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VOL. 36

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXXVI

including

CM 254940 to CM 257027

(1944)

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

SPJGK
CM 254940

30 MAY 1944

UNITED STATES v. Corporal George W. HOLDEN (7008819), Private WILLIAM A. CRECELY (12098104), and Corporal BENJAMIN D. CROWE (14047531), all of Base Detachment, Aiken Army Air Field, Aiken, South Carolina	THIRD AIR FORCE Trial by G. C.M., convened at Morris Field, Charlotte, North Carolina, 29 March 1944. Holden: Dishonorable discharge (suspended) and confinement for one (1) year. Crowe: Confinement at hard labor for six (6) months and forfeiture of $33 per month for a like period. Holden: Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina.

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

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1. The record of trial in the case of the soldiers named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence as to Corporal Crowe. 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 only question involved is whether the evidence was legally sufficient to support the findings of guilty as to Crowe. He was found guilty of the Charge and of Specification 2 thereof. The other Specifications did not relate to him. The Charge and Specification 2 were as follows:

CHARGE: Violation of the 84th Article of War.

Specification 2: In that Corporal George W. Holden, Base Detachment, Aiken Army Air Field, Aiken, South Carolina, and Corporal Benjamin D. Crowe, Base Detachment, Aiken Army Air Field, Aiken, South Carolina, acting jointly and in pursuance of a common intent, did, at Monetta, South Carolina, on or about 7 December 1943, unlawfully sell to Sam F. Whitman, three hundred (300) pounds of sugar of the value of fifteen dollars ($15.00), issued for use in the Military Service of the United States.

Crowe pleaded not guilty to the Charge and Specification 2, and, as noted, was found guilty. No evidence of previous conviction was introduced. He was sentenced to confinement at hard labor for six months and forfeiture of $33 per month for a like period. The reviewing authority approved the

sentence, ordered its execution, and designated Morris Field, Charlotte, North Carolina, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 283, Headquarters Third Air Force, Tampa, Florida, 14 April 1944.

3. Holden pleaded guilty and made a confession which involved Crowe in the alleged offense. Neither Holden's plea of guilty nor his confession may be considered against Crowe. After having been warned of his rights by the investigating officer, Crowe made a statement which was admitted in evidence (Pros. Ex. 3). In substance the statement was as follows: Crowe was a cook in the mess hall. Around the latter part of December he was off duty and lying on his bunk in the barracks when Holden entered and asked Crowe to take a ride with him. "His" [obviously referring to Holden's] truck was "sitting" between the mess hall and the barracks, and when Crowe got in, he did not know where they were going. Crowe noticed 300 pounds of sugar in the truck, but, as Holden was mess sergeant, Crowe did not "question it". When the truck approached the gate, Holden told Crowe that he was going to Batesburg and would give Crowe a "cut" to help unload the sugar. Holden said further that he was going to Story's filling station to unload, and that he would give Crowe $5. Upon reaching "Story's", they unloaded the sugar, and Holden told Crowe that they would receive their money two days later. Two days later, Holden and Crowe went to the New Cafe in Batesburg and met a man named "Sam", whom Crowe recognized as being a fireman on the base. "Sam" gave Holden $60 and Holden gave Crowe $10 as Crowe's "cut".

The prosecution and defense entered into a stipulation regarding the testimony which Sam F. Whitman would give if called as a witness. As thus stipulated, his testimony is as follows: He was employed as a civilian fireman at the Aiken Air Base. In November or December 1943, a soldier named George Holden, also at the base, asked Whitman whether the latter could dispose of some sugar for him. Whitman said he would try, and he talked to a "bootlegger" who lived near Batesburg, South Carolina. The sugar had already been delivered to B. A. Story's filling station near Monetta, South Carolina, by Holden. Whitman took the sugar to the bootlegger, who paid him $60 for the 300 pounds. Whitman gave that amount to Holden at the New Cafe in Batesburg (R. 5-6).

The rest of Whitman's stipulated testimony relates to a sugar deal obviously different from the one referred to by Crowe in his statement, and does not connect Crowe with the transaction.

Crowe did not testify or make an unsworn statement.

Since the sugar apparently had been delivered to Story's before Whitman was even approached, his testimony to the effect that Holden was the person who brought it there, constituted hearsay and was incompetent. The mere

fact that the testimony was stipulated does not eradicate its hearsay character (MCM, 1928, par. 126b). Nor does the failure of the defense to object to the hearsay testimony amount to a waiver (id., par. 126c).

4. To convict Crowe it was necessary to prove beyond a reasonable doubt that he and Holden, acting jointly and in pursuance of a common intent, unlawfully sold to Whitman 300 pounds of sugar of the value of $15, issued for use in the military service of the United States (MCM, 1928, par. 144a). It seems clear from the evidence that accused's statement and Whitman's testimony referred to the same transaction. Assuming, but not deciding, that accused's statement went far enough to constitute a confession, was there sufficient proof of the corpus delicti? In the opinion of the Board of Review there was not. There was no competent proof tending to show either directly or by reasonable inference that the sugar in question had been issued for use in the military service of the United States. The whole deal looks suspicious, but suspicion is not a proper basis for conviction. It is not enough that an accused be guilty; he must be proved guilty.

5. For the reasons stated, the Board of Review is of the opinion that as to Crowe the record of trial is legally insufficient to support the findings of guilty of the Charge and Specification 2, and legally insufficient to support the sentence.

Irving G. Ryan, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Samuel Sonnenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Corporal George W. Holden (7008819), Private William A. Creeely (12098104), and Corporal Benjamin D. Crowe (14047531), all of Base Detachment, Aiken Army Air Field, Aiken, South Carolina.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that as to Corporal Crowe the findings of guilty of the Charge and Specification 2 thereof and the sentence be vacated and that all rights, privileges, and property of which accused Crowe has been deprived by virtue of the findings and sentence so vacated be restored.

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

Myron C. Cramer

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

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

(Findings and sentence vacated in part in accordance with recommendation of The Judge Advocate General, by order of the Under Secretary of War. G.C.M.O. 297, 17 Jun 1944)

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

SPJGN
CM 254946

11 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 Dale Mabry Field, Tallahassee, Florida, 1 April 1944. Dismissal, total forfeitures and confinement for one (1) year and seven (7) months.
	)	
Second Lieutenant GEORGE W. MYERS (0-702828), Air Corps.	)	

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

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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant George W. Myers, Dale Mabry Replacement Depot Detachment, having been restricted to the limits of his barracks, did, at Dale Mabry Field, on or about 4 March 1944, break said restriction by leaving the limits of his barracks and the limits of the base.

Specification 2: In that 2nd Lieutenant George W. Myers, Dale Mabry Replacement Depot Detachment, was at Tallahassee, Florida, on or about 5 March 1944, drunk and disorderly in uniform in a public place, to wit, Route #90, West of the City of Tallahassee, Florida.

Specification 3: In that 2nd Lieutenant George W. Myers, Dale Mabry Replacement Depot Detachment, was at Tallahassee, Florida, on or about 23 February 1944, drunk and disorderly in uniform in a public place, to wit: The Cherokee Hotel.

Specification 4: In that 2nd Lieutenant George W. Myers, Dale Mabry Replacement Depot Detachment was in the vicinity of Tallahassee, Florida, on or about 22 February 1944, drunk in uniform in a public place, to wit: the Rendezvous Club on Route #90, in Leon County, West of Tallahassee, Florida.

Specification 5: In that 2nd Lieutenant George W. Myers, Dale Mabry Replacement Depot Detachment, was at Tallahassee, Florida, on or about 12 February 1944, drunk in uniform in a public place, to wit: Victory Tavern, Monroe Street, Tallahassee, Florida.

He pleaded not guilty to and was found guilty of the Charge and all its 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 at such place as the reviewing authority might direct for the term of one year and seven months. 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 the afternoon of 12 February 1944 in response to a telephone call two enlisted military police went to the Victory Tavern, Tallahassee, Florida, where they found the accused drunk and in uniform at the bar attempting to write upon an envelope. They escorted him to the MP station where he was belligerent and profane and the sergeant in charge dispatched him to the post. According to the sergeant and the two enlisted military police the accused exuded the odor of alcohol, spoke thickly, walked unsteadily and was "drunk but not out" (R. 19-20, 21-22, 22-23).

On the night of 22 February 1944 at about 2345 o'clock the accused in company with a girl and another couple was at The Rendezvous Club near the same city. On this occasion, according to the MP witness, he was "pretty drunk" but was not detained as his companions agreed to take him to the post immediately. The next day at noon, according to the same witness, in response to a telephone call he went to The Cherokee Hotel, Tallahassee, Florida, where the accused was found in a drunken condition in the lobby. The hotel manager accused him of having vomited there which he did not deny and his uniform and the rug in the lobby indicated that the hotel manager's accusation was well founded. In the opinion of the witness the accused was definitely drunk and was taken again to the MP Station where according to such witness and another the accused was noisy, profane and drunk. He was delivered to his commanding officer who verbally restricted him to his barracks which restriction was within an hour confirmed by a specific written restriction receipt of which was acknowledged by the accused and admitted into evidence. In the meantime the accused had been given a sobriety test as his commanding officer observed that he was drunk (R. 5-11, 13, 16-18; Ex. 1).

On the evening of 4 March 1944, the accused's restriction not having been lifted, the alert officer as was his duty at about 2130 o'clock

checked the accused's barracks to ascertain whether the restriction was being observed. He found the accused outside, sitting in an automobile with two women. He was directed to enter his barracks and to rigidly follow his restriction which he agreed to do. However, at 0145 o'clock, only five hours later, a recklessly driven automobile was stopped on highway number 90 at a point about four miles from the city by two state highway patrolmen and a military police. The automobile was being driven by a woman and the accused was "passed out" beside her. He was definitely drunk; his blouse and cap were missing; and his trousers were open exposing his penis. One of the patrolmen drove the woman's car into the city and the accused and his woman companion were taken to the police station in the patrol car during which journey his companion argued and the accused became profane and abusive. At the station his companion was charged with reckless driving and the accused was taken to headquarters (R. 5-11, 11-12, 12-14, 15-18).

4. The evidence for the defense shows that the sobriety test given the accused at about 1545 o'clock on 23 February 1944 although finding his speech, walk, and ability to stand to be normal and his blood alcoholic content to be less than 1% of a milligram per 100 c.c., found him to be drunk and unable to perform his duties. According to the stipulated testimony of his woman companion on the nights of 22 February 1944 and 4-5 March 1944, the accused on the former occasion had not been intoxicated and on the latter occasion he had, at her request, accompanied her to a restaurant, known as the "Chicken House" and located some ten miles from the city, to secure something to eat. They had left his barracks about 2330 o'clock, had spent about two hours at the restaurant and were returning when arrested. The accused, according to her, was not drunk; his clothes were not disheveled; his person was not exposed; and he had not been either profane or abusive (R. 23, Exs. 2, 3).

The accused, after explanation of his rights as a witness, elected to testify. He admitted his guilt of breach of restriction and that on each of the four occasions he had been drinking but contended that he was not drunk on any of them, was never profane or disorderly, and was appropriately clad so that his person was not exposed on the last occasion. He denied vomiting in the hotel lobby and abusing the military police at any time. He attributed his conduct to worry over his parents' health, dissatisfaction with his assignment and his inability to overcome the temptation of his woman companion's invitation to accompany her (R. 24-29).

5. In rebuttal the prosecution recalled one of the state highway patrolmen who testified that when the automobile was stopped on the morning of 5 March 1944 it was beyond the named restaurant with reference to the city. He also reiterated his testimony concerning accused's condition at that time (R. 29-30).

6. Specification 1 of the Charge alleges that the accused having been restricted to his barracks broke said restriction on or about 4 March 1944 by leaving the limits of his barracks and the limits of the base.

Breach of restriction is violative of Article of War 96 and a willful or wrongful intent is not an essential element of such offense (CM 234815 /1943/, II Bull. JAG, Sept. 1943, sec. 454 /21/, p. 342).

The evidence for the prosecution conclusively establishes that the accused had been restricted to his barracks except during mess time and for formations. The restriction had been orally imposed, confirmed in writing and acknowledged by the accused. It had not been lifted on 4 March 1944 when the accused breached it twice, first by leaving his barracks to converse with his two women in an automobile outside of the barracks and second by leaving not only his barracks but also the base about three hours later with one of the women and going to a restaurant some miles distant even after having been cautioned in the meantime to observe the restriction. The evidence for the prosecution establishes the accused's alleged dereliction beyond a reasonable doubt which is corroborated by the evidence for the defense and is admitted by the accused. The court's findings of guilty of Specification 1 and of the Charge are therefore fully warranted.

7. Specifications 2-5 of the Charge allege that the accused on four separate dates was drunk in uniform at four different designated public places, namely a public highway, the lobby of a city hotel and two taverns and that at the first two of such places he was likewise disorderly. Drunkenness in a public place while in uniform is violative of Article of War 96 and such conduct when attended by disorderly conduct is certainly likewise so violative (MCM, 1928, par. 152a, CM 122254 /1918/ Dig. Ops. 1912-1940 JAG, Sec. 453 /11/).

The evidence for the prosecution so overwhelmingly establishes by numerous witnesses that the accused was intoxicated on all four occasions as alleged that any suggestion to the contrary is rendered idle. All four places were public ones and on each occasion the accused was in uniform. The accused himself admits drinking of intoxicants on each occasion but weakly contends that he was not drunk. The testimony of numerous witnesses and the repetition of such reprehensible conduct belie his words and render them wholly unworthy of belief. At the hotel his vomiting upon the rug in the lobby coupled with his profane and abusive language without a doubt constituted disorderly conduct as did his disheveled condition and exposure of his person when last arrested when he also used profane and abusive language. The evidence, consequently, establishes his guilt as alleged beyond a reasonable doubt and amply supports the court's findings of guilty of the Charge and Specifications 2-5 thereunder.

8. The accused is about 21 years old. The War Department records show that he has had enlisted service from 15 February 1943 until 5 December 1943 when he was commissioned a temporary second lieutenant upon completion of Officers Candidate School and that he has had active duty as an officer since the latter 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 the findings of guilty of the Charge and all its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

Walton Shepherd, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

SPJGN
CM 254946

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 George W. Myers (0-702828), 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 thereof. I recommend that the sentence be confirmed but that the forfeitures and confinement imposed be remitted, and that the sentence as thus modified be ordered executed.

3. Consideration has been given to three letters addressed to the President from Mrs. W. C. Myers, mother of the accused, Mrs. William F. Bales, and Dr. Leonard O. Wheeler, respectively.

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,
Major General,
The Judge Advocate General.

6 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. fr. Mrs. W. C. Myers
Incl 5 - Ltr. fr. Mrs. W. F. Bales
Incl 6 - Ltr. fr. Dr. Leonard O. Wheeler

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 356, 15 Jul 1944)

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

CM 254947 9 Jun 1944

U N I T E D S T A T E S	)	SIXTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Albrook Field, Canal Zone, 23 February, 13 March 1944. Dismissal.
	)	
Major JAMES A DAILY (0-406763), Signal Corps.	)	

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

Specification 1.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, formerly Captain, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), did, at or near Fort Gulick, Canal Zone, between on or about 12 April 1943, and on or about 1 June 1943, feloniously embezzle by fraudulently converting to his own use the sum of approximately $1,080.57, funds of the First Reporting Company, Special Account, to be used in connection with Fort Davis Post Exchange, entrusted to him as custodian thereof."

Specification 2.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, formerly Captain, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), did, at or near Fort Gulick, Canal Zone, between on or about 1 December 1942 and on or about 22 February 1943, feloniously embezzle by fraudulently converting to his own use the sum of approximately $1,065.54, funds of the First Reporting Company, Special Account, to be used in connection with Fort Davis Post Exchange, entrusted to him as custodian thereof."

Specification 3.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, formerly Captain, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), did, at or near Fort Gulick, Canal Zone, between on or about 6 June 1942 and on or about 1 March 1943, feloniously embezzle by fraudulently converting to his own use the sum of approximately $116.00, funds of the First Reporting Company, Coupon Account, to be used in connection with Fort Davis Post Exchange coupons, entrusted to him as custodian thereof."

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

Specification 1.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, did, at or near Post of Corozal, Canal Zone, on or about 25 May 1943, with intent to deceive Colonel Louis J. Tatom, Colonel William M. Talbot, and Major Robert E. L. Knapp, officially state to the said Colonel Tatom, Colonel Talbot, and Major Knapp, that he had seven authentic vouchers totaling about One Thousand Dollars, representing valid claims against the United States, payment for which had been made by him as an Agent Finance Officer and on which he could and would obtain reimbursement and apply the proceeds to the First Reporting Company, Special Account, which statement was known

by the said Major James A. Daily to be untrue, in that these vouchers were not true authentic vouchers against the United States."

Specification 2.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, did, at or near Post of Corozal, Canal Zone, on or about 20 June 1943, with intent to deceive Colonel William M. Talbot, Lieutenant Colonel Fletcher K. Ware, Major Robert E. L. Knapp and Major Mathew J. Burrell, officially state to the said Colonel Talbot, Lieutenant Colonel Ware, Major Knapp and Major Burrell, that seven standard forms No. 1034, Public Vouchers for Purchases and Services Other Than Personal, made out to Esuebio Diaz, Angel Alfredo Mena, Sidney O. Duffy, Esuebio Diaz, Esuebia Diaz, Esuebio Diaz and Angel Mena, respectively, as payee, which he had in his possession and exhibited, were authentic vouchers, representing valid claims against the United States, payment for which had been made and on which he could and would obtain reimbursement and apply the proceeds to the First Reporting Company, Special Account, which statement was known by the said Major James A. Daily to be untrue, in that these vouchers were not true authentic vouchers against the United States."

Specification 3.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, formerly Captain, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), did, at or near Fort Gulick, Canal Zone, between on or about 6 June 1942 and on or about 25 May 1943, wrongfully and dishonorably neglect his duties as an officer and as custodian of the Special Account, First Reporting Company, 558th Signal Aircraft Warning Battalion, by failing to maintain an adequate accounting system for this fund."

Specification 4.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, formerly Captain, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), did, at or near Fort Gulick, Canal Zone, between on or about 1 October 1942 and on or about 1 March 1943, wrongfully and dishonorably neglect his duties as an officer and as custodian of the Special Account, First Reporting Company, 558th Signal Aircraft Warning Battalion, by borrowing money therefrom for his personal use and by failing to properly manage this fund."

Specification 5.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, did, at or near Fort Gulick, Canal Zone, on or about 14 February 1943, with intent to deceive a Board of Officers appointed to examine the company fund, of which he was custodian, being property of the First Reporting Company, 558th Signal Aircraft Warning Battalion, (Special), execute a certificate dated 14 February 1943 purporting to be a complete and accurate statement of all outstanding debts and obligations existing on 30 November 1942 pertaining to the company fund, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), which certificate was false in that it did not include or

set forth a debt owing on 30 November 1942 to the Fort Davis Post Exchange in the amount of approximately $638.88, which said certificate was on the date of the execution thereof, known by the said Major James A. Daily to be false."

Specification 6.-"In that Major James A. Daily, Signal Corps, Headquarters and Headquarters Company, 516th Signal Aircraft Warning Regiment, did, at or near Fort Gulick, Canal Zone, on or about 14 February 1943, with intent to deceive a Board of Officers appointed to examine the company fund, of which he was custodian, being property of the First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), execute a certificate dated 14 February 1943 purporting to be a complete and accurate statement of all outstanding debts and obligations existing as of this date pertaining to the company fund, First Reporting Company, 558th Signal Aircraft Warning Battalion (Special), which certificate was false in that it did not include or set forth a debt owing on 14 February 1943 to the Fort Davis Post Exchange in the amount of approximately $717.19, which said certificate was on the date of the execution thereof, known by the said Major James A. Daily to be false."

(Opinion of the Board of Review is SECRET)

(Findings disapproved in part. Sentence confirmed. G.C.M.O. 428, 4 Aug 1944)

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

SPJGV
CM 254969

5 JUN 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at
Second Lieutenant ED D. ROBERTS (0-668776), Air Corps.	)	Tucson, Arizona, 7 April 1944. Dismissal.

OPINION of 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 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 Ed D. Roberts, 233rd Army Air Forces Base Unit (CCTS) (H) was, at Davis-Monthan Field, Tucson, Arizona, on or about 30 March 1944 in a public place, to wit, the Bar of the Officer's Club, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant Ed D. Roberts, * * *, did, at Davis-Monthan Field, Tucson, Arizona, on or about 30 March 1944, lift up a weapon, to wit, a hunting knife, against Major Harry S. Alexander, his superior officer who was then in the execution of his office.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He 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 evidence for the prosecution is substantially as follows:

On the evening of 30 March 1944 accused was observed in a drunken condition in the bar of the Officers' Club at Davis-Monthan Field, Tucson, Arizona. He was wearing the prescribed officers' uniform. At one time he attempted to sit down but missed the chair about a foot and a half. He fell on the floor and was not able to rise until assisted by other officers. He became so loud and disorderly that Major Harry S. Alexander, Air Corps, ordered accused's companion "Lieutenant Sellinger" to remove accused from the bar. About 30 minutes later, just before 11 o'clock accused was again observed standing at the door of the barroom with his cap on and holding a hunting knife in his hand. When ordered to put the knife down, accused raised it to a striking position about shoulder high. He was seized from the rear by one officer who attempted to hold both arms, by another officer who grasped the right wrist of his hand which held the knife and by still another officer, the officer of the day, who seized his left wrist. A terrific struggle ensued and the officer of the day finally subdued accused by hitting him twice over the head with his service pistol.

Major Alexander testified that accused re-entered the bar about 30 minutes after he was ejected and he first observed him standing in the doorway of the bar with his hat on. He arose from his table and proceeded toward the officer of the day for the purpose of having the officer of the day get him out or arrest him. He noticed accused had a knife and thereupon altered his course and went in the direction of accused. When within a few feet of him accused raised his hand holding the knife in a threatening gesture with the blade exposed, and said, "I'm going to kill you Major". The statement was made in a very impressive tone of voice, with a lot of meaning behind it. In the early part of March 1944 accused had appeared before a Flying Evaluation Board of which Major Alexander was a member. Accused claimed he was suffering from recurrent air sickness and requested ground duties. The Board's determination gave him two alternatives (1) to train as a bombardier

and (2) to voluntarily resign his commission (R. 20).

The following day while receiving medical attention for his head injuries sustained the previous evening, accused told First Lieutenant Frank O. Shobe, the medical officer who was treating him, that it was his intention the night before to kill a certain major (R. 27). The knife which accused had in his possession on the evening of 30 March 1944 at the Officers' Club was received in evidence as Prosecution's Exhibit B. It was identified by Captain Nat W. Washington, Air Corps, the officer who helped restrain accused (R. 13) and by accused himself (R. 38).

4. For the defense.

a. Captain Arthur A. Maxwell, Finance Department, a witness for accused, testified that he was standing about five feet from the door at the Officers' Club at about 10:45 on the evening of 30 March and observed several officers seize accused. When he first saw accused he had his hat on and held a knife in his hand. He did not see Major Alexander until accused was outside the Sky Room and into the hall, but had seen him in the bar earlier that evening. He further testified that Second Lieutenant John J. Rosenquist was the first person to approach accused and he heard him tell accused to "Get out of here * * * get out and get out quick" (R. 28). Accused was standing erect, his face was pretty white, he seemed to be mad about something, was nervous, gritting his teeth and had his hat on. When Lieutenant Rosenquist came up to accused he lifted the knife about shoulder high and at this time Captain Washington grabbed him.

b. Second Lieutenant John J. Rosenquist, a witness for accused, testified that he saw the accused re-enter the bar at the Officers' Club on the evening of 30 March and observed that he had a knife held about waist high. He was the first to go up to him and he told accused, "You'd better leave right away * * * get out of here". Whereupon accused swung the knife up. He grabbed accused, held his arms and pulled him toward the door. Just then someone else grabbed his wrist. There were a lot of people in the bar during this occurrence.

c. After having his rights as a witness explained by the court, accused elected to make a sworn statement. He testified that he entered the Officers' Club between two and three o'clock in the afternoon of 30 March 1944. Several days previously accused and

several other officers had conceived a new game called Chuck-a-Luck or Chug-a-Lug or something like that. The game called for heavy drinking and he was not accustomed to that. The game is played by placing a paper napkin over a glass, then tearing the paper off and making a platform of it. A penny is then placed on the platform and each player takes turns in burning a hole in the paper with a cigarette. When the paper is burned so full of holes that it will no longer support the coin the penny obviously drops in the glass. The player who burned the last hole before the coin dropped is required to consume his drink without stopping. He did not know whether it was because he had been drinking so long or because he had eaten no dinner or supper that made the drinks so effective. He remembered Major Alexander ordering him to leave the bar and instructing his companion officer to take him to his home, earlier in the evening. He remembered being in his room and hearing his companion ask him not to return to the club. He remembered going back to the club with a knife at his side and standing in the door, but did not remember entering the building. He stated that his reason for carrying the knife in his hand was to see what effect the presence of a man with a knife in his hand would have upon the women present. He first met Major Alexander when he appeared before the Flying Evaluation Board, of which the major was a member. He bore no dislike for him, but did have some resentment and said that the major turned his head when accused met him on the street (R. 37). As to the reason for his statement to the medical officer the following morning that he intended to kill a certain major, he testified that he said this to impress the authorities with the idea that he was crazy. He knew he was in a jam and anticipated court-martial proceedings would be brought against him. In order to make it all the more convincing he attempted to maim himself by slashing his wrists with a razor blade while in the hospital.

5. The evidence is clear and convincing that accused, on the evening of 30 March 1944 at about 10:30, while in uniform, was drunk and disorderly in the bar of the Officers' Club at Davis-Monthan Field, Tucson, Arizona. Major Alexander ordered accused to leave the club and go to his quarters. About 30 minutes later accused re-entered the club with his hat on and holding a knife in his hand. He was pale, gritting his teeth and seemed to be angry about something. Major Alexander approached accused, and as he did accused raised the knife shoulder high in a striking position. He was set upon by several officers present and was restrained only when rendered unconscious by a blow on the head by the officer of the day with his service pistol.

The following day when accused regained consciousness from the blow inflicted and large amount of alcohol consumed, he made a statement to the medical officer attending him to the effect that he had intended to kill the major the night before. He also feigned insanity after realizing he was in trouble, by slashing his wrists with a razor blade. Each Charge and Specification is sustained by the evidence.

6. Accused is about 24 years of age. He enlisted in the Army 27 January 1942, and was discharged 17 December 1942 to accept a commission as second lieutenant, Air Corps Reserve. He was ordered to active duty on the latter date.

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, 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 64 or 96.

Thomas H. Tapp, Judge Advocate.

Robert B. Hanworth, Judge Advocate.

Robert E. Trevethan, 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 Ed D Roberts (0-668776), 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, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. The Staff Judge Advocate, Second Air Force, reports that before approving the sentence the reviewing authority requested information from the Base Commander at Davis-Monthan Field as to the salvage value of accused, and received a report to the effect that accused is "'worthless', that he is permanently grounded, and that Reclassification proceedings had been commenced against him prior to the offenses of which he was convicted herein", which proceedings were dropped upon the filing of the court-martial charges. 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 Execution 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.
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. 369, 17 Jul 1944)

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

(21)

SPJGH
CM 255004

1 JUL

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Army Air Field, Ardmore,
Captain PERVIS E. YOUREE	)	Oklahoma, 8 April 1944. Dis-
(0-442322), Air Corps.	)	missal and total forfeitures.

OPINION of 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 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 Captain Pervis E. Youree, 222nd AAF Base Unit (CCTS (H) (Adm Section "A"), did, on or about 5 March 1944 in the vicinity of Ardmore, Oklahoma, wrongfully fly a B-17 airplane, commonly referred to as plane No. 751, closer than five hundred (500) feet to a Braniff Airliner, in flight, in violation of Paragraph 5h, Army Air Force Regulation 60-16A, dated 15 October 1943.

He pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to dismissal and total forfeitures. 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 the afternoon of 5 March 1944 accused, an instructor in section "C", 222nd Army Air Forces Base Unit, Army Air Field, Ardmore, Oklahoma, left the field in a B-17 plane which had the number "751" and the name "Rita" on it, for the purpose of instructing Second Lieutenant William E. Guldner in "flying formation and instrument practice". They were to meet another B-17 and fly formation with it. The other plane was delayed in leaving the field, so that they did not meet it. At approximately 3:00 p.m., while accused was piloting the plane, they met a commercial airliner in the vicinity of Ardmore (R. 22-24).

On the afternoon of 5 March, Mr. Tullis C. Thomas, "Captain Pilot" of a DC-3 commercial airliner of Braniff Airways, left Dallas, Texas, on a regular flight to Chicago. With him on the plane were Mr. Gordon Winfield,

"First Officer" and "Co-pilot", Miss Earline Payne, hostess, and 21 passengers. Mr. Thomas had been flying for 17 years, with about 10,600 flying hours, of which almost 9,000 were as "first pilot", and had flown the Dallas-Chicago route for almost nine years. At about 2:36 p.m. on 5 March, the airliner met the B-17 (marked "751" and "Rita") near Ardmore (R. 6-9, 12-14, 18).

Mr. Thomas testified that as he was "cruising" at about 5,000 feet at a ground speed of about 180 miles per hour, travelling in a northeasterly direction, between Ardmore and the field, he observed the B-17 flying in a southwesterly direction about 1,500 feet below his ship. The B-17 made a turn and passed under the airliner once or twice. It then came up to the same level as the airliner, in the same direction of flight, and flew alongside it for four or five minutes. The B-17 was on the left side, the right wing of the B-17 overlapped the left wing of the airliner, and was six to ten feet above it. The distance between the fuselages of the two planes was 75 or 80 feet. Mr. Thomas could not see the pilot in the Army plane, but observed members of the crew laughing. After calling Dallas twice by radio, Mr. Thomas received instructions, started a descent of about 300 feet per minute, and went down to a level of about 3,000 feet. When he started down, the B-17 "pulled off" to the left (R. 6-13).

Mr. Winfield, the co-pilot on the commercial plane, testified that the B-17, which had been headed southwest at a lower level, approached the airliner from the west side, pulled up "under and below us and come back even with us". It came alongside from behind, and was then flying at the same level. The wings overlapped and the fuselages were 70 to 80 feet apart. This condition continued for four or five minutes, until the pilot of the airliner started a rapid descent. Miss Payne saw the B-17 flying "level with" the commercial plane for about five minutes. According to her it came within 10 or 15 feet. She was busy serving coffee at the time. It was stipulated (Exs. 1 and 2) that two of the passengers on the commercial plane would respectively testify that the wing tips of the planes were about ten feet apart and they continued on a parallel course for five or ten minutes, and that the B-17 came "much closer" than 500 feet to the airliner (R. 14-21, 30).

Lieutenant Guldner testified that he saw the commercial plane in the vicinity of, and west or northwest of, the air field at Ardmore. It was going north, and the B-17 was flying east, toward the field. The two planes were at approximately the same altitude, as he recalled it. At the time, accused, who was piloting the plane, was explaining the "proper use of throttles and methods of using four throttles and two throttles". As the planes approached, accused made a turn to the left, headed north, and flew parallel to the airliner for a "short period of time", not as much as four or five minutes. The B-17 was slightly below and behind the other plane, to the left, and at a distance from it, between wing tips, which he estimated at

about 200 feet. He did not remember the speed at which the B-17 was travelling. Before the other plane changed its altitude, accused "peeled off" and turned away. Lieutenant Guldner stated that it would be "hard to say" whether he would have noticed a change of altitude of the airliner. The wings of the ships did not overlap. The airliner is the same ship as a C-47 (R. 22-30).

4. Accused testified that he was born in Oklahoma, attended college there, is married and has one child. He entered the Army in August 1941, was commissioned in March 1942, and was promoted to captain in March 1943. He served overseas with the Eighth Air Force for about 13 months, returned to the United States about 1 October 1943, and was stationed at Ardmore from about 9 November 1943 (R. 33-34).

On 5 March 1944 accused was a flight instructor on a B-17, number 751, and they were supposed to fly formation with another plane. When the other plane was delayed they climbed to about 5,000 feet, as the air was rough at lower levels. The weather was "pretty good". When the plane was coming back to the field in an easterly direction and accused was giving instructions to the pilot of the crew, he (accused) "looked up and noticed what might be any kind of Army transport approaching from the south". It was "very obvious" to accused that he would have to do something to avoid "possibly running into" the other plane. They were flying a "collision course". He could not estimate the distance between the planes when he first saw the other. Since he did not know what the pilot of the other plane would do, accused "decided the best policy was to do a left turn". Accused "eased back on" the throttle, lost altitude, was slightly below and behind the other plane, and "assumed the heading that he was on". He turned to the left because he thought it was the best thing to do under the circumstances, and still feels that it was the best thing to do. It was "pretty quick action". Accused testified that the closest he came to the other plane was about 200 to 250 feet, that the wings of the planes did not overlap, that he flew "that course" a "very short time only", and that he then "peeled off to the left away from the other plane". He flew parallel to the airliner a "very short while", "reduced the throttles" and did not remember moving them again. He stated that he did not see the other plane lower its altitude. Having in mind the "general safety of everybody concerned" it was his "decision" that he could not have avoided flying as he did. At first he thought the other plane was a transport plane, and recognized it as an airliner as he "peeled off". He denied that he flew under the airliner at any time, but stated that he was "below the altitude of the airliner" when he was approaching and "was about same level approaching". He "eased back on down" and made a left turn (R. 34-41).

Accused admitted that he was violating regulations, and knew he was violating them in coming closer than 500 feet. He stated that he did not intend to violate the regulations and could not avoid flying as he did (R. 38, 40).

Second Lieutenant Avery O. Gage, who was in the B-17 with accused on 5 March testified that they flew west a while, then back east toward the field and then turned north a "short time". He "wondered why", looked up, noticed a "silver airplane", and went back to work. The B-17 then headed west again. He thought the other plane was 75 to 100 yards away when he saw it, but paid no more attention to it. It was his duty as navigator to notice changes in the direction of the ship (R. 31-32).

It was stipulated (Def. Exs. C, D, E) that three passengers on the airliner would respectively testify as follows: Aviation Cadet Alfred C. Rizzo, that he had been asleep, was awakened by "some commotion", glanced out and noticed a B-17 on a "heading perpendicular to that of the airliner at about 730 to the airliner, going away", and could not estimate the distance between the planes; another, that he did not see a B-17 at any time during the flight; and Mr. Otto Richter, that the B-17 approached the airliner and flew a parallel course for "about a minute" and that he could not estimate the distance between the two planes (R. 30, 33).

It was also stipulated (Def. Ex. A) that Brigadier General Frank A.Armstrong, Jr., would testify that accused served under him for several months in a combat zone, participated in 25 missions over enemy territory, performed his duties as pilot and flight commander "with marked ability and gallantry in action", at all times demonstrated a faithful observance of combat flying safety regulations, and was "ever mindful" of the safety of his crew. General Armstrong had the "highest regard" for the efficiency and ability of accused. Another stipulation (Def. Ex. B) was that Colonel James W. Wilson would testify that accused served under him for about two years, that his flying ability and devotion to duty were outstanding, at no time did he violate flying regulations, and while in combat he was courageous and trustworthy. In the opinion of Colonel Wilson accused is of inestimable value as an instructor and pilot, as shown by past performance (R. 30, 33).

Accused was awarded the Distinguished Flying Cross by General Order No. 56 (Def. Ex.F) on 6 May 1943 (R. 42).

5. Paragraph 5h, Army Air Forces Regulation No. 60-16A, 15 October 1943, provides that no aircraft will be flown closer than 500 feet to any other aircraft in flight, except as two or more aircraft may be flown in duly authorized formation.

On the afternoon of 5 March 1944 accused, an instructor at Army Air Field, Ardmore, Oklahoma, left the field in a B-17 plane for the purpose of instructing Second Lieutenant William E. Guldner in "flying formation and instrument practice". They were to fly formation with another B-17, but the other plane did not meet them. At about 2:30 or 3:00 p.m. the B-17 piloted by accused approached a commercial airliner on its regular flight from Dallas, Texas, to Chicago, and at the time accused was giving instructions on

the proper use of throttles. The airliner was carrying a crew of three and 21 passengers. When the planes met in the vicinity of Ardmore, accused brought the B-17 alongside the airliner on the left side at the same altitude, and flew a parallel course closer than 500 feet to it. This constituted a violation of the regulation, as was known by accused.

The evidence for the prosecution shows that accused flew a parallel course for four or five minutes, with the tips of the wings of the two planes overlapping, the wing of the B-17 being about ten feet above that of the other plane. The evidence for the defense shows that accused continued in a parallel course only a "very short while", not as much as four or five minutes, and that the wing tips did not overlap but were about 200 feet apart. It was not necessary for the court to determine which evidence was correct since the Specification alleges that the plane was "closer than five hundred (500) feet" and this was proved by the evidence for both prosecution and defense.

The testimony for the defense was to the effect that accused did not intentionally violate the regulation, but was forced into his position relative to the other plane by circumstances. He claimed that while flying along in an easterly direction and giving instructions he looked up and discovered that he was about to collide with the airliner; that in the emergency he decided that the safest thing to do was to make an abrupt turn to the left and bring his ship parallel to the other plane; and that after so doing he flew parallel for a short time and then turned away. By its findings of guilty the court rejected this evidence, and in the opinion of the Board of Review properly did so. The pilot of the airliner, who had been flying for about 17 years, of which the last eight or nine were as pilot on the Dallas-Chicago flight, and who had about 10,600 flying hours to his credit, testified positively that the B-17 was first observed about 1,500 feet below the airliner, flying in a different direction, and that it then came up to the same level and flew a parallel course with overlapping wings. The co-pilot of the airliner testified to the same effect. It is inconceivable that these two experienced flyers could be far wrong in their observations. Likewise, it is unbelievable that accused, with long battle experience, could have flown under the airliner, then come up to the same level, and almost collided with the commercial plane without being aware of its presence. The testimony of accused and of Lieutenant Guldner, a witness for the prosecution but obviously friendly to accused, was vague and uncertain in many important particulars, as when accused could not estimate the distance between the two planes at the time when he claimed it was necessary for him to turn to a parallel course to avoid a collision, and when Lieutenant Guldner could not remember the speed at which the B-17 was travelling.

The Board of Review is of the opinion that the evidence sustains the findings of guilty beyond any reasonable doubt.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show that he served as aviation cadet from 20 August 1941, was appointed second lieutenant, Army of the United States, Air Reserve, and entered upon active duty on 16 March 1942, was temporarily promoted to first lieutenant, 17 August 1942, and to captain on 19 March 1943 and that he received the following awards: Air Medal, 16 February 1943 (GO No. 19, 8th A.F.); oak leaf cluster, in addition to Air Medal previously awarded, 31 March 1943 (GO No. 38, 8th A.F.); oak leaf cluster in addition to Air Medal previously awarded, 10 April 1943 (GO No. 43, 8th A.F.); Distinguished Flying Cross, 6 May 1943 (GO No. 56, 8th A.F.); and oak leaf cluster for wear with Distinguished Flying Cross previously awarded, 31 May 1943 (GO No. 77, 8th A.F.).

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. Drewes, Judge Advocate.

Robert J. Glenn, Judge Advocate.

(On leave), 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 Captain Pervis E. Youree (0-442322), 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. I recommend that the sentence be confirmed but commuted to a forfeiture of pay in the amount of $100 per month for ten months, and that the sentence as thus commuted be carried into execution.

3. Consideration has been given to the attached memorandum from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 7 October 1944. He recommends that the sentence of dismissal and total forfeitures be commuted to forfeiture of pay in the amount of $100 per month for ten (10) months. I concur in that recommendation.

4. Consideration has also been given to recommendations of clemency, signed by all of the seven members of the court and by defense counsel and assistant defense counsel, and to the attached communications requesting the exercise of clemency: Letter from the accused directed to the President dated 9 May 1944; letter from Mr. Bob Bolger, Bangor, Pennsylvania, directed to the President dated 26 May 1944; letter from Miss Elizabeth Clayton, New Bedford, Massachusetts, directed to the War Department, dated 1 June 1944; letter from Miss Louise Stanley, Marietta, Ohio, directed to the President dated 1 June 1944; letter from Mrs. Wylma Youree Crain, sister of the accused, directed to the President dated 5 June 1944; letter from Mr. John F. Easley, Ardmore, Oklahoma, directed to the President, dated 10 June 1944; letter from Mr. Fred Tillman, Oklahoma City, Oklahoma, directed to The Secretary of War dated 14 June 1944 enclosing a resolution of the American Legion, Department of Oklahoma; telegram from the Honorable Robert S. Kerr, Governor of Oklahoma directed to the President, dated 19 May 1944; telegram from Mr. Rodney S. Troy, directed to the President dated 3 June 1944; and telegram from Mr. & Mrs. R. W. Grose, Lawton, Oklahoma, directed to the President, dated 3 June 1944.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President, together with a form of Executive action

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

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

17 Incls.
Incl. 1-Rec. of trial.
Incl. 2-Drft. ltr. for sig. of S/W.
Incl. 3-Form of action.
Incl. 4-Memo. fr. Lt. Gen. Giles, 7 Oct. 44.
Incl. 5-Ltr. fr. accused to Pres., 9 May 44.
Incl. 6-Ltr. fr. Mr. Bolger, 26 May 44.
Incl. 7-Ltr. fr. Miss Clayton, 1 June 44.
Incl. 8-Ltr. fr. Miss Stanley, 1 June 44.
Incl.9-Ltr. fr. Mrs. Crain, 5 June 44.
Incl.10-Ltr. fr. Mr. Easley, 10 June 44.
Incl.11-Ltr. fr. Mr. Tillman, 14 June 44, w/incl.
Incl.12-Telegram fr. Hon. Kerr, 19 May 44.
Incl.13-Telegram fr. Mr. Troy, 3 June 44.
Incl.14-Telegram fr. Mr. & Mrs. Grose, 3 June 44.
Incl.15-Ltr. fr. Sen. Pepper, 5 Sept. 44.
Incl.16-Cpy ltr. fr. Hon. Johnson, 1 Sept. 44.
Incl.17-Ltr. fr. Hon. Johnson, 23 Sept. 44.

(Sentence confirmed but commuted to forfeiture of $100 pay per month for ten months. G.C.M.O. 591, 25 Oct 1944)

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

5 JUN 1944

SPJGH
CM 255083

UNITED STATES	)	13TH AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 6 April 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private ALBERT M. HARGROVE (14121598), Company G, 515th Parachute Infantry, Camp Mackall, North Carolina.	)	

HOLDING by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Albert M. Hargrove, Company "G", 515th Parachute Infantry, did, at Fort Benning, Georgia, on or about 17 November 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Camp Wheeler, Georgia on or about 31 January 1944.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by special court-martial of absence without leave for about twelve days was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years. The reviewing authority approved the sentence but remitted ten (10) years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution in pertinent part follows: Extract copy (Ex. 2), of morning report of Company G, 515th Parachute Infantry for 17 November 1943 shows accused "Trfd to the Rec Co Prcht Sch Ft Benning Ga and left Co". First Lieutenant George D. Carlson, commanding officer of Company G at that time and until about 23 December testified that accused was not with the company after 17 November. Captain Norvel E. Thames, commanding officer of the Receiving Company, Parachute School, since 24 February 1944, testified that the name of accused did not appear on the morning

reports of that company for November 1943, and the organization records did not show that he was ever assigned to it. Captain Gordon S. Shotwell, who replaced Lieutenant Carlson as commanding officer of Company G, testified that accused was not present with Company G while he was commanding officer, but that after the apprehension of accused, he "was sent back up here and was given back to the company, I mean on paper, while he was retained in the Stockade. Evidently there had been a mistake of some sort * * *". Captain Shotwell signed an entry in the Company G morning report under date of 6 March 1944, as shown by extract copy thereof (Ex.1), reading as follows: "14121598 Hargrove, Albert M. Pvt. Err Trfd to Prcht School Ft. Benning Ga (receiving Co) M/R of 17 Nov 43. 14121598 Hargrove Pvt. Fr. dy to AWOL as of 17 Nov 43." (R. 1-10).

On 28 January 1944 accused applied for a job at the United States Ordnance Plant at Milledgeville, Georgia, stated he had been discharged from the military service and presented a "discharge" (Ex. 3) typed on a letterhead of the Georgia House of Representatives. Accused filled out an application blank and was sent to a hospital for a physical examination. A military policeman saw him at the hospital and asked him for his pass or furlough. Accused said he was discharged from the Army and his papers were on file in the employment office of the plant. Accused completed the physical examination and came to the plant the "following Monday", 31 January. He told the employment manager that his mother was coming to town and he was not going to work then. About 8 p.m. of the same day the military policeman arrested accused in a poolroom. Accused was wearing mixed civilian and military clothes (R. 10-20).

4. No evidence was offered by the defense. The accused, after being advised of his rights as a witness, stated that he desired to remain silent (R. 20).

5. Proof of absence without leave is usually made by means of an entry in the morning report. In this case, however, the entry in the morning report of Company G on 6 March 1944 showing accused "fr. duty to AWOL as of 17 Nov 43" is purely hearsay inasmuch as Captain Shotwell who made the entry was not the commanding officer of Company G in November and had no personal knowledge of the fact stated (Dig. Ops. JAG 1912-40, sec. 395 (18)). Absence without leave may be inferred from circumstances. Direct proof, though desirable, is not in all cases requisite (CM 126112, Dig. Ops. JAG 1912-40, sec. 419(2)). It is shown that accused left Company G on 17 November 1943 and was not with that company until after his apprehension on 31 January 1944. The morning report of Company G for 17 November shows accused transferred to the Receiving Company, Parachute School. No record could be found in the Receiving Company of his transfer to that organization and he was never present for duty with it. Captain Shotwell testified there was "a mistake of some sort". He made an entry in the

morning report of Company G on 6 March 1944 showing accused "Err Trfd to Prcht School Ft. Benning Ga (receiving Co) M/R of 17 Nov 43". Under this state of the record it is impossible to determine the status of accused on 17 November 1943. The only thing clearly shown is that he left Company G and that he was not transferred to and did not join the Receiving Company. However, as far as the evidence shows he may have been transferred to, and joined some other organization.

Whatever the status of accused between 17 November 1943 and 28 January 1944, there is competent evidence to show accused absent without leave on the latter date. At that time he applied for civilian employment, told the personnel manager he was discharged from the Army and produced a forged "discharge". While taking a physical examination at a civilian hospital for the job, he told a military policeman who asked him for his pass or furlough that he was discharged from the Army. On 31 January he told the personnel manager he would not go to work then because his mother was coming to town. He was apprehended that evening in a pool room in mixed civilian-military clothes. The Board is of the opinion that these circumstances are sufficient to establish that he was absent without leave on 28 January and that he had the intent to desert the military service.

6. Under the conclusions reached by the Board it necessarily follows that much of the testimony introduced by the prosecution was incompetent and its reception erroneous.

It is said in CM 127490, Dig. Ops. JAG 1912-30, sec. 1284 (quoted with approval in CM 211829, Parnell, 10 B.R. 133, 142):

> "It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded."

Applying the test above laid down, the Board, after a careful examination of the evidence, concludes that it compels a finding of guilty of desertion.

7. The accused is 23 years of age. The Charge Sheet shows that he was inducted on 9 June 1942.

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as includes desertion on 28 January 1944, terminated by apprehension on 31 January 1944; legally sufficient to support the finding of guilty of the Charge; and legally sufficient to support the sentence.

Samuel M. Bruce, Judge Advocate

Robert Hamer, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

30 JUN 1944

War Department, J.A.G.O., - To the Commanding General, 13th Airborne Division, Camp Mackall, North Carolina.

1. In the case of Private Albert M. Hargrove (14121598), Company G, 515th Parachute Infantry, Camp Mackall, North Carolina, I concur in the foregoing holding by the Board of Review and for the reasons stated recommend that only so much of the finding of guilty of the Specification of the Charge be approved as includes desertion on 28 January 1944, terminated by apprehension on 31 January 1944.

2. Although the sentence is legal it is recommended that in accordance with War Department letter dated 5 March 1943, Subject: "Uniformity of sentences adjudged by general court-martial" the period of confinement be reduced to five (5) years.

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

(CM 255083).

James E. Morrisette,
Brigadier General, U. S. Army,
Assistant Judge Advocate General
In Charge of Military Justice Matters.

1 Incl.
Record of trial.

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

SPJGQ
CM 255114

19 MAY 1944

UNITED STATES v. Private JOSEPH J. CARACAPPA (32698017), M.P. Detachment, Headquarters and Headquarters Company, Base General Depot, C-AMA, San Bernardino, California.	COMMUNICATIONS ZONE CALIFORNIA-ARIZONA MANEUVER AREA Trial by G.C.M., convened at San Bernardino, California, 14 April 1944. Confinement at hard labor for six (6) months and forfeiture of $33.00 per month for a like period.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL and FREDERICK, 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 insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Joseph J. Caracappa, MP Detachment, Headquarters and Headquarters Company, Base General Depot, C-AMA, San Bernardino, California, did, at Base General Depot, C-AMA, San Bernardino, California, on or about 5 October 1943 feloniously take, steal, and carry away Government issue property, to wit, 10 undershirts, 2 cotton shirts, 2 tent poles, 1 field jacket, 1 shelter half, 1 cotton trouser, 12 tent pins, 1 tent rope, 1 box tooth picks, 11 prs. socks cotton, 1 union alls, 15 paint brushes, 1 G.I. knife, 2 QM collar insignia, 1 US collar Insignia, 1 Infantry collar insignia, 2.45 Cal catridge, 11 A.G.F. shoulder patches, 1 pr of brown laces, of the total value about $31.75, the property of United States Government, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced at the trial. He was sentenced to be confined at hard labor at such place as the reviewing authority may direct, for a period of six months and to forfeit $33.00 per month for a like period. The reviewing authority approved the sentence and ordered it executed, the stockade at Base General Depot, C-AMA, San Bernardino, California, being designated as the place of confinement.

3. The evidence shows that about 6:00 p.m. on 5 October 1943, Private Stephen Durvetsky, M. P., stopped a private car in which accused was a passenger as it approached the gate leading from the Base General Depot, San Bernardino, California. In the trunk of the car he found a box belonging to accused which, on search, he found to contain "two tent poles, two gun cartridges, roll, and many other items" (R. 7-8). The package was taken to the Provost Marshal for investigation where it was found to contain a shelter half, a field jacket, a box of toothpicks, twelve tent pins, one rope, and one or two pairs of cotton underwear (R. 10). Nine cotton undershirts were found later upon search of accused's tent (R. 11). There were no markings which would indicate that any of the articles were Government property (R. 11-12, 16-17), except a knife which "had 'US' on it" (R. 12).

Captain McGovern, the Company Commander of the accused, testified that at the time of the incident, accused was about to be examined for a medical discharge from the Army and was planning to send his things home (R. 17). The captain also testified that most of the articles could be purchased either "downtown or at the PX" (R. 16-17), and that a discharged soldier may lawfully take certain items of military clothing with him upon discharge (R. 19). His belief that the items in question were Government property was based on the accused's "own statement" (R. 18). The nature of the alleged statement by the accused as to ownership was not shown or explained, save for the following testimony by Captain McGovern in reference to the shelter half,

> "I asked him where he got this? He said, he had gotten it from an officer in the 533d QM" (R. 21).

The captain"assumed at the time it was Government property" (R. 22).

4. <u>Law and Decision:</u>

The record is barren of any competent legal proof that the property found in accused's possession and described in the Specification was, in fact, "property of the United States Government, furnished and intended for the military service thereof". Captain McGovern's testimony as to the accused's "statement" was merely a personal conclusion of the witness and was without any evidentiary value (Dig. Ops.

JAG 1912-40), section 395 (24); C.M. 123494). The accused's alleged statement that he had obtained certain of this property from an Army officer cannot be considered the equivalent of proof of ownership of such property by the Government.

There is no proof in the record that any Government property was missing at that time and place, or that the accused had committed any act of trespass. There was not only a complete lack of proof of the corpus delicti but also of any of the elements essential to establish the commission of a larceny. Accordingly, the findings of guilty and the sentence cannot be sustained.

5. The record shows the accused to be 24 years of age. He was inducted 29 December 1942 for the duration plus six months.

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 insufficient to support the findings of guilty and the sentence.

William H. Arnold, Judge Advocate.

William H. Gamble, Judge Advocate.

Herbert B. Ruderman, Judge Advocate.

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 Joseph J. Caracappa (32698017), M. P. Detachment, Headquarters and Headquarters Company, Base General Depot, C-AMA, San Bernardino, California.

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

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

Myron C. Cramer

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

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

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 234, 29 May 1944)

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

SPJGV
CM 255120

26 MAY 1944

UNITED STATES v. Private WILLIAM BOYD (39286739), 453rd Quartermaster Laundry Company.	COMMUNICATIONS ZONE CALIFORNIA-ARIZONA MANEUVER AREA Trial by G.C.M., convened at San Bernardino, California, 18 April 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center, Turlock, California.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: (Dismissed on motion of defense).

Specification 2: In that Private William Boyd, 453rd Quartermaster Laundry Company, Camp Young, California, did, without proper authority, absent himself from his organization and station 453rd Quartermaster Laundry Company from about 22 October 1943 to about 1130 22 February 1944.

Specification 3: In that Private William Boyd, 453rd Quartermaster Laundry Company, Base General Depot, San Bernardino, California, did without proper authority absent himself from his organization and station, 453rd Quartermaster Laundry Company, Camp Young, California, from about 0900 28 March 1944 to about 2110 28 March 1944.

Accused pleaded former punishment under Article of War 104 as a bar to trial on Specification 1 of the Charge. The court sustained the plea and dismissed this Specification. Accused pleaded not guilty to and was found guilty of Specifications 2 and 3 of the Charge and the Charge. Evidence of one previous conviction by special court-martial for disrespect toward a superior officer was introduced in evidence. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence but ordered the confinement reduced to five years, ordered the execution of the sentence as modified, but suspended the dishonorable discharge, and designated the Ninth Service Command Rehabilitation Center at Camp Turlock, California, as the place of confinement. The result of the trial was published in General Court-Martial Orders Number 107, Headquarters Communications Zone, California-Arizona Maneuver Area, dated 26 April 1944.

3. In support of Specification 2 of the Charge, the prosecution introduced into evidence, without objection, an extract copy of the morning report of the 453rd Quartermaster Laundry Company, Camp Young, California, containing the following pertinent entry: (R. 11; Pros. Ex. A)

"8 Nov 43; DS Indio Calif to AWOL 22 Oct 43
Boyd, William
/s/ Guy B. Jackson
/t/ GUY B. JACKSON"

The termination of the alleged unauthorized absence was shown by the introduction in evidence of an extract copy (Pros. Ex. B) of the morning report of the same organization, containing the following entry:

"8 March 44: AWOL to conf abs sk

Pasadena, California Area
Station Hosp 1430 22 Feb 1944

/s/ Robert E Durling
/t/ ROBERT E DURLING"

Both extract copies bear the following certification:

453rd QM Ldry Co Cp Young, Calif 13 Mar 44

"I, GUY B. JACKSON 1st Lt. QMC, certify

that I am the commanding officer of 453rd QM Ldry Co and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Camp Young, California for the dates indicated in said copy which relates to William Boyd 39286739 Private 453rd QM Laundry Company

/s/ Guy B. Jackson
/t/ GUY B. JACKSON
1st Lt QMC"

In support of Specification 3 of the Charge, the prosecution introduced into evidence an extract copy of the morning report of the 453rd Quartermaster Laundry Company, Base General Depot, San Bernardino, California, containing the following entries: (R. 12; Pros. Ex. C)

"28 March 1944
39286739 Boyd William Pvt
DS Camp Young, Calif
to AWOL 0900
/s/ Robert E.
Durling
/t/ ROBERT E.
30 March 1944 DURLING
39286739 Boyd Pvt
Fr DS Camp Young Calif to AWOL
2110 to abs conf Pasadena Calif
28 Mar 44 Abs conf to dy 1400
Dy to conf 1700

453rd QM Ldry Co. BGD San Bernardino
Calif. 31 March 1944.

I, ROBERT E DURLING 2nd Lt. QMC certify that I am the Personnel Officer of 453rd QM Ldry Co. and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Base General Depot San Bernardino, Calif. for the dates indicated in said copy which relates to William (NMI) Boyd Private 453rd QM Ldry Co.

/s/ Robert E. Durling
/t/ ROBERT E. DURLING
2nd Lt. QMC Personnel
Officer"

The defense made the following objection to the admission in evidence of this exhibit:

> "DEFENSE: No objection to Exhibit C, except for the entry appearing therein, which is obviously based on hearsay information. If it may be accepted for the information contained excepting reference made to the hearsay, there will be no objection. Defense objects to the word 'confinement' in there, which has no bearing on this case whatsoever." (R. 12).

The objection was overruled (R. 13).

The only additional pertinent testimony offered to establish the prosecution's case was that of accused's company commander, First Lieutenant Guy B. Jackson, as follows:

> "Q Lieutenant Jackson, how long have you been in the accused's Company?
> "A Since March 5, 1943.
> "Q Did you have personal knowledge of the accused's absence?
> "A Yes, sir.
> "Q Do you know if he was given permission to be absent?
> "A I don't know as to that. I was stationed at Camp Young, and he was with a detachment at Indio." (R. 14)

The defense offered in evidence a letter (Def. Ex. 1) dated 8 March 1944 addressed by accused to his company commander which states inter alia "I have talked with the M.D. here and I take it, he would recommend a Section 8 discharge if it were not for my AWOL status". The letter is signed by the accused (R. 23).

In remarks addressed to the court concerning the physical condition of the accused, defense counsel made the following statement:

> "It is in the way of extenuating circumstances for his leaving the organization. It does not excuse his leaving, but shows why he left" (R. 34).

4. The entries in the morning reports (Pros. Exs. A, B) relied upon to prove the initial absence of accused on 22 October 1943 while on detached service at Indio, California, and the termination of the unauthorized absence on 22 February 1944 at Pasadena, California Area Station Hospital, were submitted at Camp Young, California.

The entries in the morning report (Pros. Ex. C) relied upon to show the initial absence of accused at 0900 hours on 28 March 1944 at Camp Young, California and the termination of the unauthorized absence at 2110 hours the same date by confinement at Pasadena, California were submitted at Base General Depot, San Bernardino, California.

It is apparent from the entries listed above (Pros. Exs. A, B, C) that they recite events which transpired at a station other than the station where the entry was made so as clearly to indicate that the entry was obviously not based on personal knowledge. Therefore, the entries on their face are hearsay and incompetent evidence of the facts recited therein (CM 224325, Michael, 14 B.R. 117; CM 230278, Gunning, 17 B.R. 349; Dig. Op. JAG, 1912-40, sec. 395 (18)).

The failure of the defense to object to an entry of a hearsay nature does not cure the defect and make the entry competent (MCM, 1928, par. 114c; Dig. Op. JAG, 1912-40, sec. 395 (21); 1 Bull. JAG 212; 2 Bull. JAG 60).

The testimony of Lieutenant Jackson, accused's company commander, fails to establish any unauthorized absence. This witness did not know accused's status as he (accused) was on detached service at a different station at the time of the alleged offenses.

The letter of accused dated 8 March 1944 (Def. Ex. 1) referring to an "AWOL status" does not constitute an admission or confession to the alleged offenses as it is not definite as to date and only refers to a "status" which may or may not represent the true facts.

The utterance by defense counsel that evidence of an ailment of accused was offered "in the way of extenuating circumstances for his leaving the organization" does not constitute a vicarious admission by accused because it is not a "statement * * * by counsel" as used in paragraph 76, Manual for Courts-Martial, 1928. It is merely an

argumentative statement made without any apparent authority of the accused. Also, the statement does not expressly admit an unauthorized absence.

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

Thomas H. Tappy, Judge Advocate.

Hartwell McKeever, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 255120

1st Ind.

War Department, J.A.G.O., 27 MAY 1944 To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (Pub. No. 325, 75th Cong.), is the record of trial in the case of Private William Boyd (39286739), 453rd Quartermaster Laundry Company, together with the foregoing opinion of the Board of Review.

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

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

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

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

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 284, 12 Jun 1944)

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

SPJGK
CM 255162

28 JUN 1944

UNITED STATES	CENTRAL PACIFIC AREA
v.	Trial by G.C.M., convened at APO 958, c/o Postmaster, San Francisco, California, 28 and 29 December 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private TOMAS LUCERO, JR. (38169009), Company F, 47th Engineer Regiment.	

REVIEW by the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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 92nd Article of War.

Specification: In that Private Tomas Lucero, Jr., Company F, 47th Engineer Regiment, did, at APO 957, on or about 17 October 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Ray H. Miller, a human being, by shooting him with a rifle.

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

Specification: In that Private Tomas Lucero, Jr., * * *, did at APO 957, on or about 17 October 1943, with intent to commit a felony, to wit, murder, commit an assault upon Private William M. Burkert, by willfully and feloniously shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to 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, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution.

The shooting occurred in Area J of APO 957 near the "gymnasium", in which accused's company was quartered (R. 12,46,71,76).

About 1 p.m. on 17 October 1943, a party of 10 or 12 enlisted men, including the deceased (Miller) and accused, went by truck to Nanakuli for the purpose of drinking beer (R. 13,19,25,31,34,49). Private Aikens drove the truck (R. 48,49). Arriving at Nanakuli between 2 and 2:30 p.m., they repaired to a beer tavern, where they remained until 3:30 or 4 p.m. (R. 13,25,34,49,51). Aikens sat with Miller and accused for a few minutes and had two beers with them. He did not see them drink anything except beer (R. 50). On the way back to the post, the party stopped at the marine base and drank more beer (R. 14,26,35,51). Technician 5th Grade Riggs saw accused drinking beer, but did not see him drinking anything else (R. 35). Accused asked Aikens to lend him some money. Aikens had only a few pennies and offered to lend them to accused, to which accused replied that he had plenty of money, did not want the money, and had merely wanted to know whether Aikens would make him a loan. Accused and Aikens discussed the size of people, and accused said that he did not believe there were people smaller than Aikens and twice as old. Aikens told accused about a person he knew who was "that way", whereupon accused said that he did not believe it and threatened to kill Aikens (R. 51-52).

At about 5 p.m., the party boarded the truck, except accused, who said he was not going (R. 14,26,35,52). Miller jumped off the truck, saying that if accused were not going, neither was he (R. 14,27,36). Accused then attempted to pull Aikens from the cab of the truck. Carey jumped off the truck and came to the aid of Aikens. Accused punched Carey, who fell to the ground. Riggs got off the truck to help Carey, and accused and Miller tried to stop him, accused "pulling a knife" on Riggs, who ran away. Some of the others broke up the fight, and eventually the truck drove off, accused and Miller remaining behind (R. 14, 15,27,36,53).

On the way back, the truck stopped to pick up accused and Miller, who had passed the party on another truck (R. 15,28,37,53,121). Immediately, Miller, who was in the front part of the truck, started to fight, and had to be held down by Riggs and O'Hara (R. 15,20,28,37). In O'Hara's opinion, Miller seemed to be under the influence of liquor (R. 21). Accused was standing at the back of the truck and, according to O'Hara, did not appear to like the restraint imposed upon Miller (R. 15,21,28).

The truck arrived at the company area and stopped on a gravel driveway (R. 15,16,28,37; Pros. Ex. B). Accused, the first man off the truck, picked up a handful of stones or rocks and started throwing them at the men on the truck. Carey left the truck and began throwing rocks back at accused. A general rock fight ensued, in which Miller also participated (R. 16,29,38,54).

The rock fight over, Miller grabbed Aikens and started fighting with him. Aikens could think of no reason for Miller's actions, as they were good friends. Blows were exchanged. Aikens got the better of Miller, and at the end of the struggle Miller was lying face down on the ground, but was conscious. Some of the men were standing around him in a circle, and others were "all scattered around" (R. 17,22,38, 47,54,55,56,59,60). O'Hara, Riggs, and Aikens testified that they did not hear Miller call to accused for help or say anything during or after the fight with Aikens (R. 23,45,60).

However, accused went to the nearby "gymnasium", procured and loaded his rifle, and returned to the immediate vicinity of the fight, apparently arriving after it was over. Private Steeves saw him on the way to the gymnasium and refused a request from accused that Steeves get accused's rifle. According to Steeves, accused's speech was normal and he was not drunk, although he looked as though he had been drinking and appeared angry and "kind of white and wild looking". An enlisted man who was in the gymnasium when accused came for his rifle testified that accused seemed to have control of his faculties, and another testified that he "seemed to be excited" and was more or less "in a mad stage" (R. 63,64, 67,69,70-73,76-78).

Steeves walked to the place where the truck was parked and warned the men that they had better leave, since accused had gone after his rifle. He testified that Miller was lying on the ground on his stomach (R. 39,55,64-66,68). At this point the testimony becomes confusing. There was evidence that some of the men boarded the truck immediately and drove away, leaving Miller on the ground (R. 55,65). On the other hand, Riggs testified that the men did not leave on the truck until after three shots had been fired at the group, the first from the opposite side of the truck from where Riggs stood (R. 39,45,46). There was a hedge near the place where the truck was parked (R. 23). Witnesses a short distance from the scene heard two or three shots (R. 18,56,65,74, 75,78,79).

Burkert, the victim of the assault alleged in the Specification of Charge II, was driving near the spot and noticed a soldier walking along the road. The soldier's face was flushed and he appeared to have been running. Burkert parked his car and walked to a place where a soldier (undoubtedly Miller) lay on the ground. Some soldiers were standing around. Burkert saw another soldier coming up the road, armed with a rifle and a cartridge belt. Then he heard a shot, turned, and saw "this man" (apparently accused) standing over "this body of this other man, who was laying on the ground" (apparently Miller). Burkert and the other men started to run. Burkert saw the man with the rifle put it to his shoulder, point it toward Burkert, and fire. The bullet entered Burkert's back, and he was "spun around and knocked to the ground". He "dove" into a ditch (R. 81-86).

Miller died on the way to the hospital from a gunshot wound which entered the right chest from the front and perforated the aorta (R. 7,8, 91-93; Pros. Ex. A). Burkert had a perforated abdominal wound, was in a serious condition, and remained in the hospital for several weeks (R. 87,92,93).

Several witnesses testified that accused acted in a normal manner during the sojourn at the tavern and the marine base, although one of them, Aikens, added that he could not tell whether accused was drunk (R. 13,14,18,19,25,34,42,50,52,57).

Accused and Miller were "chums", and none of the witnesses noticed any animosity between them on the day of the shooting (R. 20,31,47,59, 70).

About 7:30 p.m. accused and another enlisted man appeared at the orderly room of accused's company. Captain Gianelli (the company commander) and Staff Sergeant Peiffer were present. In the presence of accused, the enlisted man who accompanied him told Captain Gianelli that accused said he had shot a man and wished to be taken to the orderly room (R. 102,103,107,108A, 108B,142). Although accused seemed rather nervous, he had no difficulty in walking, standing, or sitting, and appeared normal and not under the influence of liquor (R. 104-106, 109A, 110A, 142).

Accused's first remark to Captain Gianelli was that he was sorry. Captain Gianelli asked him what had happened (R. 103). Although accused was not advised of his right to remain silent, no violence was used and no promises or threats were made (R. 104,106,109A,110A). Accused seemed anxious to tell what had happened, and proceeded to do so (R. 104,106,110A). He referred to the trip to town and said he had drunk a lot of beer. He did not mention having drunk anything except beer. He said that some of the men had tried to make him and Miller come back to the post against their wishes, in consequence of which there was a fight beside the truck. He stated that when the truck arrived at the company area, a fight started between Miller and some of the others, during the course of which Miller told accused to "'go get your gun; they are going to kill me'". Accordingly, accused ran to the gymnasium, procured his rifle, and ran back to the vicinity of the fight. He "saw these men around there" and fired some shots into the air. According to Peiffer, accused said that he fired the shots in order to stop the men from fighting with Miller, and when they did not stop, he fired closer to their heads. Immediately after the shooting, Miller told accused that someone had shot him. Accused ran to Miller, who was then lying on the ground. Thereupon, accused threw away his rifle, found an enlisted man, and requested to be taken to the orderly room (R. 104,106,108A, 110A).

Captain Gianelli turned accused over to Captain Bockus of the 762nd Military Police Battalion (R. 105,108B,109B). Captain Bockus testified that accused did not appear to be drunk, but, on the contrary, appeared to be normal and in full possession of his faculties and showed "no lack of muscular coordination in his walking" (R. 112,132,135,141). About 8 p.m. Captain Bockus had accused taken to the Post Military Police Headquarters, and about 8:30 p.m., witness went there to see him (R. 109B, 112). Accused was "being worked on" by Captain Rosenthal, Medical Corps, and seemed to be in a "passed-out" condition and "not wholly conscious", although he was sitting up straight in a chair. To the witness, he seemed to be suffering more from shock than from intoxication. He vomited (R. 113,117,136). After Captain Rosenthal's departure, witness had accused placed in the "lock-up" and told the enlisted men to let him rest (R. 113). After an hour and a half or two hours, i.e., about 10:30 p.m., Captain Bockus took accused to "the colonel's" office for questioning. Accused appeared to be normal. He walked, stood, and sat without assistance, and in a normal manner; seemed to understand what was said to him, and gave clear and lucid answers (R. 113,114,124,134). Captain Bockus properly advised accused of his right to make a statement or remain silent, and used no threats or promises (R. 113-115). Accused said that he understood his rights and wished to make a statement (R. 114,117,118). Witness took down the statement in longhand. It was then typed and read to accused, who again was advised by Captain Bockus that he did not need to sign it. Accused signed and swore to it and, at the time he did so, appeared perfectly normal. Over the objection of the defense counsel, the court admitted the statement in evidence (R. 114-119,135). The only important differences from the oral statement made to Captain Gianelli are as follows: In the written statement accused claimed that during the beer-party he and Miller had consumed a quart of whiskey between them in addition to the beer. At the time of the fight between Miller and some of the others, Miller asked accused to call the military police or bring his rifle, as the men were killing him. When accused returned with his rifle, he fired at the men who were fighting with Miller (Pros. Ex. E).

Lieutenant Colonel Garrett, Medical Corps, who knew nothing about the case, was asked a long hypothetical question based on the evidence, including the assumption that Miller and accused had consumed the quart of whiskey between them. The question concerned the probable state of accused at 8 p.m. when Captain Rosenthal examined him. Witness testified that there were three possibilities: (1) that accused was drunk; (2) that, being somewhat under the influence of alcohol, he was in a state of severe shock by reason of the realization of what he had done; (3) that he was feigning drunkenness. Witness stated that the second possibility was the most likely and that this was consistent with his apparently normal condition before and after the examination by Captain Rosenthal (R. 143, 145-152).

4. Evidence for the defense.

Private 1st Class Tardo, a member of the beer party, testified substantially in accord with the witnesses for the prosecution. He was not questioned about the fight which occurred after the arrival at the company area. He testified that he got off the truck and that accused "went off to the company". He did not testify about anything occurring thereafter (R. 120-122).

Captain Rosenthal, Medical Corps, who examined accused at 8 p.m., testified that in his opinion accused was intoxicated and that he did not believe accused's condition to have resulted merely from a shock produced by the realization that he had killed a friend. Witness did not believe that accused's condition was feigned. Witness stated that accused was slumped over in a chair and had to be held up by two military policemen. His eyes were "considerably dilated", he did not talk, his breath smelled of alcohol, and he vomited. Witness tried to rouse him by the use of aromatic spirits of ammonia. At first there was no response. After a few moments accused began to sneeze, cough, and mumble a few words. That "was about the extent of his recovery". He could not stand, was "completely uncoordinated", had a slurred speech when he started to mumble, and made no response to any verbal orders or requests. Although witness at first expressed the opinion that a man in accused's condition would not recover possession of his faculties for several hours, he modified this by stating that it might or might not have taken accused several hours to recover, and that he would not say that accused would be unable to talk three hours later (R. 123-129).

Accused elected to remain silent (R. 131-132).

5. The evidence for the prosecution relating to the situation existing at the time of the first shot is somewhat confusing. This is partly due to the fact that the witnesses made use of a map and referred to places on it as "here", "there", "in this direction", and so forth. Such references are entirely unintelligible to an appellate body. Likewise it is not clear whether Miller was on or off the ground at the time of the initial shot. However, there is evidence showing that accused shot at the group near Miller; that the bullet entered Miller's body, killing him; and that accused then shot at and wounded Burkert.

In the absence of some legal justification or excuse, the killing of Miller was done with malice aforethought and the fact that accused shot the wrong man does not protect him (MCM, 1928, par. 148a). In the opinion of the Board of Review, there was no legal justification for the killing. Although a person may take life if he reasonably believes such action necessary to prevent a violent felony, no felonious assault against Miller had occurred or was threatened. Likewise, assuming but not deciding that accused had a legal right to use force to protect his friend from a nonfelonious assault, it is clear that the measures employed exceeded the necessities of the case, in addition to which the accused must have known

that Miller started the fight with Aikens without the slightest provocation.

The Board of Review is also of the opinion that the circumstances did not create a legal provocation reducing the homicide to manslaughter, even if it be assumed that the shooting resulted from "heat of anger" produced by Miller's losing battle with Aikens. The provocation arising from an assault and battery or sudden quarrel does not extend to the case where a friend, rather than the accused himself, is involved (Comm. v. Paese, 220 Pa. 371, 69 Atl. 891, 17 L.R.A. (N.S.) 795), and note). This is especially true when the friend is the attacker.

What we have said about justification and excuse applies equally to the shooting of Burkert. Had Burkert died, accused would have been guilty of murder. Since he lived, accused is guilty of assault with intent to commit murder.

As for drunkenness, there was evidence warranting the court in believing that at the time of the shooting, accused had the capacity to entertain an intent to kill or to inflict grievous bodily harm, or to know that his act would probably cause death or grievous bodily harm; in other words that he was capable of malice aforethought (MCM, 1928, par. 148a).

For the foregoing reasons, it is our opinion that the evidence is legally sufficient to support the findings.

6. In our opinion the accused's oral statement to Captain Gianelli was competent. Although accused was not advised of his rights, the evidence shows that he voluntarily sought his commanding officer for the purpose of telling him what had happened. Furthermore, even if the admission of the statement was erroneous, no prejudice resulted, for the signed statement taken before Captain Bockus contained substantially the same information. This latter statement clearly was competent despite accused's temporary state of collapse some hours before.

7. The Charge Sheet shows that accused was 21 years old at the time he committed the offenses, and that he was inducted into the military service on 30 October 1942.

8. 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 and sentence. Penitentiary confinement is authorized for both offenses (18 U.S.C., secs. 452,454,455).

Guy G. Gore, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Thomas Mayo, Judge Advocate.

On Leave, Judge Advocate.

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

SPJGK
CM 255203

28 JUN 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant GUY M. KING (0-802036), Air Corps.	)	Trial by G.C.M., convened at Shaw Field, South Carolina, 5 April 1944. Dismissal, total forfeitures and one and one-half (1-1/2) years confinement.

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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 93rd Article of War.

Specification 1: In that 2nd Lt. Guy M. King, 10th Basic Flying Training Group, Shaw Field, S.C., did, at Sumter, S.C., on or about 8 March 1944, with intent to do him bodily harm, commit an assault upon Mr. David Garner by shooting at him with a dangerous weapon; to wit: a pistol.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charge and Specifications and was found not guilty of Specification 2 and guilty of the Charge and of Specification 1 thereof. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, but remitted one and one-half years of the confinement and forwarded the record of trial for action under Article of War 48.

