Captain Hamrick "briefed" the flight of the 4th between 1330 and 1400 neither of the accused was present. They were at lunch (R. 71). The flight was ordered for the purpose of permitting the pilots who made it to get in 2 hours flying time, which added to the two hours gained on 2 February would total the prescribed 4 hours for the month (R. 67-68). He himself took off next to the last in the flight and the ceiling then was 900 feet, indicated, or 600 feet actual. This overcast extended about eight miles along the route. At Hanford it was 1200 to 1300 feet, indicated (R. 69) or 900 to 100 feet actual (R. 71). The ceiling at Hammer Field itself was at 600 feet. The visibility at Hanford was 5 to 8 miles (R. 71).

Second Lieutenant J. M. Pritchard, also of the same squadron testified that the flight of 4 February 1944 was "to get in flying time - of two hours", and that the flying time over the route indicated, if made on a direct line, would require only one hour and a half (R. 72). As he

took off the ceiling was between 900 and 1000 feet, indicated, and it lasted to Madera, that the ceiling at Hanford was from 1000 to 1200 feet, indicated altitude, that he circled around the towns because of the weather (R. 73, 74).

Second Lieutenant Jack DeVore, also of the same squadron, testified that he made the flight in question, that its purpose was to get in flying time. He took off about 1445. The ceiling at Hammer Field varied from 900 to 1100 feet and continued at that height as far North as Merced where it broke. It was about the same at Hanford as at Hammer Field when he reached Hanford at approximately 1600. It could have been a little lower (R. 76).

Both accused were advised separately of his rights as a witness and each elected to be sworn and to testify.

Lieutenant Maddalena testified that he was 20 years of age and had approximately one year's flying experience on various planes. On 2 February 1944 he flew a P-70 plane for the first time (R. 76) for two hours. About 1130 on the 4th he went to the pilots' lounge and was told about 12:15 that flying was delayed because of bad weather. He asked permission to leave and get something to eat. This was granted and he and Vander Molen left. They returned at 1:45 and saw Captain Hamrick talking to a group of the pilots. He did not hear all that the captain was saying because he went to his locker to put on his flying equipment. All he heard was "Stockton and Hanford". He picked up his clearance papers and also Vander Molen's. He gave Vander Molen his papers. Then he went to his ship, checked it over, gave his papers to the crew chief, called the tower and taxied to the take-off. He took off about 1430, climbed to 1000 feet and hit a cloud base and dropped to 700 feet (400 feet actual (R. 83)) and stayed at that altitude until he reached Merced. Then he climbed to 1200 and then to 1800. He dropped to 700 so as not to fly through the overcast (R. 79). When about 20 to 25 miles North of the field he observed a P-70 which came near at a lower altitude and "chandelled" in front of him (R. 84). He denied that he did any "hedge-hopping". He saw Vander Molen and Vander Molen was flying at his (Maddalena's) altitude and higher. Maddalena made a sweeping turn at Stockton and then went to Hanford. He got there about 1550. The ceiling there was about 1200 feet. He was travelling at 220 miles per hour. After leaving Hanford,

> "I hit a town I thought was Hanford, - I was not positive, and went South until I spotted Tulare and I established a general position and started a left turn. I had a general idea where I was as I went to school there and thought I knew where I was. As soon as I spotted the field, I lined myself up to right angles of the mat, and when I was within two miles of the field, I started a general dive. When I reached about 800 feet, - between seven and eight hundred - I levelled off and passed over the field."

At the time he went over the pattern there were two planes in the pattern in the air. The closest he came to either was 2000 feet. It took him only a "few minutes" to get from Hanford to Tulare (R. 80).

On cross examination Maddalena stated that he took his primary training at Rankin School and knew some of the personnel there but denied agreeing on any plan with Vander Molen to fly to that field on that day. He and Vander Molen always flew together as they had gone through primary training and other training together (R. 81-82). The ceiling at Rankin when he reached there was 1200 feet (R. 82). He flew across Rankin Field at an actual altitude of 450 feet and later went to 700 feet (R. 83). When questioned by the court why he did not return immediately to Hammer Field when he found the ceiling to be actually 670 feet he stated that his only reason was that everyone else was going on (R. 85).

Lieutenant Vander Molen corroborated Maddalena regarding their previous training, the purpose of the flight, his inability to hear what Captain Hamrick said, and the briefing by the weather man (R. 85-86). He took off about 1430 or 1435 in back of Maddalena and then caught up to him about 10 to 15 miles from the field. He observed the ceiling about 400 or 500 feet above - he was flying 400 or 500 feet above ground (R. 86, 87). He denied that he did any hedge-hopping. He saw another P-70 fly below and between them near Madera and "chandell" (R. 87). They climbed up after reaching Merced as there were broken clouds there. They made a wide sweep around Stockton and headed for Hanford. Shortly thereafter he lost track of Maddalena. As he approached Rankin he was flying 800, actual, and passed about 100 feet to the end of the landing mat at 700 feet actual (R. 88). There were no training planes close to him. He saw some at a distance of between a quarter and a half of a mile.

On cross examination he claimed that at no time did he fly below 400 feet, actual (R. 91). When asked by the court why he "deviated" to Rankin Academy, he stated that Rankin "is practically in the flight plan, only fifteen miles away, and having taken my primary training there, I just went over the field for old times sake" (R. 91).

In rebuttal Lieutenant Coyle was recalled by the prosecution and repeated his former testimony that in his opinion the planes flown by the accused were hedge-hopping (R. 92).