3. The accused having been found not guilty of Specification 2, insofar as possible no reference will be made in this opinion to the testimony bearing upon that Specification.

Accused was a second lieutenant in the Air Corps, stationed and quartered at Shaw Field, about nine miles from Sumter, South Carolina.

On 7 March 1944, he and Lieutenant Nance of the same field were under orders to proceed to Orlando, Florida, on a ferry trip, with instructions to pick up two PT 17's at Camden. On arrival at Camden, one of the planes was in the air, and they were instructed to return the next day. They reported back to Shaw Field, and as Lieutenant Nance and the other two officers who were to accompany them to Orlando lived in Sumter, Lieutenant Nance invited accused to spend the night with him. This invitation was accepted and the two went to Lieutenant Nance's home, arriving there around 2000. With the exception of a short interval, accused remained there until around one o'clock the following morning (R. 8,9,13,14). Lieutenant Nance had expected accused to spend the night with him, but upon accused's insistence he dropped him off uptown at about 0130, while he was taking a couple to their home. Accused intimated that he wanted to see a girl friend who was in town. Lieutenant Nance particularly did not want to leave accused alone because he had a pistol, carried in a holster, which he declined to leave in Lieutenant Nance's car, although the latter urged him to do so (R. 10). Accused returned to Lieutenant Nance's home at about 0630, being let in by Lieutenant Nance's wife, but Lieutenant Nance did not see him until 0800, at which time he was dressed in the greens and leather jacket that he had worn the evening before, but was not carrying the pistol (R. 11).

Lieutenant Nance and accused proceeded to Shaw Field and the trip was duly undertaken at about 0900. It was not until the stop at Savannah, Georgia, that Lieutenant Nance knew that anything had happened to accused. At that time accused showed him marks that indicated that a bullet had passed "through or between the fingers of one of his hands". Accused's explanation was that he and a cab driver had gotten into an "argument over cab fare and a woman, and they had gotten into a fight", that he had "left the scene" after the fight, and that he had left his pistol there (R. 11,12). On cross-examination, Lieutenant Nance expressed the opinion that accused was not intoxicated and appeared rational at the time accused left him uptown. He would not say that accused was sober but did not think he was drunk (R. 15).

Mr. David Garner, a taxi-driver of Sumter, South Carolina, upon whom accused is charged with having made the assault, identified Lieutenant King as the officer who arranged for a taxi at his stand around 0230 or 0300 on 8 March (R. 17). After driving to various places in and beyond the limits of Sumter for more than an hour, with accused sitting in the front seat next to witness, accused directed witness to drive him to Shaw Field. After they had gone about a hundred yards beyond the city limits, accused would not permit witness to proceed further and threatened witness with a pistol, which he placed in witness' side. Upon the pretext of going to the other side of town, to which accused consented provided they did not pass through the town, witness, who was operating the car with his left hand only, then proceeded to drive into the city limits, and turned at Hampton Avenue, throwing the car into second gear, and racing the motor as fast as he

could (R. 16-19). Hampton Avenue connects Main Street with Washington Street, the latter being a part of the continuation of the Shaw Field Road and being located two blocks from Main Street (R. 33,34). When accused realized that he was near police headquarters, located about two hundred feet away, he "hollered", grabbed the wheel and told witness that if he did not go ahead he would kill him. Accused's action released the pistol (offered as Exhibit A) from witness' side, and witness thereupon grabbed the gun and tussled with accused for it. The accused's finger was on the trigger. During the tussle the pistol was fired or discharged three times, two shots going through the upper left side of the windshield and one through the upper right side of the windshield. (It is not clear whether the pistol was purposely fired by the accused in an attempt to shoot witness or was accidentally discharged as a result of the struggle by witness for possession of the pistol.) After witness had wrested the pistol from accused, the latter jumped out of the car, outran the police and got away. Witness turned over the pistol to the police. Between Shaw Field and Sumter accused had fired one other shot through an open window on his side (R. 19,20,21).

On cross-examination, Mr. Garner testified that he was 24 years of age, and had never been prosecuted or convicted (R. 21,22). He weighs 163 pounds and had no difficulty in taking the pistol away from accused, a feat which he accomplished by using both hands. He was very much frightened and afraid for his life when he drove into Main Street, at which time accused still had the pistol in witness' side (R. 37).

Exhibits B, B-1, and B-2 were identified by Corporal Chester W. Donald of Shaw Field as being true reproductions of pictures of a cab taken by him at Sumter on or about 9 March 1944 (R. 41,42).

Sergeant J. H. DuRant, a member of the Sumter Police Department for 25 years, was on duty around four o'clock of the morning of 8 March 1944. There was a car, which he thought had back-fired, at the corner of Hampton and Main "blowing the horn and racing the motor". Before he reached the scene a man jumped out and ran back of the bus station and up West Hampton. When he reached the taxi the driver got out and said, "Here's a gun, catch him and kill him if you can, he has been shooting this gun for ten miles". Witness identified Exhibit A as the pistol handed to him by the driver, Exhibit A-1 as the clip in the pistol at the time, and Exhibit C as the service cap found in the taxi. Witness and the driver ran after the man who had jumped out of the car, and subsequently drove around looking for him, but he could not be found. Witness found three holes in the windshield, "one right straight in front of the driver's seat and two to the right", which he identified as bullet holes (R. 43,44).

On cross-examination, witness testified that he originally thought that the noise was back-fires, that the first man got out of the car when he was about a hundred feet from it, that upon a subsequent examination of the pistol he found five unfired cartridges in the magazine and one in the chamber, and that he saw a little blood which he thought was on the taxi driver's hand (R. 45,46,47).

First Lieutenant Victor G. Petrone, Air Corps, had been accused's roommate uninterruptedly since 15 July 1943. Exhibit A, a Colt Woodsman Match Target Model Pistol, Caliber 22, belongs to him. It was missing the morning after "this incident". When he saw Lieutenant King that morning at Shaw Field, he was told by the latter that he had the pistol, that he was drunk and the pistol accidentally went off. Accused showed him powder burns or marks where the bullet passed through the fingers of one of his hands, which witness believed was his left hand (R. 48,49). Witness expressed the opinion on cross-examination that if the trigger was held down after the pistol was loaded and cocked it would fire continuously as long as the trigger was held down (R. 50).

Second Lieutenant David G. Mullison, Air Corps, Shaw Field, who had known Lieutenant King for a year and a half, and who was living on Main Street in Sumter on 8 March 1944, was awakened at about 0430 on that day by accused, who stated that he was in trouble and requested witness to take him to Florence to see a friend. He gave no details of the trouble, merely stating that he had gotten into an argument and saying something about four shots being fired with a pistol. He also said that he had left his hat and the gun in a cab (R. 50,51).

Major William J. Esch, Air Corps, Shaw Field, identified a statement made to him as investigating officer by Lieutenant King. This statement, marked Exhibit D, was admitted, without objection, as "an admission and not a confession" (R. 51,52). In this statement accused asserted that three quarts of whiskey were consumed on the night of 7-8 March by a group at Lieutenant Nance's home. He recalled removing a 22 caliber pistol from his bag and leaving it on the table with one of Lieutenant Nance's. Later he put the pistol in his pocket, after which "we all had drinks". He was under the impression that evidently he had had quite a few drinks, since the last thing he remembered was saying goodnight to Major Cooper, Mrs. Jordan and Captain Jordan. The next thing he remembered was "a firing of some shots, of a struggle and a man in an automobile in Sumter". Even this was vague but he knew that several shots were fired, without knowing who did the firing, and that two of the shots hit his right hand and one his left. The cause of the struggle and the participants were unknown to him. He realized that he was in trouble, made his way after a while to Lieutenant Mullison's home and requested him to take him to the home of one of his friends, a Mr. Abrams, in Florence. He requested Mr. Abrams to investigate the trouble as he was leaving early on a ferry trip.

For the defense.

Major Donald D. Cooper, Medical Corps, stationed at the Station Hospital at Shaw Field, with six year's experience as a doctor, had known Lieutenant King for over six months, had examined him once prior

to April 1944, and had been thrown in contact with him socially only on 7 March 1944, once at the home of Captain Jordan, where he stayed for about an hour, and where no drinks were served, and later at the home of Lieutenant Nance, where drinks were served. Witness did not recall how many drinks were served nor the amount that Lieutenant King drank, but he had observed him drinking (R. 54,55). On cross-examination, witness testified that he considered that around midnight as far as sobriety was concerned accused's condition was normal, and he was "well orientated", alert, and not under the influence of alcohol (R. 60). Explaining that he did not feel qualified as a psychiatrist, he gave it as his opinion that there is nothing voluntary in amnesia or consciousness, that a person in a state of amnesia or unconsciousness is not in his "right or normal mind", and that it is possible for a person to commit an act while in his right mind and thereafter through a lapse of memory not to remember the act, but that usually the amnesia exists during the whole time in which the person is acting or committing the act (R. 63-64).

In reply to questions by the court, Major Cooper reaffirmed his earlier statement that when he left Lieutenant Nance's home approximately at midnight, accused was in good control of his faculties, and expressed the opinion that it would have been possible for the accused to have committed an act in his right state of mind and later, through a period of amnesia, to forget about it (R. 65).

Nine witnesses testified to the good character of accused (R. 54-74, 75,77,78,80,84,85,86,87,89,90).

Lieutenants Nance, Mullison and Petrone, who had previously testified as witnesses for the prosecution, were recalled as witnesses for the defense.

Lieutenant Nance could not state how much accused had drunk at his home on 7 March, as the whiskey was available and each person could make his own choice as to the amount to drink (R. 77). Personally he had taken a drink or two (R. 79).

On cross-examination, Lieutenant Nance did not recall whether accused had taken any drinks after Major Cooper left witness' home, but when accused got out of witness' car at about 1:30 in the morning, accused was normal and spoke rationally. Similarly he was normal when witness next saw him at 0800 at witness' home as well as at 0900 at the field. Lieutenant King piloted his own aircraft and the flight was made without incident, the first stop being at Savannah, more than a hundred miles away, after they had been in the air considerably over an hour. Accused's condition was likewise normal after he landed (R. 78,79).

When accused called at Lieutenant Mullison's home about 0400 of the morning of the

affair, that officer testified he was drunk and when witness took accused to Florence he "was still pretty intoxicated but was sobering up fairly fast" (R. 80,81). Accused "passed out" on the way back from Florence and witness "just let him sleep" (R. 84).

On cross-examination, witness stated that his conclusion as to accused's condition was based on his actions. He came into the house, pulled the covers off of witness, walked up and down continuously, did not walk exactly straight, stuttered, did not talk too plainly, and appeared nervous. Witness "knew he was drunk. I smelled it". Further he had been out with accused when he would get drunk. By "drunk" he meant that accused did not have his full faculties, but he believed that accused was rational enough to know that he was in trouble (R. 81, 82,83). He had not noticed accused's hand too well, but accused told him that "some shots were fired, and he was in a fight over a gun, and knew that he was shot through the hand".

Lieutenant Petrone, who had been out with accused while drinking, described the traits and characteristics demonstrated by accused while so indulging as follows:

> "In the first place, he can drink more, and show it less, than any person I ever saw. Whereas a normal person would be drunk with the same amount of whiskey Lieutenant King has consumed, would appear to be very drunk. I have never known him to be nasty. He is not contentious."

On the morning that accused left for Orlando he appeared to be under nervous tension and told witness that he had had some trouble (R. 86,87, 88).

In answer to questions by the court witness stated that accused told him that he was drunk the night before, that he had witness' pistol, that it went off in the scuffle, and that he did not know what "the fuss was about". He further testified that accused had never taken the pistol before and that he did not know whether "it was automatic and continual like a machine gun if the trigger is held down" (R. 88-89).

Accused elected to take the stand and testify in his own behalf. After giving a sketch of his life, he stated that he had never been in any other trouble (R. 94). He borrowed Lieutenant Petrone's pistol solely to get in some target practice on his trip and for no other purpose. He had no idea at the time that he would spend the night in Sumter or at Shaw Field, as he expected to be in either Jacksonville or Savannah (R. 94,95).

Accused drinks his whiskey straight. He drank "quite a few" at

Lieutenant Nance's. There were three quarts, and the next morning there were three empty bottles. He recalled taking out his pistol from his bag so that Lieutenant Nance could show it to some people and remembered going for Lieutenant Peoples. He likewise recalled telling Major Cooper goodnight. The next thing that he remembered was that some shots were fired in a car (R. 96-97).

When witness regained his faculties he found wounds on his right and left hands "which looked as if a pistol bullet had gone through the fingers or between the fingers". In answer to the question whether he had received any medical treatment at the base for these injuries he replied that he had shown them to Captain Green at the hospital about two and a half days after the injuries had been sustained. The skin was broken, there were powder burns on his hands, and the injuries could be observed (R. 97,98,108). His reason for going to the home of Lieutenant Mullison, which was on Main Street about a block and a half away from where he found himself, was to get him to take accused to see one of accused's friends, Mr. Abrams, a lawyer, who lived in Florence, in order to have Mr. Abrams find out what the trouble was, as accused was leaving for Orlando that day (R. 98-99).

On cross-examination, accused reaffirmed his ignorance of what may have taken place. He admitted having mentioned to Lieutenant Nance what had happened, but denied having said that the affair happened over a cab fare and a woman, his version being that he had told him that he presumed he had had an argument with the taxi-driver (R. 101). Accused remembered several shots being fired in the cab, but did not remember having run away (R. 102). He realized that he was in trouble because of recalling the pistol shots and seeing that his hand had been injured by what looked like pistol shots, but he went to see his friend in Florence instead of the City Police or Military Police because he wanted to find out what the trouble was before "going to anyone" (R. 102,103).

In answer to an inquiry by the court as to any previous experience in which he had drunk so much that he could "maneuver around" for four hours without remembering what happened for that length of time, accused replied:

> "I have drank at a dance and gone to restaurants with people and had them tell me about it the next day, and I would not know anything about it" (R. 103).

In further reply to questions by the court, witness testified that the 22 Colt Woodsman is not fully automatic, it being necessary to pull the trigger, but "is an automatic projector" (R. 104). He recounted his visit to Lieutenant Mullison and stated that when he went to his house he was in command of his faculties (R. 104,105).

4. The evidence clearly establishes that on the morning of 8 March 1944, accused assaulted Mr. David Garner with a dangerous weapon, namely, a loaded pistol. The record indicates, however, that accused did not actually shoot at Mr. Garner, but, rather, that the pistol was discharged during the scuffle over its possession. There is lacking specific evidence to establish intent to do bodily harm, and the record does not present sufficient facts from which to draw the inference of such intent. The Board is of the opinion that the evidence is sufficient to sustain only so much of the findings of guilty as involves an assault with a dangerous weapon in violation of Article of War 96 (M.C.M., 1928, par. 126a).

It was neither charged nor even intimated that there was any possible motive for any false testimony by Mr. Garner, whose statements are supported by the testimony of Sergeant DuRant of the Sumter Police Force, the physical appearance of the taxi, and the action of the accused in running away. That accused was found not guilty of the second specification in no way reflects upon Mr. Garner's dependability as a witness, for the court may have concluded that some essential element of that offense had not been absolutely established.

In considering the legal aspect of an apparent inconsistency in findings by a court-martial, the Board of Review in CM 197115, Froelich (B.R. 3, p. 81), expresses the following views, in which we concur:

> "As the accused was convicted on one specification and acquitted on the other, both of which involved, as the evidence shows, the same fraudulent conversion, the record of trial may be said to present the question whether the inconsistency in these findings has the legal effect of invalidating the conviction on the Specification of Charge I and said Charge. We unite in the opinion that such is not the case. While the precise question before us would seem to be an open one in military justice administration, in the field of Federal criminal procedure the better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the former (Dealy v. U.S., 152 U.S. 542; Huffman v. U.S., 259 Fed. 335; Athanasius v. U.S., 227 U.S. 326; Roark v. U.S., 17 F. (2d), 570; Hopkins Federal Criminal Law, p. 22, and other authorities there cited). It follows, therefore, that in the instant case the findings of not guilty of Charge II and its Specification in no wise affect the findings of guilty of Charge I and its Specification."

The record does not justify the conclusion that accused was so drunk as to render him mentally irresponsible for his conduct. There is no doubt that accused had drunk unwisely and too heavily, but this fact does not exonerate him from responsibility for his misconduct (M.C.M., 1928, par. 126a).

No one considered accused drunk as late as 1:30 of the morning of the offense when he insisted upon not remaining at the home of his friend, Lieutenant Nance, on the pretext that he wanted to meet a girl in Sumter; he was able to outrun the police at about 4 o'clock; he then found his way to the residence of another friend, Lieutenant Mullison, for the purpose of having him drive him to Florence to discuss his trouble with a third friend, Mr. Abrams, a lawyer; he was normal at 8 o'clock that morning; and at 9 o'clock he was able to take off in an airplane and to complete a flight to Savannah without incident. These facts more than offset any deductions to be drawn from accused's testimony and that of Lieutenant Mullison.

No particular weight can be placed on the condition of accused's hands. No effort was made to describe in detail the nature of the injuries sustained. It is apparent that no bullet penetrated any of the fingers. Whatever injury suffered was between the fingers. It would do violence to elementary physical laws to conclude that a bullet wound that penetrated the fingers would result in such slight injury that within a few hours after being so wounded a person not under undue pressure could operate his airplane without incident and without complaining, or attempting to secure medical attention. It is also worthy of note that accused first showed his hands to a medical officer more than two days later; that that officer was not called upon to testify, and that there is no record of any medical treatment having been administered. It is clear that the minor injuries to accused's hand were suffered in the course of the tussle over the gun.

5. The accused is 22 years of age. The records of the War Department show that he was in training as an aviation cadet from 16 August 1942 to 28 April 1943, on which date he was honorably discharged as such, and was commissioned a second lieutenant in the Air Corps, 29 April 1943.

6. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted above, 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 of Specification 1 of the Charge and of the Charge as involves findings of guilty of assault with a dangerous weapon, namely, a loaded pistol, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Henry G. Zorn, Judge Advocate.

Walter R. Anderson, Judge Advocate.

Herman Mayer, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 8 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 Second Lieutenant Guy M. King (0-802036), 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 as involves a finding of guilty of assault with a dangerous weapon in violation of Article of War 96 and legally sufficient to support the sentence and to warrant confirmation thereof. A petition from citizens of accused's home city, Lake City, South Carolina, and several letters from individuals, attesting to accused's excellent character and requesting clemency, have been received and considered. Consideration has likewise been given to letters from the Honorable E. D. Smith and the Honorable Burnett R. Maybank, United States Senators of South Carolina, the Honorable John L. McMillan, Member of Congress from South Carolina, and the Honorable A. Sidney Camp, Member of Congress from Georgia, and to the testimony of a number of witnesses who testified to his excellent record as a civilian and as a soldier. No injury was sustained by the taxi driver upon whom the assault was made. In view of accused's youth, his previous good record, and his potential value to the service, I recommend that the sentence be confirmed but that the forfeitures and confinement imposed be remitted, and that the execution of the sentence as thus modified 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.

11 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. Action.
Incl.4-2 Ltrs. fr. Hon.E.D.Smith, 4/22/44, w/incls. & 5/23/44 w/incls.
Incl.5-2 Ltrs. fr. Hon. Jno. L. McMillan,4/21/44 & 5/26/44.
Incl.6-Ltr. fr. Samuel M. Askins, 4/29/44.
Incl.7-Ltr. fr. Mrs. M.E. King, undated.
Incl.8-Ltr. fr. Mrs. C.Y. Farrell, 6/5/44.
Incl.9-Ltr. fr. Hon. A. Sidney Camp, 5/3/44.
Incl.10-2 Ltrs. fr. Hon.Burnet R. Maybank, 5/10/44 w/incl. & 5/2/44.
Incl.11- Memo. fr. Hon. Claude Pepper, 5/10/44, w/incl.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. Execution suspended. G.C.M.O. 495, 12 Sep 1944)

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

SPJGQ
CM 255260

29 MAY 1944

U N I T E D S T A T E S	)	INFANTRY REPLACEMENT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Wheeler, Georgia, on 20 April 1944. Dismissal and confinement for ten (10) years.
	)	
Second Lieutenant JAMES B. PORTER (O-1313059), Company C, 11th Infantry Training Battalion.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 Charges and Specifications:

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

Specification: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, without proper leave, absent himself from his organization at Camp Wheeler, Georgia from about 15 March 1944 to about 25 March 1944.

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

Specification 1: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, at or near Macon, Georgia, on or about 16 March 1944, wrongfully and unlawfully convert to his own use one 1940 convertible Chevrolet coupe automobile, value of more than $50.00, the property of the Rent-A-Car Company, Macon, Georgia, entrusted and rented to him by the said Company from about 14 March 1944 to about 15 March 1944.

Specification 2: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about 8

March 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Camp Wheeler Exchange a certain check in words and figures as follows, to wit:

* * * * * * * * * *

Peoria, Ill.
~~MACON, GA.~~ Mar. 8 1944 NO. 1

THE FIRST NATIONAL BANK & TRUST COMPANY ~~64-47~~
~~in Macon~~

COUNTER CHECK

Pay to the order of CAMP WHEELER EXCHANGE $50.00

Fifty and no/100 - - - - - - - - - - - - - DOLLARS

James B. Porter
0-1313059

Co. "C", 11th Bn. 4 ITR

* * * *

On reverse side:

Pay To The Order Of
THE CITIZENS & SOUTHERN NATIONAL BANK
991 Macon, Georgia 991

For Deposit Only
CAMP WHEELER EXCHANGE

* * * * * * * * * *

and by means thereof did fraudulently obtain from the Camp Wheeler Exchange, Camp Wheeler, Georgia, $50.00, United States currency, he, the said Second Lieutenant James B. Porter then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank and Trust Company, Peoria, Illinois, for the payment of said check.

Specification 3: This Specification is similar in form to Specification 2, but alleges check dated March 8, 1944, drawn on same bank, in the amount of $17.00, made and uttered to the Idle Hour Club, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $17.00 in U.S. currency.

Specification 4: This Specification is similar in form to Specification 2, but alleges check dated March 8, 1944, drawn on same bank, in the amount of $50.00, made and uttered to the Idle Hour Club, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $50.00 in U.S. currency.

Specification 5: This Specification is similar in form to Specification 2, but alleges check dated March 8, 1944, drawn on same bank, in the amount of $50.00, made and uttered to the Idle Hour Club, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $50.00 in U.S. currency.

Specification 6: (Finding of not guilty).

Specification 7: This Specification is similar in form to Specification 2, but alleges check dated March 11, 1944, drawn on same bank, in the amount of $50.00, made and uttered to the Idle Hour Club, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $50.00 in U.S. currency.

Specification 8: This Specification is similar in form to Specification 2, but alleges check dated March 11, 1944, drawn on same bank, in the amount of $30.00, made and uttered to the Idle Hour Club, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $30.00 in U.S. currency.

Specification 9: This Specification is similar in form to Specification 2, but alleges check dated March 11, 1944, drawn on The First National Bank of Peoria, in the amount of $10.00, made and uttered to "Fay's", Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $4.75 in U.S. currency and $5.25 in merchandise.

Specification 10: This Specification is similar in form to Specification 2, but alleges check dated March 11, 1944, drawn on The First National Bank of Peoria, in the amount of $25.00, made and uttered to "Fay's", Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $25.00 in U.S. currency.

Specification 11: This Specification is similar in form to Specification 2, but alleges check dated March 10, 1944, drawn on The First National Bank & Trust Company, in the amount of $20.00, made and uttered to "Fay's", Macon,

Georgia, at Macon, Georgia, thereby fraudulently obtaining $13.50 in U.S. currency and $6.50 in merchandise.

Specification 12: This Specification is similar in form to Specification 2, but alleges check dated March 8, 1944, drawn on the First National Bank, Peoria, Illinois, in the amount of $50.00, made and uttered to Fay's Grill, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $50.00 in U.S. currency.

Specification 13: This Specification is similar in form to Specification 2, but alleges check dated March 14, 1944, drawn on The First National Bank of Peoria, in the amount of $50.00, made and uttered to the Camp Wheeler Exchange, Camp Wheeler, Georgia, at Camp Wheeler, Georgia, thereby fraudulently obtaining $50.00 in U.S. currency.

Specification 14: This Specification is similar in form to Specification 2, but alleges check dated February 28, 1944, drawn on Peoria Trust and Savings Bank, in the amount of $450.00, made and uttered to the Irwin-Union Trust Company, Columbus, Indiana, at Columbus, Indiana, thereby fraudulently obtaining $450.00 in U.S. currency.

Specification 15: This Specification is similar in form to Specification 2, but alleges check dated February 28, 1944, drawn on the Jefferson Trust and Savings Bank, in the amount of $200.00, made and uttered to the Irwin-Union Trust Company, Columbus, Indiana, at Columbus, Indiana, thereby fraudulently obtaining $200.00 in U.S. currency.

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

Specification: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, having on or about 28 February 1944 become indebted to the Irwin-Union Trust Company, Columbus, Indiana, in the sum of $656.95 for monies received, and having failed, without due cause, to liquidate said indebtedness and having on or about 11 March 1944 promised the said Irwin-Union Trust Company,

in or near Macon, Georgia, to settle said indebtedness in full by drawing a check in words and figures as follows, to wit:

* * * * * * * * * *

THE FIRST NATIONAL BANK of PEORIA 70-1
Peoria, Ill. Mar. 11 1944 NO.

Pay to the
Order of Union Trust Co. $ 656.95

Six Hundred and Fifty Six and 95/100 DOLLARS

Member
Federal Reserve 7 James B. Porter
System

* * * * * * * * * * *

then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Peoria, Peoria, Illinois, for the payment of said check, did dishonorably fail to keep said promise.

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

Specification 1: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about 13 March 1944, with intent to defraud, wrongfully and unlawfully make and utter a certain check in words and figures as follows, to wit:

* * * * * * * * * *

THE FIRST NATIONAL BANK OF PEORIA 70-1

Peoria, Ill. March 13 1944 No. -

Pay to the
order of Fay's $ 25.00

Twenty Five and no/100 - - - - - - - DOLLARS

Member 7 James B. Porter
Federal Reserve
System

* * * *

On reverse side:

Fay's

Geo. J. Fay

* * * * * * * * *

and by means thereof did fraudulently obtain from Fay's, Macon, Georgia, $25.00, United States currency, he, the said Second Lieutenant James B. Porter, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Peoria, Illinois, for the payment of said check.

Specification 2: This Specification is similar in form to Specification 1, but alleges check dated March 13, 1944, drawn on same bank, in the amount of $25.00, made and uttered to "Fay's", Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining $25.00 in U.S. currency.

Specification 3: This Specification is similar in form to Specification 1, but alleges check dated March 8, 1944, drawn on The First National Bank & Trust Company, in the amount of $15.00, made and uttered to the Rent-A-Car Company, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining service of the value of $15.00

Specification 4: This Specification is similar in form to Specification 1, but alleges check dated March 13, 1944, drawn on same bank, in the amount of $15.00, made and uttered to the Rent-A-Car Company, Macon, Georgia, at Macon, Georgia, thereby fraudulently obtaining service of the value of $15.00.

Specification 5: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, at Jeffersonville, Georgia, on or about 14 March 1944, wrongfully, unlawfully, and bigamously marry Jeanette Lyles, also known as Jeanette Richards, having at the time of said marriage to said Jeanette Lyles, also known as Jeanette Richards, a lawful wife then living, to wit, Velma Porter.

Specification 6: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about 3 March 1944, with intent to deceive First Lieutenant J. P. Hess, Finance Officer, Camp Wheeler, Georgia,

officially report to the said First Lieutenant J. P. Hess on an official Information Sheet For Officers' Pay and Mileage as follows:

****

Marital Status Jeanne E. Porter
Wife's name -(First) (Middle Initial) (Last)

Wife's complete address 710 E. 58th Street, Indpl's Ind.

****

which report was then known by the said Second Lieutenant James B. Porter to be untrue in that he was not married to one Jeanne E. Porter.

Specification 7: In that Second Lieutenant James B. Porter, Company C, 11th Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about 3 March 1944, with intent to deceive Warrant Officer (junior grade) Sidney P. Albert, Assistant Classification Officer, Camp Wheeler, Georgia, officially state to the said Warrant Officer (junior grade) Sidney P. Albert that the entry on the said Second Lieutenant James B. Porter's Officers Qualification Card, WD, AGO Form No. 66-1, an official record, that he, Second Lieutenant James B. Porter, was then married to Mrs. Jeanne E. Porter, 710 East 58th Street, Indianapolis, Indiana, was correct, which statement was then known by the said Second Lieutenant James B. Porter to be untrue, in that the said Jeanne E. Porter was not his wife.

Specification 8: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 2 of Charge II and Specification 8 of the Additional Charge, guilty of Specification 14 of Charge II, except the words "28 March 1944", substituting therefor the words "28 February 1944", and guilty of all other Specifications and the Charges. No evidence of previous convictions was introduced at the trial. 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 may direct for a period of ten years.

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

It was shown that the accused is a second lieutenant who was assigned to Company C, 11th Infantry Training Battalion, stationed at Camp Wheeler, Georgia (R. 17).

By stipulation it was agreed that William F. Goeller, manager of the Camp Atterbury, Indiana, Post Bank Branch of Irwin Union Trust Company of Columbus, Indiana, would, if present in court, testify under oath that the accused, on 28 February 1944 went to the post Bank at Camp Atterbury and after identifying himself by his A.G.O. card, presented his check dated 28 February 1944 in the amount of $200.00, drawn upon the Jefferson Trust and Savings Bank of Peoria, Illinois, and requested that the bank cash it for him (Pros. Ex. P-25). Mr. Goeller cashed the check giving the accused $200 in currency. Later in the afternoon of the same day the accused returned and presented another check dated 28 February 1944, drawn upon the Peoria Trust & Savings Bank in the sum of $450.00 and signed by the accused (Pros. Ex. P-24). Mr. Goeller also cashed this check and gave to accused $450.00 in currency. Subsequently, both checks were returned by the Peoria banks, through a correspondent bank, with the statement that the accounts of the accused had been closed. On 12 March 1944, Mr. Goeller advised the accused that these two checks had been dishonored by the two banks of Peoria and he was requested to take care of the matter immediately. In response, the accused wired to Mr. Goeller "money on the way by air mail". On 13 March 1944 Mr. Goeller received an air mail letter enclosing the accused's check dated 11 March 1944, drawn upon the First National Bank of Peoria, Illinois, in the amount of $656.95 (Pros. Ex. P-26). Mr. Goeller, thereupon, immediately called the drawee bank and as a result of the conversation telephoned the accused and informed him that the First National Bank of Peoria refused to honor this check and Mr. Goeller requested him to immediately wire the money to him and that he would thereupon return the three checks to the accused. This the accused promised to do. As a result of the information received from the Peoria Bank the check for $656.95 was not deposited for collection (R. 52-55; Pros. Ex. P-8). (Charge II, Specifications 14 and 15 and Charge III and its Specification).

It was stipulated that, during the period 8 March 1944 to, and including, 14 March 1944, there was on deposit, to the credit of the accused, the sum of $445.00 in the First National Bank of Peoria, Peoria, Illinois, but said bank did not have on file a specimen signature card of the accused during any part of said period. There was also included in such stipulation a statement that there is no such bank as "The First National Bank & Trust Company, Peoria, Illinois", and wherever such bank is mentioned in the Charges and Specifications, the name "The First National Bank of Peoria, Peoria, Illinois", is and was intended by the accused (R. 31; Pros. Ex. P-7).

Warrant Officer (J.G.) Sidney P. Albert, assistant classification officer and custodian of officers' and warrant officers' qualification cards at Camp Wheeler, Georgia, testified that, in such capacity, he had occasion to interview the accused on 3 March 1944. The purpose of the interview was to determine, check and verify important personal matters affecting the status of officers, and it was customary to so

interview all officers reporting to that station. The accused's card contained the information that his legal residence was "255 Randolph Street, Olympia, Washington", and the emergency address appearing thereon was "Mrs. Jeanne Porter, wife, 1510 State Street, Olympia, Washington". There was no claim of any dependents, other than his wife. While checking this information the accused informed Albert that he was married, but that his wife's address was "710 East 58th Street, Indianapolis, Indiana." This change was accordingly made upon the card and one dependent, additional to the wife, was appropriately indicated. Albert recalled the occasion clearly because of questioning the accused regarding the correct spelling of his wife's first name which the accused then spelled for him (R. 72-75). It was stipulated that "Jeanne E. Porter, 710 East 58th Street, Indianapolis, Indiana, is not the wife of and never has been married to the accused" (R. 75; Pros. Ex. P-38). (Additional Charge, Specification 7).

First Lieutenant John P. Hess, Jr., Chief of the Receipts and Disbursement Branch in the Fiscal Division at Camp Wheeler testified that, as such, he prepared pay vouchers for officers at that post. In order to assist in the preparation of these vouchers officers submitted to the Receipts and Disbursement Branch information sheets containing personal data essential to properly complete the pay and allowances vouchers. The accused, having arrived at Camp Wheeler on 3 March 1944, on or about that date submitted such an information sheet to Lieutenant Hess' office. Therein he stated, over his signature, that he was married to Jeanne E. Porter and that his wife resided at 701 East 58th Street, Indianapolis, Indiana (R. 70-72; Pros. Ex. p-82) (Additional Charge, Specification 6).

Miss Beatrice Whitaker, assistant cashier at the Camp Wheeler Exchange, Camp Wheeler, Georgia, testified that, in such capacity, she was accustomed to cash checks for military personnel at the post. On 8 March 1944 the accused, whom she identified at the trial, came to her office, displayed his A.G.O. identification card, and, after writing and signing, in her presence, a check dated 8 March 1944 and drawn upon The First National Bank and Trust Company of Peoria, Illinois, in the sum of $50, requested her to cash it for him. She did so, giving him $50 in cash. She identified the check by her initial, which she had written upon one corner, and it was admitted in evidence without objection. The check was not honored by the drawee bank for the reason that the bank had "no signature on file" and it has never been paid. (R. 32-34; Pros. Ex. P-10). (Charge II, Specification 2).

On the same day the accused requested Mr. George B. Wright, Assistant Manager of the Idle Hour Club, Macon, Georgia, to cash certain checks for him. The first check was dated 8 March 1944 and was drawn upon the First National Bank and Trust Company of Peoria, Illinois in the sum of $17. The second and third bore the same date (8 March 1944) and were drawn upon the same bank as the first in the sums

of $50.00 each, respectively. Each check was written and signed by the accused in the presence of Mr. Wright who cashed them, giving accused cash in the amount of $17, $50 and $50 respectively. The checks were endorsed and deposited in the bank by Mr. Wright but they were returned later unpaid, each bearing the notation "no signature on file" and they have never been paid (R. 37-40; Pros. Ex. P-12, P-13, P-14). (Charge II, Specifications 3, 4 and 5).

Mr. George J. Fay, owner and operator of Fay's Southern Grill, Macon, Georgia, testified that on 8 March 1944 at the request of the accused, he "okayed", and his cashier cashed, for the accused, a check dated 8 March 1944 and drawn upon the First National Bank of Peoria, Illinois in the amount of $50.00. The sum of $50.00 in cash was received by the accused. After depositing the check it was later returned unpaid with the notation "no signature on file" and it has never been paid (R. 47, 49; Pros. Ex. P-21). (Charge II - Specification 12).

Mr. Burney L. Hunnicutt, Assistant Manager of Rent-A-Car Company of Macon, Georgia, received from the accused on 8 March 1944, a check which was tendered as a deposit at the time accused rented a car from the Rent-A-Car Company and from which the rent accruing for the use of the automobile was taken, the balance being paid to the accused in cash. The check was dated 8 March 1944 and was drawn upon the First National Bank and Trust Company of Peoria, Illinois in the amount of $15. This check was later returned unpaid by the bank with the notation "No signature on file" and it has never been paid. (R. 58, 59; Pros. Ex. P.27) (Additional Charge, Specification 3).

On 10 March 1944 the accused again requested Mr. Fay of the Southern Grill to cash for him a check dated 10 March 1944 and drawn on the First National Bank and Trust Company of Peoria, Illinois in the amount of $20.00. Mr. Fay did not see the accused sign this check but he approved cashing it and the check was cashed by Mr. Fay and deposited. It was later returned unpaid with the notation "no signature on file" and has never been paid (R. 46, 47; Pros. Ex. P-20). (Charge II - Specification 11).

On 11 March 1944, Mr. George Wright, Assistant Manager of The Idle Hour Club, at the request of the accused, cashed two additional checks for him. Both were signed by the accused in Wright's presence, were drawn upon the First National Bank and Trust Company of Peoria, Illinois, and dated 11 March 1944. The first was in the amount of $50 and the second $30.00. Both were cashed, the accused receiving currency therefor. The checks were later returned, unpaid, after deposit by The Idle Hour Club, with the notation "no signature on file" and neither has been paid (R. 42, 43; Pros. Ex. P-16, P-17). (Charge II, Specifications 7 and 8).

On the same day (11 March 1944) the accused again requested Mr. Fay, of Fay's Southern Grill, to cash two checks for him. These checks were dated 11 March 1944 and were drawn on The First National Bank of Peoria, Illinois, one in the amount of $10 and the other in the amount of $25. Mr. Fay did not see the accused sign these checks, nor did he personally cash them, but he approved the cashing and the accused received cash for the checks from Fay's Grill. The checks were deposited by Mr. Fay and they were later returned unpaid with the notation "no signature on file" and have not been paid (R. 46, 47; Pros. Ex. P-18, P-19). (Charge II - Specification 9 and 10). The accused likewise, on 13 March 1944, requested Mr. Fay to cash two additional checks, each dated 13 March 1944 and drawn on The First National Bank of Peoria, Illinois, and each in the amount of $25. They were cashed, the accused receiving currency for them and when deposited were returned unpaid with the notation "no signature on file" and they have never been paid (R. 47, 48; Pros. Ex. P-22, P23). (Additional Charge, Specification 1 and 2).

The accused also, on 13 March 1944, gave to Mr. L. M. Loh, Manager of Rent-A-Car Company, Macon, Georgia, a check dated 13 March 1944 and drawn on The First National Bank of Peoria, Illinois in the amount of $15.00. This check was given as a deposit to guarantee the rent accruing because of the use of an automobile by the accused. The check was subsequently returned to Rent-A-Car Company unpaid because of "no signature on file" and it has never been paid (R. 59, 60; Pros. Ex. P-28). (Additional Charge - Specification 4).

Mrs. Charles E. Stroberg, cashier of the Camp Wheeler Exchange at Camp Wheeler, Georgia, was requested by the accused to cash for him a check dated 14 March 1944 and drawn upon The First National Bank of Peoria, Illinois, in the amount of $50.00. The check was signed by the accused in her presence and she identified it by the mark of her initial which she had placed upon a corner of the check. She gave the accused $50.00 in cash after he had identified himself by means of his A.G.O. identification card. She recalled the occasion because, when she arrived at the Exchange, she found the assistant cashier engaged in a discussion with the accused who was undertaking to give the exchange his check in the amount of $100 to cover two checks previously given by him which he said would "come back" because they had not been written on checks of his bank. Mrs. Stroberg then told the accused she had never heard of a check being returned for that reason and she refused to accept the $100 check (R. 35, 36, Pros. Ex. P-11). (Charge II - Specification 13).

Netta Hester, employed by Mr. George Fay in Fay's Grill, testified that, in each instance, she cashed the checks of the accused (Pros. Ex. P-18 - P-23, inclusive) because they carried Mr. Fay's O.K. and that the accused tendered the checks in payment of sums he owed for meals and playing punch-boards. The checks were in amounts greater than the sums so owed and the accused received cash for the difference (R. 49, 51).

After Captain Maurice A. Bond, Adjutant of the 4th Infantry Training Battalion had identified a War Department signature card (W.D. Form 35) which the accused had signed in his presence, and which was received in evidence (R. 27, 28; Pros. Ex. P-9), and Corporal Raymond Gnesin, Headquarters and Headquarters Company of the Infantry Training Replacement Training Center had qualified as a handwriting expert, and given his opinion that the signature on Pros. Ex. P-10 through P-28, inclusive, and P-32 "were all written by the same person who wrote P-9" the accused voluntarily admitted that the signatures on each of those instruments are his signatures (R. 30).

Mrs. Jeanette Dolman, also known as "Jeanette Lyles", "Jeanette Richards" and "Mrs. Porter" (R. 62), cashier at the Fairplay Tavern, Macon, Georgia (R. 67), testified that she met the accused on 12 March 1944 on the street corner near the Dempsey Hotel, in Macon, Georgia (R. 62) after which they then went to the Pig and Whistle for sandwiches and soft drinks. They met again on the next night and went to Fay's Grill and after some drinking went to the Idle Hour Club. Finding it closed they returned to town (R. 64, 65). On the next night (14 March) she again met the accused on the street near the Hotel Dempsey and they then went to "The Candle Light". While there the accused asked where they could be married. She suggested Jeffersonville, Georgia. They then proceeded to Jeffersonville and were married that night by Mr. W. W. Wood the Ordinary of Twiggs County, Georgia, after applying for, and receiving from him, a marriage license. When he asked them whether either was married they each replied in the negative (R. 62, 63). She identified the application for the license and the marriage certificate and they were admitted in evidence (Pros. Ex. P-34, P-35). After the marriage they went to Fay's for something to eat, then to the Pig and Whistle and finally to the Hotel Dempsey where they spent the night together. The next morning he left and she never saw him again until he was returned to camp and placed in the stockade (R. 64). On cross-examination she stated that she was first married at the age of fourteen, that she is now 21 years of age (R. 67) and has been married three times previous to marrying the accused (R. 66). When asked whether she had ever been divorced she invoked her constitutional right against self incrimination (R. 65-67) and refused to answer.

Mr. W. W. Wood the Ordinary above mentioned, stated that on 14 March 1944 the accused and a girl purporting to be Jeanette Richards applied to him for a marriage license. He thereupon interrogated them under oath and they signed an application in which the accused stated that he was not married and that there was no legal impediment to the proposed marriage (R. 68, 69). He then performed the marriage ceremony (R. 70).

A certificate showing the marriage of the accused and Velma N. Foster on 31 May 1942 in Walker County, Georgia was admitted in evidence without objection (R. 60; Pros. Ex. P-30).

By stipulation Mrs. Heddie L. Foster of Heiskell, Tennessee, testified that she is the mother of Velma N. Foster who married the accused in Rossville, Georgia on 31 May 1942 and who is still living on 17 April 1944 (R. 61; Pros. Ex. P-33).

By a certified extract copy of the morning report of the accused's organization submitted at Camp Wheeler, Georgia, on 15 March 1944 it appears that the accused was, on that date, absent without leave from his duty station (R. 18; Pros. Ex. P-1). It was stipulated that the accused was apprehended by civil authorities in Indianapolis, Indiana, on 25 March 1944, was returned to military control on the same day at 1352nd Service Unit, Casual Company, Fort Benjamin Harrison, Indiana, and was thereafter returned to Camp Wheeler, Georgia on 30 March 1944 (R. 12; Pros. Ex. P-4). A certified extract copy of the morning report of the 3552nd Service Unit, Casual Company, submitted at Fort Benjamin Harrison, Indiana, discloses that the accused was confined in the station hospital on 25 March 1944 (Pros. Ex. P-3). A certified extract copy of the morning report of Infantry Officers Replacement Pool submitted at Camp Wheeler, Georgia, discloses that on 22 March 1944 the accused had been assigned to the pool and on 30 March (R. 18; Pros. Ex. 2) 1944 was confined in the Post Stockade at Camp Wheeler, Georgia. The extract copies of the respective morning reports were admitted in evidence without objection (R. 18).

4. The accused having been informed of his rights chose to make the following unsworn statement:

"At the time I first came here, I had some money but I did not know exactly how much I had in the bank. One time I had money in the Jefferson bank, this bank being in Peoria, Illinois, and when I received word that the checks I had drawn on this bank were no good, I wired home and asked them to put money in the bank for me. I asked them to put enough money in the bank to cover a $200.00 check. . . When this account was closed, I don't really know. I also asked my family to put enough money in the First National Bank of Peoria to cover a $456.00 check that I had written, and I received word back from the folks after I had written these checks. I had made out the $656 check to cover the balance of those two - and after I heard from the folks - they said that only $200.00 was put in the one bank for me. They used to have a bank account in Jefferson, also, and that is when I had my money there. They must have had some kind of fall in and changed to the First National Bank. The put $200.00 in the First National along with $310.00 I sent, and so then I found out I was short the money, I received this call from Camp Atterbury regarding the $656.00 check I wrote, which they said was no good.

"So, the reason I went AWOL was to try to borrow the money from somebody. . I wanted to make these checks good, and I knew a few men around the central part of the country, and I figured I could borrow the money from them to cover the $656.00 check and the smaller checks . ..

"So far as the car is concerned, I never intended to steal the car. I put it in the garage in Columbus, and I had the parking ticket on it . . . I had no gas and no gas tickets . . . I was going to come back for it and drive the car back . . I had intended to come back three days after they picked me up, as I had one man to see in order to borrow some money, and I was pretty sure I could get it from him.

"As for the bigamy charge, I guess I just had some impulse to get married . . I did that the first time, I knew my first wife two hours before we got married . . . It looks like I do things like that without thinking . . . Like Mrs. Lyles or Mrs. Richards said, I had a few drinks . . . .

"I am sorry for what I have done, and I want to prove that I can pay the money back, and also to indicate to you gentlemen that I am not such a bad fellow as the charges indicate." (R. 78).

5. The accused stands charged with a variety of offenses all of which were committed within the period from 28 February 1944 to 15 March 1944. In this short space of time it is alleged that he issued 17 worthless checks, made two false official statements, converted an automobile of another to his own use, contracted a bigamous marriage and then absented himself without leave.

That he did, hastily, marry a girl who was hardly more than a casual acquaintance, when he had a lawful wife then living, is clearly established by the evidence of record. It is needless to comment upon the shameless manner in which both the accused and the partner of his bigamous venture entered into the unlawful matrimonial relationship. By his own testimony, accused admitted "I do things like that without thinking" and again "I did that the first time, I knew my wife two hours before we got married". The proof is amply sufficient to support the finding of guilt on Specification 5 of the Additional Charge.

It is equally clear that the accused did, as alleged, make false official statements on two different occasions to officials who had the duty to inquire into and employ, in official military transactions, the information thus furnished by him. In both instances the inquiry was made, and the information was furnished, for the purpose of determining the accused's personal status. On the one occasion, he falsely gave a change of address for a fictitious wife named by him in his WDAGO form 66-1. Later, in furnishing data requisite for the correct preparation of his pay vouchers by the finance officer, he stated, over his signature, that he had a wife by the name of Jeanne S. Porter who resided at 710 East 58th Street, Indianapolis, Indiana. In both cases, the statements were palpably false because it was stipulated that Jeanne E. Porter is not the wife of the accused and had never been married to him.

While these statements were not of such grave significance as to compel prosecution of accused therefor under Article of War 95, they are clearly of a character to merit punishment under Article of War 96, and the record is, therefore, legally sufficient to support the finding of guilt as to Specifications 6 and 7 of the Additional Charge.

The accused's duty station was Camp Wheeler, Georgia. On 15 March 1944 a morning report of his organization, submitted at that post discloses that he was absent without leave. It was stipulated that the accused was apprehended by civil authorities in Indianapolis, Indiana on 25 March 1944, was returned to military control on the same day and thereafter was taken to Camp Wheeler, Georgia. An extract copy of the morning report of 3552nd Service Unit, Casual Company, Fort Benjamin Harrison, Indiana, shows that he was placed in confinement there on 25 March 1944. Thus every element of the Specification of Charge I was clearly shown by competent evidence.

Immediately prior to his departure without leave, and evidently to assist him in his subsequent escapade, the accused rented an automobile from the Rent-A-Car Company in Macon, Georgia, under an express written contract that he would return it within 24 hours from the time he received it. He abandoned this rented automobile in Columbus, Georgia, from which place the Company was obliged to return the car to Macon, Georgia, 13 days later. The evidence conclusively establishes that the accused is guilty of wrongful conversion of the automobile to his own use as alleged in Specification 1 of Charge II.

With regard to the fraudulent issuance by the accused of the series of worthless checks as alleged in 18 separate specifications it is appropriate to first consider the explanation given by the accused in his unsworn statement at the trial.

He said that, when he arrived at Camp Wheeler, he "had some money" but "did not know exactly how much (he) had in the bank". At "one time (he) had money in the Jefferson Bank . . . in Peoria, Illinois."

Evidently acting upon this vague, indefinite and uncertain recollection he drew a check upon the Jefferson Trust and Savings Bank of Peoria, Illinois, in the amount of $200 and received $200 in cash therefor from the Post Bank at Camp Atterbury, Indiana. On the same day he presented another check to the same bank drawn upon the Peoria Trust and Savings Bank of Peoria, Illinois, in the amount of $450 and received cash therefor. The accused seems to have forgotten this latter check for, when speaking of "The Jefferson bank in Peoria, Illinois" he further stated that "when I received word that the checks I had drawn on <u>this bank</u> were no good, I wired home and asked them to put money in the bank for me". (underscoring supplied). There is no doubt whatever that he was then referring to the two checks, aggregating $650, which he had drawn

upon two separate banks, though he never mentioned the Peoria Trust and Savings Bank or claimed to have ever had an account therein. He did, however, state that he had "wired home and asked them to put money in the bank . . . enough money . . . to cover a $200 check", though he failed to mention whom he asked and what bank he designated as the depository. He also asked his "family" to "put enough money in the First National Bank of Peoria to cover a $456 check . . .". The "family" however, honored only one of these requests and placed $200 to his credit in the First National Bank of Peoria, Illinois, which, together with $310 remitted by the accused, aggregated deposits of $510 in that bank, according to his statement.

In the light of his own explanation of how he conducted his financial affairs it is interesting to note the abandon with which the accused issued checks upon these dubious arrangements. The following list, chronologically arranged, will aid materially in understanding the accused's transactions and his knowledge and intent, from time to time, as he issued the checks:

Date 1944	Payee	Drawee Bank	Amount	Charge & Specification
28 Feb.	Cash	Jefferson Trust and Savings Bank, Pecria, Illinois.	$200	II - 15
28 Feb.	Cash	Peoria Trust and Savings Bank, Peoria, Illinois.	450	II - 14
8 Mar.	Camp Exchange	First National Bank and Trust Co., Peoria, Illinois.	50	II - 2
8 Mar.	Idle Hour	First National Bank and Trust Co., Peoria, Illinois.	17	II - 3
8 Mar.	Idle Hour	First National Bank and Trust Co., Peoria, Illinois.	50	II - 4
8 Mar.	Idle Hour	First National Bank and Trust Co., Peoria, Illinois.	50	II - 5
8 Mar.	Fay's Grill	First National Bank, Peoria, Illinois.	50	II - 12
8 Mar.	Rent-A-Car	First National Bank and Trust Co., Peoria, Illinois.	15	AC - 3
10 Mar.	Fay's Grill	First National Bank and Trust Co., Peoria, Illinois.	20	II - 11
11 Mar.	Union Trust Co.	First National Bank, Peoria, Illinois.	656.95	III- 1

Date 1944	Payee	Drawee Bank	Amount	Charge & Specification
11 Mar.	Idle Hour	First National Bank and Trust Co., Peoria, Illinois.	$50	II - 7
11 Mar.	Idle Hour	First National Bank and Trust Co., Peoria, Illinois.	30	II - 8
11 Mar.	Fay's Grill	First National Bank, Peoria, Illinois.	10	II - 9
11 Mar.	Fay's Grill	First National Bank, Peoria, Illinois.	25	II - 10
13 Mar.	Fay's Grill	First National Bank, Peoria, Illinois.	25	AC - 1
13 Mar.	Fay's Grill	First National Bank, Peoria, Illinois.	25	AC - 2
13 Mar.	Rent -A-Car	First National Bank, Peoria, Illinois.	15	AC - 4
14 Mar.	Camp Exchange	First National Bank, Peoria, Illinois.	50	II - 13

Thus, it will be observed that, on 28 February 1944, the accused cashed a $200 check drawn upon an account, the amount of which he did not know, and a $450 check drawn upon a bank, the existence of which can only be inferred from the testimony of the officer at the Post Bank at Camp Atterbury, Indiana, who said "both checks were returned by the Peoria banks, thru our correspondent bank, with the statement that the accounts of Lt. Porter had been closed". The allonge on each of these checks bears the notation "closed since Aug. 26, 1943" and both checks are accompanied by formal certificates of protest.

By the exercise of such reasonable prudence and caution as was required of a person in his situation, the accused should have known the condition of the accounts upon which he presumed to draw checks in such substantial amounts. He is legally chargeable with such knowledge under the facts and circumstances disclosed. Neither carelessness nor negligence can excuse such a deliberate misuse of banking facilities. It is apparent, from his own statement at the trial, that it was not until after he had discovered these two checks were dishonored that he requested people at home to "put money in the bank" for him. Having already given worthless checks which aggregated $650 in amount he cannot, legally or morally, offer in defense of the charges based upon this fraudulent issue, his attempt to make these dishonored checks good by tender of

a check for $656.95 drawn upon an account which contained only $445. Neither on the day when they were issued, nor at any time subsequent thereto, was there a sufficient fund on hand to the credit of the accused in any of the banks upon which these checks were drawn, to pay the amounts thereof.

Nor can the accused have honestly believed that there were funds on hand to his credit in any bank sufficient to guarantee the payment of any of the checks issued on and after 11 March 1944; nor could he have honestly intended that there should have been.

On 11 March 1944 he tendered to the Union Trust and Savings Bank, as above stated, a check drawn upon The First National Bank of Peoria, Illinois, in the amount of $656.95 in payment of the two dishonored checks of the accused then held by that bank and it is admitted that only $445 was on deposit to the credit of the accused in the drawee bank between 8 and 14 March. Indeed, had the seven checks theretofore drawn by the accused on the same bank, between 8 and 11 March been paid (assuming that the accused intended they should be paid), the balance remaining in the bank on 11 March 1944 would have been only $193; and this fact the accused must have known.

There is consequently, not the slightest doubt of the fraudulent intent of the accused either at the time he issued the $656.95 check to the Union Trust and Savings Bank or at the various times when he issued all subsequent checks alleged to be worthless. The attempted explanation of the tangled skein of his finances is not convincing. One cannot arbitrarily draw checks at will upon a non-existent account, or on an account known to be insufficient to pay the checks so issued, and thereafter legally establish an honest intent by showing an effort, however well-intentioned, to have some other person provide the funds with which to pay the otherwise worthless checks. Unless one who gives a check to another for value knows, or has good reason to believe, that he has or will have sufficient funds available and applicable to the payment of the check in the drawee bank, he cannot be said to act in good faith; and when, as in this case, the circumstances are clearly such as to put any ordinary, reasonable person on notice that there could not be sufficient funds on hand to pay the checks issued, a fraudulent intent may properly be inferred from the carelessness, negligence and indifference shown by the manner in which the transactions were handled by the accused.

However, with regard to those checks which were drawn by the accused upon the First National Bank and Trust Company of Peoria, Illinois, (it being agreed that he intended to specify "The First National Bank of Peoria, Illinois) prior to 11 March 1944, it cannot be said that the evidence shows, beyond reasonable doubt, that he intended to defraud the holders of these checks "well knowing that he did not have and not intend-

ing that he should have sufficient funds" in the drawee bank to assure the payment of said checks upon presentment.

Payment of these checks was refused in each instance because the bank had no signature of the accused on file. There is nothing in the record to show that the bank, or any of the holders of the unpaid checks, had ever brought to the accused's attention the reason why the checks were not honored and it is nowhere shown that the bank ever demanded his signature or that he ever refused to furnish it. Since there was $445 to the credit of the accused in the bank upon which the checks dated 8 to 10 March 1944, inclusive, were drawn, it would be enlarging the scope and plain import of the specification, as drawn, to hold that the lack of a signature card at the bank was proof of an intent on the part of the accused to defraud "well knowing he did not have and not intending that he should have sufficient funds" in the bank to pay the checks so issued. The record is, therefore, legally insufficient to support the findings on Specifications 2, 3, 4, 5, 11 and 12 of Charge II and Specification 3 of the Additional Charge.

6. The records of the War Department disclose that the accused was born in Peoria, Illinois on 8 October 1919. He was graduated from the Omaha Technical High School in 1938 and from Lane Technical High School in 1939. He was a member, on inactive service, of the 130th Infantry, National Guard of Illinois. After his organization was called into federal service on 5 March 1941 he served as a sergeant and staff sergeant at Camp Forrest, Tennessee, and Fort Lewis, Washington until 26 February 1943, when, after completing a course at The Infantry School, Fort Benning, Georgia, he was commissioned as a second lieutenant, Army of the United States. In civil life he was employed as a clerk in a grocery store for eleven months and as a clerk in an air filter plant for 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 insufficient to support the findings of guilty as to Specifications 2, 3, 4, 5, 11 and 12 of Charge II and Specification 3 of the Additional Charge, but is legally sufficient to support the findings of guilty as to all other Specifications and the Charges and to support the sentence and warrant confirmation thereof. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and such punishment as a court martial may direct is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

William A. Pounds, Judge Advocate.

William A. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 10 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 James B. Porter (0-1313059), Company C, 11th Infantry Training Battalion.

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 as to Specifications 2, 3, 4, 5, 11 and 12 of Charge II and Specification 3 of the Additional Charge, but is legally sufficient to support the findings of guilty as to all other Specifications and the Charges and to support the sentence and warrant confirmation thereof. I recommend that the sentence be confirmed but that the confinement be reduced to two years and that as thus modified the sentence be carried into execution. I further 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 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Confinement reduced to two years. G.C.M.O. 383, 18 Jul 1944)

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

SPJGV
CM 255358

21 JUN 1944

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Second Lieutenant HARVEY T. SCHMID (O-705816), Air Corps.	)	Trial by G.C.M., convened at Liberal, Kansas, 12 and 13 April 1944. Dismissal, total forfeitures and confinement for five (5) years.

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OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 93rd Article of War.

Specification: In that Second Lieutenant Harvey T. Schmid, Air Corps, did, at Liberal Army Air Field, Liberal, Kansas, on or about 28 March 1944, with intent to do him bodily harm, commit an assault upon First Lieutenant James H. McDaniel, by striking and cutting him in the eye, face, and neck, with a dangerous thing, to-wit: a glass tumbler.

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 five years. 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:

On the evening of 28 March 1944 First Lieutenant Maurice L. Griffith and his party occupied one table, Lieutenant Harland and his

group were at a second table, and accused was a member of a group at a third table, all in close proximity, at a dinner dance being held in the Officers' Club at Liberal Army Air Field, Liberal, Kansas. Lieutenant Harland left his table for awhile and on his return found one of the chairs at his table missing. He asked the accused about the missing chair and the accused denied taking the chair. Harland then procured a chair from another table. Lieutenant Griffith then remarked that accused had taken the chair, whereupon accused told Lieutenant Griffith to shut up, that he was "just a God damn basic instructor" and should stay out of the argument. First Lieutenant Diedrick, also a basic instructor, overheard the argument, and instructed the accused to return to his own table. Lieutenant Diedrick then went in search of the officer of the day, but was unable to find him. While Lieutenant Diedrick was in search of the officer of the day the accused invited Lieutenant Griffith to step outside and settle the argument, but Griffith refused to go. Lieutenant Diedrick returned at about this time and accused invited him to go outside. Diedrick, who weighs about 125 pounds, started out, followed by accused, whose weight is around 165 pounds. However, some of accused's table companions intervened and led him back to his table (R. 31-32).

Shortly after the above incident Lieutenant Diedrick was at the bar in the Officers' Club conversing with First Lieutenant McDaniel and Lieutenant Chessmore. The accused walked up to the group and again started abusing and cursing Lieutenant Diedrick in particular, and first lieutenants and basic instructors in general. Lieutenant McDaniel thereupon told him "to get quiet", and asked accused who his group commander was, and accused refused to tell him (R. 16, 105). Lieutenant McDaniel then asked Lieutenant Diedrick to go find the officer of the day to get the accused out of the club (R. 16). The accused at this point invited McDaniel outside, who accepted the invitation. They left the club with McDaniel walking two or three feet in front of accused, and Diedrick seeing them leaving followed ten or twelve feet behind. As McDaniel reached the end of the duckboard walk leading from the front of the club the accused without warning struck McDaniel on the left side of his face with a glass he was carrying, the glass being shattered by the impact. As McDaniel turned after the blow, the accused hit him with his fist and McDaniel swung in an effort to protect himself, but was unable to strike accused because of his injuries. Diedrick then jumped on accused's back and held him until several other officers arrived (R. 106, 107).

As a result of the blow struck by accused Lieutenant McDaniel received two cuts on the left side of his face, one of which was rather deep and required about 15 stitches. He also sustained an incision of the left eyeball, which penetrated through the cornea, tore the iris, and lacerated the lens. At the time of trial McDaniel had lost 75 per cent of the visibility of this eye. A medical expert testified that he was unable to predict the ultimate recovery of the eye from this injury, though he did express the opinion that the sight in this eye would never be good enough to meet the visual requirements necessary for flying officers. He testified that with proper treatment and an operation by a qualified specialist the sight might be restored as good as it was before the injury, and on the other hand even with such treatment the sight from this eye might be lost entirely (R. 21-24).

Second Lieutenant Irving S. Weiss testified he had seen the accused at the dinner dance probably around 11 o'clock when accused had sat at his table for about half an hour. Accused's speech was coherent, but not connected at all times, and he was drunk and did not know what he was doing (R. 57). The trial judge advocate avowed surprise at this witness' testimony and was permitted to cross-examine him as to whether this was the same opinion this witness had expressed to the trial judge advocate in a previous conference, and the witness stated he did not recall ever telling the trial judge advocate that accused was not so intoxicated as to not know what he was doing (R. 59). No other testimony to impeach this witness was introduced.

Lieutenants McDaniel, Griffith, Sacke, Simpson and Diedrick testified that while accused had been drinking on the night in question his speech was coherent, he walked all right, and in their opinion knew what he was doing (R. 11, 31, 40, 49, 108).

4. For the defense:

During the afternoon of the dance the accused had been in the company of Lieutenants Ruppe, Showalter, Ruddy and Rung from about 1500 to about 1800, and together they had drunk about two thirds or three fourths of a bottle of scotch liquor (R. 63, 64, 71, 72, 96). The accused ate a light meal at about 1800, and after this meal, he, Lieutenant Showalter and a third officer had more drinks, consuming about a half pint of whiskey this time (R. 73). Accused then proceeded to the dinner dance, carrying a pint bottle of whiskey with him. Prior to committing the assault on Lieutenant McDaniel accused said he had consumed all but about one inch of the whiskey in this bottle (R. 97).

Second Lieutenant Herbert K. Ruppe, who had drunk with accused during the afternoon and who saw him later at the party, testified that accused was "quite intoxicated" (R. 65). He admitted, however, that accused did not stagger, that he talked coherently, though in an excited manner, was able to play the slot machines and that his conduct had not been such as to cause him to make an effort to take accused home (R. 70).

Second Lieutenant Alex Showalter, another of the group who had drunk with the accused during the afternoon, testified that he "imagined" that accused was intoxicated. However, he admitted that the accused talked coherently, danced once or twice during the evening, did not stagger, and was not so drunk that this witness thought he should be taken home (R. 73-76).

Second Lieutenant Robert J. Ruddy testified that the accused was drunk at the dinner dance (R. 80). Like the other witnesses, Lieutenant Ruddy admitted he did not see accused stagger and his conversation was intelligent, though thick tongued, and accused did knock over a drink during the evening. This witness, another of the group who had drunk with accused during the afternoon, did not notice that accused caused any disturbance at the dance and did not think accused was so drunk that he should have been taken home. During the time he saw accused he felt accused was perfectly capable of taking care of himself (R. 79-82).

Second Lieutenant Mahlon H. Long, Jr. who saw accused at the dance, was of the opinion accused was drunk because he did not think anyone could drink as much whiskey as accused had consumed and not be drunk. However, this witness said he observed nothing unusual about accused's dancing, nor about the way he talked (R. 85-87).

Second Lieutenant James E. Welborn, Jr. testified that as he came around the corner of the clubhouse on the night of the dance he saw two officers (the accused and Lieutenant McDaniel) scuffling. Lieutenant Diedrick ran up and jumped on the back of the accused. This witness then ran up and took hold of accused. McDaniel and Diedrick then went inside and witness started to take accused home, not knowing any damage had been done (R. 88). Witness would say accused was drunk. He asked accused what he had done and accused said he did not know (R. 88). On redirect examination this witness testified as follows:

"Q. Did you ask him what had happened?

A. I asked Lt. Diedrick what had happened and he said that the accused had hit Mac with a glass. I asked Lt. Schmid what he did that for and he said, 'I should have let him hit me'.

Q. You said to Lt. Schmid, 'Lt. Diedrick said you hit him with a glass'.

A. Yes sir.

Q. And then you turned to Lt. Schmid and said 'You hit him with a glass'.

A. Yes and then Lt. Schmid said to me, 'I couldn't let him hit me'." (R. 94).

The accused after having his rights as a witness explained to him elected to testify under oath. After detailing the amount of liquor he had consumed on the afternoon and night of the dance he said that he barely remembered the argument about the chair, and did not know how it started. He remembered offering to take Lieutenant Diedrick outside, but did not remember being restrained by his friends. He remembered having a second argument with Lieutenant Diedrick at the bar. He had never seen Lieutenant McDaniel before, and had no reason for being angry with him, but remembers inviting "someone" out during this second argument with Diedrick. He remembered having a glass in his hand as he started out, but remembered nothing about the assault. After the assault, being told about it, he tried to find out what it was all about (R. 98-102). He stated to the court, "I just want to say that I must have been drunk to talk to my superior officers the way I did, asking them outside—I didn't know what I was doing" (R. 102).

5. The evidence shows that accused on 28 March 1944 was present at a dinner dance being held in the Officers' Club, Liberal Army Air Field, Liberal, Kansas. An argument ensued between accused and the occupants of two nearby tables as to whether accused had taken a chair from one of the tables. Accused invited Lieutenant Griffith outside, and Griffith declined to go. When told to return to his own table by Lieutenant Diedrick accused invited Diedrick outside and they started out, but accused was led back by his companions at his table. Later at the bar in the club he resumed the argument with Diedrick in the presence of Lieutenant McDaniel, cursing Diedrick in particular and first lieutenants and basic instructors in general. When told by McDaniel "to get quiet" accused invited McDaniel outside. As they walked outside the club, accused, without warning and from the rear, struck McDaniel with a water glass, inflicting two cuts on the left side of McDaniel's face and severely injuring his left eyeball. The prognosis of the injury to the eye is uncertain, the sight being 75 per cent impaired at the time of trial, with the possibility of either total loss of sight in the eye, or complete recovery if surgical treatment is undertaken by a competent eye surgeon.

The only material question presented by the record is whether accused was so drunk at the time of his assault on McDaniel as to be incapable of harboring the specific intent necessary to sustain the finding of guilty of assault and battery with a dangerous weapon. The accused undoubtedly had consumed a large quantity of liquor, and testified he remembered nothing of the assault. Several witnesses for the defense testified that accused was drunk at the dance. On cross-examination, however, they admitted that accused did not stagger, that his speech was coherent, that he danced all right, and one witness said accused played the slot machines properly. Two of the witnesses who had also drunk with accused during the afternoon said his condition was not such that they felt he should be taken home. On the other hand, Lieutenants Diedrick, McDaniel, Griffith, Sacke, and Simpson testified that in their opinion accused was not so drunk as to not know what he was doing. The Board of Review is of the opinion that the court was amply justified in concluding that accused was not drunk to such an extent that he was incapable of entertaining the specific intent necessarily an ingredient of the offense with which accused was charged.

6. War Department records show that accused is 20 years of age. He attended East High School, Denver, Colorado, for four years, but did not graduate. He enlisted in the Army 10 March 1942, and after graduating from Pilot School (Advanced 2 Engine), Frederick Army Air Field, Frederick, Oklahoma, was commissioned second lieutenant, Army of the United States, 7 January 1944.

7. There is attached to the record a letter from Colonel E. H. Underhill, Commanding Officer, Liberal Army Air Field, Liberal, Kansas, recommending clemency in this case. Colonel Underhill states that in his opinion the sentence is too severe and that dismissal from the service would be adequate punishment.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 93.

Thomas M. Tabby, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 255358

1st Ind.

War Department, J.A.G.O., 7 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 Harvey T. Schmid (0-705816), 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, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures 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. Consideration has been given to the attached letter from the accused's father, Mr. Fred L. Schmid, dated 13 May 1944, and to the attached letters and inclosures presented by Honorable Edwin C. Johnson, United States Senate.

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.

6 Incls.
Incl.1-Record of trial.
Incl.2-Ltr fr acc father, dated 13 May 44.
Incl.3-Ltr fr Hon Edwin C Johnson w/incls, dated 23 May 44.
Incl.4-Ltr fr Hon Edwin C Johnson w/incls, dated 10 Jun 44.
Incl.5-Dft ltr for sig S/W.
Incl.6-Form of action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 484, 7 Sep 1944)

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

SPJGK
CM 255436

(93)

19 JUN 1944

UNITED STATES	)	FOURTH ARMY
v.	)	Trial by G.C.M., convened at Camp Polk, Louisiana, 28 and 29 March 1944. Dismissal.
Lieutenant Colonel WILLIAM G. REED (0-355123), Coast Artillery Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel William G. Reed, Commanding Officer of 558th Antiaircraft Artillery Automatic Weapons Battalion, did, at Maneuver Area, Louisiana, at various times from November 1943 to February 1944 inclusive, wrongfully fail to properly perform his duties, in consequence whereof enlisted men in his command were subjected to cruel, unusual and unauthorized forms of punishment.

Specification 2: In that Lieutenant Colonel William G. Reed, * * *, did, at Maneuver Area, Louisiana, in or about November 1943, wrongfully order Sergeant William H. Mohney to commit an assault and battery on the person of Private Ralph Edward Laschisky.

Specification 3: In that Lieutenant Colonel William G. Reed, * * *, did at Maneuver Area, Louisiana, in or about November 1943, wrongfully fail to stop cruel treatment of Private Ralph Edward Laschisky by Sergeant William H. Mohney.

Specification 4: (Finding of not guilty).

Specification 5: In that Lieutenant Colonel William G. Reed, * * *, did, at Maneuver Area, Louisiana, on or about 6 February 1944, wrongfully fail to stop cruel treatment of Privates Roland McKee and Arthur R. McCandless, by 2nd Lt. Howard R. Mudd and Sergeant George J. Steffish, Jr.

Specification 6: (Finding of not guilty).

Specification 7: In that Lieutenant Colonel William G. Reed, * * *, did, at Maneuver Area, Louisiana, on or about 6 February 1944, wrongfully seize and shake, Private Arthur R. McCandless.

Specification 8: (Motion for finding of not guilty sustained).

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

Specification 1: Same as Specification 1 of the Charge.

Specification 2: Same as Specification 2 of the Charge.

Specification 3: Same as Specification 3 of the Charge.

Specification 4: (Finding of not guilty).

Specification 5: Same as Specification 5 of the Charge.

Specification 6: (Finding of not guilty).

Specification 7: Same as Specification 7 of the Charge.

Specification 8: (Motion for finding of not guilty sustained).

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

Specification 1: In that Lieutenant Colonel William G. Reed, * * *, did, at Maneuver Area, Louisiana, on or about 24 November 1943, wrongfully fail to stop cruel treatment of Private Charles S. Suddith by Sergeant George J. Steffish, Jr.

Specification 2: In that Lieutenant Colonel William G. Reed, * * *, did, at Maneuver Area, Louisiana, on or about 17 December 1943, wrongfully order Sergeant William H. Mohney to commit an assault and battery on the person of Private Arthur R. McCandless.

Specification 3: In that Lieutenant Colonel William G. Reed, * * *, did, at Maneuver Area, Louisiana, on or about 17 December 1943, wrongfully fail to stop cruel treatment of Private Roland McKee by Second Lieutenant Howard R. Mudd and Sergeant George J. Steffish, Jr.

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

Specifications 1, 2 and 3: Same as Specifications 1, 2 and 3 of Additional Charge II.

He pleaded not guilty to all Specifications and Charges. A motion for findings of not guilty of Specification 8 of each of the above Charges was sustained (R. 163). He was found not guilty of Specifications 4 and 6 of the Charge and Specifications 4 and 6 of Additional Charge I. He was found guilty of all other Specifications except Specification 7 of the Charge and Specification 7 of Additional Charge I, of which specifications the court found him guilty except the word "shake", substituting therefor the words, "seized by the collar". He was found guilty of all the Charges. 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. Each Specification of the Charge is identical with the corresponding Specification of Additional Charge I. The Charge is laid under Article of War 96, and Additional Charge I is laid under Article of War 95. Likewise, each Specification of Additional Charge II is identical with the corresponding Specification of Additional Charge III. The former charges the offenses as violations of Article of War 95; the latter as violations of Article of War 96. It is fundamental that the same offense may be charged in duplicate as a violation of Article of War 95 and of any other applicable Article of War (MCM, 1928, par. 151).

4. The evidence groups itself into four incidents and will be treated accordingly. Specification 1 of the Charge, which, as noted, is identical with Specification 1 of Additional Charge I, does not allege any specific acts or omissions, but is a general Specification covering the whole conduct of accused from November 1943 through February 1944. Proof of this Specification lies in the proof of the specific instances hereinafter related.

5. The events occurred at or near the "Rehabilitation Center" of the 558th Antiaircraft Artillery Automatic Weapons Battalion. Accused, who was in command of the battalion, created the Rehabilitation Center on 7 November 1943 (R. 12,13,14). According to the testimony of accused, the Center was organized in order to punish and rehabilitate habitual offenders and to turn "goldbrickers" into soldiers (R. 155,161). At first the Center was inclosed by a barbed wire fence, but later the inclosure was removed. The battalion was in a maneuver area, and the Center moved with the rear echelon (R. 14).

Second Lieutenant Howard R. Mudd was the Provost Marshal and Officer in Charge of the Center, but accused was present frequently and "more or less supervised over everything" (R. 12-13). Sergeants Mohney and Steffish, mentioned in some of the Specifications, were the Provost Sergeants under the supervision of accused and Lieutenant Mudd, and several guards completed the personnel on duty there (R. 12-14).

Shortly after 7 November 1943, orders were issued to the effect that a prisoner should work during the whole of his first night at the Center,

doing "burpees" and "pushups" and digging foxholes. After the first day, his hours were from 6 a.m. to 10 p.m. (R. 22,27,38). In February the Center was closed (R. 12).

6. Events of 7 November 1943, Specifications 2 and 3 of the Charge and of Additional Charge I. Specification 2 alleged that accused wrongfully ordered Sergeant Mohney to commit an assault and battery on Private Laschisky. Specification 3 alleged that accused wrongfully failed to stop cruel treatment of Laschisky by Mohney.

Laschisky was the first prisoner at the Rehabilitation Center and arrived on 7 November (R. 13,14). He had been absent without leave for about 22 days, but had not been court-martialed at the time (R. 26,82). During the afternoon he dug a garbage pit near the kitchen. The pit was about three feet square and three feet deep (R. 179,180).