6. With reference to Specifications 1 and 2 of the Charge the accused pilots are charged with violating paragraph 16, AAF Regulation No. 60-16 by operating an aircraft "below 1000 feet altitude and over an obstruction to flight" at Rankin Field, and also "along U.S. Highway 99 between Fresno and Merced". In order to sustain the findings of guilty of the court it is necessary to determine (1) whether paragraph 16 of the Regulation applied to the accused pilots during the flight, and (2) if so, whether the accused violated its provisions. It is noted that

paragraph 49 of the same Regulation permits commanding officers to deviate from the Regulation when necessary to carry out training directives. It was clear from the evidence that the flight upon which the accused pilots were ordered was necessary for their training. The very purpose of the flight was to permit them to get in their required four hours flying time for the month and to familiarize themselves with the operation of a P-70 plane. Planes were few in number compared to pilots. The weather had been and was bad. Training apparently was being conducted under difficulties. These pilots were required to fly when flying was prohibited by the Regulation unless this flight was an authorized deviation under paragraph 49 of Section V - "Nonapplication of Air Traffic Rules". However, the height of the overcast appears to have no bearing since the evidence rather clearly shows that the overcast at Rankin Field was about 2000 feet. The Field altitude is 300 feet, thus the overcast was 1700 feet above the ground, and even flying 500 feet below the overcast permitted the accused to fly 1200 feet above the ground. The evidence indicates that they were flying even higher than this when they dived down at the field to altitudes of about 200 feet (Maddalena) to 500 feet (Vander Molen) above the ground. Maddalena flew through the traffic pattern, Vander Molen near the edge of it. Obviously Maddalena's conduct here was the more reprehensible, but it is equally obvious that they both violated the regulations as charged. The finding of guilty as to Specification 1 of the Charge is sustained as to each accused.

With reference to Specification 2, the height of the overcast furnishes a legitimate basis for a reasonable doubt since the regulations normally require flying 500 feet below the overcast when one must fly under it; although the proper course is to go around or turn back. The finding of guilty as to each accused as to Specification 2 is not sustained.

With reference to Specification 3 of the Charge the pilots were accused of violating paragraph 1 of the Regulation at Rankin Field by flying a military airplane in a reckless and careless manner. All witnesses agreed that Maddalena flew directly over Rankin Field at a time when the student pilots were receiving their primary training. These students were beginners in flying. It was established that Maddalena flew his P-70 plane at 220 miles per hour at an altitude variously estimated from 150 feet to 500 feet across the traffic pattern where these novices were endeavoring to learn to fly. One witness testified that he came within 50 feet of one trainer and 100 feet of another. The court heard all of the circumstances and had the opportunity to observe the witnesses. Its conclusion that Maddalena was operating his plane carelessly and recklessly under the circumstances should not be disturbed. In this connection the Board is mindful that the witnesses for the prosecution as well as for the defense expressed their opinion upon whether the accused operated their planes in a careless or reckless manner. This was the ultimate fact in issue.

From a technical flying standpoint the manner of operating the plane is not necessarily the determining factor. Of course, a pilot can so operate a plane as to make his flying reckless and careless but he may also operate the plane in an expert manner and still, due to his proximity to others, fly in a careless and reckless manner. Diving on a flying field, particularly one from which novice trainees are taking off and landing, with a powerful two motored plane, even though, as in the case of Vander Molen, one reaches only the edge of the traffic pattern, is both reckless and careless. The chances of precipitating, directly or indirectly, a fatal accident by such action are so great that such flying can be given no other than a reckless and careless characterization. Obviously the flying officers who were members of the court realized this as is shown in their finding of guilty. Their opinion as to what was careless and reckless under the circumstances disclosed by the evidence should be followed. The finding of guilty as to both Vander Molen and Maddalena of Specification 3 of the Charge is therefore sustained by the evidence.

Specification 5 of the Charge avers that the accused violated paragraph 24 of the Regulation "by deviating from the approved flight plan and going to Tulare, California". An examination of Paragraph 24 of the Regulation clearly shows that it applies only to instrument flights. Paragraph 24 is a part of Section III entitled "Instrument Flight Rules". True it is that this same Paragraph 24 is adopted by reference in paragraph 17 a (1), but paragraph 17 itself does not apply to the type of flight undertaken by these pilots. It applies only to "contact flights above 3500 feet on civil airway". The Trial Judge Advocate frankly admitted this to be so but endeavored to correct the erroneous Specification by amendment. He moved to remove from the Specification all reference to the Regulation and simply charge the accused with deviating from the approved flight plan. Such an amendment was a substantial change and should not have been permitted (C.M. 129525, Par. 73, M.C.M., 1928). However, it was a harmless error because the Specification in its amended form does not aver an offense. If amended as requested it simply avers that the accused deviated from an approved flight plan. It does not aver that such a deviation was wrongful or unlawful. Many instances of proper deviations from approved flight plans can be suggested. Weather conditions or change of orders by one in authority can compel or effect a proper deviation. Failure therefore to aver in the Specification that the deviation was wrongful or unlawful is fatal. The conviction of Specification 5 cannot be sustained as to either accused (C.M. 187548; C.M. 251162).

With reference to the remaining Specification (6) wherein the accused are charged with flying lower than 200 feet in violation of an order of the Commanding General, the finding of guilty is supported by the sole testimony of the witness Lieutenant W. E. Coyle. To the contrary in defense we find only the emphatic denials of the two accused. The matter is therefore one of credibility. The overcast offered the

accused no defense in flying below 200 feet in violation of orders, as charged. Considering the evidence on this point, the testimony of the accused, both vitally interested witnesses, on the one hand, and that of Lt. Coyle, an experienced flyer and disinterested witness, on the other, the court was right in finding the accused guilty. There can be no question as to Lt. Coyle's ability, under the circumstances in the case, to determine whether accused were flying below 200 feet and "hedge hopping". He states that when he first saw accused they were "flying low"; that he was then flying at 700 feet; that he took after them and caught them; that during this chase and in an area north of Madera, which he indicated on the map, the accused descended to altitudes of 50 feet to 150 feet several times; that they were missing the obstructions, scattered houses and trees, when flying low "and when they decided to quit they raised to 700 ft" at which time he chandelled under them and took their numbers. During this chase it is apparent that Lt. Coyle was closing on the accused all the time and he states that during the period of hedge hopping, which must have covered a matter of miles, he was close to them, "within a mile", behind and a little to the left. He had gone down from 700 feet and states that he was "on a level with them". Apparently he meant generally on the level with them, but at any rate he was close enough and at a low enough altitude to be able to determine with a reasonable degree of accuracy that they were flying for a considerable distance under 200 feet and were "hedge hopping". It is true that the accused both testify that they flew during this time at 700 feet, indicated, and never varied. It was for the court to determine who was telling the truth, and from the evidence it is convincing that the court reached the correct conclusion.