After supper, under instructions from accused, Sergeant Mohney put Laschisky to work doing burpees and pushups and digging foxholes. He was also made to double-time around an elliptical area estimated as about "30 feet wide and 100 feet long", and designated by the witnesses as a circle (R. 15,16,28,38,81,85,179-181). After Laschisky had run around the "circle" for ten or fifteen minutes, he appeared to be tiring and slowed down (R. 15,28,29,180). At this juncture, accused told Mohney to get a switch and hit Laschisky with it in order to make him run faster (R. 15,81,82,85,180). Thereupon Mohney picked up a switch or stick (R. 15,82,85,180). The stick was somewhere between $2\frac{1}{2}$ and 4 feet long and between a half inch and an inch thick (R. 16,85,180). Mohney hit Laschisky with the stick at that time, and whenever Laschisky slowed down Mohney hit him again, administering several blows in all (R. 16, 28,81,82,85,87). The blows were administered across the legs, and in hitting the victim, Mohney made a sweep of from two to three feet or possibly more (R. 16,28,84,86,180). Laschisky testified that he was hit hard and that the blows "stung" but left no marks (R. 82,83). According to one witness, Laschisky "yelled" when hit (R. 28). Accused was present during the whole performance, and not only made no effort to stop Mohney's actions, but repeatedly instructed Mohney to hit Laschisky whenever the latter slowed down (R. 16,82,85,86,180). Accused told Mohney to use water if Laschisky "passed out", which did not occur (R. 16). After the double-timing, Laschisky was made to work all night by accused's orders (R. 16,27).

Accused testified that Laschisky was an habitual offender and that when Mohney, under instructions from accused, ordered Laschisky "to work", the latter refused three times and was "cocky" and arrogant. Thereupon, accused told Mohney to switch him in order to "get him going". Accordingly Mohney struck Laschisky with the switch. Altogether, four or five blows were struck. They were short blows and not hard, and accused felt certain

that they did not injure the prisoner (R. 156,157). Accused testified further that prior to the time Laschisky was ordered to double-time, he had no difficulty in walking, but that when the order was given, he complained of a sore ankle. Accused did not examine the ankle (R. 156, 162). Accused testified also that upon a subsequent occasion when Laschisky was wet, accused let him take accused's only suit of underwear and procured some blankets for him (R. 158).

Captain Dan W. Harvey, S-3 of the battalion, corroborated accused's testimony (R. 128-132). He stated that Laschisky was "quite arrogant and cocky" and refused to double-time when so ordered, giving as a reason that something was wrong with his ankle (R. 128); that accused told Mohney to use the stick if Laschisky refused to obey (R. 129); that Mohney "prodded" Laschisky with the stick across the back of the legs, using short cracks not brutal in nature (R. 128,129,132); that the hitting induced Laschisky to double-time; and that it then became apparent that there was nothing physically wrong with him (R. 128). Witness described the stick as a tree branch several feet long and about three-quarters of an inch in diameter (R. 132).

Captain Charles R. Sawyer, commanding officer of Laschisky's battery, testified that he saw Laschisky a few days after he had been confined and that Laschisky seemed to be all right and did not complain of mistreatment. He stated that Laschisky previously had not been a good soldier, but that since his release from the Rehabilitation Center he had been (R. 144,145).

7. Events of 24 November 1943: Specification 1 of Additional Charges II and III. This Specification alleged that accused wrongfully failed to stop cruel treatment of Private Suddith by Sergeant Steffish.

Around Thanksgiving, 1943, Suddith, who had been absent without leave but had not been sentenced, was brought to the Rehabilitation Center (R. 25, 26,61,70,72). He was made to do burpees and pushups and to double-time around a circle, holding a shovel at arm's length over his head. The circle was about 35 or 40 feet in diameter (R. 25,35,37,61,67,71,172,173). Sergeant Steffish was directing the procedure under orders from accused (R. 25,26,61,71). Suddith appeared exhausted and fell or "passed out" several times. When he fell, Steffish picked him up by the belt, "booted" him in the seat of the pants with his knee, and started him going around the circle again (R. 25,35,61,64,67,68,69,71,72,173). At least once, Steffish threw water on him to revive him (R. 26,61,62,71,173). Accused remained a few feet away and took no steps to stop the proceedings (R. 26, 62,67,72,173). Once or twice, accused and Steffish talked together, after which Suddith was kept running around the circle (R. 72,173). The double-timing continued for a period between a half hour and an hour (R. 25,172).

Accused did not testify with reference to this incident. Suddith

testified for the defense and denied the whole affair (R. 113-115). He testified that under Sergeant Mohney's supervision he did some pushups and burpees, dug a foxhole, and went to bed (R. 114).

8. Events of 17 December 1943: Specifications 2 and 3 of Additional Charges II and III. Specification 2 alleged that accused wrongfully ordered Sergeant Mohney to commit an assault and battery on Private McCandless. Specification 3 alleged that accused wrongfully failed to stop cruel treatment of Private McKee by Lieutenant Mudd and Sergeant Steffish.

On the evening of 17 December 1943, McKee and McCandless, who had been absent without leave but had not been tried, were brought to the Rehabilitation Center under guard (R. 17,22,26,29). At that time there was an inclosure around the area (R. 22). Among the people present were accused, Sergeants Mohney and Steffish, Lieutenant Mudd, and, for a time, Major Raymond M. Beall (R. 22,23,92,94). McKee and McCandless were made to do pushups and burpees (R. 22,23,30,31). After awhile, by order of accused, they were taken to a spot outside the inclosure, accompanied by accused and the others, except Major Beall (R. 23). They separated into two groups, about 50 feet apart. Mohney and McCandless were in one group, and Lieutenant Mudd, Steffish, and McKee in the other. Accused walked back and forth between the two groups. Mohney and Steffish had switches (R. 23).

McKee and McCandless were made to do exercises for about 20 or 25 minutes, and showed signs of becoming tired (R. 23,24). Accused told Mohney to use a switch on McCandless if he stopped exercising. Accordingly, Mohney switched McCandless across the legs. Steffish struck McKee (apparently with a switch), and Lieutenant Mudd told McKee to look down the barrel of his pistol and fired the pistol over McKee. Accused was standing by Lieutenant Mudd and made no effort to stop the activities (R. 24). On 18 December, McKee and McCandless escaped (R. 17,32).

Accused did not testify to these Specifications except to say that prior to their arrival at the Maneuver Area, McKee and McCandless had been serving sentences for absence without leave and had escaped (R. 159). Private Lortz, a prisoner, testified for the defense that McKee and McCandless dug foxholes from about 7 p.m. to 10 p.m., but were not beaten (R. 106-107). Private Lewis, a witness for the defense, was in his tent until 2 a.m. Steffish was in the tent except for about 20 minutes. Lewis saw no prisoners beaten and heard no screams or sounds of whipping. He did not see or hear accused. Lewis was on guard between 2 a.m. and 6 a.m. on 18 December. McKee and McCandless were the only prisoners around. During witness' tour of duty, he was hit on the head from behind. When he came to, McKee and McCandless had gone (R. 116-120). Major Beall, who was Executive Officer of the battalion, testified that he was at the Center for about 30 minutes, during which time McKee and McCandless were double timing and doing pushups. While witness

was present, neither prisoner was touched, and accused did not order them to be hit. About 30 minutes after witness left, he saw accused at the Command Post tent (R. 133-134). Captain Sawyer, commanding officer of the battery to which McKee and McCandless belonged, testified that they were not good soldiers (R. 145).

9. Events of 6 February 1944: Specifications 5 and 7 of the Charge and of Additional Charge I. Specification 5 alleged that accused wrongfully failed to stop cruel treatment of McKee and McCandless by Lieutenant Mudd and Sergeant Steffish. As modified by the court, Specification 7 charged accused with wrongfully seizing McCandless by the collar.

McKee and McCandless were brought back to the Rehabilitation Center on 6 February 1944 (R. 17,26,87,88). They were taken to a spot in the woods. Accused, Lieutenant Mudd, and Sergeant Steffish were present (R. 17,18). McKee and McCandless were made to do burpees and pushups and to double-time around a circle (R. 18). Accused stood inside the circle (R. 19). Accused directed that switches be used on the two prisoners if they slowed up. The prisoners appeared exhausted and slowed up. Sergeants Mohney and Steffish used the switches on them. The switches were about the same size as those used on Laschisky on 7 November 1943 (R. 18,19). Lieutenant Mudd and Sergeant Steffish struck both men in the stomach with their fists (R. 19). Then they were made to double-time with a small log over their heads. When they stopped, Lieutenant Mudd struck McKee in the mouth (R. 19). Accused grabbed them by the collar of their shirts, twisted the collar with both hands, and asked which one had knocked out the guard (R. 19,33,34). According to Mohney's testimony, accused twisted the collars as though he "more or less wanted to choke it out of them", although they were still able to talk (R. 33,34). McKee cried for help several times, and Steffish filled his mouth with mud (R. 19, 34,35). The prisoners were so fatigued that they could do no more, and the exercising or punishment finally ceased (R. 20,34). Sergeant Steffish threw water on the prisoners to revive them (R. 20).

First Lieutenant John A. Steinmetz, Assistant Battalion Motor Transport Officer, and Master Sergeant Elmer J. Bischoff, Battalion Motor Sergeant, were in the Battalion Motor Pool and heard screams of pain from the woods (R. 41,42,44,164,187). Lieutenant Steinmetz went to the medical tent and told Captain Thomas S. Armstrong, Jr., Medical Corps, Battalion Surgeon, about the screams (R. 43-46). Upon leaving the tent, Captain Armstrong heard the cries of pain and saw some people on the other side of a small ravine (R. 46,51,190). One man was standing. Another was on his knees and held a blunt instrument in his hand. Another was prone on the ground. A fourth was kneeling on the ground, and someone was standing above him. One person was walking toward witness (R. 46).

Captain Armstrong walked toward the spot and when he reached the ravine

he saw a man kneeling on the ground with a blunt instrument in his hand and raising and lowering the instrument (R. 46). The instrument was about 10 or 12 inches long and about one-quarter of an inch in diameter at one end and an eighth of an inch at the other. It was "malleable" and "on the order of a tree switch" (R. 50). Upon arrival at the spot, witness saw accused, Lieutenant Mudd, and Sergeants Mohney and Steffish (R. 46). McCandless was lying on the ground, McKee was on his knees, and Lieutenant Mudd was getting up from a kneeling position. Water was being poured on McCandless' neck. Witness asked accused whether he could examine the prisoners, to which accused replied that if witness were "prejudiced by anything" he had seen there, he could leave. Witness discovered that McCandless was in a state of exhaustion and completely "out". His skin was cold and clammy and his pulse barely perceptible and thin and irregular. McKee got to his feet and seemed to be oriented (R. 46, 47).

The men were taken to the medical tent and examined (R. 20,47,52). Captain Armstrong, Sergeant Mohney, and two enlisted men of the Medical Detachment testified with reference to their condition. The sum and substance of their testimony is as follows: The men were in a state of exhaustion. Their lips were cut, and blood was running from McKee's mouth and nose. They had fresh welts on their backs and legs, and abrasions on their backs. The welts were red and swollen. They could have been caused by a rawhide whip or switch. McKee had dirt on his face (R. 21, 48,50,53,55,56,60,61,64,65). The men received treatment for the welts and cuts (R. 24,48,53,61).

Accused sent for Captain Armstrong and inquired about the condition of the prisoners. Captain Armstrong told him that they would be able to do manual labor the next day. He had in mind such duties as digging latrines and foxholes (R. 49-51). McKee and McCandless were made to work all night digging foxholes. They worked all the next day until 10 p.m. (R. 24). They were absent without leave at the time of trial (R. 16).

Accused testified as follows: He asked McKee and McCandless which one had struck the guard at the time of their prior escape. They refused to tell him, and McKee said they would never "soldier" again "'for the god-damn United States Army'". McCandless made no such statement. Accused grasped McKee by the collar, but did not choke or shake him. He warned McKee of the seriousness of his acts and said that he wanted to make soldiers of both the men. He then let go of McKee's collar, took hold of McCandless' collar, and told him the same thing. He did not choke or shake him. His purpose in grabbing the men by the collar was to attract their attention, and he did not intend to hurt them (R. 159).

10. The defense introduced a number of witnesses who testified that they had never seen or been informed of any mistreatment of prisoners in

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the Rehabilitation Center (R. 97, 101, 105, 109, 110, 112, 114,115,119-121, 125,127,134-143,148). However, most of them visited it infrequently.

11. The defense introduced a number of character witnesses, all of whom were officers or enlisted men who had served with accused at one time or another. Epitomized, their testimony is as follows: Accused was an energetic, capable, conscientious, and very efficient officer and battalion commander. He was an outstanding leader, thoughtful toward and respected by his men. His character was excellent. The morale of his battalion was very high. Although a firm disciplinarian, he was never unjust. During maneuvers, he performed very efficiently and displayed excellent tactical judgment (R. 98-100, 121-123,125,128,135,141-144, 146-153).

12. Both the prosecution and defense attempted to impeach various witnesses. It is not deemed necessary to detail the evidence relating thereto. The court saw and heard the witnesses, and there is nothing in the record to warrant our disturbing their conclusions regarding the veracity of the witnesses.

13. A detailed recapitulation of the evidence is unnecessary. It is clear that throughout the period under consideration, accused forced the various prisoners to do exercises and to double-time beyond the point of exhaustion, ordered them struck with switches when they stopped or slowed down, and sat calmly by while those under his command administered this and other cruel treatment. He admitted ordering the switching of Laschisky, but claimed that the blows were not hard and were ordered because of Laschisky's defiant attitude. The prosecution's evidence refutes this claim. Although Suddith denied having received the treatment alleged, the array of manifestly unbiased witnesses for the prosecution justified the court in discrediting his testimony. The medical testimony corroborates the eyewitness accounts of the events of 6 February 1944. In this connection the seizing of McCandless by the collar was in no way justified by the scurrilous remarks attributed by accused to McKee, if, indeed, any such remarks were made.

✓ Cruel treatment of soldiers constitutes a violation of Article of War 95 as well as of Article of War 96 (MCM, 1928, par. 151). The mere fact that the soldiers were prisoners does not lessen the degree of culpability. One who is an officer and a gentleman does not engage in or countenance such brutal conduct. Although considered apart from its setting, the seizing of McCandless by the collar might not amount to a violation of Article of War 95, taken in conjunction with the surrounding circumstances it does amount to such a violation. The evidence is sufficient to support the findings of guilty. ✓

14. Attached to the record of trial is a recommendation for clemency signed by accused, the defense counsel, and the assistant defense counsel.

15. War Department records show that accused is 30 years old and a high school graduate. He served as an enlisted man in the Minnesota National Guard for several years and held commissions as second lieutenant and subsequently first lieutenant in the National Guard of the United States, the latter commission in Coast Artillery. He entered upon active duty on 6 January 1941. On 1 November 1941, he was promoted to captain, Army of the United States; on 23 July 1942 to major; and on 22 December 1943 to lieutenant colonel. In recommending accused for promotion to lieutenant colonel, his commanding officer stated that his manner of performance as battalion commander had been excellent.

16. 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 and sentence and to warrant confirmation of the sentence. Dismissal is mandatory under Article of War 95 and authorized under Article of War 96.

Percy G. Zon, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Hermann Moyse, Judge Advocate.
Samuel Gruenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - 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 Lieutenant Colonel William G. Reed (O-355123), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Despite the testimony that accused has been an excellent officer, his cruel treatment of prisoners indicates a lack of judgment and humanity rendering him unfit for commissioned service. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to a letter from Honorable Melvin J. Maas, Honorable Joseph P. O'Hara, House of Representatives of the United States, and to a letter from Honorable Henrik Shipstead, United States Senate, inclosing letters from Mr. Merton H. Reed, father of the accused, and Mr. George H. Moeller, and to a letter from the father of the accused to the President. The letters accompany the record of trial.

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.

7 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. sig.Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Hon. Melvin J. Maas, 8 Jun. 1944.
Incl.5-Ltr. fr. Hon. Jos. P. O'Hara, 6 Jun. 1944.
Incl.6-Ltr. fr. Hon. Henrik Shipstead, 6 Jun. 1944, w/incls.
Incl.7-Ltr. fr. Mr. Merton H. Reed to Pres., 3 Jun. 1944.

(Sentence confirmed. G.C.M.O. 492, 11 Sep 1944)

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

SPJGK
CM 255437

28 JUN 1944

UNITED STATES	FOURTH ARMY
v.	Trial by G.C.M., convened at Camp Polk, Louisiana, 30 March 1944. Dismissal.
Second Lieutenant HOWARD R. MUDD (O-1050002), Coast Artillery Corps.	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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: Violation of the 96th Article of War.

Specification 1: (Motion by defense counsel to strike sustained).

Specification 2: In that Second Lieutenant Howard R. Mudd, 558th Antiaircraft Artillery Automatic Weapons Battalion, did, at Maneuver Area, Louisiana, on or about 17 December 1943, wrongfully fail to stop cruel treatment of Privates Roland McKee and Arthur R. McCandless by Sergeant George J. Steffish, Jr.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Motion for finding of not guilty sustained).

Specification 6: (Motion for finding of not guilty sustained).

Specification 7: In that Second Lieutenant Howard R. Mudd, 558th Antiaircraft Artillery Automatic Weapons Battalion, did, at Maneuver Area, Louisiana, on or about 6 February 1944, wrongfully fail to stop cruel treatment of Privates Roland McKee and Arthur R. McCandless, by Sergeant George J. Steffish, Jr.

Specification 8: (Finding of not guilty).

Specification 9: (Finding of not guilty).

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

Specification 1: (Motion by defense counsel to strike sustained).

Specification 2: Same as Specification 2 of the Charge.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Motion for finding of not guilty sustained).

Specification 6: (Motion for finding of not guilty sustained).

Specification 7: Same as Specification 7 of the Charge.

Specification 8: (Finding of not guilty).

Specification 9: (Finding of not guilty).

ADDITIONAL CHARGE II: (Withdrawn by direction of appointing authority).

Specification: (Withdrawn by direction of appointing authority).

ADDITIONAL CHARGE III: (Finding of not guilty).

Specification: (Finding of not guilty).

ADDITIONAL CHARGE IV: (Finding of not guilty).

Specification: (Finding of not guilty).

A motion by defense counsel to strike Specification 1 of the Charge and Specification 1 of Additional Charge I was sustained (R. 8a). Accused then pleaded not guilty to all other Charges and Specifications. Motions during and at the conclusion of the trial for findings of not guilty of Specifications 5 and 6 of the Charge and Specifications 5 and 6 of Additional Charge I were likewise sustained (R. 49,86). Additional Charge II and its Specification were withdrawn by direction of the appointing authority (R. 49). Accused was found not guilty of Specifications 3 and 4, 8 and 9 of the Charge, of the same Specifications of Additional Charge I, and of Additional Charges III and IV and their respective Specifications, and guilty of Specifications 2 and 7 of the Charge and of the Charge, and

of the same Specifications of Additional Charge I. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specification 2 of the Charge and of Specification 2 of Additional Charge I as involved findings of guilty of said Specifications with the exception of the words, "and Arthur R. McCandless", approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Accused was found guilty under both the 95th and 96th Articles of War of wrongfully failing to stop cruel treatment of an enlisted man by one Sergeant Steffish on 17 December 1943, and of two enlisted men by the same sergeant on 6 February 1944. The events leading up the acts of omission which constitute the offenses charged against the accused will be best understood by a preliminary resume of the situation existing at the time, which may be gathered from portions of both the prosecution's and defense's evidence.

All participants were officers and enlisted men of the 558th Anti-aircraft Artillery Automatic Weapons Battalion. Between early November and late February this organization was participating in winter maneuvers in the Louisiana Maneuver Area near Leesville. The battalion established and operated its own stockade and "Rehabilitation Center", which consisted of a barbed wire fence inclosing a circle about fifty feet in diameter. It was moved as the organization moved (R. 10,11). Some time after its inception a tent was placed inside of it. Between early November and late February the total number of prisoners committed to the stockade approximated fifteen, with never more than five confined at one time (R.9). The Table of Organization makes no provision for a Provost Marshal, but accused was designated as such by the battalion commander, Major (later Lieutenant Colonel) William G. Reed, and had general supervision of the center, spending much of his time there in overseeing the activities and tasks required of the prisoners. Sergeant William H. Mohney was assigned to the center as Provost Marshal Sergeant, with Sergeant George J. Steffish as his assistant. There were ten or fifteen guards (the total number at one time is not clearly established) who were furnished .45 caliber machine guns with ball ammunition (R. 9,10,16).

The normal work day included calisthenics, infantry drill, classes in military courtesy, and hard labor. It was a policy within the battalion that when a man was brought into the stockade he would be put at hard labor for the first twenty-four hours, and then go on the schedule above outlined, but with eight hours' sleep in each twenty-four (R. 16,30,69,70).

With this prefatory summary, the alleged offenses will be considered separately as will the evidence offered by the defense with respect to each.

a. Specification 2 of the Charge and Specification 2 of Additional Charge I (failure to stop cruel treatment of Private McKee by Sergeant Steffish on 17 December 1943).

Sergeant Mohney testified that Privates Roland McKee and Arthur R. McCandless, members of the 558th Battalion, were brought to the Rehabilitation Center under guard about 2000 on 17 December. It appears from defense's evidence that they had been absent without leave. Clothing was issued to them, after which they were put through calisthenics designated by the witness as "burpees". The exact nature of the exercises was not explained by any of the witnesses. Present during this time were witness, accused, Sergeant Steffish, the two prisoners, three other prisoners and two guards. This took place within the wire stockade and continued for about 25 minutes. Towards the end of the time the prisoners were exercising somewhat unwillingly, but there had been no mistreatment of them (R. 10,11, 14,16,17).

In the meanwhile Colonel Reed had arrived. He issued an order to take McKee and McCandless outside the inclosure in separate groups and to exercise them. In accordance with this order McKee and McCandless were taken to points about 50 feet beyond the inclosure. In one group were accused, Private McKee, and Sergeant Steffish, and in the other group were witness, Private McCandless, and a guard named Minerovic. The exercises and workout outside of the inclosure lasted approximately one-half hour. The two groups were in plain view of each other by reason of two fires inside the inclosure, which illuminated the scene. Colonel Reed went from one group to the other. Acting under Colonel Reed's orders, witness used a switch on McCandless. Steffish similarly used a switch on McKee, but witness heard no orders given to him to do so. Accused was present during the whole time and made no effort to stop the treatment the prisoners were receiving (R. 14-18). McKee and McCandless were later made to dig foxholes and were still doing so when witness went off guard at 2200. In the morning the two prisoners were missing, having escaped and gone absent without leave again (R. 20).

b. Evidence for defense. Specification 2 of the Charge and Specification 2 of Additional Charge I.

Accused's rights were explained to him and he elected to remain silent as to these specifications.

Sergeant Steffish and Private Nicholas Lewis, one of the guards, gave similar testimony. They shared a pup tent located ten or fifteen feet beyond the barbed wire inclosure. Steffish left the tent for about one-half hour to sort out clothing for the prisoners after they were brought in about 1900 or 1930 from their absence without leave (R. 51,52,59,61,65). Steffish then returned to the tent, talked to Lewis, and did not leave the tent again that night. Lewis slept from about 2000 to 2200, while Steffish read books and fell asleep about 2200. Neither paid any attention to the prisoners. Steffish saw "two fellows digging fox holes" while he was sorting clothes, but denied beating any one. He saw accused "standing around in the front" (R. 52,54,61,64). Lewis went on guard duty at 0200

for a 4-hour tour, but served only until 0400, when he was hit just below the skull in the back of his head by McKee and McCandless, who then went absent without leave again. He did not see either of them strike him, but they were the only two working at the time (R. 52,53,54).

Private Harold W. Lortz testified that he was a prisoner in the stockade when McKee and McCandless were brought in. Accused read to them the rules of the camp, and about a half hour after they came in the prisoners started digging foxholes. They were still doing this at 2200 when witness went to bed. Witness did not remember their doing any calisthenics and saw no one strike them. He corroborated Steffish's testimony that the latter sorted clothes and then returned to his pup tent (R. 54-56).

Major Raymond M. Beall, Battalion Executive, testified that he went with Colonel Reed to the stockade after learning of the presence of the prisoners. It was dark, but fires illuminated the scene. The prisoners were ordered to do calisthenics (apparently by accused) inside the inclosure. To the best of witness' recollection both Sergeant Mohney and Sergeant Steffish were present and were actively engaged in directing the exercise. After about five minutes of this, the prisoners ran around the circle at double-time for five or ten minutes, then did calisthenics again for half an hour. Witness then left and returned to the command post. He did not see accused or any one else strike a prisoner while he was there, and saw no holes being dug by them. Colonel Reed returned to the command post later (R. 67-70).

Captain Roland W. Harvey, who was not present at the stockade and who heard no unusual sounds from his place at the command post, testified that the prisoners escaped eight or nine hours after they were brought in (R. 70-72).

c. Evidence in rebuttal. Specification 2 of the Charge and Specification 2 of Additional Charge I.

In rebuttal the prosecution introduced as a witness Private Robert Moore, who was a prisoner in the Rehabilitation Center, serving a 30-day sentence for absence without leave when McKee and McCandless were brought in, one of them being whipped at the time by Sergeant Steffish. Witness was standing by the fire when they were brought in. On Sergeant Mohney's instructions, witness procured a stick about four feet long and one inch thick from outside the stockade and gave it to Sergeant Mohney, who in turn gave it to Sergeant Steffish. He saw Sergeant Steffish whip both prisoners inside the stockade. He did not see any whipping that took place outside the stockade. He was doing pushups at the time the whipping was going on. (It is not clear from the answer given by witness whether he continued doing pushups for an hour or whether the whipping lasted for that period.) Sergeant Mohney did not whip the prisoners, but merely kept them busy at calisthenics. Colonel Reed, Major Beall, and accused

were present until the prisoners were taken from the stockade. Witness did not know what happened thereafter. Accused saw the beatings and did nothing to stop them. Witness did not see Sergeant Steffish sorting any clothing. It was dark when the prisoners were first brought in, but there were two fires inside the stockade, one built after the prisoners' arrival.

d. Specification 7 of the Charge and Specification 7 of Additional Charge I. (Failure to stop cruel treatment of Privates McKee and McCandless by Sergeant Steffish on 6 February 1944.)

Privates McKee and McCandless were brought back from Camp Edwards, Massachusetts, by Sergeant Steffish and Private (then Corporal) Richard Lederer. After a 2-1/2 day journey, during part of which the prisoners were placed in the Texarkana, Arkansas, jail over night, they arrived at their battalion on the evening of 6 February 1944 (R. 11,20,58,59,61,67). Sergeant Mohney testified that after a conversation among accused, Colonel Reed and Sergeant Steffish, the prisoners were taken into the woods in which the organization was bivouacked. About fifteen minutes later, accused summoned witness through a messenger. About 250 yards away witness found the group. McKee and McCandless were doing pushups and burpees, supervised by the others. They were then ordered to run (in a circle) at double time, and, at Colonel Reed's orders, they were whipped to make them do so, the whippings being administered by witness and Steffish with switches about two and half feet long and one inch thick whenever they slowed down. Accused was present when the order was given. Witness himself switched both men more than once. This mistreatment continued during the hour which witness remained there. McKee commenced to scream and did so several times. Steffish put mud in McKee's mouth to make him stop. Accused was present at the time (R. 12,13,20,21).

First Lieutenant John A. Steinmetz was at his desk in a truck in the battalion motor pool between 1800 and 1900 that day and heard several outcries which he interpreted "as pain" and which he described as "human sounds". He walked fifty or sixty yards in the direction of the cries, then changed his course and summoned Captain Thomas S. Armstrong, Jr., the battalion surgeon, from the medical tent. The two men then continued in the direction of the cries. When they reached a slightly wooded ravine, Captain Armstrong went down through it, but Lieutenant Steinmetz, feeling nauseated, turned about and returned to the motor pool (R. 24-27).

Captain Armstrong testified that as a result of a report to him by Lieutenant Steinmetz he left the aid tent, started to the motor pool, heard one or two screams close together, and started in the direction of the outcries. From a distance of about one hundred yards he saw several figures on an elevated area. Two were standing, one was walking toward witness from his right, one was lying prone on the ground, and a fifth was kneeling over the prone one. The kneeling one, recognized by witness as the accused, struck the figure on the ground, later identified by

witness as McCandless, with a switch or whip at least four or five times (R. 27,29). Witness crossed the ravine and went up to the group, which consisted of accused, Colonel Reed, Sergeants Mohney and Steffish, and the two prisoners. Accused jumped up and told witness that the prisoners "were putting on a show", and that they had been beaten up in a prison in Arkansas. In answer to a question by witness whether "these were the tough boys that they had been talking about", accused answered that they were and that they had to bring them back in handcuffs. Accused took the handcuffs from his pocket, showed them to witness, and wanted to squeeze them on witness' hand but witness protested and nothing was done. Witness could not say whether this was done in a joking or serious manner (R. 27, 29,30).

Witness talked to Colonel Reed, McCandless, the one lying on the ground, had fainted, while McKee was still on his feet. McCandless' pulse was "irregular and thready", and his skin had a cold clammy feeling. Sergeant Mohney procured water from the ravine and poured it over him to revive him (R. 13,28,30). The condition of McCandless was typical of "abnormal exercise" and he "was in a state of exhaustion" which at that time witness thought to be severe. Later he changed his diagnosis to one of "moderate to mild" exhaustion (R. 28,31). In accordance with his conversation with Colonel Reed, the prisoners were taken to his tent about one-half to three-fourths of an hour later. They were wearing handcuffs when they arrived. They were treated by witness and Sergeants John D. McCarter and Phillip A. Long. Though there had been by this time a general improvement in their condition, witness observed "a certain amount of dehydration and malnutrition". Because of the presence of the handcuffs, the prisoners only partly undressed. They were wearing fatigue suits and dropped their trousers below their hips. Upon examination, witness found that the backs and legs of the men were covered with welts, three to five centimeters in length and about 1/4 to 1/2 inch in height or depth. The welts appeared as fresh wounds and had been made within an hour and a half prior to the examination by witness. There were also old lacerations on their arms. The fresh wounds were cleaned with alcohol and an antiseptic and tincture of methylate were applied (R. 28,31, 32-35).

The presence of the fresh welts was also testified to by Staff Sergeant McCarter (R. 32) and Technician Third Grade Long (R. 34), both of the Medical Detachment, and Sergeant Mohney, who took the prisoners to the aid tent (R. 14,21).

That evening Captain Armstrong told Colonel Reed that the men would be able to carry on their work, but asked that they be brought to him in the morning (R. 30). According to Sergeant Mohney, under orders given by accused, all the men, including the prisoners, were ordered to dig foxholes that night, and the prisoners dug all night and until 2200 the next night. The situation was "tactical" at the time and it was necessary to

"dig in" (R. 22). The digging started around 2000 or later and Sergeant Mohney was on duty only for a two-hour period that night (R. 23).

e. Evidence for the defense. Specification 7 of the Charge and Specification 7 of Additional Charge I.

Accused's rights were explained to him and he elected to remain silent as to these specifications.

Sergeant Steffish, who, with Corporal Laderer, had brought the prisoners back, testified that he was present with accused, Colonel Reed, and Sergeant Mohney when the prisoners were undergoing calisthenics on 6 February about fifty yards from the Rehabilitation Center tent. Witness directed the calisthenics, which consisted of "burpees", "windmills", "knee-jitters", and about five minutes of double-timing, the whole consuming fifteen minutes to one-half hour. He did not strike either of the prisoners. After they had finished these exercises, the prisoners were in "perfect" physical condition, and not as fatigued as after ordinary exercise (R. 61,62). Witness and Laderer had spent 2-1/2 days bringing the prisoners back to camp, but he did not know them apart and could not remember which one was standing up and which one was lying down when Captain Armstrong crossed the ravine that lay between the Rehabilitation tent and the place where the men were being exercised (R. 62,63). He denied that McCandless was lying down when Captain Armstrong arrived (R. 63). Nothing more than routine calisthenics and double-timing was conducted there. Witness did not see either prisoner fall down while double-timing or see either one hit across the back. He was present the whole time and neither he nor any one else mistreated them. He had observed their backs "about a day previous" and had noticed then that they were cut and that they showed signs of a previous beating. The welts were fresh at that time. The prisoners' arms, backs, and legs were also scratched. They had not complained about injuries or pains to him and "just yelled because they did not want to do it" (R. 63-66).

Private Lortz testified that he saw the prisoners when they were first brought back by Steffish and Laderer. He fixed them some food, but after they were taken to the stockade he did not see anything of them nor hear any unusual sounds (R. 55-58).

f. Evidence in rebuttal. Specification 7 of the Charge and Specification 7, Additional Charge I.

Recalled as a witness by the prosecution, Captain Armstrong again described the welts which he found on the prisoners' backs as marks which could not have been made earlier than 24 hours previous to his examination. There was no evidence of primary union, which on clean wounds will start usually within 24 hours, and which did characterize the small pin point scratches, eight to ten inches long, which he found on their arms. The

wounds across their backs "were characterized by a red base with oozing plasma and a blanched area on top" (R. 80). On cross-examination witness testified that he was certain that the person he saw kneeling over McKee or McCandless was the accused. On further cross-examination with reference to his statement to the representative of the Inspector General in February, Captain Armstrong was asked:

> "To refresh your memory, did you tell him this, 'Now, my first impression was that I saw someone bending over hitting a man on the ground with a switch, but I saw nothing of that when I arrived'".

This question elicited the following reply:

> "I was referring to the switch which I did not see when I got there." (R. 80,81).

4. It is impossible to reconcile the testimony offered by the prosecution and the defense on the vital points involved. In addition, the witnesses for each side differ among themselves as to many important features of what occurred. This is particularly true with regard to the events on the evening of 17 December. Sergeant Mohney, the principal witness for the prosecution, stated definitely that he saw no mistreatment of the prisoners within the stockade, and that the mistreatment took place outside the stockade. Private Moore, a prisoner on that date, who was offered as a rebuttal witness after defense's witnesses had testified to an absolute lack of cruelty, contradicted this testimony by affirming that he saw the cruel treatment by Sergeant Steffish of both prisoners in the presence of accused and Colonel Reed within the inclosure where he was doing pushups. It is impossible to state which version the court accepted. It is worthy of note that the court found accused not guilty of four specifications under both the Charge and under Additional Charge I, as to which Sergeant Mohney had testified positively that the accused had committed the acts therein described.

It is the view of the Board of Review that if there was any mistreatment on the night of 17 December this actually took place outside the inclosure. Not only does Sergeant Mohney so testify but the testimony of Major Beall, who was present in the inclosure for about a half hour, negatives any mistreatment there.

As to the occurrences of that night, the Board is of the opinion that there is no clear proof that Sergeant Steffish inflicted cruel treatment on the prisoner, McKee, which could have been prevented by the accused, and that such treatment as the prisoner received was inflicted upon him by order of Lieutenant Colonel (then Major) Reed, accused's superior officer and commander of the battalion. In this connection it will be noted that

Sergeant Mohney merely testified that he had used a switch on McCandless during the course of the half-hour exercise and work-out outside the inclosure under the orders of Colonel Reed, that he did not hear any orders given to Sergeant Steffish, but that Colonel Reed went from one group to the other, and that he saw Sergeant Steffish use a switch on McKee, without any effort on the part of accused to stop him.

As to the occurrences of 6 February, the testimony is far clearer that a switch was applied to both McKee and McCandless. The only direct testimony that Steffish used the switch on the prisoners is that of Sergeant Mohney, who admitted that he himself had switched both men more than once that evening during the workout. The discovery of the fresh welts on the bodies of both men by Captain Armstrong and his assistants indicates clearly that some whipping took place. It is equally clear from Sergeant Mohney's testimony that the order to apply the switches to speed up the prisoners when they slowed down was given by Colonel Reed and not by the accused, although the latter was present and did not interfere. The only other act of cruelty charged by Sergeant Mohney against Sergeant Steffish was the alleged stuffing of McKee's mouth with mud when he screamed. Assuming that this took place, there is nothing to indicate that accused could have prevented it.

5. The Board of Review is of the opinion that the evidence does not establish a violation of either the 95th or 96th Article of War. As to the occurrences of 17 December, we believe that there is a lack of proof of any definite cruel treatment and that, if there was any such treatment, there is no proof that this could have been prevented by accused. As to the occurrences of both nights, we believe that the record clearly shows that the punishment inflicted was under the specific instructions and orders of the Commanding Officer of the Battalion, directed not to the accused but to the two sergeants, and that that officer was present at all times to enforce obedience to his orders and instructions. Under these conditions, it is the opinion of the board that it was not an offense, cognizable under the Articles of War, for accused not to interfere with the compliance by the guards with these orders and instructions.

Paragraph 2a(2), AR 600-375, 17 May 1943, vests in the commanding officer of a unit full responsibility for the security, management, and rehabilitation of all prisoners. Much discretion is granted by these regulations to the commanding officer in the handling of prisoners, but he is barred from transgressing the rules of humane treatment. When he does so and gives an illegal order, he becomes amenable to prosecution under the Articles of War. In the present instance, charges were duly filed against Lieutenant Colonel Reed, based on the same events as those set forth in the specifications under which accused was tried and found guilty, and after trial he was found guilty and sentenced to be dismissed the service (CM 255436). Final action has not yet been taken by the confirming authority.

The ruling of the Board of Review in CM 118423, Antell, is not applicable to the situation now under consideration. In that case the acts of cruel treatment were performed by prison guards, directly under the supervision and control of the prison officer, without interference from superior authority. Approval of these unauthorized acts by superior authority was held not to exonerate the accused. Similarly it was held that orders to the prison officer from superior authority to inflict illegal punishment would not have justified his actions. The obligation on his part to prevent compliance with an order given directly to one of his guards by a superior officer was not involved.

It is a fundamental principle that obedience is one of the first duties of a soldier. In United States v. Clark (31 Fed. 310), the court quoted with approval the following from the earlier case of McCall v. McDowell (1 Abb. (U.S.) 212):

> "If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moments for action would be wasted in wordy conflicts between the advocates of conflicting opinions."

A subordinate need not obey an order that is palpably illegal, but he disobeys any order of his superior at his own risk. It would tend to the creation of a chaotic condition if a soldier, who had received an order from an officer, would then be compelled additionally to determine whether he should obey that order or a contradictory one prohibiting him from doing so issued by another officer superior to him but subordinate to the officer issuing the original order. To hold that the accused in the present case was compelled to prevent the execution of an illegal order given directly by his commanding officer to a prison guard, the commanding officer being actually present while the guard was carrying out the order, would be to recognize an obligation on the part of a subordinate that would tend further to create this undesirable situation.

6. War Department records show that accused is 25-8/12 years of age and married. He attended the University of Texas for a very short time, but did not graduate. He has worked at various jobs, among them a gasoline service station attendant, electrician and radio repair man, shop foreman, aircraft mechanic, and motorcycle stunt man with a traveling show. He was a private in the Texas National Guard from July of 1938 until some time in 1940. He entered the Army of the United States in January 1942, attended the Antiaircraft Artillery School, Camp Davis, North Carolina, and upon graduation therefrom was commissioned a second lieutenant, Coast Artillery Corps, on 14 January 1943. In recommending him for attendance at Officers' Candidate School, his commanding officer, Captain Charles T. Ames, Coast Artillery Corps, stated that accused's character was "excellent" and his qualities of leadership were "good".

7. The court was legally constituted and had jurisdiction of the person and the offenses. For the reasons set forth above 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.

Irving G. Gore, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Herman Moyse, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - JUL 1944 - To the Commanding General, Fourth Army, Fort Sam Houston, Texas.

1. In the case of Second Lieutenant Howard R. Mudd (O-1050002), Coast Artillery Corps, 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 (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 255437).

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

1 Incl.

Record of trial.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

CM 255443 8 Jun 1944

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

v.

Private Paul J. Steckler

(33146804)

OPINION of the BOARD OF REVIEW is
CONFIDENTIAL

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

SPJGQ
CM 255447

18 MAY 1944

UNITED STATES	)	70TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Adair, Oregon, 28 April 1944. Dismissal and total forfeitures.
First Lieutenant OTTO V. MARSHALL (01286320), 275th Infantry.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Otto V. Marshall, 275th Infantry, did, at Benton County, Oregon, between Albany, Oregon and Corvallis, Oregon, on or about 6 April 1944, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection per os with one Lloyd F. Callis, a male human being.

Specification 2: In that First Lieutenant Otto V. Marshall, 275th Infantry, did, at Corvallis, Oregon, on or about 12 April 1944, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection per os with one Lloyd F. Callis, a male human being.

Specification 3: In that First Lieutenant Otto V. Marshall, 275th Infantry, did, at Newport, Oregon, on or about 16 April 1944, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection per os with one Lloyd F. Callis, a male human being.

He pleaded guilty to, and was found guilty of, the Charge and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The law member explained to the accused the meaning and effect of his pleas of guilty in open court and accused stated that he understood the explanation and desired his pleas to stand (R. 6).

The competent evidence for the prosecution consists of the stipulated testimony of the pathic, a minor sixteen years of age, one Lloyd F. Callis, and the voluntary statement made by accused to Major William K. Shepherd, 275th Infantry, who identified this statement and testified as to the circumstances surrounding the occasion when it was made. The Callis stipulation was agreed to by the defense, was received in evidence by the court as Prosecution Exhibit A and was read in open court (R. 6). Because of the age of Callis and the expressed belief of the trial judge advocate that he might be embarrassed or even permanently harmed if compelled to appear in person and testify before the court, the trial judge advocate consented to the stipulation, which reads as follows:

"It is stipulated and agreed by and between the prosecution, defense, and the accused, as evidenced by their respective signatures hereto appended, that if Lloyd F. Callis, Corvallis, Oregon, were present in court and testifying under oath as a witness for the prosecution, he would testify as follows:

"I am Lloyd F. Callis. I reside at 503 N. 18th Street in Corvallis, Oregon. I am sixteen years of age and attend High School in the city of Corvallis. About 12 o'clock at night on April 5, 1944, I was walking home from the show. A car drove up and stopped. An Army lieutenant in this car asked me if I could help him find his tire, which was being repaired. He asked me to get in his car and show him where he might find the place. We found the shop, but his tire was not fixed up yet. He told me his name was Jim Marshall. I found out later that his name was Otto V. Marshall. I drove his car around town for an hour or an hour and a half. He rode with me, and he had his arm around me about half the time. I drove to my home, and he departed.

"He drove up to my home about 6:00 P. M. the next day, April 6, 1944. We drove over to Albany, Oregon, that evening and ate supper there. I suggested that we return to Corvallis from Albany by a parallel route, not the usually travelled highway. A couple of miles from Albany, he put his arm around me while I was driving and played with my penis. I showed him the farm that I had lived on previously. About 10:00 o'clock that night we stopped alongside the road for about an hour. He took my penis out of my pants and played with it. He called me "honey" several times. After he had been

playing with my penis about 15 minutes, he asked me if he could bite it. I did not say he could, but I did not struggle against it. We both got out of the car, and he sat on the floor of the car, and I stood up, facing him. He held me around my hips and put his mouth around my penis and sucked until I went off. We then got in the car and went to my home. I got out, and he left.

"I next saw him a day or two later, on Saturday, about noon. We went in his car out towards Mary's Peak, but could not find the right road. I was driving. We returned to Corvallis, and during a little bit of the trip he laid his head in my lap and rested. We got back to Corvallis about 5:00 o'clock in the afternoon and went to a movie. After that, we returned to my home. He then departed.

"On Monday, April 10, 1944, he came to my home about 7:15 in the evening, and we went to a movie. After that, I drove his car out to Avery's Park near Corvallis. He rode with me. When we got out there, he began to play with my penis again. He tried to suck me off. I was sitting in the car seat, and he placed his mouth down around my penis and sucked. He sucked for about a half hour, but my penis would not erect, so he quit. We returned to my home, and I got out of his car. He then departed.

"My spring vacation from high school commenced Tuesday, the next day, and he came in and picked me up. We went to the movie, and then I drove him out towards Camp Adair in his car. We stopped on a road south of Lewisburg, Oregon, off of Highway 99W. He suggested that we get in the back seat of the car, and we did so. He then tried to suck me off by placing my penis in his mouth, trying from time to time for about half an hour. Then I jacked him off. He tried to jack me off. I could not get any erection during the sucking, but did during the jacking process. We were parked there in all about one hour. I then drove him out to Camp Adair and drove his car back into town.

"I returned his car to him the following Friday.

"He drove to my home on Saturday, April 15, 1944, about 5:00 o'clock in the afternoon. I suggested that we go to the coast, so we started out. I drove his car. We arrived at Newport, Oregon, and checked in at the Gilmore Hotel in Newport, Oregon, a little after 10:00 P. M. We occupied the same room and the same bed. He had a quart of Italian wine with him. He offered me some of it. We both drank some of it. We went to bed about 10:30 P. M. Immediately after we got in bed, he began to play with my penis. He asked me if he could suck me off. I did not say anything. He placed my penis in his mouth. He sucked on my penis for about 15

minutes; my penis was erected, but I did not go off. I then jacked him off. He tried to jack me off, but I did not go off. We remained in bed until about 9:00 o'clock that morning. Then we got up, ate breakfast and returned to Corvallis, arriving about 1:15 in the afternoon.

"Lt. Marshall never did mention paying me on account of the relations I had had with him, and never did pay me anything. I did have the use of his car for about three days, during which time I polished it and made some minor repairs on it.

/s/ Otto V. Marshall
OTTO V. MARSHALL
1st Lieutenant, Infantry
0-1286320
Accused

/s/ Leo H. Silverman
LEO H. SILVERMAN
Major, G. S. C.
Trial Judge Advocate

/s/ Harvey Blythe
HARVEY BLYTHE
Major, Infantry
Defense Counsel"

Major William K. Shepherd, 275th Infantry, Camp Adair, Oregon, testified that on 24 April 1944 (R. 2) accused made a statement to him after having been warned of his rights in the following manner:

"I told the accused I wanted to ask him some questions and get the whole story and I told him he did not have to answer any of the questions and if he did talk, anything he said may be held against him. I also warned him to the same effect after the statement was typed up, just before he signed it".

Accused signed this statement in Major Shepherd's presence and Major Shepherd witnessed his signature thereon in his capacity as investigating officer. Witness then identified Prosecution Exhibit B as the one in question and it was received in evidence with the express consent of the defense, read in open court and marked Exhibit "B" (R. 7). The statement reads as follows:

"STATE OF OREGON)
SS
"COUNTY OF BENTON)

"Personally appeared before me, the undersigned, authority for administering oaths, in cases of this character, one Otto V. Marshall, First Lieutenant, 275th Infantry, who, being duly sworn on oath deposes and says:

"I am, Otto V. Marshall, 01286320, 1st Lt., 275th Infantry, assigned to Company L. I was born 5 July 1915.

"When I was a child I used to play with dolls. When I was about ten years old I commenced masturbating and did this quite a bit. Other boys and I use to masturbate each other. As a boy I attempted no other means of sexual satisfaction. I had homosexual dreams from time to time. In some of these dreams I thought I was having something in the nature of a love affair with a man; not of the sexual type of dream but when I woke up I would find it to have been a wet dream.

"When I was in High School the boys did not think I was a sissy because I held to a standard. This kept me under a continual strain. Although I had not been attracted to basket ball I learned to play in order to maintain my standard. I went out on double dates and did various other things which were repulsive to me.

"When I was 20 years of age a man approached me and wanted to have homosexual relations with me. I refused to comply with his request.

"I first had homosexual relations when I was 23 years of age. The other man involved went down on me. I was really in love with him and loved him very much, however, I was mean to him and sometimes would not let him come over when he wanted to and I would tell him I was going to be married; that hurt him very much. He became attracted to another man and I became so ill and nervous that I had to go to bed.

"When I was teaching school I had my first experience as the more active participant in the homosexual relationship. I kissed the other man and wanted to go farther but at first I could not do so.

"When I was an Enlisted Man I had homosexual relations with a civilian. While I was at Officers Candidate School I had homosexual relations with a Lieutenant.

"I first met Lloyd F. Callis in Corvallis, Oregon, on or about 5 April 1944. I was driving around Corvallis and saw him walking and picked him up. I had left a tire, for repair, in a shop in Corvallis and I asked Callis to help me locate the shop.

"A day or two later, Callis and I rode, in my car, to a farm between Corvallis and Albany, not on the usually

traveled Albany-Corvallis Highway. We parked near a road junction near this farm for about two or three hours. I kissed him. He played with my penis and I played with his. Finally I asked him if I could suck him off. He said I could if I wanted to. I sat in the door of the car, on the floor, and he stood up on the ground facing me. I took hold of his penis and placed it in my mouth. I believe that my hands were then on my knees and his hands were on my head. After a short while he ejaculated. After that he buttoned up his pants and we got in the car and drove away. I did not know whether he had really wanted me to suck him off or whether he was just being nice.

"Several times Callis and I drove to a park near Corvallis and stopped and parked there. Sometimes we just sat and talked. On one occasion which I believe was about the 12th or 13th of April, 1944, while we were sitting in the car at this park I asked him - could I? He knew what I was talking about - about sucking him off -. His penis was erect. I placed my mouth around his penis and tried but he did not come. He would have come if I had sucked longer but I did not want to do so.

"On 15 April 1944, Callis and I drove to Newport, Oregon. I had not secured permission from any military authority to make this trip. It was farther than I thought. Callis and I stayed at the Gilmore Hotel, at Newport and occupied the same room and the same bed. We had no homosexual relations that night. The next morning, however, I did suck his penis but he did not come soon, so I quit. We were both lying down in bed at that time. He did not object to my actions. On that occasion I sucked for perhaps a minute on his erected penis. Before I had commenced sucking we had each been playing with the others penis. Neither of us jacked the other one off.

"Neither Callis or I have ever paid each other for our relations with each other. To the best of my knowledge I have always asked Callis if I might suck him off before attempting to do so. I have not had homosexual relations with any person other than Callis since I arrived at Camp Adair, Oregon.

"On or about 19 April 1944, while driving around Corvallis, Oregon, I picked up a boy whom I am told was Ralph O. Webster. He rode around Corvallis with me for awhile. I did not have any homosexual intent toward Webster.

"I can pick out a person who is homosexually inclined by observation. I do not know how I can tell but I do know.

"Women hold no attraction for me. Close contact with women is repulsive to me although I do like to dance. I do not like to kiss women and to make love to them.

"I sing like a woman, falsetto, in private but never in public. I enjoy formal dinners. I like to do housework and to clean house but do not care for cooking. As a child, I would like to have a man to take care of me much as I suppose a woman would like to have a husband to take care of her.

"When I suck a man off my penis does not erect and I do not ejaculate. It gives me a thrill but not a thrill in any one place.

"I make this statement and swear to it of my own free will and accord. No undue influence or pressure whatsoever has been brought to bear. I fully understand that this statement may be used against me.

"Further deponent sayeth not.

/s/ Otto V. Marshall
OTTO V. MARSHALL,
1st Lt. 275th Infantry.

"Sworn and subscribed to before me this 24th day of April, 1944, at Camp Adair, Oregon.

/s/ William K. Shepherd
WILLIAM K. SHEPHERD,
Major, 275th Infantry,
Investigating Officer."

The defense called as a witness Captain Howard W. Burkett, M. C., Headquarters 70th Infantry Division, Camp Adair, Oregon (R. 7), who testified in pertinent part that he is the Division Neuropsychiatrist and has talked with accused (R. 8). In his opinion, the accused's condition may be diagnosed as psycopathic personality commonly known as homosexuality, resulting from a failure in normal development at a certain level whereby his normal interest in the opposite sex was never attained. His homosexual desires are quite similar to those of a normal man for a woman. This desire is not increased or aggravated by close proximity to a large group of males (R. 8). There is no known medical cure for it (R. 9). A homosexual can control his actions (R. 9).

His rights as a witness in his own behalf having been explained to him in open court by the law member, accused elected to make an unsworn statement through his counsel as follows:

"I realize that I am guilty of the offense as alleged. I also realize that to the average person this is a very disgraceful offense. To me it is also very disgraceful and I've always been ashamed of it, and tho I have had a very strong urge to the contrary, I have refrained from homosexual only by exercising much will power. I have fought against this urge as long as I can remember.

"I believe that the memory of this embarrassment, plus a strong will power, that I feel sure I can maintain, will prevent me from indulging in this act again if I am privileged to live a normal life as a civilian.

"I have liked the Army and would regret very much having to give up my commission, however, the close association with large groups of males has aggravated my condition and I believe that under the circumstances it would perhaps be better for me to leave the Army and pursue my profession in civilian life, which I had successfully done before entering the Army.

"I am a college graduate and believe that if I am given the opportunity to do so, that I can secure a position in civilian life that will permit me to maintain high standards and will permit me to continue the support of my mother as I have in the past.

"My mother is 62 years old and is dependent entirely upon me for support. If I should be placed in prison for this offense, it would not only break her heart but would leave her without any means of support. My family and my friends would all be lost.

"The fact that I volunteered all the information that has been used as evidence in this case seems to be an indication that I am sincere and have been truthful in this case. If I had not volunteered this information willingly to Capt. Burkett, of course, there would have been no ground for this court-martial. This information was volunteered because I realized that my condition was growing worse and I believed that Capt. Burkett, the Division Neuropsychiatrist, could help me."

After this statement the defense rested, both sides made closing arguments and the court was closed (R. 10).

The court reopened and recalled Captain Burkett as its own witness (R. 10), and subsequently at his own request accused was sworn and testified as a witness in his own behalf after being advised a second time of his rights as a witness (R. 14). Captain Burkett's testimony is substantially as follows:

On Saturday, 22 April 1944, and before the charges were preferred in this case (R. 11), he made a psychiatric examination of accused at the request of Major Shepherd and to help in investigating "another incident" which led to suspicion of Marshall (R. 11). Accused did not know at that time whether or not he was going to be court-martialed for the instant offense. As a result of this medical examination, which extended to a consideration of whether accused was able to differentiate between right and wrong and adhere to the right, it was determined he was so able to differentiate and has the ability to adhere to the right (R. 12).

On Monday, 24 April 1944, both in the morning and afternoon, Captain Burkett again interviewed accused (R. 10) during the investigation of the instant charges conducted by Major Shepherd in his official capacity as investigating officer. Burkett then told accused he was being investigated for court-martial charges (R. 11). Captain Burkett did not, during this investigation, indicate to accused "that no charges would be brought against him for making these voluntary statements" (R. 13).

Accused, having been advised again of his rights, was sworn and testified as follows:

He first met Captain Burkett on Monday, 24 April, at 8:00 a.m. at Regimental Headquarters of the 275th Infantry (R. 14).

"A. Well, I was introduced to the Captain and I had been confined to quarters before this and wasn't notified of this confinement. I was called over to 275th Headquarters and introduced to the psychiatrist, and he told me that he had a statement; he first asked me if I knew anyone in Corvallis. I told him I knew Lloyd Callis. So he started asking me personal questions and he told me that he had a statement from Lloyd Callis containing personal affairs and I told him the whole story on the sheet there. He said he was there to help me and not to harm me, and he wanted me to tell the truth, and I did.

"Q. What impression did Captain Burkett leave with you relative to your Army status?

"A. Well, I have always heard of psychiatrists and I knew if I ever met one and had an interview I would probably have to get out of the Army because I knew they didn't want homosexuals in the Army because of the grief they have to go through and the strain to hold themselves as normal men. It just really led up to a resignation of my commission.

"Q. Did he leave an impression with you then that nothing was to be done other than the fact that you would be released from the Army?

"A. That's right, he did not tell me that I would be court-martialled.

"Q. Then was it your impression that whatever you told Captain Burkett would simply lead to no more punishment than your being discharged from the Army?

"A. Well, at first I thought it was confidential. I had never met a psychiatrist but always wanted to, but I was so ashamed of it. When I met Captain Burkett I just told him the whole story, thinking he could help me."

Here ensued an oral battle in which the defense attempted to show that accused's confession (Ex. B) was based on the statements he made to Burkett which were "of a confidential nature" (R. 15). On cross-examination accused admitted that on 19 April 1944 he was arrested by the military police at Corvallis, Oregon, on complaint of Ralph Webster, a minor, age 15 (R. 16). His statement to Major Shepherd was voluntary and after having been advised of his rights (R. 17) when he was interviewed by Captain Burkett, "Major Shepherd left and closed the door" (R. 17). Accused thought the interview was confidential although Burkett did not say it was. When accused finished his story Burkett called Shepherd back, made accused repeat his story, and Shepherd took it down in shorthand (R. 17). Although Captain Burkett and Major Shepherd did not say so, accused thought that they insinuated he would be permitted to resign (R. 18).

4. The pleas of guilty plus accused's voluntary confession are amply sufficient to sustain the findings.

Some confusion ensues because of an inapt use of phraseology in the record as to the voluntariness of accused's confession. Captain Burkett made a mental examination of accused to test his sanity on Saturday, 22 April 1944. This was two days before charges in the instant case were preferred and was evidently inspired by some incident pertaining to the complaint of a minor named Ralph Webster, which Major Shepherd was investigating aside from this case. The nature of the complaint is not shown. The following Monday, 24 April 1944, accused was hailed before Major Shepherd, the officer who was named on that same date under the provisions of Article of War 70 to investigate the charges in the instant case. Burkett also participated in this investigation, and got a statement from the accused when only he and the accused were present. Accused later reiterated that statement to Major Shepherd, after being warned of his rights, as Shepherd testifies, and as accused himself corroborates under oath (R. 17). Apparently the court by questioning Burkett was probing to find out if accused's confession was, in fact, voluntary, and defense counsel tossed in the inference that, whether it was voluntary or not, it was a privileged communication between doctor and patient and therefore not competent. This, of course, is not the law. There is no Federal statute providing that communications between a physician and his

patient shall be privileged and the Manual for Courts-Martial expressly provides that they are not (par. 123, M.C.M. 1928, p. 131). In this respect military law follows the common law. Whatever the motive of the court they evidently overlooked the fact that since the accused called Dr. Burkett as his own witness he thereby waived the privilege if there had been one.

Regardless of this confusing interlude at the trial, it still is clear that by pleading guilty in open court with a full understanding of his rights in the premises, accused made a judicial confession, which is the highest form of proof known to the criminal law.

5. War Department records disclose that accused is now 27 years of age and single. He graduated from high school in 1935 and from Southeastern State College, Durant, Oklahoma, in 1940 which a B.S. degree. From 1 June 1936 to September 1938 and a gain from 7 November 1939 to September 1940 he served in the Medical Detachment of Company G, 179th Infantry, and was a member thereof when it was federally recognized. As a sergeant of this unit in the 45th Infantry Division he was selected to attend the Officers Candidate School and was commissioned a second lieutenant, Army of the United States, and entered into active duty on 30 June 1942. He was promoted to first lieutenant, Infantry, Army of the United States, on 18 December 1943.

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

William H. Rounds, Judge Advocate.

William H. Gaunbrell, Judge Advocate.

Herbert D. Fredman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 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 Otto V. Marshall (O-1286320), 275th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. 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. sig. of S/W.
3 - Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 396, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGN
CM 255471

18 May 1944

FORT HUACHUCA
NINTH SERVICE COMMAND
ARMY SERVICE FORCES

UNITED STATES

v.

Private WILLIAM H. PRINCE (38032482), Supply and Service Detachment, Service Command Unit 1922.

Trial by G.C.M., convened at Fort Huachuca, Arizona, 27 April 1944. Life, Penitentiary.

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, 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 Private William H. Prince, Supply and Service Detachment, Service Command Unit 1922, did, at Fort Huachuca, Arizona, on or about 17 April 1944, forcibly and feloniously, against her will, have carnal knowledge of Melecia Rutiaga de Vaughn.

The accused pleaded not guilty to and was found guilty of the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leaven-

worth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that shortly after 12:00 a.m. on 17 April 1944 Frank Morres, a resident of Nogales, Arizona, drove his car through the North Gate of Fort Huachuca, Arizona, and continued toward the Old Post. He was accompanied by Melecia Rutiaga de Vaughn, his mother-in-law and godmother, who was seventy-three years of age, by Peter de Vaughn, her son, and by Peter's little boy. They were all on their way to visit Frank Morres' son who was serving as an enlisted man at the Old Post under the name of Frank Eggerton (R. 7-9, 12, 18, 44, 46).

About a mile and a half beyond the North Gate the car developed engine trouble and ceased to operate. At Morres' request Peter de Vaughn and his son set out on foot to obtain help. For some reason which does not appear in the record they were delayed in the performance of their mission and had still not been heard from two hours later. It was cold and Mrs. de Vaughn was "frozen". About 2:00 a.m. a jeep drove up alongside and, upon being hailed by Morres, came to a stop. The accused was at the driver's wheel. To his right on the front seat was Private First Class James Young. In the rear sat a Corporal named Hayes. Morres saw only the occupants of the front seat (R. 8-9, 15, 19-20, 27-28, 34, 36, 45).

Young and Hayes were members of the Military Police. The accused was attached to the Supply and Service Detachment, but had been assigned that evening to drive the "Sergeant of the Guard around the patrol" in a jeep. All three had done some drinking while on duty. The accused had had some wine and whiskey but was not intoxicated (R. 25-28, 24-36, 38, 50, 92-93, 95; Pros. Ex. 4, pp. 1, 3).

Morres asked that he be given a ride to his son's house so that he might obtain a car in which to convey his mother-in-law to their destination. The accused replied, "I will carry you up but I can't bring you back". After reassuring his mother-in-law in Spanish that he would soon return, Morres seated himself in front to the right of Young and was driven to a point some one hundred yards away from Eggerton's house. Not finding his son at home, Morres walked about a quarter of a mile to where a Sergeant Smith lived and awakened him. After Smith had spent some fifteen minutes in dressing, both entered his car and proceeded to the rescue of Mrs. de Vaughn (R. 9-12, 18-22, 28-30, 45).

In the meantime the accused had driven to the guardhouse.

He and Young entered the building but Hayes walked on "toward the company". After "a few moments" the accused "said something about he had to go make some kind of patrol, and he left and stayed about forty-five minutes". He immediately headed for the stalled car. Upon reaching it, he got on the seat beside Mrs. de Vaughn, laid her down, raised her skirts, and "attacked [her] with his sexual organ". She "was very frightened and it was very painful". She "resisted and told him not to touch [her]. He held [her] very tight and [she] could not do anything because of [her] weakness". Penetration was effected. After completing his first attack, he left the car. In "a very short time he returned and raped her again". Though differing in certain material respects, his own version of what occurred tends to confirm this account. In a pre-trial statement which was obtained from him after he had been warned of his rights under Article of War 24 and which was properly admitted into evidence when offered by the prosecution as its Exhibit No. 4, he has stated that:

> "* * * this lady was sitting in the car. I stopped and went to the car and asked her could I get in and she didn't say no. I don't know how she looked or what. I had been drinking and it was dark. She didn't say I couldn't get in or what. I got in and sat down. She still didn't say anything or put up a struggle and so I touched her. She still didn't say anything, so I asked her about the sexual intercourse and she still didn't say anything, and I touched her on the shoulder and she just lay down, and I couldn't consider that rape. I know she says I was there twice. That is wrong. In fact, I just started and got up. I didn't have to force her or nothing. I didn't know how old she was. That is all there is". "At first I couldn't [tell how old she was]. That is what I realized after, and that is why I stopped. That is when I left. I mean I didn't know exactly. I knew she was pretty old, that is why I got up and left" (R. 31, 39, 45-49, 52-53; Pros. Ex. 4, pp. 1, 5, 7-8).

When Morres arrived at the scene of the attacks, Mrs. de Vaughn related her terrifying experience, informed him that she was bleeding, and showed him a glove which the accused had left in the car. She described the accused as "colored, not very dark" with big eyes and a moustache. Morres and Sergeant Smith immediately reported the crime to the Provost Marshal, who had her removed to the "No. 2 Hospital".

An examination by Captain William B. Price of the Medical Corps disclosed "a fresh first degree laceration at the posterior commissure" of the genitalia, extending to the "inside ivolving the mucosa and also outside involving the skin". There were also two small abrasions on the right side of the external genitalia between the labia majora and the labia minora". The injuries were caused by "trauma". They were "not necessarily" the result of the introduction of a penis. According to the Captain, in "cases of senility there is atrophy or shrinking of the external genitalia so that instead of being elastic it is fragile and easily torn" (R. 12-14, 22-25, 46, 57-61).

The accused returned to the guardhouse about 3:20 a.m. In the presence of other enlisted men he boasted that he had just had some "good stuff," some "good pussy". He said that the "lady" was "about twenty-two or three". The front braid on his garrison cap "was torn off, one side". This damage he attributed to the fact "that the lady didn't want him to leave and caught hold of his cap and pulled it" (R. 31-33, 36-37, 39-42, 93).

Within the hour Technician Fourth Grade John D. Keel, who was in charge of the patrol, received word of Mrs. de Vaughn's rape. He dispatched a Corporal Busby to carry her to the hospital in a "recon car" and directed the accused to follow it and, in case it ran out of gasoline "to carry the patient" in his jeep. The accused trailed the "recon" car a short distance and then, in contravention of his orders, returned to the guardhouse. He went out again on an undisclosed mission and was involved in a "wreck" in which he sustained injuries to his head (R. 42-43; Pros. Ex. 4, p. 6).

Later the same morning a search of the back seat of Morres' car by Second Lieutenant Kenneth H. Beckenhauer resulted in the finding of the mate to the glove which Mrs. de Vaughn had secured. When at 5:30 a.m. the accused was brought in for questioning, he stated that "he did have a pair". Upon being subsequently shown the gloves left in Morres' car, he said "that they were identical with the type * * * he had" and that "they were actually his". He tried one of them on and it fitted him satisfactorily. About 6:00 a.m. his trousers and his shorts were removed at the hospital. Bloodstains were found on both. Those on the shorts were analyzed but those on the trousers were not. The blood of the accused and Mrs. de Vaughn and that on the shorts was typed. All three were different, being B, O, and A, respectively (R. 50-51, 62-64, 95-96, 98).

4. The accused, after having been apprized of his rights relative to testifying or remaining silent, took the stand on his own behalf.

Major R. Hernandez, the chief of the Neuropsychiatric Section, Station Hospital No. 1, was the only other witness called by the defense. He testified that, on the basis of several examinations between 18 April and 21 April 1944, he was of the opinion that the accused was "not mentally deficient, although he may be mentally retarded, meaning that he has not had the usual ordinary educational opportunities". In the capacity of a "general medical man, not as a specialist in nerves and mental diseases", the Major also stated that:

> "Age will have a tendency to produce an atrophy of the external and internal organs - internal genital organs, rather. This atrophy may progress to the extent that a condition known as stenosis may result, which is characterized by a fusion of the inner walls of the genitalia. This fusion, however, depends on various factors, particularly on whether or not the woman has had sexual intercourse during recent years or not. If the sexual intercourse has not taken place, in due time, possibly ten or more years after that, it might be a tendency for these walls to approach each other to the extent that an almost complete fusion might take place" (R. 65-69).

The testimony of the accused was, in the main, to the effect that he was under the influence of liquor and drugs on the night of 16-17 April 1944, and that he did not remember then having intercourse with a woman. He had consumed large quantities of wine and whiskey and some beer and had had two marihuana cigarettes, one of which had been given to him by Corporal Hayes. It had been smoked in the presence of Private First Class Young. This was not the accused's first experience with the "weed". He had "smoked since [he had] been in the Army, just off and on". Two or three "sticks" a week were consumed by him. The last time he had purchased some, they had cost him a dollar each (R. 71, 76, 78-82).

Upon direct examination he denied even having seen a woman in the stalled car. Under cross-examination by the trial judge advocate, his memory was refreshed, and he did recall that he "saw one". He admitted also that he had entered the car, but he categorically denied that he had had intercourse. When asked whether he had "tried to", he replied, "Not that I can remember". Prior to the trial he had acknowledged an attempt in his statement to Lieutenant Beckenhauer (R. 77, 82-84).

As a result of a "jeep accident" the accused had sustained certain injuries to his head. When questioned about the blood on his trousers and

underclothes, he said that "I can't account. I was wiping my head and my hand was bloody * * * and I don't know how I got that" (R. 78, 84).

5. Private First Class Young and Technician Fourth Grade John D. Keel were recalled on rebuttal by the prosecution. They both testified that the accused appeared to be sober and normal on the morning of 17 April 1944. Young who had been on duty with the accused had not seen any marihuana smoking and had not heard the subject discussed. Captain Julian O. Blache of the Medical Corps, who was also used by the prosecution on rebuttal, stated, among other things, that he had tested the blood of the accused on the morning of 17 April 1944 for alcoholic content. He had found the alcoholic concentration to be "132 milligrams percent". The accepted standard for drunkenness was "200 milligrams and above" (R. 86-95, 97).

6. The Specification of the Charge alleges that the accused did, "on or about 17 April 1944, forcibly and feloniously, against her will, have carnal knowledge of Melecia Rutiaga de Vaughn". This offense is set forth as a violation of Article of War 92.

Paragraph 149b of the Manual for Courts-Martial, 1928, defines rape as the "unlawful carnal knowledge of a woman by force and without her consent". It would be difficult to conceive of a more horrible example of this heinous crime than the instant case. The victim was seventy-three years old, a venerable age which should alone have been her shield against the world. A mishap placed her on a lonely highway late at night far from the protection afforded by friends, neighbors, and relatives. The accused had been assigned to assist the military police in their patrol of the reservation. Although not officially himself a member of the military police, he for the time being shared their responsibility to maintain order and suppress crime. He discharged his duty by committing two violent and loathesome attacks upon a woman who had been deprived by advanced years of the power to resist effectually.

The medical testimony concerning the nature of the injuries inflicted upon Mrs. de Vaughn can lead to no conclusion other than that penetration was accomplished. The accused's boast, upon returning to the guardhouse, that he had just enjoyed some "good pussy" provides strong corroboration.

His claim of intoxication is not supported by the evidence, While he may have consumed some intoxicating liquor, the record is clear that he had full control of his faculties and that he committed his attacks deliberately and wantonly. The findings of guilty are fully sustained.

7. The record shows that the accused is about 20 years of age; that he was inducted shortly before his assignment to Battery "B",

33rd CATB, Camp Wallace, Texas, on 3 June 1941; and that he had 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 and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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

SPJGV
CM 255568

9 JUN 1944

UNITED STATES	XXII CORPS
v.	Trial by G.C.M., convened at Camp Campbell, Kentucky, 14 April 1944. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant GLENN F. RICHARDSON (0-1184576), Field Artillery.	

OPINION of 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 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 58th Article of War.

Specification: In that Second Lieutenant Glenn F. Richardson, 274th Armored Field Artillery Battalion, did, at Camp Campbell, Kentucky, on or about 7 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at El Reno, Oklahoma, on or about 22 February 1944.

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

Specification: In that Second Lieutenant Glenn F. Richardson, 274th Armored Field Artillery Battalion, did, at St. Louis, Missouri, on or about 16 February 1944, feloniously embezzle by fraudulently converting to his own use Forty Dollars and Fifty Cents ($40.50), lawful money of the United States, property of the Wayside Auto Court, entrusted to him by the said Wayside Auto Court.

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

Specification 1: In that Second Lieutenant Glenn F. Richardson, * * *, did, at Camp Campbell, Kentucky, on or about 7 February 1944, with intent to defraud, wrongfully and unlawfully, make and utter to Planters Bank and Trust Company a certain check, in words and figures as follows, to wit:

Emporia, Kans., 2-7 1944 No. 2
CITIZENS NATIONAL BANK
of Emporia
Pay to the Order of Planters Bank & Trust Co. $50.00
Fifty and no/100 Dollars.
For Cash Glenn F. Richardson
0-1184576 2d Lt, FA

and by means thereof did fraudulently obtain from the Planters Bank and Trust Company $50.00, lawful money of the United States, he the said Second Lieutenant Glenn F. Richardson, then well knowing that he did not have and not intending that he should have any account with the Citizens National Bank of Emporia, Kansas, for the payment of said check.

Specification 2: (Nolle prosequi entered by direction of the appointing authority).

Specification 3: (Nolle prosequi entered by direction of the appointing authority).

Specification 4: Same form as Specification 1, but alleging check dated 7 February 1944, payable to the order of M. L. Cross Co., made and uttered to M. L. Cross Co., Clarksville, Tennessee, and fraudulently obtaining thereby $20 in cash.

CHARGE IV: Violation of the 96th Article of War. (Finding of guilty disapproved by the reviewing authority).

Specifications 1 to 4 inclusive: (Findings of guilty disapproved by the reviewing authority).

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

Specification: In that Second Lieutenant Glenn F. Richardson, * * *, having been duly placed in confinement at Station Hospital, Camp Campbell, Kentucky, on or about 20 March 1944, did, at Camp Campbell, Kentucky, on or about 6 April 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all Specifications and Charges and was found guilty by appropriate exceptions and substitutions, of so much of Charge I and its Specification as involved absence without leave in violation of the 61st Article of War and guilty of all other Charges and Specifications except Specifications 2 and 3 of Charge III as to each of which a nolle prosequi was entered by direction of the appointing authority as noted above. 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 at such place as the reviewing authority might direct for five (5) years. The reviewing authority approved only so much of the findings of guilty of Charge II and its Specification as involved embezzlement of the sum of $24.50 at the time and place and in the manner alleged, disapproved the findings of guilty of all Specifications of Charge IV and Charge IV, approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three (3) years, and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced competent evidence to prove that accused absented himself without leave from his organization, 274th Armored Field Artillery Battalion, Camp Campbell, Kentucky, at 1700 on 7 February 1944 (R. 16-20; Pros. Ex. B). Sometime that same day a person who identified himself as Glenn F. Richardson entered the Camp Campbell branch of the Planter's Bank and Trust Company and presented a check for $50 dated 7 February 1944, made to the order of that bank, drawn on Citizens National Bank of Emporia, Kansas, and bearing the signature "Glenn F. Richardson, 2d Lt FA" as maker (R. 48; Pros. Ex. E). The bank teller wrote the serial number O-1184576 on the check which he presumed he obtained from the AGO card presented to him for identification. He cashed the check and, after it was processed through regular clearing channels, it was returned unpaid (R. 48, 49; Pros. Ex. E). The bank was subsequently reimbursed the amount of the check (R. 49). On the same day an individual also identifying himself as Glenn F. Richardson entered the store of M. L. Cross Company, a men's clothing establishment in Clarksville, Tennessee, and the bookkeeper cashed a check for him in the amount of $20. The check was dated 7 February 1944, was drawn on the Citizens National Bank of Emporia, Kansas, to the order of M. L. Cross Company and was signed "Glenn F. Richardson, 2d Lt FA". After processing through banking channels the check was returned unpaid (R. 45-47; Pros. Ex. D). No reimbursement has been made to the payee of the check (R. 47).

According to the records of the Citizens National Bank, Emporia, Kansas, the accused had no account with them at any time from 1 January 1940.

On 27 January 1944 accused wrote the bank that he wished to open an account but never did so and no pay check for him was ever received for deposit (Pros. Ex. F).