7. The records of the War Department show the accused Lieutenant Charles E. Vander Molen to be 22 years of age. He was born and raised in Palmyra, New York. He is single. He graduated from high school in 1939, operated his father's farm for one year, employed as a machine operator for one year and enlisted in the Army 8 January 1942. He received five months instruction as an airplane mechanic. He became an Air Corps Cadet 28 October 1942 and completed his pre-flight, primary, basic and advanced training 30 August 1943 on which date he was commissioned second lieutenant, A.U.S. and assigned to the Air Corps as a fighter pilot twin engine planes. He received further training and instruction in B-25 transition and as a night fighter pilot at La Junta, Colorado and Orlando, Florida.

8. The records of the War Department show the accused Lieutenant Samuel A. Maddalena to be 21 years of age born in Sicily. He migrated to this country with his parents in childhood and was raised in Irvington, New Jersey. He graduated from high school and attended Newark College of Engineering for one year. He was employed as an automobile mechanic and drill press operator until he enlisted 25 May 1942. He became an Air Cadet 29 October 1942 and completed his training as a

pilot 30 August 1943. On the same date he was commissioned second lieutenant, A.U.S. and assigned as a fighter pilot to the Air Corps. He received further training and instruction in B-25 transition and night fighter pilot at La Junta, Colorado, and Orlando, Florida.

9. The court was legally constituted. It had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty as to each accused of Specifications 2 and 5 of the Charge, but is legally sufficient to support the findings of guilty of Specifications 1, 3 and 6 of the Charge and the Charge and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

William A. Pounds, Judge Advocate.

William H. Gamble, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles E. Vander Molen (0-754565), and Second Lieutenant Samuel A. Maddalena (0-753700), 349th Night Fighter Squadron, Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 2 and 5 of the Charge as to each, but is legally sufficient to support the findings of guilty of Specifications 1, 3 and 6 of the respective Charges and to support each Charge and the respective sentences thereunder, and to warrant confirmation of the sentence as to each. Each accused was found not guilty of Specification 4.

3. Consideration has been given to the attached memorandum from the Commanding General of the Army Air Forces, dated 24 April 1944. He recommends that the sentence as to each be confirmed and carried into execution. I concur in that recommendation.

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

Myron C. Cramer

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

4 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action
4 - Memo. from CG, Army Air Forces, dated 24 April 1944

(Findings of guilty of Specifications 2 and 5 of respective Charges disapproved. Sentence confirmed as to each accused. G.C.M.O. 438, 16 Aug 1944)

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

SPJGV
CM 253556

15 MAY 1944

UNITED STATES v. Second Lieutenant ROBERT V. GODDARD (0-1647460), Corps of Engineers.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Gruber, Oklahoma, 29 March 1944. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Robert V. Goddard, Fourth Regiment, Army Service Forces Replacement Depot, Camp Reynolds, Pennsylvania, did, without proper authority, absent himself from his station at Camp Reynolds, Pennsylvania, from about 28 December 1943 to about 15 February 1944.

He pleaded guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, but recommended that in view of the announced policy in paragraph 3b (2), AR 605-300, that "no officer will avoid service in an overseas theatre through absence without leave or desertion", that the sentence be suspended and the officer ordered to immediate duty in a foreign theater of operations.

3. By paragraph 14, Special Orders No. 294, The Engineer School,

Fort Belvoir, Virginia, dated 9 December 1943, the accused was relieved from assignment at Fort Belvoir and assigned to Engineer Officers' Replacement Pool, Camp Reynolds, Pennsylvania, to report on or about 11 December 1943. He was granted a 10-day delay en route in addition to authorized travel time (R. 7; Ex. A). Accused was granted an additional five-day delay in reporting to Camp Reynolds by verbal order over the telephone by the Commanding Officer, Camp Reynolds. Allowing for all authorized leave and travel time accused should have reported to Camp Reynolds on or about 28 December 1943. Accused has never reported to Camp Reynolds (R. 7; Exs. B, C). An extract copy of morning report of the 4th Training Regiment to which accused had been attached at Camp Reynolds was received in evidence showing accused from leave to absence without leave as of 28 December 1943 (R. 7; Ex. D). It was stipulated that accused was arrested at Osage, Oklahoma, on 15 February 1944, by Captain Grady J. Flynn, Jr., Provost Marshal, Tulsa, Oklahoma.

4. Accused, after having his rights as a witness explained to him, elected to testify under oath. He testified:

> "I have no statements to make in evidence except the fact that I have admitted my guilt, and I am here to accept my punishment. I wish to start on my punishment and get it over with and get back into the service" (R. 8).

On cross-examination and examination by the court accused said he had not satisfied himself as to why he went absent without leave. While he was on leave his wife became sick and he took her to his home and put her under the care of his family doctor, though his absence was one of those cases of "I will be back tomorrow" (R. 9). He stayed at his home with his wife while he was absent, led a normal life, wore his uniform, and did not attempt to conceal himself (R. 10).

5. The evidence shows conclusively that accused failed to report from leave to his organization at Camp Reynolds, Pennsylvania, and was absent without leave from 28 December 1943 until apprehended at his home in Osage, Oklahoma, on 15 February 1944.