On 10 February 1944 accused, using the name Joseph E. Hays and dressed in civilian clothes, applied for work at the Wayside Auto Court in St. Louis, Missouri, stating he desired a steady job (R. 23, 24, 31-33, 37). He claimed to have been discharged from the Army after being wounded while serving in the Pacific area (R. 23). Accused was accompanied by a woman who was represented to be "Mrs. Hays" and they were both hired at a total weekly wage of $35 by Philip LaFerla, one of the co-owners of the auto court (R. 23-25). They were instructed that "Mrs. Hays" was to run the office of the auto court during the mornings and early afternoons, renting quarters and collecting the charges for the accommodations, and the accused was to perform similar duties during the nights (R. 26). The accused and "Mrs. Hays" had been staying at the Maryland Hotel in St. Louis but they promptly moved to quarters provided for them at the auto camp and thereafter entered upon their duties on 12 February (R. 23-26). On that day accused told LaFerla that his previous story concerning his discharge from the Army as a result of disability from wounds was false and that in fact he had been dishonorably discharged for striking a superior officer. He explained his first falsehood by stating that his wife was ignorant of his dishonorable discharge and that he did not wish to tell her. It was then agreed accused would have his dishonorable discharge sent to LaFerla from an Oklahoma bank to serve as identification of the accused (R. 26).

Accused and "Mrs. Hays" worked at the auto camp for several days. On the night of 15 February 1944 accused reported for work relieving Domenic Amaro, one of the co-owners. Amaro turned over to accused $40.50 which had been collected during the day (R. 27, 29, 33, 34). It was estimated that there was an additional $16, approximately, also left with the accused representing the proceeds of cigarette and soda sales (R. 29). According to the records made by the accused during the night he received $23.50 in proceeds from business for the night (R. 27, 29, 31). The following morning both the accused and "Mrs. Hays" were missing and so was all the money mentioned above except for a few pennies found in one cash drawer. All of their personal belongings had been removed from their quarters (R. 28, 37). This money was the property of Wayside Auto Court and the accused had been given no permission to use it or to pay himself from it (R. 27). The money has never been repaid to the proprietors of the auto camp (R. 35, 37).

On 22 February 1944 accused was arrested by civil authorities while in bed at a tourist court at El Reno, Oklahoma (R. 40, 42). He dressed in his uniform which was on a chair by his bed and was the only outer clothing visible. On the way to police headquarters he admitted he was absent without leave from his organization and that he had issued some "hot checks" in Emporia, Kansas, but that he believed his mother had taken care of them (R. 41, 44). Accused was possessed of "quite a roll of bills" when arrested (R. 42). He was turned over to the military authorities at Fort Sill, Oklahoma and confined on 22 February until he was sent back to his organization at Camp Campbell on 27 February (Pros. Ex. C). On 1 March 1944 he rejoined his organization (Pros. Ex. B).

On 28 March 1944 the investigating officer appointed to examine the original charges interviewed the accused. After being fully advised of his rights and without any threats or promises being made, the accused expressed the desire to make a statement in mitigation of his offenses. (R. 60, 61). Thereafter he gave a lengthy statement, asserting, in essential particulars, that on 27 January 1944 he wrote to the finance officer serving his organization requesting that his check be sent to the Citizens National Bank of Emporia, Kansas and also wrote the bank on the same day that his monthly pay check was to be deposited with them (R. 64). Apparently he was transferred to and arrived at Camp Campbell on 2 February, received no pay check but did receive a check book from the bank so he assumed his check had been deposited. On 6 February a Miss Imogene Ludwig came to the camp to visit him (R. 64). On 7 February he received his pay check and realized then that a check he had cashed on 2 February would be dishonored. He was also late reporting for duty that day and his battalion commander restricted him to the area. He admitted writing and cashing the check for $50 at the Post Bank on 7 February thinking "that when I came back I could make the check good" (R. 65). Obtaining a quart of whiskey he commenced drinking and thereafter he and Miss Ludwig went to the town of Clarksville where he admitted cashing the check for $20 at the M. L. Cross Company. Their itinerary then took them to Nashville and Memphis, Tennessee, and St. Louis, Missouri, where they obtained a job at the Wayside Auto Court to earn enough money to return Miss Ludwig to Oklahoma and accused to his organization. After working four days accused "got scared and wanted to return to camp" so he took $24 from the funds of the auto camp as wages he believed due them and left the remainder of the money in a drawer in the office desk. They proceeded to Duncan, Oklahoma, so that accused could talk to Miss Ludwig's mother and "on the eve before I was picked up, I had started back to Camp Campbell, Kentucky. All this time since I had left St. Louis, I was wearing my Army uniform" (R. 66).

On 20 March 1944 accused was confined in the station hospital at Camp Campbell by his battalion commander apparently because the post

stockade had no facilities for officer prisoners (R. 12, 60-62; Pros. Ex. B). On the evening of 6 April 1944 a search of the prisoners' ward at the station hospital at Camp Campbell revealed that the accused was not present. His clothing was missing from the ward clothing room and a bathroom window, screen and grille guard were found to have been opened. A broken bathrobe cord was discovered tied to the grille. The accused had received no permission to leave the hospital since his confinement on 20 March 1944 (R. 52-54). Corporal William D. Stults, corporal of the guard on 6 April, was informed of the accused's escape (R. 55). Remembering an address he had seen on a letter shown him by the accused, Corporal Stults accompanied by Captain Oliver J. Buser, duty officer in the provost marshal's office on this date, went to a particular neighborhood in the nearby town of Gracey and made certain inquiries. While there a taxicab appeared and peering inside of it they discovered the accused in the rear seat (R. 56-59). Accused was taken into custody and stated to his captors at the time that it was fortunate they had apprehended him so promptly otherwise they never would have since he was about to go to Panama (R. 57). Accused was returned to Camp Campbell and confined in the post stockade about 2300 hours, 6 April (R. 59).

At the inception of the trial, Captain Raymond Nadell, M.C., a neuropsychiatrist in the neuropsychopathic section of the station hospital, testified he had the accused under observation during his confinement in the station hospital and diagnosed accused's condition as that of a constitutional psychopath suffering from inadequate personality, i.e. emotionally unstable, impulsive in action, erratic in behavior, and motivated by poor judgment (R. 7, 8). He was not insane, however, and knew the difference between right and wrong (R. 8).

4. After accused's rights had been fully explained to him, he elected to take the stand and testify under oath in his own behalf. He stated that on 7 February 1944 he had a lot on his mind, including financial worries and had experienced "quite a bit of turmoil" with Miss Ludwig (R. 22). He was married and had two children and he was "snowed under in debt" as a result of attempting to support his family and still carry on his association with Miss Ludwig which had commenced about a year after he entered the Army (R. 76, 77). He decided he had to go away for a few days and think over his affairs so he and Miss Ludwig, who was at the guest house on the post, departed for Nashville (R. 73).

His agreement with LaFerla as to wages at Wayside Auto Court was that he and Miss Ludwig together were to receive $35 a week plus an additional $1.50 extra until further help was hired. Having worked

four nights he figured they were entitled to $24.50 which he took with him from the auto court funds, leaving the balance of the funds in the office cash drawer. They left the auto court about 2 a.m. without locking the office door (R. 73). From there they traveled to St. Louis, Missouri, and then to Duncan and El Reno, Oklahoma. He went to El Reno to catch a train to return to Camp Campbell but on 22 February he was apprehended in that town by civil authorities, taken to Fort Sill, Oklahoma, and eventually arrived at Camp Campbell on 1 March 1944 (R. 74, 75). He was on duty at the latter station until 20 March when he was confined in the station hospital by his battalion commander (R. 75).

Accused was intoxicated from the day he left Camp Campbell, 7 February until the morning after he arrived in St. Louis, approximately a three-day interval of time (R. 79). He took $24.50 from the funds of Wayside Auto Court as wages he and Miss Ludwig had earned while working there although he had no agreement permitting him to do so (R. 81).

Accused had no idea what prompted him to escape from confinement. He denied telling Corporal Stults that if they hadn't caught him when they did they never would have. The purpose of his visit to the town of Gracey after his escape was to see Miss Ludwig (R. 82).

5. Under Charge I and its Specification, the initial absence without leave on 7 February 1944 is proven by the morning report entry of accused's organization submitted at Camp Campbell on 8 February 1944 (Pros. Ex. B) and its termination at Fort Sill, Oklahoma, on 22 February 1944 is proven by a morning report entry on that date submitted at Fort Sill (Pros. Ex. C). The accused admitted this absence both in his statement and his sworn testimony at the trial. The evidence sustains the findings of guilty of absence without leave under Charge I and its Specification.

Under Charge II and its Specifications, the evidence shows that funds of the Wayside Auto Court in the amount of $40.50 were turned over to the accused on the night of 15 February and accused took in an additional $23.50 from business done by him during the night. Only a few pennies were found in the office cash drawer the next morning. Accused admitted he left the auto camp during the night taking with him $24.50, the amount which he computed was due as wages. He had no authority however, so to pay himself. His pay was not due until the end of his work week. These funds were the property of Wayside Auto Camp

when appropriated by him. The evidence sustains the findings of guilty of this Specification and Charge as approved by the reviewing authority.

Under Specifications 1 and 4 of Charge III, the evidence offered by the prosecution and the accused's statement conclusively prove that he cashed two checks for a total of $70 at a time when he knew he had no funds in the drawee bank and had no intention of depositing any. Accused testified he thought he could make the checks good when he returned from his perambulations. Such conduct is dishonorable and constitutes a violation of Article of War 95 (Dig. Op. JAG, 1912-40, sec. 453 (21)). The evidence fully supports the findings of guilty of Specifications 1 and 4 of Charge III.

Under the Additional Charge and its Specification, the evidence of the prosecution and the accused's sworn testimony fully establish that the accused escaped from confinement in the station hospital at Camp Campbell on the evening of 6 April 1944 being apprehended by military authorities later that same evening in the nearby town of Gracey, Kentucky. The evidence sustains the findings of guilty of the Additional Charge and Specification.

6. The accused is about 27 years of age. War Department records reveal that he was inducted into the service on 9 December 1942 and was commissioned a second lieutenant, Field Artillery, on 12 August 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of violations of Articles of War 61, 69 and 93.

Thomas H. Tappy, Judge Advocate.

Robert B. Harrison, Judge Advocate.

Robert C. Trivelpiece, Judge Advocate.

SPJGV
CM 255568

1st Ind.

War Department, J.A.G.O., 17 JUN 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Glenn F. Richardson (O-1184576), 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 as approved by the reviewing authority and to warrant confirmation of the sentence. As approved by the reviewing authority the accused was found guilty of absence without leave from 7 February 1944 to 22 February 1944, in violation of Article of War 61; of embezzling the sum of $24.50 from Wayside Auto Court of St. Louis, Missouri, in violation of Article of War 93; of fraudulently uttering two checks in the total amount of $70 knowingly having no funds on deposit to satisfy them, in violation of Article of War 95; and of escape from confinement, in violation of Article of War 69. As approved by the reviewing authority, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. Sometime prior to entering the service, the accused was prosecuted for larceny upon complaint of his father and served 11 months in a State Reformatory for the offense. I recommend that the sentence as approved by the reviewing be confirmed, but that the forfeitures be remitted, 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 as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 397, 18 Jul 1944)

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

SPJGN
CM 255602

12 JUN 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant DAVID C. PRITCHARD (0-804036), Air Corps.	)	Trial by G.C.M., convened at Gunter Field, Montgomery, Alabama, 4 April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 64th Article of War.

Specification 1: In that Second Lieutenant David C. Pritchard, 86th Flying Training Squadron, Gunter Field, Montgomery, Alabama, having received a lawful command from Captain Thomas D. Hatcher, Jr., his superior officer, to cease flying for the night, did, at Deatsville Auxiliary Air Field, on or about 5 March 1944, wilfully disobey the same.

Specification 2: In that Second Lieutenant David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, having received a lawful command from Major George F.

Cermak, his superior officer, to remain in the 86th "A" Flight Office, Gunter Field, Montgomery, Alabama, until he, the said Major George F. Cermak, arrived there, did, at Gunter Field, Montgomery, Alabama, on or about 5 March 1944, wilfully disobey the same.

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

Specification: In that Second Lieutenant David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, was at or near Montgomery, Alabama, on or about 6 March 1944, in a public place, to wit: Hilda's Restaurant, drunk, while in uniform.

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

Specification 1: In that Second Lieutenand David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, did, at or near Gunter Field, Montgomery, Alabama, on or about 5 March 1944, wrongfully pilot and fly an airplane described as a BT-13, while he was under the influence of intoxicants, said Second Lieutenant David C. Pritchard, being, at the time, engaged in giving flight instruction to Aviation Cadet Robert H. Ramsdell.

Specification 2: In that Second Lieutenant David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, did, on or about 5 March 1944, at or in the vicinity of Deatsville Auxiliary Air Field, Deatsville, Alabama, violate the written provisions of Subparagraph a, Paragraph 93, Flying and Safety Regulations, Army Air Forces Pilot School (Basic), Gunter Field, Montgomery, Alabama, dated 10 November, 1943, to which he was subject and which provides as follows: "Pilots will not fly at an altitude below one thousand (1000) feet above the ground except when landing or taking off, when necessary to complete a duly assigned mission or in case of emergency.", in that he piloted and flew an airplane described as a BT-13 at an altitude below one thousand (1000)

feet above the ground at a time when he was not landing or taking off nor in case of an emergency and it then and there not being necessary to do so to complete a duly assigned mission.

Specification 3: In that Second Lieutenant David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, did, on or about 5 March 1944, at or in the vicinity of Deatsville Auxiliary Air Field, Deatsville, Alabama, violate the written provisions of Sub-paragraph b, Paragraph 93, Flying and Safety Regulations, Army Air Forces Pilot School (Basic), Gunter Field, Montgomery, Alabama, dated 10 November 1943, to which he was subject and which provides as follows: "Acrobatic maneuvers will be performed only in the prescribed acrobatic areas and acrobatic maneuvers will be completed not lower than three thousand (3000) feet above the ground. No acrobatic maneuver will be performed in proximity to other aircraft, or over cities, towns, or villages. Spins will not be commenced or entered at an altitude less than seven thousand (7000) feet above the ground.", in that he completed acrobatic maneuvers at an altitude lower than three thousand (3000) feet above the ground.

Specification 4: In that Second Lieutenant David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, having been restricted to the limits of Gunter Field, Montgomery, Alabama, did, at Gunter Field, Montgomery, Alabama, on or about 12 February 1944, break said restriction by going to Hilda's Restaurant at or near Montgomery, Alabama.

Specification 5: In that Second Lieutenant David C. Pritchard, 86th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, having been restricted to the limits of Gunter Field, Montgomery, Alabama, did, at Gunter Field, Montgomery, Alabama, on or about 5 March 1944, break said restriction by going to Hilda's Restaurant at or near Montgomery, Alabama.

Specification 6: (Finding of not guilty).

He was found not guilty of Specification 6, Charge III, guilty of all other Specifications, guilty of Charges I and III and of Charge II "Not guilty, but 'Guilty' of a violation of the 96th Article of War". Evidence of one previous conviction, of being twice drunk in uniform in violation of Article of War 96, 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 shows that on 5 March 1944 the accused was assigned the duty of giving night flying instructions to Cadet Robert H. Ramsdell. The accused arrived at the take-off position at about 1900 o'clock. Although the accused and Cadet Ramsdell did not come within five feet of each other incident to taking their respective seats in the front and rear cockpit of the plane, Cadet Ramsdell observed that the accused walked oddly, acted strangely and in such a manner as indicated that the accused was under the influence of intoxicating liquor. The accused told Cadet Ramsdell that the flight was to be an "X" ride which Cadet Ramsdell understood meant that the accused would not operate the plane on the occasion of this flight. Before Cadet Ramsdell completed his check of the magnetos accused took over the controls, turned the aircraft in a complete circle at the take-off position, and took a position immediately behind another aircraft which was also awaiting a signal to take off for a similar training mission. Accused effected a take-off of the plane immediately behind the other plane and commenced acrobatic flying by banking the plane more than 70 degrees, changing directions of 180 degrees and participating in a "dog fight" and a "rat race" with one of the other planes. Each of these two planes dove and "zoomed" at the other for about ten minutes at altitudes estimated at under 2000 feet. In a number of instances these two planes flew at altitudes below 1000 feet. Such low flying was not within the traffic pattern and was not necessitated by any emergency condition. The accused put his plane into a dive in the direction of the other plane with which he had been having a "dog fight" and the two aircraft came to within 25 feet of each other. At another time these two planes came within 100 feet of each other. Although the only destination for the flights was Deatsville Auxiliary Air Field, the accused, after his plane arrived over Elmore Field, directed Cadet Ramsdell to turn out the navigation lights, to take over the controls and to make a landing. Cadet Ramsdell complied and as the aircraft touched the ground at Elmore Field the accused directed him to make a "follow through landing" and take off again. Ramsdell complied with instructions and then proceeded to Deatsville Field where he circled his zone, then made two landings, took off immediately and returned to his zone in the air. The accused then carried on a line of "chatter"

over his radio with the instructor in another plane, and made a bet with the other instructor that he, the accused, could beat the other instructor to a landing. The accused again took the controls of his plane and proceeded to land. In landing he did steep turns "like making a let-down" which tumbled the gyroscopic horizon out of position rendering it inaccurate. He overshot the runway and had to "s" back. In order to prevent overshooting the field he had to put down full flaps and make a sideslip. This landing was in defiance of instructions which he had received from the control tower directing him to go around the field again before landing. As the aircraft touched the ground he "gave it the gun" and took off again and returned the controls to Cadet Ramsdell for a further landing. Upon landing the accused left the aircraft without checking the cockpit instruments or giving instructions in the use of the flourescent light. A moment later when the plane and lightwere examined by Captain T. D. Hatcher, Jr., it was found not to be working properly. Captain Hatcher then "checked out" Cadet Ramsdell because he did not consider the accused to be competent to do so. Captain Hatcher, about fifteen minutes later, asked the accused how late he had been drinking and the accused replied, "3:00 or 4:00 o'clock". He then told the accused that he was "grounded" for the night and that he should return to Gunter Field by truck. The accused insisted that he was "okay" for flying but when told the condition of the instruments of his plane denied that he knew anything was amiss. He was under the influence of intoxicants and Captain Hatcher could smell their odor on his breath. The accused asked to be permitted to "check out" Cadet Ramsdell but was refused and Captain Hatcher once more advised him that he was grounded. Accused explained to Second Lieutenant George D. French, the Operation Officer, that he had had to win a bet and asked if he had been "goofing up" the night flying. The odor of liquor was noticed on his breath and he was not in full control of his faculties. He was seen subsequently lying on the ground on the east side of the tower.

Later the same night Sergeant Joseph P. Baldwin saw accused at about 2230 o'clock at Deatsville Field sitting in the front cockpit of a plane "energizing" it. Sergeant Baldwin advised the accused that he had received orders that no more planes were to leave the ground, reached into the front cockpit, and turned off the ignition switch. Shortly the plane was again being energized and Sergeant Baldwin again told accused that he was "not going to" take the aircraft off the ground. The accused, however, falsely answered that he had permission from the control tower. Sergeant Baldwin then told the accused not to take the aircraft off the ground until he had received confirmation from the control tower. At the control tower Sergeant

Baldwin was directed not to let the aircraft leave "under any circumstances". Sergeant Baldwin ran back toward the aircraft but was unable to prevent the accused from taking off from an improper position and without lights (R. 9-58, 80-82; Ex. A).

When the accused reached Gunter Field by this unauthorized flight, he was advised that he was ordered by Major George F. Cermak to remain in the flight office until Major Cermak arrived. A telephone call, inquiring for the accused, came to the flight office while the accused was there. The accused answered the call but represented that he was someone else and stated that he, the accused, had already gone and could not be found. After about fifteen minutes the accused left the flight office going in the direction of the automobile parking area, and consequently was not at the flight office when Major Cermak arrived (R. 58-71).

A few minutes before midnight on the same night the accused was next seen at Hilda's Restaurant in Montgomery, Alabama, where he was having some "drinks". Being found asleep at his table shortly after midnight two waiters assisted him to a taxicab, which was waiting outside, so that the restaurant could be closed. A military policeman found the accused lying on his back upon the floor of the cab with his feet hanging out of the left door. He was picked up and carried to a jeep by the military policeman who testified that the accused's breath bore a strong odor of whiskey and that he appeared to be drunk. He was in uniform at the time (R. 71-80).

There was introduced into evidence a copy of General Court-Martial Orders No. 414 which shows that the accused was restricted to the limits of his post for three months from 15 December 1943. The evidence also shows that accused had been in Hilda's Restaurant in Montgomery, Alabama, on or about 10 or 12 February 1944 in violation of such restriction (R. 77; Ex. B).

A true extract copy of paragraph 93 of the Flying and Safety Regulations, Army Air Forces Pilot School (Basic), Gunter Field, Alabama, dated 10 November 1943, was admitted into evidence. The regulation prohibits flying within 1000 feet of the ground except in taking off and landing, in case of emergency, or when necessary to complete an assigned mission. It also prohibits acrobatic maneuvers within 3000 feet above the ground and in proximity to other aircraft.

4. The defense offered no evidence. The accused elected to remain silent after the defense counsel had announced that the accused's rights relative to testifying or remaining silent had been explained to him.

5. Specifications 1 and 2, Charge I, respectively allege that the accused at designated times and places willfully disobeyed the lawful commands of two superior officers, to wit: Captain Hatcher's order to cease flying for the night and Major Cermak's order to remain in the flight office at Gunter Field. The offenses alleged are defined by controlling authority as the willful disobedience, manifesting an intentional defiance of authority, of an order, relating to a military duty, given by an authorized superior officer (M.C.M., 1928, par. 134b).

The evidence for the prosecution shows beyond a reasonable doubt that the accused received both of the orders, which clearly relate to military duties and were given by his superior officers, and that he deliberately violated the first by flying his plane back to Gunter Field and the second by leaving the flight office for Hilda's Restaurant before Major Cermak's arrival. Such actions were plainly in direct defiance of the orders. The evidence, therefore, conclusively establishes his guilt of the alleged offenses and fully supports the court's findings of guilty of Charge I and its two Specifications.

6. The Specification, Charge II, alleges that the accused was "on or about 6 March 1944, in a public place, to wit: Hilda's Restaurant, drunk, while in uniform". Drunkenness while in uniform at a public place is violative of Article of War 96 (M.C.M., 1928, par. 152a).

The evidence shows that after a series of eccentric acts at Gunter Field, all indicative of drunkenness, the accused proceeded to Hilda's Restaurant, consumed additional quantities of liquor and lapsed into a stupor. He had to be assisted to a taxi. He was subsequently carried bodily by a member of the military police from the taxi to a jeep. When taken into custody by the military police he exuded the odor of intoxicants. Since a restaurant is unquestionably a public place and since he was wearing his uniform, the offense set forth in the Specification was established beyond a reasonable doubt and the court's finding of guilty of the Specification in violation of Article of War 96 is fully warranted.

7. Specification 1, Charge III, alleges that the accused did on 5 March 1944 pilot an aircraft while under the influence of intoxicants, the accused being at the time engaged in giving flight instructions to Cadet Ramsdell. Such alleged conduct is clearly prejudicial of good order and military discipline and therefore violative of Article of War 96 (M.C.M., supra).

The evidence shows that accused walked oddly and acted strangely before entering his ship; that he made a dangerous and reckless take-off; that he banked his plane at such precarious and steep angles as to render the gyroscopic horizon inaccurate; that he participated in a "dog fight" and "rat race", that he indulged in unauthorized conversation with another pilot; that he overshot the field in attempting to land; that he failed to check his instruments after finally bringing his plane down; and that he was subsequently found lying on the ground. Those who spoke to him immediately after he left his ship noticed that his breath carried the odor of intoxicating liquor and the accused admitted to Captain Hatcher that he had been drinking as late as 1500 or 1600 o'clock. These circumstances are strong proof that accused was then under the influence of intoxicants. The uncontradicted testimony conclusively establishes that he piloted the aircraft as alleged and therefore amply sustains the court's findings of guilty of Charge III and the first Specification thereunder.

8. Specifications 2 and 3, Charge III, respectively allege that the accused at a named time and place violated a specified paragraph of the flying regulations of his field which prohibited flying within 1000 feet of the ground except under certain conditions and engaging in acrobatic maneuvers within 3000 feet above the ground or while in the proximity of other planes or over populated places. "Disobedience of standing orders" is conduct prejudicial to good order and military discipline (M.C.M., 1928, par. 152a).

The evidence for the prosecution conclusively establishes the existence and controlling applicability of the regulation in effect at the accused's field which prohibits the acts alleged in the two Specifications. The accused must be presumed to have had both actual and constructive knowledge thereof. The evidence equally as conclusively shows that the accused engaged in flying below an altitude of 1000 feet and in acrobatics below an altitude of 3000 feet while in the immediate proximity of other planes. None of the circumstances permitting such acts were shown to exist. The acts were flagrantly violative of the regulation and fortuitous circumstance alone averted injury to person and damage to property. A student cadet, seeking proper instruction, was deprived of the training to which he was entitled and instead was given a disgraceful example of misconduct. All of the evidence beyond a reasonable doubt establishes the accused's guilt as alleged and fully warrants the court's findings of guilty of Charge III and Specifications 2 and 3 thereunder.

9. Specifications 4 and 5, Charge III, respectively allege that the accused, having been restricted to the limits of Gunter Field, broke his restriction on both 12 February 1944 and 5 March 1944 by going to Hilda's Restaurant which is located at or near Montgomery, Alabama. A sentence of a General Court-Martial imposing restriction upon an officer for a specified period of time is, for its duration, tantamount to a standing order and breach thereof is violative of Article of War 96 (M.C.M., 1928, par. 152a).

The evidence for the prosecution shows that the accused by the sentence of a General Court-Martial had been restricted to Gunter Field for a period of three months from 15 December 1943. The evidence also conclusively shows that the accused breached such restriction on the two occasions alleged by going to Hilda's Restaurant. The findings of guilty of Charge III and Specifications 4 and 5 thereunder are therefore abundantly supported by the evidence.

10. The accused is 22 years of age. The records of the Office of The Adjutant General show that the accused entered the service as an enlisted man on 7 March 1941 and was commissioned a second lieutenant, Army Air Forces, on 28 May 1943.

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 sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 64 or 96.

Abner E. Lyscombe, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 255602

1st Ind.

War Department, J.A.G.O., 28 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 David C. Pritchard (0-804036), Air Corps.

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Memo from Commanding General, Army Air Forces.

(Sentence confirmed. G.C.M.O. 439, 16 Aug 1944)

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

SPJGQ
CM 255607

19 MAY 1944

UNITED STATES	IX CORPS
v.	Trial by G.C.M., convened at Camp Shelby, Mississippi, 21-22 April 1944. Dismissal.
Second Lieutenant EDWARD J. BRINGENBERG, JR. (0-1309207), Company G, 442nd Infantry.	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Edward J. Bringenberg, Junior, Company "G" 442d Infantry did, without proper leave, absent himself from his station and duties at Camp Shelby, Mississippi from about 0001 8 April 1944, to about 2100 12 April 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. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Captain William Aull, Commanding Officer, Company G, 442nd Infantry, Camp Shelby, of which organization accused is a member, testified that the accused was absent, without his knowledge or permission, between 8 April and 12 April 1944 (R. 6A). In addition, duly authenticated extract copies of the morning report of the company,

establishing accused's initial absence without leave on 8 April 1944, and his return to military control on 12 April 1944, were introduced, without objection by the defense, and received in evidence as Prosecutions Exhibits B. and C respectively.

Accused, having had his rights explained to him prior to trial by the defense counsel and again in open court by the President of the Court (R. 6A, 6B), elected to make an unsworn statement in these words:

> "I just want the Court to understand the reason for being AWOL was not to avoid hazardous duty with the 442d Infantry, and I do want to go overseas with them".

The Court called as its own witness Major Carl Heune, Corps of Military Police, Camp Shelby, who testified that, as the result of a telephone call from the Lieutenant Colonel of the 442d Infantry, he and three others went to a house, the address having been supplied him, at about 9:55 p.m. on 12 April (R. 6C). He asked the lady who came to the door if accused was present. She said no but to try the Forest Hotel (R. 6D). Just then a soldier reported to a sergeant in his party that he had seen a soldier in a window of the house, whereupon witness threatened to get a search warrant immediately. The lady then asked the Major to wait a minute. In about 15 minutes accused himself came out of the house on to the porch. Witness placed accused under arrest then and there, warned him of his rights under Article of War 24, and immediately thereafter returned him to Camp Shelby (R. 6D).

The Court also called as its witness Lieutenant Colonel James Handley, 442d Infantry, Camp Shelby, accused's Battalion Commander (R. 6D) who testified that this organization had been alerted prior to his receiving the report of accused's absence; but when asked whether accused was a member of the battalion when it was alerted, and whether Article of War 28 was read to him, witness replied, "I am not certain" (R. 6E).

4. The witnesses called by the Court established termination of accused's absence without leave by apprehension. The Court also inquired into the status of accused's unit when he went AWOL. This latter inquiry was obviously prompted by accused's negative statement as a witness in his own behalf, that he had not gone absent without leave to avoid hazardous duty. The evidence thus obtained did not clarify that issue. The Specification does not charge any more than absence without leave. However, the inquiry of the Court, while irregular, was not materially prejudicial to any substantial right of accused (A.W. 37). Accused's plea, together with the evidence of record, is amply sufficient to legally sustain the findings and to support the sentence.

5. War Department records disclose that this officer is now 23 years of age and single. He graduated from the West Hazelton High School, West Hazelton, Pennsylvania in 1939, and attended Pennsylvania State College for two years, 1940-42. He has been employed as a clerk in a grocery store and was temporarily employed by the United States Bureau of Entomology. He served two years (1940-42) in the R.O.T.C. at Pennsylvania State College. He enlisted in the Army 9 July 1942, attended Officers Candidate School at Fort Benning, Georgia, was commissioned a second lieutenant, Infantry, Army of the United States and reported for active duty on 25 January 1943.

6. 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 Article of War 61.

William H. Founds, Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 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 Edward J. Bringenberg, Jr. (0-1309207), Company G, 442nd 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 of trial to the President, 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.

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

(Sentence confirmed. G.C.M.O. 350, 15 Jul 1944)

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

SPJGK
CM 255610

31 MAY 1944

UNITED STATES	)	70TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Adair, Oregon, 1 May 1944. Dismissal and total forfeitures.
Second Lieutenant GORDON L. GUSTAFSON (O-1319382), Infantry.	)	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, 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 Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 2nd Lieutenant Gordon L. Gustafson, Infantry, did, without proper leave, absent himself from his station at Camp Haan, California from about 13 March 1944 to about 17 March 1944.

Specification 2: (Finding of guilty disapproved by reviewing authority).

Specification 3: In that 2nd Lieutenant Gordon L. Gustafson, Infantry, did, without proper leave absent himself from his station at Camp Adair, Oregon from about 10 April 1944 to about 19 April 1944.

The accused pleaded guilty to and was found guilty of the Charge and all specifications. Evidence was introduced of one previous conviction by general court-martial of absence without leave in violation of Article of War 61. He was sentenced to dismissal, total forfeitures, and to be confined at hard labor for five years. The reviewing authority disapproved the findings of guilty of Specification 2, approved the sentence, but remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. Without objection, certified extract copies of the morning report

of accused's organization were introduced showing accused absent without leave as alleged in Specifications 1 and 3 (R. 6,7; Exs. A,C,G,H).

Defense.

Captains Howard M. Burkett and R. A. Welzer, Medical Corps neuropsychiatrists, each testified that he had examined the accused and found him to be a chronic alcoholic. Captain Welzer stated that accused "uses alcoholism as a means of release. He has no control over it and never will have any control unless he is actually led and guided by someone who has a lot of time" (R. 8-11).

The accused, after being properly advised of his right to testify, testified under oath that he is 34 years old, married, and the father of three children. He was an enlisted man in the regular Army from 1936 to 1939; regular Army Reserve from 1939 to 1941. He reenlisted 8 June 1942 and was commissioned a second lieutenant, Infantry, 8 May 1943. He was a postal clerk in civilian life and was once arrested for drunkenness. He stated that without solicitation on his part he was selected for and assigned to Officer Candidate School, Fort Benning, Georgia (R. 12,13).

4. War Department records show that accused is 33 years and six months of age and married. He is a high school graduate. The records confirm his testimony with respect to prior enlisted service in the regular Army. He was tried and convicted by general court-martial in November 1943 for the offense of absence without leave (7 days) in violation of Article of War 61 and sentenced to dismissal. The sentence was confirmed by the President but commuted to a reprimand.

On 1 April 1944 accused tendered his resignation as an officer for the good of the service. Within 10 days from that date and before final action had been taken upon his resignation the accused absented himself without leave from his organization for a period of nine days (this offense is the subject of Specification 3 herein).

5. 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 authorized upon conviction of violation of Article of War 61.

Irving G. Ean, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Samuel Sonnenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 23 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 Gordon L. Gustafson (0-1319382), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation of the sentence. The evidence shows that accused is a chronic alcoholic and that he has no proper appreciation of the responsibilities of a commissioned officer. 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.
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, forfeitures remitted. G.C.M.O. 426, 4 Aug 1944)

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

SPJGN
CM 255612

29 MAY 1944

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Army Air Base, Biggs Field, El
Second Lieutenant REX A.	)	Paso, Texas, 24 April 1944.
STAGE (0-740971), Air Corps.	)	Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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. He was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Rex A Stage, AC, 410th Base Headquarters and Air Base Squadron, Training Unit, did, near Fort Stockton, Texas, on or about 20 March 1944 violate the provisions of paragraph 16 a (1) (d), Army Air Force Regulation 60-16, dated 6 March 1944, by then and there wrongfully and willfully flying a B-17F airplane at an altitude of less than five hundred feet above the surface of the earth, while not in the process of take-off or landing.

Specification 2: In that Second Lieutenant Rex A Stage, AC, 410th Base Headquarters and Air

> Base Squadron, Training Unit, did, near Fort Stockton, Texas, on or about 20 March 1944, wrongfully and recklessly operate a B-17F airplane in such a manner as to collide with a passenger bus operating on a public highway thus endangering the lives of the occupants of said bus and causing damage to said bus.

He pleaded guilty to and was found guilty of the Charge and its two Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority remitted the forfeitures, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's pleas of guilty, shows that on the evening of 20 March 1944 the accused was the pilot of a four motored B-17F bomber which took off from the Army Air Base, Pyote, Texas, at about 1900 o'clock on a scheduled routine "slow-time" flight. He was accompanied by First Lieutenant William M. Thompson, co-pilot, Staff Sergeant John E. Doyle, engineer, and Staff Sergeant Ralph V. Mulford, radio operator. The flight was not an experimental one and the Director of Flying Training at the field had not authorized either the pilot or co-pilot to fly at altitudes of less than 500 feet during the flight except in taking off and landing. Pursuant to existing orders the landing gear of the plane was not retracted during the flight (R. 14, 15, 17; Ex. 5).

Before dark at about 1950 o'clock a Kerrville Bus Company's bus, operated by driver Thomas H. Oliver and occupied by 28 passengers, was proceeding along the highway about 30 miles from Fort Stockton, Texas, on its regular run from Pecos, Texas, to the former city when a four motored plane, which had theretofore been observed by the bus driver in the distance, suddenly swooped down over the bus causing it to sway and terrifying its passengers. The plane's landing gear struck the top of the bus damaging three pieces of luggage and the canvas cover over them and leaving wheel marks along the entire length of the bus' top. This damage was not discovered until the bus reached Ft. Stockton, Texas, and upon its discovery the driver then reported the incident to the appropriate authorities. Thereafter photographs showing the damage were taken and after proper identification they were admitted into evidence. The plane, after the above incident, gradually gained altitude above the bus' height of 9 feet 2½ inches and flew away to the northeast. None of the passengers were injured although they were severely frightened and the damage to the bus and the luggage was inconsequential. The bus

driver was unable to identify the plane by number but described it as a four motored bomber. According to one of the sergeants in the plane a "slight bump" was experienced by the plane and its occupants as it passed over the bus but when he looked back the bus was proceeding on its way which fact he reported to the accused who was piloting the plane which at such time was traveling at a speed of about 160 miles per hour (R. 6-14, 14-17; Exs. 2-4).

The accused made no report of the incident when he returned to the field. An original AAF Regulation No. 60-16, dated 6 March 1944 was admitted into evidence. According to paragraph 16 a (1) (d) thereof flying a plane under the circumstance above shown below 500 feet above the ground was prohibited (R. 6; Exs. 1, 5).

4. The evidence for the defense shows that four of the accused's superior officers, including his present and former commanding officers, considered him an excellent officer, pilot and instructor and that he would be welcomed to their respective organizations notwithstanding his alleged dereliction. He had never been subjected to previous disciplinary action and was a splendid morale builder (R. 17-19, 20-22, 22-27, 27-30).

The accused, after explanation of his rights as a witness, testified that at the time he was shown the charge sheet during the investigation, the first Specification only was shown thereon. He admitted knowledge of the provisions of the flying regulation above mentioned, the occurrence of the incident and his failure to report it. He was unable to explain his actions except that he had been seized with a very strong impulse to get "the feel" of the plane at a very low flying level even while realizing that such action would violate the regulation. When his commanding officer had questioned him about the incident, he had readily admitted it and accepted responsibility therefor to the exclusion of his co-pilot (R. 31-40).

5. Specifications 1 and 2 of the Charge respectively allege that the accused on or about 20 March 1944 near Fort Stockton, Texas, wrongfully and willfully violated a named provisions of AAF Regulation No. 60-16, dated 6 March 1944, by flying a B-17F plane at an altitude of less than 500 feet above the ground while not in the process of taking off or landing and that on such occasion he wrongfully and recklessly operated such plane by causing it to collide with a passenger bus on a public highway thereby endangering the lives of the occupants of the bus and damaging it. "Disobedience of standing orders" is conduct prejudicial to good order and military discipline (M.C.M., 1928, par.152a). The reckless operation of a plane so as to endanger the

plane and its occupants and civilians upon the ground and their property is clearly conduct of a nature to bring discredit upon the military service and also prejudicial to good order and military discipline because such operation is likewise condemned by the first paragraph of the regulation above mentioned (Id., CM 248683, Amaral, 26 February 1944).

The two Specifications clearly allege two separate and distinct offenses and consequently the court properly denied the motion of the defense "to strike" Specification 2 because of the asserted reason that it was a mere multiplication of offenses. Likewise the court properly denied the motion of the defense "to strike" such Specification because it was not upon the charge sheet when it was shown to the accused during the investigation and for such reason the investigation did not comply with Article of War 70. According to the accused's own testimony he was fully advised of the incident that was being investigated so that he was not misled or mistaken concerning any particular thereof. The fact that the incident included the commission of two separate offenses which were ultimately alleged in two Specifications did not necessitate further investigation because the administration of justice would not have been aided thereby (M.C.M., 1928, par. 34).

The evidence for the prosecution conclusively supplements the accused's pleas of guilty and establishes his guilt as alleged beyond a reasonable doubt. The regulation was shown to be in existence and applicable. It prohibited the operation of military planes by military pilots within the continental limits of the United States under the circumstances shown within 500 feet of the ground. The accused must be presumed to have had both actual and constructive knowledge thereof even if he had not by his pleas of guilty and his own testimony admitted such knowledge. The testimony of the bus driver, the sergeant and the director of training at the field abundantly establishes every element of the offenses charged which are likewise admitted by the accused by his pleas and in his own testimony without even a semblance of extenuation. The recklessness involved in diving a gigantic four motored bomber at a speed of 160 miles per hour upon a passenger bus so that contact is made between the two machines surpasses understanding. Only attendant good fortune prevented destruction of both machines and their occupants. Such good fortune, however, does not exculpate the accused's guilt. All of the evidence, therefore, supplements the accused's pleas of guilty, and beyond a reasonable doubt establishes his commission of the offenses alleged, amply supporting the findings of guilty of the Charge and its Specifications.

6. The accused is about 24 years old. The War Department records show that he has had enlisted service from 22 June 1942 until 10 March 1943 when he was commissioned a temporary second lieutenant upon completion of Officers' 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 Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

(174)

SPJGN
CM 255612

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 Rex A. Stage (0-740971), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority 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.

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Memo from General Arnold.

(Sentence confirmed. G.C.M.O. 378, 18 Jul 1944)

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

SPJGQ
CM 255741

30 MAY 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
v.	)	
Private JAMES H. PARKER (34900555), Company F, 217th Infantry Training Battalion.	)	Trial by G.C.M., convened at Camp Blanding, Florida, 3 May 1944. Dishonorable discharge and confinement for life. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 Charges and Specifications:

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

Specification: In that Private James H. Parker, Company F, 217th Infantry Training Battalion did at Camp Blanding, Florida on or about 15 April 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at or near Lake Butler, Florida on or about 16 April 1944.

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

Specification: In that Private James H. Parker, Company F, 217th Infantry Training Battalion having been duly placed in confinement in Stockade #1 Camp Blanding, Florida on or about 20 March 1944 did at Camp Blanding, Florida on or about 15 April 1944 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 93rd Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications, and was found guilty of all Charges and Specifications, except Charge III and its Specification of which he was found not guilty. Evidence was introduced of three previous convictions, (a) by summary court-martial for absence without leave (1 day), in violation of Article of War 61; (b) by summary court-martial for absence without leave (3 days), in violation of Article of War 61; and (c) by general court-martial for absence without leave (9 days), in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for life. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of desertion until surrender at Lake Butler, Florida, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution:

The accused was placed in confinement in Stockade No. 1, Camp Blanding, Florida, on 20 March 1944 (Pros. Ex. 1). He was not thereafter released from confinement by proper authority (R. 5). On 15 April 1944 three prisoners, one of whom was the accused, were assigned by the stockade to Private Dale E. Hall, an armed guard, who was "told to take them to the infirmary". Private Hall waited outside of the infirmary while the prisoners went in. When the prisoners came out of the infirmary, Private Hall was directed by a superior officer "to take them to Service Club #1 and police the area". Private Hall further testified as follows:

> "We policed the area and had just finished emptying the waste cans. The gnats were quite thick and one was bothering me quite a lot, and I reached around like this (witness demonstrated movement of brushing insect off his neck) and the next thing I knew I was on the ground. I struggled a little bit until I was struck on the head. My gun was taken away from me and the gun was pointed at me. The men walked away backwards and then they turned around and ran. I immediately went into the Service Club and called the stockade, and that was the last I saw of them" (R. 7, 8).

When asked if he knew which of the three prisoners pointed the gun at him, Private Hall stated it was the accused. He further testified that this blow on the head momentarily knocked him "completely out" (R. 8). The gun was a 12-gauge shotgun and was loaded (R. 10).

On the following day, 16 April 1944, the military police, with the aid of civilian authorities and bloodhounds, conducted a search for the accused in an area near Lake Butler, Florida, a distance of approximately fifteen miles from Camp Blanding. Corporal Bert April, a member of the searching party who stayed near the radio in the car in order to be in contact with Camp Blanding, testified he next saw the accused, "at approximately 4 o'clock", when there was "one other person shackled to him beside the road". Accused was later "brought to Camp Blanding". The accused was wearing "O.D. clothes" when apprehended (R. 10, 11).

There was introduced in evidence a general court-martial order, dated 17 April 1944, approving a sentence of dishonorable discharge, total forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, adjudged against the accused on 10 April 1944 by reason of conviction of absence without leave (Pros. Ex. 2). This order directs execution of the sentence, but suspends that portion thereof adjudging dishonorable discharge until the soldier's release from confinement.

4. Evidence for the defense:

No evidence was introduced by the defense. The accused, having been advised as to his rights as a witness, elected to remain silent.

5. All of the elements of the offense alleged in the Specification of Charge I are fully established by competent and legal evidence of record. Accused's absence without leave is too clear to require further discussion. While the duration of his absence was only one day, his intent permanently to absent himself from his organization is plainly inferable from the circumstances surrounding his escape from confinement, viz., a violent assault upon the armed sentry guarding him, taken in conjunction with the fact that at the time of his escape he as a general prisoner had just commenced the service of a sentence of five years confinement at hard labor. An inference of accused's intent not to return may be drawn from the fact that he "had escaped from confinement at the time he absented himself" (MCM, 1928, par. 130).

Since the fact of accused's alleged apprehension was not definitely shown by competent evidence of record, "the only presumption that arises is that involving the lesser degree of guilt, viz., that the absence was terminated by surrender" (Dig. Op. JAG 1912-1940, sec. 416 (7)). The action of the reviewing authority was, therefore, proper.

That portion of the sentence adjudged against the accused on 10 April 1944, which involved dishonorable discharge, having been suspended by the general court-martial order of 17 April 1944, (Pros. Ex. 2) the accused, although a general prisoner, retained the status of a soldier and could be tried for desertion (Dig. Op. JAG 1912-1940, sec. 359 (15)).

6. As to the offense alleged in the Specification of Charge II, the evidence is clear that the accused was placed in confinement in Stockade No. 1, at Camp Blanding, Florida, on 20 March 1944, that he was not thereafter released from confinement by proper authority, and that by resort to the use of force and violence he escaped from an armed guard on 15 April 1944 and thereupon departed from the camp area.

Confinement of accused in the stockade at Camp Blanding was proved by a duly authenticated extract copy of the morning report of the stockade, plus the additional fact that the accused was, at the time the instant offense was committed, serving a court martial sentence of confinement. "A confinement is presumed to be legal" (Par. 139 (b) MCM 1928).

The Board of Review is of the opinion therefore, that the evidence is legally sufficient to support the conviction of the offense alleged.

7. The charge sheet shows that the accused is 21 years old and that he was inducted in the service at Camp Forrest, Tennessee, on 29 September 1943, with no prior service.

8. The court was legally constituted and 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 legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon a conviction of a violation of Article of War 58.

William A. Jones, Judge Advocate.

William H. Saunders, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

SPJGK
CM 255770

25 MAY 1944

UNITED STATES	)	20TH ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 11 March, 21,22,24 and 25 April 1944. Dishonorable discharge and confinement for life. Penitentiary.
Private First Class TOMMIE WILLIAMS (36798189), 674th Ordnance Ammunition Company.	)	

REVIEW by the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, 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 First Class Tommie Williams, 3218th Quartermaster Service Company, did, at Camp Campbell, Kentucky, on or about February 14, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Donald N. Lewis, 3218th Quartermaster Service Company, a human being, by shooting him with a carbine.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. On the afternoon of 14 February 1944, Private First Class Donald N. Lewis of the 3218th Quartermaster Service Company, Camp Campbell, Kentucky (hereafter referred to as the deceased) was instantly killed as the result of a gunshot wound in the head. The fatal shot came from a carbine in the hands of Private First Class Tommie Williams, 3218th Quartermaster Service Company, Camp Campbell, Kentucky, hereafter referred to as the accused. The deceased was quartered in barracks V-4. The accused

was quartered in barracks V-21 (R. 17,93). About 6:40 p.m. on 14 February 1944, Captain Clifford O. Richey, Medical Corps, Station Hospital, Camp Campbell, Kentucky, in response to a call went to the second floor of barracks V-4 and there found on the floor the dead body of a colored soldier. The body was in a prone position; the face and head were in a large pool of blood, which had come from the nose and eyes and the occiput or right rear portion of the skull. In the opinion of Captain Richey, death had been instantaneous. The soldier had been dead about three-quarters of an hour and from the character and appearance of the wound, the shot which caused the death was fired at close range (R. 11,16,87,88).

The following witnesses testified concerning the facts and circumstances surrounding the homicide: Corporal William D. Windrow (R. 9-22), Private First Class Robert Avery (R. 28-49), Private James W. Calhoun (R. 49-55), Private Willie Abron (R. 55-59), Sergeant Louis H. Baldwin (R. 60-67), Private Robert B. Finn (R. 68-74), Private Earl Gaither (R. 75-82), and Private Vernon King (R. 138-159), all of whom belonged to accused's organization and were quartered in barracks V-4, and most of whom were eye witnesses.

Captain Charles W. Sims, Executive Officer 143rd Quartermaster Battalion, testified to statements made in his presence by the accused a few hours after the shooting (R. 88-90), and First Lieutenant Emmett L. Barlow, Quartermaster Truck Company, who conducted the investigation of the charges, testified as to statements made to him by the accused in the course of the official investigation (R. 135-138).

A summary of the evidence is as follows:

About 5 o'clock on the afternoon of 14 February 1944, the accused was at Post Exchange No. 4, Camp Campbell, drinking beer with other soldiers of his company. The deceased joined the group and very shortly thereafter the accused was either "pushed or knocked down" by the deceased. Corporal Windrow, in order to prevent any further disturbance, took the deceased from the post exchange to the company area. Deceased wanted to return "to straighten things out" with the accused, but Windrow persuaded him not to do so. Windrow stated that he did not know whether the deceased was drunk or not. He said deceased was talking quite a bit but "wasn't staggering or anything" (R. 18,19). Later on the deceased returned to his barracks building V-4. Here he secured his mess kit and went to the mess hall for the evening meal (R. 29). Corporal Windrow stated that the meal was served cafeteria style and that the accused (who was a cook) was behind the food counter. When deceased moved up the line opposite accused, accused asked deceased why he had knocked him down. Deceased replied that he was only playing and that no harm was intended. Accused said to deceased that "he was going to get him for it" (R. 19,20,44).

Private First Class Robert Avery testified that between 5 and 6 o'clock p.m. he saw accused and deceased coming up the stairs in barracks V-4. Avery stated that "when the chow whistle blowed" the deceased got his mess kit and left; but that the accused remained and that he heard accused say to someone that "he was going to kill him if its the last thing he did" (R. 29,38,40). After mess deceased returned to his barracks. While he was standing beside his bunk drying his mess kit, the accused entered the main barracks from a smaller room at the other end of the building. The accused was carrying a carbine in his right hand with the stock up and the barrel down. One witness said he was carrying it at port (R. 76,77). When within about 10 feet of where deceased was standing, accused asked deceased why he had hit him. The deceased replied that he did not hit him or that he was only playing, or words to that effect, and at the same time took a step or two towards accused. He made no threatening gesture. Thereupon the accused with one hand raised the carbine about chest high and without taking aim or sight, shot and killed the deceased (R. 30,42-44,51,70,72-73,76,77). Immediately after the shooting the accused operated the bolt of the carbine and told other soldiers who were present that if any of them moved he would kill them also (R. 30,45, 54,77). Accused then proceeded to the other end of the barracks, thence down the stairs and across the company street where he was met by his commanding officer, "Lieutenant Cole". He saluted Lieutenant Cole and handed him the carbine, saying that if any man hit him he had to die (R. 30,31,45,52,61,62,71,78). Private Avery said that accused as he spoke to Lieutenant Cole did not appear to be excited. Sergeant Baldwin stated that accused was "very excited, upset, nervous and highly emotional" (R.63). Immediately after the shooting and as he was leaving the second floor of barracks V-4, accused was heard to say "anybody that hits me, he should be dead" (R. 58,59) or "the man that hits me had to die" (R. 54,58,59).

Later that evening a preliminary investigation was begun by Major Clifford T. Riordan. About 9:30 p.m., after several witnesses had been interviewed at battalion headquarters, the accused was called and his rights fully explained to him. Accused stated to the investigating officer, "I understand it, I want to tell everything about what happened". "Colonel Pitts, Colonel Wilson and Colonel Kirshner" were of the opinion that the accused did not at that time have complete grasp of himself and ordered that the investigation be temporarily suspended, and that the accused be taken to the stockade (R. 88). Major Riordan in turn instructed Captain Charles W. Sims to take accused to the hospital for a blood test and then to the stockade for confinement, and directed that accused was not to talk to anyone until further orders from Major Riordan (R. 88-114). Thereafter, between 10:45 and 11:15, while Captain Sims was waiting at headquarters for transportation, the accused said to him, "Captain, you wouldn't hit me, would you?". Captain Sims replied, "No". Accused then said, "Because if you do, you'll have to die, because anybody that hits me either has to die or I have to die". Accused repeated this statement two or three times between the headquarters and the stockade. In the

opinion of Captain Sims the accused's manner was "nothing out of the ordinary. * * * He asked for a cigarette, smoked it normally as any man would, not hurriedly or not slowly. His actions were that of a normal man who possibly had finished a day's work" (R. 89,90). On cross-examination Captain Sims was asked by defense counsel why the "colonels" stopped the examination of accused. Witness replied that from his own knowledge these officers were under the impression that the accused "was too eager to give the whole story". He also stated that these officers had not observed accused any length of time because they were in the room where the examination of the other witnesses was conducted, and that the accused had been in an adjoining room (R. 89).

First Lieutenant Emmett L. Barlow, Jr., the investigating officer, testified as a witness for the court. Lieutenant Barlow stated that he made a full and complete explanation to the accused with respect to his rights, after which accused stated that he understood his rights. According to the witness, the accused then stated in substance that on the evening of 14 February 1944, he and the deceased were in the post exchange drinking beer; that accused's hand tipped over the deceased's beer and that deceased knocked him down. Accused stated that this made him very mad and that when he (accused) left the post exchange he went to the room of Privates Pitts and Gentry on the second floor of barracks V-4, the same barracks in which the deceased was quartered, and picked up a carbine. (Note: It was stipulated that this carbine had been issued to Private Enoch Pitts, and that accused removed it from Pitts' room (R.133).) Continuing, Lieutenant Barlow quoted accused as saying that -

> "He walked out on the floor in front of Lewis [the deceased] where he was standing, and asked Lewis why he hit him. Then Lewis said he didn't mean to hit him or words to that effect. Then the accused told me he pulled the trigger, that the carbine went off, and Lewis dropped to the floor" (R. 135,136).

On cross-examination and in response to questions by the defense counsel, Lieutenant Barlow stated that the unit to which accused and deceased were assigned left Camp Campbell for a port of embarkation on 15 February 1944; that all the men had been given a carbine, and that several of the men had them in their rooms (R. 137).

For the defense.

The accused, after his rights had been explained to him, elected to testify under oath. He stated that he was 32 years old, married, and had five children. He was inducted into the Army 5 February 1943 and served as a cook. On 14 February 1944 he was attached to the 3218th Quartermaster Service Company, Camp Campbell, Kentucky, and was assigned to barracks V-21. He knew Private Donald Lewis, the deceased, by name but was not "close to

him socially". He knew that the deceased lived in barracks V-4. The organization to which he had been assigned had been alerted and restricted for movement to a port of embarkation. About 3 o'clock on the afternoon of 14 February he went to the second floor of V-4 barracks for a visit with Privates Raymond Johnson and Vernon King, and also to see about some clothing which he had left with Johnson. On leaving barracks V-4 he went to the service club for a while and then to the post exchange, arriving at the post exchange about 4:15 or 4:30. After making a few purchases he bought some beer for himself and other soldiers. It seems that more glasses or bottles of beer were placed on the table than there were people in the accused's party, so the deceased came over and "picked up a beer and drank it". Accused then bought deceased another beer. Deceased reached for the glass that accused had his hand on and accused told him that he could not have it. Thereupon the deceased struck accused and knocked him down. When accused got up, deceased had gone. Accused stated that he, accused, went to his barracks V-21 to see about packing his equipment and to see Private Johnson who lived in barracks V-21 (R. 92-97,104). Accused stated that he had 5 or 6 beers but that he was not drunk (R. 99, 114). Failing to find Johnson in barracks V-21 he went to barracks V-4 to see if Johnson was there. It was then 5:35 or 5:40 o'clock (R. 97). He went to the room on the second floor which he had visited earlier in the afternoon. Failing to find Johnson, he stated that as he was leaving the room he noticed a carbine against the wall near the door and that since his rifle was missing he took the carbine with the view of checking it in the supply room to see if it were his. On picking up the carbine he did not check the chamber for live ammunition (R. 97-101). As he came out of this small room he was holding the carbine in his right hand at the front sling swivel and carrying it in the position of trail arms (R. 102). As he turned to go down the stairs he noticed the deceased standing by a bed at the far end of the barracks (R. 103). Accused then started towards deceased - carrying the carbine at trail arms - "to ask him why he hit me like he did" (R. 104,105). Accused stated that he was not mad and that he did not approach deceased to "get even with him", but that he just wanted "to find his reason for hitting me like he did". Accused saw other men in the room but did not pay any attention "to know who they were" (R.103,105). When within 8 or 10 feet of where deceased was standing - still carrying the carbine at trail arms - accused said, "I slowed my pace down" and asked the deceased "Why did you hit me. I would like to know the reason why because I did not ever hit you or anyone else". The deceased started talking in a round-about way and accused said, "I do not want to know all that. I want to know why you hit me", to which deceased replied, "Aw forget it. * * * I didn't hit you", and started to walk towards accused. Continuing his testimony, accused stated:

> "I was standing there with the gun talking to him, and when he started into the aisle towards me, I throwed up the gun so he

wouldn't hit me in the face, and a shot goes off and the gun fell to the floor. I picked up the gun and by that time he fell. * * * I raised the weapon in case he intended to hit me. He couldn't hit me if I had the gun" (R. 107).

Accused stated that as deceased advanced towards him he (accused) did not "back up" but that he spread his feet apart (R. 121); that he did not know the gun was loaded (R.119); that he had no intention of killing deceased; and that he did not remember and did not intend pulling the trigger (R. 107, 108,114). He stated that he intended to "bring the gun up" and if necessary use the butt end to keep deceased from reaching him. He stated that he did not recall whether it was his mess kit or not but that deceased had something in his hand, either a knife or fork (R. 122), and that deceased was advancing when the gun went off (R. 106,131). He stated that when the gun fired, it fell to the floor. The deceased "grabbed himself and started to fall". Accused said that he picked up the gun and went down the steps across the street to the company orderly room, walked up to Lieutenant Cole, saluted him, and handed him the rifle. He stated that he met one or two soldiers on the way, but that he said nothing to them (R. 109,110). Accused categorically denied making any threats against the deceased prior to the shooting and denied making any statements after the shooting such as had been attributed to him by the witnesses for the prosecution. Accused recalled the investigation which was conducted at battalion headquarters the night of the shooting and stated that no one talked to him and that he made no statement to anyone that night. He recalled leaving the headquarters for the hospital with Lieutenant Cole or "some white officer", but he specifically denied making the statement on the way to the hospital as related by Captain Sims - "that anyone who hit him had to die" or words to that effect. Accused did not remember the name of the investigating officer, but he recalled that a second lieutenant in the course of an investigation of the charge explained to him his rights with respect to making a statement. Accused admitted that in the course of the investigation he told the investigating officer about the shooting. However, he denied telling the investigating officer that he pulled the trigger (R. 114-116,119).

4. The undisputed evidence shows that Private First Class Donald N. Lewis was instantly killed 14 February 1944 as the direct result of a gunshot wound from a carbine in the hands of accused. The shooting occurred in the barracks occupied by the deceased and following an altercation between the accused and deceased in the post exchange earlier in the afternoon. After the incident at the post exchange the deceased went to his barracks, then to the mess hall for his evening meal. After eating, the deceased returned to his quarters on the second floor of barracks V-4. Shortly thereafter and while deceased was standing by his bunk drying his mess kit, the accused, who was quartered in barracks V-21, came from a room at the other end of barracks V-4 carrying a carbine in his right hand.

The accused advanced to within 10 or 12 feet of the deceased and asked deceased why he had hit him, to which deceased replied, "I didn't hit you," or "I was just playing", or words to that effect. Thereupon the accused with his right hand raised the carbine about chest high and without taking any aim or sight, shot and instantly killed the deceased. After the altercation in the post exchange and before the shooting, the accused asked deceased in the mess hall why deceased had struck him, and said, "he was going to get him for it". Thereafter, on the second floor of the deceased's barracks and shortly before the shooting, accused was heard to say that "he was going to kill him if it is the last thing he did". Immediately after the shooting the accused was heard to say, "anybody that hits me should be dead" or "the man that hits me had to die", or words to that effect. The testimony of the accused with respect to the evidence preceding the actual shooting is substantially the same as that of the prosecution. The principal conflict relates to the circumstances under which the carbine was fired. In this connection the accused contended that he was not mad with the deceased; that he went to deceased's barracks to see another soldier; that while in the room where he expected to find the soldier he saw a carbine against the wall which he thought was his; that he picked up the carbine with a view of checking its number in the supply office, and as he started down the stairs - carrying the carbine in his right hand at trail arms - he turned and noticed the deceased standing by his bunk at the far end of the barracks. Accused stated that he then walked towards deceased, "to ask him why he had hit me like he did". He continued that when within 8 or 10 feet of where deceased was standing he asked deceased this question and deceased replied, "Aw, forget it * * * I didn't hit you" and started to walk towards him with a knife or fork or mess kit in his hand. At this point the accused stated:

> "* * * I throwed up the gun so he wouldn't hit me in the face and a shot goes off * * *. I raised the weapon in case he intended to hit me * * * and if necessary to use the butt end."

Accused contended that he had no intention of killing deceased and that he did not intend and did not remember pulling the trigger. In other words, the accused contended that the homicide was a sheer accident.

Viewing the record in the light of all the evidence, the Board of Review is of the opinion that the court was fully justified in rejecting the unsupported testimony of accused and finding that the accused with malice aforethought feloniously and unlawfully killed Private First Class Donald N. Lewis as alleged in the Charge and Specification. This conclusion is supported by a chain of evidence and circumstances which clearly and beyond all reasonable doubt establishes every element of the offense of murder. There is no contention of legal justification. Malice may be presumed by the intentional use of a deadly weapon. Moreover the

previous altercation between the accused and the deceased, the threats of the accused after the altercation, and before the shooting, and the appearance of the accused in the deceased's barracks where the dispute or argument was resumed by the accused, and the remark of the accused immediately after the shooting, not only warrant an inference of actual malice but are indicative of personal ill will. A homicide under such circumstances is murder in violation of Article of War 92.

5. The Charge Sheet shows that accused is 31 years 10 months of age, and that he was inducted in the military service 5 April 1943.

6. 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 and the sentence. A sentence 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 section 273-275, Criminal Code of the United States (18 U.S.C., 452,454).

Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Samuel Sonnefeldt, Judge Advocate.

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

SPJGK
CM 255774

28 JUN 1944

UNITED STATES	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Captain LEIGHTON E. WARE (O-441390), Corps of Military Police.	)	Trial by G.C.M., convened at Fort Wayne, Michigan, 28 March 1944. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that Captain Leighton E. Ware, 728th Military Police Battalion, did, at Detroit, Michigan, on or about July 14, 1943, present for approval and payment a claim against the United States by presenting to Colonel Roy J. Caperton, Finance Department, Finance Officer, at Fort Wayne, Detroit, Michigan, an officer of the United States duly authorized to approve and pay such claims, Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, in the amount of $44.66 for reimbursement of mileage for travel performed by rail by Captain Leighton E. Ware from Detroit, Michigan, to Chicago, Illinois, and return on July 11, 1943 and July 13, 1943, respectively, which claim was false and fraudulent in that the said Captain Leighton E. Ware did not travel by rail but traveled by government automobile furnished by the United States and was then known by the said Captain Leighton E. Ware to be false and fraudulent.

Specification 2: In that Captain Leighton E. Ware, 728th Military Police Battalion, did, at Detroit, Michigan, on or about November 2, 1943 present for approval and payment a claim against the United States by presenting to Colonel Roy J.

Caperton, Finance Department, Finance Officer at Fort Wayne, Detroit, Michigan, an officer of the United States duly authorized to approve and pay such claims, Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, in the amount of $44.66 for reimbursement of mileage for travel performed by rail by Captain Leighton E. Ware from Camp River Rouge Park, Detroit, Michigan, to Chicago, Illinois, and return on October 31, 1943, and November 1, 1943, respectively, which claim was false and fraudulent in that the said Captain Leighton E. Ware did not travel by rail but traveled by government automobile furnished by the United States and was then known by the said Captain Leighton E. Ware to be false and fraudulent.

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

Specification 1: In that Captain Leighton E. Ware, 728th Military Police Battalion, did at Detroit, Michigan, on or about July 14, 1943, with intent to deceive Colonel Roy J. Caperton, Finance Department, Finance Officer, Fort Wayne, Detroit, Michigan, officially state in writing on a Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, as follows:

"Mileage Voucher

For mileage under attached order, SO #112, 10 July 1943, received at
Cp River Rouge Pk,
Detroit, Michigan

Date	From	Date	To	Kind of Transportation furnished
1943		1943		
(1)	(2)	(3)	(4)	(See note) (5)
7/11	Detroit, Michigan	7/11	Chicago, Illinois	None (R)
7/13	Chicago, Illinois	7/13	Detroit, Michigan	None (R)

Leighton E. Ware
(Payee)

Captain, 728th M.P. Bn."
(Rank or Title)

which statement was known by said Captain Leighton E. Ware to be untrue in that transportation was furnished by the United States by means of a government automobile.

Specification 2: In that Captain Leighton E. Ware, 728th Military Police Battalion did at Detroit, Michigan, on or

about November 2, 1943, with intent to deceive Colonel Roy J. Caperton, Finance Department, Finance Officer, Fort Wayne, Detroit, Michigan, officially state in writing on a Mileage Voucher, on Standard Form No. 1071 - Revised Form approved by the Comptroller General of the United States, as follows:

"Mileage Voucher

For mileage under attached order, 28 October 1943, received at Cp. River Rouge Pk, Detroit, Michigan.

Date 1943 (1)	From (2)	Date 1943 (3)	To (4)	Kind of transportation furnished (See Note) (5)
10/31	Cp. River Rouge Pk. Detroit, Michigan	10/31	Chicago, Illinois	None*
11/1	Chicago, Illinois	11/1	Cp. River Rouge Pk Detroit, Michigan	None*

*Officer traveled by rail

Leighton E. Ware (Payee) — Captain, 728th M.P. Bn" (Rank or Title)

which statement was known by said Captain Leighton E. Ware to be untrue in that transportation was furnished by the United States by means of government automobile.

Specification 3: (Finding of not guilty).

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

Specification 1: In that Captain Leighton E. Ware, 728th Military Police Battalion, did, at Camp River Rouge Park, Detroit, Michigan, from on or about 1 January 1942, to on or about 3 March 1944, wrongfully fail to deposit in a bank a certain fund of money known as a "slush or band fund" of the 728th Military Police Battalion, contrary to the provisions of paragraph 6, Army Regulations Number 210-50, War Department, Washington, December 29, 1942.

Specification 2: In that Captain Leighton E. Ware, 728th Military Police Battalion, did, at Camp River Rouge Park, Detroit, Michigan, from on or about 1 January 1942, to on or about 3 March 1944, wrongfully fail to keep any record pertaining to a certain fund of money known as a "slush or band fund" of the 728th Military Police Battalion,

contrary to the provisions of paragraph 18, Army Regulations Number 210-50, War Department, Washington, December 29, 1942.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 3 of Charge II, and Specifications 3,4, and 5 of Charge III, and guilty of all other Specifications and of the Charges. In Specifications 1 and 2 of Charge III the words "1 February 1943" were substituted for the words "1 January 1942". No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Accused was Adjutant of the 728th Military Police Battalion stationed at Camp River Rouge Park, Detroit, Michigan, from 5 August 1942 until the early part of March 1944. The charges of violation of the 96th Article of War arise from his custody of funds in his official capacity, and will be considered separately from the charges of violation of the 94th and 95th Articles of War, which are so closely related that they may properly be dealt with together.

a. Specifications 1 and 2 of Charge I, violations of 94th Article of War, and Specifications 1 and 2 of Charge II, violations of 95th Article of War.

On 11 July 1943 and on 31 October 1943, acting under orders issued by the commanding officer of the 728th Military Police Battalion, accused, accompanied on the first trip by two other officers of the battalion, and on the second by one other officer of the battalion, proceeded to Chicago on official business. The nature of the transportation to be used was not designated in the orders. In each instance a government car, driven by Sergeant Kramer of the same battalion, was used. Prior to departure from camp for Chicago, the tank was filled with gasoline belonging to the Government. All other gas used on the trips was purchased by the officers making the trip (R. 13,22,41-47,104-107,109,110).

Upon his return from Chicago after the July trip, accused on the morning of 14 July signed a mileage voucher, which had been prepared in the Personnel Section at Battalion Headquarters. This section was under the supervision of First Lieutenant Harry R. Scott (R. 11,12,14). In this voucher (Ex. 1) accused claimed reimbursement for travel by rail and

certified that no transportation had been furnished by the United States "either in kind or on Government transportation request". In accordance with instructions printed on the voucher, the letter "R", to indicate travel by rail, was inserted after the word "None" in the column headed "Kind of transportation furnished". Although Lieutenant Scott knew that the travel had been performed in a Government car, he voluntarily and without any comment later signed the certificate that the account was correct and that the travel performed was in accordance with the orders issued therefor. Before doing so he testified that he had satisfied himself that his only obligation under regulations was to certify that the travel had been performed (R. 15).

The voucher for the second trip was prepared on 2 November 1943 at the request of accused in the office of First Lieutenant Sam W. Truett, who had succeeded Lieutenant Scott as assistant adjutant and personnel officer. In reply to a direct question by Lieutenant Truett, accused stated that the travel had been performed by rail. Lieutenant Truett then requested his sergeant, Malits, to prepare the voucher (R. 29-31). Sergeant Malits likewise asked accused whether he had traveled by rail, and received a most emphatic vulgar assurance that he had (R. 35,36). In this voucher (Ex. 2) accused likewise claimed reimbursement for travel by rail and certified that no transportation was furnished by the United States "either in kind or on Government transportation request". After the word "None" in the column entitled "Kind of transportation furnished" there appears an asterisk. The corresponding asterisk is followed by the typewritten words, "Officer traveled by rail". The correctness of this voucher was certified by Lieutenant Truett.

These vouchers were duly forwarded to Colonel Roy J. Caperton, Finance Officer, U. S. Army, at Detroit for approval and payment (R. 15,31). The vouchers were processed in Colonel Caperton's office and the amount due was computed. This amount, $44.66 in each case, was duly paid to accused. In each case there was an overpayment of $16.26, accused receiving three cents more per allowable mile than he was entitled to receive (R. 38,39).

After having his rights explained, accused took the stand and testified that he had signed both vouchers without having read them, and denied that he had made any statement to Lieutenant Truett or Sergeant Malits that he had traveled by rail (R. 106,107,110,127,129,130). The organization is a small one, and copies of all travel orders are furnished to the personnel section, which "automatically" prepares such vouchers for the officers (R. 144-146). He "signed hundreds of things, a good many every day", that he did not read (R. 128). He had made other trips to Chicago, but was not familiar with the mileage between that city and Detroit and paid no attention to the amounts of the travel checks that he received, merely cashing them on receipt (R. 123-125). He prepared the travel order of 11 July and knew that there was no mention of the mode of travel (R. 123). He denied

any intention of deceiving any one when he presented the vouchers to Colonel Caperton (R. 109) and had no knowledge that he was claiming rail transportation when he signed the vouchers (R. 111,112). He promptly refunded the overpayment when he was notified of the "discrepancy" by Major Boyd of the Inspector General's Department in March 1944 (R. 113).

b. Specifications 1 and 2 of Charge III, violation of the 96th Article of War.

As Adjutant of the 728th Military Police Battalion, accused was the custodian of a fund commonly known as a "slush or band fund". The amount in this fund was never deposited in a bank, nor was a council book kept for the fund, although there was one for the regular battalion fund (R. 16,17, 65,66). The first "slush" fund was started through contributions of fifty cents per month from the officers of the battalion, and ten per cent commission received from a tailor. Later donations from outside sources and amounts received by an unofficial Battalion Band were placed in this fund (R. 58-66). The members of the band owned their own instruments, but subsequently some additional instruments and a stop watch for the leader of the band were purchased from this fund (R.51,55,56). Minor battalion expenses, such as special delivery, registry and express charges, were paid out of the fund (R. 63). In June 1943, while accused was absent on detached service, Lieutenant Scott, Acting Adjutant, found about one hundred dollars in cash,belonging to the fund, in the safe in accused's office (R. 16-18). A donation to the band came in during accused's absence and was turned over by Lieutenant Scott to accused. There were no records in which to make entries of receipts. There were no receipts in the safe for any sums paid out of the fund (R. 16-22). No report of this fund was made to Major Boyd when he conducted his periodical inspection on 18 and 19 February 1944. The Inspector General's Department having received a report that there were unreported funds, Major Boyd returned to the camp 3 March 1944. Upon being interrogated by Major Boyd, accused stated that he had not reported the fund because he had not thought about it. Major Boyd concluded from his investigation that between January and February 1942, shortly after the battalion was organized, and 3 March 1944, a total of $540 had gone into this fund. Statements, in the nature of a confession, were made by accused to Major Boyd, without any warning to accused of his rights, and these statements were testified to by Major Boyd without objection (R. 68-76). While these statements were inadmissible, the testimony of other witnesses for the prosecution and of the accused amply established the facts which they tended to prove and the rights of accused were not substantially injured thereby.

Accused, testifying in his own behalf, admitted that the funds had not been deposited in any bank, although most of the other funds in the battalion were deposited in a bank in Dearborn, seven or eight miles from headquarters (R. 116-120,139). The money had been kept on hand so that

it might be available for "ready disbursement". He believed that at times the amount on hand reached $200. Disbursements were made for minor battalion expenses, for the purchase of instruments for the band, various articles for the Battalion S-2, and materials for parties and entertainments for the men, and for loans to officers (R. 116-120). He had kept a "meticulous record" but it had been lost when the money was transferred from one envelope to another during one of his absences (R. 121). He had started the fund in question in February, 1943, with $20, one-half of the first payment received by the band for a performance (R. 141). At various times he gave the Colonel of the battalion an idea of the size of the fund (R. 139). The contributions by officers were prior to his becoming adjutant and no slush fund was turned over to him when he assumed that office on 5 August 1942 (R. 141).

c. Character witnesses for accused.

It was stipulated that if four designated businessmen of Bay City, Michigan, the home of the accused, were present they would testify to his good character, honesty, integrity, trustworthiness, and ability.

4. It is the opinion of the Board of Review that the evidence clearly sustains all the findings of guilty. As to the charges under Articles of War 94 and 95, the evidence shows that the accused signed the two mileage vouchers, prepared in the office of the Personnel Officer in accordance with the prevailing custom, and presented them for payment to Colonel Caperton, Finance Officer, United States Army, at Detroit. They were duly processed and paid. The voucher for the July trip was prepared without specific instructions from accused, but that for the second trip was prepared after accused had stated to the Personnel Officer and his sergeant that he had traveled by rail. Both contained the certificate and the typewritten matter heretofore described.

5. One who certifies or signs a document is presumed to have read it and to have knowledge of its contents and normally cannot avoid responsibility for incorrect statements which it contains merely on the ground that he failed to read the document. In the present instances, a most casual reading or even a quick glance at the vouchers shows that they contain a specific representation that the travel was by rail and that no government transportation had been furnished. Accused had been Adjutant of the battalion since 5 August 1942, and testified that he had prepared the travel order of 11 July 1943 and knew that it contained no provision for the mode of travel. Further, as to the voucher of 2 November 1943, there is abundant proof that accused furnished the information that the travel had been by rail, and that it was upon this information that the voucher was prepared in the office of the Personnel Officer. To hold one guilty of an offense under that part of the 94th Article of War involved in the present case, it is essential that it be established that claimant had knowledge of the falsity or fraudulent nature of his claim; and it is

an inescapable conclusion from the facts and circumstances that when accused submitted his vouchers he knew that they were false.