6. War Department records show that accused is 21 years of age. He attended Osage High School, Osage, Oklahoma, for two years and enlisted in the Army 12 August 1940. He completed the Officer Candidate Course, Eastern Signal Corps School, Fort Monmouth, New Jersey, 10 June 1943, and was on that date appointed second lieutenant, Signal Corps, Army of the United States. He received academic ratings of excellent and satisfactory in courses he attended as an officer at the Eastern Signal Corps Schools.

On 31 October 1943 he was detailed in the Corps of Engineers and upon completing the 5th Engineer Training Course at the Engineer School, Fort Belvoir, Virginia, received an academic rating of very satisfactory.

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

Thomas N. Tappy, Judge Advocate.

Norman M. Kiedaisch, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 253556

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 - 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 V. Goddard (0-1647460), 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 of guilty, to support the sentence and to warrant confirmation of the sentence. In his action the reviewing authority states that "In view of the announced policy in paragraph 3 b (2), AR 605-300, that 'no officer will avoid service in an overseas theatre through absence without leave or desertion', it is recommended that this sentence be suspended and the officer ordered to immediate duty in a foreign theatre of operations." I do not concur in that recommendation. In his review the Staff Judge Advocate states that the Commanding Officer at Camp Reynolds has advised that the accused was in an "alerted replacement status". In my opinion the Army regulation referred to was not intended to apply to a situation of this kind. This officer was absent without leave 49 days. He had been ordered to Camp Reynolds, which is a staging area, but never reported there for duty. He did not voluntarily give himself up but was finally apprehended at his home by military police officers. I recommend that the sentence be confirmed but that the forfeitures adjudged be remitted, that the period of confinement be reduced to one year, and that the sentence as thus modified be carried into execution. I also recommend 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 343, 11 Jul 1944)

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

6 JUN 1944

SPJGH
CM 253578

UNITED STATES	)	COMMUNICATIONS ZONE CALIFORNIA-ARIZONA MANEUVER AREA
v.	)	Trial by G.C.M., convened at Ordnance Base, Pomona, California, 4 March 1944. Dismissal and total forfeitures.
Second Lieutenant WILLIAM F. KOSAVEACH (0-1555237), Ordnance Department.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that 2nd Lt. William F. Kosaveach, 824th Ordnance Base Depot Co., 256th Ordnance Bn., did, at Ordnance Base, California-Arizona Maneuver Area, Pomona, California, on divers, many and sundry occasions between the dates of 18 October 1943, and 12 February 1944, more specific dates of which are to the accuser unknown, feloniously take, steal and carry away:

4 electric drills of the value of about $134.50
33 wrenches of the value of about $13.14
68 twist drills of the value of about $26.50
1 tire No. 110850413 of the value of about $8.00
1 electric portable drill press of the value of about $141.63
1 electric portable sander of the value of about $31.40
1 mitre box of the value of about $10.95
1 hydraulic jack of the value of about $22.00
1 taps and dies set value of about $27.86
1 vise of the value of about $11.09
2 sets drill index of the value of about $31.50
1 spot light of the value of about $16.00
2 machetes with scabbards of the value of about $13.00
1 precision blade band saw of the value of about $12.00
1 twelve volt tank battery of the value of about $27.50
1 tank siren of the value of about $18.00

1 compass of the value of about $5.00
1 spark plug cleaner of the value of about $14.15 (together with 111 other items, or groups of items, valued from $.07 to $9.14, and consisting of 230 pieces of automobile and electrical equipment and hardware, as set out in the Specification, but not copied here).

property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to "dismissal from the service and to forfeit all pay and allowances to become due". The reviewing authority approved the sentence. The record of trial has now been forwarded for action under Article of War 48.

3. Evidence for the prosecution: Accused was assigned to the 824th Ordnance Base Depot Company about 15 May 1943 shortly after finishing Officer Candidate School. Private Robert J. Mills, of that organization, testified that from the "5th of November" until "just before Christmas" he worked in "the receiving section" at "the depot" as a truck driver under accused. On six or eight trips accused accompanied Private Mills while the latter was delivering merchandise to various buildings in the area. Accused would go through the buildings, would have boxes put on the truck and taken to the company supply room. "Between 30 and 40" boxes were handled in this manner and among their contents were a generator, defroster, spotlight, jack, two inner tubes and two tool boxes. On one occasion when boxes were being taken to the supply room accused ordered Mills to "Drive on this side of the supply room so Capt. Mulkerin cannot see me from the orderly room". Technical Sergeant Paul J. Basko testified that on the evening of 10 February 1944 he was acting supply sergeant and that accused came into the supply room and left a tire there. Staff Sergeant George Elliott saw the tire there later on that evening. Sergeant Elliott further testified that he had been supply sergeant under accused since May 1943 and that accused brought various items to the supply room which were not company property and instructed that they were to be kept out of the way "so they could not be seen". Among the items brought there were two tubes, a spotlight, a brake lining, a spark tester, a battery, and a portable electric sander. Sergeant Elliott saw accused pick up and take away some of the items (R. 55-56, 108-113, 115-117, 117-122).

On the morning of 14 February 1944 accused went to the acting mess sergeant of the 824th Ordnance Base Depot Company and asked for a sack of coffee, some canned goods and a half slab of bacon, and that it be delivered to "his company supply base". His request was reported to Captain John J. Mulkerin, Jr., their company commander. Captain Mulkerin thereupon made an investigation concerning accused and reported the results to the

commanding officer of the base. The following morning, 15 February, the automobile of accused was searched on the base by Major Otto J. Cook, provost marshal of the ordnance base, Captain Maurice F. Connor, assistant provost marshal, "Mr. Phillips", a small parts expert at the base, and Captain Mulkerin. A box of .30 caliber ammunition, a carbon clip, and two small "T-drills" were found in the glove compartment. The "turtle back" of the car was locked so accused was summoned. As he walked to the car with Captain Connor he remarked that he had a battery in the car belonging to the base. The rear end was opened and in it were found a "crash" helmet, an extension cord, several wrenches, a can of wax, a 12 volt tank battery, a hull compass and "numerous other items". The battery was "welded in and connected up". A 12 volt siren was also found, bolted to the steering wheel under the hood (R. 12-17, 17-21, 43-47, 59-61, 76-80, 87-88, 93-95, 98-102).

During the afternoon of 15 February, Captain Connor and Captain Mulkerin, under orders from Major Cook, accompanied the accused to his home in San Gabriel, about 26 miles from the base. When they arrived at the house accused went inside to get the key to the garage while the other officers waited in the car. The garage was located immediately to the rear of the house. When accused came out Captain Connor asked if he was familiar with his rights under the 24th Article of War. Accused said he was. Captain Connor then said, "You understand this is voluntary on your part". Accused did not reply but proceeded to open the garage door. Inside accused picked up two empty tool boxes, some wire, a soldering iron, a set of drills, and two "O.D." cans, saying that they belonged to the Pomona Ordnance Base. Also in the garage were a large number of other tools, drills and an electric sander which accused said were his own property. Accused stated these tools had either been given him by his father, a cabinet maker from Poland, or he had procured them on the "east Coast". The articles identified by accused as belonging to the base were returned there and placed in the provost marshal's office (R. 21-25, 47-50, 52, 61-62, 80-83).

The following day, 16 February, accused was placed under arrest in quarters by written order (Ex. 4) of the commanding officer of the ordnance base group. Major Cook talked to accused, asked if he understood his rights under Article of War 24, and told him that it meant, "you do not have to make any statement that will incriminate you in any way, and the fact that you don't make a statement can not be used against you". Accused said he understood and wanted to tell "everything". Major Cook then asked if the electric sander and the carpenter tools in his home came "from the base". Accused said they did. He further stated that "everything that I took from the base I can produce for you" and that he had not sold anything. Captain Connor, Captain Mulkerin and accused thereupon made another trip to the latter's home. Accused turned over to them a large number of tools and a quantity of equipment, including electric drills, a portable drill press,

a tire, tool boxes, sandpaper and a hydraulic jack, which he said belonged to the Pomona Ordnance Base. Captain Connor made a list (Ex. 5) of the articles and they were brought back to the base and locked up in the staff car under the custody of the provost marshal. Accused said there were some other articles in the house which his wife would bring in. That evening the wife of accused brought in a suitcase of articles, including tubes, a hand saw blade, machettes and a defroster. The tools and equipment taken from the garage and home of accused and from his car, were classified and appraised by "Mr. Curtis", an expert in the tools and equipment section of the Ordnance Group, and by Mr. Phillips. The articles were then placed in boxes and an inventory (Ex. 1) made of the contents of each box. Exhibit 1, containing an itemized list of articles substantially the same as the itemized list of articles set out in the Specification was received in evidence (R. 25-32, 36-37, 64-66, 70-71, 75, 84-87, 92-93).

Major Leonard C. Bessom, investigating officer in the case, interviewed accused about 21 February. He warned accused of his rights and had accused repeat the explanation back to him. He then read the charge sheet to accused and asked him if the charges were true. Accused said they were. He then told Major Bessom about his childhood; how home conditions were responsible for his formation of habits of lying and stealing; that all his life he had wanted to work with tools but never had been able to obtain them; and that he thought he saw an opportunity in and around the shops and places where he had been. A mimeographed form (Ex. 3) containing the 24th Article of War with an acknowledgment, dated 21 February 1944, signed by accused, stating that he had read, received a copy of and understood the article, was received in evidence (R. 41-42, 51-52, 123-127).

An unboxed tire and ten boxes (numbered 1 to 5 and 8 to 12) containing the tools and equipment taken from accused were received in evidence as Exhibit 2. Captain Mulkerin testified that he had charge of the storage and issuance of all equipment in the Pomona Ordnance Base and that none of these articles had been issued to accused on requisition, nor had he given accused permission to take them to his home or out of the depot; that accused had no right to take such items out of the depot and that he (Captain Mulkerin) had no knowledge prior to 14 February that they had been taken by accused. Captain Mulkerin further testified that he could not identify any of the particular articles as coming from the stock of the depot but they were all items ordinarily carried by the depot. None of the items had been specifically missed by the depot. Mr. Phillips testified that the battery found in the car of accused was a tank battery, which would not be carried in an ordinary battery stock but could be purchased only through special channels such as "heavy truck or heavy bus connections". The 12 volt siren was "strictly a Government" item and the hull compass was distinguishable as Government issue by its rubber mounting. The "net cost" of the battery was $27.50, the siren was "an $18.50 item" and the compass

retailed for $4.50. In arriving at these values Mr. Phillips had consulted the Government Standard Nomenclature List. Mr. Curtis testified that the approximate value of the drill press was $140, the tire $8, the spotlight $16, the battery $27.50, the saw $1.75, and the hydraulic 7-ton jack $18. These values were either the Standard Nomenclature List valuation or the manufacturer's price less 20 percent which was "a very close approximation" (R. 31-37, 38-41, 53-55, 95-97, 102-107).

4. Evidence for the defense: Colonel Victor A. Goedde, commanding officer of the 256th Ordnance Battalion, testified that he ordered accused into arrest on Tuesday morning, 15 February 1944, limiting him to his quarters and the mess hall (R. 132-134).