> "It is not the object or purpose of the party in transaction but his knowledge that the claim is false or fraudulent which is made by the Article the gist of the offence. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge, that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; otherwise not.* * * " (Winthrop's Military Law and Precedents, 2d Ed., p. 701.)

Accused's knowledge of the falsity of the claims justifies equally the conclusion that when he presented the vouchers to the Finance Officer he did so with intent to deceive, as charged in Specifications 1 and 2 of Charge II. These offenses are properly charged under the 95th Article of War (Dig. Op. JAG 1912-40, sec. 453(18)). While they arise substantially from the same situation which is the basis for the specifications under Charge I, there is no impropriety or illegality in a finding of guilty under both Article of War 94 and Article of War 95 (Bull, JAG, Mar. 1943, sec. 395 (44)).

6. As to the charges under the 96th Article of War, the evidence clearly shows that accused, as Adjutant of the Battalion, was the custodian of the "slush or band fund" under paragraph 5a(1), Army Regulations 210-50, 29 December 1942, and that he neither deposited these funds in a bank, as required by paragraph 6 of these Regulations nor kept any record pertaining thereto as required by paragraph 18. Accused failed to present any justification under the Regulations for his failure to comply with its provisions.

7. The accused is 48 years of age. The records of the War Department show that he served as an enlisted man in the Michigan National Guard from 10 April 1913 to 9 April 1916 and as an enlisted man in the Army of the United States from 28 April 1918 to 19 April 1919. He served overseas from 13 July 1918 to 29 March 1919. He enlisted in the Ohio National Guard on 11 December 1924 and served as an enlisted man until 8 January 1926, at which time he was commissioned as first lieutenant. He served as such until 12 November 1926. On 12 January 1942, at the age of 46, he tendered his services during the emergency and was appointed a first lieutenant in the Army of the United States on 5 March 1942. He was called into active service, effective 21 March 1942, and was assigned to the 728th Military Police Battalion, with which he served first as a company officer and later as adjutant. He was promoted to Captain on 6 January 1943.

8. 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. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of Article of War 94 or Article of War 96.

Irwin G. Zon, Judge Advocate.

Esther R. Andrews, Judge Advocate.

Tolmann Mayer, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 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 Captain Leighton E. Ware (O-441390), Corps of Military Police.

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. In view of accused's excellent record as a civilian, as testified to by business men of his home city, and his long and honorable record as a soldier, including overseas service in the first World War and service in the Michigan National Guard and the Ohio National Guard, and in further view of the fact that accused has returned to the Government the amount illegally collected by him ($32.52) on the claims here involved, I recommend that the sentence be confirmed but commuted to a reprimand, and that the sentence as thus commuted be carried into execution. A similar recommendation was made in the companion case of Lieutenant Colonel Victor L. Colson (O-190614), Corps of Military Police (CM 255948), who was convicted of having illegally collected an identical amount under the same circumstances and for the same trips.

3. Consideration has been given to a letter from the wife of accused to the President attached hereto.

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.

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Mrs. L.E. Ware.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 480, 1 Sep 1944)

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

SPJGN
CM 255831

5 JUN 1944

UNITED STATES	)	106TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Atterbury, Indiana, 22 April 1944. Dismissal and total forfeitures.
Second Lieutenant KENNETH H. GRAWUNDER (0-1308632), 424th Infantry.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 94th Article of War.

Specification: In that Second Lieutenant Kenneth H. Grawunder, Antitank Company, 424th Infantry, being at the time Class "A" Agent Finance Officer, did, at Fort Jackson, South Carolina, on or about 8 January 1944, knowingly and willfully misappropriate lawful money of the United States of the value of $74.75, the property of the United States, furnished and intended for the military service thereof, intrusted to him by Lieutenant Colonel Royer K. Lewis, Finance Department, Disbursing Officer, 106th Infantry Division.

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

Specification 1: In that Second Lieutenant Kenneth H. Grawunder, Antitank Company, 424th Infantry, being at the time Class "A" Agent Finance Officer, at Fort Jackson, South Carolina, on or about 15 January 1944, also being indebted to Sergeant Russell W King, Antitank Company, 424th Infantry, did, with intent to defraud, wrongfully and dishonestly make and utter to the said Sergeant King, a certain check in words and figures, as follows, to wit: THE SOUTH CAROLINA NATIONAL BANK, Columbia, S.C., January 15, 1944, Pay to the order of: Sergeant Russell W King, $74.75, (signed) Kenneth H. Grawunder, Second Lieutenant, 424th Infantry; then well knowing that he, the said Lieutenant Grawunder, did not have and not intending that he should have sufficient funds in the South Carolina National Bank, Columbia, South Carolina, for the payment of said check.

Specification 2: In that Second Lieutenant Kenneth H. Grawunder, Antitank Company, 424th Infantry, did, at Fort Jackson, South Carolina, on or about 24 December 1943, wrongfully and dishonorably borrow the sum of $64.30 from Technical Sargeant (then Staff Sergeant) Daniel N. Garritano, Antitank Company, 424th Infantry, an enlisted man, whom he, the said Lieutenant Grawunder, knew to be custodian of the said sum of money for a group of enlisted men.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

Specification 6: In that Second Lieutenant Kenneth H. Grawunder, Antitank Company, 424th Infantry, at Camp Forrest, Tennessee, on or about 22 January 1944, did, with intent to defraud, wrongfully and dishonorably make and utter to The Camp Forrest Exchange a certain check, as follows, to wit:

THE SOUTH CAROLINA NATIONAL BANK, Columbia, S.C., January 22, 1944, Pay to the order of: Cash, $25.00, (signed) Kenneth H Grawunder, Second Lieutenant, 424th Infantry; then well knowing that he, the said Lieutenant Grawunder, did not have and not intending that he should have sufficient funds in the South Carolina National Bank, Columbia, South Carolina, for the payment of said check.

Specification 7: Similar to Specification 6, but alleging check drawn on same bank, in same amount, payable to Cash, made and uttered to Camp Forrest Exchange, on 24 January 1944, at same place.

Specification 8: Similar to Specification 6, but alleging check drawn on same bank, in same amount, payable to Cash, made and uttered to The First National Bank, Tullahoma, Tennessee, on 26 January 1944, at Tullahoma, Tennessee.

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

Specification: (Finding of not guilty).

The accused pleaded guilty to Specification 2 of Charge II and not guilty to all Charges and all other Specifications. He was found guilty of the Specification of Charge I, of Charge I, and of Specification 2 of Charge II, guilty of Specification 1 of Charge II, "except the words 'intent to defraud and wrongfully and dishonestly.' Of the excepted words, not guilty"; guilty of Specifications 6, 7, and 8 of Charge II, "except the words 'intent to defraud.' Of the excepted words, Not Guilty"; not guilty of Charge II "but guilty of a violation of the 96th Article of War"; and not guilty of Specifications 3, 4, and 5 of Charge II, of the Specification of Charge III, and of Charge III. 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 accused, a Second Lieutenant in the Antitank Company, 424th Infantry, was appointed Class "A" Agent Finance Officer on 8 January 1944

"for the purpose of payment of supplemental payrolls for enlisted personnel of the 424th Inf, for the Month of December 1943." His duties in that position have been described as follows:

> "The agent officers are designated by special order put out by regiment or battalion headquarters. The payrolls have already been computed at that time and are on hand in the finance office. On the basis of this special order, we draw the funds from the bank, put them up in a bag and on the designated payday, the Class A Agent Officer reports to the finance office. At that time he signs a receipt — War Department Form No. 35 -- for the total sum of money which is listed on the back of the payroll. The receipt is turned over to the finance officer or myself, and the agent officer then takes the money into the back of the office and there verifys it as to accuracy and departs. Once he leaves, it is accepted as final that the account is correct. He thereupon goes out and makes payment to troops. If there is any money left over for men being absent, he returns those funds to the finance office, fills out a form we have on hand called a turn back sheet, listing the names of the men he was unable to pay. He signs the form. If there are no turn backs, no form is prepared. We then issue a receipt, a form 45-B and C, showing the total amount of the funds which were entrusted to him, and in addition to that, the net amount of the payroll paid and the amount of the turn back. Those two totals agree with the total amount entrusted to him."

The procedure was the same for both supplemental and regular payrolls (R. 12-13; Pros. Ex. B).

Sergeant Russell W. King, who was a member of the accused's company, had been "shorted" in his pay for the month of December 1943 and had accordingly returned the money tendered. Arrangements were made to disburse the correct amount to him by supplemental payroll. Before distribution could be effected he found it necessary to leave his organization on an emergency furlough. On 10 or 11 January 1944, within two or three days after his departure, $74.75 was disbursed for his account by the local Finance Office. The accused received the sum, but neither paid it to the sergeant who was absent nor made a

"turn back". When the sergeant returned from his furlough, an envelope containing a short note and a check payable to his order was handed to him by a Private First Class Band. Both instruments were signed by the accused. The note read as follows:

> "Sergeant King, I have deposited your money in the bank. Here is a check for the amount." (R. 14-19; Pros. Ex. C).

The check was cashed by the sergeant at the Fort Jackson, South Carolina, branch of The South Carolina National Bank of Columbia, South Carolina, the drawee institution, with which the accused had maintained a checking account for several months. As of 15 January 1944 his original statement sheet showed a deficit of forty-eight cents. When the check was presented to the parent bank, payment was of course refused because of insufficient funds. No attempt was made to recover from the sergeant. Instead Mr. Thomas J. Lyons, the cashier, on 22 January and again on 9 February 1944 dispatched letters to the accused's commanding officer requesting help in effecting collection. On the last date the accused sent $100 by Western Union wire from Lebanon, Tennessee, for deposit in his account. The following day the full amount of the check was charged against this remittance (R. 18-20; Pros. Ex. D).

Shortly before Christmas of 1943 the enlisted men of the Antitank Company, 424th Infantry, voluntarily raised a fund of $64.30 for the purchase of a gift which they intended to present to the company commander. They intrusted the sum to Technical Sergeant Daniel N. Garritano and delegated to him the responsibility of selecting something "suitable". In the meantime the accused had been granted a few days leave "to see his brother in Washington". Being in need of money, he asked the sergeant for a loan of the fund. The request was made on 23 December 1943. The following day the sergeant advanced the $64.30 to the accused. A demand for repayment was made on 26 or 27 December. The accused had just returned from his leave. The sergeant approached him and said that "inasmuch as the money didn't belong to anybody in particular, I would like to have it back". The accused was in a hurry and did not answer. Sergeant Garritano again requested the return of the $64.30 on 11 January 1944. He was told that he would be paid before the accused "went to umpire school at Camp Forrest". Five days later Private First Class Band handed the sergeant a sealed envelope. In it was a check in the sum of $64.30, dated 20 January 1944, drawn on The South Carolina National Bank, payable to the order of "Daniel Garritano", and executed by the accused. It was cashed on 18 January 1944 by an officer, who in turn obtained currency or merchandise for it at Stein's, a business concern located in Columbia, South Carolina. The instrument was deposited in The South Carolina

National Bank which refused to honor it because it was postdated and "because it was drawn against insufficient funds". The accused's commanding officer was immediately acquainted with the facts by wire. A money order for the face amount of the check was ultimately received by Stein's "during the period March 12 to March 23" 1944. (R. 20-30; Pros. Exs. D, E. F).

Two checks, each in the sum of $25, executed by the accused, and bearing the respective dates of 22 January and 24 January 1944, were cashed by him at the Camp Forrest Exchange. Both were rejected upon presentation to The South Carolina National Bank, the drawee institution. Neither had been redeemed by the accused as of 29 March 1944 (R. 33; Pros. Ex. H).

A third check for $25, drawn against The South Carolina National Bank and signed by the accused, was cashed by him on 26 January 1944 at the First National Bank of Tullahoma, Tennessee. It was twice presented to The South Carolina National Bank and twice returned for insufficient funds. A written demand for payment of the $25 was made upon the accused by the First National Bank of Tullahoma, Tennessee, on 7 February 1944. No reply had apparently been received as of 29 March 1944 (R. 33; Pros. Ex. I).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand in his own defense. He had hoped to present his wife as the principal witness on his behalf, but she had left her home and, despite his most diligent efforts, he had been unable to trace her to her new address. He had written letters to her parents and to one of her friends and had made several long distance telephone calls inquiring about her whereabouts, but no one seemed to know where she could be found. These facts were called to the court's attention at the commencement of the trial, but since defense counsel was not particularly sanguine about what could be accomplished by a further delay, and since he had had ample time in which to prepare the case, no continuance was granted (R. 4-5, 36, 40; Def. Exs. 1, 2).

The accused had married on 6 August 1942. When stationed at Fort Jackson, South Carolina, his wife had lived with him, "Off and on. Once in awhile she went home to her sisters. Her sister was always sick. She also went on a trip to California". Her travels had been "quite an expense". Early in January 1944 he had arranged to have some money deposited in his account with The South Carolina National Bank. In his own words,

"We were on the D series and we got into camp

> rather late. One night I went to town and that night I told my wife to deposit two-hundred dollars and save sixty dollars. My check at that time was two-hundred and sixty some dollars * * *."

The following day she returned $50 to him and stated that she had placed two hundred dollars to his credit with the bank (R. 36, 42-43, 49-50).

During the month of January 1944 the accused issued checks totalling $260.55. When it was pointed out to him that the sum exceeded the amount which his wife was supposed to deposit to his credit he added that:

> "On the same day that I paid the troops, I went in town right from paying the boys, and since I had no place to keep this seventy-five dollars of Sergeant Kings, so I gave her that seventy-five dollars, and told her just whose it was and that she should deposit it until he got back from furlough".
>
> "I should have had over two-hundred and seventy-five dollars in the bank with the money I gave my wife to deposit that belonged to Sergeant King. There was no place to keep Sergeant King's money on the post. I was going out on the range and so forth, and I didn't want to take a chance on loosing /sic/ it."

He had withheld the $74.75 at Sergeant King's own suggestion. The sergeant had taken steps to obtain a divorce and "everything was ready". In the presence of the accused, Lieutenant Hair, and Lieutenant Bare he had said that:

> "* * * he needed the money to go home and that he didn't like the idea of borrowing it, and he had hoped that the company commander or somebody would see that he would get his pay so that when he came back he could repay the money he borrowed."

The accused did not consider it improper "to hold money out" because he "had seen it done in /his/ company just a week previous to that" (R. 43-44, 47-49).

He did not learn that some of his January checks had been returned for insufficient funds until 27 January 1944. The first written notice reached him only a week before trial. Upon being orally apprised, he sent $100 to The South Carolina National Bank and $64.30 to Stein's. He later also remitted four $20 bills to the bank "for the purpose of clearing any outstanding checks * * * that were left". Several months prior to January 1944 he had executed two other checks which were subsequently dishonored (R. 39-42, 50; Def. Exs. 3, 4, 5).

He freely admitted that he had borrowed $64.30 from Sergeant Garritano. He disclaimed all knowledge, however, that the money was not the sergeant's (R. 46-47).

5. The Specification of Charge I alleges that the accused did,

> "on or about 8 January 1944, knowingly and wilfully misappropriate lawful money of the United States of the value of $74.75, the property of the United States, furnished and intended for the military service thereof, intrusted to him by Lieutenant Colonel Royer K. Lewis, Finance Department, Disbursing Officer, 106th Infantry Division."

This offense was set forth under Article of War 94.

As Class A Agent Finance Officer the accused occupied a position of trust. The sum of $74.75 was disbursed to him for the sole and exclusive purpose of paying Sergeant King. Failing that, it was the accused's duty to return the money forthwith to the Finance Department. Instead, he used it, as he himself has admitted, to augment his personal checking account. This was clearly a misappropriation within the meaning of paragraph 150i of the Manual which defines the offense as a "devoting to an unauthorized purpose". That the sergeant was promptly paid what was due to him when he returned from his furlough negates a fraudulent intent. Proof of such intent is not, however, essential to a conviction of misappropriation. It was sufficient that the accused acted "knowingly and wilfully".

6. Specification 2 of Charge II alleges that the accused did,

> "on or about 24 December 1943, wrongfully and dishonorably borrow the sum of $64.30 from Technical Sergeant (then Staff Sergeant) Daniel N Garritano,

> Antitank Company, 424th Infantry, an enlisted man, whom he, the [accused] knew to be custodian of the said sum of money for a group of enlisted men."

This was stated to be a violation of Article of War 95.

The accused pleaded guilty, and there is nothing in the record to indicate that his plea was improvidently entered. Such evidence as was adduced by the prosecution tends clearly to establish the offense. As was said in Dig. Ops. JAG, 1912-1940, sec. 378 (3), "A plea of guilty admits the facts set forth in the specification * * *": CM 121429 (1918). Under ordinary circumstances a plea of guilty even in the absence of any evidence by the prosecution would be sufficient to sustain a conviction: Dig. Ops. Jag, 1912-1940, sec. 378 (3); CM 134185 (1919).

7. Specification 1 of Charge II alleges that the accused,

> "being at the time Class 'A' Agent Finance Officer * * *, on or about 15 January 1944, also being indebted to Sergeant Russell W. King * * * did, with intent to defraud, wrongfully and dishonestly make and utter to the said Sergeant King, a certain check [in the sum of $74.75], then well knowing that he, the [accused], did not have and not intending that he should have sufficient funds in the South Carolina National Bank, Columbia, South Carolina, for the payment of said check."

Specifications 6 and 7 of Charge II allege that the accused on or about 22 January and 24 January 1944, respectively, "did, with intent to defraud, wrongfully and dishonorably make and utter to The Camp Forrest Exchange" two checks, each for $25, "then well knowing that he, the [accused] did not have and not intending that he should have sufficient funds in the South Carolina National Bank, Columbia, South Carolina, for the payment of said" checks. Specification 8 of Charge II alleges that the accused "on or about 26 January 1944, did, with intent to defraud, wrongfully

and dishonorably make and utter to The First National Bank, Tullahoma, Tennessee, a certain check" in the face amount of $25, "then well knowing that he, the [accused], did not have and not intending that he should have sufficient funds in the South Carolina National Bank, Columbia, South Carolina, for the payment of said check." All of these acts were laid under Article of War 95.

The court by exceptions eliminated the words "intent to defraud" and "wrongfully and dishonestly" from its finding of guilty of Specification 1 of Charge II and the words "intent to defraud" from its finding of guilty of Specifications 6, 7, and 8 of Charge II, and found the accused not guilty of violating Article of War 95 but guilty of violating Article of War 96. This action was obviously taken because of the absence of any proof that the accused's motives in executing the checks enumerated were fraudulent or deceitful.

In the light of all the facts, however, it is difficult to believe that he turned over a check to his wife and directed her to deposit $200 of the proceeds in The South Carolina National Bank. The coincidence of her disappearance at a time when her testimony in corroboration of his story was most essential casts some doubt as to what she would actually have stated as a witness under oath. Her sudden and unexplained departure is dramatic but it cannot erase or obscure the accused's guilt. Between 10 October 1943 and 10 February 1944 his net balance with the bank had been an overdraft of forty-eight cents. Before any of the transactions herein described he had issued other worthless checks. In applying Sergeant King's money to his personal use he disclosed a flagrant disregard for his duties as a custodian of funds and a contempt for the rights of others.

The accused had complete and exclusive control of his account, and he is chargeable with knowledge of its status: CM 202601; CM 236070; CM 243908; CM 254349. The offense of making and uttering checks with insufficient funds in the drawee bank in contravention of Article of War 96 has been established beyond a reasonable doubt.

8. The accused is about 24 years old. The records of the War Department show that he had enlisted service in the New York National Guard from 8 October 1935 to 7 October 1938 and from 11 October 1938 to 10 October 1941; that he was called into federal service on 16 September 1940; that he was commissioned a Second Lieutenant in the Army of the United States on 20 January 1943; and that since the last date he has been on active duty as an officer.

9. The court was legally constituted. No errors injuriously

affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 94 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(Resigned)

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

SPJGQ
CM 255948

8 JUN 1944

UNITED STATES v. Lieutenant Colonel VICTOR L. COLSON (0-190613), Corps of Military Police.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Wayne, Michigan, 29 March 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 94th Article of War.

Specification 1: In that Lieutenant Colonel Victor L. Colson, 728th Military Police Battalion did, at Detroit, Michigan, on or about July 14, 1943, present for approval and payment a claim against the United States by presenting to Colonel Roy J. Caperton, Finance Department, Finance Officer at Fort Wayne, Detroit, Michigan, an officer of the United States duly authorized to approve and pay such claims, Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, in the amount of $44.66 for reimbursement of mileage for travel performed by rail by Lieutenant Colonel Victor L. Colson from Detroit, Michigan, to Chicago, Illinois, and return on July 11, 1943, and July 13, 1943, respectively, which claim was false and fraudulent in that the said Lieutenant Colonel Victor L. Colson did not travel by rail but traveled by government automobile furnished by the United States and was then known by the said Lieutenant Colonel Victor L. Colson to be false and fraudulent.

Specification 2: In that Lieutenant Colonel Victor L. Colson, 728th Military Police Battalion did, at Detroit, Michigan, on or about November 2, 1943 present for approval and payment a claim against the United States by presenting

to Colonel Roy J. Caperton, Finance Department, Finance Officer at Fort Wayne, Detroit, Michigan, an officer of the United States duly authorized to approve and pay such claims, Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, in the amount of $44.66 for reimbursement of mileage for travel performed by rail by Lieutenant Colonel Victor L. Colson from Camp River Rouge Park, Detroit, Michigan, to Chicago, Illinois, and return on October 31, 1943, and November 1, 1943, respectively, which claim was false and fraudulent in that the said Lieutenant Colonel Victor L. Colson did not travel by rail but traveled by government automobile furnished by the United States and was then known by the said Lieutenant Colonel Victor L. Colson to be false and fraudulent.

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

Specification 1: In that Lieutenant Colonel Victor L. Colson, 728th Military Police Battalion did at Detroit, Michigan, on or about July 14, 1943, with intent to deceive Colonel Roy J. Caperton, Finance Department, Finance Officer, Fort Wayne, Detroit, Michigan, officially state in writing on a Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, as follows:

"Mileage Voucher

For mileage under attached order, SO#112 10 July 1943, received at Cp River Rouge Pk, Detroit, Michigan

Date 1943 (1)	From (2)	Date 1943 (3)	To (4)	Kind of Transportation furnished (See note) (5)
7/11	Detroit, Michigan	7/11	Chicago, Illinois	None (R)
7/13	Chicago, Illinois	7/13	Detroit, Michigan	None (R)

Victor L. Colson (Payee)

Lt. Col., 728th M.P. Bn" (Rank or Title

which statement was known by said Lieutenant Colonel Victor L. Colson to be untrue in that transportation was furnished by the United States by means of government automobile.

Specification 2: In that Lieutenant Colonel Victor L. Colson, 728th Military Police Battalion did at Detroit, Michigan, on or about November 2, 1943, with intent to deceive Colonel Roy J. Caperton, Finance Department, Finance Officer, Fort Wayne, Detroit, Michigan, officially state in writing on a Mileage Voucher, on Standard Form Number 1071 - Revised Form approved by the Comptroller General of the United States, as follows:

*Mileage Voucher

For mileage under attached order, SO-184 P-1 October 28, 1943, received at Cp. River Rouge, Pk. Detroit, Michigan

Date 1943 (1)	From (2)	Date 1943 (3)	To (4)	Kind of transportation furnished (See note) (5)
10/31	Cp River Rouge Pk Detroit, Michigan	10/31	Chicago, Illinois	None*
11/1	Chicago, Illinois *Officer travelled by rail	11/1	Cp River Rouge Pk. Detroit, Michigan	None*

Victor L. Colson (Payee) — Lt. Col., 728th M.P. Bn* (Rank or Title)

which statement was known by said Lieutenant Colonel Victor L. Colson to be untrue in that transportation was furnished by the United States by means of government automobile.

Specification 3: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 3 of Charge II, both Specifications of Charge III and Charge III, and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution insofar as it relates to the Specifications of which the accused was found guilty:

The accused, was Commanding Officer of the 728th Military Police Battalion from September 1942 until he was relieved of his command on 4 March 1944, and was stationed at Camp River Rouge Park, Michigan, throughout the period stated. He performed duty travel from Camp River Rouge Park to Chicago, Illinois, on 11 July 1943, and from Chicago to Camp River Rouge Park on 13 July 1943. The entire round trip was made in a Government owned automobile (R. 38, 78, 80, 81). Following return of accused, a travel voucher (Form No. 1071), covering his mileage allowance for the trip, was prepared under the supervision of the Assistant Adjutant, signed by accused, and forwarded by the Assistant Adjutant to Colonel Roy J. Caperton, Finance Officer, Fort Wayne, Michigan, for payment. An authenticated photostatic copy of such voucher was introduced in evidence as Prosecution's Exhibit 1 (R. 10, 11, 40). In column (5) of the voucher, under the caption "Kind of transportation furnished", the word "None" appears. Immediately following that word, the letter "(R)" appears. A printed explanatory note on the face of the voucher discloses that the letter "(R)" indicates that the method of travel used was "Rail". The notations referred to, viz., "None (R)", were on the voucher when it was forwarded to the Finance Officer, but the figures in columns (6) and (8), setting out the amount of mileage involved and the amount of money allowable on the voucher, were inserted at the Finance Office (R. 14, 20).

On 31 October 1943, the accused made another trip from Camp River Rouge Park to Chicago, returning to the camp on 1 November 1943, and again using a Government owned vehicle on the entire trip (R. 38, 39). A mileage voucher similar to the one described above, with the single exception noted below, was promptly prepared covering this trip (Pros. Ex. 2). In the case of this voucher, the clause "Officer travelled by rail" was written on the face of the voucher instead of the letter "(R)". The Assistant Adjutant testified specifically that this clause was written on the voucher by his direction and that it was on the voucher when the accused signed it (R. 25, 30). As in the case of the July voucher, the figures in columns (6) and (8) of the November voucher (the amount of mileage allowance involved) were inserted in the Finance Office (R. 27). The practice of having those figures inserted by someone in the Finance Office was "always" followed (R. 27).

Both vouchers were paid to the accused in regular course, the July voucher being paid on or about 20 July 1943, and the November voucher being paid on or about 8 November 1943 (R. 40). The amount paid on each voucher, $44.66, was computed at the rate of 8 cents per mile, except for 13 miles each way designated as land grant mileage which was paid for at the rate of 5 cents per mile (R. 41).

As received by the Finance Officer at Fort Wayne, Michigan, there were no errors apparent on the faces of the two vouchers signed by the the accused (Pros. Exs. 1 and 2) which would necessitate any refund to the Government (R. 44). However, after a conversation on 3 March 1944, with Major Harold L. Boyd, Inspector General's Department, who made the annual inspection at Camp River Rouge Park (R. 66, 69-70), the accused, on 6 March 1944, made a cash refund to the Finance Officer of the sum of $32.52 as reimbursement for the difference between the amount allowable for travel by rail and the amount allowable for travel by Government owned automobile on the mileage represented by the July and November vouchers (R. 41, 44; Def. Ex. 1).

4. Evidence for the defense insofar as it relates to the Specifications of which the accused was found guilty:

After having his rights as a witness explained to him, the accused elected to testify under oath in his own behalf. He briefly reviewed his military history. Prior to World War I, he was an enlisted man in the National Guard, and during the war he served as a lieutenant in the 32nd Division. Following World War I, he had eighteen years of service as Company Commander in the National Guard. Shortly after the attack on Pearl Harbor, he returned to active duty in the Army of the United States and from sometime in September 1942 until 4 March 1944 he was the Commanding Officer of the 728th Military Police Battalion (R. 78-80).

The trips made by the accused from Camp River Rouge Park to Chicago on 11 July 1943, and 31 October 1943, were made pursuant to orders of the Commanding General of the Sixth Service Command, and were made to enable the accused to attend conferences at the Headquarters of that Command. He admitted that both trips were made by Government owned automobile (R. 80), and that for both trips he signed and presented for payment mileage vouchers of which Prosecution's Exhibits 1 and 2 are photostatic copies (R. 81-82). He received a payment of $44.66 on each of the vouchers (R. 82). Although he has read some vouchers which he has signed, he did not read either of the two here under consideration even though he gave no instructions as to their preparation (R, 84). When these two vouchers were presented to Colonel Roy J. Caperton, the Finance Officer, for payment he (the accused) was not aware that they contained any false representations (R. 85). It was not until he received the check for the November voucher that his attention was drawn to the fact that the amount claimed on that voucher was too large (R. 89), and it was not until he talked to the Inspector General on 3 March 1944 that his attention was drawn to the fact that the amount claimed on the July voucher was too large (R. 89). After testifying that he refunded to the Government on 6 March 1944, the sum of $32.52, representing the difference between the amount allowable for travel by rail and the amount allowable for travel by Government owned vehicle in respect of the mileage covered by the two vouchers, he added

"I did that immediately after talking to the Inspector General, explaining that I had intended to take care of it, but due to the fact that I did not know the difference in the amount, due to the fact that I did not have a checking account, and the fact that I lived 12 miles from the Finance Officer and I have only been in Fort Wayne once in a years time, my intentions were to straighten it up but it was just put off from day to day and from time to time and it was not taken care of. I figured also that there was no particular hurry about it" (R. 90).

He did not call the Finance Officer by telephone and undertake to dispose of the matter by that means because he intended to go to Fort Wayne and take it up with him personally (R. 111, 112). When he talked with Major Boyd, of the Inspector General's Department, about the matter on Friday, 3 March 1944, he realized, however, that "the thing was brought then to a critical stage" and he promptly sent an officer to Fort Wayne on the following Monday, 6 March 1944, with cash to make the necessary refund (R. 111).

The accused also testified with respect to a previous refund he had made to the Finance Officer in the amount of $44.66, on 10 April 1943, and the receipt he received for such repayment was introduced in evidence as Defense's Exhibit 2. Colonel Caperton, the Finance Officer, testified that the clause on the face of the receipt (Def. Ex. 2) reading "Previous payment made on No. 123006" lead him "to believe that there were two vouchers that came through for the same trip" and that "when they were detected" in the Finance Office the refund was made.

On cross examination the accused testified that he was placed in arrest on 4 March 1944 (R. 104). It had been his custom to make about one trip to Chicago per month (R. 107). All of these trips were by train except the trips made on 11 July and 31 October 1943, which were made by Government owned automobile (R. 107). He was entitled to 8 cents per mile when he traveled by rail and 5 cents per mile when he traveled by Government vehicle (R. 108). Prior to July 1943, he had made many trips from his station to Chicago and well knew that the travel allowance for travel by rail was $44.66 (R. 109). He admitted that the two vouchers signed by him (Pros. Exs. 1 and 2) showed on their faces the dates on which the travel was performed and the mode of travel employed (R. 123, 124). Although when he received the check for the November voucher he became aware that the voucher must have been inaccurately prepared, he did not go to the Sergeant who prepared it or to the Assistant Adjutant under whose supervision it had been prepared and make any complaint of the error (R. 127). He does not recall telling anyone anything about it (R. 127). The accused specifically denied that his discovery of the overpayment in respect of the trip made 31 October 1943 suggested to his mind that a similar over-

payment might have been made in respect of the single previous trip he had made to Chicago by automobile, viz., the trip made on 11 July 1943 (R. 127). On page 127 of the record of trial the following question and answer appear:

"Q. And you had not taken any action on either of those overpayments until about March 3, 1944, is that correct?"

"A. Yes, sir. When I saw that it was necessary to take action I hurried through with it".

Six officers (three captains and three lieutenants), who have served considerable periods of time with the accused in the 728th Military Police Battalion, testified as character witnesses. Four of them testified that accused's reputation for truth and veracity is "good", and two of them that it is "very good" (R. 130, 132, 133, 135, 136, 138). There was also introduced in evidence by the defense a copy of a letter from Brigadier General W. E. Gunther to Major General H. S. Aurand, Commanding General of the Sixth Service Command, officially commending the accused for the excellent performance of his duties in connection with the emergency that arose as a result of the Detroit race riots during the week of 21-28 July 1943 (R. 117; Def. Ex. 3). Also it was stipulated that if Thomas Colleday, Brigadier General, Michigan National Guard, Commanding, were present as a witness, he would testify that the accused's prior National Guard Service was excellent and that in the witness' opinion the accused's interest in the service and devotion to duty is outstanding (R. 139).

5. The competent and legal evidence of record fully establishes accused's guilt of the offenses alleged in Specifications 1 and 2 of Charge I. The evidence shows, and the accused does not deny, that the two travel vouchers in question, containing material and substantial misstatements of fact, were signed by the accused and by him presented to Colonel Roy J. Caperton, Finance Officer at Fort Wayne, Michigan, for approval and payment, and that the full amount claimed on each voucher, $44.66, was paid to the accused in regular course. The only defense asserted by the accused is that he did not know, at the time of signing and presenting the vouchers, that they contained any misrepresentations. This alleged lack of knowledge he attributes to his not having read the vouchers at the time he signed them. While the routine details of preparing vouchers may be placed in the hands of clerical assistants, whose duty it is to perform the ministerial work of processing them, one who signs or certifies vouchers prepared in this way cannot escape the responsibility devolving upon him of ascertaining the correctness of the subject matter contained therein which he certifies to be true. Even the most cursory examination of the two vouchers here considered would have disclosed their falsity. On the face of each voucher there was set out the dates of the travel involved, and not only a representation that the transportation furnished by the Government was "None" but also a representation that

the travel was performed by "rail". Both were deliberate misstatements of fact which under the circumstances are not credible upon any hypothesis of ignorance or innocence. Moreover, the refund which the accused was required to make to the Finance Officer on 10 April 1943, of the sum of $44.66, to reimburse for a duplication of payments made on a previous trip to Chicago should have intensified the alertness of the accused in the matter of carefully checking travel vouchers. If these vouchers were in fact the result of an honest error, this was the time for an honest man to say so. Actually, however, the evidence compels the conclusion that the accused continued, even up to the time of the investigation by the Inspector General on 3 March 1944, to evade any attempt to acknowledge the error or refund the amounts illegally obtained. His attempted explanation of why he delayed for approximately four months to take steps to rectify the overpayment on the November voucher after the fact of the overpayment had been brought to his attention is evasive and incredible. The inescapable inference from all of the evidence is that the accused had guilty knowledge at the time he signed and presented the vouchers for allowance and payment and that in thus signing and presenting them he was attempting a deliberate fraud upon the Government.

6. The Board of Review is likewise of the opinion that the competent and legal evidence of record fully establishes accused's guilt of the identical offenses alleged in Specifications 1 and 2 of Charge II as violations of Article of War 95. The gravamen of each of the two offenses alleged under Charge II is the making of a false official statement with intent to deceive. These offenses are properly charged under Article of War 95 (Dig. Op. 1912-1940, Sec. 453 (18)). There is no illegality or impropriety in the charging of offenses arising out of the same transactions under both Article of War 94 and Article of War 95. While the transactions are the same, the offenses charged under the different Articles are different in nature (Dig. JAG, 1922, p. 118, Bull. JAG, Jan. 1944, Sec. 428 (5)). For the same legal reasons applicable to the offenses discussed in the preceding paragraph the Board of Review is of the opinion that accused's denials and explanations by way of defense are obviously implausible. The only reasonable inference from the evidence, taken as a whole, is that the accused knowingly presented false vouchers with an intent to deceive the officer to whom they were presented. The further fact remains that the Finance Officer who paid these claims was actually deceived to the extent of taking the representations made thereon at their face value.

7. After the trial, numerous requests and recommendations for clemency were received by the reviewing authority. These included a written recommendation signed by all members of the court who heard and decided the case, except two, in which, "in consideration of the long and honorable service" of the accused, it was recommended that clemency be granted to the extent "that execution of the entire sentence be suspended". That recommendation, together with the following additional

communications, are attached to the record of trial: Telegram from Post Commander George Van Hall, Sergeant Alvin Jonkers, Post 2326, Veterans of Foreign Wars, Grand Haven, Michigan, dated 4 April 1944; Letter from Brigadier General LeRoy Pearson, The Adjutant General, Michigan National Guard, Lansing, Michigan, dated 25 April 1944; Letter from Earl Babson, Superintendent, Grand Haven Public Schools, Grand Haven, Michigan, dated 27 April 1944; and letter from Reverend J. V. Roth, Pastor, First Presbyterian Church, Grand Haven, Michigan, dated 27 April 1944. Also, the Staff Judge Advocate, in his review, recommends that the execution of the sentence be suspended.

8. The accused is 49 years of age. The records of the War Department show that the accused was born and reared in Grand Haven, Michigan. He graduated from the Grand Haven High School, and subsequently attended Alma College, Alma, Michigan, for 1 year and Worsham Training School (embalming), Chicago, Illinois, for 6 months. He joined the Michigan National Guard in 1915, and served as a lieutenant in the 32nd Division during World War I. Following the war he was a Company Commander in the Michigan National Guard 17 years. He was called to active duty in the Army of the United States on 20 April 1942 in the grade of major, and has been on active duty since that date. He was promoted to the grade of lieutenant colonel on 7 December 1942. In civilian life the accused was engaged in the undertaking business from 1920 to 1930, was engaged in Federal Emergency Relief work for 2 years in the middle thirties and was engaged in managing a liquor store for 1 year and 5 months covering parts of 1939 and 1940.

9. The court was legally constituted and 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 legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal and total forfeitures are authorized upon a conviction of a violation of Article of War 94, and dismissal is mandatory upon a conviction of a violation of Article of War 95.

William A. Pounds, Judge Advocate.

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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 Lieutenant Colonel Victor L. Colson (0-190613), Corps of Military Police.

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. The Staff Judge Advocate of the Sixth Service Command, in his review of the record of trial, has recommended that the sentence be approved but suspended. Also, there was submitted to the reviewing authority a clemency petition, signed by seven of the nine members of the court who heard and decided the case, recommending, "in consideration of the long and honorable service" of the accused, that the sentence be suspended. In addition, the reviewing authority has received clemency letters from the accused's pastor, the superintendent of the public schools of the town in which he resides (Grand Haven, Michigan), and from various military associates and superiors of the accused. Particularly noteworthy, also, is a letter from Brigadier General W. E. Gunther to Major General H. S. Aurand, Commanding General of the Sixth Service Command (Def. Ex. 3), officially commending the accused for the excellent performance of his duties in connection with the emergency that arose as a result of the Detroit race riots during the week of 21-28 July 1943. In view of the long and honorable previous record of the accused in the military service, including combat service in World War I, and in view of the fact that he has repaid to the Government the amount illegally collected by him ($32.52) on the claims he was convicted of having fraudulently presented to the Finance Department, I recommend that his sentence be confirmed but commuted to a reprimand.

3. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the above recommendation, 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 reprimand. G.C.M.O. 392, 18 Jul 1944)

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

SPJGK
CM 256061

30 MAY 1944

UNITED STATES)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.)	Trial by G. C. M., convened at Craig Field, Selma, Alabama, 2 May 1944. Dismissal.
Second Lieutenant HENRY C. FUCIK (0-823057), Air Corps.)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 96th Article of War.

Specification: In that Second Lieutenant Henry C. Fucik, Army of the United States, Army Air Forces Pilot School (Advanced - Single Engine), Craig Field, Selma, Alabama, did, on or about 17 April 1944, while engaged in a flight at or near Meridian, Mississippi, wrongfully violate the written provision of Section I, Paragraph 1 of Army Air Forces Regulation Number 60-16, dated 6 March 1944, to which he was subject and which provides as follows:

"1. Reckless Operation. An AAF 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."

In that he wrongfully piloted and flew an airplane described as a PT-19 by approaching another airplane, also described as a PT-19, from the rear and flying directly beneath the second airplane until he had reached a point of such close proximity thereto that in suddenly pulling downward

> the empennage section of his airplane was raised and struck the approached airplane, resulting in the approached airplane veering sharply to the right and striking a third airplane, also described as a PT-19, which was flying a position of approximately one hundred (100) feet to the right and to the rear of the approached airplane.

He pleaded not guilty to, and was found guilty of, the Specification and the Charge. No evidence of previous convictions was introduced at the trial. 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. For the prosecution it was shown that on 17 April 1944 accused was one of a group of officers engaged in ferrying ten PT-19 airplanes from Jackson Army Air Base, Jackson, Mississippi, to Craig Field, Selma, Alabama (R. 7, 8). Second Lieutenant Gordon C. Kreger, Air Corps, was the flight leader (R. 8, 23) and, under his direction, the group was flying a loose "V" formation at an altitude of 2500 feet (R. 7, 9). The ship on Lieutenant Kreger's right was piloted by Second Lieutenant Gordon M. Day, Air Corps (R. 7, 10), while Second Lieutenant Arthur M. Hockett, Air Corps, piloted the first ship on the leader's left (R. 11). Lieutenant Kreger was flying a straight and level course and the planes were at a distance of approximately 50 to 100 feet from one another (R. 8, 10) with sufficient space for another plane to pass between them (R. 8, 12). At approximately 1810 o'clock, when the group was between 5 and 10 miles east of Meridian, Mississippi, Lieutenant Kreger, who had just checked to see if all the ships were in formation, looked for his next check point and, as he was doing so, his plane was hit and thrown up and over to the right side, causing it to crash into Lieutenant Day's ship. Lieutenant Kreger was more or less dazed by the impact and when he "came to" he had lost about 1500 feet of altitude. Finding himself too close to the ground to risk a jump he was obliged to make a crash landing (R. 7, 8). Upon examination of his plane thereafter he discovered a piece of fiber from some other plane wedged in the windshield of the front cockpit (R. 8). There had been a prior flight by the same number of ships from Jackson to Craig Field earlier on the same day and under Lieutenant Kreger's leadership (R. 8), and

neither on that nor the subsequent flight did the leader have any occasion to, nor did he, make any movements up or down from the 2500 foot altitude (R. 9) and the weather was calm, the air very smooth (R. 10, 12) and the visibility was unlimited (R. 12).

By stipulation Lieutenant Gordon M. Day testified that he was piloting the ship flying to the right and rear of Lieutenant Kreger's plane. At about 1810 o'clock, when near Meridian, Mississippi, he saw the plane operated by the accused (the original position of which he did not observe) come from below and behind the lead ship, until, as it passed under, the front part of the accused's ship suddenly went downward and the tail section was raised and went into the bottom of the lead ship. Lieutenant Day thought of shoving forward in order to go "down and out" but Lieutenant Kreger's ship turned over in front of his plane and he had to "pull up". It was too late, however, for Lieutenant Day to get out of Lieutenant Kreger's way and the lead ship "rolled over" Lieutenant Day's ship and struck the left wing, compelling Lieutenant Day to bail out (R. 10, 11).

Second Lieutenant Arthur M. Hockett testified that he was one of the pilots flying a straight and level course in a "rather loose" "V" formation heading directly toward Craig Field, under the leadership of Lieutenant Kreger on 17 April 1944. From his position as first ship on the left of the leader he saw another airplane just behind and below, but moving slowly forward and under, the lead ship. At about the time when the tail of that ship was even with the propeller of the lead ship the two planes collided, either because the tail of the lower plane was raised or the lead plane lowered. The lead ship moved to the right and the ship on the right turned to get out of the way. At that time Lieutenant Hockett turned to the left and saw a man, whom he later discovered was Lieutenant Day, parachute from a plane and he followed him down.

Another of the group of pilots engaged in ferrying the planes in question was Second Lieutenant Theodore J. Badger, Air Corps, who was flying the ship furthest to the left of the lead ship piloted by Lieutenant Kreger. He saw nothing of the initial impact between the accused's ship and Lieutenant Kreger's plane but heard the crash and saw pieces of airplane flying in the air. He did, however, see the lead ship turn over on its back and crash into the plane on its right. As the accused's plane was going down toward Craig Field Lieutenant Badger followed him and, thinking the plane was so badly damaged that the accused would have to bail out any minute, he "pointed him back"

to Meridian. As he recalled it, both elevators, the rudder and half of the left horizontal stabilizer of the accused's ship were gone and the vertical stabilizer was flapping around very loose (R. 13, 14).

Second Lieutenant Charles L. Lind, Air Corps, was the "Second wing man on the left" of the formation and he saw the lead ship strike the plane on its right and take off a part of the wing of that plane (R. 15).

At the request of the court Major Abbott Kagan, Air Corps, Operations Officer at Craig Field, Selma, Alabama, was called as a witness and testified that on 17 April 1944 he had assigned a group of officers, including the accused, to the duty of piloting a number of PT-19 airplanes from Jackson, Mississippi, to Craig Field, Alabama. These officers were called in, prior to making the trip, and definitely instructed by Major Kagan as to the manner in which they should fly to Jackson and back. They were told not to fly under 1000 feet, not to execute any acrobatic maneuvers and not to fly "close formation" going over or coming back. The pilots were also told who would be the flight leader on the way back. Lieutenant Kreger was designated as the leader for the group with which the accused was flying. Major Kagan assumed that each pilot understood what was meant by close formation inasmuch as they were all trained pilots who had flown in formation. When asked his opinion as to what method he would use if he were flying in "V" formation and wished "to join up on either the right or left", he stated that he would "clear the outside and join in"; that it was "very dangerous" to "pull ahead of the formation underneath, pull around, make a 180° turn and come back" and such a method was not acceptable and had never been taught at Craig Field. He defined a "loose formation" as one whereby the pilot of each individual plane is not required to look to the pilot immediately ahead to maintain altitude but is at the beck and call of the leader who can go back and instruct pilots individually without disturbing any particular member of the formation. In the instant case it was a formation in which any PT ship could fly between any other two planes and still have plenty of room between wing tips (R. 22-24).

Section I, paragraph 1, Army Air Forces Regulation No. 60-16, 6 March 1944, was introduced in evidence without objection (R. 11; Pros. Ex. 1).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified that he was assigned to ferry a

PT-19 airplane from Jackson, Mississippi, to Craig Field, Alabama, on 17 April 1944. He had made one flight between the same stations on the same day. On the second flight he "took off" from Craig Field and followed behind and below the lead ship which was piloted by Lieutenant Kreger. As he remembered, only eight ships were in formation flying "V", right and left, at an altitude of 2500 feet. He was flying "between ten (10) and fifteen (15) feet" below the other planes. Then in his own words:

> "*** I had in mind to pull ahead of the formation and turn then get out on the wing of the formation. I chose the lead ship because that ship was being flown on the most steady course. I started under him and was going to pull out far enough ahead of him to turn away and come back on his wing.
>
> * * * * * *
>
> I held the same altitude, which should have put me about fifteen (15) feet below him.
>
> * * * * * *
>
> I watched him and kept the same distance between us until I got to where I could not look up any further. I glanced ahead to see if everything was clear, glanced around, noticed I was getting close to the lead ship and pushed forward the stick. The tail of my plane went up toward the lead ship, right on the wing of the ship.
>
> * * * * * *
>
> My ship, after it went down, went straight ahead. I did not see behind me." (R. 17-19).

He admitted that, while the air was quite rough earlier in the afternoon, it "smoothed out" toward evening. Under examination by the court the accused stated that Major Kagan had instructed the pilots to "fly loose formation" and this the accused understood to mean "that the planes would be far enough apart so that another plane could be flown between them" (R. 19). He had never before had occasion, when following the leader in formation, to go out ahead of the leader but he had been warned of the dangers of crossing under or flying close, directly underneath other aircraft, and he was aware of the fact that it is dangerous to fly close to another aircraft in any kind of air due to the probability of down-draft or up-draft. The accused passed through preflight, primary, basic and advanced training without having suffered any accidents. He had, however, only $2\frac{1}{2}$ to $3\frac{1}{2}$ hours experience in flying PT-19 airplanes.

5. There is no dispute whatever concerning the manner in which the accident to three PT-19 airplanes occurred at the time and place alleged. Two witnesses for the prosecution saw a plane approach the lead ship from behind and below and eventually collide with it and the accused himself admitted that he was piloting that plane. Therefore, the sole question to be determined is whether the accused, in the operation of his ship, was careless or negligent or endangered friendly aircraft in the air.

Although he had only 2½ to 3½ hours experience in the flying of a PT-19 airplane, the accused had passed through training courses in preflight, primary, basic and advanced flying without any accident. He had, on the same day and previous to the accident, successfully piloted a PT-19 ship from Jackson, Mississippi, to Selma, Alabama. He admitted that he knew the fundamental rules of formation flying which obliged him to follow the lead pilot and he stated that he had never before attempted, while in formation, to go out ahead of the leader. He had also been instructed in the dangers of crossing under, and especially of flying close, when directly underneath other aircraft, and was fully aware of the danger incident to such a maneuver because of the likelihood of sudden up-drafts and down-drafts.

It is a matter of common knowledge that airplanes move in an element which, without any warning or act on the part of the pilot, changes suddenly in density and current so as to cause the ship to shift upward, downward, to the right or to the left. Casual observation of any plane in flight will demonstrate to anyone that it does not progress along a perfectly straight course at a constantly maintained altitude but that, even in completely calm air, and without human interference, it dips and sways at unexpected moments. How then could the accused, in the light of his training, justify what he attempted on the flight during which the accident occurred?. He said he "had in mind to pull ahead of the formation and turn then get out on the wing of the formation", but Major Kagan, the Operations Officer, testifying as a witness for the court, stated that such a maneuver was "very dangerous", was not considered the accepted way and had never been taught at Craig Field.

That such an attempt is, in fact, dangerous was clearly demonstrated by what happened. Although he knew that he was flying only about 15 feet below the altitude at which the lead plane was being

flown, the accused nevertheless went forward intending to pass it and make a turn to the wing of the formation. He held to the same difference in altitude between ships as he moved forward until he "could not look up any further" and then as he was getting close to the lead ship he shoved the stick forward. It is evident from what happened that he had already gone under the plane piloted by Lieutenant Kreger, the leader, for at that moment the tail of the accused's ship rose and hit the lead ship. Kreger's plane, having been thrown off its course, rolled over and struck Day's plane immediately on his right, tearing off a wing. As a result, Lieutenant Kreger was compelled to make a crash landing, Lieutenant Day, pilot of the second ship which was struck, was obliged to bail out and the accused's ship was forced to land in a badly damaged condition.

Again, common sense should have indicated to the accused that, while attempting such an independent movement without the knowledge or consent of the leader, and at a distance of only 15 feet below the leader's plane, any up-draft could, and probably would, dash his plane into the lead ship. So also any down-current could, and probably would, have caused the lead ship to drop upon the accused's plane.

The situation was aggravated because the leader was in complete ignorance of the position of the accused's plane at the moment of impact and there is not the slightest doubt that, under the circumstances, the accused was careless in failing to follow instructions which he had received and was bound to respect; reckless in violating the "loose formation" rules which required him to fly his plane so that another could pass safely between it and any other plane in the formation; and not only endangered other aircraft in the air but jeopardized the lives of two fellow air officers as well as his own.

It may safely be assumed that among the members of the court, consisting of two lieutenant colonels, three majors, one captain and one first lieutenant, all members of the Air Corps, there were some experienced fliers, and all of the members may be presumed, by training and experience, to be peculiarly qualified to pass upon the facts and circumstances surrounding the accident and arrive at a proper decision on the question of recklessness involved. They resolved the matter against the accused and the record abundantly supports their findings.

6. Records of the War Department disclose that the accused was

born in Waukegan, Illinois, and is 19 years and 9 months of age. After graduation from high school he was a truck driver for a dairy company and a life guard employed by the City of Waukegan, Illinois. He became an aviation cadet in February, 1943, and was graduated from Army Air Forces Pilot School (Advanced - Single Engine) at Craig Field, Selma, Alabama, on 8 February 1944 and was commissioned a second lieutenant, Army of the United States, on the same day. He is unmarried.

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

William A. Pounds, Judge Advocate.
William H. Gambrell, Judge Advocate.
Herbert B. Frederick, 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 Henry C. Fucik (0-823057), 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. Consideration has been given to the attached memorandum from Lieutenant General Barney M. Giles, Deputy Commander of the U. S. Army Air Forces, dated 9 June 1944. He recommends that the sentence of dismissal be confirmed and ordered executed. I concur in that recommendation.

4. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President, together with a form of Executive action designed to carry into effect the above recommendation, 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 Lieutenant General Barney M. Giles, Army Air Forces, dated 9 June 1944.

(Sentence confirmed. G.C.M.O. 389, 18 Jul 1944)

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

SPJGN
CM 256115

26 MAY 1944

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Second Lieutenant CHARLES M. KROUSE (0-689062), Air Corps.	)	Trial by G.C.M., convened at Majors Field, Greenville, Texas, 28 April and 3 May 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Charles M. Krouse, Air Corps, having on or about 12 November 1943, become indebted to Levy's Credit Jewelers in the sum of one hundred eighty-five dollars and thirty-nine cents ($185.39) for merchandise and having failed without due cause to liquidate said indebtedness, and having on or about 1 February 1944 promised the said Levy's Credit Jewelers that he would on or about 2 March 1944 make a payment of fifty dollars ($50.00) on said indebtedness, did, without due cause, at Greenville, Texas, on or about 2 March 1944, dishonorably fail to keep said promise.

The accused pleaded guilty to, and was found guilty of, both the Charge and the 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 on 5 November 1943 purchased a wristwatch for $195 from Harry L. Levy, a jeweler doing business in Greenville, Texas, and five days later on 12 November 1943 also purchased an identification bracelet and certain Army insignia from him for $23.23. Down payments totalling $32.84 were made, leaving an obligation of $185.39. This was to be satisfied in two installments, one for $80 due 1 December 1943 and the other for the balance due 10 January 1944. The arrangement was in compliance with Credit Regulation W issued by the Federal Reserve Bank (R. 10-11, 16).

Nothing was paid by the accused on his indebtedness either in December or January. Upon being contacted by telephone on 27 January 1944, he agreed to come to Mr. Levy's place of business to discuss the matter. A conference was finally held on 1 February 1944, and at that time, according to Mr. Levy,

> "He stated that he was in financial difficulties and it was impossible to pay the full amount at that time; I explained to him in reference to Credit Regulation W and the fact that when an account is delinquent that the Government gives a relief to an embarrassed debtor and makes provision whereby a Credit Manager has the right to use their best judgment to liquidate an account as rapidly as the debtor can possibly liquidate it and after I informed him of that he said 'I want you to make it as easy on me as you can, whatever way you tell me to pay it, I will pay it in that manner' and he said he wished to pay $25.00 that month and $25.00 per month and I told him that in the face of the amount of the account that if the Federal Credit Inspector, who is sent out by the Federal Reserve Bank, were to see an account that was delinquent as this one was and was to take into consideration the officer's pay that a Credit Inspector would consider $25.00 was not a sufficient payment on the indebtedness and I said 'Under that, don't you think you could pay as much as $50.00 a month' and he said 'Yes' he could pay $50.00 a month and then said 'Okay, I will pay $50.00 now' which he

> had agreed to do and did and I told him that he could pay the balance $50.00 per month, payments to be made in March and April and the balance of $35.89 in May. Lieutenant Krouse agreed to do this. Due to the fact that we would have difficulty in contacting Lieutenant Krouse and have him come in we have found it a common practice that practically most of the officers today are handling those accounts as a convenience to us and themselves by giving us a series of checks post dated after their checks are deposited. Most of the boys have their checks deposited at the bank and I told him he could give us a series of checks dated 2 March for $50.00 and one dated 2 April for $50.00 and one dated 2 May for $35.89 and told him that that agreement was satisfactory to us and I was sure that it would be to the Federal Inspector if he examined the account."

The accused executed and delivered the checks as suggested (R. 12-13).

When 3 March 1944 arrived, Mr. Levy called the bank against which they were drawn and inquired whether there were sufficient funds on deposit to meet the first of the series. The answer was in the negative. Mr. Levy waited a few days and on 6 March 1944 deposited the check dated 2 March 1944. It was returned marked "Insufficient Funds". Mr. Levy on 8 March 1944 called the accused. The latter, upon being told that his check had been dishonored, "said he was sorry and that he would be in in a few days and take care of same". The promise was not kept. Mr. Levy telephoned twice more prior to 20 March 1944 but was unable to contact the accused. On that day they spoke to one another over the telephone, and the accused represented "that he had written for some money and he would be in in a few days and take care of it * * *". Between 11 and 15 March 1944, Mr. Levy had complained to Corporal Crow, who brought the matter to the attention of Captain L. L. Van Stavern, the Provost Marshal of the 2522nd Army Air Forces Base Unit (Basic), Majors Field, Greenville, Texas. When admonished by the Captain to pay his indebtedness, the accused had remarked that "he was messed up at the bank, that he thought the money was there to meet all checks that he had out and /that/ 'I will go down and take care of it'" (R. 13-14, 20-21).

The accused finally went to see Mr. Levy on 12 April 1944.

The check which had been due on 2 March 1944 was paid in full and $20 was paid on account of the check which had matured on 2 April 1944. Mr. Levy testified that:

> "I told [the accused] at that time that I wasn't interested in keeping his delinquent checks and things like that but that it was more to his interest to have that April 2nd check since it was past due. He said that it was impossible for him to pay the entire $100.00 that was due at that time and I told him to tell me how he could pay it and if it was within reason I would be glad to cooperate with him and suggested that he pay it within thirty or sixty days. I said, 'You have payment due May 2nd. I will give you the $50.00 check back, you are paying $20.00 on 2 April check and then you can give us a check for $30.00 dated 2 June and it will be deposited and show that it is delinquent and if the Federal Inspector sees the account he will see that it will be handled in a business like manner."

The payments made on 12 April 1944 reduced the indebtedness to $65.39. This sum was still due and owing at the date of the trial. Throughout the period from 5 November to 28 March 1944 the accused at various times apparently had had substantial sums on deposit in his bank account (R. 14-20; Pros. Exs. 1, 2).

4. The accused, after his rights as a witness had been fully explained to him, elected to remain silent. No evidence was offered on his behalf.

5. The Specification alleges that the accused

> "* * * having on or about 12 November 1943, become indebted to Levy's Credit Jewelers in the sum of * * * ($185.39) for merchandise and having failed without due cause to liquidate said indebtedness, and having on or about 1 February 1944 promised the said Levy's Credit Jewelers that he would on or about 2 March 1944 make a payment of * * * ($50.00) on said indebtedness, did, without due cause, at Greenville, Texas, on or about 2 March 1944, dishonorably fail to keep said promise."

This violation was laid under Article of War 96.

The accused pleaded guilty to both the Charge and the Specification. The meaning and effect of his action had previously been explained to him by his counsel, and the Law Member subsequently added a further explanation. The accused stated that he understood and that he wished his plea to stand.

"Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the non-payment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit, or specific promises of payment, it may properly be deemed to constitute an offense": Dig. Ops. JAG. 1912-1940, sec. 453 (14). The evidence for the prosecution supplements the accused's plea of guilty and tends to show that the accused's failure to pay falls within the latter category. His numerous and consistently broken promises and his issuance of a worthless check, when viewed in the light of his plea of guilty, provide an adequate foundation for the court's findings of guilty.

6. The accused is about 23 years of age. The records of the War Department show that he had enlisted service from 18 October 1942 to 30 August 1943 when he was commissioned a Second Lieutenant in the Air Corps, 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 the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 256115

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 M. Krouse (O-689062), 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 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.

(Sentence confirmed but execution suspended. G.C.M.O. 391, 18 Jul 1944)

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

SPJGQ
CM 256116

31 MAY 1944

UNITED STATES v. Second Lieutenant STANLEY CASTEN (0-574178), Headquarters and Headquarters Squadron, 70th Two Engine Flying Training Group.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Frederick Army Air Field, Frederick, Oklahoma, 1 May 1944. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Stanley Casten, Air Corps, did, at Frederick Army Air Field, Frederick, Oklahoma, on or about 18 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Officers' Mess, Frederick Army Air Field, Frederick, Oklahoma, a certain check, in words and figures as follows, to wit:

"New York, N.Y. March 18, 1944. No._____
NATIONAL CITY BANK OF NEW YORK, Jackson Heights Branch,
Pay to Cash, or order - - - - - - - - - - - - - - - - - $10.00
Ten 00/100 - Dollars
Jackson Heights Br. (Signed) Stanley Casten."

and by means thereof, did fraudulently obtain from the said Officers' Mess $10.00 in lawful money of the United States, then well knowing that he did not have and not intending that he should have sufficient funds in the National City Bank of New York, Jackson Heights Branch, for the payment of said check.

The remaining 11 Specifications under this Charge allege offenses identical with that set forth in Specification 1, except as to the date and amount of each check, which facts are alleged respectively in terms as follows:

Specification	Date	Amount
2	20 March 1944	$10.00
3	20 March 1944	10.00
4	20 March 1944	10.00
5	22 March 1944	10.00
6	22 March 1944	10.00
7	23 March 1944	10.00
8	27 March 1944	10.00
9	27 March 1944	10.00
10	27 March 1944	10.00
11	27 March 1944	10.00
12	29 March 1944	5.00

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

3. In addition to accused's plea of guilty, the prosecution introduced the following evidence:

Gerald Isaac, of Frederick, Oklahoma, is the bartender of the Officers Club at the Frederick Air Base (R. 16). He knows accused personally (R. 17). He identified twelve checks (Pros. Exs. A to L incl.) as those which he had seen accused make and which witness had cashed for him during the period between 18 March and the latter part of March (R. 16). He did this under the authority which he has been granted to cash checks in his occupation where the amount of the check is $10.00 or less (R. 17). He gave Lieutenant Casten actual cash for each of the checks in question and then sent them over to the Mess Management where he traded them in for cash (R. 17). He can definitely say that each of these checks was presented to him by Lieutenant Casten (R. 18).

First Lieutenant Patrick E. Brown, Jr., 452nd Base Headquarters and Air Base Squadron, FAAF, Frederick, Oklahoma, is the Mess Officer at the Frederick Air Field. He identified accused and states he is in the military service. Witness is Acting Secretary and Treasurer of the Officers Mess at this field and operates, in his official capacity, the bank account of the Mess maintained at the First National Bank of Frederick, Oklahoma (R. 10). He identified singly each individual check as alleged in each of the twelve Specifications and as introduced into the evidence (R. 10-11-12; Pros. Exs. A to L incl.). He is

familiar with accused's signature and testified that the signature on each of these twelve checks was that of accused (R. 15). He deposited all of these checks in the bank and they were all returned unpaid. From his own knowledge he knows that a total of $115.00 was paid accused for these checks and the Officers Mess had to make good this amount when the checks were returned (R. 15). The accused did not make or offer to make them good at the time they were returned but he did pay them off "this morning" (Day of the trial 1 May 1944) (R. 14).

A written stipulation, signed and agreed to in open court by accused and his counsel, was received into the evidence as follows:

"That there were insufficient funds in the account of the accused in the National City Bank of New York and the National City Bank of New York, Jackson Heights Branch, to pay the checks involved, dated as follows:

March 18, 1944	March 25, 1944
March 20, 1944	March 27, 1944
March 20, 1944	March 27, 1944
March 20, 1944	March 27, 1944
March 22, 1944	March 27, 1944
March 22, 1944	March 29, 1944

(Sig.) /s/ WILLIAM A. GRAVINO
Trial Judge Advocate

Agreed to and signed at Frederick Army Air Field, Frederick, Oklahoma, April 24, 1944.

(Sig.) /s/ JAMES A. MARSHALL
Defense Counsel

(Sig.) /s/ STANLEY CASTEN
Accused" (R. 18; Pros. Ex. M)

After the prosecution rested the defense made a motion for a finding of not guilty on the ground that the prosecution's evidence was not sufficient to convict beyond a reasonable doubt (R. 18). After discussion between the law member and defense counsel in which accused was again given the opportunity to change his plea to not guilty, the motion was withdrawn and accused reiterated his desire to let his plea of guilty stand (R. 19). Having been advised of his rights as a witness in his own behalf accused elected to remain silent (R. 19). The defense offered no testimony (R. 19).

4. War Department records disclose that this officer is now 23 years of age and married. He finished grammar school, attended two high schools in New York but did not graduate, and was a student in the Delehanty Institute of New York, a trade school. He has been employed since 1936 as a theatre usher, a night steward by a steamship line and an auto mechanic. He has served since September 1940 as an enlisted man in the National Guard of New York and attained the grade of Sergeant. He was commissioned from an Air Forces Officer Candidate School as a second lieutenant, Army of the United States on 3 March 1943.

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

William H. Founds, Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, 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 Stanley Casten (0-574178), Headquarters and Headquarters Squadron, 70th Two Engine Flying Training Group.

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 above recommendation, should such action meet with approval.

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

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

(Sentence confirmed. G.C.M.O. 402, 18 Jul 1944)

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

SPJGN
CM 256247

26 MAY 1944

UNITED STATES	)	HEADQUARTERS U. S. TROOPS ADAK, ALASKA
v.	)	
First Lieutenant SETH L. EVANS (0-1541503), Medical Administrative Corps.	)	Trial by G.C.M., convened at Amchitka, Alaska, 22 April 1944. Dismissal, total forfeitures and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 63rd Article of War.

Specification: In that SETH L. EVANS, First Lieutenant, Medical Administrative Corps, 42nd Station Hospital did at Amchitka, Alaska, on or about 20 March 1944, behave himself with disrespect toward JAMES M. MOTT, Lieutenant Colonel, Medical Corps, his superior officer by saying to him "you kansas son of a bitch" or words to that effect.

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

Specification: In that SETH L. EVANS, First Lieutenant, Medical Administrative Corps, 42nd Station Hospital

was, at Amchitka, Alaska, on or about 20 March 1944 found drunk on duty.

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

Specification: In that SETH L. EVANS, First Lieutenant, Medical Administrative Corps, 42nd Station Hospital did at Amchitka, Alaska on or about 19 March 1944 with intent to do him bodily harm commit an assault upon CARL B. BAUER, Second Lieutenant, Medical Administrative Corps by willfully and feloniously striking and kicking said CARL B. BAUER.

He pleaded guilty to Charge I and its Specification and not guilty to the other Charges and Specifications. He 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 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 for the prosecution shows that on the night of 19 March 1943 at about 2030 o'clock Second Lieutenant Carl B. Bauer was in his quarters with two other lieutenants and a warrant officer when the accused entered, joined in the conversation and partook of a drink in celebration of Lieutenant Bauer's first wedding anniversary. Shortly thereafter, according to Lieutenant Bauer whose testimony was substantially corroborated by his other guests, the following incident occurred:

"Lieutenant Evans came in and sat down and picked up the conversation. Argument soon developed and he called me a few names and I asked him if he wouldn't leave. I left the hut and stood outside the back door for a few minutes and came back in and started to write a letter. Lieutenant Evans then came to my side of the hut and pushed my head on the desk and pushed me against a chest of drawers I have next to the desk. I struck Lieutenant Evans. He knocked me to the floor and kicked me hitting me near the left temple. I got up tried to get away from him but he kicked me again. I, Lieutenant Moon, Mr. Warrick and Lieutenant Gore told him

> to leave the quarters. He came back and came in and .... no that is not quite right. He didn't leave the quarters. I tried writing again. He picked me up and slamned me against the chest of drawers and threw beer in my face. He came back later that evening but nothing occurred after that."

The accused was ultimately prevented from again reentering the quarters by the door being nailed up. The next morning the accused approached Lieutenant Bauer at about 1000 o'clock and threatened to kill him if he ever struck the accused in the face again, stating that he, the accused, had tried to kill Lieutenant Bauer the previous night but had been prevented from doing so. At this time the accused was drunk (R. 12-17, 17-20, 20-21, 22-25).

About three hours later the accused, who was the mess officer on duty, entered the Officers' Mess Hall for lunch and, after delaying a short time in the kitchen, took his place at the table where he began to use profane language in a loud voice. He was observed at this time by several officers who testified that he was drunk. Among them was Lieutenant Colonel James M. Mott, a physician and the accused's commanding officer, who ordered the accused "to excuse himself and go to his quarters". The accused left the mess hall but immediately returned to the kitchen where he was again ordered to go to his quarters and stay there. Lieutenant Colonel Mott, accompanied by another officer, followed the accused to his quarters where, according to both officers, the accused stated that Lieutenant Colonel Mott was a poor commanding officer and called him a "drunken Kansas son-of-a-bitch" (R. 4-8, 8-11, 21, 22).

4. The accused, after explanation of his rights as a witness, elected to remain silent but, according to Lieutenant Leon W. Hughes, the accused shortly before 19 March 1944 had spoken about having received some "bad news" from his sweetheart (R. 25-26).

5. The Specification, Charge I, alleges that at a designated time and place the accused behaved himself with disrespect towards his superior officer, Lieutenant Colonel James M. Mott, by saying to him "you Kansas son-of-a-bitch" or words to that effect. "Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language" which detracts from the respect due to the authority and person of a superior officer (M.C.M., 1928, par. 133).

The evidence for the prosecution conclusively supplements

the accused's plea of guilty to Charge I and its Specification and shows beyond a reasonable doubt that the accused as alleged addressed his superior officer with the alleged vile language which was implicitly disrespectful to both the authority and person of the officer to whom it was addressed. All of the evidence, therefore, abundantly establishes the accused's guilt of the offense as alleged and amply supports the findings of guilty of Charge I and its Specification.

6. The Specification, Charge II, alleges that the accused at a designated time and place was found drunk on duty. 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] (M.C.M., 1928, par. 145).

The evidence for the prosecution, comprised of the testimony of four officers who were eye-witnesses to the accused's conduct at the mess at noon on 20 March 1944, shows beyond a reasonable doubt that the accused on such occasion was drunk. He was the mess officer then on duty and his condition was such that his commanding officer was impelled to order him, the accused, to his quarters, thereby clearly showing that the accused's drunkenness on the occasion rendered him unable to perform his duties. All of the evidence, therefore, conclusively establishes that the accused was found drunk on duty as alleged and fully supports the findings of guilty of Charge II and its Specification.

7. The Specification, Charge III, alleges that the accused at a named time and place "with intent to do him bodily harm" committed an assault upon a named brother officer by "willfully and feloniously striking and kicking" the named officer. The offense alleged is that of assault "aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed" which is violative of Article of War 93 (M.C.M., 1928, par. 149n).

The evidence for the prosecution adduced by the testimony of three officers and a warrant officer who witnessed the incident, shows that the accused committed the assault upon the named officer as alleged, after such officer had unsuccessfully attempted to avoid a physical encounter with the accused. The fact that the assaulted officer was knocked to the floor and kicked in the head by the accused adequately shows that bodily harm was intended as does also the accused's statement to the assaulted officer on the following morning. The evidence for the defense upon this Charge and Specification, as

upon the other Charges and Specifications, does no more than to suggest an inadequate explanation for accused's irritability which sounds weakly even in extenuation and falls wholly short of any legal justification or defense for his unwarranted conduct. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply sustains the findings of guilty of Charge III and its Specification.

8. The accused is about 31 years of age. The War Department records show that the accused has had enlisted service from about 27 March 1941 until 18 September 1942 when he was commissioned a temporary second lieutenant upon completion of Officers' Candidate School, that he has had active duty as an officer since the latter date and that he was promoted to first lieutenant on 18 December 1942.

9. The court was legally constituted. No error 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 Article of War 63 and Article of War 93, and is mandatory upon conviction in time of war of a violation of Article of War 85.

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 256247

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 First Lieutenant Seth L. Evans (0-1541503), 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 thereof. I recommend that the sentence be confirmed but that the confinement and forfeitures imposed 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 confinement and forfeitures remitted. G.C.M.O. 387, 18 Jul 1944)

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

SPJGQ
CM 256255

-1 JUN 1944

UNITED STATES v. Second Lieutenant FRED S. BOYER (0-567412), 540th Base Headquarters and Air Base Squadron.	SIXTH AIR FORCE Trial by G.C.M., convened at Army Air Base, Guatemala City, Guatemala, 7-8 April 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 Charges and Specifications:

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

Specification: In that Second Lieutenant Fred S. Boyer, 540th Base Headquarters and Air Base Squadron, did, at United States Army Air Base, Guatemala City, Guatemala, on or about 5 November 1943, feloniously embezzle by fraudulently converting to his own use money of the value of SEVEN HUNDRED DOLLARS ($700.00), the property of the 540th Base Headquarters and Air Base Squadron Fund, entrusted to him under the provisions of Paragraph 5 a (1), Army Regulation 210-50.

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

Specification 1: In that Second Lieutenant Fred S. Boyer, 540th Base Headquarters and Air Base Squadron, did, at United States Army Air Base, Guatemala City, Guatemala, on or about 12 December 1943 with intent to deceive his Commanding Officer, Major Charles O. Huffman, officially represent that "I have retained about SEVEN HUNDRED DOLLARS ($700.00) in cash in my quarters to pay the laundry", or words to that effect, which statement was known by the said Second Lieutenant Fred S. Boyer to be untrue.

Specification 2: In that Second Lieutenant Fred S. Boyer, 540th Base Headquarters and Air Base Squadron, did, at United States Army Air Base, Guatemala City, Guatemala, on or about 5 November 1943, with intent to deceive his Commanding Officer, Major Howard W. Gaghagen, wrongfully and unlawfully make an entry on check stub number 0549 of the account of the Squadron Fund of the 540th Base Headquarters and Air Base Squadron, to wit, "Deposit 11/5/43 $1012.06", which entry was known by the said Second Lieutenant Fred S. Boyer to be untrue.

Specification 3: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 3 of Charge II and guilty of all other Specifications and the Charges. No evidence of previous convictions was introduced at the trial. 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 may direct, for a period of two years. The reviewing authority approved the sentence but remitted that portion thereof involving confinement at hard labor for two years and forwarded the record of trial for action under Article of War 48.

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

The accused was, during October, November and December 1943 a second lieutenant assigned to and serving with Headquarters and Headquarters Squadron, 16th Service Group which was disbanded and reorganized as 540th Base Headquarters and Air Base Squadron on 1 November 1943 (R. 8, 10).

On 4 October 1943 Major Howard R. Gaghagen became the custodian of funds belonging to Headquarters and Headquarters Squadron, 16th Service Group and on 11 October 1943 he transferred the balance of said funds then on hand in the amount of $450.15 to the accused who thereupon became the custodian (Pros. Ex. 1).

The items in the council book of the organization, as originally entered by the accused, disclose that on 4 November 1943 the sum of $1,012.06 had been collected and reported on Q.M.C. Form #20 (R. 10; Pros. Ex. 1). The bank statement, however, shows that only $512.06 of this amount was deposited on 5 November 1943 (R. 14; Pros. Exs. 1 and 4). On pay day, 30 November 1943, the additional sum of $1232.31 was collected (R. 17, 28, 29; Pros. Ex. 5) and both the council book and the bank statement show that a deposit of $500 was made in the bank on that day (R. 11, 14-16; Pros. Exs. 1 and 4). Only one other deposit was made between 5 and 30 November 1943 and that was in the sum of $217.70 which, according to the entries in the council book, represented contributions of the 1013th Signal Company and the 74th Bomber Squadron for civilian kitchen police, in the sums of $16.80 and $200.90, respectively (Pros. Exs. 1 and 4). Sometime between 10 and 13 December 1943, Second Lieutenant Henry H. Proctor, Jr.,

Base Administrative Inspector, acting in pursuance of his duties to make all inspections charged to the base commander under AR 210-10, made an examination of the funds and council book of the 540th Base Headquarters and Air Base Squadron (R. 8-10). Upon an inspection of the council book he noted the collection item of $1,012.06 on 4 November 1943 and although the check stubs of the organization's check book showed $1,012.06 credited to the account, the bank statement disclosed that only $512.06 had been deposited. This discrepancy was reflected in the accounts from 5 November to 30 November 1943, on which latter date a deposit of $500 reconciled the figures at the close of the month (R. 11; Pros. Exs. 1 and 4). In explanation of this irregularity in the accounts the accused stated to Lieutenant Proctor that when he noted the bank statement showing the deposit of only $512.06 he became confused and had kept $500 in the drawer of his desk during the month of November (R. 16).