Accused, cognizant of his rights as a witness, made an unsworn statement to the court as follows: He was born in Indianapolis, 5 December 1918. His mother died when he was six weeks old and his father, a baker, remarried when accused was thirteen weeks old. Accused did not know then what he was "in for", but by the time he was five he began to realize it. His stepmother was a "story-book step-mother", a sadist who probably did not realize how cruel she was. When he was very small he was tied by both hands to a stove leg, so close to the stove he almost suffocated. His stepmother did not beat him with an ordinary stick but used a broom handle or a stove poker, until he would almost "pass out". They were not allowed such things as milk, butter and eggs. These were kept locked up in the ice-box and when the stepmother was away, he and his brother would take the hinges off and help themselves. They did not feel that it was wrong, it was something that tasted good and that they wanted, so they "went after it". They would count the number of apples and oranges and if there were only a few would not touch them for they knew they would be beaten if caught. His father came from Poland, was a good man, but without any courage. He would watch the stepmother beat the children and not do a thing about it. He never offered accused any advice except to "learn by your own experience". When he was 15 he had appendicitis, and his appendix ruptured, but his stepmother did not call the doctor for two days. His brother told her he would kill her if anything happened to accused so she finally called a doctor and he was rushed to the hospital. He was there three months, was constantly told about the expense he was causing and that he therefore could not go to college. After graduating from high school at 15 he left home and went to Washington, D.C., where he lived with his brother and worked as a "soda jerker" until 1936 (R. 137-139).

In December 1936 he joined the Army intending to make it a career. He was stationed at Carlisle and in charge of mimeograph machines. He found that he liked mechanics and would take the machines apart, clean them and reassemble them. He transferred from Carlisle to Washington to be with his brother and served at Walter Reed Hospital until 1938. When he returned to civilian life he realized how much the Army really meant. When the draft came up the only reason he stayed out was that he was learning a

trade to fall back on if needed. He went to his draft board, asked that his number be put on top and got in right away. He served with the Army until 18 October 1941 and as his wife had a baby he secured a dependency discharge and went back to his old job. As soon as his wife was able to return to work he came back in the Army. He made application for officers' candidate school, studied hard preparing for his board, and passed. He was sent to school at Aberdeen, Maryland and was almost "kicked" out due to an appendectomy rupture. After finishing school he was sent to Santa Anita (R. 139-141).

His idea of officers at that time was "one that was out of this world" and he could hardly believe that he was going to be an officer but he finally got his commission. However, after arriving at Santa Anita his idea of officers began to drop. He was put in a troop school and went through everything they had done in officer candidate school all over again. There were officers there with higher grades who could not drill, drill men, or give commands and at lectures they fell asleep but because of their position the instructors would not say anything to them. He was finally assigned to the 824th Ordnance Base Depot under "1st Lt. Mulkerin" and was made mess and supply officer. He worked very hard and as they were not given any vehicles to use, walked all over camp getting "stuff" for his company during its activation. They got the company together, whipped it into condition and it was one of the best companies in the area. An executive officer and another officer left the company but he was not moved up into either of their places. Other men replaced them who had less time in grade than accused. By the time they moved to Pomona he was discouraged and his efficiency fell (R. 141-142).

On the morning of 15 February Colonel Goedde called him to his office, told him what he had found out and placed him under arrest in quarters. He was in his quarters when "Mr. Jasmin, with the warrant officer" came and asked for the key to his car which he reluctantly gave him. Later he was taken to the provost marshal's office. His car was searched before he had been told anything about his rights. In officer candidate school they often skip such a thing as the rights of an officer. He was ignorant of the fact that he had certain rights. He was never told whether Colonel Goedde had released him from arrest and Colonel Henderson placed him under arrest in quarters. He had no laundry facilities, washed his own clothes and when he asked for his iron from his Bachelor Officers' Quarters he was told he "had been put there" and "would concentrate and think about things there". He was afraid he might be transferred to the stockade so he kept his mouth shut thereafter (R. 135-137).

He was happy in the Army and was miserable as a civilian. He had done wrong but was no criminal. "I know if I could get a chance and opportunity to prove it, I can still wear a uniform" (R.142).

5. a. The evidence for the prosecution shows that in May 1943, accused was assigned to the 824th Ordnance Base Depot Company at the Ordnance Base, Pomona, California. Thereafter accused brought to the company supply room various items which were not company property and which included a tire, two tubes, a spotlight, a brake lining, a spark tester, a battery and a portable electric sander. Accused instructed that they be kept out of the way "so they could not be seen". A truck driver for the "receiving depot" from "5th of November" to "just before Christmas" testified that accused accompanied him on six or eight trips when he was delivering merchandise. While the driver unloaded the goods accused went through the buildings and carried out boxes which he had the driver put on the truck and take to the supply room. The driver carried "between 30 and 40" boxes in this fashion containing such items as a generator, a defroster, a spotlight, a jack, two inner tubes and two tool boxes. On one occasion accused instructed the driver to "Drive on this side of the supply room so Capt. Mulkerin cannot see me from the orderly room".

On 14 February 1944 accused asked the acting mess sergeant for some groceries and meat for his own use. His request was reported to Captain John J. Mulkerin, the company commander, and resulted in an investigation. The following day the car of accused was searched at the base. The search disclosed a 12 volt tank battery, a 12 volt siren and a hull compass, all identified as items of Government issue and valued at $27.50, $18.50 and $4.50, respectively. Other items found in the car included a carbon clip, two small "T-drills", a "crash" helmet, an extension cord, several wrenches, and a can of wax. Captain Mulkerin and Captain Maurice F. Connor, assistant provost marshal at the base, then drove with accused to his home in San Gabriel, 26 miles from the base, to make a further search. Upon arrival at the house accused went in and got the key to the garage located to the rear of the house. When he came out Captain Connor asked if he was familiar with the 24th Article of War and accused said he was. Captain Connor then said "You understand this is voluntary on your part". Accused did not reply but proceeded to open the garage door. There was a large collection of tools in the garage and accused selected two empty tool boxes, some wire, a soldering iron, a set of drills and two "O.D." cans which he said belonged to the ordnance base. He said the other tools were his own.

The following day, 16 February, accused was questioned by Major Otto J. Cook, the provost marshal. Accused, after being warned of his rights, said he wanted to tell "everything" and that the tools in his house came from the base. Accused stated, "everything that I took from the base I can produce for you" and that he had not sold anything. Another trip was made to the home of accused and he turned over a large quantity of tools to Captain Mulkerin and Captain Connor which he said belonged to the base.