Lieutenant Proctor had talked to the accused early in November (after the reorganization of the squadron) and advised him that since the old service group was disbanded all the records would have "to be fixed up according to regulations" and that the old council book "would have to be crossed out and a new book started for the new organization". When the books were presented to him early in December this had not been done and the irregularities were discovered. Thereupon Lieutenant Proctor turned the books over to the post commander (R. 23).

At the time when the inspector made the examination of the council book check stubs and other books of account of the accused in his capacity as custodian of the organization funds there were no erasures, obliterations or interlineations on them (R. 11, 13). When shown the council book, which was admitted in evidence as Prosecution Exhibit No. 1, Lieutenant Proctor testified that, as it then appeared, the item, Voucher 1, of 4 November 1943 which showed receipts of $1,012.06 and expenditures of $794.97 had been crossed out and the figure $512.06 interlined in place of $1012.06. The expenditure item, after deletion as a portion of Voucher 1, was added as Voucher 8 as of 4 November 1943 (R. 12). So also, stubs of checks which, when he had first seen them bore no alterations, were changed later as appeared when he examined them and testified regarding them at the trial. Thus, check stub #LF0549 (Pros. Ex. 3) disclosed that the amount of a deposit in the sum of $1,012.06 is crossed out and $512.06 interlined instead; the original balance of $1370.21 is deleted and $870.21 substituted therefor; and $773.56, the former balance then remaining after deducting the sum of $596.65 which was the amount of the check attached to the stub, was crossed off and $273.56 interlined in place of it (R. 13).

The next check #LF0550 (Pros. Ex. 3) shows a balance carried forward of $773.56, but this in turn was deleted and $273.56 substituted therefor. The amount of the check referred to in this stub is $40.64 which would have left a balance as originally entered, of $732.92. This was also crossed out and $232.92 is interlined.

The next check (#23776-Pros. Ex. 2) appears to have had $732.92 originally entered as the balance forwarded and this is lined out and $232.92 is substituted therefor. The amount of the check is $91.68 and the balance originally entered in the sum of $641.24 is changed to read $741.24.

Check No. 23777 (Pros. Ex. 2) shows a balance forwarded of $641.24. This was deleted and $141.24 was substituted therefor. The amount of the check is $20 yet the original balance figure of $621.24 is deleted and $121.24 is interlined.

Check #23778 (Pros. Ex. 3) is illegible in part but shows alterations and a balance forwarded of $12.44 whereas the original balance before deletion was $512.44.

Check #23779 (Pros. Ex. 3) shows an original forwarded balance of $512.44. The check itself was written on 3 December 1943 in the sum of $32.90, and shows an original forwarding balance of $479.54 after deducting $32.90 from the original balance brought forward from the previous stub. This check was voided, however, and a deposit was entered upon the stub as of 30 November 1943 in the amount of $500. The original amount of $512.44 is deleted and $12.44 substituted therefor and the balance to be forwarded, after adding the deposit, is changed to $512.44.

On the stub of check #23780 the balance forwarded is shown as $479.54 and $512.44, respectively. Both amounts are deleted and a balance of $12.44 inserted instead. Again the deposit of 30 November 1943 in the amount of $500 is shown together with a balance of $512.44.

All of these obliterations, deletions and alterations are initialed, most of them bearing the initials of the accused and Lieutenant Mann, the latter apparently an officer of the 540th Base Headquarters and Air Base Squadron who succeeded the accused as custodian of the organization funds (R. 26; Pros. Exs. 1, 2, 3 and 6).

During the first week of November 1943, Major Howard R. Gaghagen, who was the squadron commander in October and part of November 1943, first saw the council book and check stubs when he checked the accused's records for October 1943 and there were no alterations or erasures on them at that time. Upon examining both the council book (Pros. Ex. 1) and check stub #LF0549, at the trial he observed and stated that the item of receipt in the council book amounting to $1,012.06 and the purported deposit shown on the check stub in the same amount had both been deleted and the figures $512.06 substituted therefor (R. 31, 32).

On 12 December 1943 Major Charles O. Huffman became the commanding officer of the 540th Base Headquarters and Air Base Squadron and the accused served as his adjutant (R. 33, 34). While Major Huffman and the accused were at the Officers' Club on 12 December 1943 a telephone message for

Major Huffman was received from the base administrative inspector. The accused stated to Major Huffman that he (the accused) thought he knew what it was all about; that it concerned the squadron fund. Since accused said then that he knew more about it than Major Huffman, he promised to take care of the matter. Nothing more was then said or done about it (R. 34).

On 13 December 1943 Major Huffman was called into the office of the commanding officer, Colonel Lanth and Major Huffman then summoned accused. The accused produced the council book, bank statement, fund check book and vouchers. Major Huffman asked him why the check stubs and council book showed $1,012.06 received and deposited on or about the first day of November 1943 whereas the bank statement showed only $512.06 deposited on or about 1 November and $500 on 30 November. The accused then told the major that he had kept the money on his person to pay certain bills and did not, in fact deposit $1,012.06 in the bank as shown by the check stubs. This he claimed he had done through ignorance. The major then asked him how much money the accused had on hand to which the accused replied "I have around $700" (R. 35, 36). Major Huffman was shown the council book (Pros. Ex. 1) at the trial and he stated that when he had first seen the book on 11 December 1943, after returning from the post administrative inspector, there were no deletions or alterations but that now some did appear therein. When the book was presented to him on 11 December 1943 Major Huffman signed it (R. 36).

Second Lieutenant Oscar H. Ohlson, a member of the accused's organization, was approached by the accused on 14 December 1943 and requested to make a loan to the accused. The reason given by the accused for his request was that there was a shortage in the squadron fund and that he was responsible for it. Lieutenant Ohlson thereupon loaned the accused $700 (R. 38, 46).

Check stub #23788 shows a deposit made by the accused on 14 December 1943 in the amount of $773.49. The bank statement shows six deposits on 14 December 1943 in the amounts of $192.66, $400, $87.60, $87.24, $2.53 and $3.46, respectively, aggregating $773.49 (R. 41; Pros. Ex. 7). The council book for December 1943 shows voucher #10, $400.00 as a deposit of collections from enlisted men for the month of November; voucher #11, $87.60 as a deposit of collections from enlisted men for payment of current expenses of Base Mess; voucher #12, $81.24 as a deposit of rebate from Royal Laundry to Squadron Fund; voucher #13, $192.66 as a deposit of 32 shares of 62nd Service Squadron Fund; voucher #14, $3.46 as a deposit of rebate to Squadron Fund from San Antonio Laundry; and voucher #15, $2.55 as a deposit of rebate to Squadron Fund from Squadron Barber (Pros. Ex. 6).

It was also shown that from 30 November 1943 to 14 December 1943 the following expenditures were made:

4 December,	Army Exchange	$16.50
6 December,	Post Tailor Shop	52.00
7 December,	Royal Laundry	400.00
10 December,	N.C.O. Club	20.00
10 December,	Royal Laundry	65.51

10 December, San Antonio Laundry	1.44
10 December, Squadron Barber	9.77
Total	$565.32

According to the council book the only deposit made between the one of $500.00 on 30 November 1943 and the one of $773.49 on 14 December 1943 was one of $123.35 on 10 December 1943 (R. 41; Pros. Ex. 6). The bank statement (Pros. Ex. 7), however, shows an additional deposit on 7 December 1943 of $112.44.

It should be noted that after the books and records of the accused as custodian of the squadron fund had been turned over to the Post Commander (R. 23) another council book (Pros. Ex. 6) was prepared and the old book (Pros. Ex. 1) was voided (R. 22). By whom the new book was prepared is not shown but all certificates therein are signed by the accused. In this council book the deposits for November are correctly shown and the lump disbursement item of $794.97 shown in the item of voucher 1 in the old book is broken down into detail.

The new council book was not seen by the Base Administrative Inspector, Lieutenant Proctor, until sometime after 15 December 1943 (R. 18) at which time he examined and inspected it in his official capacity (R. 18).

4. The accused, having been advised of his rights, elected to remain silent and no testimony was offered in defense.

5. It is not difficult to comprehend the situation presented by the evidence in this case, nor is it necessary to enter upon any extensive analysis of the account involved in order to understand the reason for the deletions, obliterations and alterations which were made upon the books which the accused was obliged to keep as custodian of the squadron funds of his organization.

It is obvious that the accused, as custodian, received the sum of $1012.06 on 4 November 1943. This money was derived from collections from enlisted men and like all other funds coming into his hands as custodian, was, by the provisions of par. 6, A.R. 210-50, W.D., 29 December 1942, to be "promptly deposited in the bank, if feasible"; except that cash so collected might be used for immediate cash payments.

The records show, and the accused admitted, that only the sum of $512.06 was so deposited on 5 November 1943 although the council book discloses that there was no need to retain out of this deposit the sum of $500.00 or any sum as ready cash for immediate cash payments, as the first item of expenditure reflected by the account was the substantial sum of $596.65 paid to the Royal Laundry by check; indeed, all other disbursements made in November were likewise made by check.

Notwithstanding only a little more than half of the $1012.06 so received was deposited, the accused entered upon the council book an item purporting to show the deposit of the entire amount and at the same time made an entry upon the stub of the squadron fund check book indicating a deposit of $1012.06. This false situation was maintained by appropriate entries upon the check stubs during all of November and presumably through part of December 1943 until the books of account and all records of the squadron fund were checked and examined by the Base Administrative Inspector.

When the inspector examined the squadron council book and the check books there were no alterations, deletions, or interlineations on any of them. The accused's attention was, however, called to the discrepancy between the bank statement showing $512.06 deposited on 5 November and the entries upon the council book and check stub showing a deposit of $1012.06. When his attention was directed to the matter the accused admitted that he had withheld $500.00 of the total amount received on 4 November and kept it in his possession until 30 November when he deposited it. This deposit is reflected in the November bank statement.

On the same day (30 November) the squadron was paid and the accused received, as custodian, the sum of $1232.31, representing collections from enlisted men, but the accused failed to deposit this sum promptly as he was supposed to do. Indeed, between 20 November and 14 December 1943 he made only two deposits which, according to the bank statement, were $112.44, and $123.35 respectively.

By 12 December 1943 the examination of the accused's accounts had evidently caused considerable concern, for on that day the Base Administrative Inspector telephoned to Major Huffman, the accused's commanding officer. Without knowing the object of the call the accused, who was present, volunteered the information that the call was probably regarding the squadron fund and that since he knew more about it than the major he, the accused, would take care of it.

On the next day (13 December) Major Huffman called the accused to his office and after looking over his accounts asked why only $512.06 had been deposited on 4 November 1943 when $1012.06 had been collected. To this the accused replied that he had, through ignorance, withheld $500.00 to pay certain bills. When then asked how much money he had on hand the accused told Major Huffman "I have around $700.00".

Major Huffman, Major Gaghagen and the Base Administrative Officer each testified that neither the council book nor the check stubs had contained any alterations, deletions or interlineations when they saw them around 10-11 December 1943; yet at the trial it appeared upon inspection that the items $1012.56 were crossed out in the council

book and on the check stub and $512.06 had been interlineated on each and a deposit of $500 had been added as a deposit to the council book receipts, as of 30 November 1943. This disparity of $500 was also corrected on all subsequent check stubs by deletion and interlineation.

It is, therefore, apparent that, without further evidence, the accused was guilty of gross irregularities and, although the sum of $500.00 withheld by him from 4 to 30 November, was eventually placed on deposit with the squadron bank account, there was a wrongful withholding of the money wholly inconsistent with the duties of a custodian of such funds. Accused's gratuitous explanation in the council book for November (Ex. 6) to the effect that $500 was erroneously retained by him out of the collections of 30 October for the purpose of paying bills in cash and because of the discontinuance of collection sheet, Q.M.C. Form #20, is purely a self serving declaration.

But a cursory examination of the accounts discloses a graver situation. There was a balance of $512.44 carried forward to the December account from the November account in the council book (Ex. 1 and 6). None of the $1232.31 collected from the enlisted men on 30 November 1943, which was the organization pay day, was deposited in November if the accused spoke the truth; for, the $500.00 deposited by him on 30 November 1943, by his own admission, was the balance of the October collections from enlisted men. Therefore, there should have been on hand, and properly accounted for, in the bank and in the possession of the accused on 1 December 1943, the total sum of $1744.75. Between 1 and 14 December the council book shows disbursements of $565.32 and it and the bank statement show deposits of $235.79. By a simple process of arithmetic it is apparent that accused should have had the sum of $1415.22 available on 13 December 1943. The collection sheet of 30 November 1943 discloses purported cash payments on 5 December 1943, one to Royal Laundry of $394.21; one to the Base Mess of $79.00, one to San Antonio Laundry of $31.20; and one to the squadron barber of $22.72. None of these are, however, accounted for in the council book and only one cash payment in December is reflected therein. That being so, when the check for $793.49 was drawn on 14 December 1943, it presumably left a balance on hand of $641.73.

It must be borne in mind that the accused executed a certificate on 30 November 1943 setting forth that the November account submitted in the council book (Ex. 6) "is a true and complete statement of all receipts and expenditures, and that the balance for which I am responsible is accounted for as follows:

Checking account deposited with Bank of London and South America, Ltd.	$512.00
Savings account	none
<u>Cash in my personal possession</u>	none
Registered Government bonds	none"

(underscoring supplied)

Surely these irreconcilable and wholly incompatible statements reflect a condition from which it could reasonably be inferred without additional proof, that the accused was not only guilty of nonfeasance in his acts as custodian but malfeasance as well.

But there is one established fact from which, by direct admission of the accused himself, it is evident that he misappropriated some of the squadron funds. When his irregularities had been discovered by the Base Administrative Inspector and Major Huffman, the accused's commanding officer, had confronted him with the evidence of discrepancies in the accounts, the accused then and there, on inquiry by Major Huffman, said he had "around $700.00 on hand". By this he meant cash because Major Huffman was at that time, investigating the accused's claim that he had retained cash in his personal possession to pay certain bills. On the next day the accused admitted to a fellow officer that there was a shortage in the squadron funds for which he was responsible and obtained a loan of $700.00 from him and on that same day $773.49 was promptly deposited by the accused in the squadron bank account.

The evidence is compelling and it is an inescapable conclusion that the accused did embezzle and convert to his own use, certain funds of the squadron which he held as custodian. The efforts of the accused to alter the books and records of the squadron fund so as to reconcile them with his improper handling of the funds, followed by his false statement to his commanding officer, when taken in connection with the guilty knowledge evidenced in his borrowing immediately thereafter the amount he had falsely claimed to have in his possession leave no reasonable doubt of the guilt of the accused under the Specification of Charge I. The amount of the peculations was not shown to have been the exact amount named in the Specification but that is of no consequence. Where it is alleged that the accused embezzled a certain sum it may be proved that he embezzled any part of that sum (Dig. Ops. JAG 1912-1940; par. 451 (23)).

While the evidence fails to show who had the custody of the books and records after they had been presented, unaltered, to the Base Administrative Inspector and the Commanding Officer of the Squadron, the reasonable inference is that they were in the custody of the accused. He signed all the certificates in the two council books after he became custodian of the funds; his initials appear in connection with almost all of the alterations in the records and he alone would have the reason and motive to change the records so as to make them speak the truth.

There is no question, however, that he did, on 13 December 1943, tell his commanding officer that he had around $700.00 on hand when his act in borrowing that amount immediately thereafter for the reason he himself assigned, conclusively demonstrates that he did not, and there is not the slightest doubt that the accused entered upon the check stub of the squadron check book a purported deposit of $1012.56 on 5 November 1943 knowing that the entry was false. The record is, therefore, legally sufficient to support the findings as to Specification 1 and 2 of Charge II.

6. Records of the War Department disclose that the accused was born in Illinois and is 26 years and 3 months of age. He was graduated from high school and attended Milliken School of Business Management for one year and studied accounting for 6 months at Northwestern University. He enlisted 21 September 1940 and after completing the prescribed course was commissioned a second lieutenant, Army of the United States on 9 December 1942. In civil life he had been employed by the Wabash Railroad Company as a transportation clerk from December 1937 to August 1940 and by Hershey and Houidall, automobile parts and accessory manufacturers in Chicago, Illinois, as assistant personnel interviewer and classifier. He is married and has two children. He was graduated from the Air Corps Institute, Scott Field, Missouri.

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 thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93 and is mandatory upon conviction of a violation of Article of War 95.

William A. Bounds, Judge Advocate.

William H. Gaines, Judge Advocate.

Herbert B. Frederick, 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 Fred S. Boyer (0-567412), 540th 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 of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. 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 of trial to the President, together with a form of Executive action designed to carry into effect the above recommendation, should such action meet with approval.

Myron C. Cramer,

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

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 450, 24 Aug 1944)

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

SPJGN
CM 256282

26 MAY 1944
FIRST AIR FORCE

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	Charleston Army Air Field,
Second Lieutenant CHARLES	)	Charleston, South Carolina,
D. HEFNER (0-801278), Air	)	12 May 1944. Dismissal.
Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Charles D. Hefner, 113th AAF Base Unit (Bombardment (H)), formerly of 611th Bombardment Squadron (H), did, without proper leave, while en route between Army Air Base, Langley Field, Virginia, and Charleston Army Air Field, Charleston, South Carolina, absent himself from his command at Charleston Army Air Field, Charleston, South Carolina, from about 23 March 1944 to about 2 April 1944.

He pleaded not guilty to and was found guilty of the Charge and the Specification. Evidence of a prior conviction for absence without

leave in violation of Article of War 61 was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of one year. The reviewing authority approved the sentence, but remitted the confinement and forfeitures, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that paragraph 6 of Special Order 75, issued by the Commanding General of the I Bomber Command on 16 March 1944, stated that the accused "is reld fr asgmt & sta 1st Search Attack Gp, Langley Fld, Va, and is asgd to the 400th Bomb Gp, Charleston, SC for asgmt to an RTU Combat Crew. WP. PCS. TDN TPA 1-5250 P 431-01 02 03 07 08 A 0425-24". An authenticated copy of this provision was handed to the accused on 20 March 1944. He was then under restriction to the limits of his post for absenting himself without leave from 28 January to 5 February 1944, but at about 0600 o'clock on 22 March 1944 he was given his Adjutant General Officers' Pass, WD, AGO 65-1, and shortly thereafter that same day he departed from Langley Field (R. 7, 16; Pros. Exs. 1, 2, 3, 5).

He had been authorized to travel "TDN" "TPA". The motor distance between Langley Field and the Charleston Army Air Field was 423 miles by the preferable route and 489 miles by a more circuitous route. The maximum time permitted by applicable regulation for the journey, if undertaken by private conveyance, was forty-eight hours. The distance by rail was 483 miles for which applicable regulation permitted a maximum travel time of eighteen hours. No evidence was adduced concerning the type of conveyance used. (R. 7, 9-10).

The accused arrived at the Charleston Army Air Field on 2 April 1944 and between 0800 and 0900 o'clock reported for duty. Having been overdue since 24 March 1944, he was being carried, when he reported, as AWOL on the records of the 400th Bomb Group to which he had been transferred (R. 10-12; Pros. Exs. 3, 4).

4. After his rights as a witness had been fully explained to him, the accused elected to remain silent. No evidence was offered on his behalf.

5. The Specification of the Charge alleges that the accused

> "did, without proper leave, while enroute between Army Air Base, Langley Field, Virginia, and Charles-

ton Army Air Field, Charleston, South Carolina, absent himself from his command at Charleston Army Air Field, Charleston, South Carolina, from about 24 March 1944 to about 2 April 1944".

This was set forth as a violation of Article of War 61.

Paragraph 132 of the Manual for Courts-Martial, 1928, enumerates the elements of the offense of absence without leave as follows:

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

The prosecution has demonstrated beyond a reasonable doubt that the accused willfully and without permission from competent authority absented himself from the 400th Bomb Group during the period between 24 March and 2 April 1944. He thus clearly violated Article of War 61.

6. The accused is about 28 years old. The records of the War Department show that he served in the Navy as a fireman from 12 December 1933 to 5 November 1937 and as a private in the National Guard of West Virginia from April 1938 to February 1940; that he had enlisted service in the Army from 4 December 1942 to 29 April 1943 when he was commissioned a second lieutenant; 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 the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 256282

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 D. Hefner (0-801278), 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 as approved by the reviewing authority 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,
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 approved by reviewing authority confirmed. G.C.M.O. 365, 17 Jul 1944)

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

SPJGN
CM 256334

21 JUL 1944

U N I T E D S T A T E S	)	INFANTRY REPLACEMENT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Fort McClellan, Alabama, 10 April 1944. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.
Private MASAO KATAOKA (39154461), 33rd Training Battalion, Infantry Replacement Training Center.	)	

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES 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 64th Article of War.

Specification: In that Private Masao (nmi) Kataoka, Company "B", 33rd Training Battalion, Infantry Replacement Training Center, Fort McClellan, Alabama, having received a lawful command from Major William B. Aycock, his superior officer, to march to the Field House, Fort McClellan, Alabama, did at Fort McClellan, Alabama, at 0700, on or about 20 March 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the

service, to forfeit all pay and allowances due or to become due and to be confined at such place as the reviewing authority might direct for thirty years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused, a native born citizen of the United States who had spent about fifteen years in Japan prior to his return to this country in 1937, is capable of speaking and understanding simple English and that he had been inducted into the Army shortly "after Pearl Harbor". At about 0700 o'clock on 20 March 1944 a group of trainees, including the accused, assembled in front of their organization's orderly room where some of the group were conversing with non-commissioned officers. The battalion commander, noticing the group, approached it, directed the non-commissioned officers to stand aside and in a loud, clear and distinct voice gave the following order in the English language to the group: "You will march to the field house". The battalion commander was wearing his uniform and insignia of rank. He then turned the group over to a corporal with the direction to march the group to the field house and the corporal gave the command of execution in response to which the group marched off. After proceeding some 50 to 75 yards the entire group halted without being ordered to do so. The corporal heard some of the group muttering "This is as far as we go". The battalion commander again approached the group, explained the seriousness of willful disobedience of an order and asked if any of them did not understand or had acted mistakenly in which events they were directed to fall out. Not one of the group fell out and the battalion commander then directed the corporal to take the names of the men in the group. All members of the group refused to give their names and such fact was reported to the battalion commander who thereupon had the Provost Marshal's office called and turned the entire group over to the military police officer who arrived, in response to the call, with the direction that they be taken to the stockade where it was found that the group numbered 43. By check against the other members of the organization it was determined that the accused was a member of the group and he was also identified by the corporal who testified substantially to the same effect as the battalion commander (R. 6-10, 10-11, 12-19, 19-24, 24-27, 30-31).

4. The accused, after his motion for findings of not guilty had been over-ruled and his rights as a witness explained to him, elected to make an unsworn statement by his counsel reading a statement pre-

viously prepared by the accused. The statement in its entirety is as follows:

"First statement: 'Why I Wanted to See the Company Commander.' 'I was born in the United States and at the age of six went to Japan with my parents. I was educated in Japan and lived with my parents fourteen years in Japan. My parents and family are all in Japan. One brother is serving in the Japanese Army. I have my home and all my property in Japan, and am also a Japanese citizen. I returned to the United States six years ago, and since then tried to believe the great democratic ideas and principles of this country. Three years after I returned I was inducted into the army through the compulsory selective service program. I felt that this was my duty as an American citizen, and tried to do my best to perform my duty. During the three years I was in the Army and until this date I had many difficulties doing my duties and was handicapped because of my lack of English knowledge. My time in the army during peace time was fairly suitable for at that time there was very little discrimination to the Japanese people and to myself as a soldier. After the United States entered the war many activities concerning Japanese people and Japanese Americans of this country in the way of intolerance and hatred have been dealt to Japanese people of this nature, and I have since then believed very little in democracy.

"Second statement: After United States entered war, all the Japanese in the West Coast of the United States have been given hatred and discrimination by the public, followed by this evacuation to inland area, my belief in the democratic principles and knowledge I had of this government have faded from my mind. I have been taught when I was a child that justice, liberty and humanity always existed among any human race, and to obtain and preserve those things and practice them. I will fight for those rights even though I face death, for those are the things I have

well in my mind and heart. I believe justice and humanity are taught not only in Japan but here also. At the present time, citizens of Japanese ancestory are restricted from many places and areas in the United States where the other citizens are free to go. At Fort Riley U. S. Soldiers of Japanese ancestory, which I am one, were not permitted to enter or go near the Post Headquarters. But it was free for others. If true democracy exist even in war time, why doesn't Japanese American citizens or soldiers have the same rights as other Caucasian citizens? I think that Democracy should apply to all people regardless of race or color, than just to the Caucasians as have been done and still are existing. Since all these acts of injustice and inhumanity done to the Japanese people of this nation, my belief and idea of this democracy and constitution is out of my mind and heart. If I should join the combat unit and sacrifice my life and the present condition exist towards the Japanese people of this country, I shall die in vain. There is nothing—no real cause for which I should die for. These injustice and inhumanity, the memory of tragedy must be taken out of my mind and heart, before I have the spirit and will to fight and struggle for the real cause. We the people of this nation are fighting for the rights and liberty for all. The people of this nation, regardless of race or color" (R. 32-35, 35-36).

5. The Specification alleges that the accused at a designated time and place, after having received a lawful command from his named superior officer "to march to the Field House", willfully disobeyed such order. The offense alleged is defined by controlling authority as the willful disobedience, manifesting an intentional defiance of authority, of an order, relating to a military duty, given by an authorized superior officer (M.C.M., 1928, par. 134b).

The evidence for the prosecution conclusively shows that the accused was possessed of a practical working knowledge of the English language and that he was a member of the group of 43 men that

the battalion commander ordered to march to the field house. The testimony of the battalion commander is unmistakably to the effect that the group was given a definite order for the performance of which the corporal merely gave the commands of execution. The group undertook the performance of the order but after marching less than one hundred yards deliberately desisted from further compliance and therefore failed to obey it. After explanation of the seriousness of their conduct and a tendered, but unaccepted, opportunity to relieve themselves from their violation, each member of the group further evidenced their defiance of military authority by refusing to give their names. Implicit in the unsworn statement of the accused is the admission of an adequate working knowledge of the English language and a preconceived design to evade training and further compliance with orders unless his mental objections were obliterated. The statement breathes disloyalty and inherently admits his guilt. The order was lawful; the order related to a military duty; the order was given by a military superior; the order was willfully and defiantly disobeyed. The evidence therefore, beyond a reasonable doubt, establishes the accused's guilt as alleged and fully supports the court's findings of guilty.

6. The accused is about 27 years old. He was inducted on 11 March 1941. 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. 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.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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

SPJGQ
CM 256407

8 JUN 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Wolters, Texas, 12 May 1944. Dismissal.
	)	
First Lieutenant JACK T. JAYCOX (0-449430), Infantry.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 61st Article of War.

Specification 1: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, did, without proper leave, absent himself from his organization at Camp Wolters, Texas, from about 1200 hours 22 March 1944, to about 1330 hours 22 March 1944.

Specification 2: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, did, without proper leave, absent himself from his organization at Camp Wolters, Texas, from about 2300 hours 17 April 1944 to about 0035 hours 18 April 1944.

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

Specification 1: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, having been duly placed in arrest in his quarters at Camp Wolters, Texas, on or about 7 April 1944, did, at Camp Wolters, Texas, on or about 11 April 1944, break his said arrest by going to the Main Gate of Camp Wolters, Texas, before he was set at liberty by proper authority.

Specification 2: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, having been duly placed in arrest in his quarters at Camp Wolters, Texas, on or about 7 April 1944, did, at Camp Wolters, Texas, on or about 17 April 1944, break his said arrest by going to Mineral Wells, Texas.

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

Specification 1: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, did, at Camp Wolters, Texas, on or about 27 March 1944, with intent to deceive Lt. Col. Rives O. Booth, Commanding Officer, 58th Infantry Training Battalion, Camp Wolters, Texas, officially report in writing to the said Lt. Col. Rives O. Booth, as follows:

COMPANY "B" FIFTY EIGHTH INFANTRY TRAINING BATTALION

Camp Wolters, Texas
27 March 1944

SUBJECT: Speeding Violation.

TO : Commanding Officer, 58th Infantry Training Battalion, Camp Wolters, Texas.

C-E-R-T-I-F-I-C-A-T-E

1. In regard to the report that on the 22nd of March 1944 at 1330, it was stated that my car was seen on Highway 81 travelling between Mineral Wells and Camp Wolters at the speed of about 50 miles per hour, I certify as follows:

2. On the 22nd of March 1944 during the noon hour, 2nd Lt Herman E. Bush, then of the 62nd Battalion had stopped by to see me. Being a good friend of mine he stopped by to tell me that he had orders to leave that afternoon for Brooks General Hospital. He asked if I might be able to run him into town with some things he had to send to San Antonio, Texas by Railway Express. I told him I wouldn't have time to go, but that he could use my car. He said he would be back about 1400 that afternoon which was the time he did return the car. This was the last I saw of him.

3. As far as his speeding was concerned, he made no mention of that to me and I know nothing of that part of it, except that he could of very easily not realized the speed at which was stated he was traveling because of my speedometer cable being broken. This is all I know of the incident.

4. On 22nd March 1944, from 1300 to 1700 I was with the troops in Drill Area 3, assisting in instruction on anti tank mines and booby traps.

/s/ Jack T. Jaycox,
JACK T. JAYCOX
1st Lt., Infantry

Which report was known the said First Lieutenant Jack T. Jaycox, to be false, in that he did not see or talk to Second Lieutenant Herman E. Bush, on that day, in that he did not loan his car to said Second Lieutenant Herman E. Bush, on that day, in that he was not in Drill Area #3, from 1300 hours to 1330 hours on that day and in that the said First Lieutenant Jack T. Jaycox, himself drove his car to Mineral Wells during the noon hour on that day and did not return to Camp Wolters, Texas, until about 1330 hours of that day.

Specification 2: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, on or about 24 March 1944, did wrongfully, willfully and knowingly solicit Second Lieutenant Herman E. Bush, 62d Infantry Training Battalion, to make a false statement, to the effect that he, the said 2d Lt., Herman E. Bush, knew the said 1st Lt. Jack T. Jaycox, and used his, the said 1st Lt. Jack T. Jaycox's car. He, the said 1st Lt. Jack T. Jaycox, well knowing that said statements were untrue.

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

Specification: In that First Lieutenant Jack T. Jaycox, 58th Battalion, 13th Infantry Training Regiment, Camp Wolters, Texas, did, on United States Highway 180, enroute from the town of Mineral Wells, Texas, to Camp Wolters, Texas, on or about 22 March 1944, wilfully and wrongfully drive his automobile at a speed in excess of thirty-five miles per hour in violation of paragraph IV, War Department Circular 47, dated 11 February 1943.

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

Accused was on a duty status with his organization, Company B, 58th Battalion, 13th Infantry Training Regiment, at Camp Wolters, Texas, on 22 March 1944. He had no permission to leave the Post or Camp at any time during duty hours on that day (R. 6, Ex. A), nor was he at liberty to leave the Post during the noon hour without express permission from proper authority (R. 11).

At approximately 1:20 o'clock, p.m., on 22 March 1944, Captain Edward K. Standerfer was driving his automobile from Mineral Wells, Texas, to Camp Wolters, at a speed of approximately 30 miles per hour, when a Ford convertible coupe, bearing "O tag 404", and believed by him to be a 1939 model, driven by someone whom he did not recognize, overtook and passed him from the rear (R. 7). At the time of passing, the car was being driven at an estimated speed of 40 miles per hour, in a zone where the speed limit was 30 miles per hour. After the car passed, its speed was increased. Captain Standerfer pursued it, and, over a distance of approximately two miles, clocked its speed at 50 and 55 miles per hour (R. 7, 8).

On 4 March 1944, accused made application to the Provost Marshal's office, Camp Wolters, Texas, for registration of a Ford convertible coupe, 1940 model. The car was checked and registered, and tag No. O-404 was issued to accused for use thereon (R. 9, 10, Ex. B).

On 27 March 1944, Lieutenant Colonel Rives O. Booth, commanding officer of the 58th Battalion, 13th Infantry Training Regiment, received the following official certified report from accused with regard to the latter's "actions in leaving the Post on March 22nd", to wit (R. 6, Ex. A):

> "1. In regard to the report that on the 22nd of March 1944 at 1330, it was stated that my car was seen on Highway 81 travelling between Mineral Wells and Camp Wolters at the speed of about 50 miles per hour, I certify as follows:
>
> "2. On the 22nd of March 1944 during the noon hour, 2nd Lt. Herman E. Bush, then of the 62nd Battalion had stopped by to see me. Being a good friend of mine he stopped by to tell me that he had orders to leave that afternoon for Brooks General Hospital. He asked if I might be able to run him into town with

some things he had to send to San Antonio, Texas by Railway Express. I told him I wouldn't have time to go, but that he could use my car. He said he would be back about 1400 that afternoon which was the time he did return my car. This was the last I saw of him.

"3. As far as his speeding was concerned, he made no mention of that to me and I know nothing of that part of it, except that he could of very easily not realized the speed at which was stated he was traveling because of my speedometer cable being broken. This is all I know of the incident.

"4. On 22nd March 1944, from 1300 to 1700 I was with the troops in Drill Area 3, assisting in instruction on anti tank mines and booby traps" (Incl. 1, Ex. A).

Mr. White, a handwriting expert, testified that in his opinion the following letter was written by the same person who made proven genuine signatures of accused (R. 21, Pros. Ex. 1). This letter was received by Second Lieutenant Herman E. Bush, Company D, 62nd Infantry Training Battalion, Camp Wolters, Texas, within a few days after 29 March 1944 (R. 15, 16, 17, 22), in an envelope postmarked 29 March 1944 (R. 15, Ex. C). It reads as follows:

"Friday P.M.
March 24/44

Dear Sir,

First of all, I'll introduce myself, my name is Lt. Jack T. Jaycox of the 58th Bn. Next I'll tell you just why I'm writing to you.

On the 22nd of March 44 during the lunch hour, I went into Mineral Wells and about 1:30 that same afternoon I left Mineral Wells returning to Camp Wolters. Being in a hurry to get back I passed an officer who took my Camp Wolters tag number, but who did not know me or could of recognized who the driver was. When he returned to Camp Wolters, he turned my camp tag number into the M.P. Office, stating that I was going about 50 M.P.H. Two days later, the report came to my Battalion, after they looked up the tag number to see who owned the car. My Bn Commander sent a note to my company orderly room asking me for my explanation of this incident.

Well, they wouldn't be able to prove that I was speeding, so I wasn't worried about that, but I was worried about being off the post without permission which is the second offense for me and would have meant a general court martial for me which I realize is my fault.

I knew that if I could find out if there were an officer who was signing out on the 22nd and stating that he borrowed my car, being a friend of mine, that they wouldn't do anything about it and it would clear me of being courts martials. You were the one I picked on because you signed out at 1430 on the 22nd of March. So I took the chance of using your name in my reply.

I know you are thinking that I have alot of nerve and that I'm pretty bold in doing this, but all I ask of you if they write and ask if you know me and used my car, please say you did. I realize it will be making you a speeder and you will be telling a fib, but you will be saving me a courts martial and I assure you that I would do the same for you. I doubt very much if you will ever hear anything at all about this, but I'm writing you this letter to tell you the circumstances in case they do ask you. I know they won't do anything to you. If I thought they would I wouldn't have used your name. I realize, and I suppose that you do also, that if the truth is ever found out about this, it will cost me my commission, so I'm trusting that you will destroy this letter after you receive it and read it.

I inquired at your Bn. Officers Quarters about you, stating I thought I knew you, just so I could find out the type of fellow you were before I used your name, because some officers would turn another fellow officer in for something like this. Your fellow officers spoke well of you so I thought it would be alright. I didn't tell them anything about this matter though. They said you were from Chicago and had worked for a railroad for quite a while.

Well I'm from Chicago also and if I can ever do you a favor, please don't hesitate to look me up after the war. My home address is - 401 Fullerton Prky, Chicago, Illinois.

My Camp Wolters address is 58th Bn. Please drop me a line if you have time and let me know if you hear anything

Very Respectfully Yours,

Lt. Jack T. Jaycox,
1st. Lt. Infantry.

P.S. Enclosed is a duplicate copy of my explanation to my Bn. Commander" (R. 22, Ex. C).

Lieutenant Bush, the addressee of this letter, went to the hospital on or about 22 or 23 March 1944 (R. 17) and did not return to his organization for duty until on or about 29 March 1944 (R. 15). On the

day after his return from the hospital, he was questioned by his battalion commander with reference to the report accused had made to his own commanding officer under date of 27 March 1944, herein above set out (R. 17).

Lieutenant Bush did not stop by to see accused during the noon hour on 22 March 1944, nor did he have any conversation with him about any of the things stated in accused's letter to Colonel Booth (R. 23). He did not borrow accused's car between 12:00 o'clock and 2:00 o'clock on March 22nd (R. 18). Not only was he unacquainted with accused (R. 15, 23), but he had never seen him prior to the trial of the instant case (R. 23). He has no knowledge of the incident mentioned (R. 18).

On 7 April 1944, accused was placed in arrest in quarters, at Camp Wolters, Texas, by the commanding officer of the Infantry Replacement Training Center, acting through Major Elma W. Redman, Executive officer of the 13th Infantry Training Regiment (R. 10, 12), who conveyed the order of arrest orally (R. 12). Major Redman explained to accused at the time that he (accused) was not to leave the Bachelor Officer Quarters to go anywhere, except to the mess hall of Area 3 (R. 10). This arrest in quarters was not thereafter lifted (R. 11).

On 11 April 1944 accused was intercepted and stopped in the outgoing lane at the main gate of Camp Wolters, Texas, by military police (R. 14). On 17 or 18 April 1944, upon entering the West Texas Cafe in the city of Mineral Wells, Texas, at approximately 11:45 in the evening, Captain Russell E. Poster discovered accused, with two women (R. 12). After accused had left the cafe, Captain Poster instructed two military police to apprehend and return him to camp (R. 12, 13), which they did, and turned him over to the Duty officer of the 13th Regiment (R. 13).

Having been first duly warned, accused, on 3 May 1944, made a voluntary confession in writing to the investigating officer, which confession was introduced in evidence without objection, the pertinent parts thereof being as follows (R. 25, 26; Ex. D):

> "I am 1st Lieutenant Jack Jaycox, 0-449430, now assigned to Company B, 58th Battalion, Camp Wolters, Texas. I am 22 years of age, married and have one child, age 13 months. My wife, Donna M. Jaycox, and I are now separated, and she lives at Chicago, Illinois.
>
> "I wish to make a voluntary statement as to the trouble I have gotten into here at Camp. I admit that on March 22, 1944 between the hours of 1200 and 1330, that I drove my car to Mineral Wells without permission and that upon returning to

Camp I drove my car at a speed in excess of 35 miles per hour; upon my return to Camp, I passed a car when I was speeding on highway 180, and the officer in the car I passed I believe took the license number of my car.

"I also admit having made a false statement of the true circumstances of my misconduct which occurred on March 22, 1944, to my Battalion Commander in a certificate dated March 27, 1944, regarding my absence and the speed violation. I admit this certificate was false, and that this statement was made by me to deceive the Battalion Commander. I also admit that I wrongfully and willingly and knowingly wrote a letter to one Lt. Herman E. Bush, this letter being dated on or about March 24, 1944, where I endeavored to get Lt. Bush to cover up for my misconduct which happened on 22 March 1944. The purpose of this letter was to induce Lt. Bush, who I admit was a stranger to me, to make a false statement which would be a benefit to me if it was believed. I admit that I was speeding on March 22, 1944 on the highway in violation of Par. IV, War Department Cir. 47, dated 11 February 1943.

"I also voluntarily admit that having been placed in arrest in my quarters at Camp Wolters, Texas, on or about 7 April 1944, that I wrongfully did break my arrest on or about 11 April 1944 and go to the main gate of Camp Wolters, before being set at liberty by proper authority.

"I also voluntarily admit that from 2330 hours 17 April 1944 to about 0035 hours 18 April 1944, I did without proper leave, absent myself from my organization and go to Mineral Wells thereby breaking my arrest of April 7, 1944, wrongfully; in doing this, I realize that I was not breaking arrest only but was also AWOL.

"I have read the charge sheet containing the charges and specifications made against me, and I voluntarily admit that all the specifications as set forth in Charges I, II, III and IV are absolutely true in substance and fact, and that I am guilty as therein charged, in said specifications."

4. The defense offered no evidence and the accused did not testify.

5. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed. There must be evidence of the corpus delicti other than the confession itself. Par. 114a, MCM 1928. Such evi-

dence need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the Charge, or to connect the accused with the offense (Par. 114a, MCM 1928). The corpus delicti need not be proved aliunde the confession at all, but some evidence corroborative of the confession must be produced, and such evidence must touch the corpus delicti CM 202213 (1934), Dig. Op., J.A.G., 1912-1940, Sec. 395 (11).

Specification 1 of Charge I (AWOL - AW 61): The competent evidence of record, aside from accused's confession establishes that if accused departed the limits of Camp Wolters, Texas, between the hours and upon the date alleged, he did so without proper authority. It also establishes that, at approximately 1:20 o'clock, p.m., on 22 March 1944, accused's automobile was being driven by someone toward Camp Wolters from the direction of Mineral Wells, Texas, upon a public highway outside the limits of Camp Wolters. Accused falsely represented to his commanding officer when called upon for an explanation of the incident, that he had loaned his automobile to Lieutenant Bush during the noon hour of 22 March 1944, to enable the latter to carry some things into the city of Mineral Wells, Texas. Furthermore, he solicited Lieutenant Bush by letter to corroborate this lie. His false official statement plus his effort to fabricate testimony in his behalf are sufficient, standing alone, to compel the inference that accused was the person who was driving his automobile at the time and place in question. So considered, the evidence of record is sufficient, without recourse to the confession, to establish the corpus delicti of being absent from his organization, without proper leave, on the date in question. Viewed in any light, the fact that his automobile was being driven from the direction of Mineral Wells toward Camp Wolters, Texas, at approximately 1:20 o'clock p.m. on the day in question corroborates his confession that, without permission, he drove his car to Mineral Wells between the hours of 12:00 o'clock, noon, and 1:30 o'clock, p.m., on 22 March 1944, and directly touches upon the corpus delicti, within the contemplation of the rule above set out. Article of War 61 is designed to cover every case not elsewhere provided for where any person subject to military law is, through his own fault, not at the place where he is required to be at a time when he should be there. Par. 132 MCM 1928.

Specification 2, Charge I (AWOL - AW 61): The evidence proves conclusively that from approximately 11:45 o'clock, p.m., on 17 or 18 April 1944, until he was apprehended and returned to Camp Wolters by Military Police, accused was in the city of Mineral Wells, Texas. On 7 April 1944, he was placed in arrest in quarters, and the arrest had not been lifted, which fact without more, is legally sufficient to establish beyond reasonable doubt that both accused's presence in Mineral Wells and his absence from his organization and quarters, were without proper authority. The evidence, particularly in view of accused's confession, is legally sufficient to support the finding of guilty.

Charge II, and its Specification, (Breach of Arrest - AW 69): Accused was ordered into arrest in quarters on 7 April 1944 by his commanding officer. The arrest was not lifted after it was imposed, nor were the limits thereof enlarged. Accused was restricted to the Bachelor Officer Quarters in which he lived, except to go to the mess hall. The evidence conclusively establishes, and accused admits in his confession, that before he was set at liberty by proper authority, accused infringed the limits of arrest set by the orders given him and breached his arrest on two separate occasions, as alleged in the specifications of Charge II by going to the main gate of Camp Wolters on 11 April 1944 and by visiting the city of Mineral Wells on the night of 17 April 1944. Par. 139a, M.C.M., 1928.

Specification 1, Charge III (False official statement, AW 95): The letter or certificate written by accused to his commanding officer under date of 27 March 1944 was an official statement or communication. That it was false in its entirety is clearly established both by the testimony of Lieutenant Bush, and by the letter written by accused to Lieutenant Bush under date of 24 April 1944 (Ex. C), and admitted by accused in his confession. Accused was fully aware that the statements he made therein were false when he prepared the certificate. He could have had no other purpose in making the false representations except to deceive his commanding officer, and, in his confession, acknowledges such to have been his purpose and intent. The making of a false official statement, knowing it to be false, and with intent to deceive, is conduct unbecoming an officer and gentleman, and violates Article of War 95. Dig. Op. JAG 1912-1940, Sec. 453 (18).

Specification 2, Charge III (Soliciting Lieutenant Bush to make a false statement, AW 95): The competent evidence of record, aside from accused's confession, is legally sufficient to show that accused wrote the letter, dated 24 March 1944 (Pros. Ex. 1) addressed to and received by Lieutenant Bush. In this letter accused relates that, in an effort to hide from his commanding officer his absence without leave on 22 March 1944, he had falsely represented to his commanding officer that Lieutenant Bush was his good friend and had borrowed his automobile and driven it to Mineral Wells, Texas, during the noon hour on that day. He requested that, in the event Lieutenant Bush should receive any communication or be questioned about the matter, he falsely represent that he knew accused and had borrowed his car at the time in question. Lieutenant Bush did not know accused, and had not borrowed his car at any time, facts of which accused was thoroughly cognizant. The falsity of these statements, accused freely acknowledges both in the letter itself and in his subsequent confession. Accused's audacity in soliciting a fellow officer, a complete stranger to him, to boldly lie and to degrade himself by making false official statements to protect accused from the result of his own misconduct constitute conduct unbecoming an officer and gentleman, and was a violation of Article of War 95.

Charge IV, and its Specification, (Driving his automobile at a speed in excess of 35 miles per hour, in violation of paragraph IV, War Department circular 47, dated 11 February 1943 - AW 96): The fact that someone drove accused's automobile on the public highway from the direction of the city of Mineral Wells, Texas, toward Camp Wolters, Texas, on 22 March 1944, at a rate of speed considerably in excess of 35 miles per hour is sufficiently proved by competent evidence of record, other than accused's confession, and constitutes the corpus delicti of the offense charged. The corpus delicti having been proved by competent evidence aliunde accused's confession, the confession may be considered, and is sufficient to prove that accused was in fact the driver at the time and place in question. While paragraph IV of War Department Circular No. 47, 11 February 1943, does not promulgate any law or regulation, but merely invites attention to a 35-mile-per-hour speed restriction shortly theretofore placed on all vehicles (by what agency is not stated), it does state over the signature of the Chief of Staff U.S. Army that it is imperative that all military personnel rigidly comply with this restriction in the operation of private motor vehicles, and directs that violations be followed by prompt, effective disciplinary action. It thus has the effect of an order from the War Department. Accused is presumed to have had notice of this circular. By disregarding and failing to abide by the order, impliedly if not expressly contained therein, he is guilty of conduct prejudicial to good order and military discipline, in violation of Article of War 96. Furthermore, as pointed out in the circular, the restriction is a war measure, designed primarily to conserve both tires and motor fuel, and is applicable to all motor vehicles. The act of accused in violating the restriction with which the civilian as well as the soldier is expected to comply and for the violation of which he may be penalized, constitutes conduct of a nature to bring discredit upon the military service, and is therefore a violation of Article of War 96.

6. War Department records disclose that accused is 22 years of age, and is married. He is a high school graduate (Morgan Park Military Academy - Chicago) and has had one year of college training at North Park College. He was a theater usher, mill operator, and life guard before entering the army. Accused was appointed second lieutenant, Army of the United States (Infantry Reserve) under date of 10 April 1942, was discharged as an enlisted man 16 April 1942, and entered upon active duty under his reserve commission on 17 April 1942. He was for a time assigned to duty with the Army Air Forces while undergoing pilot training in officer grade, but upon being eliminated, was reassigned to the Infantry. He was promoted to the grade of first lieutenant effective 1 January 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 sufficient to support the findings and sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon a conviction of Articles of War 61, 69, or 96.

William A. Pounds, Judge Advocate.

William H. Bamberell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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 First Lieutenant Jack T. Jaycox (0-449430), Infantry.

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

3. Inclosed 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. sig. of S/W.
3 - Form of action.

(Sentence confirmed. G.C.M.O. 374, 18 Jul 1944)

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

SPJGV
CM 256441

14 JUN 1944

UNITED STATES	PERSIAN GULF COMMAND
v.	Trial by G.C.M., convened at Teheran, Iran, 8 and 9 May 1944. Dismissal.
Major JAMES T. ROUNTREE (0-317926), Medical Corps.	

OPINION of 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 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 Major James T. Rountree, Detachment 5, ASC, USSTAF, APO 798, was, at Casablanca, French Morocco, on or about 15 April 1944, drunk and disorderly in a public place, to-wit, in or near the Cafe Le Petite Poucet, while in uniform.

Specification 2: In that Major James T. Rountree, Detachment 5, ASC, USSTAF, APO 798, was, at Teheran, Iran, on or about 24 April 1944, drunk and disorderly in a public place, to-wit, the Ritz Hotel, while in uniform.

Specification 3: In that Major James T. Rountree, Detachment 5, ASC, USSTAF, APO 798, was, at Camp Amirabad, Teheran, Iran, on or about 25 April 1944, drunk and disorderly in a public place, to-wit, the Officers' Mess, while in uniform.

Specification 4: In that Major James T. Rountree, Detachment 5, ASC, USSTAF, APO 798, did, at Camp Amirabad, Teheran, Iran, on or about 25 April 1944, wrongfully strike 1st Lt. Benjamin

Day in the mouth with his, the said Major James T. Rountree's, fist.

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

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

a. Specification 1.

First Lieutenant Albert M. Jaroff, Captain Daniel S. Feidt and Captain Ralph Fletcher testified that they, First Lieutenant Arthur J. Hiller, and the accused were seated at a table in Cafe Le Petite Poucet in Casablanca, French Morocco, on the evening of 16 April 1944 preparatory to obtaining dinner. Major Rountree invited a group of civilians at an adjoining table to join them for wine, but they ignored the invitation and left in a short while. Another group of civilians, not Americans, took their place and Major Rountree also invited them to join him in drinking wine, and again his invitation was ignored. Major Rountree, apparently irritated by this rebuff, then made remarks derogatory to the French people, to the effect that "the French had not been bombed enough by the American forces, and that we were * * * allied with the wrong side in this war" (R. 9), "that the United States would pay the entire cost of the war in any event, and that we * * * would be better off if we had the Germans on our side". In addition he continually referred to the French as "frogs" (R. 16) and said "it was too bad there were not more bombs dropped on France" (R. 21). In addition to these remarks addressed in English the accused also made statements in German for anyone to hear, these statements not being understood by these witnesses (R. 10, 21).

During the soup course the waiter was requested to bring some pepper to the table occupied by accused's party, but the waiter either did not understand this request, or for some other reason failed to procure any pepper. Lieutenant Jaroff then obtained a condiment cellar from another table, which was found to contain paprika and not pepper. The accused thereupon emptied the contents of the cellar on the table and threw the glass cellar at the waiter (R. 9, 15, 20). All three witnesses were positive the cellar struck the waiter, and Captain Fletcher testified that the cellar after hitting

the waiter just below the belt bounced and hit him on the arm (R. 21).

After completing the meal the party left the cafe. On the sidewalk in front of the cafe Lieutenant Jaroff observed the accused in animated conversation with a drunken sergeant, and the last he saw of them they were edging toward the curbing in an embrace, either "friendly or hostile" (R. 10). Lieutenant Jaroff then left for his billet. Captain Feidt went to the latrine in the cafe on his way out, and when he reached the sidewalk he observed the accused and a soldier, whom he thought was Lieutenant Jaroff, with arms around each other stooped over and motionless. He also apparently left the party at this time (R. 16, 17). Captain Fletcher's testimony as to accused's behavior on the sidewalk after leaving the cafe is more specific. He testified that when he came out of the cafe he saw accused intrude in a conversation between several enlisted men. Accused caught a sergeant by the neck and started across the sidewalk with him and when Captain Fletcher tried to stop him accused told the captain, "Don't bother. I'll be back in a minute". In a few minutes Captain Fletcher went in the direction the accused had taken the sergeant and saw the sergeant on his knees, the accused slapping the sergeant's face and heard him tell the sergeant, "Get down on your knees if you want to talk to me". Many people witnessed this incident (R. 22).

Lieutenant Jaroff testified that accused on this night "had quite apparently been drinking" but was not "boisterous" (R. 10). Captain Feidt said accused "had been drinking" (R. 14, 17) and Captain Fletcher said that in his opinion the accused was drunk (R. 22).

b. Specification 2.

On the evening of 24 April 1944 Captain Alfred P. Collins was at the Hotel Ritz in Teheran, Iran, having drinks with Lieutenant Coats and Lieutenant Zak. They had been there probably 30 minutes when accused arrived. Captain Collins first noticed accused when he was "trying to make advances of some kind" to a bar girl in the hotel. Being unsuccessful in these efforts accused turned to Captain Collins and said, "This girl is a Nazi sympathizer and we shouldn't be here, patronizing this bar". Captain Collins replied the girl had always seemed to him a very good bar girl. Accused then told Captain Collins that members of the Persian Gulf Command didn't know what the war was about, and were noncombatant troops leading an easy life. Growing more vehement accused told Captain Collins that he (accused)was an ex-light heavyweight boxing champion of some school, and a football player of

note and that many members of the Persian Gulf Command were cowards and that Captain Collins was a yellow bastard. Accused invited the captain to step outside, but the captain, remembering he was not a trained fighter, decided he would "gain the advantage of the first blow", and struck the accused. After a few blows they were separated (R. 31, 32). Accused was intoxicated at this time (R. 27). At least five civilians were present at the time of this occurrence (R. 28).

c. Specifications 3 and 4.

On 25 April 1944, the night following the episode at the Ritz Hotel, the accused was at the Officers' Mess at Camp Amirabad, Iran. He was drunk and staggering (R. 34). He went to the table occupied by First Lieutenant Anthony F. Carducci, First Lieutenant Benjamin Day and Second Lieutenant Betty Long, Army Nurse Corps. Here he was quite abusive toward Lieutenant Day and was asked several times to leave. Finally he insisted that Lieutenant Day come outside and fight, but Lieutenant Day did not want to do so "particularly with a major". Finally, in an effort to quiet the accused Lieutenant Day did leave the Mess with him. Outside the accused was very insistent that Lieutenant Day fight, telling him he had been a boxer and liked to fight. The lieutenant finally pacified the accused and they went back into the building, the accused telling Day he was "yellow" as a parting remark. Accused again returned to the Carducci, Day, Long, table and stated to Lieutenant Day, in the presence of Miss Long, "I made you suck ass outside, so keep quiet now". He was again abusive to Lieutenant Day and insistent that he go outside. To avoid further embarrassment to Miss Long, Lieutenant Day again went outside with accused, where he still tried to quiet the accused and told him he did not want to fight. When Lieutenant Day threw away his cigarette accused pushed and struck Lieutenant Day, and they both fell. After the fight Lieutenant Day discovered he had lost a tooth in the melee (R. 34, 35, 38-41).

4. For the defense:

Major Kenneth A. Reecher testified that he had proceeded from Casablanca to Teheran with the accused and stayed with him two nights in a hotel room in Casablanca. During the time that he had observed accused his official and unofficial conduct was satisfactory. He saw accused in the hotel where he was quartered in Casablanca when he came in about 10:30 p.m. on the night of 16 April 1944, and accused was not drunk (R. 47).

First Lieutenant Arthur J. Hiller, a member of the group at accused's table at the Le Petite Poucet Cafe in Casablanca on the night of

16 April testified that accused had not thrown a condiment cellar at the waiter that night. In an effort to show the waiter that a cellar had been procured accused spilled the contents of the cellar on the table. Whether the top glanced off and hit the waiter the witness did not remember (R. 49). This witness had been with Captain Fletcher earlier during the day and they had had two drinks before lunch, and four or five later in the afternoon at a bar (R. 50).

Second Lieutenant Louis F. Sokol, who had been in accused's party since they left England, testified that accused fulfilled his duties capably and took good care of the men under him (R. 53).

The accused after having his rights as a witness explained elected to testify under oath. After giving a lengthy account of his medical career and accomplishments accused said that in Casablanca on 16 April 1944 he had had two drinks of brandy at lunch, and had then gone to the race track alone. Returning to his hotel he had a bath, and met his party in the lobby of the hotel. They then proceeded to the Le Petite Poucet Cafe. He said he had not thrown a cellar at the waiter, but that in shaking a cellar to indicate to the waiter that they did not need another one the top came off and the contents got on the waiter, who brushed off his clothes and continued serving the meal (R. 56, 57).

Upon leaving the cafe he noticed a technical sergeant who was very drunk and running into everyone. He told him he had better go home or the MPs would pick him up. He took the sergeant by one arm and the enlisted man took him by the other arm and walked the sergeant away from the hotel. The enlisted man then took the sergeant off (R. 57).

In connection with Lieutenant Day the accused said he had first seen Lieutenant Day on 23 April 1944 in the Officers' Mess, at Camp Amirabad. After dinner he was sitting at the bar in the Mess with another officer and Lieutenant Day sat on the opposite side. Lieutenant Day, whom he had never seen before said to him, "Major Rountree, there are two or three officers in your outfit who think you are a son-of-a-bitch". The accused replied, "Maybe so" and tried to leave, but the lieutenant kept calling him back, and finally said, "Maybe you <u>are</u> a son-of-a-bitch". The accused finally got up and went to the other end of the bar (R. 57). On 25 April 1944 he and a Lieutenant Jones were in the bar at the Officers' Mess in Camp Amirabad and both had had several drinks. The accused went over to a table to speak to Miss Long, a nurse in his outfit. He said "hello" to Lieutenant Day who was at Miss Long's table, and Day replied, "Why don't you go away". Both he and Day had been drinking and an argument ensued leading accused to invite Day outside.

Day did not want to go outside but finally did so, "but nothing came of it. * * * In a little while, we got into another argument and he went outside with me again. This time I took my blouse off and we boxed a little. Then we stopped and went back inside" (R. 58). Colonel Lancaster ordered accused and Lieutenant Jones to leave the Mess and they did. Jones had forgotten his cap and had to return for it, and when he did Captain Fletcher told Jones, "If you don't go I will beat hell out of both of you" (R. 58).

On cross-examination accused testified it was quite possible he had used foul and indecent language toward Lieutenant Day in their argument on the night of 25 April 1944 as he was quite angry. He had been drinking, but was not drunk. He had boxed some back in the States, but doesn't know whether he knocked Lieutenant Day's tooth out or not, as they both fell to the ground during the fight (R. 60).

He does not remember making any disparaging remarks of any sort toward the French while in the Le Petite Poucet Cafe in Casablanca on the night of 16 April 1944. On the outside of the cafe he merely led the drunken sergeant to a more shaded area where he would be less conspicuous, and did not strike the sergeant in any manner. The sergeant was very drunk and may have gone down on one knee during this process (R. 62).

In his difficulty with Captain Collins in the Ritz Hotel on 25 April 1944 both he and Captain Collins had been drinking, and Captain Collins struck him first. He does not remember whether he called Captain Collins a "yellow son-of-a-bitch" or not before the captain struck him (R. 65).

5. The evidence shows that on 15 April 1944 accused, together with several other officers, was having dinner in a cafe in Casablanca, French Morocco. Accused became angered when a group of civilians at an adjoining table ignored his invitation to join him for wine and made several highly disparaging remarks about the French people, to the effect that they had not been bombed enough, that we were allied with the wrong people in this war, and that the United States would have to pay the entire cost of the war in the end. Later during the meal accused emptied the contents of a condiment cellar on the table and threw the cellar at the waiter. Upon leaving the cafe accused became embroiled with an enlisted man and according to Captain Fletcher's testimony at one time had the enlisted man down on his knees and was slapping his face, and told the enlisted man to get on his knees when he spoke to him.

On 24 April 1944 accused became involved in an argument with Captain Collins in the Ritz Hotel in Teheran, Iran. He told Captain

Collins that members of the Persian Gulf Command did not know what the war was about and that some members of that command were yellow noncombatants, and finally called Captain Collins a yellow bastard. At this time Captain Collins struck accused and they exchanged several blows before being separated by others present.

Later on the evening of 25 April 1944 accused was at the Officers' Mess, Camp Amirabad, Iran, where he addressed obscene and vulgar remarks at Lieutenant Day in the presence of Lieutenant Betty Long, Army Nurse Corps, Day's companion. At accused's insistence Lieutenant Day went outside with him where accused attacked Lieutenant Day, who lost a tooth in the fight.

The Board of Review is of the opinion that the court's findings of guilty of all Specifications and of the Charge are fully sustained by the evidence.

6. War Department records show that accused is 33 years of age. He graduated from Baylor Medical School in 1934. He was appointed first lieutenant, Medical Corps Reserve, 28 May 1934, and was on active duty with C.C.C. from 28 March 1934 to 21 August 1936 when he was honorably discharged in view of the fact that he was in the U.S. Public Health Service. On 5 May 1942 he was appointed captain, Army of the United States, and promoted to major 29 April 1943. Accused was graduated as Aviation Medical Examiner by the School of Aviation Medicine, Randolph Field, Texas, 5 February 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 thereof. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Thomas N. Taffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevellyan, Judge Advocate.

SPJGV
CM 256441

1st Ind.

War Department, J.A.G.O., 23 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 Major James T. Rountree (0317926), 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 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 confirmed. G.C.M.O. 425, 4 Aug 1944)

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

SPJGK
CM 256455

(291)

19 JUN 1944

UNITED STATES v. Second Lieutenant BENNING W. ELLIOTT, JR. (0-802845), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at George Field, Illinois, 27 April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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 95th Article of War.

Specification 1: In that 2nd Lieutenant Benning W. Elliott, Jr., Air Corps, AAF Pilot School (Advanced 2 Engine), George Field, Lawrenceville, Illinois, did, at Terre Haute, Indiana, on or about 24 December 1943, with intent to deceive and injure, wrongfully make and utter to Terre Haute House, Terre Haute, Indiana, a certain check in words and figures as follows, to wit:

"Van Orman Hotels
Guest Check
O.K.'d by 0802845 Dec. 24, 1943

Pay to the order of - Terre Haute House - - - $25.00
TWENTY-FIVE and 00/100 - - - - - - - - - - - Dollars
For value received I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof.
2ND NATIONAL BANK /s/ BENNING W. ELLIOTT
Robinson, Ill. Geo. Fld, Ill."

And by means thereof, did fraudulently obtain from Terre Haute House, Terre Haute, Indiana, twenty-five dollars ($25.00), he, the said 2nd Lieutenant Benning W. Elliott,

Jr., Air Corps, then well knowing that he did not have and not intending that he should have sufficient funds in the Second National Bank, Robinson, Illinois, for the payment of said check.

Specification 2: Same as Specification 1 but alleging check for $20.00 dated December 25, 1943.

Specification 3: In that 2nd Lieutenant Benning W. Elliott, Jr., Air Corps, * * *, did, at Lawrenceville, Illinois, on or about 29 December 1943, with intent to deceive and injure, wrongfully make and utter to Peoples National Bank, Lawrenceville, Illinois, a certain check in words and figures as follows, to wit:

"Customer's Check

THE PEOPLES NATIONAL BANK
in Lawrenceville

Lawrenceville, Illinois, Dec. 29, 1943

Pay to the Order of - - - - Peoples National Bank - - $50.00
FIFTY AND 00/100 - Dollars

Value received and Charge to Account of

To: 2ND NATIONAL BANK /s/ Lt. BENNING W. ELLIOTT, Jr.
Robinson, Ill. 0-802845"

and by means thereof, did fraudulently obtain from The Peoples National Bank, Lawrenceville, Illinois, fifty dollars ($50.00), he, the said 2nd Lieutenant Benning W. Elliott, Jr., Air Corps, then well knowing that he did not have and not intending that he should have sufficient funds in the Second National Bank, Robinson, Illinois, for the payment of said check.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. 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. The prosecution proved that accused wrote two checks payable to the Terre Haute House, Terre Haute, Indiana, on 24 and 25 December 1943, and received for them the sum of $25 and $20, respectively (R. 7-8, 9-10; Pros. Exs. B and C). It was likewise proved that he wrote a customer's draft payable to the Peoples National Bank of Lawrenceville, Illinois, on 29 December 1943, and received for it the sum of $50 (R. 10-11; Pros. Ex.D).

All three instruments were drawn on the Second National Bank of Robinson, Illinois, and were returned by it to the respective payees during the last week in December, 1943 and the first week in January, 1944, because there were not sufficient funds in his account in the drawee bank to make payment (R. 13-14).

Accused had opened an account with the Second National Bank in August of 1943. Either he or his wife could draw upon it (R. 12,14,15). It appears from the bank's ledger sheet of his account that deposits of varying size were made to the account around the first day of August, September, October, November, and December 1943, but that long before the end of each month the balance would be reduced almost to zero by withdrawals. For example: on 1 October $260.40 was deposited, but by 15 October the balance was $12.93 as a result of 19 checks; on 1 November a deposit of $261.80 resulted in a balance of $262.76, but by 12 November it was down to $18.04 as a result of 12 checks; and on 30 November a deposit of $320.40 resulted in a balance of $320.90 which was reduced by 10 checks to 90¢ (Pros. Ex. E). The last deposit mentioned was accused's pay check for the month (R. 16,17). No other deposit was made until 4 February 1944 (R.17, Pros. Ex. E). Of the 10 checks paid between 1 and 4 December 1943, five of them, totaling $122, were written by accused's wife, and five, totaling $198, by accused (R. 15,16; Pros. Ex. E). The bank did not notify accused of the status of his account after 4 December, nor did it mail the 1 December statement to him, because his wife had previously notified "someone in the bank" that she or accused would in the future pick it up in person (R. 16,17).

None of the checks had been paid at the time of the trial. The manager of the hotel wrote two letters, one by special delivery, to accused at his airfield, both with a return address. None had been returned. The assistant cashier of the payee bank wrote twice to accused concerning the $50 check, to his airfield, and twice to Billings General Hospital at Indianapolis, after he learned that accused was there. He received no replies. All six letters appear to have been written in January (R. 20-24).

Evidence for defense.

Mrs. Glenore Elliott, accused's wife, testified in his behalf. She stated that they lived in Robinson, Illinois, during December of 1943, and that from their joint account in the Second National Bank she had drawn checks which her husband did not know about. She did not know, however, how many checks she had drawn, nor their total amount. She did not maintain the passbook, or keep track of the balance of the account, and did not know the status of the account during December (R. 25-27). She denied that she had instructed the bank not to mail statements, but admitted that she "did call to see what was in the bank" (R. 28).

Accused's rights were explained to him, and he testified under oath (R. 28). He stated that he was 23 years of age, had a high school education and a night school business and bookkeeping course lasting sixteen weeks. He had been a machinist in civilian life and had never had a checking account. After enlisting in the Army he applied for training as an aviation cadet (R. 29). He opened the joint account with the Second National Bank in August of 1943, and thereafter had his pay checks sent to the bank to be credited to his account. This was done with the check for November, but he did not know the status of his account as of 1 December other than that it contained the proceeds of that check (R. 30). He received no bank statement in December and made no effort to learn from the bank the amount of his balance (R.38). He thought, however, that the three checks in issue would be honored, and did not intent to defraud the payees (R. 31).

He did not know how many of his wife's checks had cleared the bank in December 1943, but did not deny that he had written those which depleted the account beyond her withdrawals of $122 (R. 32,33). He picked up the December pay check in person because he had received no acknowledgment from the bank that it had arrived there; he stopped in at the Field's Finance Office and found that it was still there about 2 January. "There was no explanation given why it was not sent". He admitted that the check was payable directly to him instead of to the bank, to be deposited to the credit of his account, but stated that this was not at his request (R. 33,35,36,37). He maintained no pass book and kept no balance, so did not know the status of his account. His expenses were greater in December, January, and February than they had been in previous months, due to the fact that he and his wife had moved and were paying higher rental, and because of her pregnancy. They "just wrote more checks than we thought we did. Consequently our bank account got in the red and these checks bounced back" (R. 32,34).

Accused went to Billings General Hospital, at Indianapolis, on 11 January, for a tonsilectomy and a nasal operation. While there he received the dunning letters. He implied that he did not answer them because he was not feeling well. He got back to his field on 12 April, and received only $100 of his pay on 1 May because he was "on non-pay status" during his stay in the hospital in February and March. Since returning he had been making efforts to obtain money from the Finance Office to pay the checks (R. 31-35,38).

Evidence in rebuttal.

In rebuttal the prosecution showed by the testimony of Second Lieutenant Richard V. Ehrich, Finance Department, the assistant finance officer at accused's field, that the reason why accused's check for his December pay and allowances was not mailed to his bank was "that

he personally requested that it be made out to him this time and that he would pick it up". As made out, the bank could not properly accept it to the credit of his account, as it could the check for November (R. 37,38; Pros. Ex. F). Accused's pay and allowance vouchers for November and December, certified as correct by accused before presentation, showed that the direction to place the pay to his credit with the bank was omitted in the December voucher. This voucher called for payment to him. Such an alteration would not be made without authority from the payee (R. 39,40; Pros. Ex. G).

Evidence in sur-rebuttal.

Accused stated that he did not go to the finance office in December of 1943 to instruct that his check be made payable to him personally. He admitted, however, that he did not put any of the proceeds of his December pay check in his account at the bank (R. 41).

4. The Board of Review is of the opinion that the record of trial supports the court's findings. It is clear that accused's banking habits over several months had become most unbusiness-like. It is clear also that he had taken no steps either to ascertain the condition of his account or to assure the presence of a balance sufficient to meet his demands on the account. In fact, for some reason which he chose not to make clear, he deliberately departed from his established custom of making a monthly deposit in the bank, picked up his check personally, and did not use it to make good his bad checks. It is finally clear that although he received six letters requesting payment, he did not answer any of them, even to urge the excuse for non-payment which he gave on the witness stand. Under all the circumstances the Board of Review holds that his conduct evidences a knowledge that he did not have funds sufficient to meet the checks and did not intend to have any in the bank.

5. War Department records show that accused is 24 years of age. He is a high school graduate. He entered the Army on 17 July 1942, was appointed an Aviation Cadet on 20 August 1942 and was commissioned a second lieutenant, Air Corps, Army of the United States, on 29 April 1943. The records also show that in August 1943, action through channels was required in the matter of a $10 check given by accused to the Hotel Lincoln, New York, New York, which had been returned by the Robinson National Bank, marked "no account".

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

Amy G. Fox, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Herman Moyse, Judge Advocate.
Samuel Sonnfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 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 Benning W. Elliott, Jr. (0-802845), 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 thereof. In view of the nature of the offenses of which he here stands convicted, and because of the statement in the Staff Judge Advocate's review that accused has issued checks without sufficient funds prior to, and since, the commission of the offenses for which he was here tried; that he has been remiss in and inattentive to his duties as a flight instructor, and in view of information received in this office that since receipt of the record of this trial further charges have been filed against accused under Article of War 94 alleging presentation of two false pay and allowance vouchers, it is evident that accused is unworthy to hold a commission in the Army. 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. 429, 4 Aug 1944)

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

SPJGN
CM 256563

8 JUN 1944

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Camp Plauche, New Orleans Port of Embarkation, New Orleans, Louisiana, 15 May 1944. Dismissal.
Captain ROBERT M. ANDREWS (0-912513), Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 Captain Robert M. Andrews, TC, did at New Orleans, Louisiana on or about 22 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Louis Zollinger a certain check in words and figures as follows, to wit:

New Orleans, La., 22 April 1944 No._____

WHITNEY NATIONAL BANK 14-17
of New Orleans

Pay to the
order of Louis Zollinger $500.00

Five Hundred & no/100 - - - - Dollars

COUNTER CHECK Rob. M Andrews

in payment of five hundred dollars ($500.00) lawful money of the United States that he then and there owed to the said Louis Zollinger, he, the said Captain Robert M. Andrews, then well knowing that he did not have and not intending that he should have any account with the Whitney National Bank of New Orleans, for the payment of said check.

Specification 2: In that Captain Robert M. Andrews, TC, did at New Orleans, Louisiana, on or about 22 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Arthur G. Levy a certain check in words and figures as follows, to wit:

New Orleans, La., 4 22 1944 No.

WHITNEY NATIONAL BANK 14-17
of New Orleans

Pay to the
order of Arthur G. Levy $200.00

Two Hundred & no/100 Dollars

COUNTER CHECK Rob M Andrews
g

in payment of two hundred dollars ($200.00) lawful money of the United States that he then and there owed to the said Arthur G. Levy, he, the said Captain Robert M. Andrews, then well knowing that he did not have and not intending that he should have any account with the Whitney National Bank of New Orleans, for the payment of said check.

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

Specification: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Charge II and its Specification but guilty of Charge I and the Specifications 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 prior to Saturday, 22 April 1944, the accused had participated in two poker games for high stakes with several individuals, including Louis J. Zollinger, a real estate broker, and had emerged a winner. During the afternoon of that day Mr. Zollinger was one of a foursome at the City Park golf course in New Orleans, Louisiana. His companions were Harry J. Gigler and Howard C. Peck, salesmen, and Private First Class Arthur G. Levy of the United States Marine Corps. Just as they completed eighteen holes and were contemplating continuing for another four the accused approached Mr. Zollinger and proposed a session of poker. This suggestion met with a favorable reception. The accused was introduced to Gigler, Peck, and Levy to whom he was a stranger, and a game was arranged. Levy went to a drug store to purchase two decks of "Bee and Bicycle" cards, and the accused left for his home to obtain some money (R. 6-7, 9, 11-12, 15-16, 27, 29-31, 33-35, 72).

About twenty to thirty minutes later at 4:30 p.m. they reassembled at the City Park Casino near the tennis lockers and commenced playing. The ante initially was $1.00, but it was eventually raised to $5.00. About 6:00 p.m. Peck withdrew from the game and departed. Some two or three hours later Gigler followed his example. The three who remained did not leave the game even for dinner, but sent the porter for sandwiches, soft drinks, and water. No intoxicating liquors of any kind were consumed (R. 7-8, 12-13, 16-18, 32, 42, 70).

"The game continued on" until "between two and three a.m." Sunday morning. The accused's ability as a poker player was only "average", and his luck was continuously bad. By midnight he had lost all of the funds aggregating some $400 which he had brought with him from his home. At the time Zollinger was ahead to the extent of some $500 and was the sole winner. The accused accordingly asked him for a loan of $100 for which he proposed to give his personal check. When Zollinger stated that he had some Whitney National Bank blanks, the accused remarked "Why that's my bank". No check for $100 was, however, executed. Instead the accused "wrote one hundred dollars" on one of blanks "and put his initials on it", "just a memorandum on it" (R. 12, 18-19, 26, 31, 36, 42).

The accused's luck did not improve. Within twenty to thirty minutes he was again without funds. He borrowed another $100 from Zollinger and, when that was gone, another $200. The memorandum was corrected in each instance to reflect these transactions. When the accused's possession of the $200 also proved to be transitory, Zollinger advanced another $100 but demanded in return a check payable to himself for the total of $500. The accused complied by executing one of the Whitney National Bank blanks for that amount (R. 14, 19-21, 37-39; Govt. Ex. I).

The last $100 sufficed only a few minutes. To remain in the game the accused secured two $100 loans on memorandum from Levy. This money, also, was soon dissipated. The accused then obtained $200 more from Zollinger on memorandum. This time fortune momentarily smiled on the accused. The Zollinger memorandum was placed in one of the "pots", and the accused won (R. 21-22, 32, 38).

Shortly thereafter he was dealing a stud poker hand. As he turned up his own third card, a four, he was accused by Levy of cheating. According to the latter,

> "I told him he dealt from the bottom of the deck. * * * I caught him in the act. I was suspicious of him before, furthermore he did it very clumsily. He slid the 4 off the bottom of the deck. I was out of the pot but when I saw him cheating I called him on it. When I turned up his hole card it was the 4 of Diamonds, which gave him a pair of fours. * * * /If/ he hadn't been cheating he would have lost a lot more."

Zollinger remembered that previously during the same game "Levy said he had three Sevens and /the accused/ said he had three Kings and I saw his hand when he threw it in the deck. He didn't have three Kings. He had two Kings and a Jack". In Levy's opinion the accused was "feeling the pressure because he couldn't pay off" (R. 23-25, 41-42).

The game was at an end. Another check on the Whitney National Bank, this one in the sum of $200 and payable to "Arthur G. Levy", was executed by the accused. Below his signature appeared the letter "g". The date "4-22", was subsequently filled in by Levy. As the three men were leaving for their respective homes, the accused remarked that his wife would probably stop payment on both checks because "the money was /hers/ as well as his" (R. 24, 41, 45). Levy replied that, "They better be good or you'll wish they were". He explained the threat as meaning

simply that he would turn the matter over to the "authorities" (R. 23-24, 32-33, 40-41; Pros. Ex. II).

The following morning which was Monday, 24 April 1944, Zollinger and Levy met at the Whitney National Bank at opening time. They hoped to forestall a "stop payment" order by presenting their checks for payment at the earliest possible moment. They were informed that the accused had no account with the bank. None had been opened by him as of the date of trial (R. 14-15, 33, 42; Govt. Ex. III).

4. After being apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. His version of the events of 22-23 April 1944 contradicted the evidence adduced by the prosecution in every vital respect. To lend weight to his story three high-ranking officers were called by the defense who attested to his reputation for truth and veracity (R. 47, 65-69).

He had known Zollinger some three or four months, had played poker with him once before, and had won about $50 or $60. When they met on the afternoon of 22 April 1944, it was Zollinger who suggested a gambling session and who induced Levy, Gigler, and Peck to participate. The accused was "absolutely positive" that he was not introduced to any of the three gentlemen, whom he had never seen before. He did not learn Levy's full name until after the game (R. 48-49, 61).

They commenced playing at approximately 6:00 p.m. and not 4:30 as the witnesses for the prosecution had asserted. Peck and Gigler did not leave until 7:30 p.m. and 8:30 p.m., respectively. The accused's initial resources consisted of $467 most of which he and his wife had saved. He expected "just a small game" involving bets of "not over $10.00". At Levy's suggestion the ante was increased "from one and two dollars to ten dollars. They immediately started betting as high as one hundred dollars on a game" (R. 49-50, 64).

Between 11:30 p.m. and midnight after having lost all of the $467, the accused remarked, "That's all I got boys". Zollinger then said "We'll let you have some more". The sum of $100 was then advanced. Nothing was said about repayment; no check was written; no memorandum prepared; and no I.O.U. given. The same was true of all of the other monies lent by Zollinger and Levy. Only $135 of the $200 advanced at one time was actually in cash. The rest was represented by a deficit on a "pot" (R. 50-52).

When the second $100 obtained from Levy was "just about gone",

the accused was charged with cheating. This allegation was without foundation, for he did not have a pair in his hand. If he "wanted to [he] wouldn't know how" to cheat at cards. Levy nevertheless said "I'm going to quit, pay us off". The accused replied, "God damn man. If I was cheating do you think I would lose $450.00 and then $700.00 more". Levy insisted, "Pay us off. Give us a check". The accused remonstrated, "No use giving you a check. I haven't got any money in the bank". Zollinger called the accused a "damn liar" and said: "You are going to give us a check. What bank do you want it on?" The accused's answer was, "One bank is as good as the other bank. I don't have a bank account". Levy threatened: "You are in the Army. If you haven't got any money we are going to make you wish you did have" (R. 53-54).

Subjected to pressure and intimidation, the accused executed the checks on the Whitney National Bank. He has himself admitted that:

> "* * * to be positively honest about it, after repeatedly telling them I didn't have a bank account and they still insisted upon the checks, I wrote them out because I thought they would just use the checks and after they found out I wasn't lying that would be all there was to it. I thought they might use them as I.O.U.'s."

He wanted to write the word "gambling" under his signature to the latter instrument for $200 but his hand was knocked aside by Levy. Later as they walked "down the steps" the accused repeated that the checks "weren't any good". Levy stated "If they aren't any good we are going to make you wish they had been good" (R. 54-55).

The accused had noticed no cheating during the game, but "everytime I would be in the pot one of them would get out if there would be a pot of any size. The only pots I won were the small pots". Before leaving he picked up one of the decks of cards and put it in his pocket. Upon examining them at home he discovered that some "of them had been creased or crimped in different places. Some of them had pinched marks or small broken places on the ends" (R. 55-58).

At 10:30 a.m. on 24 April 1944 the accused was informed by Zollinger over the telephone that the checks had been dishonored. In reply to a query as to what he proposed to do, the accused said,"you've got all the money I had. There isn't a thing I can do about it". Zollinger commented, "We certainly feel sorry for you" (R. 59-60).

5. Specification 1 of Charge I alleges that the accused did "on or about 22 April 1944, with intent to defraud, wrongfully, and unlawfully make and utter to Louis Zollinger a certain check" against the Whitney National Bank of New Orleans, Louisiana,

> "in payment of five hundred dollars ($500.00) lawful money of the United States that he then and there owed to the said Louis Zollinger, he, the [accused], then well knowing that he did not have and not intending that he should have any account with the Whitney National Bank of New Orleans for the payment of said check".

Specification 2 of Charge I alleges that the accused committed the same offense, in like manner, on the same day with respect to a check in the sum of $200, payable to the order of Arthur G. Levy, and drawn on the Whitney National Bank of New Orleans, Louisiana. Both acts were set forth as violations of Article of War 95.

One of the instances of conduct unbecoming an officer and a gentleman enumerated in paragraph 151 of the Manual for Courts-Martial, 1928, is "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's execution of the checks to Zollinger and Levy falls within the well-defined purview of this offense. He had no account at the Whitney National Bank, and he made no effort to establish one. In making and delivering the checks he acted dishonorably, for his purpose was to deceive. His protestations of good faith, his allegations of coercion and intimidation, do not bear the earmarks of truth. He had previously won substantial sums at poker, and, like many others before him, he apparently assumed that fortune would always favor and bless him. With this rash supposition to spur him on he solicited Zollinger to play and came armed for the contest with $467. Practical experience impells the conclusion that one does not enter a poker game with so large a sum without a full appreciation of the risk entailed. When he was confronted with the necessity of executing the first check, the hope of all defeated gamblers was probably still in his heart. It mattered not that the instrument was fraudulent. He would soon win it back and his deceit would never be known. When finally he had to deal with the stark reality of paying Levy, he took the course which was momentarily less unpleasant. Having already committed himself to a course of deceit by signing the $500 check to Zollinger, he executed the check to Levy for $200 in order to avoid a scene and personal embarrassment. Foreseeing the possibility of future controversy, he wrote the letter "g" under his signature and

thus laid what he considered to be a foundation of a defense.

The only question remaining to be considered is raised by an apparent conflict between two authorities contained in the Digest of Opinions of The Judge Advocate General, 1912-1940. In section 453 (24) it is said that:

> "Where accused is charged (A.W. 95) with drawing a worthless check and the court by exception excluded the allegation that the check was given for value it was held that the view that no offense is committed in passing a bad check unless value be received for it is too strict and would cause unfortunate consequences. A check given in payment of preexisting debt or a gambling debt, a check given as a charitable contribution or as a gift, are all given without valuable consideration in the eye of the law, yet the giving of a bad check by an officer under the above circumstances would clearly be discreditable to the military service and in many cases conduct unbecoming an officer and a gentleman. The specification as modified states an offense. CM 202601 (1935)."

On the other hand section 453 (26) states that:

> "Where accused was found guilty (A.W. 95) of wrongfully and dishonorably stopping payment on certain of his checks previously cashed for him by the operator of a gambling game, the proceeds being used by accused in such game, it was held, that a drawer has a legal right to stop payment on his checks before payment or certification, and while certain acts not otherwise denounced may constitute violations of the Articles of War when committed by military personnel, no such offense was here committed inasmuch as the acts themselves were not wrongful or dishonorable and the State statutes concerned (Colorado) make void all such gambling checks and the evidence raises considerable doubt as to the fairness of the game. The debts of accused were not shown by the evidence to be just nor does the proof establish that a moral obligation existed for him to pay them. CM 203609 (1935)."

Since under the law of Louisiana gambling is illegal, and since recovery on an instrument given in payment of a gambling debt has been denied in that state, it is strenuously argued by defense counsel that the last precedent sanctions the accused's utterance of a worthless check. This contention overlooks the distinction between the two cases cited.

A careful consideration of the opinion in the second case supra, shows that the Board of Review recognized that "a grave doubt" existed as to the fairness of the gambling game in question and found that the "actions on the part of the accused certainly indicate his intent to do nothing wrongful and dishonorable". The findings and sentence were disapproved because the conduct of the accused under the facts presented was not deemed to be dishonorable or prejudicial to the service within the contemplation of Articles of War 95 or 96. No principle inconsistent with the earlier decision cited was announced.

On the other hand, in the present case, the evidence upon the issue of the fairness of the gambling game is conflicting. The court, acting within its prerogative, resolved the issue against the accused's contentions. The conduct of the accused in making and uttering checks directed to a bank in which he had no account was deceitful and not consonant with the standards required of an officer and a gentleman. The evidence is, therefore, legally sufficient beyond a reasonable doubt to sustain the findings of guilty and the sentence.

6. The accused is about 37 years old. The records of the War Department show that he was appointed a first lieutenant on 25 July 1942; that he was promoted to captain on 23 October 1943; and that he has been on active duty as an officer since 1 August 1942.

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

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 256563

1st Ind.

War Department, J.A.G.O., 12 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 Captain Robert M. Andrews (0-912513), 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. 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.

(Sentence confirmed. G.C.M.O. 465, 1 Sep 1944)

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

(307)

SPJGQ
CM 256598

26 JUN 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at MacDill Field, Florida, 4 May 1944. To be confined at hard labor for three (3) months, and to forfeit $14.00 per month for a like period.
	)	
Private THOMAS L. WILLIAMS (34567068), Base Detachment, Section II, MacDill Field, Florida.	)	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Thomas L. Williams, MacDill Field Base Detachment, Section II, having received a lawful command from Second Lieutenant B. C. Cornwell, his superior officer, to report to First Lieutenant Francis W. O'Donnell, did, at MacDill Field, Tampa, Florida, on or about 30 March 1944, willfully disobey the same.

He pleaded not guilty to both the Specification and the Charge. The findings of the court were as follows:

> "Of the Specification of the Charge: Guilty, except for the words 'willfully disobey', substituting therefor the words, 'refuse to obey'. Of the excepted words, not guilty. Of the substituted words, Guilty." "Of the Charge: Not Guilty; but guilty of the violation of the 96th Article of War."

No evidence of previous convictions was introduced. Accused was sentenced to be confined at hard labor for a period of three (3) months and to forfeit fourteen dollars ($14) per month for a like period.

The reviewing authority approved the sentence, directed its execution, and designated MacDill Field, Tampa, Florida, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 361, Headquarters Third Air Force, Tampa, Florida, 14 May 1944.

3. The evidence shows that before noon (R. 6) on 30 March 1944 (R. 4, 5), Second Lieutenant Burnett C. Cornwell gave accused, a private under his command, a direct command or order to report to First Lieutenant Francis W. O'Donnell, special service officer, at one o'clock p.m. that day for duty (R. 4, 5). Accused told Lieutenant Cornwell that he was not going to report to Lieutenant O'Donnell, but that if he was needed he would be around on the base (R. 4, 5). Thereupon, and within thirty minutes after giving him the order to report to Lieutenant O'Donnell, Lieutenant Cornwell had accused placed in confinement in the guard house (R. 4).

Accused elected to remain silent and offered no evidence.

4. The command given by Lieutenant Cornwell to accused to report to Lieutenant O'Donnell was a lawful command, and the evidence is undisputed that accused unequivocally stated that he was not going to obey it. However, the command was one to be performed or obeyed in the future, and before the time for performance had arrived, accused had been placed in confinement and was not thereafter in a position to obey the command.

The court properly found accused not guilty of a violation of Article of War 64. At the time he was placed in confinement, he had done nothing more than state his intention to disobey the command which had been given to him by Lieutenant Cornwell when the time for performance should arrive. The Manual for Courts-Martial expressly provides that, "where the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under Article of War 64, although carrying out such an intention may be". Par. 134b, M.C.M., 1928. When the time for execution or performance of the command arrived, performance had been rendered impossible by military authority. This was sufficient to relieve accused from the consequences which might otherwise have attended his failure to comply with the order.

While it found accused not guilty of willfully disobeying the command of Lieutenant Cornwell, the court, by use of exceptions and substitutions, nevertheless found, as a violation of Article of War 96, that he did "refuse to obey" the command. The Board of Review is of the opinion that the only reasonable construction that can be placed on the substituted words is that accused was found guilty of a completed act of disobedience. In other words, that "did refuse to obey" imports the same thing as "disobey". It has been heretofore held by the Board of Review

that the phrases, "willfully disobey the same" and "willfully refuse to obey the same", are substantially equivalent and that a specification which alleges that an accused did "willfully refuse to obey" a lawful command is sufficient to support a finding of guilty of a violation of Article of War 64. CM 200284 (1933). As above pointed out, accused was not culpably guilty of disobeying or failing to comply with the command. He could not, in the very nature of things, disobey or "refuse to obey" the command by noncompliance therewith until the time for performance had arrived, and at that time performance was impossible because of confinement imposed by military authority. The record of trial is not legally sufficient to support the finding of guilty.

5. The accused is 33 years of age and was inducted at Fort Benning, Georgia, 20 January 1943.

6. For the reasons stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty or the sentence.

William A. Bounds, Judge Advocate.

William H. Gamble, Judge Advocate.

Herbert L. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 23 JUN 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 Thomas L. Williams (34567068), Base Detachment, Section II, MacDill Field, Florida.

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

3. Inclosed is a 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.
1 - Record of trial
2 - Form of action

(Findings and sentence vacated by order of the Acting Secretary of War. G.C.M.O. 347, 12 Jul 1944)

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

SPJGN
CM 256601

21 JUL 1944

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Fort McClellan, Alabama, 15 April 1944. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.
Private First Class SADAYUKI SAKUMA (39012151), 33rd Training Battalion, Company C, Infantry Replacement Training Company.	

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES 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 64th Article of War.

Specification: In that Private First Class, Sadayuki (nmi) Sakuma, Company "C", 33rd Training Battalion, Infantry Replacement Training Center, Fort McClellan, Alabama, having received a lawful command from Captain Robert P. White, his superior officer, to fall out for training did at Fort McClellan, Alabama, at 1315 on or about 20 March 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for thirty years. The reviewing authority approved the

sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused was not present at his company's formation at about 1300 o'clock on 20 March 1944. His company commander, Captain Robert P. White, upon being advised that the accused was in his tent immediately went to the accused's tent which was about five yards away from the formation, where he found the accused in uniform, busying himself with a footlocker. The captain asked the accused why he had failed to "fall out" for the formation and the accused replied "I am one of the disloyal ones". The captain then said "That doesn't concern us right now, what I am interested in is you falling out for this formation". To this the accused replied that he couldn't fall out as he was awaiting further orders from Washington. The captain informed the accused that he would have to take the seventeen weeks of training and ordered him to fall out and join the company. The accused refused to obey the order, stating again "I am disloyal, and I made a statement to that effect at Fort Bliss". The captain waited for about five minutes for the accused to obey the order during which time he explained to the accused the seriousness of disobeying an order but the accused merely continued to busy himself with the footlocker. Whereupon the captain restricted him to his tent and departed (R. 7-13).

4. The evidence for the defense, elicited through the testimony of the accused who, after explanation of his rights as a witness, elected to testify, shows that the accused was alone in his tent at 1300 o'clock on 20 March 1944 when a corporal asked him what he was doing there. He advised the corporal that he, the accused, was packing his stuff. A few minutes later Captain White entered his tent and asked him what he was doing there to which the accused replied "I am disloyal" and "I am packing my stuff". Then the captain said "* * * I take train. I take order to train. That is all he said. Then he say stay in my hut. He /the captain/ went outside and he go out he just said to me, 'You are right—you may remain in the hut'". The substance of his testimony is that the captain did not order him to fall out while also admitting that he had no intention of taking training that afternoon since he was disloyal because of claimed knowledge of discrimination against Japanese-Americans and because of his belief that transfer to a combat unit for training and ultimate actual combat amounted to a sentence to death which he preferred to have assessed by a court (R. 14-19).

5. The Specification alleges that the accused at a designated time

and place, after having received a lawful command from his company commander to fall out for training, willfully disobeyed such order. The alleged offense is defined as the willful disobedience, manifesting an intentional defiance of authority, of an order, relating to a military duty, given by an authorized superior officer (M.C.M., 1928, par. 134b).

The testimony of the accused's company commander is unmistakably to the effect that the accused was given a direct order by his military superior "to fall out for training", which is clearly a military duty. Such testimony likewise clearly shows that the order was disobeyed by the accused even after it and the seriousness of his failure to obey it had been explained to him under circumstances which permit no other conclusion except that of intentional defiance. The avowed disloyalty of the accused and his asserted personal reasons for his disobedience compel the conclusion that he acted deliberately and intentionally and, since he was so acting, his denial of having received the order is weakened beyond the point of credence which further justified the court in disbelieving his testimony upon such issue and in believing the prosecution's evidence as it was entitled. The evidence, therefore, establishes beyond a reasonable doubt the accused's guilt as alleged and amply supports the court's findings of guilty.

6. The accused is about 24 years of age. He was inducted on 9 October 1941. 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. 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.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Gordon, Judge Advocate.

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

SPJGN
CM 256631

11 JUL 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant ROBERT W. BURTON (O-736100), Air Corps.	)	Trial by G.C.M., convened at Gunter Field, Montgomery, Alabama, 20, 21 and 26 April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 96th Article of War.

Specification 1: In that Second Lieutenant Robert W. Burton, Air Corps, 84th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, did, on or about 16 March 1944, at or near Titus, Alabama, violate the provisions of Sub-paragraph a, Paragraph 93, Section XVI, Flying and Safety Regulations, Army Air Forces Pilot School (Basic), Gunter Field, Montgomery, Alabama, dated 10 November 1943, to which he was subject and which provides as follows: "Pilots will not fly at an altitude below one thousand (1000) feet above the ground except when landing or taking off, when necessary to complete a duly assigned mission, or in case of emergency.", in that he piloted and flew an airplane described as a BT-13 B at an altitude less than 1,000 feet above the surface of the earth at a time when he was not practicing take-offs or landings, nor in case of an emergency and it then and there not being necessary to do so to complete his mission.

Specification 2: (Finding of not guilty).

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

Specification: In that Second Lieutenant Robert W. Burton, Air Corps, 84th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama, did, at Gunter Field, Montgomery Alabama, on or about 16 March 1944, with intent to deceive Captain Howard N. Jackson, Engineering Officer, 84th Basic Flying Training Squadron, Gunter Field, Montgomery, Alabama and other officers of the Army of the United States, officially report on AAF Form 1-A that a government-owned airplane described as a BT-13B, Serial No. 42-89894, was in a satisfactory condition, which report was known by the said Second Lieutenant Robert W. Burton to be untrue in that the said airplane was not in a satisfactory condition at the time.

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

Specification: In that Second Lieutenant Robert W. Burton, 84th Basic Flying Training Squadron, Army Air Forces Pilot School (Basic), Gunter Field, Montgomery, Alabama, did, on or about 16 March 1944, at Gunter Field, Montgomery, Alabama, with intent to deceive, wilfully and wrongfully induce Staff Sergeant Richard P. Kreitter to conceal damage to a government airplane described as a BT-13-B, Serial No. 42-89894.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 2 of Charge I, but guilty of all Charges and all other Specifications. Evidence of one previous conviction for violation of low flying regulations under Article of War 96 was introduced. The accused 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 was an instructor at the Army Air Forces Pilot School (Basic), Gunter Field, Alabama. Subparagraph 93a, Section XVI, of the Flying and Safety Regulations of that organization stated that, "Pilots will not fly at an altitude below one thousand (1000) feet above the ground except when landing or taking off, when necessary to complete a duly assigned

mission, or in case of emergency". The accused was cognizant of this provision (R. 11, 20; Pros. Exs. A, E, H).

During the morning of 16 March 1944 he and Corporal Antoine A. Anton, a French student pilot, took off from Gunter Field in a BT-13B. For "forty-five or fifty minutes" the corporal received instruction in "instrument flight" and piloted the plane while "under the hood". At the end of that period they fould themselves "pretty far north" of Gunter Field at a height of approximately 4,000 feet. The corporal "came out from under the hood", and the accused "took over the airplane". About five miles north of Gunter Field they had encountered a dense overcast, which extended from 100 to 200 feet above the earth's surface to a maximum altitude variously estimated at 1,100, 1,200 and 1,500 feet (R. 20-21; Pros. Exs. E, F).

After riding above the clouds for several minutes, the accused began "letting down" through an opening in the clouds. When he had descended to a point below the overcast and just "a little above the tree tops" and had continued along that level for a short distance, "just long enough to see where" he was, he realized that he "was getting too close to the ground" and started to rise. In that instant "a slight sound" was heard. The plane had struck and severed an electric power line which spanned "a little slough" (R. 22-23, 26-28, 63-64; Pros. Exs. E, F).

Since neither the engine nor any other vital part was affected, the accused continued to ascend until he attained an altitude of approximately 1,000 feet. In four or five minutes he reached Dannelly Field and landed. A quick inspection revealed that the "engine cowling was dented". The accused remarked that, "It is nothing at all". He and the corporal reentered the plane and flew back to Gunter Field (R. 23-24, 28, 33; Pros. Ex. F).

They arrived there in about ten minutes. Private Richard P. Kreitter, who was then a staff sergeant and the flight chief of the 84th Squadron, examined the plane and found that the "outer ring cowling was dented on both right and left sides halfway between the prop and the bottom of the cowl and the air scoop for the oil cooler on the bottom auxiliary cowl was cut". Having only recently been convicted by court-martial of "low altitude flying", the accused was "nervous" and "exceedingly worried". After representing that it was "within [Kreitter's] power that he continue his career as a pilot or be dishonorably discharged from the service", he solicited the sergeant to make the necessary repairs "without saying anything about it". The sergeant replied that he "would fix it up and not report it". The accused expressed himself as being deeply appreciative (R. 24, 30-32; Pros. Exs. E, F, G).

Having received this reassurance, he prepared and submitted a Form 1A. This was a record of "all remarks of a defect or malfunctioning of the airplane as reported by the pilot [at the end of a flight] and it also is a record of any maintenance work done on the

airplane by the crew chief or any maintenance man. It keeps other information--gas consumption, any little minor defect . . .". The only entry made by the accused was "OK". This, according to Captain Howard N. Jackson, the engineering officer, indicated "that there were no defects or malfunction of the airplane during the flight". About 7:30 p.m. on 19 March 1944, he was informed of the actual facts by a technical sergeant named Cash. The following day Kreitter made a full disclosure because he "felt there wasn't any use in covering it up any more" (R. 16-19, 24-25, 28, 32-33; Pros. Exs. D, F).

5. The accused, after he had been apprised of his rights relative to testifying or remaining silent, took the stand in his own defense. He succinctly summarized his version of the events of 16 March 1944, as follows:

> "At the end of the 45 or 50 minutes I had [Corporal Anton] make an instrument letdown. It is the usual procedure at the end of the instrument lesson. He let down to approximately 3000 feet and on arriving at 3000 feet I found myself almost over solid overcast with no visible reference point. I considered myself more or less lost although I knew I was in the vicinity of the Field. At this time I saw a good-sized hole in the overcast showing trees and I decided to let down and orient myself to the ground rather than use the radio beam which is more or less a last resort we use if we consider outself lost in the flying area and visibility is so poor, then we use the radio beam. In this case I saw an opportunity to fix my position visibily which is the reason I decided to go through the hole and try to find myself by means of a checkpoint on the ground.
>
> * * * *
>
> "As I was letting down the top of the overcast was 1500 feet and I remember mentioning to my student at the time the various instrument procedures on the way down. I remember going through the clouds. There is a phenomena more or less when you are flying among clouds. There is a tendency to fly both contact and instruments and you shift your attention from visible reference to the ground to the instruments and that is dangerous. I remember mentioning that to my student and that is perhaps why my attention was not strictly on what I was doing. I suddenly noticed I was getting pretty close to the ground and decided to pull back up through the

> overcast. As I eased back on the throttle the engine coughed a little like it does when it loads up. It was at this time that I hit the wire" (R. 44-46).

The bottom of the overcast was between 100 to 300 feet above the earth's surface. This condition was testified to by the accused, and substantially confirmed by Second Lieutenant Richard W. Woody, the assistant weather officer at Gunter Field. The accused descended at a speed of 140 miles per hour, a rate at which "things happen pretty fast". He did not attempt to orient himself by radio because:

> "It is only in the very last resort that you use it. It takes fifteen, twenty, sometimes thirty minutes depending upon your distance from the station and as I say I saw this opportunity to establish myself visibly and having flown around this area for a year I figured if there is any visible checkpoint whatsoever I could find myself and if it wasn't for the wire I would have been okay".

Upon examination by the court he admitted that the proper methods of orientation which he had been taught were "visible recognition" at an altitude above 1,000 feet and, in the event that was not feasible, recourse to the radio (R. 37-44, 49-51, 53-54).

When he returned to Gunter Field, he was "completely frightened, worried". He realized that it was his duty to report the accident, but the knowledge that this was his second offense filled his mind with misgivings as to his ability to prove his innocence before an investigating officer. He "therefore decided that I should try to have the slight damage repaired and say nothing about it". The plane was in a safe operating condition, and he would never have marked Form 1A OK had he "for one moment thought otherwise" (R. 47-48).

He did not fly in formation that morning. "It was an instrument flight". Just before the accident occurred he knew he was "going north", and he had plenty of gasoline (R. 49, 52-53; Pros. Ex. F).

6. The prosecution presented several witnesses in rebuttal. Major Webster W. Plourd, the director of training at Gunter Field, stated that the "proper procedure is to locate himself by means of radio range orientation, rather I should say, the first procedure is to attempt to contact his home base. I am assuming now it is a Gunter Field plane. He would contact the tower and tell them he is above an over-

cast and is not sure of his position and give them his name, ship number and as soon as he has determined his position, report that position and wait instructions from the Maxwell Field radio". This method was taught to all aviation students. When employed by one "qualified on radio range instrument flying, it would yield the required information within two or three minutes" (R. 55-56, 61).

Mr. William G. Wingard, the manager of the Rural Electric Cooperative, learned about 11:00 a.m. on 16 March 1944 that the power line of his company had been severed about an hour and a half earlier that morning. He and one of his linemen arrived at the scene of the accident "near one o'clock in the afternoon". The sun was shining, and the clouds "were not low". Prior to being severed, the wire had been about 80 feet above the water (R. 63-65).

On the same morning Mr. Willie F. Brown was at his home in Titus, Alabama. Between "eight and nine o'clock" and "not later than nine-thirty" he saw three silver-colored planes flying at the level of the tree tops in "a V formation on the southwest". After remaining within his line of vision for a short period, they "went on to somewhere near the top of the River Hill and they made a dip and when they made the dip, they went out of my sight". Immediately thereafter a loud noise was heard. It "sounded like a big tree falling in the woods and breaking limbs in the fall". Later in the day Mr. Brown went down to the slough about a half a mile east of his house to get his fishing line and saw the wire being repaired. His boat was being used for that purpose. (R. 69, 73).

The accused's ship was a "green-nosed monoplane with silver center section and the vertical stabilizer and rudder were red". According to Sergeant Kreitter, there were twenty-three other planes in the squadron with like markings (R. 67-68).

7. The accused also took the stand in rebuttal. He categorically denied that there were any other planes nearby when the accident occurred. Indeed from the time of the take-off until his landing at Dannelly Field he did not see another "BT ship". The power line was not struck by him as he was going down but rather as he commenced the "pull-up". He "didn't fly level along the trees". He repeated his defense that he had merely attempted to orient himself. "I went down below the overcast which was lower than I thought it was. I realized it was an error in judgment. I am not trying to justify my error but my motive. I was trying to orient myself and only that. I just happened to hit the wire". When asked to account for the wire "not catching the prop", he replied:

"I don't know sir. It was just one of those things. If you remember the last one, I hit in Ozark, Alabama, and it did exactly the same thing. I must have a guardian angel or something because that is the way it happened" (R. 74-79).

8. Specification 1, Charge I, alleges that the accused violated Flying and Safety Regulations forbidding a pilot to fly at an altitude below 1,000 feet above the ground "except in landing or taking off, when necessary to complete a duly assigned mission, or in case of emergency".

The principal question presented by the record is whether the accused committed a willful violation of the flying regulations quoted. The evidence shows that the accused knew at the time he testified that he was lost, that he was proceeding in a northerly direction, that he was still in the immediate vicinity of his home base and that he could readily and easily ascertain his location by radio. His plane was in good operating condition and he had an ample supply of gasoline. No condition existed requiring immediate or drastic action of any kind. He could well have afforded to have delayed descending to a low altitude for the 15 to 30 minutes which he testified were essential for orientation by radio. In short, his descent at the time in question was demanded neither by necessity nor emergency. Having been convicted only a month before of violating flying regulations he could not have failed to realize that he was violating them again in descending to an altitude below 1000 feet. The evidence, beyond a reasonable doubt, sustains the findings of guilty of Specification 1, Charge I.

9. The Specification of Charge II alleges that the accused did, "on or about 16 March 1944, with intent to deceive Captain Howard N. Jackson, engineering officer . . . and other officers of the Army of the United States, officially report on AAF Form 1-A that a government-owned airplane described as a BT-13B, Serial No. 42-89894, was in a satisfactory condition, which report was known by the said /accused/ to be untrue in that the said airplane was not in a satisfactory condition at the time". The evidence, including admissions of the accused, clearly shows that the accused made the false official report as alleged. The fact that the airplane reported by the accused as being in a satisfactory condition was only slightly damaged cannot excuse the accused's calculated scheme to deceive his superior officer. The evidence sustains, beyond a reasonable doubt, the findings of guilty of the Specification of Charge II and Charge II.

10. The Specification of the Additional Charge alleges that the accused "did, on or about 16 March 1944, . . . with intent to deceive, wilfully and wrongfully induce Staff Sergeant Richard P. Kreitter to conceal

damage to a government airplane described as a BT-13B, Serial No. 42-89894". The evidence clearly shows that the accused after slightly damaging his plane by flying into a high-powered wire persuaded a staff sergeant who was the flight chief of the 84th Squadron to repair the plane without reporting the damage. The accused represented to the sergeant in question that it was within his, the sergeant's, power to continue the accused's career as a pilot by making the necessary repairs "without saying anything about it". The evidence shows that the accused induced Sergeant Kreitter to join in the deceitful scheme as alleged to conceal the damage to the plane and sustains beyond a reasonable doubt the findings of guilty of the Specification of the Additional Charge and the Additional Charge.

11. The accused is about 23 years of age. The records of the Office of The Adjutant General show that he had enlisted service in the Navy from 16 February 1938 to 24 October 1941 and in the Army from 16 April 1942 to 3 January 1943; that he was commissioned a second lieutenant on 4 January 1943; and that he has been on active duty as an officer since the last date.

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

Abner E. Lifsecomb, Judge Advocate.

(On Leave), Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 256631

1st Ind.

War Department, J.A.G.O., 4 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 Second Lieutenant Robert W. Burton (0-736100), Air Corps.

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive Action.
Incl 4 - Ltr. fr. Commanding General, Army Air Forces.

(Sentence confirmed. G.C.M.O. 466, 1 Sep 1944)

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

SPJGQ
CM 256673

9 JUN 1944

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Camp Blanding, Florida, 15 May 1944. Dismissal.
Captain MALCOLM S. MacDONALD (0-312810), Infantry.	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Captain Malcolm S. Macdonald, Infantry, then of Company "C", 202d Infantry Training Battalion, 63rd Infantry Training Regiment and now of Headquarters, 63rd Infantry Training Regiment, Camp Blanding, Florida, did, without proper leave, absent himself from his organization at Camp Blanding, Florida from about 7 December 1943 to about 9 December 1943.

Specification 2: In that Captain Malcolm S. Macdonald, Infantry, then of Company "C", 202d Infantry Training Battalion, 63rd Infantry Training Regiment and now of Headquarters, 63rd Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida at 1930 on or about 6 December 1943 fail to repair at the fixed time to the properly appointed place of duty for a meeting of Company Commanders of the 202d Infantry Training Battalion.

Specification 3: In that Captain Malcolm S. Macdonald, Infantry, then of Company "D", 205th Infantry Training Battalion, 63rd Infantry Training Regiment and now of Headquarters, 63rd Infantry Training Regiment, Camp Blanding, Florida, did, without proper leave, absent himself from his organization at Camp Blanding, Florida from about 10 March 1944 to about 12 March 1944.

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

Specification 1: In that Captain Malcolm S. Macdonald, Infantry, then of Company "D", 205th Infantry Training Battalion, 63rd Infantry Training Regiment and now of Headquarters, 63rd Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida on or about 10 March 1944, wrongfully and dishonorably convert to his own use a certain automobile, valued at more than fifty dollars ($50.00), the property of First Lieutenant Marvin L. Arent, Company "C", 205th Infantry Training Battalion, and intrusted to him by the said First Lieutenant Marvin L. Arent, for the purpose of driving to Starke, Florida and return in one (1) hour.

Specification 2: In that Captain Malcolm S. Macdonald, Infantry, Headquarters, 63rd Infantry Training Regiment, Camp Blanding, Florida, having on or about 1 June 1943 become indebted to the National Exchange Bank of Augusta, Georgia, in the sum of one hundred and fifty dollars ($150.00) for money loaned and having failed without due cause to liquidate said indebtedness and having on or about 3 January 1944 promised to liquidate said indebtedness in monthly installments, did, without due cause, at Camp Blanding, Florida, on or about 1 February 1944 dishonorably fail to keep said promise.

Specification 3: (Finding of not guilty.)

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 3, Charge II and guilty of all other Specifications and the Charges. 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 finding of guilty of Specification 3 of Charge I as involves a finding of guilty of absence without leave from 10 March 1944 to 11 March 1944 and only so much of the findings of guilty of Specification 2 of Charge II as involves a finding that the accused, at the time and place alleged, did wrongfully fail to keep the promise alleged in violation of Article of War 96, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The pertinent and competent evidence for the prosecution relating to those Specifications upon which the accused was found guilty may be summarized as follows:

The accused was, during the months of December 1943, January and February 1944, a captain assigned to and serving with the 202nd and 205th Infantry Training Battalions, stationed at Camp Blanding, Florida (R. 7, 12, 14, 16).

On 3 December 1943 he was the commanding officer of Company "C", 202nd Infantry Training Battalion, and as such, he attended a meeting of company commanders of the Battalion called on that day by Major Erickson. On that occasion Major Erickson announced that there would be another meeting of company commanders on 6 December 1943 for the purpose of discussing tactical problems for the balance of the training cycle. This meeting was held, as scheduled, on 6 December 1943 and although all other company commanders were present for a period of about two or two and one half hours the accused failed to attend the meeting at any time during that period (R. 9, 14, 15).

On 7 December 1943, Captain John J. Miller, Adjutant of the 202nd Infantry Training Battalion, received a telephone call from the accused in Jacksonville, Florida, advising that he (the accused) had been in Jacksonville on the preceding evening, had missed the early morning bus but that he would be in camp as soon as another bus arrived (R. 7, 8).

December 7th fell on a Tuesday, which was a day of duty in the Battalion, and the accused's duties required him to be present with Company "C" on that day. Captain Miller reported the matter to the Battalion Commander and then searched the entire Battalion area at 1300 o'clock. He checked Company "C" and the officers' hutments but could not find the accused anywhere in the area (R. 8). First Lieutenant William E. Whitaker, Jr., Executive Officer of Company "C", had been ordered to take command of Company "C" and did so at 0830 o'clock remaining in command during that and the next day. The accused was not present with the company at any time during these two days and Lieutenant Whitaker did not see him again until 1330 o'clock on 9 December 1943 (R. 13, 14).

First Sergeant Andrea A. Timberlake, Company "C", 202nd Infantry Training Battalion, was present with his company on 7 and 8 December 1943 when Lieutenant Whitaker was in command and he did not see the accused on duty with the company on either of these days; in fact, he did not see the accused again until 9 December 1943 when he saw him, early in the morning, at Battalion Headquarters (R. 12). Sergeant Timberlake made appropriate entry in the morning report of the organization regarding the accused's absence and a certified, extract copy of the morning report of the organization covering the period 8-9 December 1943 was introduced and received in evidence (R. 8, 12; Pros. Ex. 1). This document showed an initial absence of the accused at 0600 on 7 December 1943 and a return to duty at 0300 on 9 December 1943.

No objection was made to the introduction in evidence of the deposition by First Lieutenant Marion L. Arent, an officer of Company "C", 205th Infantry Training Battalion. Therein he stated that he was the owner, on 10 March 1944, of a 1938 Plymouth Sedan. On that day, at approximately 1200 o'clock the accused requested the loan of this car "for an hour" in order to go to Starke, Florida to purchase

necessary materials for the construction of training aids for the battalion. Lieutenant Arent agreed and gave the keys of his car to the accused expecting its return at 1300 o'clock. At this hour Lieutenant Arent started checking to find the accused and the car but he did not see either until 1615 o'clock, when he found the automobile parked near accused's quarters. The accused explained that the stores in Starke had been closed and he had come back to camp but wished to return and again requested the loan of the car. Lieutenant Arent advised the accused that he had needed his car during the afternoon; that he thought accused's actions were "a dirty trick" but consented to the further use of the automobile by the accused provided he would return by evening as he wanted the car that night. On this occasion Lieutenant Arent expected the accused back by 1800 o'clock and although he checked the battalion area repeatedly during that evening and the following day he did not see the accused or his automobile until 0730 o'clock on Sunday morning 12 March 1944, when the accused came to Lieutenant Arent's hut and returned the car keys to him. When asked where he had been the accused admitted he had been to Jacksonville, Florida and was unable to get the car started when he tried to come back. Lieutenant Arent had not had any trouble starting his automobile as a new battery had been recently installed in the car. In addition to the use of the car Lieutenant Arent had given the accused three gasoline coupons with which the accused obtained 9 gallons of gas, almost all of which was consumed upon the trip and one of the automobile tires had blown out while the car was in the possession of the accused (R. 28; Pros. Ex. 4).

During March 1944 the accused was commanding officer of Company "D", 205th Infantry Training Battalion. On 10 March 1944, First Lieutenant Donald A. Phillips, Adjutant of the Battalion, had occasion to look for the accused and in doing so went to the orderly room of Company "D", the Post Exchange, the officers' quarters and the officers' latrine at 1700 o'clock but was unable to find him. He left word with the first sergeant of Company "D" to have the accused report to Battalion Headquarters upon arrival and although Lieutenant Phillips remained at Battalion Headquarters until 1900 o'clock the accused did not put in an appearance. On the next morning (11 March), as was his custom, Lieutenant Phillips checked the morning reports of the various organizations of the Battalion and noted that the accused had not signed the morning report as commanding officer of Company "D". He sent the report back by messenger for the accused's signature but the messenger was informed that Captain Macdonald was not in the company area. Lieutenant Phillips again searched the officers' quarters and latrine without finding the accused and after waiting until 1100 o'clock he went to the battalion orderly room to see whether the accused had signed the register and discovered that he had not done so. The commanding officer of the battalion then instructed Lieutenant Phillips to sign Captain Macdonald's name to the morning report of Company "D" and send it forward. Although Lieutenant Phillips was

in the battalion area from 0730 until 1330 o'clock on 11 March 1944 he did not see the accused at any time in that period (R. 18, 19).

Major John J. Wrinn, Commanding Officer of the 205th Infantry Training Battalion in March 1944, also made a search for the accused on 11 March 1944 after he had been informed by the battalion adjutant that the accused had failed to sign his company's morning report. Before noon he checked the battalion area and looked for the accused in the officers' quarters, officers' latrine and in the company area without finding him. He did not see the accused until Sunday morning, 12 March 1944, at about 0930 o'clock at which time the accused reported to Major Wrinn in his quarters and stated that he did not know he "was being considered absent without leave" as he had trouble with his car and was "unable to get back". The accused had no authority from Major Wrinn to be absent on Saturday morning, 11 March 1944, but as to Saturday afternoon and Sunday, there being no training prescribed for that period, the accused could have been absent with leave under a VOCO by signing the VOCO register. This signing was obligatory in order to make the leave effective (R. 23-27).

Second Lieutenant James M. Kelly, 3rd Platoon Leader of Company "D" was present with the company during the duty hours on the morning of 11 March 1944 and did not see the accused at any time during that period (R. 16, 18).

The VOCO register of the battalion and an extract copy of the morning report of Company "D" for 11 and 12 March 1944 were introduced and received in evidence (R. 20, 25; Pros. Ex. 2 and 3).

Upon inspection of the VOCO register by Lieutenant Phillips on 13 March 1944 it appeared that the accused had "signed out" as of 1500 o'clock on 12 March 1944. When his attention was called to this entry the accused stated the date was in error and, in the presence of Lieutenant Phillips, he changed the dates appearing thereon (R. 20).

There was, likewise, no objection to the introduction in evidence of the deposition of Mr. E. P. Peabody, President of the National Exchange Bank of Augusta, Georgia. Therein it appears that the accused became indebted to the bank on note in the amount of $150.00, dated 17 June 1943 and payable 19 July 1943. A partial payment of $35.00 was made on 27 July 1943 and a renewal note of $117.07 was executed by accused on that date, but ante-dated 19 July 1943 and payable 18 August 1943. This indebtedness was not paid on the due date; indeed, the accused made only one payment thereon in 1943 and that was in the amount of $25.00 on 2 September 1943. The time for payment of the note dated 19 July 1943 was never extended by the bank.

On 10 December 1943, having already written to the accused on 9 October, 28 October and 4 December 1943 demanding payment, and having received no word from the accused, Mr. Peabody wrote to the commanding officer of the Third Student Training Regiment at Fort Benning, calling attention to the accused's delinquencies (R. 28, 29; Pros. Ex. 5). This letter eventually reached Colonel Albert J. Tucker, Executive of the Infantry Replacement Training Center at Camp Blanding, Florida, and he had an interview with the accused on 3 January 1944 wherein the accused executed a letter in which he promised "to pay to the National Exchange Bank of Augusta, Georgia the sum of twenty-five ($25.00) Dollars per month until my note with this bank is paid * * *. These payments will be made on or about the first of each month beginning 1 January 1944" (R. 32; Pros. Ex. 5). In accordance with this promise $25.00 was sent to the bank by the accused on 7 January 1944. No payment was made in February although demand was made therefor on 10 February 1944. On 8 March 1944 accused sent $50.00 on account and paid the balance due and discharged the debt on 14 April 1944 (Pros. Ex. 5).

4. The accused, having been advised of his rights, elected to remain silent.

5. It is shown, beyond any reasonable doubt, that the accused, while commanding officer of an Infantry company, failed to attend a meeting of company commanders called by the battalion commander for the important purpose of planning tactical problems for the balance of the battalion's training cycle. The accused was personally present at a prior meeting when the subsequent meeting was ordered and although all other company commanders attended the latter meeting for two and one-half to three hours the accused failed to appear at any time during the period. No explanation for the absence appears in the record of trial. Article of War 61 is designed to cover every case not elsewhere provided for where any person subject to military law is, through his own fault, not at the place where he is required to be at a time when he should be there (par. 132, MCM 1928). In the absence of any explanation the accused's absence constituted a violation of Article of War 61 as alleged in Specification 2 of Charge I.

It is equally evident that the accused, without leave, absented himself from his duties and station from 7 to 9 December 1943. These were days of duty for Company "C" of the 202nd Infantry Training Battalion and as the company commander, the accused was obliged to be present with his company unless excused by proper authority or his absence was due to no fault of his own. Again there is no explanation of the absence in the record. True, the accused called the battalion adjutant to advise him that he (the accused) was in Jacksonville, Florida and had missed the early morning bus but would be in camp as soon as another bus arrived. There is no reason assigned for the accused's presence in Jacksonville at the time and although the adjutant searched the battalion area later in the day the accused could

not be found and the lieutenant who assumed command of the company because of accused's absence and the first sergeant of the accused's company both testified that, though they were both on constant duty with the company on 7 and 8 December 1943, neither of them saw the accused until 9 December 1943. The record is abundantly sufficient to support the findings as to Specification 1 of Charge I.

The accused's conduct on Friday, 10 March 1944, when he was in command of Company "D" of the 205th Infantry Training Battalion, furnished the circumstances upon which Specification 3 of Charge I and Specification 1 of Charge II are based. On this occasion the accused, at about noon, obtained the use of an automobile belonging to Lieutenant Arent, a junior officer of the accused's company, ostensibly for the purpose of driving to a town near camp for materials essential in the construction of training aids. The car was to be returned within an hour. To further accommodate the accused, Lieutenant Arent gave him three gasoline coupons with which the accused obtained 9 gallons of gasoline. He did not return the automobile and gave a plausible explanation when Lieutenant Arent, after making repeated searches during the afternoon, finally found the accused in his quarters at about 4:15 p.m. The accused, stating that he had been unsuccessful in his mission, again requested the temporary use of the car for the same purpose and Lieutenant Arent reluctantly obliged him once more but demanded the return of the car by evening as he required the car for his own use that night. Lieutenant Arent did not see either the accused or his car again until the following Sunday, 12 March 1944, at which time the accused returned the car keys to him. Upon examination of the automobile it was discovered that one of the tires had been blown out and almost all of the gasoline provided by Lieutenant Arent had been consumed.

Meanwhile, the battalion adjutant had occasion to look for the accused on 10 March 1944 at about 5:00 p.m. but, though he checked the battalion area he was unable to find him, and although he left orders with the first sergeant to have the accused report to battalion headquarters as soon as he returned, he had not done so by 7:00 p.m. when the adjutant went home.

Nor was the accused present for duty with his company on the next morning (Saturday). Both the adjutant and the battalion commander searched for him before noon on that day but were unable to find him; nor did Lieutenant Kelly, a platoon leader of Company "D", see the accused present with the company at any time on Saturday morning.

Although the Specification alleges an absence without leave from 10 to 12 March 1944, the court properly found the accused guilty only of such absence from 10 to 11 March 1944. A finding of not guilty of Specification 3 of Charge II alleging the making of a false

official statement to the effect that the accused had signed out on the officers' register at 1500 on 11 March 1944 would have made any other finding inconsistent.

Clearly the deceitful manner in which the accused obtained the use of his junior officer's automobile, his wrongful abuse of the privileges extended to him, which misconduct has, under similar circumstances, been held analogous to embezzlement, the inconvenience he knowingly caused the rightful owner of the car, and, the lack of respect and consideration for the generosity and kindness of another under circumstances which indicate that the accused was presuming upon his subordinate because of his superior rank and authority, were such as to warrant prosecution and punishment therefor under Article of War 95, and the evidence is sufficient to sustain the findings thereunder as to Specification 1.

Without discussing the evidence adduced in support of Specification 2 of Charge II it is sufficient to say that the findings therein were also eminently proper. The course of dealing between the bank and the accused resulting in a mutually satisfactory discharge of the obligation in question was not such as to constitute a violation of Article of War 95 and the reviewing authority properly modified the findings accordingly.

6. Records of the War Department disclose that the accused was born in Holyoke, Massachusetts and is now 36 years and 8 months of age. He attended the public schools, graduating from high school. He was a C.M.T.C. student from 1925 to 1927. He enlisted in the 419th Infantry, Massachusetts National Guard, on 1 October 1926. He served as a second lieutenant in the 104th Infantry from 1934 to 1937 and as a first lieutenant in that organization from 1937 to 1941. On 12 March 1941 he was promoted to captain. He entered upon active duty 16 January 1941. He is married and has two children, a son 12 years of age and a daughter 6 years of age.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. A sentence of 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. Lounds, Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Diderich, Judge Advocate.

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 Malcolm S. Macdonald (0-312810), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation 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 of trial to the President, and a form of Executive action designed to carry into effect the above recommendation, 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 confirmed. G.C.M.O. 380, 18 Jul 1944)

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

SPJGK
CM 256706

(335)

20 JUL 1944

UNITED STATES v. Second Lieutenant THOMAS L. SIDDON (0-793683), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Shaw Field, South Carolina, 16 February 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

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

Specification 1: In that 2nd Lt. Thomas Lee Siddon did, at the 59th AAF Flying Training Detachment, Helena, Arkansas, on or about October 11, 1943, with intent to deceive, wrongfully and unlawfully make and utter to Staff Sergeant J. C. Lawson, a certain check, in words and figures as follows, to wit: "Winnsboro, La., Oct. 11, 1943, to Winnsboro State Bank and Trust Co., pay to the order of J. C. Lawson, $55.00, Fifty Five Dollars and no/100, (signed) Thomas L. Siddon", and by means thereof did fraudulently obtain from Staff Sergeant J. C. Lawson, fifty five dollars ($55.00), he, the said 2nd Lt. Thomas Lee Siddon, then well knowing that he did not have and not intending that he should have any account with the Winnsboro State Bank and Trust Co. for the payment of said check.

Specification 2: In that 2nd Lt. Thomas Lee Siddon did, at the 59th AAF Flying Training Detachment, Helena, Arkansas, on or about October 11, 1943, with intent to deceive, wrongfully and unlawfully utter to Helena Aero Tech, civil operator of the 59th AAF Flying Training Detachment, under contract to the U. S. Government, a certain check, in words

and figures as follows, to wit: "Winnsboro State Bank and Trust Co., Winnsboro, Louisiana, Oct. 11, 1943, pay to the order of Helena Aero Tech, $40.30, Forty dollars and 30/100, (signed) Thomas L. Siddon", and by means thereof did fraudulently obtain from Helena Aero Tech, forty dollars and thirty cents ($40.30), he, the said 2nd Lt. Thomas Lee Siddon, then well knowing that he did not have and not intending that he should have any account with the Winnsboro State Bank and Trust Co., for the payment of said check.

Specification 3: In that 2nd Lt. Thomas Lee Siddon did, at Maxwell Field, Montgomery, Alabama, on or about October 22, 1943, with intent to deceive, wrongfully and unlawfully make out and utter to the Maxwell Field Post Exchange a certain check, in words and figures as follows, to wit: "Franklin State Bank and Trust Co., Winnsboro, La., Oct. 22, 1943, pay to the order of the Maxwell Field Post Exchange, $25.00, Twenty Five and no/100 dollars, (signed) Thomas L. Siddon", and by means thereof did fraudulently obtain from the Maxwell Field Post Exchange, twenty five dollars ($25.00), he the said 2nd Lt. Thomas Lee Siddon, then well knowing that he did not have and not intending that he should have any account with the Franklin State Bank and Trust Co. for the payment of said check.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of guilty disapproved by reviewing authority).

Specification 6: (Finding of not guilty).

Specification 7: (Finding of guilty disapproved by reviewing authority).

Specification 8: In that 2nd Lt. Thomas Lee Siddon, with intent to deceive, did, at Bainbridge, Ga., on or about July 10, 1943, wrongfully and unlawfully convert to his own use Office of Price Administration Form R-544, an instrument to be used by military personnel in accordance with provisions of Army Air Force Regulation No. 70-4, dated July 1, 1943, which requires that: "Amount in gallonage of gasoline to be procured with each individual form in this instance will be determined by subtracting three (3) gallons from capacity of tank", inasmuch as he, the said 2nd Lt. Thomas Lee Siddon, used one (1) individual form to procure forty two (42) gallons of gasoline for motor vehicle, License No. La. 197-426, from the West Side Service Station, Bainbridge, Georgia, which amount of gasoline

is in excess of the capacity of the tank of said motor vehicle.

Specification 9: (Nolle prossed at direction of appointing authority).

Specification 10: In that 2nd Lt. Thomas Lee Siddon, with intent to deceive did, at Winnsboro, La., on or about October 19, 1943, wrongfully and unlawfully convert to his own use Office of Price Administration Form R-544, an instrument to be used by military personnel in accordance with provisions of Army Air Force Regulation No. 70-4, dated July 1, 1943, which requires that: "Amount in gallonage to be procured with each individual form in this instance will be determined by subtracting three (3) gallons from capacity of tank", inasmuch as he, the said 2nd Lt. Thomas L. Siddon, used one (1) individual form to procure sixty-six (66) gallons of gasoline for motor vehicle, 1940 Chrysler Conv't Coupe, License No. La. 376-616, from Hatfield Hardware and Lumber Company Service Station, Winnsboro, Louisiana, which amount of gasoline is in excess of the capacity of said vehicle.

Specification 11: In that 2nd Lt. Thomas Lee Siddon, did, at the 55th AAF Flying Training Detachment, Bennettsville, S.C., on or about November 29, 1943, with intent to deceive Major F. X. Bradley, Jr., his commanding officer, officially state to the said Major F. X. Bradley, Jr., that: "I have written to the Franklin State Bank and Trust Co., Winnsboro, Louisiana, to have my account transferred to the local bank. I have over $400.00 in my account there", or words to that effect, which statement was known by the said 2nd Lt. Thomas Lee Siddon to be untrue, in that the said Second Lieutenant Thomas Lee Siddon had not written to said bank to have his account transferred to a local bank, and did not have $400.00 in his account in the said Franklin State Bank and Trust Company.

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: (Finding of guilty disapproved by reviewing authority).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 4 and 6 of Charge I, and guilty of all other Specifications and of the Charges. No evidence of previous convictions

was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority disapproved the findings of guilty of Specifications 5 and 7 of Charge I, and of the Additional Charge and its Specifications, approved the sentence but remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

The offenses committed by accused fall into three categories, uttering bad checks, a false official statement to his superior officer, and misuse of Office of Price Administration gasoline ration forms. They will be discussed separately. The only evidence introduced by the defense was a brief unsworn statement by accused, after an explanation to him of his rights as a witness (R. 17). The portion thereof which is applicable will be referred to in discussing each separate specification.

a. Specification 1, Charge I (Unlawfully making and uttering a check for $55 without having or intending to have funds in the bank).

The deposition of Staff Sergeant John C. Lawson, 59th Army Air Forces Flying Training Detachment, Thompson-Robbins Field, Helena, Arkansas, showed that on or about 11 October 1943, accused gave Lawson his personal check for $55. It was dated that day, was payable to Lawson's order, and was drawn on the Winnsboro State Bank and Trust Company of Winnsboro, Louisiana. It was in payment of a loan. The check was presented by Lawson for payment through the Helena National Bank (Pros. Exs. G,G-1). The deposition of Mr. W. F. Prickett, president of the Winnsboro bank, showed that accused had never had an account in that bank, and while he had no record of the presentation and dishonor of this specific check, he stated that accused had drawn other checks upon the bank during 1943 and that no checks drawn by accused during that year had been paid because accused had no account (Pros. Ex. D). Sergeant Lawson wrote a letter to accused in November of 1943 stating that the check had been returned. The check was paid on 14 January 1944 (Pros. Ex. G).

In his unsworn statement accused said that he had paid this check "around the middle of January by a Cashier's Check from Sumter" (R. 17).

b. Specification 2, Charge I (Unlawfully making and uttering a check for $40.30 without having or intending to have funds in the bank).

The deposition of Mr. J. O. Kempthorn, general manager of "Helena Aero Tech", Helena, Arkansas, showed that on or about 11 October 1943 accused gave witness a check payable to "Helena Aero Tech", in the amount of $40.30. It was signed by accused, was drawn on the Winnsboro State Bank, and was in payment of accounts receivable. It was presented for payment through a bank in Helena (Pros. Exs. H, H-1). Mr. Prickett's

testimony showed that accused's check payable to Helena Aero Tech in the amount of $40.30, dated 11 October 1943, was presented to the Winnsboro State Bank, and was refused by it on 16 October because there were no funds (Pros. Ex. D). Mr. Kempthorn testified that the check was paid on 14 January 1944 (Pros. Ex. H).

In his unsworn statement accused said that the check here involved had been paid at the same time as the Lawson check (R. 17).

c. Specification 3, Charge I (Unlawfully making and uttering a check for $25 without having or intending to have funds in the bank).

The deposition of Captain Joseph B. Keith, Air Corps, the Post Exchange officer at Maxwell Field, Alabama, showed that on 22 October 1943 accused presented to the Post Exchange a check signed by him, dated that day, and payable to the Exchange. It was in the amount of $25 and was drawn on the Franklin State Bank of Winnsboro, Louisiana (Pros. Ex. J). The deposition of Mr. Bailey Martin, Cashier of the Franklin State Bank, showed that while accused had an account there "for a very short time" in 1938, he had had none since then, and that there were no funds in his name in 1943. The bank's records showed a number of checks drawn by accused during 1943, none of which was honored. Mr. Martin could not state to whom the checks were payable (Pros. Ex. C).

Captain Keith stated that accused's check was returned to the Post Exchange on 6 November bearing the notation, "no account", that accused was notified by letter on that date, and that on 16 November the Exchange received a United States Postal Money Order for $25 in payment of it. The check was subsequently returned to accused, and was not introduced in evidence (Pros. Ex. J).

In his unsworn statement accused said that this check had been "paid by money order around the 28th or 29th of November (R. 17).

d. Specification 11, Charge I (False official statement concerning payment of above and other checks).

Some time in November, 1943 (alleged in the specification to be 29 November), not otherwise fixed by the witnesses, accused was called before his commanding officer, Major Francis X. Bradley, Air Corps. Also present at the interview was Captain Edward G. Johnson, of their organization. Major Bradley had received certain unpaid checks issued by accused and asked accused how he intended to pay them. Accused stated that he had a bank account at the Winnsboro State Bank, that he had already asked that bank to transfer his account to a bank in Bennettsville, South Carolina (apparently the one upon which the unpaid checks were drawn), and that the

money should have been in Bennettsville by that time. He implied that the failure of the Winnsboro Bank to do so promptly was the reason why the checks had not been honored. In response to Major Bradley's question as to the amount of his balance in the Winnsboro Bank accused stated that it was approximately $400 (R. 8-10).

As was shown in connection with the checks alleged in Specifications 1 and 2, supra, accused had no account in the Winnsboro State Bank (Pros. Ex. D).

On cross-examination Major Bradley stated that accused had been in his command for three months as a "supervisor" and was a competent pilot. He was liked for his pleasant personality, but was not highly respected as an officer (R. 9,10).

Accused offered no explanation in his unsworn statement of his statements to Major Bradley (R. 17).

e. Specifications 8 and 10, Charge I (misuse of OPA gasoline ration forms).

Army Air Forces Regulation 70-4, effective 1 July 1943, provides in its applicable part as follows:

> "5. The following procedure is to be followed in issuing the Form R-544 for official travel:
>
> "a. In regard to Form R-544 which is provided for official travel, mileage will be computed by a standard highway mileage guide * * *. Number of copies of this form given an individual will be determined by mileage to be travelled under official order, taking into consideration the capacity of gas tank, and on a basis of 15 miles per gallon. Amount in gallonage of gasoline to be procured with each individual form in this instance will be determined by subtracting 3 gallons from capacity of tank * * *".

The deposition of Captain John L. Parker, Air Corps, 59th Army Air Forces Flying Training Detachment, Helena, Arkansas, shows that Captain Parker was adjutant of that organization during June of 1943. On 17 June 1943, accused received orders transferring him from Helena to the Bainbridge, Georgia, Army Air Field. He requested and received permission to travel by private automobile. Captain Parker issued to him Office of Price Administration Forms R-544 in sufficient number to provide him with gasoline for the trip (Pros. Ex. I).

The mileage between Helena and Bainbridge was figured from road maps, allowing 15 miles per gallon, the nature and proper use of the forms was explained to accused, and he was told that he had sufficient forms to make the trip and that he should not

use a form until his tank was practically empty (Pros. Ex. I).

In his deposition Mr. Harvey Smith of Bainbridge, Georgia, operator of the West Side Service Station in that city, testified that accused purchased gasoline from him on 10 July 1943. There may have been purchases by accused prior to that date, but witness was at least certain of the fact that the last of them took place on 10 July and that at that time accused signed and delivered to him as a receipt a Form R-544 calling for the purchase of 42 gallons of gasoline (Pros. Exs. E,E-1).

Accused admitted to First Lieutenant Jacob Steinfeld, Air Corps, 55th Army Air Forces Flying Training Detachment, Bennettsville, South Carolina, the officer who investigated the charges, that he had signed the form and that he had put all 42 gallons of gasoline in his car (R. 12-14).

The deposition of Louis A. Wooldridge, attendant of the Hatfield Service Station, Winnsboro, Louisiana, shows that the capacity of the gas tank on accused's car was 16 or 18 gallons. Witness had sold accused gasoline "at least ten times". Several different times on 19 October 1943, witness made sales of gasoline to accused. The sales totaled 66 gallons, in authorization of which accused presented an Office of Price Administration Form R-544 signed by him and calling for that amount of gasoline (Pros. Exs. F, F-1). It appears from an examination of Exhibits G-1 and F-1 that the license numbers of the cars used by accused on the two occasions in question were not the same, but it is impossible to tell whether the cars were different.

Accused admitted to Lieutenant Steinfeld that his signature appeared on Exhibit F-1 (R. 14).

Concerning Specifications 8 and 10, accused said in his unsworn statement: "About the only thing I can say is that I * * * did wrong, but I wasn't fully acquainted with the rules" (R. 17).

4. Comment.

a. Specifications 1, 2 and 3.

Accused never had an account in the bank upon which he drew the checks described in Specifications 1 and 2. For a short period of time five years previously he had an account in the bank on which he drew the check involved in Specification 3. Since he had no accounts in the drawee banks he could not possibly have expected the checks to be honored, and it is obvious that he issued them with an intent to deceive the payees. On two of them he delayed payment until the following January; while the third was taken up sooner, it is impossible to overlook the fact that he knew he had no account at the time he issued it. This is the real gravamen of all three offenses.

offenses.

It was shown, however, that the checks alleged in Specifications 1 and 2 were given in payment, respectively, "of a loan", and of "accounts receivable". There is no evidence in the record concerning what accused received for the check to the Post Exchange, alleged in Specification 3. In these respects the proof fails to meet the allegations of the respective Specifications, to the effect that accused fraudulently obtained from the payees of the instruments the amounts thereof. It has been held, however, that a worthless check given by an officer in payment of a pre-existing debt, a gambling debt, or even as a charitable contribution or a gift, is properly the subject of a charge under Article of War 95 (CM 202601, Sperti, 6 B.R. pp. 171,219). As previously stated, the scandal and disgrace to which the military establishment is exposed by an act of dishonoring the written instrument issued by one of its commissioned members, is, in final, the thing sought by the Article to be prevented. The Board of Review is, therefore, of the opinion that an offense under the Article was committed in each case, and that the record of trial is sufficient to support the court's findings of guilty of each of these Specifications with the exception of the following words in each:

Specification 1: "* * * and by means thereof did fraudulently obtain from Staff Sergeant J. C. Lawson, Fifty Five Dollars ($55.00), * * *".

Specification 2: "* * * and by means thereof did fraudulently obtain from Helena Aero Tech, forty dollars and thirty cents ($40.30), * * *".

Specification 3: "* * * and by means thereof did fraudulently obtain from the Maxwell Field Post Exchange twenty five dollars ($25.00), * * *".

b. Specification 11.

It is obvious from his past financial history that accused could not have requested a transfer of a $400 balance from the Winnsboro State Bank, because he never did have an account there. It was a completely false statement, made in the course of an investigation into his financial manipulations, and was obviously intended to deceive. That it constituted a violation of Article of War 95 needs no citation of authority.

It was alleged in the Specification that accused stated to Major Bradley that his funds were in the Franklin State Bank and Trust Company. The proof showed that he claimed to the Major that the money was in the Winnsboro State Bank. But other evidence shows that both banks were in the same city, and that during 1943 accused had drawn worthless checks on both when he had no funds in either. The other circumstances surrounding the false statement were specifically alleged and clearly shown. The gist

of the offense was the falsity of the statement as to his financial resources and of his intentions of making good some checks, and not the particular bank in Winnsboro which was involved. Accused did not claim to be and obviously was not misled by the variance. We hold it to be immaterial.

c. Specifications 8 and 10.

These Specifications alleged that accused failed to comply with specific terms of Army Air Force Regulations 70-4 upon the two separate occasions when he used Office of Price Administration forms to obtain rationed gasoline. The provisions of the Regulations, which were not introduced in evidence upon trial, have already been set forth, above.

This particular regulation became effective on 1 July 1943. Therefore, although it was in operation at the times accused used the forms to procure the gasoline, it would not have been at the time when he received his travel orders, obtained the forms and was instructed in their use. The Board of Review has examined the regulation in the form in which it existed at the time accused received the instructions. This form of the regulation was quite different; in particular, it contained no such specific and technical methods for computing gallonage as existed after 1 July, 1943.

It is impossible to ascertain from the meager evidence in the record whether accused had actual knowledge of the provisions of the newer regulation. The Board of Review is strongly inclined to believe that he did, both from the lapse of time between their promulgation and the commission of his two offenses, and from the circumstances under which he obtained unconscionably large amounts of gasoline. The inference is that he used the forms to obtain gasoline for his private use, and in that sense at least he converted the forms. Webster's New International Dictionary, Second Edition, unabridged, defines the noun, "conversion", as "an act of being converted * * * from one use or purpose to another by diversion". It is clear, from the instructions given to accused, that he is at least guilty of this. In view, however, of the fact that positive knowledge is not shown, the wilfulness and deliberation element is lacking, and the Board feels that the offenses can be said only to be in violation of Article of War 96. Accused himself said that he had done wrong, but that he was not "fully acquainted" with the regulations. The evidence, therefore, supports only a finding of guilty in violation of Article of War 96.

5. Prior to arraignment the defense interposed a special plea of insanity. The court thereupon adjourned, and a board of medical officers was subsequently appointed to determine accused's sanity (R. 3). The board found that accused "was sane and responsible for his actions,

beginning November, 1942 and subsequently", and also at the time of trial (Pros. Ex. A). When the court reconvened the board's report was submitted, whereupon the court overruled the plea (R. 4). The Board of Review is satisfied from the report that the court's action was correct.

6. War Department records show that accused is 23 years of age. He is a high school graduate, and worked as a farmer and truck driver before entering the Army. The Staff Judge Advocate states that accused has also played semi-professional baseball. He was appointed an aviation cadet on 18 January 1942, and was commissioned a second lieutenant, Air Corps Reserve, on 10 November 1942. The files show three arrests for forgery and two for obtaining money under false pretenses between 1937 and 1940, but do not disclose the disposition of these charges. This record was known at the time accused was commissioned. The files also disclose two other instances in which accused gave worthless checks, but for which he was not tried in the trial which is the subject of this opinion.

7. The court was legally constituted and had jurisdiction of the person and the offense. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specification 11, legally sufficient to support the findings of guilty of Specification 1, except the words, "and by means thereof did fraudulently obtain from Staff Sergeant J. C. Lawson, Fifty Five Dollars ($55.00)", legally sufficient to support the findings of guilty of Specification 2, except the words, "and by means thereof did fraudulently obtain from Helena Aero Tech, forty dollars and thirty cents ($40.30)", legally sufficient to support the findings of guilty of Specification 3, except the words, "and by means thereof did fraudulently obtain from the Maxwell Field Post Exchange twenty five dollars ($25.00)", legally sufficient to support only so much of the findings of guilty of Specifications 8 and 10 as involves findings of guilty in violation of Article of War 96, legally sufficient to support the finding of guilty of the Charge and the sentence as approved by the reviewing authority, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

Judge Advocate.

Judge Advocate.

Judge Advocate.

War Department, J.A.G.O., 7 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 Second Lieutenant Thomas L. Siddon (0-793683), 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 of Specification 1, except the words, "and by means thereof did fraudulently obtain from Staff Sergeant J. C. Lawson, Fifty Five Dollars ($55.00)", legally sufficient to support the findings of guilty of Specification 2, except the words, "and by means thereof did fraudulently obtain from Helena Aero Tech, forty dollars and thirty cents ($40.30)", legally sufficient to support the findings of guilty of Specification 3, except the words, "and by means thereof did fraudulently obtain from the Maxwell Field Post Exchange twenty five dollars ($25.00)", legally sufficient to support only so much of the findings of guilty of Specifications 8 and 10 as involves findings of guilty of these specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of Specification 11, legally sufficient to support the findings of guilty of the Charge and the sentence as approved by the reviewing authority, and to warrant confirmation thereof.

Since the receipt of this record of trial, this office has been informed by telegram from the Commanding General, Army Air Forces Eastern Flying Training Command, Maxwell Field, Alabama, that charges against accused have been filed containing two specifications of absence without leave, one specification of embezzlement, two specifications of breach of arrest, five specifications of drawing checks upon a bank in which he had no account, two specifications of wrongfully wearing the insignia of a captain, and one specification of fraudulently obtaining an automobile under false pretenses. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to a letter from the Honorable Allen J. Ellender, United States Senate, addressed to The Judge Advocate General, 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 designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Sen. Ellender.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed. G.C.M.O. 459, 26 Aug 1944)

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

SPJGN
CM 256709

12 JUN 1944

UNITED STATES	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Luke Field, Arizona, 8 and 12 May 1944. Dismissal.
Second Lieutenant WILLIAM R. GRIFFITTS (0-760174), Air Corps.	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that 2nd Lt. William R. Griffitts, 944th Single Engine Gunnery Training Squadron, Ajo Army Air Field, Ajo, Arizona, did, on or about 20 March 1944, at Ajo Army Air Field, Ajo, Arizona, wrongfully fail to obey Par. 16, AAF Regulations 60-16, by piloting an AT-6 airplane over said Ajo Army Air Field at an altitude of about 100 feet.

He pleaded guilty to and was found guilty of the Charge and its Specification. Evidence of one prior conviction for a violation of Article of War 96 involving a similar offense on 3 January 1944 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, supplementing the accused's pleas of guilty, shows that at about 0950 o'clock on 20 March 1944 the accused, wearing a bright yellow jockey cap, took off from the Ajo Army Air Field, Ajo, Arizona, in an AT-6 military plane for Williams, Arizona. He was accompanied by another officer and two officers were in two other planes on the ground at the field waiting to take off. According to the latter three officers the accused, after gaining an altitude of in excess of 500 feet, came back over the field at an altitude of about 100 feet and at a distance of about 300 feet from the lead plane of the two on the ground before pulling into a climbing turn and proceeding on his way to Williams, Arizona. The accused was identified by the two officer pilots of the two planes on the ground and, of course, by his officer passenger who also testified that the accused's plane had not developed engine trouble (R. 9-17, 17-19, 20-23; Ex. 1).

According to the stipulated testimony of Sergeant Ferris A. Aide, who was on duty in the control tower at the time and observed the entire episode, he called the accused by microphone and ordered him to cease acrobatics over the field which order was acknowledged by the accused. A diagram of the field showing the course taken by the accused's plane was admitted into evidence and the court took judicial notice of paragraph No. 16 of Army Air Forces Regulation No. 60-16 (R. 7-8; Exs. 2,3).

4. The accused, after explanation of his rights as a witness, elected to remain silent but by stipulated testimony it was shown that one of his superior officers rated the accused as an excellent pilot, a very satisfactory gunnery instructor and an officer who would perform well in combat. Likewise it was shown that a medical officer, who had examined the accused, was of the opinion that the accused would make a good combat pilot as he had "learned his lesson" (R. 24-27).

5. The Specification alleges that the accused on or about 20 March 1944 at Ajo Army Air Field, Ajo, Arizona, wrongfully failed to obey "Par. 16, AAF Regulations 60-16, by piloting an AT-6 airplane over said Ajo Army Air Field at an altitude of about 100 feet". "Disobedience of standing orders" is conduct prejudicial to good order and military discipline and therefore violative of Article of War 96 (M.C.M., 1928, par. 152a). The specified paragraph of the designated regulation prohibits the operation of military aircraft within 500 feet above the ground except during taking off and landing. The court was appropriately

entitled to take judicial notice of the existence and applicability of the regulation.

The regulation involved is one of general application governing the operation of military aircraft within the continental limits of the United States and the accused, a military pilot, must be presumed to have had both actual and constructive knowledge thereof. The evidence for the prosecution, through the testimony of four eye witnesses, conclusively establishes that the accused violated the regulation as alleged. His pleas of guilty likewise admit his commission of the offense. Although neither damage to property nor injury to person resulted, such attendant good fortune does not obliterate the offense. The evidence for the defense sounds only in mitigation since it is but a plea for clemency. All the evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply supports the findings of guilty of the Charge and its Specification.

6. The trial was a rehearing which had been appropriately ordered upon the disapproval by the reviewing authority of the findings and sentence determined at the original trial. The court therefore was properly advised of the original sentence in order that the original sentence be not exceeded. An appropriate instruction was given to the court in this connection and the sentence assessed was the act of the court.

7. The accused is about 20 years old. The War Department records show that he has had prior enlisted service from about 5 November 1942 until 6 November 1943 when he was commissioned a temporary 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 the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(350)

SPJGN
CM 256709

1st Ind.

War Department, J.A.G.O. 20 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 R. Griffitts (0-760174), Air Corps.

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Memo from Deputy Commander, Army Air Forces.

(Sentence confirmed. G.C.M.O. 377, 18 Jul 1944)

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

SPJGQ
CM 256738

-9 JUN 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Lake Charles Army Air Field, Lake Charles, Louisiana, 10 May 1944. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant J. C. MARTIN (O-759960), Air Corps.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 61st Article of War.

Specification: In that 2nd Lieutenant J.C. (IO) Martin, Headquarters and Bombardment Crew Section, 336th Bombardment Group (M), did, without proper leave, absent himself from his organization at Lake Charles Army Air Field, Lake Charles, Louisiana from about 24 January 1944 to about 25 March 1944.

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

Specification 1: In that 2nd Lieutenant J.C. (IO) Martin, Headquarters and Bombardment Crew Section, 336th Bombardment Group (M), Lake Charles Army Air Field, Louisiana, did, at Lake Charles, Louisiana, on or about 12 February 1944, with intent to deceive, wrongfully and unlawfully make and utter, to the Calcasieu Marine National Bank of Lake Charles, Lake Charles, Louisiana, a certain check in words and figures as follows, to wit:

"Lake Charles, Louisiana, February 12, 1944,
The Calcasieu Marine National Bank of Lake

Charles, Lake Charles office, pay to the order of cash $15.00, fifteen and no/100 dollars, J.C. Martin, 2nd Lt. A.C."

and by means thereof, did fraudulently obtain from the said Calcasieu Marine National Bank, Lake Charles, Louisiana, the sum of $15.00, the said Lt. Martin then well knowing that he did not have, and not intending that he should have sufficient funds in said bank for payment of said check.