The numerous articles included a portable drill press valued at $140, an $8 tire, a $16 spotlight, a $1.75 saw and an $18 hydraulic jack. Accused said he had some other articles which his wife would bring in and that evening she brought in a suitcase containing tubes, a hand saw blade, machettes, and a defroster. An inventory made of the articles taken from the car and garage of accused showed substantially the same articles listed in the Specification to the Charge. It was shown that none of the articles had been issued to accused, that he had not received permission to take the articles from the base and that they were taken without the knowledge of Captain Mulkerin, his superior officer. Captain Mulkerin testified they were all articles ordinarily carried by the depot. Major Leonard C. Bessom, the investigating officer in the case, interviewed the accused, warned him of his rights, and read him the charges from the charge sheet. Accused said the charges were true. He told Major Bessom that home conditions during his childhood were responsible for his formation of habits of lying and stealing.

The evidence offered by the prosecution was uncontradicted. The accused made an unsworn statement which principally concerned events of his past life. In connection with the charges against him he stated that before anything was said to him about his rights, he was asked for the key to his car and it was searched. He said he was ignorant of the fact that he had certain rights.

b. The accused was charged with the larceny of a large quantity of tools and equipment from the Pomona Ordnance Base where he was assigned to duty. The evidence shows that these articles were found in his possession, either in his car or in and around his home, located 26 miles from the base. During the months preceding the discovery of the articles in his possession, it appears that the accused had secretively picked up in various buildings around the base and brought to the company supply room for temporary storage, many articles of a similar nature. Three items found in the possession of the accused, a battery, a siren and a compass, were identified as articles of Government issue and the remainder were shown to be similar to items carried at the ordnance base. Subsequent to being warned of his rights, accused made the statement on at least two occasions that all of the tools and equipment found in his house belonged to the ordnance base. Finally, after charges had been filed against him, the accused told the investigating officer, who warned accused of his rights and then read the charge sheet to him, that the charges were true.

The offense is thus proven by the admissions and confessions of accused, together with the accompanying evidence by which the corpus delicti is clearly established. Proof of value of the articles taken was limited to that of a battery ($27.50), a siren ($18.50), a compass ($4.50), a portable drill press ($140), a tire ($8), a spotlight ($16), a saw ($1.75), and a jack ($18), or a total of $234.25. The specific date on which any particular item was taken is not shown. However, it is established that the articles were taken subsequent to May 1943 and that many were taken in November and December 1943.

6. The record of trial shows that by agreement of counsel the reading of the numerous items set out in the Specification was omitted at the arraignment. The reporter thereupon omitted to list these articles in reciting the Charge and Specification upon which the accused was arraigned. Although this is a serious irregularity, there appears to be not the slightest doubt that the accused was arraigned upon the Specification as set out in the charge sheet and the Board believes that under the circumstances no prejudice to the substantial rights of the accused resulted from this clerical error.

7. Miss Virginia E. Holland, Washington, D.C., appeared before the Board of Review in behalf of the accused.

8. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 7 December 1936 to 17 October 1938, from 12 April 1941 to 7 October 1941, and from 7 May 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 17 April 1943.

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

Samuel W. Driver, Judge Advocate

Robert [illegible], Judge Advocate

F. J. Lotthutos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - 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 F. Kosaveach (O-1555237), Ordnance Department.

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, a supply officer assigned to duty at the Pomona Ordnance base, stole and carried away, principally to his home, over a period of several months, numerous items of hardware, automobile and electrical equipment, including such things as a $27.50 battery, an $18.50 siren, a $4.50 compass, a $140 portable drill press, an $8 tire, a $16 spotlight, a $1.75 saw and an $18 jack. I recommend that the sentence to dismissal and forfeiture of "all pay and allowances to become due" be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter dated May 3, 1944, in behalf of accused, from Miss Virginia Holland, Washington, D.C.

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 carrying into effect the recommendation made above.

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Miss Virginia Holland, May 3, 1944.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 382, 18 Jul 1944)

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

SPJGK
CM 253597

2 MAY 1944

UNITED STATES	)	THIRD SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Second Lieutenant LEE W. GOGGIN (0-1596663), Quartermaster Corps.	)	Trial by G.C.M., convened at Camp Lee, Virginia, 30 March 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Lee W. Goggin, Headquarters and Headquarters Company, 54th Quartermaster Base Depot, was, at Camp Lee, Virginia, on or about 24 March 1944, in a public place, to-wit, Building T-1321, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant Lee W. Goggin, Headquarters and Headquarters Company, 54th Quartermaster Base Depot, did, at Camp Lee, Virginia, on or about 24 March 1944, while in Building T-1321 willfully and wrongfully expose in an indecent manner to public view his penis.

He pleaded not guilty to and was found guilty of all Charges and Specifications, with the exception of the words "wilfully and" in the Specification of Charge II, of which excepted words he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provided for dismissal, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

Technician 4th Grade Julia A.Pokorski, Technician 5th Grade Beatrice M. Emery, and Private First Class Anna C. Cohen, all members of Headquarters Company, WAC Detachment, Camp Lee, Virginia, were preparing breakfast for their company at 0430 on 24 March, when they heard someone attempting to open the side door of their mess hall. Corporal Emery went to the door, looked outside through the window, and saw accused, who called, "Open up or I'll freeze" (R. 22, 24, 25, 28). The door stuck, and could not be opened. Corporal Emery twice told accused to go around to the back door, and he finally left and entered the mess hall through another side door. As he walked around the corner of the serving counter which separated the kitchen from the mess hall, the three cooks perceived that his blouse and trousers were unbuttoned, and his private parts fully exposed (R. 22, 23, 25, 26, 28).