Specification 2: (Same form as Specification 1, but alleging check drawn on same bank, dated 14 February 1944, made and uttered to LeBlanc Cafe, Lake Charles, Louisiana, and fraudulently obtaining thereby the sum of $15).

Specification 3: (Same form as Specification 1, but alleging check drawn on same bank, dated 16 February 1944, made and uttered to The Palms, Lake Charles, Louisiana, and fraudulently obtaining thereby the sum of $15).

Specification 4: (Same form as Specification 1, but alleging check drawn on same bank, dated 18 February 1944, made and uttered to the Rendezvous Club, Lake Charles, Louisiana, and fraudulently obtaining thereby the sum of $10).

Specification 5: (Same form as Specification 1, but alleging check drawn on same bank, dated 18 February 1944, made and uttered to the Blackstone Cafe, Lake Charles, Louisiana, and fraudulently obtaining thereby the sum of $20).

Specification 6: (Same form as Specification 1, but alleging check drawn on same bank, dated 19 February 1944, made and uttered to the Grand Leader, Beaumont, Texas, and fraudulently obtaining thereby the sum of $20).

Specification 7: (Same form as Specification 1, but alleging check drawn on same bank, dated 23 February 1944, made and uttered to the First National Bank, Beaumont, Texas, and fraudulently obtaining thereby the sum of $30).

Specification 8: (Same form as Specification 1, but alleging check drawn on same bank, dated 26 February 1944, made and uttered to George Wilson, Inc., Beaumont, Texas, and fraudulently obtaining thereby the sum of $20).

Specification 9: (Same form as Specification 1, but alleging check drawn on same bank, dated 26 February 1944, made and uttered to Price Cafe, Beaumont, Texas, and fraudulently obtaining thereby the sum of $20).

Specification 10: (Same form as Specification 1, but alleging check drawn on same bank, dated 27 February 1944, made and uttered to Price Cafe, Beaumont, Texas, and fraudulently obtaining thereby the sum of $25).

Specification 11: (Same form as Specification 1, but alleging check drawn on same bank, dated 28 February 1944, made and uttered to Price Cafe, Beaumont, Texas, and fraudulently obtaining thereby the sum of $20).

Specification 12: (Same form as Specification 1, but alleging check drawn on same bank, dated 29 February 1944, made and uttered to George Wilson, Inc., Beaumont, Texas, and fraudulently obtaining thereby the sum of $30).

Specification 13: In that 2nd Lieutenant J.C. (IO) Martin, Headquarters and Bombardment Crew Section, 336th Bombardment Group (M), Lake Charles Army Air Field, Louisiana, did, at Beaumont, Texas, on or about 1 March 1944, with intent to deceive, wrongfully and unlawfully make and utter to Hoffer's Sportswear, Beaumont, Texas, a certain draft in words and figures as follows, to wit:

> "Beaumont, Texas, March 1, 1944, pay to Hoffer's Sportswear or order, twenty and no/100 dollars, $20.00, I hereby represent that the amount drawn for in this draft is on deposit to my credit, free of any claims, and acknowledge that this amount will be paid upon my representation of said facts, Bank The Calcasieu Marine National Bank, Signed J.C. Martin, 2nd Lt. A.C., Address A.A.B. Lake Charles, La., Phone 8311."

and by means thereof, did fraudulently obtain from said Hoffer's Sportswear, Beaumont, Texas, the sum of $20.00, the said Lt. Martin then well knowing that he did not have and not intending that he should have sufficient funds in said bank for payment of said draft.

Specification 14: In that 2nd Lieutenant J.C. (IO) Martin, Headquarters and Bombardment Crew Section, 336th Bombardment Group (M), Lake Charles Army Air Field, Louisiana, did, at Houston, Texas, on or about 3 March 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Second National Bank of Houston, Houston, Texas, a certain customers' draft in words and figures as follows, to wit:

"The Second National Bank of Houston, Houston, Texas, March 3, 1944, pay to the order of cash $25.00, twenty-five and no/100 dollars, with exchange value received and charge the same to account of The Calcasieu Marine National Bank, Lake Charles, La., J.C. Martin, 2nd Lt. A.C. O-759960"

and by the means thereof, did fraudulently obtain from said Second National Bank of Houston, Houston, Texas, the sum of $25.00, the said Lt. Martin then well knowing that he did not have and not intending that he should have sufficient funds in said bank for payment of said customers' draft.

Specification 15: (Same form as Specification 14, but alleging draft, dated 4 March 1944, made and uttered to The Fort Worth National Bank, Fort Worth, Texas, and fraudulently obtaining thereby the sum of $25).

Specification 16: (Same form as Specification 14, but alleging draft, dated 16 March 1944, made and uttered to the Fidelity National Bank of Oklahoma City, Oklahoma City, Oklahoma, and fraudulently obtaining thereby the sum of $25).

The accused pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications, and he 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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

From sometime prior to 24 January 1944, until the date of the trial, the accused was a member of the Headquarters and Bomb Crew Section (also known as Section "S") of the 336th Bombardment Group (M), Lake Charles Army Air Field, Louisiana. He was reported absent without leave on the morning report of his organization for 24 January 1944. On that day and on several succeeding days a search was made for the accused in the organization area but no trace of him could be found. He had no authority to be absent (R. 6-9; Pros. Ex. 1). He was not seen again with his organization until after his apprehension by the military police in Oklahoma City, Oklahoma, on 25 March 1944 (R. 8; Pros. Ex. 20).

All of the checks and drafts described in Specifications 1 to 16, both inclusive, of Charge II, were drawn against Calcasieu Marine National Bank, Lake Charles, Louisiana. Cecil K. Colon, Executive Vice-President of the bank, testified that the accused opened a checking account in the bank on 6 February 1944, at which time he made a deposit of $25 in cash. On the same day (6 February) there was charged to the

account a check for $10 given by the accused to Gordon's Drug Company. On 8 February 1944 there was charged to the account a check for $10 given by the accused to Mary A. O'Neil. On 14 February 1944 the accused drew and personally cashed at the bank a check payable to "cash" in the amount of $15. The effect of cashing the last mentioned check was to overdraw the account to the extent of $10 (R. 9, 10). No further deposits having been made, the $10 overdraft was charged to "losses" and the bank closed the account on 10 March 1944 (R. 10). A transcript of the accused's account with the bank, reflecting the transactions above described, was introduced in evidence as Prosecution's Exhibit 2 (R. 10), and a signature card bearing what the defense admitted to be the genuine signature of the accused was introduced in evidence as Prosecution's Exhibit 3 (R.10).

The check last above mentioned, being the same check described in Specification 1 of Charge II, was introduced in evidence as Prosecution's Exhibit 4. With respect to the check described in Specification 2 of Charge II, it was stipulated on the record that if the proprietor of LeBlanc Cafe were present he would testify that on 14 February 1944 he received said check from the accused and gave the accused the sum of $15 in exchange for it. The check itself was thereupon introduced in evidence as Prosecution's Exhibit 5 (R. 11, 12).

It was stipulated on the record, as to each of the checks and drafts described in Specifications 3 to 16, both inclusive, of Charge II, that such check or draft was executed by the accused and that he received therefor the amount appearing on the face thereof. Such checks and drafts were introduced in evidence as Prosecution's Exhibits 6 to 19, respectively (R. 12, 13).

The prosecution also introduced in evidence, without objection, two written statements signed by the accused, under oath, during the course of the pre-trial investigation (R. 14; Pros. Exs. 20 and 21). In such statements the accused admitted substantially all of the material allegations of the Charges and Specifications.

4. The competent evidence of record for the defense may be summarized as follows:

The defense offered to introduce in evidence receipts showing "that full restitution has been made". These were offered "in extenuation" and not to prove innocence. The law member ruled that "the instruments may be admitted in extenuation". Thereupon, to save time, the prosecution agreed to a stipulation on the record that "all the checks in question, referred to in Specifications 1 through 16, were paid in full between the dates 26 April and 9 May 1944" (R. 14, 15).

The rights of the accused as a witness having been explained to him, he elected to make an unsworn statement, which was as follows:

> "What I have to say -- I mean, I know I have done wrong, and I don't look to get out of it without any punishment whatsoever, but I have had extensive training, and I know that I could be of some use to the United States Army. All I ask is that I be given a chance to remain in the service of the United States. I can't be of use to the service unless I am" (R. 15).

5. Accused's guilt of the offense alleged in the Specification of Charge I is overwhelmingly established by the competent and legal evidence of record, thus supporting his plea of guilty thereto. In his sworn statement dated 10 April 1944 (Pros. Ex. 20), the accused readily admits a long absence from his organization, without any claim of authority therefor, on a trip which took him from his station at Lake Charles, Louisiana, to Oklahoma City, Oklahoma, where he was apprehended by the military police. In this statement he quibbled only as to the date of his departure from his organization, his contention being that he did not leave until 20 February 1944, whereas the Specification alleges that his absence without leave commenced 24 January 1944. It is undisputed that his apprehension in Oklahoma City occurred on 25 March 1944, and the date of his departure alleged in the Specification is sufficiently supported by the testimony of his commanding officer and the first sergeant of his organization.

6. The testimony of the Executive Vice-President of Calcasieu Marine National Bank showing that accused's account with the bank did not contain sufficient funds to pay any of the checks or drafts described in Specifications 1 to 16, Charge II, is corroborated by the stipulation, entered into at the request of the defense, that all of the defaulted instruments were paid in full between 26 April 1944 and 9 May 1944. The accused's own unsworn statement, made at the trial, is substantially tantamount to a plea of confession and avoidance.

The evidence, taken as a whole, leads to but one conclusion, namely, that the accused, being at the time absent without leave, deliberately set out upon a course of fraud and deception, intending to swindle all of those who accepted his checks and drafts. The instruments in question were all dated and issued between 12 February 1944 and 16 March 1944.

The offenses alleged under Charge II are laid under the 95th Article of War. That the issuing of worthless checks and other instruments for the payment of money, with intent to defraud, is conduct unbecoming

an officer and a gentleman, in violation of the 95th Article of War, has been held too many times to warrant any extended discussion of the subject (Dig. Op. JAG, 1912-1940, sec. 453 (24) (25); Bull. JAG, Feb. 1944, sec. 453 (23)). The Board of Review is of the opinion, therefore, that the competent and legal evidence of record is sufficient, beyond any reasonable doubt, to establish the guilt of the accused of the offenses alleged under Charge II.

7. The records of the War Department show that the accused is 21 years and 8 months old. He enlisted in the Army 16 February 1941, and served as an enlisted man approximately 2 years before becoming an aviation cadet. He was graduated from the Army Air Forces Bombardier School, Victorville, California, 13 November 1943, at which time he was commissioned a second lieutenant. He is married and has a son approximately 2 years old. For short periods of time he has held positions in private life as a cook in a restaurant and as a fountain clerk in a drug store.

8. The court was legally constituted and had jurisdiction of 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 legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon a conviction of a violation of Article of War 61, and dismissal is mandatory upon a conviction of a violation of Article of War 95.

William A. Pounds, Judge Advocate

William H. Gaines, Judge Advocate

Herbert B. Fredman, Judge Advocate

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 Second Lieutenant J. C. Martin (0-759960), 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. I further 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 of trial to the President for his action, and a form of Executive action designed to carry into effect the above 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. 398, 18 Jul 1944)

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

SPJGK
CM 256780

(359)

23 JUN 1944

UNITED STATES	TANK DESTROYER CENTER
v.	Trial by G.C.M., convened at Camp Hood, Texas, 16 May 1944. Dismissal.
Second Lieutenant MILTON H. SNYDER (0-1824524), Army of the United States.	

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

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1. The record of trial in the case of the officer named 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 1: In that Second Lieutenant Milton H. Snyder, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center; attached Company "B", One Hundred Fortieth Tank Destroyer Training Battalion, North Camp Hood, Texas, did, without proper leave, absent himself from his organization at North Camp Hood, Texas, from about 14 February 1944 to about 16 February 1944.

Specification 2: In that Second Lieutenant Milton H. Snyder, * * *, did, without proper leave, absent himself from his organization at North Camp Hood, Texas, from about 21 February 1944 to about 8 March 1944.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications, and was found guilty of Charge I and its Specifications, and not guilty of Charge II and its Specifications. 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 the evidence.

The prosecution showed that while en route from the 661st Tank Destroyer Battalion, Camp Hood, Texas, to join the Tank Destroyer Officers' Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, accused absented himself without leave from 0001 on 13 February until 2055 on 17 February 1944 (R. 5-6; Pros. Exs. A,B, and C). The prosecution further showed that accused was thereafter absent from his organization at his new station from 0800 on 21 February until 0100 on 8 March 1944 (R. 6: Pros. Ex. D).

Evidence for defense.

Stipulated testimony of Dr. David B. Davis of Dallas, Texas, was to the effect that on 21 February accused was treated by him at witness' office in Dallas for sinus trouble. Accused was at that time in considerable pain and it appeared that he had been for two or three days prior thereto. After treatment, which consisted of minor surgery, witness advised accused that his condition did not prevent his returning to camp, but suggested that accused return the next day for treatment. Accused apparently returned to witness' office several days later, but received no further medical treatment (R. 25).

Accused's rights were explained to him by the law member, and he elected to testify under oath concerning Specification 2 of Charge I (R. 26). He went to Dallas on the verbal authorization of his commanding officer on 19 February. (He admitted that he registered at a hotel with some woman, not his wife, as "Lieutenant and Mrs. Milton H. Snyder") (R. 39,40,51). On the night of 20 February he became ill with what he recognized from previous experience as sinus trouble (R. 27). His "VOCO" expired on 21 February (R. 27). On that day he went to Doctor Davis for treatment for the sinus trouble. Doctor Davis performed an operation on his nose, and, in response to accused's inquiry whether he would return to camp, said that he could if he thought he could stand the train or bus ride. If not, accused was to return to him the next day for further treatment (R. 41).

While in Dallas accused had become acquainted with a young lady by the name of Nola Allen. She said that she was going to show him a way "to make a lot of money", and by her other conversation led accused to believe that "I was being asked to engage in either some form of subversive activity or in something that I knew would be illegal" (R. 27). Accused was to meet "a man from Mexico City" at a dinner party who was

to show him how to make this money. Before he went to the dinner he went to "one Mr. Jenkins" of the Federal Bureau of Investigation at Dallas, to whom he told the foregoing facts. Mr. Jenkins agreed that subversive activities might be involved, and instructed him to attend the dinner party and to learn what proposition would be made to him. Actually all that happened was that he was told by the man from Mexico City that any time he wanted to go down to Mexico City "to look around", the man would wire him the money to come (R. 28).

Accused saw Jenkins again the next day. Jenkins was convinced that some sort of subversive activity was involved, promised to assign his agents to the investigation, and instructed accused to keep in touch with the various people he had met. Several days later accused again saw Jenkins, who told him that his services were no longer needed, whereupon accused returned to camp (R. 28).

Accused also claimed that on 21 February he had sent a telegram to his organization, saying that he was unable to leave Dallas due to illness, and giving Doctor Davis' name and address. He did not give his own address, however, or telephone to camp to determine whether he had permission to remain away. He admitted that he received no reply to his telegram, that he did not tell the Military Police about his suspicions concerning Miss Allen, and that he was not ill with sinus trouble as of 23 February (R. 29, 37-39, 42).

4. Accused offered no explanation for his first unauthorized absence. The court obviously did not believe his reasons for the second. Neither does the Board of Review. The elements of both offenses are found in the prosecution's evidence.

5. War Department records show that accused is 24 years of age. He graduated from high school in Akron, Ohio, and attended Kent State (Ohio) University and Akron University for a total of 3-1/2 years, but did not graduate. He entered the Army on August 1, 1942, as a voluntary officer candidate, attended the Tank Destroyer School, Camp Hood, Texas, and was honorably discharged as an enlisted man and commissioned a second lieutenant, Army of the United States, on 17 March 1943.

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

Jerry A. Egan, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Thomas W. Mayse, Judge Advocate.

On Leave, Judge Advocate.

1st Ind.

War Department, J.A. G.O., 27 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 Milton H. Snyder (0-1824524), 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 and the sentence and to warrant confirmation thereof. Accused's repetition of his offenses shows that he has no proper appreciation of his responsibilities as a commissioned officer. 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. 404, 27 Jul 1944)

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

CM 256840 12 Jul 1944

U N I T E D S T A T E S	)	ALASKAN DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Richardson, Alaska,
First Lieutenant HOMER J.	)	13 January 1944 and 5 May 1944.
PAGE (O-364324)	)	Dismissal and confinement for
	)	one (1) year. Disciplinary
	)	Barracks.

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

Specification 1.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, did, at Fort Richardson, Alaska, on or about 20 October 1941, present for approval and payment claims against the United States by presenting to Lieutenant Colonel S. C. Page and Major R. R. Doolen, finance officers at Fort Richardson, Alaska, officers of the United States, duly authorized to approve and pay such claims, in the amounts of $18.60 for subsistence allowance and $60.00 for rental allowance, as a married man with a lawful dependent wife, from 1 October 1941, to 31 October 1941, which claims were false and fraudulent in that the said First Lieutenant Homer J. Page was not married and did not have a lawful dependent wife during said period of time, and were then known by the said First Lieutenant Homer J. Page to be false and fraudulent."

Specification 2.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, did, at Fort Richardson, Alaska, on or about 20 November 1941, present for approval and payment claims against the United States by presenting to Lieutenant Colonel S. C. Page and Major R. R. Doolen, finance officers at Fort Richardson, Alaska, officers of the United States, duly authorized to approve and pay such claims, in the amounts of $18.00 for subsistence allowance, and $60.00 for rental allowance, as a married man with a lawful dependent wife, from 1 November 1941 to 30 November 1941, which claims were false and fraudulent in that the said First Lieutenant Homer J. Page was not married and did not have a lawful dependent wife during said period of time, and were then known by the said First Lieutenant Homer J. Page to be false and fraudulent."

Specification 3.-"In that First Lieutenant Homer J. Page * * * Infantry, then of the * * * Infantry, did, at Fort Richardson, Alaska, on or about 20 December 1941, present for approval and payment claims against the United States by presenting to Lieutenant Colonel S. C. Page and Major R. R. Doolen, finance officers of the United States, duly authorized to approve and pay such claims, in the amounts of $18.60 for subsistence allowance and $60.00 for rental allowance, as a married man with a lawful dependent wife, from 1 December 1941 to 31 December 1941, which claims were false and fraudulent in that the said First Lieutenant Homer J. Page was not married and did not have a lawful dependent wife during said period of time, and were then known by the said First Lieutenant Homer J. Page to be false and fraudulent."

Specification 4.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, did, at Fort Richardson, Alaska, on or about the 20th day of January, February, March, April, May and June, 1942, present for approval and payment claims against the United States by presenting to Lieutenant Colonel S. C. Page and Major R. R. Doolen, finance officers at Fort Richardson, Alaska, officers of the United States, duly authorized to approve and pay such claims, in the amount of $108.60 for subsistance allowances and $360.00 for rental allowances, as a married man with a lawful dependent wife, from 1 January 1942 to 30 June 1942, which claims were false and fraudulent in that the said First Lieutenant Homer J. Page was not married and did not have a lawful dependent wife during said period of time, and were then known by the said First Lieutenant Homer J. Page to be false and fraudulent."

Specification 5.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, did, at Fort Richardson, Alaska, on or about the 20th day of July, August, September, October and November, 1942, present for approval and payment, claims against the United States by presenting to Lieutenant Colonel S. C. Page and Major R. R. Doolen, finance officers at Fort Richardson, Alaska, officers of the United States, duly authorized to approve and pay such claims, in the amount of $107.10 for subsistence allowances and $375.00 for rental allowances, as a married man with a lawful dependent wife, from 1 July 1942 to 30 November 1942, which claims were false and fraudulent in that the said First Lieutenant Homer J. Page was not married and did not have a lawful dependent wife during said period of time, and were then known to the said First Lieutenant Homer J. Page to be false and fraudulent."

Specification 6.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, for the purpose of aiding another, viz,, Sally Glashoe, alias Sally Page, to obtain the approval and allowance of a claim against the United States, by causing to be presented to the Finance Officer, United States Army, Washington, D. C., an officer duly authorized to approve and allow such claim, did, at Fort Richardson, Alaska, on or about 13 February 1942, make and use a certain paper to wit: 'Transportation Certificate For

Passenger Travel' (War Department Quartermaster Corps Form 207, authorized 24 April 1923), which said paper, as he, the said First Lieutenant Homer J. Page, then knew, contained statements that a Mrs. Sally Page was his wife, a member of his immediate family, dependent upon him for support and entitled, under the act of 13 May 1920, to transportation at public expense, or words to that effect, which statements were false and fraudulent in that the said Mrs. Sally Page, alias Sally Glashoe, alias Sally Page, was not his wife, or dependent upon him for support, or entitled to transportation at government expense, and were then known by the said First Lieutenant Homer J. Page to be false and fraudulent."

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

Specification 1.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, did, at Nome, Alaska, on or about 17 December 1942, with intent to deceive Captain Neil W. Phillips Jr., an investigating officer, officially state under oath to the said Captain Neil W. Phillips Jr., that at the time he, the said First Lieutenant Homer J. Page, made application claiming allowance for a dependent wife starting from 1 November 1941; he believed he was married to one Sally Glashoe, alias Sally Page, or words to that effect, which statement was untrue, and was believed by the said First Lieutenant Homer J. Page to be untrue, in that he, the said First Lieutenant Homer J. Page, at the time of making said application did not believe he was married to the said Sally Glashoe, alias Sally Page."

Specification 2.-"In that First Lieutenant Homer J. Page, * * * Infantry, then of the * * * Infantry, did, at Nome, Alaska, on or about 17 December 1942, with intent to deceive Captain Neil W. Phillips Jr., an investigating officer, officially state, under oath, to the said Captain Neil W. Phillips Jr., that he, the said First Lieutenant Homer J. Page, had received, during the first part of December, 1941, a letter from his friends telling him that he had not been married, or words to that effect, which statement was known by said First Lieutenant Homer J. Page to be untrue in that he had not received such a letter."

Specification 3.-"In that First Lieutenant Homer J. Page, * * * Infantry, did, at Fort Richardson, Alaska, on or about 22 October 1943, with intent to deceive Major George R. Wilkins, an investigating officer, officially state, under oath, to the said Major George R. Wilkins, that he the said First Lieutenant Homer J. Page, had not received any allowance for a dependent wife for October, 1941, or words to that effect, which said statement was untrue, and was known by the said First Lieutenant Homer J. Page to be untrue in that he, the First Lieutenant Homer J. Page, had in fact

applied for and received an allowance for rental and subsistence for an alleged dependent wife for October, 1941."

(Opinion of the Board of Review is CONFIDENTIAL)

(Sentence confirmed. G.C.M.O. 476, 1 Sep 1944)

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

SPJGQ
CM 256869

14 JUN 1944

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Army Air Base, Salinas, California, 4 May 1944. Dismissal and total forfeitures.
Second Lieutenant ARVID D. BELGUM (O-762216), Air Corps.	)	

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OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Arvid D. Belgum, Air Corps, Squadron "T-2", 451st Army Air Force, Base Unit, Salinas, California, did, without proper leave, absent himself from his post and organization at Army Air Base, Salinas, California, from about 15 April 1944, to about 19 April 1944.

He pleaded guilty to, and was found guilty of, the Specification and Charge. Evidence of one previous conviction (AWOL and failure to obey lawful order of superior officer - the failure to obey being, according to the staff judge advocate's review, a part of his failure to report on time, and all the result of having missed a train - for which a sentence of forfeiting $600 of his pay was imposed) was introduced at the trial. Accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

A duly authenticated extract copy of the morning report of accused's organization, Squadron T-2, 451st AAF Base Unit, Salinas,

California (R. 8, 12), for 19 April 1944, was introduced in evidence without objection (R. 8). It contained entries pertaining to accused, as follows: "fr dy to AWOL 0800 the 15th" and "fr AWOL to dy 1900 the 19th". Accused was absent from an inspection he was supposed to stand at 8:00 o'clock, a.m., on 15 April 1944, a Saturday (R. 7, 10, 11). A search was thereupon instituted for him, but he could not be located on the base (R. 7, 10). His tactical commander did not again see accused until 7:00 o'clock p.m., on 19 April 1944. Accused had no authority to be absent from the inspection on 15 April or from his organization between 15 and 19 April (R. 7, 8, 10).

Upon cross-examination, accused's commanding officer, Major Rush, testified that it was the general practice in the organization to which accused was attached to release all officers on pass from 12:00 o'clock, noon, on Saturdays until Sunday night (R. 7, 8). There was a rule in effect that their local passes did not entitle officers to travel more than 125 miles from the air base, special permission from the commanding officer being necessary if this limit was to be exceeded (R. 11).

4. Evidence for the defense:

Accused, his rights having been first explained to him, elected to be sworn as a witness in his own behalf, and testified substantially as follows:

It being permissible, he spent Friday night, 14 April 1944, at a hotel in Salinas, California. He requested of the hotel personnel that he be called Saturday morning in time to enable him to reach the air base in time for the eight o'clock inspection, but was not called, so overslept (R. 13). He nevertheless went to the air base, arriving there about eleven o'clock, a.m. (R. 13). He did not see any of the officers of his squadron. Upon checking his mail, he discovered a note in his box, requesting that he call operator 30, in Los Angeles, California. He called, and was informed that his mother was ill (R. 13). Since he had been absent from inspection that morning, accused feared that a request by him for leave would be denied, so he concluded not to ask for leave, but to go to Los Angeles that afternoon (Saturday) and return Sunday night (R. 13). It was the customary practice in his squadron to release all officers after the Saturday morning inspection until Sunday night, and they were not required to have any pass except their regular AGO passes (R. 22). He had never been informed that he was not supposed to go further than 125 miles from his station without special permission (R. 14).

So, without obtaining permission (R. 14), accused left the air base at about 12:30 o'clock, noon, (R. 13), caught a ride to Los Angeles, a distance of approximately 330 to 360 miles from Salinas (R. 14), and arrived there about twelve o'clock Saturday night (R. 13, 15). He immediately reported to the hospital but was unable to see his mother (R. 15). He reported back to the hospital at about six o'clock Sunday morning and remained with his mother "off and on all day", until about

eight o'clock in the evening (R. 13, 15). He had intended to return to his station Sunday afternoon, but his mother was very ill at the time, so he stayed (R. 13). He thought his mother was suffering a recurrence of gall stone trouble (R. 13, 19), and neither she, the doctor, nor the nurses told him the cause of her illness (R. 19). A telegram to him from one of his bunk mates, urging him to return to his station, was delivered to his mother Sunday night (R. 13) (subsequent references fixed time as Monday night, R. 20, 22). She did not know where to reach him, due to the fact he was spending the night with friends, and had not left their address with his mother, so he did not receive the telegram until Monday morning (R. 13), (Tuesday morning, R. 22). He thereupon checked the possibilities of getting transportation back to Salinas, and was informed that he would have to make reservations a day in advance (R. 14). His mother, who was a nurse in the hospital at which he visited her (R. 15), suffered another severe attack of her illness on Monday, so he remained over with her until Tuesday (R. 13). He spent virtually all of Monday and Tuesday with his mother at the hospital (R. 15, 16). His mother remained in bed all of Monday and most of Tuesday and did not work either day (R. 16, 17). On Tuesday he made reservations for his return to Salinas on Wednesday, and reached the air base at about five o'clock Wednesday afternoon, 19 April 1944 (R. 13, 16).

During cross-examination of accused, the prosecution introduced in evidence certified true copies of telegrams exchanged between the Field Director, American Red Cross (Salinas, Cal.) and the Glendale, California, chapter of that organization, relative to the illness of accused's mother, accused's presence with her, and the time of his arrival and departure (R. 17; Exs. 2, 3, 4, 5). The Glendale chapter of the American Red Cross supplied the information that accused's mother stated she had been ill Saturday and Sunday (15 and 16 April) with ptomaine poisoning, but had returned to work Monday, without consulting a doctor (Ex. 3); that accused arrived midnight of 15 April (Saturday) and left the morning of 19 April (Wednesday), having spent the first night and part of the next day with his mother and the remainder of time with friends (name and address unknown); that a telegram denying accused's extension of leave was delivered to his mother at the hospital, but she was unable to advise him because she did not know his whereabouts; he left immediately upon obtaining the information the following morning (Ex. 5). These copies of telegrams were introduced in evidence with the express consent of defense counsel, in full recognition that they were hearsay, to avoid calling accused's mother as a witness (R. 17, 18, 20).

On redirect examination accused reaffirmed that his mother was sick on both Monday and Tuesday, that he was with her both days, and that she did not work either day (R. 18). The only time his mother did not know where to locate him was on Monday night when the telegram arrived, at which time he was staying with friends (R. 20). He could not return Tuesday, because he was unable to get transportation until Wednesday (R. 22).

5. The evidence, in conjunction with accused's plea of guilty, is legally sufficient to support the findings. While accused testified that he went to the air base Saturday morning, 15 April 1944, at about eleven o'clock and remained there for a short time, he did not report to his superior officers for duty. It was customary for all officers of his squadron to be released from duty following the Saturday inspection, which was held at eight o'clock in the morning, but accused was absent without leave from that formation and was not present to be excused with the other officers. No question is presented for discussion with reference to his absence on Monday, Tuesday, and Wednesday, 17, 18 and 19 April.

The copies of telegrams (Exs. 2-5) introduced in evidence are hearsay and secondary evidence, and serve to impeach the testimony of accused, but counsel for defense, with full knowledge of his right to have them excluded upon objection, expressly consented to their admission. There is nothing in the record to indicate that this was done without the full knowledge and acquiesence of accused. Under these circumstances, the Board of Review is of the opinion no error was committed in admitting this evidence. Furthermore, in view of accused's plea of guilty and the fact that the evidence is otherwise sufficient to support the findings and sentence, no prejudice to the substantial rights of accused appears to have resulted.

6. War Department records disclose that accused is 23 years of age and is unmarried. He is a high school graduate and attended the A & M College of New Mexico for one-half year. He was employed in an aircraft factory immediately before entering the service. He entered training as an aviation cadet on 15 March 1943 and, having successfully completed his course of training, was commissioned a temporary second lieutenant, Army of the United States, on 5 December 1943. He entered on active duty the same day at Luke Field, Arizona.

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 authorized upon conviction of a violation of Article of War 61.

William A. Pounds, Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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 Second Lieutenant Arvid D. Belgum (0-762216), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Evidence of one previous conviction was introduced. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that, as thus modified, the sentence 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 above recommendation, 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 confirmed but forfeitures remitted. G.C.M.O. 393, 18 Jul 1944)

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

SPJGV
CM 256886

12 JUN 1944

UNITED STATES v. Second Lieutenant CAREY R. WILBER (0-576692), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Columbus, Mississippi, 9 May 1944. Dismissal.

OPINION of 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 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 96th Article of War.

Specification: In that Second Lieutenant Carey R. Wilber, Air Corps, Columbus Army Air Field, Columbus, Mississippi, did, at Columbus, Mississippi, on or about 6 February 1944, wrongfully and unlawfully contract marriage with one Inez Holoway, he, the said Second Lieutenant Carey R. Wilber, having a legal wife, viz. Marion D. Wilber, then living.

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

3. The prosecution introduced competent evidence to prove that shortly before midnight on 5 February 1944 accused called at the home of James C. Cockerham, Clerk of the Circuit Court, Lowndes County, Mississippi, and was received by Cockerham's daughter, Mrs. Willie Mae C. Wood (R. 10, 13). Accused requested a marriage license and Mrs. Wood issued one to him, taking a blank form of license previously signed by her father and entering on it the necessary information (Ex. A; R. 13). Her father was confined to bed as a result of a heart attack and had

given his daughter instructions about filling out marriage licenses and affidavits on forms that he had signed in blank (R. 10). The license authorized the performance of the rites of matrimony between Mr. Carey Wilbur and Miss Inez Holoway (Ex. A). Shortly after midnight of 5 February a couple giving the names Carey Wilbur and Inez Holoway were married by James T. Searcy, Justice of the Peace for District 2, Lowndes County (R. 7). Certification of performance of the marriage ceremony was entered upon the marriage license issued to Carey Wilbur and Inez Holoway (Ex. A). On 7 February the license so certified was returned to the office of the Clerk of the Circuit Court and entry of the marriage between Carey Wilbur and Inez Holoway was duly made in the Marriage Book for Whites, No. 40, Lowndes County, Mississippi (Ex. C; R. 10, 11).

It was stipulated by the prosecution, defense and the accused that on 12 January 1938 the accused was married to Marion Diehl Wilber at Buffalo, New York, by the Reverend Leo R. Smith, and that Marion Diehl Wilber was living on 6 February 1944 (R. 6; see Ex. H).

On or about 1 March 1944, Major Harold B. Leeton, Post Adjutant at Columbus Army Air Field, called accused to his office because of certain information he had received which indicated accused might have entered into a marriage ceremony with a Columbus girl while carrying a Marion Wilber of Buffalo, New York, as "beneficiary" on his pay voucher (R. 17). He did not threaten or extend any promises to accused, told him that he need answer no questions and that anything he might say could be used against him if there were a court-martial. Accused was then asked if he had obtained a divorce and he stated he had (R. 17). Thereafter, Major Leeton received a telegram from Buffalo, New York, and summoning accused again to his office, he exhibited the telegram to him. Accused was asked if he understood his rights under Article of War 24 and understood that anything he might say could be used against him. Accused affirmed that he so understood and then stated "that as far as he was concerned, the thing was up, or something to that effect" (R. 17). When asked the meaning of such a statement he replied that "he had not received a divorce from Marion Wilber in New York and that he had married a girl in Columbus, Mississippi" (R. 17).

On 24 March 1944, the accused, after his rights had been fully explained to him and without any threats or promises being made, elected to make a sworn statement to Second Lieutenant Levon V. Twyford, the officer appointed to investigate the instant Charge (R. 19). Accused stated, in essential particulars, that he and his wife, Marion Diehl Wilber, had separated and both were agreeable to a divorce of their marriage. He was also dissatisfied with his administrative work in the Air Corps believing that he was "primarily a combat soldier". He found it impossible to establish firm friendships with any of the officers at the field because of his attitude. He met and became intimate with Miss Inez Holoway with the eventual result that she became pregnant. Although she knew of his existent marriage, she agreed to marry accused. This marriage was to be kept quiet until accused

secured a divorce from Marion Wilber. However, after his marital affairs had been brought to light, the second marriage was annulled. Accused entered into this bigamous marriage because he felt he could not conscientiously permit Miss Holoway to face the consequences of their intimacy alone (Ex. G).

4. After his rights had been fully explained to him, accused elected to take the stand and testify under oath in his own behalf. He testified that he reported for duty at Columbus Army Air Field on 8 May 1943 and immediately made application for transfer to the Paratroop branch of the Infantry. He admitted his marriage to Marion Diehl and that there had been no divorce (R. 22). He also testified that he met and fell in love with Inez Holoway. They became intimate and her pregnancy resulted. To protect her they were married on 6 February 1944 and this marriage was terminated by divorce on 12 April 1944 (R. 23, 24; Ex. I). He entered into this second marriage guided by the dictates of his conscience and his sense of loyalty to Miss Holoway (R. 24).

During the months succeeding September 1943, accused appeared to his brother officers to be in an unhealthy frame of mind and apparently wished a transfer from the Air Corps. Remarks uncomplimentary to the accused were passed among the officers and at an officers' party during that autumn a skit was produced satirizing the accused's efforts to transfer from the Air Corps and the accused's "troubles leading up to that" (R. 21).

5. At the inception of the trial, counsel for the defense challenged one of the members of the court, Major Wilbert M. Becker, for cause. This member testified on his examination under oath that sometime during the preceding six or eight months, while the accused was dissatisfied with his work in the Air Corps, he expressed a "belittling opinion" to the accused during an interview between the two of them. It was used and intended as a corrective measure by a superior toward a subordinate officer, the matter under discussion being purely a military one. Major Becker testified that he had no prejudice against the accused which would affect him in deciding the present case and that he had formed no opinion of the accused's guilt or innocence (R. 3a, 3b). The challenge was voted upon by the court in closed session and by secret written ballot. It was not sustained and properly so inasmuch as no legitimate grounds were proven to support it (MCM, 1928, par. 58e). The evidence failed to show any hostility or prejudice on the part of this member toward the accused, or any other valid grounds for the challenge.

6. Bigamy has long been recognized as an offense under Article of War 96 without reference to state laws (3 Bull. JAG 150). It is committed when one party enters into a contract of marriage while a former marriage of that party still exists undissolved and the spouse of that marriage remains alive (Dig. Op. JAG, 1912-40, sec. 454 (18)). That the accused committed this offense while in the military service is fully sustained by the evidence of the prosecution and the testimony of the accused. The evidence sustains the findings of guilty of the Charge and Specification.

7. The accused is about 28 years of age. War Department records show that he enlisted in the service on 13 September 1942 and was commissioned a second lieutenant on 3 March 1943.

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

Thomas H. Jaffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 256886

1st Ind.

War Department, J.A.G.O., 23 JUN 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Carey R. Wilber (0-576692), 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 was found guilty of bigamy committed in Lowndes County, Mississippi, and sentenced to be dismissed the service. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the attached correspondence from the accused, in which he requests clemency.

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

Myron C. Cramer

4 Incls.
Incl.1-Record of trial.
Incl.2-Dft ltr for sig S/W.
Incl.3-Corresp. fr accused.
Incl.4-Form of action.

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

(Sentence confirmed. G.C.M.O. 413, 27 Jul 1944)

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

(379)

SPJGH
CM 256909

23 JUN 1944

UNITED STATES	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Second Lieutenant GEORGE L. ROBINSON (0-1595128), Quartermaster Corps.	)	Trial by G.C.M., convened at Camp Maxey, Texas, 12 May 1944. Dismissal, total forfeitures and confinement for ten (10) years.

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 64th Article of War.

Specification: In that Second Lieutenant George L. Robinson, Eighth Service Command, Camp Maxey, Texas, having received a lawful command from Captain William A. Patrick, his superior officer, to go take charge of the pits, did, at Camp Maxey, Texas, on or about 17 April 1944 willfully disobey the same.

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

Specification: In that Second Lieutenant George L. Robinson, Eighth Service Command, Camp Maxey, Texas, did, at Camp Maxey, Texas, on or about 17 April 1944, behave himself with disrespect toward Captain William A. Patrick, his superior officer, by saying to him, "You are full of shit", or words to that effect.

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

Specification: In that Second Lieutenant George L. Robinson, Eighth Service Command, Camp Maxey, Texas, did, at Camp Maxey, Texas, on or about 17 April 1944, wrongfully offer to engage in physical combat with Private Curtis Shipe by saying to him, the said Private Shipe, "I will take off my bars, God Damn it, and we will fight", or words to that effect.

CHARGE IV: Violation of the 95th Article of War.
(Finding of guilty disapproved by reviewing authority).

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

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be "dishonorably dismissed" the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for forty (40) years. The reviewing authority disapproved the findings of guilty of the Specification, Charge IV, and of Charge IV, approved the sentence but reduced the period of confinement to ten (10) years, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows: On 10 April 1944 the accused was attached for duty to the 696th Ordnance Ammunition Company, Camp Maxey, Texas, a separate or detached company under the command of Captain William A. Patrick, Jr. (R. 6a-7, 13).

On 17 April 1944 accused was in charge of the pits, at rifle range number 3, Camp Maxey, during target practice, supervising enlisted men in pulling and marking targets. Private Curtis Shipe, one of the enlisted men assigned to pull targets, was standing outside the pits while some of the "boys" were wrestling. Accused came up and said "God damn it get back in the pits and stay in there. You never do anything at calesthenics. Looks like you could stay in there". After Private Shipe returned to the pits the accused came back and told him to mark a target. The accused returned later and told Shipe that he was going to take him to the guardhouse. Private Shipe stated that he did nothing to cause his removal from the pits and asked accused the reason but accused did not tell him. Accused told Shipe that if he did not "like it" he (accused) would take off his bars and "whip" him. Accused further stated, according to Shipe, that he could "lick" anybody in the pits. Shipe spelled out his name for a corporal who wrote it down at the request of accused. Accused took Shipe to the firing line (R. 8-12, 14).

Captain Patrick received a telephone call from accused requesting permission to bring a soldier to the firing line. Captain Patrick stopped the firing and accused brought Private Shipe out of the pits. Accused stated to Captain Patrick that Shipe had been misbehaving and insisted on taking him to the guardhouse immediately. Captain Patrick inquired of accused the nature of the charges he was going to prefer against Shipe. Accused replied that he did not know but would "figure out something to pin on him". Captain Patrick informed accused that he thought the matter could be handled in another manner later in the day without "rushing" Private Shipe off to the guardhouse. Accused insisted on making the trip to the guardhouse but Captain Patrick informed him he had made his decision. Accused made some remarks to the effect that "he did not like it" and "I don't know what you are, but I am a soldier".

He also said "something about settling disputes of this nature by taking off his bars". Accused wanted to continue the conversation and Captain Patrick again informed him that he could not take Private Shipe to the guardhouse. The accused then said "Captain, you are full of shit". When asked by Captain Patrick what he said, accused repeated the statement. Captain Patrick informed accused that he had "stood for" about as much as he should from him and to consider himself in arrest in quarters. Accused said he did not want to walk to his quarters and was told he could wait until transportation arrived. As no officer was in charge of the "butts" Captain Patrick told accused to take charge until his transportation arrived. Accused asked "is that an order" and, on being told that it was an order, said "I refuse" and remarked that Captain Patrick should read the manual. He then sat in the ammunition truck until a jeep came, and he left in it (R. 9-11, 13-16, 19-30).

On cross-examination Captain Patrick testified that when accused came to the firing line with Private Shipe he made some statement to the effect that Private Shipe had been using profane langauge in the "butts" and indicated that the profanity had been directed at him. After questioning Private Shipe, Captain Patrick concluded that Shipe had used profane language language within the hearing of accused but was not addressing accused. Captain Patrick further testified that he considered his order directing accused to take charge of the pits as temporarily releasing accused from arrest (R. 16-18).

Five enlisted men who overheard the conversation between Captain Patrick and accused testified substantially the same as Captain Patrick except in a few particulars. First Sergeant George E. McCormick testified that when Captain Patrick asked accused what charge he was going to place against Private Shipe the accused answered that he did not care to discuss the matter in the presence of the enlisted men, but if the Captain would "step aside" he would tell him. Captain Patrick did not "step aside". Sergeant Walter Jackson did not overhear the entire conversation between Captain Patrick and accused but as he remembered the incident he believed that accused was ordered to go to the pits before he was placed in arrest. According to Private John Kakule the accused told Captain Patrick that Private Shipe swore at him in the pits and accused wanted to take off his bars and "whip the ass off of him" (R. 19-20, 22-24, 28).

4. For the defense:

In a prepared unsworn statement read to the court accused stated that on 17 April 1944 Captain Patrick placed him in charge of the pits on the rifle range. The enlisted men under his charge were "horse playing" outside the pits and he told them to stay inside as he did not know when the firing would start. A few minutes later he noticed Private Shipe outside the pits throwing stones and said to him "You never do anything right when it comes to

calisthenics and I am quite sure that it would require little effort for you to sit inside". Later on he found Private Shipe marking the wrong target and told him to mark the target which was being fired upon. Shipe replied by saying "Every God Dam time I try to do something, somebody comes fucking with me". Accused stated that he then asked Shipe his name and requested that "Cpl. Smith" write it down. Private Shipe gave his name in three parts beginning with his last name and when accused told him to repeat his full name in its correct order Shipe replied that he had given it to him once. Accused again asked him to repeat it and Shipe called over to Corporal Smith, saying "My name is Shipe and not Shit or Ship. Tell him how to spell it Cpl. He doesn't know how, its a Jewish name". He then told Private Shipe that he was taking him to the stockade because of his cursing and the remarks he had made to the corporal, to which Shipe replied that the remarks had not been addressed to accused but were made to the corporal and the man working on the target with him. When they arrived at the firing line accused told Captain Patrick what had happened in the pits and that he was going to take Private Shipe to the stockade. Captain Patrick said they would talk the matter over and accused replied that "it was very little talking to be done when an enlisted man curses at his officer". Captain Patrick said accused would be putting him "on the spot" if he took Shipe to the stockade and accused answered that he could not "help that" (R. 30, 34).

When Captain Patrick asked accused what charge he was going to prefer against Shipe he requested Captain Patrick to step aside so they could talk but Captain Patrick refused, saying that as far as he was concerned the talking was over. Accused stated that he was "greatly" embarrassed as he did not feel that it was the right attitude for the commanding officer to take toward a junior officer in the presence of enlisted men. He then asked Captain Patrick what "kind of a soldier" he thought Private Shipe would make and Captain Patrick stated "Lieutenant, you must not forget that some of my officers are not soldiers" and added that he was referring to accused. He said "You are being reclassified. You are no soldier". Accused stated he replied that he was a soldier and added "but I do not know what you are and if Pvt. Shipe is so bad that he can't obey anyone or take orders from anyone I will gladly take my shirt off and take care of him". He further stated that after he called the attention of Captain Patrick to the fact that during the firing that morning only fourteen shots out of approximately five hundred had hit the targets, Captain Patrick informed him that he was not taking "any more" from him and that he would either stay and work or consider himself under arrest. The accused stated that he demanded respect and would not work in the company if he could not get it because he did not allow men to curse him. Captain Patrick told him that he was not "in a position to demand anything" and said "consider yourself under arrest in quarters, and you had better be in your quarters when I get back". Accused asked for transportation and was told that he would have to wait until transportation arrived, but in the meantime to "go back

and take charge of the pits". According to accused he then asked "Captain, is that an order?" and Captain Patrick replied "Yes. Why, do you refuse it?" Accused then stated "Yes, sir, I do", and called the attention of Captain Patrick to the manual. He did not obey the order because he felt it was illegal under Army Regulations stating that one in arrest could not exercise command functions. Being in charge of 81 men in the pits would place him in the position of exercising a command function (R. 30, 34).

With reference to his disrespectful conduct toward Captain Patrick (Chg. II) the accused stated that he did not recall making the statement but "in the midst" of his anger and embarrassment in front of the enlisted men, and incited by the refusal of Captain Patrick to support his efforts at maintaining discipline, it was "quite possible" that he did say "you are full of shit" (R. 30, 34).

5. a. Charge III: The evidence shows that on 17 April 1944 the accused was in charge of the enlisted men operating targets in one of the pits on the Camp Maxey rifle range. Before firing started he reprimanded Private Curtis Shipe for not remaining in the pits. He later heard Private Shipe using profane language which he believed was directed at him. He informed Private Shipe he was going to take him to the guardhouse and if Shipe "did not like it" he would take off his bars and "whip" him. He took Private Shipe to the firing line and in the presence of the commanding officer and enlisted men again offered to "take care of" Private Shipe. The conduct exhibited by accused in offering to remove his bars and whip Private Shipe was clearly to the prejudice of good order and military discipline.

b. Charge II: Captain William A. Patrick, Jr., the commanding officer of accused, refused to give accused permission to take Private Shipe to the guardhouse, stating to accused that the matter could be disposed of later in the day. Accused was insistent and intimated that Captain Patrick was not a soldier. When Captain Patrick again informed accused that he had made his decision the accused stated, "Captain, you are full of shit". When asked what he had said the accused repeated the statement and Captain Patrick placed him in arrest in quarters.

The accused stated that in the midst of his anger and embarrassment in front of the enlisted men he might have told Captain Patrick he was "full of shit" but did not remember making the statement.

The evidence shows that accused behaved himself with disrespect toward his superior officer by using the disrespectful language as alleged and sustains the finding of guilty of the Specification.

c. Charge I: It is shown by the evidence and admitted in the unsworn statement of accused that after being placed in arrest and while awaiting transportation back to his quarters he was told by Captain Patrick to take charge of the pits until his transportation arrived. The accused asked whether

the Captain was giving him an order and on receiving an affirmative reply said, "I refuse". The accused stated that he did not obey because he felt the order was illegal in that an officer under arrest is prohibited from performing command functions, and in taking charge of 81 men in the pits he would be exercising command.

An accused cannot be convicted for failing to obey an illegal order of his superior, but a subordinate who refuses to obey an order to perform a military duty on the ground that the order is illegal does so at his peril (MCM, 1928, par.134b). The Board of Review is of the opinion that the order given by Captain Patrick to accused to take charge of the pits was legal. The order itself removed any impediment existing as a result of the arrest of accused as it was a constructive release from the arrest (Dig. Op. JAG, 1912, p. 480; Winthrop's Military Law and Precedents, p. 118). The evidence shows that accused willfully failed to obey the order and sustains the finding of guilty of this Specification.

6. The form of the sentence adjudged, to be "dishonorably dismissed the service", is unusual. To be dismissed the service is in itself a dishonorable termination of a career as an officer in the Army. The word "dishonorably" is superfluous, adds nothing to the sentence of dismissal, and may be disregarded (CM 241597, Fahey).

7. Careful consideration has been given to a brief submitted by accused. The assignment of error set forth therein has been discussed by the Board of Review in paragraph 5c of this opinion.

8. The accused is 20 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 25 February 1943; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 30 July 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the approved findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 63rd, 64th or 96th Article of War.

Samuel M. Driver, Judge Advocate.

(On Leave), Judge Advocate.

F. J. Litthichos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 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 George L. Robinson (0-1595128), 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 of guilty and the sentence and to warrant confirmation of the sentence. The accused willfully disobeyed a lawful command of his superior officer (Spec., Chg. I), behaved himself with disrespect toward the same superior officer (Spec., Chg. II), and wrongfully offered to engage in physical combat with a private (Spec., Chg. III). I recommend that the approved sentence to dismissal, total forfeitures and confinement at hard labor for 10 years be confirmed, but in view of the youth and inexperience of accused and in order that he be made eligible for immediate induction as an enlisted man, 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 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. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Sec. to Mrs. Roosevelt, 6/24/44, to General Cramer, w/3 incls.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 427, 4 Aug 1944)

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

SPJGK
CM 256955

(387)

15 JUN 1944

UNITED STATES	)	ARMORED CENTER
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 12 May 1944. Dismissal and total forfeitures.
Second Lieutenant CHARLES GORDON, JR. (0-1017104), Infantry.	)	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS, MOYSE and SONENFIELD, 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 Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 2nd Lt Charles Gordon, Armored Command Officers Replacement Pool, Armd Repl Trng Center, Fort Knox, Kentucky, did, without proper leave absent himself from his command at Fort Knox, Kentucky, from about 22 February, 1944, until about 8 March, 1944.

Specification 2: In that 2nd Lt Charles Gordon, * * * did, without proper leave absent himself from his command at Fort Knox, Kentucky, from about 14 March, 1944, until about 28 March, 1944.

He pleaded guilty to and was found guilty of the Charge and both Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence, but remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. In view of the accused's plea of guilty, the prosecution introduced no evidence.

4. Defense.

The accused, after being fully advised of his rights to testify under oath or to make an unsworn statement or to remain silent, elected to testify

under oath. In substance, he stated that for seven months previous to his misconduct he had been a patient at Nichols General Hospital. Upon his release from the hospital he was given a leave of absence of seven days which was extended a number of times. His leave expired on 22 February 1944, on which date he should have returned to duty at Fort Knox, Kentucky. Accused remained at his home at Glendale, Long Island, from 22 February to 8 March 1944, on which latter date he entered Fort Jay Station Hospital for what he thought was a little heart attack. He told the hospital authorities that he was on leave. Upon his release from Fort Jay Hospital on 14 March 1944, instead of returning to his organization as he was instructed to do by the hospital authorities he went to his home at Glendale and remained there until 27 March 1944, "trying to figure out exactly what to do". He returned to Fort Knox on 28 March 1944 and again entered the hospital, where he remained until about 12 April. Accused stated that he enlisted in the Army and that after one year of enlisted service he was selected for the Armored Force Officer Candidate School, Fort Knox, Kentucky. He stated that throughout his enlisted service he had spent only two days in a hospital, and after receiving his commission as a second lieutenant on 21 March 1943, he had spent the greater part of his time in a hospital. When asked to explain to the court why he had absented himself without leave as alleged in the Charge and Specifications, accused stated:

> "Well, for sometime I have felt that I was emotionally incapable of commanding troops; at the slightest provocation I would lose my head and become excited; I seemed to lose my head and everything at the moment. I was constantly dreading some man would be injured or killed, and because of that dread I constantly just blowed up and I just couldn't seem to control it; I tried my best and tried very hard to control that dread. Still since I came in the Army my idea was to get a commission and go as far as I possibly could. I enlisted in March, 1942. I was in a state of mental confusion, I didn't know whether to go on and have happen would I feared would happen by these periods of my losing my head and blowing up or just reporting in and reporting to the hospital and telling them my story of exactly how I felt, giving up everything that I had worked for from the beginning. I just didn't want to do that. I didn't want to see all the time and effort spent in making me an officer just thrown away, and I just didn't know what to do. I didn't know what decision to make until I reported here on the 28th of March at the Station Hospital and told them a complete story of how I felt." (R. 6-7)

Accused further stated that he had tendered his resignation from the Army "approximately five weeks ago", but that no action had been taken thereon. He added that if he were discharged from the service he would have no objection to reenlisting (R. 6-10).

5. War Department records show that accused is 23 years old. He

attended Brooklyn College three years, but did not graduate. On 20 March 1943, upon the completion of the prescribed course at the Armored Force Officer Candidate School, Fort Knox, Kentucky, accused was commissioned a temporary second lieutenant, Infantry, Army of the United States.

6. The court was legally constituted and had jurisdiction of the person and the 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 of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Perry C. Zoll, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Herman Mayer, Judge Advocate.
Samuel Bornfield, Judge Advocate.

(Resigned)

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

SPJGN
CM 257015

23 JUN 1944
THE INFANTRY SCHOOL

UNITED STATES	)	Trial by G.C.M., convened at Fort Benning, Georgia, 5 May 1944. Dismissal and total forfeitures.
v.	)	
Second Lieutenant JAMES F. REID (0-1314060), Officers Replacement Pool, The Infantry School.	)	

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 Charges and Specifications:

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

Specification: In that 2nd Lieutenant James F. Reid, Officers Replacement Pool, The Infantry School, was at Columbus, Georgia on or about 29 March 1944, disorderly in uniform in a public place, to wit: Good Eats Cafe, 1009 Broadway.

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

Specification: (Disapproved by the reviewing authority).

He pleaded not guilty to and was found guilty of both Charges and the

Specifications thereunder. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of the Specification, Charge II, 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 visited the Good Eats Cafe, 1007 Broadway, Columbus, Georgia, on the nights of March 28 and 29, 1944. The cafe's dining room floor was comparatively small being about 25 by 35 feet in size. The kitchen was located next to the dining room and the men's rest room was just beyond the kitchen. On the first night, the accused arranged to meet a waitress, Mary Wright, previously unknown to him, at one o'clock the next morning in front of the cafe. The waitress who consented to the "date" with accused because "he wouldn't take no for an answer" failed to keep the appointment. On the following night, the accused returned to the cafe at approximately eight or nine o'clock, and insisted that Miss Wright wait upon him. She did so and he "bawled her out" for not keeping the date on the preceding night. Then the accused told "everyone in the cafe he had a hotel room for" her "so that everybody could hear" or that "It's a hell of a waitress that will make a date and have me get a hotel room and then won't go" or words to that effect. There were several people present, both civilians and soldiers, at this time - one witness testifying the number was 25, another testifying 5 or 6. The accused followed Miss Wright to the kitchen several times. He asked her for a "date", and then he asked another waitress, Girlie Sellers, for a "date". The owner of the restaurant told Miss Wright to make the accused leave her alone. During the evening, the accused went to several tables and drank beer with some enlisted men. He was not drunk. The accused followed the waitresses "all over the place from one table to another". A sergeant who was in the cafe told the accused that if he would pull off his bars that the sergeant would pull off his stripes, go outside and beat "hell out of him". The accused merely smiled at him. Later in the evening, he went into the kitchen, backed a 15 year old negro girl, Ernestine Mitchell, against a sink and said, "If you go out in back with me I'll give you $3.00". The girl then "ran away" and told Mr. John S. Dokas, the cafe owner, of the accused's statement to her. The accused left the kitchen with Mr. Dokas and they went to the cash register in the cafe. The owner told the accused, in the presence of the negro girl, what the latter had said. The accused denied making the statement. Mr. Dokas called the M.P.'s and at about midnight took the accused by the arm and pushed him out of the cafe. Captain Marshall E. Bullock of the Military Police arrived at the cafe after the accused had left. He then drove down Broad Street and saw the

accused and an enlisted man. Captain Bullock asked the accused if he had been in the Good Eats Cafe to which the accused replied that he had not. He returned with the accused to the cafe where the accused was identified. The accused then stated "Oh, yes, this is the place" (R. 6-10, 14-15, 17-19, 20-27, 29-33, 35-36).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, testified that on the night of 28 March he had stopped by the cafe for a bottle of beer and had asked the "blond waitress" if there was any place around town open for officers. She told him of such a place and said that she would like to go with him, and in response to the accused's question, said that she finished her work at midnight and would meet him in front of the cafe after that time. The accused returned in a cab at about 0030 o'clock but was unable to locate her. On the next night while passing the cafe, the waitress motioned with her hand and smiled at accused who then entered the cafe. The waitress came to where the accused had seated himself and asked him if he had tried to meet her the preceding night to which he replied in the affirmative. She told him that she was sorry that she had not met him but that she had been tired. The waitress returned repeatedly to his table. Either the accused or the waitress said something about her going with him that night when she was through working. At about 10:15 p.m. he walked to the rest room and on his return he was asked by a staff sergeant and a corporal to join them in a bottle of beer which had already been purchased. The accused did so and ordered another round of beer. The sergeant told the accused that the "boss" didn't like the idea of the "blond's talking with him". The "blond" whispered to the accused not to be mad at her but the boss did not like her talking with him. Later, observing the "blond" and two colored girls in the kitchen talking about him, the accused went to the rest room and then asked one of the colored girls on his return what the "blond" had said. The colored girl smiled and walked off. After he had seated himself again, the accused noticed a sergeant at the bar who nodded his head toward accused. He went to the sergeant and was asked if he had ever boxed any. The accused told him that he had and the sergeant said that when he had a couple of drinks that he liked to fight, that he would take off his stripes if accused would take off his bars. The accused told the sergeant that they could do nothing like that - they had to be "examples". The sergeant then said that he was sorry. The accused denied that he had been walking around after the girls. He had been walking over to the music box which he played five or six times. The accused walked to the cash register and the "boss" told him not to come back and called him a "god-damned yellow-livered second lieutenant son of a bitch". The accused asked him what

was wrong and the "boss" replied that the accused had offered one of the colored girls $3.00 to meet him in the rear. The accused denied this. The owner then took a small pistol from the cash register, put it in his pocket and pushed accused out of the door. The accused walked down the street with a soldier, and later was asked by a captain in a car if he had been in a cafe. The accused had thought Atlantic was the name of the cafe (R. 38-43).

On cross-examination, the accused testified that he had sent his wife who was in Hattiesburg, Mississippi, an air-mail letter on Monday, 27 March to catch the 11:30 train on Tuesday night, that if he couldn't meet her he would try to have a room at the Cardinal Hotel. He wrote another air mail letter to his wife on Tuesday telling her not to come because he expected to be reassigned. He did not think of sending a wire. The accused obtained a room at the hotel on Wednesday afternoon (29 March). He stated that he had stopped before the colored girl and merely asked what the "blond" had said. He did not remember any of the records which he played on the music box (R. 43-48).

On examination by the court, the accused testified that he had sent the second letter to his wife on Tuesday even though she was supposed to leave Hattiesburg between 11 and 12 that night. His wife did not come. He received a letter from her saying that both of his letters had arrived at the same time - either Wednesday or Thursday. He asked his wife a week before the trial to send him the letters but she said that she had lost them. A letter to the accused from his wife with envelope post-marked 1 May 1944 is included in the record. This letter stated that the "letter sent by air mail on Mon. after he left telling me that you would meet me at the train or have a room at the Cardinal Hotel" had been misplaced (R. 49-51; 53; Def. Ex. A).

5. The Specification, Charge I, alleges that the accused was at Columbus, Georgia, on or about 29 March 1944 "disorderly in uniform in a public place, to wit: Good Eats Cafe,". Disorderly conduct has been correctly defined as being conduct of "such nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby" (State v. Zanker et al (Minn. 1930), 229 NW 311).

Tested by this definition, it seems clear that according to the prosecution's evidence, which the court, within its right, elected to believe, the accused's conduct on the night of 29 March 1944 at the cafe was disorderly. His conduct which prompted his being ejected by the owner from the cafe and which, it may be inferred, provoked a sergeant to challenge him to a fight if he would remove his bars, affected the "peace and quiet of persons" who saw and heard him and "disturbed or provoked" them to resentment. The ac-

cused's remark that "It's a hell of a waitress that will make a date and have me get a hotel room and then won't go" alone is reprehensible because it carried by implication if not directly, an indecent suggestion. The utterance of obscene words in public, being a gross violation of public decency and good morals, was indictable at common law (State v. Appling, 25 Mo. 315; 69 A. Dec. 469). Thus, the public utterance of such a remark, coupled with the other acts of the accused, clearly amounted to disorderly conduct. Since the disorderly conduct was in a public restaurant, was seen and observed by persons who were there and provoked at least two persons to resentment, and because the accused was in uniform, it follows that the misconduct of the accused clearly infringes that provision of the 96th Article of War prohibiting "all conduct of a nature to bring discredit upon the military service". The evidence for the prosecution, therefore, beyond a reasonable doubt supports the court's findings of guilty of Charge I and the Specification thereunder.

6. The misconduct in question was alleged in the Specification, Charge I, as a violation of Article of War 96, and in the Specification, Charge II, as a violation of Article of War 95. The court found the accused guilty of both Charges and Specifications. The reviewing authority disapproved the the finding of guilty of the Specification, Charge II but failed to expressly disapprove the finding of guilty of Charge II. Since the disorderly conduct in question was not of such a character as to justify a conviction under the 95th Article of War the reviewing authority acted properly in disapproving the finding of guilty of the Specification, Charge II, except that the form of his disapproval should have also included the disapproval of Charge II (See CM 202846, Shirley, 6 B.R. 337; CM 197398, Mini).

7. The accused is about 30 years of age. The War Department records show his enlisted service from 27 July 1933 to 11 March 1943; and that he was commissioned second lieutenant on 12 March 1943, after graduating from Officer Candidate School at Fort Benning, Georgia.

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

Abner E. Lipscomb, Judge Advocate.

Walton Shepherd, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN
CM 257015

1st Ind.

War Department, J.A.G.O., 3 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 James F. Reid (0-1314060), Officers Replacement Pool, The Infantry School.

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 as approved by the reviewing authority as involves a finding of guilty of the offense alleged in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. The reviewing authority disapproved the finding of guilty of the Specification, Charge II, but failed to expressly disapprove the finding of guilty of Charge II. I recommend that the finding of guilty of Charge II be disapproved, that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified 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.

(Finding of guilty of Charge II disapproved. Sentence confirmed but forfeitures remitted. Execution suspended.
G.C.M.O. 419, 27 Jul 1944)

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

SPJGQ
CM 257027

16 JUN 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Will Rogers Field, Oklahoma, 1 May 1944. Dismissal and total forfeitures.
Second Lieutenant DONALD L. MORRIS (0-688115), Air Corps.	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL 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 Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Donald L. Morris, 11th Combat Mapping Squadron, 2nd Photographic Group, Reconnaissance, attached 9th Photographic Group, Reconnaissance, having been restricted to the limits of Will Rogers Field, Oklahoma, pursuant to sentence adjudged by a General Court Martial at Will Rogers Field, Oklahoma, on 17 March 1944, did, at Will Rogers Field, Oklahoma, on or about 22 March 1944, break said restriction by going to Oklahoma City, Oklahoma.

He pleaded not guilty to, and was found not guilty of, the Charge (A.W. 95); but pleaded guilty to, and was found guilty of, this identical specification as a violation of Article of War 96. Evidence of one previous conviction (Violation of A.W. 96 - altering entries in his official efficiency records without authority - the same conviction hereafter referred to in the body of this opinion) was introduced at the trial. 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 of record may be summarized as follows:

On 17 March 1944 the accused was convicted by a general court-martial at Will Rogers Field, Oklahoma and sentenced as follows:

To be restricted to the limits of the post at which he may be serving for three (3) months, to forfeit $83.30 per month for a like period and to be reprimanded (R. 11, 12).

The sentence was duly announced in open court by the President of the Court-Martial on 17 March 1944, and such sentence was approved and ordered executed on 14 April 1944 by General Court-Martial Orders No. 271, Headquarters Third Air Force, Tampa, Florida (R. 11, 12, 25, Ex. C).

On 18 March 1944 the accused asked the permission of Major Newton, his Squadron Commander and Captain Mowbray, Squadron Executive Officer, to go to town in order to straighten up his personal affairs (R. 12, 15). He was informed that they had no authority to grant him permission to go to town, but Captain Mowbray proceeded to call Base Headquarters and obtain permission for the accused to go into town that afternoon, which information was conveyed to the accused (R. 13, 14, 16). On 21 or 22 March 1944, Captain Mowbray called the accused on the telephone, asking him if he, the accused, knew that he was not permitted to leave the Base and asking if the accused had been going to town in the evenings (R. 16). Upon receiving a negative reply Captain Mowbray asked the accused if he realized that he was not supposed to go to town to which the accused answered definitely, "Yes Sir" (R. 16). Sometime prior to 1900 (7:00 p.m.) on 22 March 1944 Lieutenant Akelman asked the accused if he could borrow the accused's car (Exhibit A). The accused gave him permission to do so and proceeded to go with Lieutenant Akelman to Oklahoma City, the accused driving the car (Exhibit A). They arrived at Oklahoma City, which was approximately ten (10) miles from the field, at about 2000 (8:00 p.m.), and the accused got out of the car at the Skirvin Tower Hotel (Exhibit A). Arrangements were made for Lieutenant Akelman to come back and pick the accused up at Bishop's Restaurant across the street from the hotel after a short period, but Lieutenant Akelman went to see a "party", and did not return until about midnight (Exhibit A). Upon finding that the accused was not at the restaurant when he got there Lieutenant Akelman returned to the field alone in the accused's car (Exhibit A). The accused told Lieutenant Akelman that he wanted to go into town to try and dispose of his car as he was going "out" the next afternoon (Exhibit A).

During the investigation of the case the accused after his rights had been explained to him, made a sworn statement in which he stated that on the afternoon of 22 March 1944 Major Newton informed him that he, the accused, would leave for overseas the next day; that he found he would not be able to drive his car home; that he drove to town for the purpose of storing his car and arranging for a friend to drive it home, and that after accomplishing that purpose came back to the field (R. 14 and Exhibit B). At the trial he testified that on

22 March 1944 he left the field for town shortly after 7:00 p.m. (R. 21); that he did not contact the Squadron or Group Officers to get permission as he decided it was "definite" that he had to go to town, and that since it was after hours he just assumed that it would be useless to try to get in touch with anyone at that particular time (R. 21); that he knew Major Newton lived off the Base and there was no one else on the field to ask (R. 21); that he went to the Skirvin Hotel lobby, attempted to call Mr. McElvany by phone with reference to driving his, the accused's, automobile home (R. 22); that he was unable to reach Mr. McElvany at that time (R. 22); that he inquired and made arrangements at the Auto Hotel across the street with reference to storing his automobile if necessary (R. 22); that after eating dinner he returned to the Skirvin Tower Hotel and called Mr. McElvany twice more, finally reaching him by phone at around 9:30 or 10:00 p.m. (R. 22); that he made arrangements to deliver his car to Mr. McElvany the next day, so that he, Mr. McElvany, could drive the car to accused's home in Shreveport, Louisiana (R. 17, 22); that the next day (23rd) Colonel Williams placed the accused in arrest of quarters, saying to him, "If you had asked me to let you go into town I would have let you go. We don't want to work any hardship on you" (R. 22); that on the afternoon of 22 March 1944 he had been informed that he would ship out the next day (R. 23); that Captain Mowbray lives on the post but that he did not contact him before going into town (R. 24); that he was in Oklahoma City two or three hours and returned to the field on the bus (R. 25).

Four officers testified at the trial that the accused was an efficient reliable officer and was above average (R. 18); that the accused had flown heavy bombardment 686 hours and 10 minutes (R. 19); that accused is a qualified B-24 instructor and Test Pilot and is a qualified flight instructor for Aerial Photography (R. 20), and that the accused is one hundred percent trained for overseas duty (R. 20); and that the accused does instrument flying naturally with no effort whatsoever and gets more direct hits than any officer he has seen (R. 20).

4. These undisputed facts suffice to raise the only legal issue requiring determination in the examination of this record. The record discloses that the only form of restriction, which the Specification in this case alleges was breached by accused, is the restriction imposed upon him by a sentence of a general court-martial, adjudged and announced in open court on 17 March 1944. The evidence of record, together with accused's plea of guilty, would be amply sufficient to sustain the findings, provided the restriction involved was legally effective, that is to say, the sentence of restriction was in the process of execution, on the date accused committed the act which has been here charged as an offense, and found to be a violation of Article of War 96.

The GCMO promulgating the result of accused's trial on 17 March 1944 was published on 14 April 1944. The breach of restriction for which accused was tried in the instant case is alleged to have occurred on 22 March 1944, during the interval of approximately one month between the date the sentence was adjudged and announced in open court and the

date on which it was approved by the reviewing authority.

Article of War 46 provides in pertinent part that, "no sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being." Likewise, Article of War 48 provides that, "In addition to the approval required by Article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:" (Instances set out). Article of War 50½ provides, in part, as follows:

> "Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of The Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty". (Underscoring supplied).

These provisions of Articles of War 46, 48, and 50½ are mandatory, and require, as a condition precedent, that before any sentence of a court-martial may be legally carried into execution, or ordered executed, it must first have been approved by the reviewing authority. Also, in those instances provided in Article of War 50½, the record of trial upon which such sentence is based must have been held legally sufficient to support the sentence by the Board of Review, with the approval of The Judge Advocate General; and the sentence must have been confirmed by the confirming authority where confirmation is required by either Article of War 46, 48, or 51.

The mandatory nature of the above quoted portion of Article of War 50½ has been heretofore recognized in cases collated in Dig. Ops. JAG 1912-1940, sec. 408(3), from which the following is quoted:

> "So much of an action by a reviewing authority as orders execution of a sentence involving dishonorable discharge not suspended and not based upon pleas of guilty, without the sufficiency of the record having been passed upon by the Board of Review and The Judge Advocate General, is void. C.M. 173082 (1926).
>
> "A soldier who pleaded not guilty was found guilty of desertion under A.W. 58 and sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for 1 year. The reviewing authority reduced the period of confinement to 6 months, and without forwarding the record

under A.W. 50½, ordered the execution of the sentence, which action was published in a general court-martial order. Held, That as the accused did not plead guilty, the officer exercising general court-martial jurisdiction was without legal authority to order the execution of the dishonorable discharge and such discharge was therefore void and of no effect. C.M. 200131 (1933)."

Even after a sentence has been duly approved and confirmed, where confirmation is necessary, by proper authority, it does not become effective until ordered into execution. In C.M. 129804 (1919), cited in Dig. Ops. JAG, 1912-1940, sec. 403(6), the reviewing authority approved a sentence adjudging dishonorable discharge, but failed to order its execution. Notwithstanding, a certificate of dishonorable discharge was issued to the soldier. On review in the Office of The Judge Advocate General it was held that the record was not legally sufficient to sustain the sentence, and the Secretary of War directed that the sentence be set aside and the accused restored to duty. The pertinent point in that decision applicable in this case is thus expressed in the digest:

"The direction in orders of the execution of the general court-martial sentence by competent authority is necessary, and the execution of the dishonorable discharge in this case, in the absence of such an order, was without legal effect, and did not operate to separate the soldier from the service". (Underscoring supplied.)

In the instant case, the sentence under discussion had not been acted upon in any manner whatsoever by the reviewing authority on 22 March 1944 (date of accused's alleged breach of restriction). Consequently, the legal status of the sentence on that date was that of an inchoate recommendation to the reviewing authority, having of itself no legal efficacy until vitalized by the approval of the reviewing authority and his order for its execution. It is apparent that the Charge in this case is based upon the assumption and false premise that the sentence adjudged and announced on 17 March had become effective. Since it had not, the offense here charged had not, and could not have been committed. Obviously, accused's pleas of guilty to the Specification and Charge were improvidently entered under mistake and misapprehension, and such pleas, under the circumstances, are not sufficient to support the findings. The record of trial is not legally sufficient to support the findings or the sentence, and the findings and sentence should be vacated.

The administrative policy announced in par. 17b, AR 600-375, 17 May 1943, that the date on which the sentence was announced in open court (or if not announced, on which it was adjudged) "will mark the beginning of the sentence of confinement, whether the accused had then been placed in confinement or not", does not, and cannot, have the effect of changing the rule of law herein stated.

Whenever confinement or arrest of the accused is deemed necessary or advisable during the interval between the end of a trial by a court-martial and final action by the reviewing or confirming authority, it should be imposed by the local commanding officer at the place where the accused is stationed or at the post where the trial was held. The Manual for Courts-Martial specifically anticipates the probable necessity or advisability for restraint in such cases, and expressly provides the method and authority for exercise of this power in the following words:

> "The character and duration of the restraint imposed before and during trial, and pending final action upon the case, will be the minimum necessary under the circumstances. For instance, upon notification from a trial judge advocate as to the result of trial (see 41b), a commanding officer should take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may include, for example, the release of such person from any restraint, or the imposition of any necessary restraint pending final action on the case". (Underscoring supplied). Par. 19, M.C.M. 1928.

If confinement or arrest so imposed is breached or an escape therefrom occurs, the offense is properly chargeable under Articles of War 69 or 96 as a violation of the confinement or arrest imposed by the commanding officer.

5. War Department records disclose that this officer is 23 years of age and married. He is a high school graduate and attended Louisiana State University (ROTC training) for one and one-half years. He graduated from Aero Industries Technical Institute, Los Angeles, California, on 1 September 1941, after completing a seven months' course. He has a civil service rating as a junior aircraft sheet metal mechanic, and was employed at Barksdale Field, Louisiana, in that capacity before entering the service. Having successfully completed training as an aviation cadet, he was commissioned as a permanent second lieutenant in the Officers Reserve Corps on 13 December 1942, and entered on active duty the same date. He was promoted to the grade of temporary first lieutenant, Army of the United States, on 24 July 1943.

6. The court was legally constituted. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings or the sentence.

William A. Bounds, Judge Advocate.

William H. Gramlorell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

SPJGQ
CM 257027

1st Ind.

War Department, J.A.G.O., 22 JUN 1944 To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of First Lieutenant Donald L. Morris (0-688115), Air Corps, I concur in the foregoing opinion of the Board of Review holding that the record of trial is not legally sufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 257027).

Myron C. Cramer

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

1 Incl.
Record of trial

vol 36 Army JAG Bd. Rev.

vol 36 Army JAG Bd. Rev

TITLE

DATE	BORROWER'S NAME	EXT.