Miss Cohen told Pokorski and Emery to call the guard, to which accused replied mockingly, "Yes, call the Corporal of the Guard" (R. 23, 25, 28). Pokorski and Emery ran outside to do so. Meanwhile, Captain Hattie Ratcliff, Headquarters Company, ran in. She had been awake in her quarters, and had seen through her window accused's efforts to get in the mess hall door, and had come to learn what was the trouble (R.18). Accused had gone into a rear store room, where she found him standing "in a very slouchy position", his previously observed condition still continuing. She also went to the door and called for the guards, then returned to the store room (R. 19, 20, 23, 25, 28).

Private George A. Natsios, Company A, 13th Regiment, and Private Frank E. Lewis, Company B, 13th Regiment, were on guard duty in the WAC area. As he was passing the mess hall Natsios heard screams, turned, and saw the women run from the building. He ran into the mess hall and to the store room. Private Cohen was telling accused that he "could be at least gentlemanly enough to button your clothes" (R. 21, 27, 28, 30). Lewis followed Natsios into the building from his guard station. Accused made no effort to adjust his clothing, but told the two guards that "They couldn't hold him because he was an officer" (R. 23, 28, 30, 33, 34). Natsios was trying to hold accused, who apparently was trying to get into the dining room. Accused called Captain Ratcliff a son-of-a-bitch, and made one or two other obscene remarks to her and the other women (R. 26, 29, 32, 33). He seized Lewis' rifle, and wrestled with Lewis for possession of it, once pushing Lewis across some large food cans. Natsios set his weapon down, got behind accused, threw his arm around accused's neck, and threw him on the floor, where he proceeded to sit on accused's chest until the military police arrived. It was not difficult to subdue him (R. 19, 23, 26, 29, 31, 33, 34).

Accused made no improper advances toward any of the women during the time he was in the mess hall (R. 20, 23, 26, 29, 34). All testified that

..e showed no indication that he was aware of his exposure and the condition of his clothing (R. 21, 23, 24, 27, 29, 34). He did adjust his trousers when told to do so by Natsios (R. 32, 34). In the opinion of all the witnesses, he was drunk, for in addition to the disarray of his clothing, his hat was awry, his breath smelled of whiskey, and he swayed somewhat in his posture (R. 19, 20, 22, 26, 28, 31, 33).

Accused was taken to the dispensary of the Station Hospital, where he was examined by First Lieutenant Lester Siegel, Medical Corps, the medical Officer of the Day. Lieutenant Siegel testified that accused's hair was mussed, the pupils of his eyes were dilated, his face was flushed, his uniform in disorder, and he stood unsteadily. He had difficulty in performing physical coordination tests. It was witness' opinion that accused was moderately intoxicated and that he was unfit for duty. There was no sign of illness or injury (R. 7, 8). A blood alcohol content test was twice taken, at 0520 and 0620, by Private First Class Frank J. Svec, 1326th Service Unit, of the Station Hospital. Precautions were taken to insure that alcohol was not used as a sterilizing agent in the test. The first test showed an alcoholic content of 1.8 milligrams per 100 cubic centimeters, while the second showed 2.00 milligrams (R. 9, 10, 16, 17). Major Marshall M. Lieber, Medical Corps, Chief of the hospital laboratory service, with extensive experience as a pathologist, testified that a blood alcohol content of 1.5 milligrams or more indicates without question that the individual from whom the specimen was taken is under the influence of alcohol (R. 11-15).

Evidence for the defense.

Accused's rights as a witness were explained to him by the law member, and at his own request he testified under oath. On the evening of 23 March his organization held a party at the Officers' Club to celebrate their impending departure. It lasted from 1845 until after 2300, and included liquor and food. Following the party accused walked with "Lieutenant Parish" to accused's quarters, where they awakened other officers by way of horseplay. They then went to Lieutenant Parish's quarters, did the same thing, and had "a couple of nightcaps before going to bed". Accused left at approximately 0130 and went to his own quarters and to bed. He did not feel well, and arose and went out for some air. He remembered nothing until being with the military police the next morning, and admitted he was drunk (R. 34-37).

4. The record of trial sustains the court's findings beyond any doubt. Accused admitted being drunk. While he claimed that he did not remember his presence in the WAC area, his act of indecent exposure, or other events there, all witnesses for the prosecution told uncontradicting stories. His lack or failure of memory constitutes no defense to these charges.

5. War Department records show that accused is 30 years of age. He is a high school graduate, and appears to have been a gasoline station attendant for the seven years prior to his entry into the Army in February of 1943. He attended The Quartermaster School, Camp Lee, Virginia, and was commissioned a second lieutenant, Quartermaster Corps, upon graduation therefrom on 27 October 1943.

6. The court was legally constituted, and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence as approved by the reviewing authority. Dismissal is mandatory upon conviction of violation of Article of War 95 and authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 MAY 1944 - 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 Lee W. Goggin (0-1596663), 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 the sentence and to warrant confirmation thereof. In view of accused's previous good record, the fact that the court excepted the words, "wilfully and" from the finding of guilty of the Specification involving indecent exposure, and of the fact that accused was obviously under the influence of liquor at the time, I believe that his offense represents an episodic incident rather than a fundamental character defect. I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

3. Consideration has been given to a letter dated 3 April 1944 from Mrs. Florence Peach, accused's mother-in-law, to the President, requesting clemency, and inclosing an undated letter from accused to her. Consideration has also been given to a letter dated 5 April 1944 to The Judge Advocate General from the Honorable Fred J. Douglas, Member of Congress, inclosing correspondence between Mr. L. Wayland Smith and Mr. Pierrepont Noyes of Oneida, New York, to the same effect.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Draft let. sig. Sec.War.
Incl.3-Form of action.
Incl.4-Let. 3 Apr.1944 fr. Mrs. Florence Peach, w/Incl.
Incl.5-Let. 5 Apr. 1944 fr. Hon. Fred J. Douglas w/Incl.

(Sentence confirmed but execution suspended. G.C.M.O. 259, 3 Jun 1944)

vol 34 Army JAG Bd. Rev.

vol 34 Army JAG Bd. Rev.

TITLE

DATE	BORROWER'S NAME	EXT.